

PROPERTY RIGHTS

AND

**ENVIRONMENTAL
CONSERVATION**

by

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PREFACE

**I DECLARE THAT THE WHOLE DISSERTATION, UNLESS SPECIFICALLY
INDICATED TO THE CONTRARY IN THE TEXT, IS THE CANDIDATES
ORIGINAL WORK.**

by

A handwritten signature in black ink, appearing to read 'Russell Anthony Fitzpatrick', written over a horizontal line.

Russell Anthony Fitzpatrick

ACKNOWLEDGEMENTS

SPECIAL THANKS TO MOM, DAD, DAVE AND SAS.

ABSTRACT

The intention of this dissertation is not to embark on a discussion on the desirability of a property clause, nor to undertake a full analysis of the property and environmental clauses as they appear in both the interim and working draft constitutions.

Instead it is my intention to analyze the inherent conflict that exists between property rights, specifically ownership, and environmental conservation. This will be assessed against the backdrop of the common law, case law and in the light of both the interim and working draft constitutions.

Due to the fact that the terms "deprived" and "expropriate", as used in both constitutions, broadly correspond to the concepts of police powers and eminent domain, and since measures taken in the name of environmental conservation are invariably carried out under the auspices of the States police power, it is necessary to :-

- (a) assess the "deprivation"-"expropriation" conflict and emphasise the ambiguity that can arise in interpreting and differentiating between the two terms;
- (b) draw a distinction between police power deprivations and expropriatory deprivations. Foreign jurisdictions have experienced grave problems in drawing this distinction, which has been further exacerbated by the concept of inverse condemnation. U.S takings jurisprudence is analyzed to elicit the resultant chaos which will emerge if the courts do not come up with an adequate solution. A possible solution is offered which will provide the courts with an analytical framework within which to work; and
- (c) assess, although to a lesser extent, the courts ability to review Parliamentary enactments and administrative action.

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CHAPTER 1

INTRODUCTION

1.1 *AB INITIO*

'Cleaning up our nation's air and water is clearly an important goal of environmental law, as is protecting the public health from toxic chemicals. There is, however, another strand of environmental law which seeks different, though related, goals. Indeed, this strand may well predate the anti-pollution effort. The reference, of course, is to the goal of preserving wilderness and other natural areas.'¹

Beneath this quote lies an inherent conflict: property rights and environmental rights. An estimated 80% of the world's biodiversity lies in the tropics. South Africa hosts approximately 10% of the world's species of plants, birds and fish. However, the past 350 years has seen the loss of an estimated 46% of *our* dry forest, 62% of *our* grasslands, 50 % of *our* wetlands, and 90% of *our* renosterveld. Furthermore, an appraised 22 000 species of flora exists in South Africa, of which 80% (approximately 17 600 species) are endemic.² These in turn support a wide variety of ecosystems. Over and above this the majority of our natural and semi-natural habitats lie outside state owned conservation areas and national parks and vest in the hands of private landowners.³ The result is that the responsibility of conserving and managing these biologically diverse habitats rests in the hands of private land owners, consequently the field is set for a conflict between private ownership rights (to use and enjoy one's property as one pleases) and State initiatives to conserve the environment in the interest of the general public.

¹ Findley and Farber 'Environmental Law in a Nutshell (2nd Ed)' (1988) @ 304.

² These figures are taken from Rothwell 'All Species Great and Small'. In 'Accent: On Environmental Management' Zaaiman (Ed.) (1994) 2:1 @ 24. See generally Honnegger (Ed.) 'Africa Panorama: Special Environmental Edition' (1995) 40:1 @ 48. For a global appraisal see 'Time International Magazine: The State of our Planet' 30 October 1995 @ 68-83.

³ McDowell 'Legal Strategies to Optimise Conservation of Natural Ecosystems by Private Landowners - Restrictive Legislation' 1986 CILSA 450 @ 450, estimates that as of 1986, 80% of land in South Africa (excluding the homelands) was privately owned, mainly under the control of 77 000 white farmers. That which is not privately owned is State owned.

This conflict needs to be resolved. As Rabie aptly points out:

'The fundamental issue to the limitation of landownership is the reconciliation of the legitimate rights of landowners to use their land with the interests of society in maintaining an environment susceptible to sustaining a satisfactory quality of life ... [To] what extent can an individual landowner be expected to bear the costs of environmental conservation ? ... [What] degree of financial sacrifice should a landowner be called upon to make in the public interest?'⁴

1.2 THE HURDLE:

'Property law in general, and ownership in particular, functions as a catalyst in the conflict between the individual and society ..., between a democratically elected government and an appointed judiciary and between public and private law.'⁵

There are few things that stir the human emotion as that of 'property', 'title', 'ownership', or simply 'land'. 'Land is the basis of material and psychological security and the way in which the law determines a system of tenure is a matter of immediate consequence to all people.'⁶ It is of little wonder that there have been few societies in which the preservation of property has not been regarded as one of the supreme purposes of law.⁷ South Africa is no exception.

There is no doubt that the dominant theory of land rights in South Africa is based upon the understanding that ownership is a right, deemed to be unlimited and generally understood to be absolute; landowners are entitled to do with their land as they please, when they please and how they please. This approach is reflected in both our common law and our case law *infra*.

⁴ 'The Influence of Environmental Legislation on Private Landownership.' In 'Landreform and the Future of Landownership in South Africa' van der Walt (Ed.) (1991) @ 97.

⁵ Kroeze 'The Impact of the Bill of Rights on Property Law' (1994) 9 SAPR/PL 322 @ 322.

⁶ Bennet et al 'Editorial Preface - Land Ownership: A Changing Concept' 1985 Acta Juridica @ v.

⁷ Lloyd 'The Idea of Law: A repressive evil or social necessity ?' (1964) @ 146.

Van der Walt⁸ points out that this perception has a number of implications: *inter alia*, that ownership is used as a yardstick against which the nature, content and legal effects of other rights are measured, and any restrictions or limitations, on a landowners concomitant right to use and enjoy his property as he pleases, are regarded as exceptions.

Such an approach is naturally non-conducive to environmental conservation:

'Modern society with its attendant problems of industrialisation, urbanisation and overpopulation demands the introduction of effective measures for the combating of pollution and the conservation of limited but essential natural resources. However, because of the individualistic structure of modern western society, as embodied in the concept of ownership as an absolute right, limitations and restrictions on ownership of land are regarded as unnatural and exceptional measures that should be kept to a minimum.'⁹

1.3 A STEP IN THE RIGHT DIRECTION:

'When the skies begin to fall justice removes the blindfold from her eyes and tilts the scales.'¹⁰

This is a all too true statement as far as environmental conservation is concerned. With the pending new constitutional dispensation due to be published later this year, it appears that environmental rights are almost assured a place, whilst the constitutional protection of property rights still hang in the balance.¹¹ This goes some way towards curing the

8 'Informal Housing and the Environment: Landrights in Transition' (1992) SAPR/PL 201 @ 203-4.

9 van der Walt op cit @ 210. See also Caldwell 'Rights of Ownership or Rights of Use ? The Need For a New Conceptual Basis for Land Use Policy' (1975) Environment Law Review @ 409 quoted infra.

10 Silberberg and Schoeman 'The Law of Property (2nd Ed.)' (1983) @ 520.

11 It is important to note that it is not the intention of this dissertation to discuss the desirability of a property clause. In this regard your attention is drawn to, inter alia, the Chaskalson-Murphy debate: Chaskalson 'Should there be a property clause ? Implications of The Constitutional Protection of Property in The United States and The Commonwealth' (1993) 9 SAJHR 388, especially @ 408-411 or (1993) 9:3 SAJHR 388; Murphy 'Property Rights and Judicial Restraint: A Reply to Chaskalson' (1994) 10 SAJHR 385-98. See further Brookes 'Property Rights in the New South Africa' (1992) 3:3 Stell.L.R. 349-56.

Nor is it my intention to analyze every aspect of the property clause per se. For an analysis of s28 of the Constitution of the Republic of South Africa Act 200 of 1993 see Basson 'South Africa's Interim Constitution: Texts and Notes' (1994) @ 42-44; Cachalia et al 'Fundamental Rights in the New Constitution: An overview of the New Constitution and a commentary on Chapter 3 on Fundamental Rights' (1994) @ 91-98; Chaskalson 'The Property

imbalances experienced by the environment in the past at the expense of ownership.

Property and its unencumbered 'absoluteness' is going to have to make room for environmental concerns. As will be seen recent cases point in this direction. 'The scales must tilt', but how is this best achieved? As will be discussed *infra*, the state is not only vested with *dominium emenens*,¹² but is also vested with the power to control the use of private property. Whilst expropriation is an option, is it a viable option? It is submitted that expropriation is unrealistic solution to the environmental problem primarily because:-

1. the 'public purse' is hopelessly inadequate to provide the necessary funds for the acquisition of land for environmental conservation, particularly in light of the current Reconstruction and Development Programme; and
2. with expropriation the property vests in the state. However, due to the current political sensitivity of land issues, it is submitted that expropriation will do little to promote environmental conservation especially given the current housing shortage and the imminent possibility for informal housing and unlawful occupations.¹³

The only viable options realistically open to the State are to embark on regulatory schemes to promote environmental conservation or to rely on self-imposed restrictions.¹⁴

Clause: Section 28 of the Constitution' 1994 SAJHR 131-139; Du Plessis and Corder 'Understanding South Africa's Transitional Bill of Rights' (1994) @ 182-3; Kroeze (1994) 9 SAPR/PL 322; Murphy 'Interpreting the property clause in the Constitution Act of 1993' (1995) 10 SAPR/PL 107-130; van der Merwe 'Law of Property (including Mortgage and Pledge)' (1993) Annual Survey of South African Law @ 291-92; van der Walt 'Notes on the interpretation of the property clause in the new constitution' 1994 (57) THRHR 181-203; van der Walt 'The future of private ownership of land' (October, 1994) 35:2 Codicillus 4-18; van der Walt 'Property Rights, Land Rights, and Environmental Rights' In 'Rights and Constitutionalism: The New South African Legal Order' van Wyk, Dugard, De Villiers, Davis (Eds.) (1994) @ 455-501; van der Walt 'The impact of a bill of rights on property law' (1993) 8:2 SAPR/PL 296-319. For a general all round discussion on property see Murphy 'The ambiguous nature of property rights' 1993 Journal for Judicial Science 18(2):35-66.

¹² overriding ownership.

¹³ Booysens (Ed.) 'Our Living World: Magazine of WWF South Africa' In 'Africa Environment and Wildlife' Borchert (Ed.) (1995) 3:5 @ 4.

¹⁴ in this regard see McDowell *op cit* (1986) CILSA 450 and see generally Booysens (Ed.) *op cit* (1995) 3:5 which often contains articles on landowners self-imposing restrictions on their land-use.

1.4 The Absoluteness/Regulatory Dichotomy:

Rose¹⁵ offers an interesting analysis of property rights and regulatory regimes.¹⁶ Although this analysis takes place against the backdrop of American "takings" jurisprudence, it nevertheless echoes the sentiments behind most articles seeking to synthesise property and environmental rights. The understanding of this exposition is essential to fostering a new conceptual basis. Rose draws a distinction between those people who support, what she terms, the 'property rights' position and those who support the 'regulatory regime' position, i.e those who view property rights as being absolute and the function of property as 'an institution through which a rightly-ordered regime assures a domain of autonomy and individuality in the citizenry',¹⁷ and those who view property rights as essentially limited and the function of the law of property to establish 'what public limitations on property rights were suppose to accomplish.'¹⁸

Property, whether protected constitutionally or through the common law, is protected for a number of reasons, *inter alia*, it assures a sphere of autonomy and individuality;¹⁹ it encourages political goals and preserves the *laissez-faire* doctrine so central to democratic

15 Rose 'Property Rights, Regulatory Regimes And the New Takings Jurisprudence - An Evolutionary Approach' (1990) 57 Tennessee Law Review 577.

16 The importance of these regulatory regimes will be discussed in greater detail in the ensuing chapters.

17 An approach obviously supported by property owners. It is submitted that Reich, the founding father of the "new property" regime) is a proponent of this approach: 'If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfilment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence endure. These were the objects which property sought to achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work We must create a new property' ('The New Property' (1964) 73 Yale LJ 733 @ 787).

18 Environmentalists and those seeking to foster social reform programmes inevitably fall into this category. Caldwell op cit (1975) Environment Law Review 409 would appear to fall into this category.

19 Rose op cit @ 582; Reich op cit @ 787.

capitalist societies and its economic foundations;²⁰ and it promotes national wealth. Land is treated as a commodity, an article to be traded in, and to be dealt with as pleased by the owner in the pursuit of wealth.²¹ The result is that 'the nation as a whole is wealthier and stronger because the tax base of propertied and prosperous citizens becomes larger, and because the citizens are contented and not fractious.'²²

On the other hand, property regimes exist to engineer conflict over scarce resources. Indeed, there is much truth in the matter:

'property rights are defined when there is a scarcity of something ... we do not concern ourselves with property rights when a lot of something is available.'²³

Thus, from a South African perspective, the Roman and Roman-Dutch jurists did not have to concern themselves with protecting the environment because they did not have an environment to protect, i.e there was no scarcity.²⁴ The result is that twentieth century dilemmas cannot be solved by strict adherence to seventeenth century writings.²⁵ Only when the competition for land increases, as it increasingly becomes more scarce and, consequently, more valuable due to industrialization, urbanization and exorbitant population growth do we become more focused on the regulation of property rights by imposing restrictions, limitations and duties on private landowners. It is then that we hear cries of

20 See the Murphy-Chaskalson debate op cit.

21 Rose op cit @ 582-4; Caldwell op cit @ 414.

22 Rose op cit @ 583.

23 Rose op cit @ 585. In the early nineteenth century the American government while acknowledging the sacredness of property rights often took undeveloped land for public projects without paying compensation. Although this 'practice appears odd at first blush, ... it really is not so amazing, considering that such a great deal of undeveloped land was available, and that many landowners may not have believed that the expense of compensation as a great practice was worth the effort' (@ 585).

24 But, as will be seen infra, this is not to say that this would have prevented either Roman or Roman-Dutch State from embarking on collectivist schemes such as environmental conservation schemes.

25 Yet our courts have. The result, as Lord Scarman points out, is that 'the judges have been unable by their own strength to break out of the cabin on the common law and tackle the broad problems of land use [and the concept of ownership] in an industrialised and urbanised society' (cited in Cowen 'Toward distinctive principles of South African environmental law: some perspectives and a role for legislation' 1989 (52) THRHR 3 @ 8).

"takings". What people do not realise is that while property has always recognised ownership rights, it has also imposed duties on the landowner and recognised the States duty to embark on regulatory schemes in the public interest or for a public purpose. The reason why these have lay dormant for so many centuries, is due to the fact that land was not a scarce resource or commodity then, as it is today.

The inevitable result is that we have an inherent conflict in property rights: the "traditional" interests of the individual landowner *versus* the interests of society. Indeed many of us have become accustomed to the deceptive nature of ownership and its concomitant "free-and-easy" ways, to the extent that we believe that we have rights to continue these uses regardless of other peoples concerns.²⁶ But:

`As resources get more scarce, we have to be more concerned about managing and deflecting conflict, and effectively, that is what a property regime ought to help us do. To adhere to all the conceptions that we might associate with the Wild West is not helpful.'²⁷

What is required is a shift in emphasis from the outdated conceptual approach²⁸ to a broader functional approach²⁹ emphasising the social function of 'ownership' rather than

²⁶ Rose op cit @ 587.

²⁷ Rose op cit @ 594-5.

²⁸ `In legal systems based upon such a conceptual approach legal principles, rules and institutions are perceived as products of more or less scientific and systematic process of logical deduction and elaboration, working from a limited number of abstract concepts such as 'subjective right', 'real right' and 'ownership'. The most important tenet of the conceptual approach is that the abstract and autonomous nature of legal concepts are regarded as a guarantee of its objectivity and validity, with the result that considerations of moral and social justice or expediency are effectively excluded from legal discourse' (Van der Walt 'Roman-Dutch land and environmental land use control' (1992) SAPR/PL 1 @ 10; see further Brudner 'The Unity of Property Law' 1991 Canadian Journal of Law and Jurisprudence 3-66 @ 8-16).

²⁹ `... the functional approach ... stresses the fact that legal institutions such as ownership must be seen in their proper social context, and that their nature and content can only be determined with proper regard for their social function. In this spirit it has been argued that ownership must be seen as a fundamentally and intrinsically limited right, the precise content of which can only be determined with reference to the social context, the nature of the object and similar considerations. Such an approach makes it possible to break with the traditional absolute concept of ownership, and to determine the content and the limitations of various land-use rights in the context of broader social and moral land-use policy, which can and should include principles concerning the management and control of land use for purposes of, *inter alia*, environmental conservation' (Van der Walt op cit @ 10 and related articles; Brudner op cit @ 8-16).

its individual function. The courts have to engage in a juggling match: they have to balance the interests of society with the interests of the individual and *vice versa*:

'The conventional concept of "ownership" in land is detrimental to rational land use, obstructive to the development of related environmental policies, and deceptive to those innocent individuals who would trust it for protection. A new conceptual basis for land use law and policy is required to reconcile the legitimate rights of the users of land with the interest of society in maintaining a high quality environment.'³⁰

This is by no means a new innovative concept in South African legal theory. Reference may be had to the development of planning law and its impact on the concept of property in South Africa.³¹

Land is no longer plentiful nor are our natural resources, accordingly any regulatory regime ought to help us take account of their greater scarcity. A word of caution however, "semi-conscious" regulatory regimes which increasingly place the burden on private owners is not the answer. We must move beyond the "anything goes" approach for landowners, and we must avoid the "anything goes" approach for land regulation.

Just as landownership rights emerged in a time when natural resources were not scarce, so landownership must mature and adapt to a time when resources are scarce. Our problem is our fixation on a conceptual approach to the interpretation of landownership; it is outdated:

'Land is a 'resource' and property a mutating 'institution'.³²

Once realised, we can move towards a functional approach to property regulation and modify 'archaic concepts of property rights' that dominate our property regime. It is submitted *infra* that such a shift is facilitated with the constitutional protection of environmental rights (despite the existence or non-existence of property rights).

³⁰ Caldwell *op cit* @ 409.

³¹ Milton 'Planning and Property' 1985 *Acta Juridica* 267. See *infra*.

³² Nagan 'Resource Allocation: Land and Human Rights in a New South Africa'. In 'Land, Property Rights and the Constitution' Venter and Anderson (Eds.) (1993) @ 154.

Ultimately, landowners and users alike are the conservator's of the land,

`which must be preserved for posterity It should be an inherent principle of landownership itself that such ownership is subject to the duty of serving the public interest in the conservation of the land.'³³

1.5 A HYPOTHETICAL EXAMPLE:

What kind of dispute is likely to arise, particularly with both environmental rights and property rights being afforded some kind of constitutional protection ? Consider the following hypothetical example, and bear this in mind when reading the ensuing discussion:

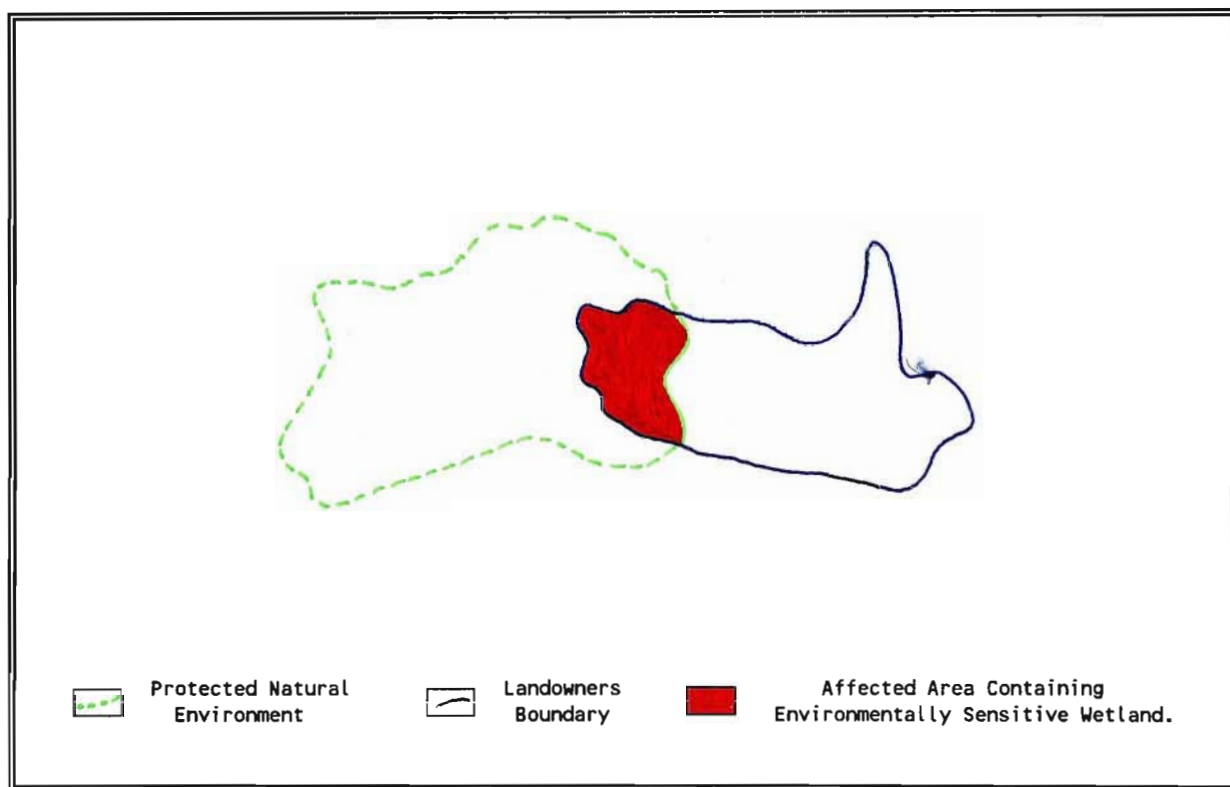


Diagram 1: An Illustration of a Hypothetical Problem

Joe Soap owns a piece of property in the Wilderness area of the south eastern Cape. Joe's property consists of 5 acres, of which 1 acres falls within a declared protected natural environment (PNE) - as per s16(1)³⁴

³³ Rabie op cit @ 100-1.

³⁴ This is now a Provincial Competence as per Proc R29 GG 16346 of 7 April 1995.

of the Environmental Conservation Act (ECA). This particular part of the PNE is an environmentally sensitive wetland, which Joe wants to dredge and fill this acres of land to build a family cottage.

The Minister of Environmental Affairs and Tourism, acting in terms of s 21, has identified the following activities³⁵ as activities which may have a substantial detrimental effect on the environment and, as such, are prohibited unless written authorization is obtained from the Minister, Administrator or Local Authority:

1. *disturbance of vegetation*: deliberate trampling, cutting or removal of vegetation with an intent to damage or destroy the vegetation.
2. *Earthworks*: excavation, moving, removal, depositing or compacting of soil, sand, rock or rubble.
3. *Dredging and filling*: dredging, excavation, moving, removal, or depositing of sand, soil or rock from a river, tidal river, tidal lagoon, floodplain or wetland.
4. *Dune Stabilisation* ...

The Local Authority, exercising its regulatory police powers in terms of s16(2), aiming at furthering the objects of the ECA issues the following binding directions³⁶ in respect of permitted uses and conditional uses in the PNE:³⁷

Permitted uses:

Any land which falls within the boundaries of the declared PNE of Wilderness shall not be used for any activity, including the erection of any building or alteration thereof, except for

- (1) the harvesting of woody or herbaceous plants;
- (2) sustained yield forestry;
- (3) utilities such as, but not restricted to, telephone, telegraph and power transmission lines;
- (4) hunting, fishing, preservation of scenic, historic and scientific areas and wildlife preserves;
- (5) non-resident buildings used solely in conjunction with raising waterfowl, animals and fish;
- (6) hiking trails.

³⁵ as per GN 1017 GG 16527 of 14 July 1995.

³⁶ s16(3).

³⁷ NOTE: these are hypothetical directives. The basis of these directives was taken from US law regulating wetlands. It is, however, submitted that similar regulations/directives may well be adopted in South Africa to regulate coastal zones and what wetlands we have left.

Conditional Uses:

The following uses are permitted upon issuance of a conditional use permit:

- (1) general farming;
- (2) filling, drainage or dredging of wetlands;
- (3) removal of top soil or peat;
- (4) pleasure boat launches.

Such permit must be accompanied by an Environmental Impact Report (EIR) as required by s22 of the ECA. The Minister of Environmental Affairs and Tourism has issued regulations relative to these reports.³⁸ In terms of regulation 3(1) any application for an authorization of an activity to be undertaken shall be made to the Minister under s22(1), or, in terms of the same section, the Local Authority. Such application must be accompanied by an EIR (reg. 3(3)) meeting the requirements of reg 5.³⁹

Part of the land owned by Joe is designated as wetland and is included in the PNE. Consequently, and in order to dredge and fill his acres of property, Joe is required to obtain a conditional-use permit from the Local Authority. Joe, without securing the requisite permit, hauled 80 tons of sand onto his property and promptly proceeded to dredge and fill that part of the wetland which fell within the boundary of his property.

The Local Authority makes repeated representations requesting that Joe cease such activities to which Joe refuses, saying that he will only cease such activity if he is compensated for the loss of the use and enjoyment of that property. The Local Authority refuses citing lack of funds and the issue ends up in litigation with Joe challenging the unfavourable land-use restrictions alleging :-

- (a) that the restrictions represent an invalid and unreasonable exercise of the state's police power;
- (b) in the alternative, that the restrictions amounts to a state "taking" without just compensation;
- or
- (c) both.

³⁸ GN 1018 GG 16527 of 14 July 1995.

³⁹ Lyster "Protected Natural Environments": Difficulties with Environmental Land Use Regulation and Some Thoughts on the Property Clause' (1994) 27:1 *De Jure* 136 @ 141-142 also notes that the directions issued under s10 of the Environmental Conservation Act 100 of 1982, prohibiting the building on and the subdivision of land within a nature area may well still be applicable. Such directions were published in GN 2166 GG 10487 of 17 October 1986.

1.6 IN FINE

These and related issues will be analyzed from three perspectives:

- (1) State authority and the common law;
- (2) State authority and the constitution; and
- (3) State authority and the courts review ability.

Notwithstanding the uncertainty as to the continued constitutional entrenchment of property rights, property rights (particularly ownership rights) will still find protection. Indeed both the interim⁴⁰ and working draft⁴¹ constitutions protect common law rights, *but* only in so far as they are consistent with the Bill of Rights. Accordingly it is necessary to assess our common law heritage and consider case law impacting on these issues. Is there a shift in attitude toward the regulation of property in the interests of environmental conservation ?

If, on the other hand, the 'property clause' option is exercised, then it is necessary to emphasise the ambiguities that are created when the terms "deprived" and "expropriate" are used. Is the state obliged to pay compensation when it deprive's a person of his property without having paid compensation ? To do this we need to asses both public international and municipal pronouncements. In addition to this assessment and, since these terms correspond to the States inherent power to expropriate (in flexing its eminent domain powers), and its lesser power to regulate property (in accordance with its police power), the courts are presented with the unenviable task of having to distinguish between these two state powers. Its task is not made any easier by the inception of inverse condemnation. How have the courts in foreign jurisdictions approached this task ? Particular emphasis is placed on US 'takings' jurisprudence. A possible solution to this apparent chaos is considered, and assessed, as to whether it could be adopted in South Africa.

Finally, the courts power to review parliamentary enactments and administrative actions is

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The Constitution of the Republic of South Africa Act 200 of 1993.

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For a complete copy of the working draft see internet: <http://www.constitution.org.za/drafts/3wd20115.htm>; or Constitutional Talk 'Working Draft of the New Constitution ... Reporting Back to the Nation' (1995) Official Newsletter of the Constitutional Assembly

considered. Are the courts entitled to look into the substantive reasonableness of enactments and administrative actions ? How far are the courts willing to scrutinise Parliamentary enactments and administrative action ? As will be seen, this has important implications for legislative and administrative action aimed at promoting environmental conservation. This task is not made any easier by our courts historical reluctance to look into such issues. What is considered to be just and fair administrative action ? More significantly, is the property owner entitled to a fair hearing when the state decides to expropriate in the interests of environmental conservation ? South African and foreign jurisprudence is considered in establishing the possibilities that exist in this regard.

The following distinctions can be drawn between these powers:³

Table 1: Eminent Domain versus Police Power

Difference	Eminent Domain	Police Power
The Vesting of Ownership	When the state exercises its narrow state powers of eminent domain it effectively <u>takes</u> ⁴ property away from a particular person/group of persons for a public purpose or use and vests such property in the hands of the state. Effectively ownership changes hands.	Police powers, on the other hand, are broad state powers which <u>interfere</u> with a particular person/group of persons rights in property without it effectively amounting to a "taking". Ownership does not change hands. It merely amounts to a regulation of the use and exploitation of property. Legislation imposes restrictions or limitations (possibly even duties) on the landowners' freedom to use and exploit their own property as they deem fit. ⁵
The Aim	Eminent domain serves a public purpose or use in the interests of the community. The aim of eminent domain is the fulfilment of the states obligation to the community. To do so its must become an active participant.	Police powers, on the other hand, aims at regulating intercourse of citizens with citizens ⁶ by limiting the rights of its citizens. It seeks to protect its citizens by preventing people from using their property in a way that may be injurious or detrimental to others. It is synonymous with the idea of limiting rights of one for the benefit of all. It appears that in limiting these rights the State may only do so in order to protect or promote public health, morals, safety, and the general welfare of the state. ⁷

³ see Chaskalson op cit (1993) 9:3 SAJHR 388 @ 396; Murphy op cit (1993) 18:2 Journal for Juridical Science 35 @ 44-5; Murphy op cit (1995) 10 SAPR/PL 115 @ 115-17; Murphy op cit (1993) 26 CILSA 211 @ 218-9; van der Walt op cit (1994) 35:2 Codicillus 4 @ 9.

⁴ completely deprives a person of their property.

⁵ legislation providing for environmental conservation is an example of legislation enacted under the police power (see infra).

⁶ See Munn v Illinois 94 US && [1877] as cited by Murphy op cit @ 116 - 7.

⁷ Also see, inter alia, Murphy op cit @ 14; Laitos 'Natural Resources Law: Cases and Materials' (1985) @ 903; Gildenhuys 'Onteieningsreg' (1976) cited with approval by Chidayausiku J in Davies and Others v The Minister of Lands, Agriculture and Water Development 1995 (1) BCLR 83 (2) 88G-H.

<p style="text-align: center;">Compensation</p>	<p>When the state exercises its powers of eminent domain, it is always accompanied by compensation. As such it contains an immunity against expropriation.</p>	<p>The police power, due to its regulatory nature, <u>ordinarily</u>⁸ does not attract compensation. When the state exercises its police powers it does not necessarily contain an immunity against expropriation. This all depends on whether or not the court is prepared to accept inverse condemnation.⁹</p>
<p>The Taxing power is the right the State has to enact laws that it deems necessary to secure the payment of taxes or other contributions or penalties.¹⁰</p>		

Are these concepts part and parcel of our law ? From what follows it will be clear that these two powers are not novel concepts in South Africa. A perusal of South African common law, public and private law, modern commentators on the South African law of property, and our case law, will reveal that South Africa does recognise that the state is vested with *dominium eminens*¹¹ as well as the lesser power to control the use of private property. The ensuing discussion furthermore reveals a shift from a conceptual approach to ownership towards a functional approach. This has important implications for environmental conservation.

2.2 THE COMMON LAW.

Our common law heritage of property law lies in Roman-Dutch law. In turn, this has been influenced by both Roman and Germanic law, with Roman law forming the essential basis of our property regime. English law has, albeit to a lesser extent, also played a minor role particularly in our law regulating expropriations.¹²

⁸ except where the courts are of the opinion that inverse condemnation has taken place (see Chapter 3 *infra*).

⁹ also referred to as creeping expropriations or constructive eminent domain.

¹⁰ Adapted from Article 1 of the First Protocol to the European Convention on Human Rights which entrenches property rights.

¹¹ 'overriding ownership'.

¹² Silberberg and Schoeman *op cit* @ 8-9.

At the heart of the common law lies the concept of 'ownership'.¹³ The concept of private ownership is what Gallie would call 'essentially contested'¹⁴ and 'not simply of abstruse philosophical concern.'¹⁵

2.2.1 Roman law

Birks¹⁶ analyses the Roman law concept of *dominium*¹⁷ and the idea of absolute ownership from two perspectives: the *content* and the *concept* of ownership.¹⁸

Practically, during the Roman empire, 'most of the material world could be owned, and the owner's freedom to use and to alienate his property was, broadly speaking, secure and unhampered. However it was not absolutely unhampered; nor was there any legal theory to set a limit beyond which legislative interference could not go.'¹⁹

Expropriations by the sovereign (as the personification of the community) were permitted in the public interest, so long as it was subject to compensation at the market value.²⁰ Expropriations which amounted to confiscations were not permitted. But, as in the case today, there were exceptions to this rule where some actions which amounted to a loss of use did *not* attract compensation.²¹

¹³ 'dominium'.

¹⁴ Visser 'The 'Absoluteness' of Ownership: the South African Common Law in Perspective' 1985 Acta Juridica 39 @ 39.

¹⁵ Bonyhady 'Property Rights'. In 'Environmental Protection and Legal Change' Bonyhady (Ed.) (1992) @ 45.

¹⁶ op cit. The following analysis which follows is adapted from Birks only in so far as it is useful to the current discussion. Also see Lee 'The Elements of Roman Law' (4th ed) @ 108-183.

¹⁷ Although "dominium" and "ownership" have the same legal connotations, the former according to Silberberg and Schoeman op cit @ 3 'expresses far more vividly than the latter that the essence of ownership is the legal power to control the use of the thing.'

¹⁸ ie: Birks analyses the practical and theoretical aspects of Roman ownership.

¹⁹ Birks op cit @ 31.

²⁰ Birks op cit @ 11-14.

²¹ eg: a space was to be kept clear on either side of an aqueduct. This is similar to our modern day law in South Africa where a municipal authority owns a meter into one's property.

Furthermore, the Romans did impose restrictions on the owner's right to use and deal with his property as he pleased. The exact extent of these restrictions is uncertain, but it appears that restrictions were only imposed so as to prevent harm to others. Birks notes that

"Such restrictions (were) compatible with individualism as being for the benefit of individual owners as opposed to being burdens on owners for the benefit of the community as a whole. However, the line between the two is imprecise, and no theory can be elicited from the texts that 'harm to others' was the only justification for restricting owners. If there *were* such a theory of public morality, the word 'absolute' might be taken as appropriate to denote the quality of ownership protected by it. The truth, however, seems to be that the proviso for restrictions by the general law which definitions of ownership derived from Roman law always contain - making ownership freedom to use etc 'save as is by law prohibited' - was operated by the Romans, so far as they thought of it at all, entirely pragmatically"²² [*my emphasis*]

Consequently, there was nothing, theoretically, to prevent the Roman state from passing legislation that may well have been deemed fundamental, practical, realistic, sensible, or utilitarian, including environmental legislation. Birks continues:

'No *theoretical* obstacle can be discerned which would have prevented the Roman state from embarking on collective schemes of the kind which, in derogation of owner's powers, are familiar endeavours of the modern 'activist state', as for example schemes for environmental, zoological, or historical conservation, [or] for town and country planning....It is anachronistic, and a trifle absurd, to carry back projects of this kind into the Roman world, which lacked the resources to contemplate them. *But* it is not unimportant to recognise that *they were not excluded by any rule of law, or theory of constitutional morality, about the actual or natural content of private ownership*. And respect for regularity and the rule of law is another. The combination of the two assures owners of formal justice but creates no substantial barrier against the erosion of their autonomy. Only by adding a further assumption to the effect that the law does not change, it is possible to entrench the freedoms which a Roman owner actually enjoyed. But that assumption, though perhaps part of the medieval outlook, is utterly alien to us; nor does it appear to have been a premise of the Roman legal mind"²³ [*my emphasis*].

Conceptually, however, the term 'absolute' is better exonerated. Things were classified according to their 'physical nature, or according to the technical rules of the legal system in question.'²⁴ The jurists' responsibility was to say which things, even incorporeal, *meum esse* meant ownership as opposed to paternal authority or some other superiority.²⁵ The classification adopted by the Romans were essentially the result of historical development or practical convenience. They displayed little inclination towards

²² Birks *op cit* @ 24.

²³ *op cit* @ 24-25.

²⁴ Lee *op cit* @ 108.

²⁵ Birks *op cit* @ 26.

scientific analysis.²⁶ As a result, if a thing was 'listed', then it was distinct and as such capable of ownership. Furthermore, ownership was a single relationship between a citizen and a patrimonial thing,²⁷ remembering that a 'thing' in Roman law meant a unit of economic value.²⁸ Finally, 'the assertion of ownership by an owner...was absolutely exclusive, it supposed that nobody else at all was owner.'²⁹

To *conclude*, on a conceptual analysis of Roman ownership, *dominium* was 'absolute' in the sense that it was distinct, singular, and exclusive. However, some things were excluded from private ownership because, by their very nature, they were clearly incapable of ownership.³⁰ Furthermore, expropriations in the public interest³¹ were permitted, but only on the obligatory payment of the market value. An interesting observation made by Birks is that there appears to be no *theoretical* obstacle which would have prevented the Roman state from embarking on collectivist actions, including, environmental management schemes.³² Consequently, it is submitted that there is nothing that essentially stood in the way of environmental issues, including the removal of ownership rights, if the need arose.

2.2.2 Roman-Dutch law

Whilst it is clear that our common law heritage lies in Roman-Dutch law, there appears to be some uncertainty as to the historical foundation of the concept of "ownership". The arguments forwarded appear to be two-fold :-

²⁶ Lee op cit @ 108.

²⁷ Birks op cit @ 26-27.

²⁸ Lee op cit @ 108.

²⁹ Birks op cit @ 27-29.

³⁰ For a more full account of what was in- and outside one's patrimony see Lee op cit and Birks op cit.

³¹ '... the law may itself lay down that individuals enjoy their rights at the will of the community as a whole or at the will of the sovereign as the personification of the community; in which they may have to give them up when the good, or the convenience, of the community so requires' [*my emphasis*] (Birks op cit @ 11).

³² op cit @ 24-25. Although Birks does point out that such issues were probably no pertinent to that time, and as such afforded no protection.

(1) van der Walt,³³ relying on Grotius in support of his argument, argues that "ownership" in Roman-Dutch law was

'an *absolute, abstract and exclusive right* that entitles the owner to deal with and use the object of his right as he pleases, subject only to clearly defined and explicit limitations arising from public or private law'³⁴ [*my emphasis*].

Van der Walt³⁵ supports this contention along the following lines :

- (a) the distinction between real and personal rights as defined by Grotius: real (person-thing relationships) rights can be exercised without reference to another and could be exercised without regard to another's rights - a highly individualistic notion not exactly conducive to environmental land-use issues.
- (b) Private property inherently incorporates individuality, to the exclusion of the outside world, to utilise and exploit *his* property as *he* deems fit to the exclusion of society; ie: "my bat, my ball".
- (c) Limited real rights as viewed by Grotius entitled the holder of those rights to exercise some, but not all rights imparted on an owner proper; ie: a limited right is an incomplete right of ownership, whilst unlimited ownership confers a complete right upon the owner of such right.

All three arguments undeniably inhibit the growth of collectivist schemes such as environmental land-use schemes in a modern activist state.

But this is an eternally pessimistic view. If one traces ones steps back to Roman law, if there was no theoretical obstacle to prevent collectivist schemes in Roman law *supra*, which recognised many of these principles enumerated above, then why can't Roman-Dutch law effectively recognise a similar approach ? Despite the fact that environmental law was not an issue back then, surely Grotius was not blind to such issues ?

³³ op cit (1992) SAPR/PL 1.

³⁴ van der Walt op cit @ 4.

³⁵ op cit @ 3-6.

(2) Visser,³⁶ on the other hand whilst also relying on Grotius in support of his argument, argues that Roman-Dutch law never viewed "ownership" as 'absolute'; ownership as conceived in Roman-Dutch law was

'essentially *restricted*. The restricted nature of ownership in that system should, of course, not be over emphasised.³⁷ Certainly Grotius' definition of full ownership has a definite individualistic *component* which coloured the view of later writers. *But* an individualistic note in the Roman-Dutch concept of ownership (with its concomitant implication that an owner can generally exclude others from the use of the object of ownership) *does not necessarily make it an absolute concept*'³⁸ [*my emphasis*].

Visser offers the following arguments in support of this contention:

1. The 'modern' idea that there are no degrees of ownership was only weakly developed by Roman-Dutch law. Roman-Dutch law did, however, recognised 'duplex dominium.'³⁹
2. "Ownership" has never been viewed as entirely 'absolute', there have always been limitations imposed on owners. As van der Merwe⁴⁰ notes: 'the only periods in history when ownership was regarded as *almost*⁴¹ absolute and unencumbered were probably at the beginning and the end of the Roman period and again after the French Revolution'. Whilst Grotius' definition of ownership⁴² is essentially individualistic in nature,⁴³ he nevertheless

³⁶ op cit 1985 Acta Juridica 39.

³⁷ With respect, it is submitted that van der Walt does overemphasise the 'absolute' and unrestricted nature of ownership.

³⁸ op cit @ 46. Visser @ 46-48 and van der Merwe 'The Law of Things' (1987) @ para 6 are of the opinion that the concept of 'absoluteness' is a Pandectist concept that arose out of the French Revolution and was read into South African law 'as if they counted amongst our institutional writers' and as such have no place in our law, although they have influenced it.

³⁹ Grotius spoke of complete and incomplete ownership. Visser op cit @ 39-43.

⁴⁰ op cit @ para 106.

⁴¹ my emphasis, 'almost', not entirely.

⁴² 'Volle is den eigendom waer door iemand met de zake alles mag doen nae zijn geliefte en t'sijnen bate dat by de wetten onverboden is' (from Visser op cit @ 40). Van der Walt op cit @ 4 interprets this as :
'ownership is an absolute, abstract and exclusive right that entitles the owner to deal with and use the object of his right as he pleases, subject only to clearly defined and explicit limitations arising from public or private law'.

recognises that the state has *dominium eminens* over private property.⁴⁴ Although very rarely used and severely restricted, it does recognise that ownership is not 'absolute'. Grotius recognised the fact that the community (represented by the state) has a greater right than the private owner for two reasons:⁴⁵

- i. 'because the members of a community and everything belonging to them should be utilised for the preservation of the community, without which the members themselves cannot be preserved', and
- ii. 'for the purpose of maintaining peace and undisturbed possession of property.'⁴⁶ Van der Walt⁴⁷ does concede that if one takes Grotius' treatment of ownership as developing with the social organisation of humankind and that 'dominium originally amounted to nothing more than the right to acquire actual and beneficial use of the undivided common property that was accessible to all', then the 'use of such

⁴³ Although it does make it clear 'that the exercise of owners' rights must take place within the limits of the law' (van der Walt op cit @ 3).

⁴⁴ Chidyausiku J in Davies op cit @ 87I-J lends further support to this contention 'Sharer comments on Hugo Grotius' writing on the subject of eminent domain as follows -

"LXV Grotius treats here of dominium eminens Grotius has treated the subject at great length in his *De Jure Belli et Pacis* and Puffendorf and, if I am not mistaken, all who wrote either before or after Grotius agree with him that the sovereign power has more right over the goods of its subjects than the owners of those goods themselves."

⁴⁵ Visser op cit @ 44.

⁴⁶ Chidyausiku J in Davies op cit @ 87 lends further support to these contentions: 'In Voet Commentary on the Pandects (Gene Translations) 1.7.7 the following passage appears under the heading, how far private right may be overridden by penalty or by public interest.

"Meanwhile nobody doubts that for pressing cause an accrued right may be duly taken from a private person by the Emperor. This may be done either by way of penalty, when an estate or part of it is confiscated for crime; or when the claims of necessity or public advantage demand such a course, providing that in the latter case an equivalent is given to fill up the place of the thing lost or right lost and that the right of the owner is cut down as sparingly as possible ..." [my emphasis]

The Digest VIII,4,13,1; Code VII,13,2; and Code VIII,II(12)9 are cited by Voet as authority for the above proposition'. Also see Carey Miller 'The Acquisition and Protection of Ownership' (1986) @ 107-9 where the learned author explores the issue of 'dominium eminens'. See particularly Pretoria City Council v Modimola 1966 (3) SA 250 (A).

⁴⁷ op cit @ 2-3.

property should still conform to the principles of natural law and natural justice, with the result that individual owners' rights are restricted by the interests of society.'

3. Although Roman-Dutch law did not recognise neighbour law *per se*, it did recognise certain unlawful exercises of ownership powers which influenced neighbour relations. Over and above this 'De Blecourt mentions no less than forty real rights which in Roman-Dutch law could rest on property'.⁴⁸ These two issues together point to the restraint of the so-called free reigns of ownership to do as you please, when you please, how you please.

Although these two arguments take on two diametrically opposed points of view, it is important to note that at the end of the day, Roman-Dutch law did recognise limitations on private ownership. To use Birks,⁴⁹ conceptually ownership may well have been 'absolute', but for the content of ownership, absoluteness is the wrong word for it offers some degree of immunity. No owner was immune from limitation (including expropriation) and such limitation was inevitably for the public good.

However, it must be noted that whilst this may be a true exposition of our common law, our case law *infra* does not reflect this view. Instead it would appear that our case law has been more influenced by the Pandectist theory of 'absolutism' rather than our Roman-Dutch heritage.⁵⁰

2.3 PUBLIC AND PRIVATE LAW.

Public law restrictions 'are imposed on all owners of a particular kind of property'⁵¹ either

⁴⁸ Visser op cit @ 46.

⁴⁹ op cit @ 31.

⁵⁰ Visser op cit @ 46-8; Lewis 'The Modern Concept of Ownership of Land' 1985 Acta Juridica 241 @ 242.

⁵¹ in this case land.

for the benefit of society as a whole or in the interests of certain sections of the community.’⁵² *Private law* restrictions ‘are those imposed under the rules of neighbour law or those imposed by the owner himself.’⁵³ Laws generally, whether they be public or private in nature, affect any rights we may have. Just as criminal legislation effects, *inter alia*, our right to freedom, so environmental legislation and neighbour laws affect landownership rights through the establishment of restrictions, limitations, and in some cases the imposition of duties. Rabie and van der Walt⁵⁴ have delved into this in some detail and it would be fruitless to repeat what has already been published, suffice to give a brief summary.

Limitations (including restrictions) are imposed in one of the following categories:⁵⁵

- .i. Private law limitations, imposed with⁵⁶ or without⁵⁷ the landowner’s consent; or
- .ii. Public law limitations, again with⁵⁸ or without⁵⁹ the landowners consent.

⁵² van der Merwe op cit para 107.

⁵³ van der Merwe op cit para 107.

⁵⁴ For an exposition of the natural environment see Rabie ‘The Impact of Environmental Conservation on Land Ownership’ 1985 *Acta Juridica* 289-313; Rabie op cit @ 81-101; Rabie ‘South African law relating to conservation areas’ (18) *CILSA* 1985 @ 51-89. van der Walt in ‘The Effect of Environmental Conservation Measures on the Concept of Landownership’ 1987 *SALJ* 469; van Der Walt ‘Possibilities for the conservation of the built-up environment in current South African statutory law’ (20) *CILSA* 1987 @ 209-29 for an overview of some of the conservation measures applicable to conservation of the built-up environment. For legislation regulating these see Teurlings ‘Guide to Legislation Concerning Natural Environment’ (1993) and Teurlings ‘Guide to Legislation Concerning Built Environment’ (1993).

⁵⁵ For more on limitations of ownership see van der Merwe op cit @ para’s 107-109; and Silberberg and Schoeman op cit @ 162-202.

⁵⁶ This is achieved through the voluntary creation of public servitudes, Trusts, and management agreements. See further Rabie op cit @ 290-292.

⁵⁷ This is achieved through the implementation of Neighbour law. See further Rabie op cit @ 292. For a more elaborated but succinct discussion of neighbour law and its possible effect on environmental land-use controls see van der Walt op cit @ 6-9, where he concludes that although neighbour law ‘offers very little which might be useful in the development of environmental law’, it may ‘perhaps be borrowed and developed to serve as part of a land-use ethic.’ In this regard (ie: that it may be borrowed and developed) see Milton op cit 1985 *Acta Juridica* 267.

⁵⁸ Achieved through
 (a) an administrative body either purchasing land from or exchanging land with private owners;
 (b) allowing an administrative body to perform certain actions on private land; or

However, coupled with the fact that our environmental conservation laws lack 'personal-gain incentives',⁶⁰ South Africa is dogged by administrative inaction and a severe lack of policing thereby eliminating any possible good that may arise out of this legislation. Furthermore, as is pointed out by just one example given by McDowell⁶¹, this legislation represents somewhat of a 'toothless tiger', relying on the support of the landowner target community itself for effective implementation. The bare fact of the matter is that 'the existing aggregation of laws and practices, pertaining to land ownership and use, are beneficial primarily to persons interested in exploitation or litigation. They provide little protection to the owner who lacks continuous economic and legal council and who is unable personally to influence political decisions.'⁶² Moreover, the laws are even less helpful to communities and the general public in maintaining or restoring the quality of the environment.'⁶³ Furthermore, any laws regulating environmental conservation, including neighbour and public safety laws, tend to focus on land use, not ownership.

Furthermore, despite the fact that neighbour law is 'based of the principles of fairness and reasonableness'⁶⁴ and the fact that the principle of *sic utere tuo alienum non laedas*⁶⁵ does

(c) the establishment of conservation areas or hiking trails on private land.
See further Rabie op cit @ 492-493.

59 ie: eminent domain expropriations and police power regulatory controls. See Rabie op cit @ 293-304.

60 McDowell op cit @ 459; see further McDowell 'Legal Strategies to optimise Conservation of Natural Ecosystems by Private Landowners - Economic Incentives' (1986) 19 CILSA 460, read in the light of s16(5) of the Environmental Conservation Act 73 of 1989. Also see de Klemm & Shine 'Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems. IUCN Environmental Policy and Law Paper No.29' (1993) @ 169-71.

61 op cit @ 456 and 459.

62 However, for an interesting analysis of people power in influencing political thought see Lunney 'A Critical Reexamination of the Takings Jurisprudence' (1992) 90 Michigan Law Review 1892 @ 1946-65.

63 Caldwell op cit @ 409.

64 van der Walt op cit @ 7. However, van der Merwe op cit @ para 119 throws a spanner in the works. One of the factors influencing objective reasonableness is the social utility of the activity or its utility to the general public. According to van der Merwe 'implicit in this factor is that one type of land use activity may have greater social utility representing the ordinary comforts of human existence. Consequently, this type of activity ought to be allowed even at the expense of another's comfort and convenience. Activities promoting public welfare, like agricultural land use activities, seem to be accorded a higher social utility by the courts than activities which only indirectly advance public welfare through trade, industry and commerce.' This would seemingly appear to include environmental conservation issues. But I am left to wonder, what about eco-

impose duties on landowners these duties are restricted to neighbours,⁶⁶ not the community at large. Rabie⁶⁷ notes that this principle 'does not involve any positive duty to treat land as part of a natural system, the conservation of which - also for future generations - is in the public interest. Nor does it entail an acknowledgement that land is a finite resource with limited capacities to sustain either itself or ... consumer demand.' Furthermore van der Walt⁶⁸ acknowledges that because our neighbour law was once part of the 17th century European acumen of *ius commune*, 'the conceptual framework of the law of neighbours is not really different from that underlying the absolute concept of ownership, making it ill-suited for the purposes of environmental conservation, which requires a fundamentally limited perception of ownership.'

2.4 COMMENTATORS AND CASE LAW.

Our courts have long acknowledged the States power to acquire ownership in property through expropriation, but, such an exercise of its eminent domain powers is only permissible in the public interest and subject to the payment of compensation.⁶⁹ Our statute books are rife with legislation empowering the State and other administrative bodies to expropriate land for a variety of reasons. The principles and procedures regulating expropriations are governed basically by the Expropriation Act 63 of 1975,⁷⁰ but certain

tourism? Would it, in the light of the aforementioned statistics, be accorded a 'higher social utility' than agricultural land-use, especially in the light of changing attitudes towards environmental conservation?

⁶⁵ 'use your property as not to injure (the rights) of another person.' The importance of this will become evident *infra*.

⁶⁶ adjoining landowners.

⁶⁷ Rabie *op cit* @ 83.

⁶⁸ *op cit* @ 8, relying on van der Merwe.

⁶⁹ see van der Merwe *op cit* @ para 161 and the cases cited therein.

⁷⁰ For example, s34(3) of the Environmental Conservation Act 73 of 1989 states that where the State and the aggrieved party cannot come to an agreement on the amount to be paid as compensation, the court shall determine the amount to be paid as compensation, and such amount shall be determined by reference to s14 and s15 of the Expropriation Act 63 of 1975. Also see s28(3) of the interim Constitution and s24(3)/(4) of options 2/3 respectively of the Working Draft Constitution. Whether or not an aggrieved party is entitled to a hearing before expropriation occurs is dealt with in Ch.3.

'environmental statutes' authorise expropriations in certain circumstances.⁷¹

Our courts have likewise acknowledged the States power to control (or regulate) the use of private property without such regulation attracting compensation. The court in Cape Town Municipality v Abdulla⁷²(1976) held that a regulation authorising the demolition of a structure was not an expropriation measure because it did not provide "for the taking away of rights from one person and conferring them upon another" but merely amounted to the curtailment of the owners rights. Similarly in Feun v Pretoria City Council⁷³(1949) it was held that a "mere restriction on the user is ... probably not expropriation in that sense". These *dicta* all point to one thing: they reflect a general 'reluctance on the part of our courts to allow expropriation law to serve as a platform for claims against the state based on interference with property rights other than the immediate act of acquisition of property by expropriation'.⁷⁴

Chidyausiku J in Davies⁷⁵(1995) expressly adopted the views propounded by the learned South African author Gildenhuys:⁷⁶

"The learned author expresses the view that the power of Government to take measures of control of the use of private property is beyond question in all states. He contends that the state has to set itself the task of promoting, by legislative and other measures, the economic prosperity, safety, health and morals of its subjects [including environmental protection measures]. To that end restrictions are imposed on free trade, free use of ground and the erection of buildings and so on. He concludes that measures of this sort are often referred to as measures of control or in the American police powers.

I find myself in agreement with the views of the learned author which I find consistent with common sense and the realities of a modern state. In my view life would be impossible if there were to be no control of any sort over how an individual uses his property. For instance pollution would make any country uninhabitable if no control were imposed on how industrialists and manufacturers operate or use their machines. Imagine what would happen

⁷¹ see, for example, section 3(1) and (2) of the National Parks Act 51 of 1976. For more see Rabie op cit @ 293 and further @ 88.

⁷² 1976 (2) SA 370 (C) 375 cited by Gildenhuys & Grobler in LAWSA 10: 'Expropriation' @ para 2.

⁷³ 1949 (1) SA 331 (T) @ 342 cited in Gildenhuys et al op cit @ para 2.

⁷⁴ Chaskalson op cit (1994) 10:1 SAJHR 131 @ 135.

⁷⁵ op cit @ 88G-H.

⁷⁶ 'Onteieningsreg' (1976).

if every property owner were allowed to use his property as he pleases. In a situation of no control the individual would be entitled to bury his dead in his backyard. On this basis the inescapable conclusion is that the Government has both eminent domain and police powers or control powers.'

Although this is a decision by the Zimbabwean High Court, the relevance is that the court used South African commentators (particularly Gildenhuis,⁷⁷ and Silberberg and Schoeman⁷⁸) and the Roman-Dutch law⁷⁹ to come to the following conclusion:

"the State of Zimbabwe, as a sovereign state, has inherent jurisdiction or power, in terms of common law of the land, *not only to compulsorily acquire private property* including the land *but that it also has the power to control the use of private property including the land*. That power however has to be exercised in accordance with the provisions of the Constitution ... The Constitution recognises and codifies the State's right to compulsorily acquire property. The Constitution also recognises, and indeed elevates the individual's entitlement to compensation for compulsory acquisition to the level of a fundamental right. It therefore follows that every acquisition or every enactment that provides for the acquisition of private property has to provide for compensation. It would appear ... that every measure of control that is excessive and is in effect an acquisition of property, interest or right therein has to provide for compensation"⁸⁰ [*my emphasis*].

According to Chidyausiku J⁸¹ if the state is deemed to have powers of eminent domain then under the principle of *omne majus continet in so minus*⁸² it is also deemed to be vested with police powers.

The result is inevitable: the courts are going to have to draw a distinction between the States police power and its power of eminent domain. The importance of this distinction will

⁷⁷ 88E-G.

⁷⁸ @ 93C-D. Chidyausiku J summarises this as follows:
 "Silberberg and Schoeman ... give numerous examples in South Africa of enactments controlling the use of private property which provide for no compensation thus clearly demonstrating the State's competence to enact such laws."
 This case dealt specifically with the issue of land-redistribution, but it is submitted that the same conclusion would have been achieved had the court been deciding the issue of environmental conservation schemes. In such a case reference would invariably have been had to Rabie op cit with respect to conservation areas and environmental law generally, and van der Walt op cit with respect to the built environment.

⁷⁹ 87F-88A.

⁸⁰ 89F-I.

⁸¹ @ 88C-D.

⁸² 'the greater includes the lesser'.

become evident in the ensuing Chapter.

2.5 THE DUAL CHARACTER OF OWNERSHIP.

Ownership, being the most comprehensive right one can have in property, essentially takes on one of two interpretations: either a traditional conservative interpretation, or a more liberal democratic interpretation.

2.5.1 *The Traditional Conservative Approach:*

This approach expounds the view that ownership involves only *rights*,⁸³ while any restrictions on land use are better classified as part of social regulation, and consequently involve an *encroachment* on land ownership. This conservatism has been the approach adopted by our courts 'jealous' attempt to protect landownership.⁸⁴

Holmes JA in Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd⁸⁵ (1976), for example, notes that

'Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner.'

Steyn CJ in Regal v African Superslate (Pty) Ltd⁸⁶ (1963) held that as a general principle:

'[’n mens] kan iedereen met sy eiendom doen wat hy wil, al strek dit tot nadeel of misnoeë van ’n ander ...'

⁸³ These rights embrace 'not only the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume the thing (*ius abutendi*), but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim the thing from anyone who wrongfully withholds it or to resist any unlawful invasion of the thing (*ius negandi*)' (van der Merwe *op cit* @ para 105).

⁸⁴ Lewis *op cit* 1985 *Acta Juridica* 241.

⁸⁵ 1976 (1) SA 441 (A) @ 452; cited by Lewis *op cit* @ 241.

⁸⁶ 1963 (1) SA 102 (A) quoted in Visser *op cit* @ 47.

Similarly, Spoelstra AJ in Gien v Gien⁸⁷ (1979), making direct reference to Regal, held that

‘Ownership is a right, unlimited in respect of its contents, to exercise control over a thing. The difference, in point of conception, between ownership, however susceptible of legal limitations (eg through rights of others in the same thing) is nevertheless absolutely unlimited as far as its own contents are concerned. As soon therefore as the legal limitations imposed upon ownership - whether by the rights of others or by rules of public law - disappear, ownership at once, and of its own accord, reestablishes itself as a plenary control. That is what is sometimes described as the ‘elasticity’ of ownership.’

Consequently, under this historical approach to ownership, ‘if there be doubt whether there is an existing right enforceable against the owner, the right of ownership must prevail.’⁸⁸ Van der Walt⁸⁹ points out that this perception has a number of implications, *inter alia*, that ownership is used as a yardstick against which the nature, content and legal effects of other rights is measured, and any restrictions or limitations on the concomitant rights to use and enjoy one’s property as one pleases are regarded as exceptions. Ownership is a ‘right which is fundamentally unrestricted, even though it can accommodate the (temporary) existence of limitations and restrictions.’⁹⁰ Therefore limitations are seen as the exception to the rule rather than the rule itself. Such an approach is naturally non-conducive to environmental conservation.⁹¹

Lord Scarman,⁹² in examining the question of whether or not the English common law is able to meet an environmental challenge, concludes:

‘For the environment a traditional lawyer reads property; English law reduces environmental problems to questions of property. Establish ownership or possession and the armoury of the English legal cupboard is yours to command.’

It is submitted that the same holds true for the South African context. Our common law heritage has been more concerned with the protection of private individual rights rather than collective, public rights - the domain of environmental law. Lord Scarman continues:

⁸⁷ 1979 (2) SA 1113 (T) @ 1120.

⁸⁸ Jansen JA in Chetty v Naidoo 1975 (3) SA 13 (A) @ 20 and 23; cited in Lewis op cit @ 241-2.

⁸⁹ op cit @ 203-4.

⁹⁰ van der Walt op cit (1992) SAPR/PL 201 @ 204.

⁹¹ see van der Walt op cit @ 210 (cited supra in Chapter 1).

⁹² the following two quotes cited in Cowen op cit @ 8.

'The common law concepts ... have failed because they have been ultimately no more than means for protecting private rights and enforcing private obligations: the law had never understood or accommodated a public right or obligation in the environment Tied to concepts of property, possession and fault, the judges have been unable by their own strength to break out of the cabin of the common law and tackle the broad problems of land use in an industrialised and urbanised society. The challenge appears, at this moment of time, to be unlikely to overwhelm the law.'

As will be seen, the Constitution may offer the way out. But, at the end of the day, if the conceptual approach expounded by our courts in the past is to be the approach to be adopted by our courts in the future, the future does not look good for environmental conservation. Strict adherence to the traditional approach will see environmental controls and natural resource conservation schemes all being struck down in the name of private property.

2.5.2 The Liberal Democratic Approach:

This approach, on the other hand, depicts ownership as consisting of both *rights and obligations* (also referred to as expectations or duties), so that any restrictions imposed on land use in the name of environmental conservation are *part and parcel of being a landowner* rather than being an violation of it. This concept is by no means new or novel in South Africa.⁹³

Macdonald ACJ made this realisation in 1971 in his well documented *dicta* in King v Dykes:⁹⁴

⁹³

See Milton 'Planning and Property' 1985 Acta Juridica 267, especially @ 273-77. Planning law regulates land-use, as does environmental conservation law. On the learned author's analysis, planning law (like environmental conservation law) interferes with private property. Planning law too effected the 'absolute' attitude to the nature of ownership rights. The result was that 'the premises of planning law became not the rights of ownership but its duties. Building on nuisance law's elementary concept of the obligations owed by landowners to their neighbours, planning law extrapolated the principle so as to 'comprehend all the obligations which according to the social standards of the day are regarded as due to neighbours and fellow citizens'. The extensive regulation of land-use activities inherent in town planning schemes derives its justification from the recognition of the advantage to the general welfare of communities involved in the proper planning of land-use activities. Implicit in all this is the acceptance of the dogma that the rights of ownership in land are not purely egotistical but involve an altruistic element of social obligation. Planning law, by demanding that landowners fulfil this obligation, has altered the perception of the nature of landownership created by the laissez-faire doctrines of an earlier age' (@ 275) [my emphasis]. It is submitted that the same argument can be forwarded for environmental conservation schemes.

⁹⁴

1971 (3) SA 540 (RA) @ 545; cited in Cowen op cit @ 26 and Rabie op cit @ 100.

'The idea which prevailed in the past that ownership of land conferred the right of the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that *an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations*. Legislation dealing with such matters as town and country planning, the conservation of natural resources, and the prevention of pollution, and regulations designed to ensure that proper farming practices are followed, all bear eloquent testimony to the existence of this more civilised and enlightened attitude towards the rights conferred by the ownership of land' [*my emphasis*].

Conradie J in Corium (Pty) Ltd v Myburgh Park Langebaan (Pty) Ltd⁹⁵ (1993) interdicted a township development in the interests of nature conservation. Indeed, he recognised nature parks as being a 'national asset of immense value, perhaps the most valuable natural resource we have.'⁹⁶ In coming to its decision, the court stated that it was 'called upon to consider not only the interests of the applicants, *but those of the general public* whose members may be affected.'⁹⁷ Consequently, the public interest in conservation was an important cornerstone to the eventual outcome of the case.⁹⁸

Rose Innes J⁹⁹ in Corium (Pty) Ltd & Other v Myburgh Park Langebaan (Pty) Ltd & Others¹⁰⁰ (1995) took into account the effects the proposed development of a steel mill would have on the environment, including, the visual (or aesthetic) effect, the destruction of vegetation, and the destruction of marshlands (or wetlands). The court also took the public interest into account in the balancing process:

"Persons with interest in the land which may be affected are ... the owners of large pieces of land adjacent to or in the vicinity of the extended permit area. Other persons whose interests may be affected are all the owners and occupiers of property in the town of Langebaan who might, one would think, conceivably object to the desecration of a nature area adjoining their town."¹⁰¹

⁹⁵ 1993 (1) SA 853 (CPD) at 859.

⁹⁶ at 858G-H.

⁹⁷ at 858E-F [*my emphasis*].

⁹⁸ at 859B-C. see Loots and Lyster 'Environmental Law' (1993) Annual Survey at 377-8 for general comment. Also see Lyster op cit (1994) De Jure at 138-40.

⁹⁹ in which Foxcroft J concurred.

¹⁰⁰ 1995 (3) SA 51 (C).

¹⁰¹ at 691-70B.

If anything these cases show not only a shift in the courts attitude towards recognition of the need for conservation, but also reflects an increasing awareness in the greater socialisation of property.

2.5.3 *In Fine*

The courts are going to have to break free from the chains of ‘absolutism.’ There is a need for a new conceptual basis for land use, since the traditional approach is outdated and conflicts with, *inter alia*, environmental rights. The aforementioned analysis is important for the present discussion for two reasons :-

- (a) The working draft provides a ‘no property clause’ option, it also contains a more extensive environmental clause than its interim counterpart. It provides that everyone has the right to have their environment protected through reasonable legislative and other measure designed to, *inter alia*, prevent ecological degradation, promote conservation and to secure sustainable use of natural resources.¹⁰² In order to promote such conservation, through the establishment of protected natural environments, for example, the State is going to have to embark on environmental protection and management schemes. Such regulatory measures are inevitably going to impact on the individuals right to use and enjoy his/her property. However, as has already been pointed out, the present common law position does not readily allow for such an interference with the landowners rights. It is submitted that the courts would do well to re-examine our common law roots.¹⁰³

In addition to this, the working draft¹⁰⁴ provides that, when interpreting and developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. The common law regards ownership as the most important patrimonial right a person has, a right deemed to be unlimited and generally

¹⁰² s23(b)(i)-(iii).

¹⁰³ It has been pointed out that such a re-examination is indeed possible.

¹⁰⁴ in s39(3); s35(3) of the interim Constitution.

understood to be absolute, the result being that any limitation plays second fiddle to property (particularly ownership rights). Surely such an interpretation cannot be seen to promote environmental conservation measures as entrenched in the constitution. Furthermore, such an interpretation cannot be seen to be reasonable and justifiable in an open and democratic society based on freedom and equality, particularly with South Africa's environmental obligations under international law (eg: Cites, RAMSAR and now more recently with our signing of the Convention of Biological Diversity).¹⁰⁵

However, if this analysis is wrong¹⁰⁶ then it is submitted that our common law origins are outdated. Environmental issues are 'tied to the 20th century idea of progress and not the 17th century idea of 'protecting' rights in a static society.'¹⁰⁷ Furthermore, had our forebears known of modern industrial and technological advancements (which have allowed exploitation on a far larger scale at a very rapid pace) it is more probable that a concept more germane to modern realities would have evolved. As such our courts would do well to re-examine the content of ownership and move away from the traditional conceptual approach to property towards a more conducive functional approach.¹⁰⁸

- (b) Furthermore, in keeping with its interim counterpart, the working draft provides two 'property clause' options and an environmental clause which imposes a positive obligation on the state to take 'reasonable legislative and other measures designed to prevent ... ecological degradation; promote conservation; and secure sustainable development and use of natural resources.' A failure on behalf of the state to carry out that duty/responsibility may give rise to an enforceable right of action. This

¹⁰⁵ in this regard your attention is drawn to the some what innovative stance s35(3) of the Working Draft takes.

¹⁰⁶ van der Walt refutes Visser's analysis in 'Das Eigentum'. In 'Das Römisch-Holländische Recht' Zimmermann & Feestra (Eds.) Fortschritte Des Zivilrechts im 17. Jahrhundert (1991). See also van der Walt op cit at fn.12.

¹⁰⁷ Nagan op cit at 153. Also see Rabie op cit at 81.

¹⁰⁸ In this regard see Caldwell op cit; Gray 'Property in Thin Air' (1991) 50:2 Cambridge Law Journal 352-307, and Lewis op cit; Underkuffler 'On Property: An Essay' (1990) 100:73 The Yale Law Journal 127-48.

Constitutional protection of environmental interests raises an important point:

‘the balancing of rights and interests in conservation of the environment. Whereas the traditional approach to environmental conservation measures constitute nothing more than temporary exceptions to that rule, *the idea of constitutionally guaranteed environmental rights suggests that the rights of landowners, and the rights of others who share the environment as a whole, can and should be weighed against each other,*¹⁰⁹ *with the result that the rights of landowners could well be limited intrinsically*’¹¹⁰ [my emphasis].

This is important from an environmental perspective because:

‘Once ownership is deprived of its fundamental supremacy in the system of land rights, environmental conservation acquires a whole new meaning because it then becomes possible to develop environmental interests *which can compete* with ownership on an equal footing, instead of largely negative temporary and exceptional limitations of a fundamentally unlimited right’¹¹¹ [my emphasis].

2.6 CONCLUSION

From the foregoing discussion it is possible to argue that the state, in terms of the common law, is imbued with both the police power and the power of eminent domain. Furthermore, we have seen that whilst the absoluteness of ownership is still the dominant theory of land rights in South Africa, recent case law and commentators¹¹² show that there is a definite shift from the traditional conceptual approach to property rights towards a modern functional approach. However, having said this, and while it is submitted that this shift is indeed welcome, we must bear in mind the warnings expressed by Rose *supra* :-

"semi-conscious" regulatory regimes which increasingly place the burden on private owners is not the answer. We must move beyond the "anything goes" approach for landowners, and we must avoid the "anything goes" approach for land regulation.

¹⁰⁹ the court in Corium appears to have done this without a constitutionally guarantee clause.

¹¹⁰ van der Walt op cit at 211-2.

¹¹¹ Van der Walt op cit at 211-2.

¹¹² Particularly Lewis op cit; see further Lewis 'The right to Private Property in a New Political Dispensation in South Africa' (1992) 8:3 SAJHR 389-430.

CHAPTER 3

**STATE AUTHORITY,
ENVIRONMENTAL CONSERVATION
AND PROPERTY RIGHTS:**

CONSTITUTIONAL ASPECTS

**PART 1:
POLICE POWER DEPRIVATIONS
versus
EXPROPRIATORY DEPRIVATIONS**

3.1 INTRODUCTION

Expropriation and land use regulation are among the more visible instances of an individual property-owner confronting the awesome power of the state¹ and the way in which the courts resolve this inevitable confrontation is a matter of immediate consequence to all people. Not only are they going to have to resolve this conflict, they are also going to have to resolve this conflict by avoiding political repercussions, as is exemplified by the Indian constitutional crisis over the property clause.²

Environmental conservation is regulatory in nature. There are numerous statutory provisions that provide for the regulation, or control, of natural resources on our statute books which impact or potentially impact on the individual property rights and ownership, yet they do not provide for compensation for any loss or restriction arising from those regulatory measures.³

¹ Bauman 'Property Rights in the Canadian Constitutional Context' (1992) 8:3 SAJHR 344 @ 352.

² This tit-for-tat battle ultimately culminated in the repeal of the property clause from the Indian Constitution in 1978.

³ eg. s8(1) of the Forest Act 122 of 1984 empowers to Minister of Environmental Affairs and Tourism, on serving a notice on the owner of a certain piece of land, may prohibit the planting of trees or reafforestation within a certain defined area of land. In this regard

If the State decides to become a more active participant in environmental conservation measures by embarking on environmental control and natural resource management schemes, then cries of "takings" are invariably going to become more prevalent, particularly if the approach expounded by our common law is adopted.

To illustrate, take our hypothetical example in Chapter 1. The state in exercising its police power regulates or imposes restrictions on the private landowners right to use and enjoy his property. The state is invariably going to claim that no compensation is payable. Why? because

- (a) it is promoting the ideals enunciated in the environmental clause;⁴
- (b) that whilst this is indeed an interference with the individual landowners rights to the use and enjoyment of his property, the restrictions clause (which allows for deprivations of property⁵) entitles the state to impose such restrictions without the fear of having to pay compensation; and
- (c) if the state had to pay compensation, in every case in which interference with property rights arises, this would inhibit the state from embarking on social reform measures aimed at environmental conservation, since it would be inundated with compensation claims which the 'public purse' is simply unable to meet.

The private landowner, on the other hand, is going to argue that whilst this may indeed be the case, this regulation is merely a disguised form of 'taking' (and effectively amounts to an expropriation) for which compensation is payable.

see Rabie op cit @ 293-304; 83-93; and van der Walt op cit @ 470-71.

⁴ s23 of the working draft Constitution.

⁵ s24(2) of option 2 of the working draft provides that 'no one may be deprived of property except in accordance with a law of general application' (similar to s28 of the Interim Constitution); or
s24(3) of option 3 of the working draft provides that 'no one may be arbitrarily deprived of property.'

The court is now faced with two conflicts

- (a) competing rights: property *versus* environmental rights as entrenched in the Constitution; and
- (b) competing interests: the individual landowners right to use and enjoyment *versus* the state's right, as the representative of society, to regulate (or impose restrictions on) the use and enjoyment of such property in the public interest; (in this case an environmentally sensitive wetland).

How does it resolve the conflict ?

- (1) as van der Walt⁶ points out, one thing is certain, the courts are going to have to engage in some very delicate footwork in their interpretation of the terms "deprived" and "expropriated." Does our property clause differentiate between "deprivations" (as contained in the restrictions clause) and "expropriations" (as contained in the expropriations clause) ?
 - (a) If a distinction *does exist*,⁷ then the two clauses (ie: the restriction and expropriation clauses) are *mutually exclusive* and as such are to be *read separately*, subject to their own inherent limitations; viz. in the case of the restrictions clause, legislative authority and public interest/purpose; and in the case of the compensation clause, legislative authority, public interest/purpose, *and* the payment of compensation. Accordingly, the state need not compensate owners for deprivations of property which fall short of expropriations. Furthermore, a deprivation need only be in accordance with validly enacted legislation. This will naturally promote environmental conservation measures.

⁶ op cit @ 198.

⁷ As is exemplified by both the majority decision (as per Viscount Dilhorne @ 347G - 348A) and the sole dissenting judgement of Lord Salmon (@ 353E-G) in the Privy Council's decision in Malaysia v Selangor Pilot Association [1978] AC 337 (PC). Also see the majority decision delivered by Das J in the Indian case of Chiranjitlal Chowdhuri v Union of India [1950] SCR 869 @ 924; [1951] AIR SC 41 @ 74 - also see Das J's decision in West Bengal v Subodh Gopal Bose [1954] SCR 587, whilst agreeing with the majority that the appeal should be allowed, he did so for a different reason (here he adhered to his decision in Chiranjitlal Chowdhuri). See further the dissenting judgement of Justice Brandeis in Pennsylvania Coal Co v Mahon 260 US 393; 43 S.Ct 158 (1922) and the dissenting opinion of Justice Douglas in Kimball Laundry Co v United States 338 US 1 (1948) in which both judges state that there is a clear distinction between a "deprivation" and a "taking" and that compensation is only payable in the case of a "taking".

- (b) But, if a distinction *does not exist*,⁸ then the two terms are *composite* and must be *read together*, subject to the same requirements; viz. legislative authority, public interest/purpose, *and* compensation. Accordingly, the state may well have to compensate for any deprivation, whether they be regulatory police power deprivations or expropriatory deprivations. This will obviously have the adverse effect of preventing Parliament from embarking on environmental conservation or natural resource management schemes, for fear of having to pay compensation.

However, as will be seen *infra*, this has been further complicated by the concept of inverse condemnation.⁹ The importance of this, is that in the case where the effect of an environmental control or natural resource management scheme is to effectively take a landowners property under the guise of a police power regulation, such a taking must be either invalidated or it must be accompanied by compensation. The question that needs to be asked is, if inverse condemnation is recognised, and there are cases in which our courts acknowledge that a regulation may go too far as to effectively amount to an expropriation, will the infringing enactment or action be invalidated, or will compensation be required ? The significance of this from an environmental perspective is that, if compensation is indeed payable in all cases, this may well inhibit the State from embarking on environmental conservation schemes since the 'public purse' is clearly inadequate to provide the requisite funds.

AND

- (2) the courts are going to have to establish a test distinguishing police power deprivations from expropriatory deprivations. Again this is important from an

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This is exemplified by the majority decision delivered by Sastri CJ in the Indian case of West Bengal op cit @ 607 which was subsequently followed in Dwarkanadas Shrinivas of Bombay v Sholapur Spinning & Weaving Co Ltd [1954] SCR 674 and Saghir Ahmad v State of Uttar Pradesh [1955] 1 SCR 707 @ 729. These two decisions resolved the conflict that raged between Chiranjitlal Chowdhuri op cit and West Bengal op cit. Also see Justice Holmes' decision in Pennsylvania Coal Co op cit @ 415 where he impliedly rejects the distinction between a "deprivation" and a "taking;" likewise the court in Kimball Laundry Co op cit expressly rejected the drawing of a rigid distinction between the two.

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also referred to a creeping expropriations or constructive eminent domain.

environmental point of view, especially if inverse condemnation is employed, but at the same time this is easier said than done and has proved problematic in foreign jurisdictions such as Germany¹⁰ and the United States.

3.2 "DEPRIVED" AND "EXPROPRIATED" DISTINGUISHED¹¹

"[A] deprivation is a broader genus of interference of which expropriation is but one species."¹²

Viscount Dilhorne in Selangor Pilot Association,¹³ lends support to this contention:

"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 the drafting of the constitution. 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."

Likewise, Das J in Chiranjitlal Chowdhuri¹⁴ was of the opinion that:

"Article 31(1) formulates the fundamental right in a negative form prohibiting the deprivation of property except by authority of law. It implies that a person may be deprived of his property by authority of law. Article 31(2) prohibits the acquisition or taking possession of property for a public purpose under any law, unless such law provides for payment of compensation. It is *suggested* that clause (1) and (2) of article 31 deal with the same topic, namely compulsory acquisition or taking possession of property, clause (2) being only an elaboration of clause (1). *There appear to me to be two objections to this suggestion*. If that were the correct view, then clause (1) must be held to be wholly redundant and clause (2), by itself, would have been sufficient. In the next place, such a view would exclude deprivation of property otherwise than by acquisition or taking of possession" [*my emphasis*].

¹⁰ "The civil and administrative courts ... have developed an extensive jurisprudence for determining when regulation amounts to a taking; the problem has proved as refractory in Germany as it has in the United States" (Currie 'The Constitution of the Federal Republic of Germany' (1994) at 293 (fn 136)).

¹¹ This distinction is important as "deprived" and "expropriated" correspond broadly to the concepts of police power and eminent domain (Cachalia et al 'Fundamental Rights in the New Constitution: An overview of the new constitution and a commentary on Chapter 3 on fundamental rights' at 93)

¹² Murphy op cit at 115.

¹³ op cit at 347G-348A.

¹⁴ op cit at 924 (1950); at 74 (1951).

Indeed, South African courts too have acknowledged such a distinction. Trollop J in Bechenstrater v Sand River Irrigation Board¹⁵ observes that 'expropriation'

"in statutory provisions ... is generally used in a wider sense as meaning not only dispossession 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."

It is apparent that only the Privy Council, in interpreting the Malaysian Constitution, has expressly recognised a clear distinction between "deprived" and "taken possession of or acquired."¹⁶ However, from a public international law perspective, the European Commission on Human Rights, for example, in interpreting Article 1 of the First Protocol to the European Convention on Human Rights,¹⁷ too has distinguished between "deprived" and "control the use of property," with the former deemed to incorporate 'nationalisation, confiscation and expropriation'.¹⁸ Only "deprivations" of this kind attract compensation. But "expropriation" in international law is used in a wide sense, including 'not only deprivation of property but also measures of interference which affect the substance of the right to the inviolability of ownership.'¹⁹ "Control the use of property," on the other hand, has been understood to mean "regulation" or "restriction." In a spate of 1991 decisions,²⁰ the European Court of Human Rights has recognised that environmental protection measures must transcend private property rights.

¹⁵ 1964 (4) SA 510 (T) @ 515B-C. Cited by Chaskalson op cit @ 135.

¹⁶ which it is submitted bear similar meaning to "expropriate". See, inter alia, Chaskalson op cit @ 135; and Murphy op cit @ 115.

¹⁷ Article 1 protects ownership as follows:
 "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

¹⁸ Peukert 'Protection of Ownership Under Article 1 of the First Protocol to the European Convention on Human Rights' (1981) 2:1-2 Human Rights Law Journal 37 @ 54-9.

¹⁹ Peukert op cit @ 55.

²⁰ these are discussed infra.

In Fredin v. Sweden, for example, the European Court, for the first time, extensively discussed the importance of environmental protection and its impact on the human rights protection of the European Convention. Of importance to the South African context is that this case dealt with environmental and property rights, only the latter being protected by the Convention in Article 1 to the First Protocol. Shelton, notes that

"the court reviewed the substantive elements which comprise the right to property, noting that the right contemplates situations in which an individual may be deprived of possession or use of property. The petitioner contended that he had been a victim of a *de facto* deprivation of property [when his permit to extract gravel had been revoked by the government]. The Court disagreed, finding that the revocation did not take away all meaningful use of the property in question, although it did have serious effects on the use and value of the land."²¹

Nonetheless, under the Privy Council's interpretation, it has recognised that the restrictions clause²² is clearly separate from the expropriations clause.²³ This has found support in dissenting judgements in the United States,²⁴ and Das J's majority decisions in Chiranjitlal Chowdhuri²⁵ and his opinions expressed in Subodh Gopal Bose²⁶ and Dwarkadas Shrinivas.²⁷ On the other hand majority decisions, in both the United States²⁸ and Indian Supreme Court,²⁹ have rejected the rigid distinction between "deprived" and "taken" or "taken or acquired".³⁰ Accordingly these terms are deemed not to be mutually exclusive

²¹ 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28 Stanford Journal of International Law 103 @ 115-6; see also Sands 'Principles of International Environmental Law I: Frameworks, Standards and Implementation' (1994) @ 226-9; and Birnie and Boyle 'International Law and the Environment' (1992) Ch.5.

²² Article 13(1) "No person shall be deprived of property save in accordance with law."

²³ Article 13(2) "No law shall provide for the compulsory acquisition or use of property without adequate compensation."

²⁴ op cit.

²⁵ op cit.

²⁶ op cit.

²⁷ op cit @ 729.

²⁸ op cit.

²⁹ op cit.

³⁰ eg: Mukherjea J in Dwarkadas Shrinivas op cit states that
"... the deprivation contemplated in clause (1), being no other than acquisition or taking possession of the property referred to in clause (2)."

and as such must be read together. The effect of this however is to blur the distinction between police power deprivations and expropriatory deprivations.

Whilst there are obvious differences between the various clauses discussed above, it is submitted that the Malaysian property clause is far more similar to our own than the US and Indian. The reason for this submission is two-fold:

- (a) In the United States³¹ these terms do not appear in separate clauses as they do in the South African constitution. They read as a single clause, therefore, it is submitted that this has allowed the courts to treat these clauses as composite clauses;
- (b) In the Indian Constitution, prior to its repeal, the property clause was found in two separate Articles (viz. Articles 19 and 31).³² The Constitution provided for "reasonable restrictions" on property in Article 19(5), leaving a limited scope for the interpretation of "deprived" and "take possession of or acquired." This opened the door for the courts (with the exception of Das J's interpretations) to embark on the somewhat complicated interpretation.

Consequently, it is submitted, that the interpretation adopted by the Privy Council should be the approach adopted by our courts. It is accordingly submitted that, since the majority of legal minds on the issue *supra* appear to be *ad idem* as to the existence of police powers and

³¹ The 5th and 14th Amendments to the United States Constitutions provide:
 "No person shall be ... deprived of ... property, without due process of law; nor shall property be taken for public use, without just compensation."
 [The 14th Amendment extends these rights to the various States].

³² Article 19
 "(1)(f) All citizens have the right ... to acquire, hold and dispose of property.
 (5) Nothing in sub-clause ... (f) ... shall effect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clause ... in the interests of the general public."

Article 31 (prior to the 4th Amendment)
 "(1) No person shall be deprived of his property save by authority of law.
 (2) No property ... shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation ... and either fixes the amount of compensation, or specifies the principles on which the compensation is to be determined and given.
 (5) Nothing in clause (2) shall affect ... the provisions of any law which the State may hereafter make ... for the promotion of public health or the prevention of danger to life or property ..."

eminent domain powers coupled with the fact that it is possible to argue that our common law and our courts can/have already recognised police power and eminent domain as being part and parcel of our law *supra*, the restrictions clauses contained in s24 the working draft³³ should be read separately and regarded as encompassing two separate powers: the police power and the power of eminent domain.

However, it is also possible that our courts may ignore these interpretations altogether if the courts feel that these interpretations do not 'promote the values that underlie an open and democratic society based on freedom and equality.' Mahomed CJ³⁴ in Government of the Republic of Namibia v Cultura 2000 states that

"A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*.³⁵ It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."³⁶

The interpretations clause³⁷ provides that 'every court *may* consider foreign law.' This provision is *directory*, it does not impose a positive duty on the court to take foreign municipal law into account when interpreting the rights in the Bill of Rights: the court '*may*

³³ s28 of the Interim Constitution.

³⁴ Now Justice Mahomed of the South African Constitutional Court.

³⁵ see also Marais J in Nortje & Another v Attorney-General of the Cape & Another 1995 (2) BCLR 236 (C) @ 238 C-E.

³⁶ 1994 (1) SA 407 (NmSc) @ 418F-G. This is in keeping with his statement in S v Acheson 1991 (2) SA 805 (Nm) @ 813A-B:

"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul,' the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion."

This was expressly adopted by Tebbutt J in Park-Ross & Another v The Director for Serious Economic Offences 1995 (2) BCLR 198 (C) @ 208 I-J. Friedman J in Bewailer & Others v University of Bophuthatswana & Others 1995 (8) BCLR 1018 (B) @ 1033G-1052D notes further that the Constitution imposes a new role on the courts in interpreting it: it requires a purposive approach and as such requires the courts to play a proactive role in changing society in accordance with the aims and spirit of the Constitution. Melunski J in Matiso & Others v The Commanding Officer, Port Elizabeth Prison & Others 1994 (3) BCLR 80 (SE) @ 86F-88H notes the difference in purpose and method of interpretation under parliamentary sovereignty and the supremacy of the Constitution, the latter necessitating a greater role of judicial activism (see Ch.4).

³⁷ in s39(1)(c) of the Working Draft and s35(1) of the Interim Constitution.

consider,' but does *not have to* consider foreign law. But in considering this, the courts must approach such jurisprudence with care and circumspection. Tebbutt J in Park-Ross³⁸ states that:

"While it is indeed so that section 35(1) of the Constitution provides that in interpreting the provisions of Chapter 3 thereof, the court may "have regard to comparable foreign case law," this should be done with circumspection because of the different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared with those in this country, and the different historical backgrounds against which the various constitutions came into being. I agree with Froneman J in Qozeleni v Minister of Law and Order 1994 (3) SA 625 (E) at 633F-G that one must be wary of the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting. The South African constitution must be interpreted within the context and historical background of the South African setting."³⁹

However, the courts '*must* consider all applicable international law.'⁴⁰ This provision, on the other hand, is *peremptory* in that it imposes a positive duty on the courts to take international law into account when interpreting any entrenched right: the court *must* have regard to the norms of international law.⁴¹ Another, though rather fascinating clause impacting on the recognition of international law is contained in the limitations clause of the working draft.⁴² This subsection requires that rights may only be limited if the limitation is, *inter alia*, "consistent with the Republic's *obligations under international law*". Although this clause has not been finally settled, it does introduce another innovative initiative undertaken by our Constitutional Assembly. It requires the courts to take into account our international obligations⁴³ under, *inter alia*, CITES,⁴⁴ RAMSAR⁴⁵ and, more importantly,

38 op cit at 208C-E, see generally 208F-209H. See also Nortje op cit; and more recently Berg v Prokureur-Generaal van Gauteng 1995 (11) BCLR 1441 (T).

39 According to Eloff JP in Berg op cit "the Constitution ought first and foremost to be interpreted according to principle of South African law".

40 s39(1)(b) of the Working Draft; s35(1) of the Interim Constitution.

41 This is in marked contrast to s35(1) of the Interim Constitution which merely required that the court shall "have regard to" the norms of international law.

42 s35(1)(c).

43 South Africa is a party to 23 international Conventions on the Environment (Cachalia et al. (1994) at 99).

44 The Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973.

the Convention on Biological Diversity.

Convention on Biological Diversity

Special reference must be made to the 1992 Convention on Biological Diversity to which South Africa is a signatory. This Convention 'represents a watershed in the evolution in international commitment to environmental conservation and sustainable development ... For the first time in a binding international instrument the inherent worth of the components of biodiversity, quite apart from their utility or value to humankind, is thus acknowledged.'⁴⁶ Historically the environment has always been viewed from an anthropocentric point of view: what can the environment do for humankind, rather than how can humankind conserve the environment. For the first time humankind is

"Conscious of the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components."⁴⁷

The objectives of the Convention are, inter alia, the conservation of biological diversity, the sustainable use of its components and the sharing of benefits. The Convention places far greater emphasis on the conservation of ecosystems than upon the protection of species per se. Parties are required, as far as practically possible, to:

- * establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- * develop, where necessary, guidelines for the selection, establishment and management of protected areas and areas where special measures need to be taken to conserve biological diversity;
- * promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in their natural surroundings;
- * rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans or other management strategies.⁴⁸

The Convention imposes no obligation on the parties to protect such areas. The Parties are free to protect whatever areas they choose.⁴⁹ The importance of the Convention, according to Glavovic⁵⁰, is that it

45 the Convention on Wetlands of International Importance Especially as Waterfowl Habitat of 1971. Although South Africa are signatories, this Convention has not as yet been ratified. However there is a big drive currently on the go to effect such ratification; eg. the 'Wetlands Conservation Bill' proposed by Senator S P Grové. The RAMSAR Convention came to prominence with the St. Lucia controversy and more recently with the Langebaan dispute over the building of a steel mill (see Van Huyssteen NO & Others v Minister of Environmental Affairs & Tourism & Others 1995 (9) BCLR 1191 (C) @ 1198E where Farlam J expressly refers to the Convention in which he says that "South Africa has under taken to protect, inter alia, the wetlands of the Langebaan Lagoon which are part of a sensitive ecosystem of international importance"). See further the Orange River mouth where both the South African Parks Board and Namibia Parks Board are engaged in a joint effort to rehabilitate the Orange River mouth so as to establish it as a RAMSAR site.

46 Glavovic 'Protection of Biological Diversity: An Introduction' (1995) 2:1 SAJELP 15 @ 17.

47 Part of the Preamble; cited by Glavovic op cit @ 17.

48 de Klemm and Shine 'Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems' (1993) an IUCN Environmental Policy and Law Paper No.29.

49 Glavovic op cit @ 19-20; de Klemm et al. op cit @ 162.

50 op cit @ 21.

"has placed the conservation of Earth's biological diversity firmly on the international political agenda. It affirms that it is the responsibility of each nation, in its own interests and in the interests of all humanity and of our planet and all its life forms, to maintain biodiversity within its area of jurisdiction and to do whatever is appropriate and within its capabilities to support other nations in doing so."

South Africa has already recognised many of the ideas propounded by this Convention:

1. we have legislation⁵¹ providing for the establishment of such protected areas;⁵² and
 2. our environmental clause explicitly protects many of the ideals propounded by this Convention.⁵³
- Again a lot of the ideals propounded by this convention are bound to conflict with the property rights of private landowners. Yet our courts must take these obligations into account when deciding whether a particular limitation is justifiable in an open and democratic society based on freedom and equality. Bearing in mind that the court in Van Huyssteen⁵⁴ too into account the RAMSAR convention to which we are signatories (and have **not**, as yet, ratified).

But this interpretational dilemma could easily be avoided if our Constitutional Assembly would just choose the correct wording. While our common law and courts have distinguished between the police power and eminent domain, this distinction becomes somewhat blurred when dealing with the terms "deprived" and "expropriated".⁵⁵ Indeed there is a similarity between the two terms, but this is only in so far as they belong to the same *genus*: an expropriation is a form of deprivation, the difference being one of degree. If "deprived" is interpreted in South Africa as it was in India, then van der Walt⁵⁶ may well be correct in saying that 'the development of a distinction between expropriation and the police power is hampered by the use of the term "deprivation"' and as such 'the property clause does not contain a clear provision with regard to exercises of the state's police power.'

It is submitted that the usage of the term "deprived" is a bad choice of wording. Better terminology would possibly be "to control the use of property" (as in Article 1 of the

⁵¹ The Environmental Conservation Act 73 of 1989.

⁵² s16 regulating protected natural environments (see infra) and s18 regulating special nature reserves.

⁵³ s23 of the working draft imparts a right to have our environment protected through reasonable legislative and other measures designed 'to prevent ... ecological degradation; promote conservation and secure sustainable development and use of natural resources'.

⁵⁴ op cit

⁵⁵ Kroeze op cit @ 328 points out that in terms of the Literal Rule of interpretation words must be construed according to their ordinary meaning, unless and until these acquire a specific or special meaning. Since the terms "deprived" is unfounded in private or public law, it must be widely construed, in which case a "deprivation" would include an expropriation. Surely this was not the Constitutional Assembly's intention ?!

⁵⁶ op cit @ 498.

European Convention on Human Rights) or "reasonable restrictions" (Article 19(5) Indian Constitution) which is essentially what the Constitutional Assembly is ultimately trying to say. If this is what it intended then it must use the terminology, not 'beat about the bush' and 'pass the buck' onto the courts to differentiate between the terms, knowing full well how messy foreign municipal jurisprudence is on this issue.

What the Constitutional Assembly appears to be trying establish is that there are times when we need to regulate/control the use of private property for the common good (particularly in the sphere of environmental conservation), but that we should not have to compensate for such regulation. But, as we have seen from foreign municipal jurisprudence, the choice of the word "deprived" to convey this meaning is a poor choice. This is of particular importance given the fact that 'the purpose of the right or freedom in question is to be sought by reference also "to the language chosen to articulate the specific right or freedom."' ⁵⁷ Tebbutt J in Park-Ross, ⁵⁸ when dealing with the interpretation of the constitution, held ⁵⁹ that:

"While the character, larger objects and the historical origins of the concepts enshrined are important in interpreting a law against the backdrop of the Constitution, the language in which the concept is couched cannot be overlooked."

In coming to this conclusion, he expressly adopts the dictum of Lord Wilberforce in Minister of Home Affairs (Bermuda) v Fisher: ⁶⁰

"A constitution is a legal instrument giving rise, among other things, to individual rights capable of enforcement in a court of law. *Respect must be paid to the language* which has been used and to the traditions and usages which have given meaning to that language" [*my emphasis*].

Furthermore, as has been pointed out *supra*, the use of the word "deprived" may end up defeating social reform legislative initiatives in the name of private property. Naturally, there are going to be cases where the state goes too far in its regulation, it is here that the

⁵⁷ Tebbutt J in Park-Ross & Another v The Director, Office for Serious Economic Offences 1995 (2) BCLR 198 (C) @ 209 G.

⁵⁸ op cit @ 209F-G.

⁵⁹ op cit @ 209 F-G.

⁶⁰ See Tebbutt J op cit @ 209H. Viscount Dilhorne in Selangor Pilot Association (*infra*) @ 374G states that 'great care is usually taken in the drafting of constitutions'. See further Murphy op cit @ 40-41.

courts are going to have to (i) establish tests to distinguish "controlling the use" of property (via the exercise of the States police power) and "expropriating" property (the exercise of the States power of eminent domain); and (ii) decide whether to invalidate such legislation (as in Germany)⁶¹ or require compensation to be paid (as in the United States).⁶²

The selection of the correct terms is absolutely essential for another reason: we do not want our constitution to be turned into something of a 'toothless paper tiger'.⁶³ With the terms as they exist at present, the ground is ripe for a constitutional battle between the court's possible crusade to protect property rights⁶⁴ and the State's quest for social reform.⁶⁵ If Parliament, once the final draft has been published, begins to change the constitution by inserting new terms⁶⁶ people will eventually lose faith in the constitutional protection of rights.⁶⁷ Therefore it is important that, from the outset, the correct terms are selected. The replacement of the term "deprived" with "control the use of" or "reasonable restrictions" is not out of step with 'the plain use of language'⁶⁸ approach adopted by our Constitutional Assembly. Indeed, it is submitted the use of the phrase "control the use of property in accordance with a law of general application" or "impose reasonable restrictions on property in accordance with a law of general application", for example, is far 'more accessible to ordinary people' and easier to understand (particularly to the layman) than the use of the phrase "deprived of property in accordance with a law of general application."

⁶¹ see infra @ 46.

⁶² see infra.

⁶³ This was the case in India prior to the eventual repeal of the property clause by the 44th Amendment in 1978. The Indian story is a long one plagued by tit-for-tat battles between the Supreme Court and Parliament. In this regard see Chaskalson op cit @ 389-395; Murphy @ 48-53; Murphy op cit @ 362-73.

⁶⁴ Given the fact that both at common law and case law ownership is deemed absolute.

⁶⁵ whether it be in the nature of housing or environmental conservation.

⁶⁶ as the Indian Government did to the property clause before its eventual repeal.

⁶⁷ This will have the effect of undermining constitutional rights, relegating the constitution to Parliamentary whim; ie: the constitution will be overridden by Parliamentary enactments.

⁶⁸ See 'Some facts about the Working Draft of the new Constitution, 22 November 1995' section entitled 'The use of plain language' (<http://www.constitution.org.za/fct22115.htm>); and Constitutional Talk @ 2.

3.2.1 *Inverse Condemnation*

No matter what terminology is adopted, if the State is going to become more active in environmental conservation, then cries of "takings" are going to ring out from private landowners. As has already been pointed out, the individual landowner is going to contend the regulation of his property on the grounds that the restrictions imposed in the name of environmental conservation are merely a disguised form of taking for which compensation is payable. The basis of this contention is no doubt going to be inverse condemnation:

'In cases of inverse condemnation, state interferences with private property do not result in the state acquiring the property as such, but nevertheless interfere with the owner's rights to such an extent that the rights are effectively frozen or made worthless, and it was therefore decided that they do amount to takings, and have to be compensated for.'⁶⁹

The following statement by Milne JA in South African Roads Board v Johannesburg City Council⁷⁰ appears to hint⁷¹ at the issue of inverse condemnation:

"It seems to me rather that a distinction should be drawn between (a) statutory powers which, when exercised, affect equally members of the community at large and (b) those which, while possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals."

In other words, there are instances where an expropriatory deprivation is disguised as a police power deprivation/regulation. Where the State's intention in enacting a particular piece of regulatory legislation is merely a colourable device for an acquisition or expropriation, or where statutory powers 'are calculated to cause particular prejudice to an individual or particular group of individuals,' such apparent 'regulation' will be deemed to have gone too far as to amount to an acquisition, for which either compensation is payable, or such legislation is *ultra vires* the Constitution (and as such null and void). It is submitted that while environmental regulation is essentially the exercise of the states police power it

⁶⁹ van der Walt op cit @ 10.

⁷⁰ 1991 (4) SA 1 (A) @ 12 E-G.

⁷¹ 'clutching at straws', perhaps? But at the very least this statement goes some way to recognising a differentiation between police power deprivations and expropriatory deprivations - which the courts are going to have to distinguish between through the establishment of some test or other?

is possible for such regulation to go too far so as to amount to a taking of private property,⁷² remembering of course that the institution of ownership is guaranteed under both the Working Draft and the Interim Constitution.

All of the Constitutions analyzed, whether it be by majority decision,⁷³ in dissenting opinions⁷⁴ or even merely stumbled upon or inadvertently adopted,⁷⁵ have recognised the existence of inverse condemnation. Indeed Chaskalson⁷⁶ has pointed out that whilst 'early Indian Supreme court judgements held that any deprivation of property by the State demanded compensation, these judgements were not based on the doctrine of inverse condemnation. In fact, they went *much further* than the doctrine of inverse condemnation

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For example see wetland protection in the US. Your attention is drawn to the following US decisions: Morris County Land Improvement Co. v Township of Parsippany-Troy Hills 40 N.J. 539, 193 A.2d 232 (1963); Commissioner of Natural Resources v S Volpe & Co 349 Mass. 104, 206 N.E.2d 666 (1965); Dooley v Town Plan and Zoning Commission of Town of Fairfield 151 Conn. 304, 197 A.2d 770 (1964); Harbour Farms, Inc v Nassau County Planning Commission 40 A.D.2d 517, 334 N.Y.S.2d 412 (1972); Just v Marinette County 56 Wis.2d, 201 N.W.2d 761 (1972); Spears v Berle 48 N.Y.2d 254, 422 N.Y.S.2d 636, 397 N.E.2d 1304 (1974); Deltona Corp. v United States 657 F.2d 1184 (1981); United States v Riverside Bayview Homes, Inc 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); Sylvester v United States Army Corps of Engineers 882 F.2d 407 (1989); Nollan v California Coastal Commission 483 US 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Lucas v South Carolina Coastal Council 112 S.Ct. 2886 (1992), although the last two mentioned cases dealt more specifically with coastal zone regulation. However, it is submitted, that wetland protection and coastal zone protection follow pretty much along the same lines. These cases are discussed (with commentary) in the following books: Beuscher et al 'Land Use: Cases and Materials' (1976); Browder et al 'Basic Property Law: American Casebook Series' (1979); Laitos 'Natural Resources Law: Cases and Materials' (1985); Wright and Wright 'Land Use in a Nutshell (2 ed)' (1985); Findley and Farber 'Environmental Law in a Nutshell (2 ed)' (1988); Findley and Farber 'Cases and Materials on Environmental Law (3 ed)' (1991); McGregor 'Environmental Law and Enforcement' (1994).

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particularly the dictum Justice Holmes in Pennsylvania Coal Co op cit @ 415 where he states that

"The protection of private property in the 5th Amendment presupposes that it is wanted for public purpose, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decision upon the 14th Amendment ... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extent 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 recognised as a taking."

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see Lord Salmon in the Privy Council case of Selangor Pilot Association (1978) op cit @ 358E-F where he expressly adopts the language of Justice Holmes op cit as further cited by Viscount Simonds in Belfast Corporation v O.D.Cars Ltd [1960] AC 490 @ 519.

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Murphy op cit @ 368 points out that Das J in Dwarkadas Shrinivas op cit @ 730 'without expressly saying so invoked the American doctrine of constructive eminent domain' (ie: inverse condemnation).

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op cit @ 136 (fn. 23).

in demanding compensation for state interference with property rights.'

The question now is: is compensation payable or will the infringing regulation be declared *ultra vires* (and as such null and void)? Again foreign municipal jurisprudence is at loggerheads on this issue. In Germany, for example, regulations which overstep the confines of proportionality are *ultra vires* the Constitution and as such are not deemed expropriations. Murphy⁷⁷ illustrates this by recapitulating the Kleingarten decision of the Federal Constitutional Court:

"An unconstitutional definition of the content of property can not be reinterpreted as an expropriation and the violation of the constitution can not be cured by granting compensation which has not been provided for in the respective law."

However, it must be remembered that the German Constitution, unlike its American counterpart, does have a limitations clause.⁷⁸

In the United States, since the Supreme Court decision of First English Evangelical Lutheran Church of Glendale v County of Los Angeles,⁷⁹ the remedy for an unconstitutional exercise of the police power is to invalidate the regulation *and* require monetary compensation to be paid for the period of time that the restriction is in effect.⁸⁰ However, and quite rightly so, this can be criticised: the remedy for 'regulation-induced taking should be to invalidate the law *and avoid* compensation. Courts fear that local communities may suffer serious financial difficulties if forced to compensate victims of takings. It is simpler for the community to replace the bad law with a good one than to pay damages to the injured party.'⁸¹

It is submitted that either approach can be adopted in South Africa. Van der Walt⁸² notes

⁷⁷ op cit @ 46.

⁷⁸ see generally de Ville 'Interpretation of the general limitation clause in the Chapter on fundamental rights' (1994) 9 SAPR/PL 287. This will be discussed infra.

⁷⁹ 482 US 304 (1987).

⁸⁰ The landowner must first prove that a taking has in fact occurred, and then the successful complainant must prove damages.

⁸¹ Laitos op cit @ 905.

⁸² van der Walt op cit @ 462.

that property clauses, generally, distinguish between three traditional features: the guarantee clause; the restrictions clause; and the expropriation clause. The working draft adds a new innovative dimension, it provides for a compensatory clause. These compensatory clauses are unique in their own right.

Under s28 of the Interim constitution this clause formed part and parcel of the expropriation clause, whilst in the working draft this clause⁸³ forms a separate subsection. On a reading with the restrictions clause this leads one to the following interpretation: if an individual is deprived of property by a regulation passed in accordance with a law of general application, and the court considers such regulation to have gone too far, then in terms of s24(3)/(4) of options 2/3 respectively, the court will have to decide on the compensation to be paid.⁸⁴ The court will have to decide the amount of compensation, if the enabling statute does not provide for such, by balancing the public interest with the individual's interest having due regard to, *inter alia*, the facts of the case, the current use of the property, and its market value. Section 24(3) of option 2 even makes reference to 'the ability of the state to pay', this is, in itself, a pointer to the State's willingness to pay compensation if the court considers (in the interests of justice and fairness) the regulation to have gone too far.

The reason for this is that if the Constitutional Assembly had not intended the courts to look at such a clause then, they would have either

- (i) excluded it from the property clause altogether (which, for obvious reasons, is not a particularly good idea); or
- (ii) left it where it originally was, in the expropriation clause.

Instead they have included it in the section as a separate subsection, functioning on its own.

On the other hand, if the courts decide that the compensation clause is to be read only as being subject to the provisions of the expropriations clause, then it is possible, as in the German Kleingarten case, to argue that a regulatory deprivation that goes too far is *ultra*

⁸³ in both options 2 and 3 of s24.

⁸⁴ Bearing in mind that the courts in term of the constitution have the final say on constitutional issues, and will have to establish when justice and fairness are deemed to have been met.

vires the constitution and cannot be cured by granting compensation. The remedy is therefore the invalidating of the infringing regulation. However, this is only possible if the restrictions clause is read in light of the limitations clause.

It has been pointed out *supra* that the police power provides justification for public intervention, with private property, without the payment of compensation, to the extent that state action stays within certain bounds and does not cross that invisible line representing an "expropriation" of private property for public use. Our constitutional court has been entrusted with the arduous task of having to define that invisible line. As will be seen, defining that line has been the central problem in defining the limits of land use regulation in foreign jurisdictions⁸⁵ - this is particularly important for measures aimed at environmental conservation.

3.3 TAKINGS JURISPRUDENCE IN THE USA: AN ENVIRONMENTAL PERSPECTIVE

3.3.1 *Introduction:*

Sax,⁸⁶ like Rose⁸⁷ *supra*, distinguishes between two different property rights: land in the "transformative economy"⁸⁸ and land in the "economy of nature".⁸⁹ The difference is best

⁸⁵ The ensuing discussion will be restricted to United States takings jurisprudence. The reason for this obvious limitation are two-fold:
 (i) space constraints; and
 (ii) more obviously, my personal inability to comprehend any international languages other than English.
 See in this regard Chaskalson *op cit* @ 388 and Murphy *op cit* @ 386-91.

⁸⁶ 'Property Rights and the Economy of Nature: Understanding *Lucas v South Carolina Council*' (1993) 45:1433 *Stanford Law Review* @ 1442-1446.

⁸⁷ *op cit* Chapter 1.

⁸⁸ this is the traditional concept of property: undeveloped land is inactive, waiting to be put to use. 'Insofar as land is "doing" something - for example, harbouring wild animals - property law considers such functions expendable. Indeed, getting rid of the natural, or at least domesticating it, was a primary task of the European settlers of North America' (Sax *op cit* @ 1442).

illustrated as follows:⁹⁰

Table 2: Transformative Economy versus The Economy of Nature

TRANSFORMATIVE ECONOMY	ECONOMY OF NATURE
Tracts are separate. Boundary lines are crucial.	Connections dominate. Ecological services determine land units.
Land as inert/waiting; it is a subject of its owner's dominium.	Land is in service; it is part of a community where single ownership of an ecological service unit is rare.
Land use is governed by private will; any tract can be made into anything. All land is equal in use rights.	Land use is governed by ecological needs; land has a destiny, a role to play. Use rights are determined by physical nature (wetland, coastal barrier, wildlife habitat).
Landowners have no obligations.	Landowners have a custodial, affirmative protective role for ecological functions.
Land has a single (transformative) purpose.	Land has a dual purpose, both transformative and ecological.
The line between public and private is clear.	The line between public and private is blurred where maintenance of ecological service is viewed as an owner's responsibility.

The courts in the United States have always recognised this dichotomy but have been unable to integrate them.⁹¹ Where property has this dual role, the potential for abuse of power is enormous. As will be seen the courts have tended to either side. From an environmental perspective all we need do is look at Just v Marinette County⁹² (1972) and Lucas v South

⁸⁹ a ecological view of property. 'Land is not a passive entity waiting to be transformed by its landowner. Nor is the world comprised of distinct tracts of land, separate pieces independent of each other. Rather, an ecological perspective views land as consisting of systems defined by their function, not by man-made boundaries. Land is already at work, performing important services in its unaltered state. For example, forests regulate the global climate, marshes sustain marine fisheries, and prairie grass hold the soil in place. Transformation diminishes the functioning of this economy and, in fact, is at odds with it' (Sax op cit @ 1442). Also see Daly and Cobb 'For The Common Good: Redirecting the Economy toward Community, the environment, and a Sustainable Future' (1989) @ 252-267.

⁹⁰ see Sax op cit @ 1445-6. For a general discussion on environmental rights see Sax 'The Search for Environmental Rights' (1990) 6:93 Journal of Land Use & Environmental Law 93-105; and Shelton 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28:103 Stanford Journal of International Law 103-138.

⁹¹ Sax op cit @ 1444 says that they 'are easy to distinguish in theory, [but] no absolutely firm lines of demarcation exist in either historical experience or legal regimes.'

⁹² 56 Wis.2d, 201 N.W.2d 761.

Carolina Coastal Council⁹³ (1992). Lucas is essentially the antithesis of Just: while Just struck a huge blow for environmentalism, so Lucas struck a counter blow in favour of property rights.

3.3.2 Takings: Police Power Deprivations or Expropriatory Deprivations

"We know that no such concept [of absolute property rights] really existed because government has always regulated the use of property to some extent. Nevertheless, the concept was an important element in judicial formulation of the concept of police power, which was regarded as justification for public intervention with property to the extent that governmental action stayed within certain bounds and did not cross that invisible line representing a "taking" of private property for public use. Defining that line has been the central problem in defining the limits of land use regulation."⁹⁴

Chaskalson⁹⁵ points out that the 5th and 14th Amendments⁹⁶ to the United States constitution protect property in two different but related ways:

1. the state may not deprive an individual of property unless such a deprivation takes place in accordance with due process; and
2. takings must be accompanied by compensation.

⁹³ 112 S.Ct 2886.

⁹⁴ Beuscher et al 'Land Use: Cases and Materials (2ed)' (1976) @ 339. This problem has plagued other jurisdictions as well. Peukert op cit @ 59 points out that it is impossible to determine any set criteria to distinguish between expropriation and the control of the use of property from the decisions of the Strasbourg institutions, particularly the Commission on Human Rights. Peukert (@ 59-60) notes that

"According to the Swiss Federal Court, a measure intended as a statutory limitation of property is to be regarded as an effective interference with the right of ownership if the owner is forbidden to continue a hitherto lawful exercise or economically realisable use of the thing in question; or if the prohibition restricts the use of the thing to an unusually high degree or in such a way that a single owner or a few owners are exceptionally affected and at the same time required to make a disproportionate sacrifice for the benefit of the community to the extent of receiving no compensation."

The Indian Courts by way of Das J in Sobodh Gopal Bose op cit and Dwarkadas Shrinivas op cit, distinguished between deprivations and expropriations by looking at 'the ultimate aim, the immediate purpose, the mode and manner of taking possession, the duration for which possession was taken and the effects of the taking on the rights of the persons dispossessed. A consideration of all these factors would assist the court to decide whether a particular exercise of the power was one of eminent domain or police power' (Murphy op cit @ 25, 367).

⁹⁵ op cit @ 395-6.

⁹⁶ cited supra.

How do the courts go about resolving this issue ? This is by no means an easy task. Justice Brennan in Penn Central Transportation Co v City of New York⁹⁷ (1978) states that

"The question of what constitutes a 'taking' for purposes of the fifth Amendment has proved to be a problem of considerable difficulty. While this court has recognized that the 'Fifth Amendment's guarantee [is] *designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole*'... [T]his Court, quite simply, has been *unable* to develop any 'set formula' for determining when '*justice and fairness*' require injuries caused by public action to be compensated by Government, rather than remain disproportionately concentrated on a few persons ... Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case'⁹⁸ [*my emphasis*].

Accordingly in light of these 'essentially *ad hoc*, factual enquiries'⁹⁹ it is somewhat difficult to set down any set formula, and the way in which a formula is to be set down is bound to meet with some criticism. What follows is an attempt to make sense of what has been called "takings jurisprudence" in the United States. Generally, a complainant who feels aggrieved by a government enactment or action will either:

1. allege that the restriction amounts to an invalid or unreasonable exercise of the state's police power;¹⁰⁰ or
2. allege that the restriction amounts to a government "taking" without compensation; or

⁹⁷ 38 US 104, 98 S.Ct. 2646

⁹⁸ cited in Browder et al 'Basic Property Law (2ed)' (1979) @ 1131-2.

⁹⁹ Not to mention its uncertainty as to what exactly "property" is. In this regard see Anderson 'Takings and Expectations: Toward a "Broader Vision" of Property Rights' (1989) 37 Kansas Law Review 529 @ 529-31; Lunney 'A Critical Reexamination of the Takings Jurisprudence' (1992) 90 Michigan Law Review 1892 @ 1900-1905; and Peterson 'The Takings Clause: In Search of Underlying Principles Part I - A Critique of Current Takings Clause Doctrine' (1989) 77 California Law Review 1299 @ 1308-1316, who points out that "property" in U.S jurisprudence is defined in three different ways:

- (1) property as tangible things;
- (2) property as economically valuable rights created by positive law; and
- (3) property as economically valuable vested rights created by positive law.

Also see Sax op cit @ 1446-1449 who sees property definitions as always being functionally dynamic: property law's are continually adapting to social change.

¹⁰⁰ McGregor 'Environmental Law and Enforcement' (1994) @ 189 states that 'typical challenges to local land use controls fit into well-recognised categories: challenges to alleged procedural mistakes, lack of legal basis, legal conflicts, violation of constitutional principles such as due process, equal protection, separation of powers, or otherwise, civil rights violations. Agency decisions may be attacked for alleged abuse of discretion, mistakes in procedure, use of incorrect criteria, lack of substantial factual basis, being beyond the legal authority of the board, violations of some statute or constitutional provisions, and a host of other possibilities including the old favourite, being "arbitrary and capricious".' All of which are going to find grounds for litigation in South Africa at some stage or another.

3. allege both a failure to comply with due process and a failure to pay compensation.¹⁰¹

McGregor¹⁰² points out that for a government restriction to survive a "taking" challenge, it must meet three legal requirements: the "purpose test", the "means test" and the "impact test". The first two are essentially used to determine whether a regulation or a restriction is a valid exercise of the police power, the latter essentially determines whether the regulation or restriction constitutes a taking.

It is uncertain whether the courts deal with the two issues (ie: the police power and takings issue) separately or lump them together. Laitos¹⁰³ points out that the Supreme Court has dealt with this issue on both planes; either

- (i) the court lumps the police power and the takings issue together and then applies the balancing test (eg: Pennsylvania Coal Co v Mahon¹⁰⁴ (1922)); or
- (ii) the court deals with the two issues separately, applying the means-ends test *infra* to the police power and one of the five takings tests *infra* to the takings issue and then applies the balancing test; ie: weighing the public benefits or interests against the private interests or burden (eg: a clear exposition of this approach is to be found in Keystone Bituminous Coal Association v DeBenedicts¹⁰⁵ (1987)).

Laitos points¹⁰⁶ out that 'the better reasoned cases suggest that police power and taking

¹⁰¹ Laitos op cit @ 902.

¹⁰² op cit @ 189.

¹⁰³ op cit @ 904.

¹⁰⁴ 260 US 393, 43 Sct 158.

¹⁰⁵ 480 US 470, Sct 1232, 94 LEd.2d 472. The point to note when comparing Pennsylvania Coal Co and Keystone Bituminous Coal is how the United States Supreme Court faced with identical facts came to opposite conclusions. The former holding that the State's police power had amounted to a taking for which compensation was payable, whilst in the latter the court held that no taking had taken place as the regulation did not completely deprive the complainant Coal Co. of all mining rights (it could still mine 50% of the coal bearing rock).

¹⁰⁶ op cit @ 903.

issues should be considered separately'. For the sake of cohesion and to avoid confusion, the ensuing discussion will follow along these lines.

3.3.2.1 The Means-Ends Test **Is the regulation a valid exercise of the police power?**

The test for evaluating whether a regulation or restriction is a valid exercise of the police power is the means-ends test:¹⁰⁷

- (a) does the regulation seek to accomplish a proper governmental end (the "purpose test") ?; and
- (b) is the regulation itself the likely means of accomplishing that end (the "means test") ?

Consequently, not only must a regulation seek to benefit the public's health, safety, morals, or general welfare, but the means adopted to achieve that government purpose must also be rational. There must be a clear relationship between the restriction placed on land-use and the legitimate police power purposes sought to protect the public health, safety, morals, or general welfare. In other words, land-use regulation must "substantially advance" a valid state interest.

(a) The "purpose test":

"All property is held subject to the right of government to regulate its use in the exercise of the police power, so that it shall not be injurious to the rights of the community, or so that it may promote its health, morals, safety, and welfare. The power of regulation by government is not unlimited; it cannot ... be imposed unless it bears a rational relation to the subjects which fall fairly within the police power and unless the means used are not within constitutional inhibitions."¹⁰⁸

Laitos¹⁰⁹ points out that the conservation of natural resources or the preservation of open spaces have been found to be a proper purpose, and the regulation of private land for that

¹⁰⁷ Laitos op cit @ 903. An approach that can be attributed to South Africa's limitations clause; see de Ville op cit @ 300-10.

¹⁰⁸ State v Hillman 110 Conn. 92, 105, 147A 294, 299, quoted by Associate Justice Shea in Dooley v Town Plan and Zoning Commission of Town of Fairfield 151 Conn.304, 197 A.2d 770 (1964).

¹⁰⁹ op cit @ 903.

purpose has been held as a valid exercise of the State's police power.¹¹⁰ The area where these have become unstuck is in the application of the various takings tests. For example, Hall J in Morris County Land Improvement Co v Township of Parsippany-Troy Hills¹¹¹ (1963) held that

"while the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate property for a flood water detention basin or open space [the benefits which would accrue to the local public as that of a nature refuge]. These are laudable public purposes and we do not doubt the high-mindedness of their motivation. But such factors cannot cure basic unconstitutionality".

McGregor¹¹² points out that the leading case addressing the "purpose test" is that of Turnpike Realty Company, Inc v Town of Dedham¹¹³ (1972). In that case the court held that 'the validity of the ordinance was supported by valid considerations of public welfare, the conservation of "natural conditions, wildlife and open spaces. The ordinance provided that lands which were subject to seasonal or periodic flooding could not be used for residences or other purposes in such a manner as to endanger the health, safety or occupancy thereof and prohibited the erection of structures or buildings which required land to be filled.'¹¹⁴ This was expressly approved by Hallows CJ in Just v Marinette County, which deemed the case to be "analogous to the instant facts":

"An owner of land has *no* absolute and unlimited right to change the essential natural character of his land so as to use it for which it was *unsuited in its natural state and which injures others*. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses ... The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is *not* a reasonable use of that land which is protected from police power regulation"¹¹⁵ [my

110 See for example wetland protection in the United States. The leading cases in this regard and leading commentators have been listed supra.

111 op cit.

112 op cit @ 190

113 362 Mass. 221.

114 as per Chief Justice Hallows in Just (cited in Beuscher et al op cit @ 470).

115 The court consequently upheld the shoreland zoning ordinance as being constitutional. It is important to note that the court did take note of cases to the contrary. For example, MacGibbon v Board of Appeals of Duxbury 356 Mass. 635, 255 NE.2d 347 (1970) where the court took the view that the preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose was not within the limit and scope of the police power and the ordinance

emphasis].

The single most important federal case on the "purpose test" is Keystone Bituminous Coal Association¹¹⁶ (1987): "courts have consistently held that a state need not provide compensation when it diminishes or destroys the value of property in stopping illegal activity or abating a public nuisance".¹¹⁷

(b) The "Means" Test:

McGregor¹¹⁸ states that 'the legislative or administrative body, acting to protect the public health, safety, or welfare, must utilise an approach that is rational to that end.' Indeed Scalia J in Nollan v California Coastal Commission¹¹⁹ (1987) notes that

"we have long recognised that land use regulation does not effect taking if it "*substantially advance[s] legitimate state interests*" ... Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements"¹²⁰ [my emphasis].

was not saved by the use of special permits. Also see Dooley op cit; Parsippany-Troy Hills op cit; State v Johnson Me, 265 A.2d 711 (1970). The court in Just distinguished these cases on the premise that "filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to the swamp". Despite the apparent inconsistency, it must be remembered that at the end of the day every case must be taken on its individual merits.

NOTE: see Lucas op cit (1992) where the court chose to ignore the purpose or validity of the legislation. Sax op cit @ 1438 points out that in terms of Lucas "states may not regulate land use solely by requiring landowners to maintain their property in its natural state as part of a functioning ecosystem, even though those natural functions may be important to the ecosystem. See Nixon 'When Does Regulation Go Too Far? The Takings Issue' (1994) @ 141-53 for the text; Adams *et al* 'The Supreme Court - Leading Cases: H. Fifth Amendment' (1992) 106 Harvard Law Review 163 @ 269-78; Christoffel & Teret 'Protecting the Public: Legal Issues in Injury Prevention' (1993) @ 151-55.

¹¹⁶ op cit.

¹¹⁷ cited by McGregor op cit @ 192. Also see Findley and Farber op cit @ 648-9.

¹¹⁸ op cit @ 189.

¹¹⁹ op cit; see Michelman 'Takings, 1987' (1988) 88 Columbia Law Review 1600; Findley and Farber op cit @ 653.

¹²⁰ We have determined *supra* that environmental conservation is a "legitimate state purpose." See *infra* for a South African and Public International perspective.

This "essential nexus"¹²¹ must exist: the restriction or limitation imposed must further the ends advanced as justification.¹²²

3.3.2.2 The Impact Test:

Does the regulation or restriction constitute a taking ?

This is probably the most perplexing question in US Constitutional law and legal theory. The historical background to the approach that the courts have taken can essentially be divided into three periods: pre-1922; 1922-1978;¹²³ post-1978; each shall briefly be looked at in turn.

(a) Pre-1922:

Wide state powers with respect to police powers.

This period was generally characterised by a pro-government action approach: 'in order for a owner to be entitled to protection under the taking clause his property must have been actually taken in the physical sense of the word. No indirect or consequential damage, no matter how serious, warranted compensation.'¹²⁴ Accordingly the Supreme Court appeared to be far more willing to strike down state statutes regulating economic activities. Economic growth planted a seed of doubt in the minds of the courts,¹²⁵ but still it adhered to this line

¹²¹ Findley and Farber op cit @ 654; McGregor op cit @ 193.

¹²² In Nollan op cit the court held, on the facts, that the condition imposed failed to further the ends advanced as justification; ie: the "essential nexus" was missing. In this regard your attention is drawn to McGregor op cit @ 194.

¹²³ For a more general discussion on this period see Chaskalson op cit @ 395-401, particularly fn 22.

¹²⁴ Beuscher et al op cit @ 343.

¹²⁵ For example Holmes J in Rideout v Knox 148 Mass.368, 19 NE 390 (1889) was of the opinion that the difference between the two state power (ie: eminent domain and the police power) was merely one of degree and no clear line could be drawn between them. This line of reasoning, according to Beuscher et al op cit (@ 344), was developed by Holmes J over the years until, some 33 years later, he delivered the majority decision in Pennsylvania Coal Co op cit.

of thought. In Mugler v Kansas¹²⁶ (1887), Hadacheck v Sebastian¹²⁷ (1915) and Powell v Pennsylvania¹²⁸ (1922) the court denied compensation to the owners of business properties that became virtually valueless because of state regulatory statutes - these were not takings as contemplated by the constitution. These decisions suggest that

'the impact of a regulation on private individuals is irrelevant to determining constitutionality. The theory ... seems to be that if a statute is otherwise legitimately within the police power - that is, if it is reasonably related to the public health, welfare, or morals - then individuals who suffer severe losses because of the regulation have no remedy.'¹²⁹

Laitos¹³⁰ sums up this period as follows:

"Traditionally, only actual physical possession of property was deemed a taking qualifying for compensation. Mere restrictions [exercises of the police power] on land use were not takings, [but] they could have been unreasonable exercises of the state's police powers."

**(b) 1922- 1978:
Pennsylvania Coal Co and beyond.**

In December 1922, Holmes J in Pennsylvania Coal Co¹³¹ stated:

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking."

¹²⁶ 123 US 623, 8 Sct 273 - a prohibition on the manufacture and sale of liquor was deemed justified. Chaskalson op cit (at 400) summarises the courts findings as follows:
"Justice Harlan ruled that the police power to ensure that citizens use their property in a socially acceptable fashion was the prerogative of the states. The states were entitled to regulate property in the interests of public health, public morals and the public safety, and the courts could only intervene if an act purporting to have been passed for one of these purposes, in fact, bore no relation to the stated purpose."

¹²⁷ 239 US 394, 36 Sct 143, 60 LEd 348, Ann.Cas.1917B 927 - an ordinance which prevented any person from establishing or operating a "brickyard or brick kiln, or any establishment for the manufacture or burning of brick" within city limits. This restriction devalued the owners property from \$800 000 to a mere \$ 60 000. The court held that the ordinance was justifiable - the court practically ignored the reduction in property value.

¹²⁸ 127 US 393 - an Act prohibiting the manufacturing or selling of margarine and other non-dairy fats without providing for compensation was deemed to be justified.

¹²⁹ Findley and Farber op cit at 639.

¹³⁰ op cit at 903.

¹³¹ op cit at 415.

Findley and Farber¹³² note that the heart of the opinion is to be found in the following passage:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. *One fact* for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain the act. *So the question depends upon the particular facts. The greatest weight is given to the judgement of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power.*"¹³³ [my emphasis]

Beuscher et al¹³⁴ note that soon after this decision the Supreme Court lost interest in the issue and refused to pass judgement on such cases except in rare instances. As a result the application of the courts balancing test (ie: weighing the public benefits of the regulation against the extent of loss of property values) was left to the safe keeping of the lower Federal Courts and, especially, the state courts in which these actions were generally brought.¹³⁵ This has essentially lead to the somewhat chaotic state of takings jurisprudence in the United States.

This era is best summed up as follows:

Both physical takings and *improper* regulatory restrictions could amount to an unconstitutional taking. Generally, this has how the issue has remained ever since.

(c) Post-1978: Penn Central Transportation Co and beyond.

¹³² op cit @ 639.

¹³³ Nonetheless a long line of cases still adhered to the Hadacheck, Mugler and Powell op cit approach. See further Chaskalson op cit @ 400-1 (fn 22).

¹³⁴ op cit @ 344.

¹³⁵ 52 states, that makes a lot of takings jurisprudence to wade through !!

Peterson¹³⁶ points out that since Penn Central's attempted synthesis of United States takings jurisprudence,¹³⁷ the courts have tended to apply one of four (now five) tests to determine whether government action other than a formal exercise of the eminent domain power constitutes a taking:

- (i) the three-factor Pen Central test;
- (ii) the Agins two-part test;
- (iii) the "no economically viable use" test;
- (iv) the Loretto per se rule;¹³⁸ and
- (v) the Lucas "title to begin with" test.

However, it must be noted from the outset that the courts have rarely adopted any one single test or deemed any single factor to be determinative of a taking. Instead there appears to be an overlap, often with courts using two or more of these tests in the same judgement.

(i) the three-factor Penn Central test:

After looking into what Justice Brennan called "essentially ad hoc, factual inquiries", the Supreme Court in Penn Central¹³⁹ was able to identify three factors that have particular significance:

"[1] The *economic impact* of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct *investment backed expectations* ... [3] So too is the *character of the government action*. A 'taking' may more readily be found when the interference with property can be characterised as a physical invasion by Government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good"¹⁴⁰ [*my emphasis*].

¹³⁶ op cit @ 1316-1334.

¹³⁷ see Justice Brennan's comment op cit.

¹³⁸ (iii) and (iv) merely focusing on a single factor as being determinative; for an extensive discussion and criticism of the U.S takings doctrine see Peterson op cit 1301-1363.

¹³⁹ op cit.

¹⁴⁰ see Browder et al op cit @ 1131-2. Lunney op cit (@ 1925) is of the opinion that the Penn Central case recognised 5 takings factors:

'(1) government action that deprived the owner of all economically viable use of his physical property; (2) government action that physically invaded an individuals physical property; (3) government action that was "not reasonably necessary to the effectuation of a substantial public purpose"; (4) government action that completely destroyed the bundle of rights in a physical thing; and (5) government action taken to acquire resources "to permit or facilitate uniquely public functions".

According to Lunney (@ 1926) the court in Hodel v Irving 481 US 704 (1987) identified 6

However, Peterson¹⁴¹ notes the following problems have, however, arisen out of this test:

- ▶ the courts in applying this test have defined each factor in a variety of ways, without acknowledging the shifts in definition of property;
- ▶ it is difficult to predict what weight the court will give to a particular factor. At one time or another the courts have regarded each one of these three factors as being decisive in establishing whether or not a taking has occurred; and
- ▶ it is unclear when the test is to be favoured over one of the other four tests advanced by the Supreme Court *infra*.

(ii) the two part *Agins* test:

In *Agins v City of Tiburon*¹⁴² (1980), the court held that

"The application of a ... law to particular property effects taking if the ordinance [1] does *not substantially advance legitimate state interests* ... or [2] denies an owner *economically viable use* of his land" [*my emphasis*].

If state action meets either part of the test, a taking is deemed to have occurred. But again the meaning and application of this test is unclear:¹⁴³

- ▶ in a number of cases the Courts have simply ignore the first part of the test without explanation (see (c) *infra*);
- ▶ the courts have interpreted the first part of the test in two different ways:
 - (a) by equating the test to the minimum rationality standard of substantive due process; and

factors that identified a "taking":

"(1) the [regulations] economic impact on particular individuals; (2) its interference with reasonable investment backed expectations; (3) its distribution of benefits and burdens (an average reciprocity of advantage); (4) the importance of the right affected by the [regulation] to our common conception of property ownership; (5) the degree of restriction on the right affected by the [regulation]; and (6) the ends-means fit of the [regulation]."

¹⁴¹ op cit @ 1317, developed @ 1317-27.

¹⁴² 447 US 225 @ 260.

¹⁴³ Peterson op cit @ 1328-30.

(b) by using it to determine whether or not the state is seeking to prevent a "nuisance-like" or "noxious" land use; and

- ▶ the courts have read the two parts together, rather than leaving them as two separate parts.

(iii) the "no economically viable use" test:

A number of cases decided before Keystone Bituminous Coal¹⁴⁴ and Nollan¹⁴⁵ held that a statute regulating the uses that can be made of property effects a taking if it "*denies an owner economically viable use of his land*". However, two problems arise in this regard:¹⁴⁶

- ▶ must the owner be denied of *all* economically viable use of his property ?; and
- ▶ there are cases in which the state may well be justified in depriving the owner of all economically viable use of the property, particularly in the advancement of legitimate state interests - bearing in mind that the state is the progenitor of the public interest.

(iv) the *Loretto per se* rule:

The Court in Loretto v Telepromoter Manhattan CATV Corp¹⁴⁷ (1982) held that any "*permanent physical occupation*" *per se* is an intrusion of such an "unusually serious character" that it constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner". According to the court where it is obvious that a permanent physical invasion has occurred (ie: "where the owner is dispossessed of his rights to use, and exclude others from his property), a taking is established. But where a *temporary* limitation or physical invasion occurs then the three factor test in Penn Central is to

¹⁴⁴ op cit.

¹⁴⁵ op cit.

¹⁴⁶ Peterson op cit @ 1330-33.

¹⁴⁷ 458 US 419.

be applied with the character of the state action being determinative.¹⁴⁸

(v) the *Lucas* "title to begin with" test:

In *Lucas v South Carolina Coastal Council*¹⁴⁹ (1992), Justice Scalia articulated a special rule for cases of total deprivation of a property's economic value:

"Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shown that the proscribed use interests were *not part of his title to begin with* ... Any limitation so severe [as to prohibit all economically beneficial use] cannot be ... legislated or decreed (without compensation), but *must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership*. A law or decree with such an effect must ... do no more than *duplicate the result that could have been achieved in the courts* - by adjacent landowners (or other uniquely affected persons) under the State's law or private nuisance, or by the state under its complementary power to abate nuisances that affect the public generally, or otherwise"¹⁵⁰ [my emphasis].

In other words, when a regulation deprives an owner of all economic value in real property, the state must compensate the landowner unless the prohibited use of the land constitutes a nuisance under a states common law.¹⁵¹

The question which the court must ask is: Were the land use restrictions "part of [the landowner's] title to begin with" ? And the way the court answers this is by looking

148 Peterson op cit @ 1333-4.

149 op cit.

150 The court then goes on to explain this analysis by the following example:
 "On this analysis, the owner of a lake bed ... would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding other's land ... Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and ... it was open to the state at any point to make the implication of those background principles of nuisance and property law explicit ... When, however, a regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."
 see Nixon op cit (@ 163), where the whole judgement is set out at 159-172.

151 see Adams et al op cit @ 270; Sax op cit @ 1435. Sax (@ 1440) points out that by leaving the penultimate decision to the courts analysis of its common law is not entirely a bad thing, especially since nuisance law in the U.S is a slippery subject: "The opinion recognises that, in the name of environmental protection, an entirely new sort of regulation could be imposed". The question now is, are the courts going to interpret their common law as including environmental rights? In this regard see Rychlak 'Common Law Remedies for Environmental Wrongs: The Role of Private Nuisance' (1989) Mississippi L.J. 657-98.

at its common law principles regulating property and nuisance.¹⁵² If the common law says that such restrictions were inherent in the owners original title, then such a regulation is lawful and as such no compensation is payable. But if such a restriction was not inherent in the original title, the regulation or restriction is unlawful and compensation must be paid.¹⁵³

3.3.2.3 Remedies:

Generally two remedies are available to a successful complainant:

- (a) the remedy for an unconstitutional exercise of the police power is to invalidate the regulation; and/or
- (b) If a taking exists, then (according to First English Evangelical Lutheran Church of Glendale v County of Los Angeles¹⁵⁴ (1987)) the remedy is invalidation of the infringing regulation/enactment *and* monetary compensation for the period of time that the restriction was in effect.¹⁵⁵

¹⁵² Indeed the court was of the opinion that this 'accords ... with our "taking" jurisprudence, which has traditionally been guided by the understanding of our citizens regarding the content of, and the State's power over, the "bundle of rights" [in ownership] that they acquire when they obtain title to property.'

¹⁵³ This is of particular importance in South Africa since our common law does not recognise environmental issues as amounting to an inherent limitation on the Landowner's original title. But having said this, our Constitution, by providing for environmental rights, including, *inter alia*, the promotion of conservation and securing sustainable development and use of natural resources, essentially cures this problem. Remember the US courts do not have an environmental clause to work with in the first place. Consequently it comes as no surprise that Lucas has been criticised most vehemently by environmentalists and conservationists alike (eg: McGregor *op cit* @ 198-99). However, despite these criticisms Adams *et al op cit* @ 276 points out that this case will allow each state to deal with their own conception of nuisance thereby allowing them to adapt to their particular needs and to their particular conceptions of reasonable land use; and the decision will increase predictability and channel public expectations.

¹⁵⁴ 482 US 304.

¹⁵⁵ *op cit*. This has been severely criticised: the remedy for "a regulation-induced taking should be to invalidate the law and avoid compensation. Courts fear that local communities may suffer serious financial difficulties if forced to compensate victims of takings. It is simpler for the community to replace the bad law with a good one than to pay damages to the injured party" (Laitos *op cit* @ 905). Similarly, the court in Lucas held that when a regulation strips a parcel of land of all economic value the state must compensate the landowner unless the prohibited use constitutes a nuisance under the State's common law. McGregor *op cit* @ 196-99 has extensively criticised both First Evangelical and Lucas.

3.3.2.4 Conclusion:

Nonetheless, despite the inconsistencies that exist in the U.S takings doctrine and apart from the fact that the answer to the takings issue lies in the facts of the case, Peukert¹⁵⁶ notes that the following criteria have assisted in the distinction between a mere restriction and a taking in U.S jurisprudence:

- 1) the nature of the *harm* caused by the regulated activity and the manner of interference;
- 2) the *nature and character* of the taking or regulation;
- 3) the *magnitude* of the taking or the extent of the interference with the property interest;
- 4) the *extent* of the public interest being protected; and
- 5) the *effect of government action* on the economic value of government resources and enterprises.

Peterson¹⁵⁷ concludes that the U.S taking doctrine is not helpful in deciding whether a taking occurred, because it does not address the issue of justice and fairness that the court tells us is at the heart of every taking case. Furthermore the courts have used so many definitions of "property" and have applied numerous tests inconsistently that essentially it has become tied up in its own chaotic web. Nonetheless Peterson does point out that despite the inefficiency of the tests, the Justices are at the end of the day deciding the cases on their own merits and by relying on their own sense of fairness.

¹⁵⁶ op cit @ 60 (fn 86).

¹⁵⁷ op cit @ 1341 and 1362.

3.3.3 *Lunney: A Possible South African Solution*

3.3.3.1 A Summary

Table 3: The Lunney Synopsis

PUBLIC AUTHORITY	THE GREY AREA REGULATED BY THE COURT	PRIVATE AUTHORITY
<i>(THE COMMUNITY OR SOCIETY)</i>		<i>(THE INDIVIDUAL)</i>
Public Rights	Rights are generally private, unless there is something special to make the right public. This is only possible in 2 circumstances:	Private Rights
In excercising its regulatory police powers the State can control the right or even eliminate it entirely without having to pay compensation so long as substantive due process is achieved.	(1) "noxious use" cases: private right conflicts with another private right; and (2) rights "clothed with a public interest" (these are court defined rights).	The State can only control the use of such property by purchasing it through eminent domain (ie: expropriation).
NO TAKING NO COMPENSATION	In both cases the right is considered public and subject to regulation. But before it is decided whether or not compensation is payable, the State regulation is subjected to the substantive due process test: (i) legitimate end (including the public interest); and (ii) close causal connection. If both satisfied, then compensation is payable.	A TAKING FOR WHICH COMPENSATION IS PAYABLE

3.3.3.2 The Theory

Lunney¹⁵⁸ offers a rather intriguing and, to my mind, a rather astute analysis of the U.S Takings jurisprudence. ‘Lunney argues that the reason for the chaos in current takings

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‘A Critical Reexamination of the Takings Jurisprudence’ (1992) Michigan Law Review 1892-1965.

jurisprudence is that the modern court's interpretation of the early cases is wrong':¹⁵⁹

"the early court separated compensable government control of property from noncompensable control by determining whether the property in question fell within the sphere of public authority (community) or the sphere of private authority (individual). If the court determined that a property right fell within the sphere of private authority (a "private right"), then the right was "private property", and the government could control or interfere with the right only by purchasing it through eminent domain. On the other hand, if the court determined that a right fell within the sphere of government authority (a "public right"), then the right was not "private property", and under its police power the government could control the right or even eliminate it entirely without paying compensation, provided the government action was reasonably necessary to achieve a legitimate end."¹⁶⁰

Lunney's analysis differentiates early jurisprudence from modern jurisprudence essentially on two grounds:

- (i) the early courts distinction between private and public rights; and
- (ii) the earlier courts lack of faith in legislative competence and process.

Lunney starts off her analysis by pointing out that the "property" protected under the constitution in early case law were legally enforceable property *rights* (like the rights to alienate, use or exclude - not physical property itself, nor 'relationships having exchange value'). An owner was deemed to possess a full "bundle" of property rights, and each "strand" was protected by the courts.¹⁶¹ If state interference had the effect of effectively eliminating, modifying, transferring or restricting any *enforceable legal right*, the issue of compensation arose. Did the enactment or state action effectively eliminate, or interfere with, the legal rights state law gave the landowner ?

Lunney points out¹⁶² that by limiting compensation to interferences with property *rights*, this had two advantages:

1. government action that did not interfere with those rights could not, by definition, amount to a taking of property; and

¹⁵⁹ Lyster "'Protected Natural Environments": Difficulties with environmental land use regulation and some thoughts on the property clause' (1994) *De Jure* 136 @ 149.

¹⁶⁰ Lunney *op cit* @ 1900.

¹⁶¹ *Contra* the modern approach: "where an owner possesses a full "bundle" of property rights, the destruction of one "strand" is not a taking, because the aggregate must be viewed in its entirety" (*Andrus v Allard* 444 US 51 @ 65-7 (1979)).

¹⁶² *op cit* @ 1904-5.

2. government makes decisions daily effecting prices and values. Requiring compensation every time prices changed would limit state authority and action, therefore, the court would be reluctant to embark on any action which would have the effect of reducing property values for fear of having to pay compensation.

However, despite the fact that the court protected each strand in the bundle of ownership rights, the courts did not require compensation every time state action had the effect of limiting or controlling any of these rights. As was pointed out in the opening paragraph, the courts differentiated between public and private rights and the court resolved the compensation issue 'by determining on which side of the public-private line the right fell':¹⁶³ 'was the right in question a public right that the legislature had the power to regulate under the police power or a private right that the legislature had no power to regulate ? If, and only if, *the court* found the right affected to be a public right, the court characterized the government action as a police power regulation and required no compensation. If, on the other hand, the right fell within the sphere of private authority, the right carried a "constitutional immunity from regulation," and the government could control it only through the power of eminent domain.'¹⁶⁴

How did the courts differentiate between private-public rights? The answer to this question is reflected in the principle of:

*sic utere tuo, ut alienum non laedas*¹⁶⁵

The early courts generally regarded rights as private but accepted the fact that they could, in certain circumstances become public:

'So long as there was nothing special that would make a right "public," it remained private and beyond the government's regulatory power.'¹⁶⁶

¹⁶³ op cit @ 1907.

¹⁶⁴ Lunney op cit @ 1908-9.

¹⁶⁵ 'use your property as not to injure (the rights) of another person' a phrase not uncommon to South African neighbour law op cit Chapter 2.

¹⁶⁶ op cit @ 1909.

What circumstances would make a private right public? There were essentially two cases in which this would occur:

1. *where two private rights conflicted*: a typical example of this would be neighbour law where the use of one's own property interferes with his/her neighbour's right to use their land. Not surprisingly these cases were labelled "noxious use" cases, and 'the principle underlying them as the nuisance exception, stating [that] the ... state may prohibit noxious uses without compensation.'¹⁶⁷ Consequently where two private rights conflicted, they were entitled to state interference by regulation without compensation, BUT, remember we are dealing with *rights*. Only when an existing right conflicted with another existing right, was the state able to intervene. This acted essentially as an inherent limit on state regulation:¹⁶⁸ 'injury to another was not enough; only "injury to another's rights" would render a right public and authorise government action under the police power.'¹⁶⁹

2. *where a private right was "clothed with a public interest"* such right may become a public right and therefore subject to state regulation without compensation.¹⁷⁰ A private right was clothed with a public interest when it bore a "peculiarly close relation between the public" and the business sought to be regulated (ie: the nature of the business created certain public rights, and any unreasonable exercise of these rights injured not only another, but also another's rights). 'The early court drew the line between these public and private rights by defining a set of rights that *it* considered the public to hold with respect to the business. If the property rights of the business came into

¹⁶⁷ Lunney op cit @ 1911.

¹⁶⁸ Lunney op cit @ 1911-1914.

¹⁶⁹ op cit @ 1914.

¹⁷⁰ Lunney op cit @ 1914-1919.

conflict with one of these court-defined rights,¹⁷¹ then the conflict would bring the business rights within the public sphere and therefore subject to regulation. Absent such a conflict, the business' rights remained private and thus beyond the reach of the legislature without just compensation.¹⁷²

Once the court decided that a particular private right was public, and therefore subject to state regulation¹⁷³ (without fear of having to pay compensation), the regulatory enactment was subject to further scrutiny. The regulation must satisfy the means-ends test and as such:

- (i) 'have a legitimate end,' that is to say that:
 "[The police] power ... embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."¹⁷⁴ Any regulation serving one of these ends is a legitimate end; and
- (ii) 'demonstrate a sufficiently close relation between the means selected and the end desired.'¹⁷⁵

This means-end test was known as the doctrine of substantive due process (reasonableness).

Consequently, property was protected in two ways under the constitution:

1. private rights could only be interfered with against the payment of compensation; and
2. public rights were protected under substantive due process by requiring limitations to

¹⁷¹ This is consistent with a pro-active and purposive approach to the interpretation of the Constitution as recognised in the dicta's of Friedman J in Bewailer op cit and Melunsky J in Matiso op cit.

¹⁷² Lunney op cit @ 1917.

¹⁷³ ie: that the state could now effectively eliminate, modify, transfer, or restrict and enforceable legal right.

¹⁷⁴ Bacon v Walker 204 US 311 (1907) cited in Lunney op cit @ 1921.

¹⁷⁵ op cit @ 1920. Proportionality was pivotal in deciding the outcome.

be reasonably necessary to achieve a legitimate end.¹⁷⁶

----- * -----

It was the decision in Nebbia v New York¹⁷⁷ that marked the end of this *status quo*. While acknowledging the "noxious use" doctrine, the court in Nebbia decided to expand public rights by redefining the "clothed with a public interest" requirement:

"A right would be considered to be "clothed with a public interest" so long as the legislature could reasonably conclude that limiting the right was reasonably related to the attainment of the public good."¹⁷⁸

Whilst early court doctrine required "something more special, something of more definite consequence," Nebbia gave the public the right to pursue the "public good". The only restriction therefore would be compliance with the means-ends test. To adapt Murphy's words¹⁷⁹, this would inevitably have the effect of leaving 'open a limited sphere of legislative sovereignty' for the state to embark on regulatory schemes provided that such state action was not arbitrary or unreasonable.

In summary, *pre-Nebbia*, the court drew the regulatory-taking line by defining a limited set of circumstances that *would justify community control* of property. *Post-Nebbia*, the court has sought to define a limited set of circumstances that justify *individual* control of property. In other words, there has been a reversal of roles. The courts now seek to find factors that identify government action that essentially amounts to a "taking." These factors have to be identified¹⁸⁰ and then balanced in some unspecified way.¹⁸¹

¹⁷⁶ see Chaskalson op cit @ 396-5; and van der Walt op cit @ 466.

¹⁷⁷ 291 US 502 (1934); see generally Lunney op cit @ 1921-24.

¹⁷⁸ op cit @ 1922.

¹⁷⁹ op cit @ 120.

¹⁸⁰ see the discussion under the U.S takings analysis op cit.

¹⁸¹ see the chaos that exists in the U.S taking jurisprudence created by the number of tests and the ad hoc way in which the courts have approached the issue op cit.

3.3.3.3 A Criticism of the Modern Approach

Lunney¹⁸² criticises this modern approach on the following grounds:

1. the courts, in seeking to determine the circumstances in which "fairness and justice" require the payment of compensation, have incorrectly interpreted the early cases. Accordingly, 'the court has avoided any need to explain how any given factor in its test comports with sensible notions of fairness and justice; it simply pretends that the early cases have already resolved the issue';¹⁸³
2. the modern court 'seeks to identify the factors that would make a right *private*, while relying on early cases that focus on the factors that would make a particular right *public*';¹⁸⁴
3. the "conflict-in-rights" and "clothed with a public interest" tests that defined compensation in early cases has been largely ignored in 'favour of interesting bits of *dicta* that provide a convenient explanation, given the modern perspective, for why a particular right should be held *private*';¹⁸⁵
4. 'the early cases rested not on notions of fairness and justice,¹⁸⁶ as the modern perspective understands those concepts, but on a particular conception of the proper scope of public and private authority.'¹⁸⁷

¹⁸² op cit @ 1927-1935. Also see Peterson op cit and Anderson op cit.

¹⁸³ op cit @ 1927.

¹⁸⁴ op cit @ 1929-30.

¹⁸⁵ op cit @ 1930.

¹⁸⁶ Peterson op cit @ 1342 points out that while the courts seek to attain "fairness and justice", the courts current takings tests do not directly address the issue.

¹⁸⁷ op cit @ 1932; see generally 1932-1934 where, *inter alia*, Lunney criticises the modern courts takings test on the basis that justice and fairness are not really the issue in takings jurisprudence, money is. It is interesting to note that Lunney @ 1932 is of the view that with the current/modern takings jurisprudence, it is impossible to predict an

5. 'The harm-benefit distinction as applied by the modern court ... is little more than word play.'¹⁸⁸ Any government action can be described as exacting a benefit or preventing a harm. Furthermore, modern US case law does 'not reveal any underlying basis for distinguishing government action that prevents a harm from government action that extracts a benefit. Lacking such an objective basis, the harm-benefit line in modern cases has become nothing more than a polling device to discover which verbal formulation a majority of the justices prefer.'¹⁸⁹
6. While the early cases saw the "legislature as a dangerous beast that needed to be confined" the modern courts view the legislature as "an agent working for the public benefit."¹⁹⁰ The court, under the modern approach, is no longer the protector of property rights, the legislature is. The sole purpose of the court is to guide the legislature, except where it deems necessary to intervene. But, while the courts have identified circumstances where intervention is warranted, the courts have applied these in a very *ad hoc*¹⁹¹ fashion.

3.3.3.4 To conclude : The South African Connection

"The constitutional requirement of compensation necessarily divides property into those rights that the government can control only if it pays just compensation and those that it control without compensation. Whichever set of labels we apply - community-individual, public-private, or takings-regulations - resolving the issue requires the drawing a line between the types of property. Both the early and modern court have faced this issue, but they have done so from opposite points of view. The early court viewed individual control as the general rule and community control the exception; as a result of *Nebbia*, the modern court has viewed community control as the general rule and individual control as the exception."¹⁹²

outcome. Peterson *op cit* @ 1362, on the other hand, is of the opinion that despite the inconsistencies in takings jurisprudence, the outcome is predictable.

¹⁸⁸ *op cit* @ 1933-4.

¹⁸⁹ *op cit* @ 1934-5.

¹⁹⁰ see generally Lunney *op cit* @ 1938-1945.

¹⁹¹ see Justice Brennan's remarks in *Penn Central op cit*.

¹⁹² *op cit* @ 1935.

Lunney¹⁹³ does not suggest a return to the "clothed with a public interest" test of the early cases which the modern courts appear to have discarded. However, it is submitted that Lunney's analysis could prove a conscientious framework within which our courts can work. It is for this reason that Lunney's analysis is of particular importance to the South African situation. Furthermore, it is submitted that, even if Lunney's analysis of US jurisprudence is incorrect, it provides a well-bred framework within which our courts can work,¹⁹⁴ especially since

- (a) our courts already recognise the distinction between private and public rights;¹⁹⁵
- (b) there is a general distrust of legislative process;
- (c) our courts have regarded rights in property (particularly ownership and its inherent rights) and individual control thereof as the general rule and community control as the exception. Although constantly being eroded, the truth of the matter is that the 'absoluteness' of ownership is still the dominant theory of land use in South African law;¹⁹⁶ and
- (d) with the increasing awareness of environmental conservation issues both here¹⁹⁷ and abroad¹⁹⁸ (see *Appendix 1*) it is submitted that private rights of ownership are

¹⁹³ op cit @ 1945.

¹⁹⁴ op cit (especially @ 152-3) also adopts the Lunney analysis and undertakes a practical application of this test, using the Magaliesberg Protected Natural Environment (as declared under the then s4 of the Physical Planning Act 88 of 1967; consistent with s16 and s44(2) of the Environmental Conservation Act 73 of 1989) as the basis of her case study.

¹⁹⁵ see Chapter 2.

¹⁹⁶ see Chapter 2.

¹⁹⁷ Apart from the plethora of publications on the market (such as Africa Environment & Wildlife, etc.); there are initiatives currently underway to get the Drakensburg, Table Mountain, St. Lucia, and the Kruger National Park declared as World Heritage Sites; furthermore the State recognises its responsibilities under International Law (eg: RAMSAR) and its signing of the Convention on Biological Diversity); not to mention the constitutional entrenchment of an environmental right; and, finally, our case law appears to moving in this direction as well infra.

¹⁹⁸ eg: 'Time International: State of the Planet' 30 October 1995 @ 68-83. Furthermore, with the coming into force of the Convention on Biological Diversity (with Mongolia becoming the thirteenth State to ratify) on the 29 December 1993, both our own and international governments have recognised the need to move away from the anthropocentrism displayed by past treaties towards a more environmentally orientated approach. This view is also

becoming increasingly "clothed with a public interest" and as such the regulation of such rights (particularly land use) are increasingly becoming public rights subject to state regulation without compensation.

Once this has been established the legislature's authority as to such regulation is still subject to further scrutiny. The regulation must still satisfy the means-ends test (as enrenched in the limitations clause¹⁹⁹). The court will then have to establish whether the landowner was singled out to bear the costs of environmental conservation and also to what degree of financial sacrifice should a landowner be called upon to make in the public interest.²⁰⁰ Was the enforcement of the restriction arbitrary? Does it demonstrate a sufficiently close relation between the means selected and the end desired?²⁰¹ Was it reasonable? If it is decided that the restriction is unreasonable or arbitrary, the court is now going to have to decide whether to declare such restriction *ultra vires* or whether to order that compensation be paid.²⁰²

It is to this, procedural and substantive reasonableness and the courts power of review that my attention now turns.

expressed in the decisions of the European Court on Human Rights *infra*.

¹⁹⁹ see de Ville *op cit* for a thorough analysis of the limitations clause as contained in s33 of the interim Constitution. It is submitted that this analysis will apply *mutatis mutandis* to s35 of the working draft.

²⁰⁰ Rabie *op cit* @ 97.

²⁰¹ Anderson *op cit* @ 547.

²⁰² *op cit*.

3.4 APPENDIX 1

Part 1:

SOUTH AFRICAN CASE LAW ON LAND-USE AND ENVIRONMENTAL CONSERVATION:

In 1971, MacDonald ACJ in King v Dykes²⁰³ stated that

"The idea which prevailed in the past that ownership of land conferred the right of the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations. Legislation dealing with such matters as town and country planning, the conservation of natural resources, and the prevention of pollution, and regulations designed to ensure that proper farming practices are followed, all bear eloquent testimony to the existence of this more civilised and enlightened attitude towards the rights conferred by the ownership of land.'

Similarly, Conradie J in Corium (Pty) Ltd & Others v Myburgh Park Langebaan (Pty) Ltd & Others (1993)²⁰⁴ interdicted a township development in the interests of nature conservation. Indeed, he recognised nature parks as being a 'national asset of immense value, perhaps the most valuable natural resource we have.'²⁰⁵ In coming to its decision, the court stated that it was 'called upon to consider not only the interests of the applicants, but those of the general public whose members may be affected.'²⁰⁶ Consequently, the public interest in conservation was an important cornerstone to the eventual outcome of the case.²⁰⁷ Conradie J²⁰⁸ observes:

"I cannot for the life of me understand how the second and fourth respondents could have come to the conclusion that the grant of permission to develop a township in an area as sensitive as this, an area which forms part of the national heritage and which might well one day be incorporated into the West Coast National Park, would be so uncontentious that no person could maintain that he was detrimentally affected thereby."

²⁰³ 1971 (3) SA 540 (RA) @ 545H.

²⁰⁴ 1993 (1) SA 853 (C).

²⁰⁵ @ 858 G-H.

²⁰⁶ @ 858 E-F.

²⁰⁷ see Loots and Lyster 'Environmental Law' 1993 Annual Survey of South African Law 340 @ 377-8. Also see Lyster op cit @ 138-40.

²⁰⁸ @ 859 B-C.

On the return date, Rose Innes J²⁰⁹ in Corium (Pty) Ltd & Other v Myburgh Park Langebaan (Pty) Ltd and Others (1995)²¹⁰ held that the Minister, the Administrator, the Town Clerk and the Municipality had acted *ultra vires* (by failing to apply the mind) in issuing a permit on the grounds that the permit to allow a cluster housing development in an area identified as a 'nature heritage' deserving national protection and proclaimed a protected natural environment (with a view to its being proclaimed a national park as expeditiously as possible) was repugnant to the objects, purposes and policies of the ECA. Rose Innes J states that

"the Administrator ... had to take into account the policies, purposes and the true intent of the [Environmental Conservation Act] which established the status of the ground with which it was proposed to interfere ... The express purpose of the Act is the preservation of ecological processes and natural systems and natural beauty, indigenous wildlife and biotic diversity. To allow the laying out of a residential township on ground with that status and which is being preserved for that purpose is to flout the provisions of the Act ... It is almost as if the Legislature had stated as part of the Act that residential townships shall not be built in protected natural environments. Nothing could be clearer. The Administrator was obliged, in granting [the] permit, to have that in mind. He did not take into account considerations which by law he was obliged to take into account in exercising his statutory discretion to issue the permits in question."

The court took into account the effects such development would have on the environment, including, the visual (or aesthetic) effect, the destruction of vegetation, and the destruction of marshlands (or wetlands). The court also took the public interest into account in the balancing process:

"Persons with interest in the land which may be affected are ... the owners of large pieces of land adjacent to or in the vicinity of the extended permit area. Other persons whose interests may be affected are all the owners and occupiers of property in the town of Langebaan who might, one would think, conceivably object to the desecration of a nature area adjoining their town."

The Cape Provincial Division in Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others (1995),²¹¹ dealing specifically with the constitution, held that government agencies were obliged to take into account the terms of the general policy

²⁰⁹ in whose judgement Foxcroft J concurred.

²¹⁰ 1995 (3) SA 51 (C).

²¹¹ 1995 (9) BCLR 1191 (C)

promulgated under s2(1) of the Environmental Conservation Act.²¹² Farlam J²¹³ chronicles

"[T]wo important things have happened which will impinge directly on rezoning applications: the first was the coming into operation of Act 73 of 1989 and the publication of the General Policy²¹⁴ determined in terms of section 2 thereof and the second was the enactment and coming into operation of the new Constitution ... That policy ... requires "all responsible government institutions ... to apply appropriate measures based on sound scientific knowledge to ensure the protection of designated ecologically sensitive and unique areas, for example ... wetlands ...". The wetlands in question have been designated for protection under an international convention [the RAMSAR Convention] to which South Africa is a party ... A decision to rezone the property on which ... [the] Respondents propose to erect a steel mill to allow the erection and operation thereof will undoubtedly affect Applicants rights to the trust property if the effect of the operation of the proposed steel mill will be to pollute or otherwise detrimentally affect the lagoon ..."

It is submitted that reference was not made to the environmental clause entrenched in s29 of Act 200 of 1993 primarily due to its limited scope. However, it is submitted that if the court had the use of s23 of the working draft which distinguishes between a *right* of individuals to live in an 'environment that is not harmful to their health or well-being'²¹⁵ and the *positive obligation* imposed on the State to take 'reasonable legislative and other measures designed to prevent ... ecological degradation; promote conservation; and secure sustainable development and use of natural resources' it would have readily made reference to it. Nonetheless these cases, at the very least, clearly demonstrate our courts willingness to take environmental issues into account in coming to their decisions - bearing in mind that both Corium and Van Huyssteen dealt with land use (particularly development) and environmental conservation.

²¹² 73 of 1989.

²¹³ @ 1212 B-G.

²¹⁴ Notice 51 of 1994 (which was published in Government Gazette 15428 of 21 January 1995). For a general discussion on this see Loots and Lyster op cit 1993 Annual Survey of South African Law 347-353. Parts of this policy are reproduced in Van Huyssteen @ 1205A-1206E.

²¹⁵ Terms that have received international recognition and have been litigated on.

Part 2:

**PUBLIC INTERNATIONAL LAW EXAMPLE:
THE EUROPEAN CONVENTION ON HUMAN RIGHTS.**

It is impossible, here, to outline in detail the stance taken by international tribunals with respect to environmental rights. However a few examples, of how the European Court has interpreted the Article 1 of the First Protocol to the European Convention on Human Rights, will show the courts change in attitude towards environmental protection and conservation.²¹⁶

The European Commission on Human Rights in X and Y v Federal Republic of Germany²¹⁷ was of the opinion that since the Convention contained 'no right to nature preservation ... among the rights and freedoms guaranteed' it was reluctant to pass a judgement favourable to the environment. As far as the Commission was concerned the European Convention does not protect conservation *per se*.²¹⁸

In the 1990 European Court decision in Powell and Rayner v United Kingdom, which involved the noise levels emitted from Heathrow Airport, the court, while acknowledging that its function was to strike 'a fair balance between the competing interests of the individual and the community as a whole,' decided that the country's economic well-being was more important than environmental well-being.²¹⁹ Again the court favoured economic interests over environmental interests.

²¹⁶ The following examples are taken from Sands *op cit* @ 220-29; Birnie and Boyle *op cit* Chapter 5; Shelton *op cit* @ 111-16; Peukert *op cit* @ 55-59.

²¹⁷ A case in which the German military was bombing adjacent wetlands for military purposes.

²¹⁸ Shelton *op cit* @ 115; Sands *op cit* @ 226-7. *Contra* the Inter-American Commission on Human Rights which has been more favourable to the protection of environmental rights; eg: the 1985 Yanomami Case where the Commission concluded that ecological degradation had caused violations to the right to life, health and food under the American Declaration of the Rights and Duties of Man.

²¹⁹ *Contra* the 1983 European Court decision in E.A. Arrondelle v United Kingdom where the Commission held that continuous and excessive noise created by the state may violate the rights protected in the European Convention. This led to a "friendly settlement". See Peukert *op cit* @ 56-7.

These decisions, as Sands points out, reflect a reluctance to allow 'environmental' concerns of a private person to take precedence over the broader economic concerns of the wider community, particularly where the government was able to point to its compliance with international standards.²²⁰

However, the tide is beginning to turn. The European Court, in a spate of decisions in 1991, has recognised the need to move away from the anthropocentrism displayed in previous decisions, towards a view that the environment not only serves humankind but that humankind is a part of a global biosphere, without it we would not exist.²²¹

In Fredin v Sweden, the European Court, for the first time, extensively discussed the importance of environmental protection and its impact on the human rights protection of the European Convention. Of importance to the South African context is that this case dealt with environmental and property rights, only the latter being protected by the Convention in Article 1 to the First Protocol. Shelton,²²² notes that

'the court reviewed the substantive elements which comprise the right to property, noting that the right contemplates situations in which an individual may be deprived of possession or use of property. The petitioner contended that he had been a victim of a *de facto* deprivation of property [when his permit to extract gravel had been revoked by the government]. The Court disagreed, finding that the revocation did not take away all meaningful use of the property in question, although it did have serious effects on the use and value of the land. The Court then turned to the issue of legitimate controls on the use of property, balancing the interests of the community with the individual's fundamental rights. According to the Court, "in today's society the protection of the environment is an increasingly important consideration," and, moreover, the state enjoys "a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."

Shelton²²³ notes further that according to Judge Vilhjalmsón

'implementation measures in the field of nature conservation take many forms and will often have to continue for years. By their very nature they may cause inconvenience to certain people since equal treatment of all persons in similar situations may not only be impractical but also impossible. It is for the Government ... and not the Court to say whether the aim

²²⁰ op cit @ 227-8.

²²¹ See Sands op cit @ 109-111; Daly and Cobb op cit @ 252-6.

²²² op cit @ 115-6; See also Sands op cit @ 226-229.

²²³ op cit @ 116 (fn 56).

of nature conservation should be realised by the closing of one or several gravel pits or if no such measures should be taken.'

It is for *the court* to consider when such measures go too far so as to constitute a taking.

Similarly in Pine Valley Development Ltd and Others v Ireland²²⁴ 'the European Court recognised that an interference with the right to peaceful enjoyment of property, which was in conformity with planning legislation and was 'designed to protect the environment,' was 'clearly a legitimate aim "in accordance with the general interest" for the purposes of' the second paragraph of Article 1 of the First Protocol to the European Convention on Human Rights. Moreover the interference, in the form of a decision by the Irish Supreme Court, which was intended to prevent a green belt, had to be regarded as 'a proper way - if not the only way - of achieving that aim' and could not be considered as a disproportionate measure giving rise to a violation of Article 1 of the First Protocol.'²²⁵

In conclusion, as can be seen, even in the absence of express environmental rights norms, the European Court appears willing to limit human rights in the name of environmental conservation. In particular, for the purposes of the current discussion, international tribunals are willing to limit property rights in the interests of environmental conservation. The courts have recognised the need to move away from the anthropocentrism displayed by previous decisions towards a more environmentally orientated approach.

²²⁴ Sands op cit @ 228.

²²⁵ Sands op cit @ 228. See also the 1991 decision of European Court on Human Right in Oerlemans v Netherlands.

PART 2:

THE COURTS REVIEW ABILITY

3.5 INTRODUCTION

‘If government cannot justify taking property then it should not take it.’¹

We have seen that the state is entrusted with the task of promoting by legislation and other measures the economic prosperity, safety, health and morals of its citizens. However such legislation must be ‘reasonable and justifiable (and, possibly, necessary) in an open and democratic society based on freedom and equality.’ Likewise, the environmental clause requires the state to protect the environment ‘through reasonable legislative and other measures designed to prevent ... ecological degradation; promote conservation; and secure sustainable development and use of natural resources.’ A recurrent theme throughout these provisions is the state’s obligation to act (whether it be through legislation or administrative action) in a reasonable and justifiable manner. The concepts of "fairness and justice" are focal. As Lunney² points out, the aim of the compensation requirement in the property clause is

"to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

We have established that the state is entitled to regulate property, but the state is not allowed to exercise its regulatory police powers unreasonably or arbitrarily, but subject to legal rules. Enter the courts powers of review. The courts are entrusted with the ability to keep state action in check and at bay. However, as Boule, Harris and Hoexter³ point out our courts have been loathed to look into issues of unreasonableness. Reasonableness or

¹ Murphy op cit @ 53.

² op cit @ 1892.

³ ‘Constitutional & Administrative Law’ (1989) @ 340.

unreasonableness is said to be hopelessly subjective and incurably substantive and as such does not belong in the realm of judicial review. The fear is that the judges interpretation is tainted with political and moral motivations.

A clear exposition of this approach from a property law perspective is the well cited Lochner⁴ period which dominated the first four decades of this century in the United States.

Baumann⁵ describes this period as follows:

"[In] the so-called Lochner era ... the US Supreme Court invalidated many, though not all, state and federal laws involving deprivation of property ..., for failing to meet the due process⁶ requirement under the Fifth and Fourteenth Amendments. These judgements had the effect of restraining 'progressive and redistributive social and economic legislation throughout the early twentieth century."

Chaskalson⁷ continues:

"The Lochner line of cases added substantive protection to the procedural protection obviously provided by [the 5th and 14th Amendments]. In effect these cases read into the requirement of due process of law the additional requirements that the aim of the law was reasonable and that there was a reasonable relationship between this aim and the means adopted in pursuit of it. The sole arbiter of reasonableness in this context was an *extremely conservative* Supreme Court. Thus this period saw a wide range of industrial and social welfare⁸ legislation declared unconstitutional."

In the light of this *Lochner-experience* it is of little wonder that legal theorists caution against the admittance of substantive reasonableness.⁹ It is against this backdrop that (the subjectiveness of) reasonableness is considered the most controversial aspect of administrative law:

⁴ named after the founding case Lochner v New York 198 US 45 (1905).

⁵ op cit @ 355.

⁶ Murphy op cit @ 14 describes due process as being 'akin to the idea that restrictions on property are expected to comply with substantive and procedural reasonableness.'

⁷ op cit @ 401.

⁸ it is submitted that environmental conservation laws fall into this category of social welfare.

⁹ Chaskalson op cit @ 134; Murphy op cit @ 121.

"... it exposes the tension between two conflicting judicial emotions: the fear of encroaching on the province of the executive arm of government by entering into the merits of administrative decisions, and the watchdog-like desire for adequate control over the decisions of public authorities".¹⁰

We have established *supra* that the state is entitled to regulate property rights in the interest of environmental conservation. But the courts are still going to have to answer the following questions: Has the landowner been singled out to bear the costs of environmental conservation ? What degree of financial sacrifice should a landowner be called upon to make in the public interest ?¹¹ Was the enforcement of the restriction arbitrary ? Does it demonstrate a sufficiently close relation between the means selected and the end desired ?¹² Was it reasonable ? These are essentially questions of substantive reasonableness, leaving it up to the court to decide the issue. The answers to these questions are important for they will inevitably assist the court in coming to its decision on whether compensation is payable for a certain administrative action and/or whether the infringing legislation should be declared unconstitutional.

3.6 DEFINING JUDICIAL REVIEW:

Judicial review

"is a process concerned with identifying illegalities committed by the administration. Its purpose is to ensure that the requirements of legality are met and to provide complainants with remedies when legality is breached."¹³

Legality comprises of essentially four basic requirements: authority and regularity (procedural aspects), on the one hand, and fairness and reasonableness¹⁴ (substantive aspects) on the

¹⁰ Boulle et al op cit @ 340

¹¹ Rabie op cit @ 97.

¹² Anderson op cit @ 547.

¹³ Boulle et al op cit @ 241.

¹⁴ or proportionality.

other. For sake of brevity, Boule, Harris and Hoexter¹⁵ define these as follows:

"The requirement of *authority* entails that every action must be duly authorised by Parliament ... *Regularity* means that formalities and statutory prescriptions must be complied with ... *Fairness and reasonableness* mean that administrative action must comply with minimum standards, that is they must be fair and reasonable as these terms have come to be defined in administrative-law doctrine. (For example) if a decision is so outrageous in its defiance of logic or of basic moral standards that no sensible person who applied his mind could have arrived at it, then the courts will be likely to interfere and exercise a substantive review jurisdiction."

3.7 THE PROBLEM DEFINED:

The question now is, how far are our courts willing to take reasonableness as a requirement of judicial review ? Is it to be limited to procedural reasonableness, or will it include substantive reasonableness ? Constitutional Courts and Supreme courts in various international tribunals and foreign municipal jurisdictions have applied different review standards when dealing with regulatory deprivations and expropriatory deprivations. This is of particular importance to environmental conservation schemes:

- (a) Parliament, when embarking on such regulatory schemes, can only do so in accordance with validly enacted legislation. If the court merely requires legislative authority and regularity then this will have the effect of promoting social legislation (such as environmental control measures or schemes) since all that would be required is validly enacted legislation. But, if the courts decide to scrutinise such legislation on the grounds of both procedural and substantive reasonableness, this may well have the same effect as that experienced in the *Lochner era* in the US, which saw socio-economic reform legislation being struck down as being unconstitutional (or *ultra vires* the Constitution). A similar effect was achieved in India after the Supreme Court decision in Kochunnui v State of Madras.¹⁶

¹⁵ op cit @ 99. See generally the discussion @ 98-100.

¹⁶ See Murphy op cit @ 51.

- (b) The extent to which the courts are prepared to extend their review powers is also important from a human rights point of view. If all that is required is legislative authority and regularity, then the courts, by necessary implication, choose to give Parliament a relatively wide scope of legislative authority in relation to economic regulation to embark on such schemes as environmental protection as they deem fit. But this would be at the expense of property, a fundamental human right, since there are no real checks on government action. The result would effectively be to render the concept of ownership or property nugatory and rights in property merely being of symbolic value. On the other hand, while procedural and substantive reasonableness may well uphold property rights, thereby recognising property as being more than merely symbolic, such an interpretation will have the effect of rendering social reform legislation obsolete. The courts are therefore going to have to establish a balance between mere procedural review on the one hand and substantive review on the other.

The issue of review and whether or not the courts are entitled to look into the substantive reasonableness will be considered from two perspectives:

- (i) legislative reasonableness: can the courts inquire into the substantive merits of enactments ?
- (ii) administrative reasonableness: can the courts inquire into the substantive merits of administrative action ?

3.7.1 Legislative Reasonableness:

3.7.1.1 International and Municipal Jurisprudence:

The Privy Council in Selangor Pilot Association construed the text of the Malaysian property clause *verbatim* and were not prepared to go beyond the actual textual boundaries. Accordingly a deprivation of property is competent if 'that deprivation was in accordance

with a law which was within the competence of the legislature to pass'.¹⁷ This restricts review to the narrowest of grounds, thereby leaving 'a limited sphere of legislative sovereignty in relation to economic regulation'.¹⁸ The state is thereby given essentially free reign to embark on environmental control and natural resource schemes without attracting compensation, so long as such regulatory deprivation is exercised in accordance with a law which was within the competence of the legislature to pass.

The Indian Supreme Court in the 1960 decision of Kochunni subjected police power "deprivations" to the requirement of reasonableness (as per State of Madras v VG Row¹⁹). Some 10 years later, the court in the Bank Nationalisation Case²⁰ then extended the requirement of reasonableness to "takings or acquisition" (ie: in exercising its powers of eminent domain the State had to act reasonably when enacting expropriatory legislation). Thus *both* eminent domain and police powers²¹ were subject to the test of procedural and substantive reasonableness.²² This naturally increased the courts review powers, the result being that 'a law possessed of public purpose could still be substantively unreasonable, moreover, expropriated owners could insist on procedural due process.'²³

Although the court had lost its power to insist on compensation with the passage of the 4th amendment, it had found a way to gain the power to strike down legislation on such vague

¹⁷ a 348A.

¹⁸ Murphy op cit @ 120.

¹⁹ see infra.

²⁰ as cited in Murphy op cit @ 372.

²¹ until limited to police powers by the 25th Amendment.

²² Murphy op cit @ 48. As mentioned this reasonableness test was set down by the Indian Supreme court in State of Madras v VG Row [1952] SCR 587. Murphy op cit @ 52 and op cit 372 sets this out as follows:

'Firstly, no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. Relevant considerations include the nature of the right alleged to have been infringed; the underlying purpose of the restrictions imposed; the extent and urgency of the evil sought to be remedied by the restriction; the disproportion of the imposition; and the prevailing conditions at the time. In sum, the Indian Supreme Court had assumed enormous powers to deal with legislation touching property rights.'

²³ Murphy op cit @ 372.

criteria as reasonableness. Thus legislation which authorised the 'taking' and thereby prevented compensation, could now be struck down as being unconstitutional on the grounds that such legislation was unreasonable. Hence, just about any legislation aimed at social reform programmes (including measures aimed at environmental conservation) could be struck down. Not surprisingly, as a result of this, the 25th amendment was passed to, *inter alia*, prevent Article 19 from being used to prevent eminent domain takings. The aim was to reverse the Bank Nationalisation case, which it succeeded in doing. The court in Kesavananda v State of Kerala²⁴ upheld the amendment, with the result that reasonableness was no longer a requirement for eminent domain takings. But, reasonableness remained a prerequisite for police power takings.

In American constitutional jurisprudence, both eminent domain and police powers are subject to the due process requirement.²⁵ The American courts have been very active in regard to their due process clause, shifting interchangeably from procedural to substantive reasonableness.²⁶ As has been pointed out *supra*, the *Lochner* line of cases added substantive due process to procedural due process, requiring not only proportionality, but that there be a sufficiently close nexus between the means adopted and the purpose sought to be remedied. This 'means-ends' requirement coupled with a conservative judiciary, who are the sole arbiters of proportionality, could only result in property rights being enshrined in a cloud of almost impenetrable absoluteness: if industrial and social welfare legislation were continually being struck down, what chance would environmental control and natural resource management schemes have ?!

The European Court of Human Rights in interpreting the phrase 'prescribed by law' in the European Convention on the Protection of Human Rights and Fundamental Freedoms have adopted a substantive due process approach. The court has required that the relevant

²⁴ 1973 Supp SCR 1.

²⁵ see van der Walt *op cit* @ 196 and Murphy *op cit* @ 53.

²⁶ see Chaskalson *op cit* @ 401-3 where he points out that the courts appear not to have conclusively made up their minds, shifting from procedural to substantive due process (*Lochner v New York* 198 US 45 (1905)), then back to procedural (*West Coast Hotel Co v Parrish* 300 US 379 (1937)) and recently there appears to be a retreat back to a 'soft' substantive due process (*Pruneyard Shopping Centre v Robins* 447 US 74 (1980) and *Nollan v California Coastal Commission* 483 US 825 (1987)).

legislation must be both ‘adequately accessible and sufficiently precise,’²⁷ and that there must be a reasonable relationship between the means employed by the state and the purpose for which these means are employed.’²⁸

Accordingly, any regulation, deprivation or restriction on the use and enjoyment of property under Indian and US constitutional law and under European Court decisions is²⁹ a deprivation of property and will only be permitted by the courts if it is reasonable or justifiable in the public interest. Reasonability under Article 19(5) of the Indian Constitution and due process under the 5th Amendment of the U.S Constitution depends on all the relevant factors ‘including the quantum of the deprivation, the public benefit achieved, the attending circumstances, the existence of alternative methods of achieving the same public benefit.’³⁰ The state under the US and Indian approach is always subject to some form of scrutiny. The free reign which the Privy Council has given to the Malaysian state to embark on environmental control and natural resource schemes without attracting compensation does not exist in the US and India.

3.7.1.2 South Africa

Our working draft provides that ‘no one may be deprived of property except in accordance with a law of general application;’³¹ ‘no one may be arbitrarily deprived of property;’³² and ‘property may be expropriated only in terms of/in accordance with a law of general application.’³³ Furthermore, any legislation enacted which encroaches on property rights,

²⁷ Lithgow v United Kingdom (1986) 8 EHHR 329, § 110.

²⁸ James v United Kingdom (1986) 8 EHHR 123, § 50; Sporrong and Lönnroth v Sweden (1983) 5 EEHR 35, § 73 as per Chaskalson op cit @ 134; also Murphy op cit @ 121.

²⁹ ‘was’ in the Indian sense. In 1978 the property clause was repealed by 44th Amendment.

³⁰ Tripathi cited in Murphy op cit @ 14.

³¹ s24(1) of option 2; similar to s28 of the interim Constitution.

³² s24(2) of option 3.

³³ s24(2) and (3) of options 2 and 3 respectively.

as protected in the constitution may only do so if it is reasonable and justifiable in an open and democratic society based on freedom and equality.³⁴

The question that now arises is: does our property clause in the Working Draft lend itself to a possible 'due process' interpretation (which, as has been pointed out, is akin to procedural and substantive reasonableness) ?

South African commentators on this point seem to differ:-

- (1) Du Plessis and Corder³⁵ expressly say that the restrictions or deprivations clause in s28(2) of the interim Constitution³⁶ is a 'due process' clause;
- (2) Van der Walt³⁷ and Murphy³⁸ have pointed out that s28(2) may indeed be interpreted to include a due process clause but only if read in the light of the limitations clause.³⁹ Kroeze⁴⁰ seems to agree; and
- (3) Chaskalson,⁴¹ on the other hand, holds that s28(2) does not incorporate the United States doctrine of 'due process' and it should not be open to the court to raise the authority of s28(2) to embark on a substantive inquiry into the merits or demerits of any law'. The reason for this is most probably the fear of succumbing to *Lochnerism*.

It is submitted that option 3 of the working draft constitution, lends itself more readily to a due process interpretation. The term 'arbitrarily' goes a little further than the 'in accordance with law of general application' requirement. Words that are synonymous with 'arbitrary'

³⁴ s33 of the Interim Constitution and s35 of the Working Draft.

³⁵ 'Understanding South Africa's Transitional Bill of Rights' (1994) @ 183.

³⁶ which is similar to that contained in option 2 of the working draft.

³⁷ op cit @ 9; and further op cit @ 498.

³⁸ op cit @ 122-4.

³⁹ du Plessis and Corder op cit @ 183 expressly refer to s28(2) as a "'due process' clause".

⁴⁰ op cit @ 328.

⁴¹ op cit @ 134.

include impulsive, personal, subjective, capricious, inconsistent, whimsical, despotic, imperious and tyrannical. From the property clause perspective this points to one thing: the prevention of arbitrary action. It is a limitation on a deprivation, that such deprivation shall not be arbitrary in nature. Unlike option 2, the prevention against arbitrariness does not have to be read into the equation, the use of the term "arbitrary" gives special or specific meaning to the word "deprived". It is a pointer to the courts to embark on a due process inquiry into the state action. Arbitrariness of state action as a ground of review (under the umbrella term of 'reasonableness') is not unknown in South African Constitutional law.⁴²

But there is an important distinction to be made between the Malaysian, Indian and US experiences and the South African experience: South Africa has both (a) an internal limitations⁴³ clause within the property clause itself and (b) a general limitations clause; the other three jurisdictions merely have internal limitations clauses (ie: they do not have general limitations clauses). The result is that these other courts, particularly India, have had to engage in some form of judicial activism, in order to establish their respective powers of review. In the South African situation, as in Germany and Canada:

"Where the bill of rights provides for limitations on rights by way of a general circumscription clause, judicial review tends to proceed in a clearer fashion. The process is marked by an assessment of the reasonableness of policy and is less burdened by the obfuscating [complicated] games of linguistic analysis."⁴⁴

It is accordingly submitted that, whether or not the property clauses are interpreted in a way so as to import due process or the principle of legality⁴⁵ into the property clause,⁴⁶ depends on the courts interpretation of the limitations clause. In other words, whether or not the

⁴² Boulle *et al op cit* @ 350; and Baxter *op cit* @ 521-2.

⁴³ the internal limitations (ie: legislative authority and public interest) in option 2/3, is to be found in the terminology 'in accordance with a law of general application' and 'arbitrary' with respect to the restrictions clauses; whilst legislative authority; public purpose/interest and compensation is to be found in the use of the words in the expropriations clauses.

⁴⁴ Murphy *op cit* @ 54.

⁴⁵ see Baxter 'Administrative Law: Legal Regulation of Administrative Action in South Africa' @ 301.

⁴⁶ it has been submitted that usage of the term 'arbitrary' is more readily able to allow such an interpretation.

courts will be allowed to look into the substantive merits/demerits of a validly enacted piece of legislation or whether they will be limited to testing procedural reasonableness will all depend on the constitutional courts interpretation of s33.

However, before embarking on a discussion of s33, the author finds it rather curious why Murphy⁴⁷ wishes to establish a link between the property clause and the limitations clause. With due respect to the learned author, surely that link exists by the mere presence of the limitations clause itself:

"[Constitutionally entrenched rights must] at times give way when they are in conflict with rights granted for the protection, safety and general welfare of the public ... Restrictions on (individual) rights are permissible if reasonable and designed to accomplish a purpose properly within the purview of the police power." ⁴⁸

Murphy appears to embark on a similar approach to the Indian experience in trying to establish whether a "limitation," as required by the limitations clause, is quantitatively the same as a "deprivation" in the restrictions clause. If there is a measurable difference between the two clauses then they are mutually exclusive, requiring "deprivations" being limited to a more restricted standard of review (depending on which approach to judicial review the court adopts; eg: Indian, US or Malaysian). If, on the other hand, a "deprivation" and a "limitation" are composite then, by necessary implication, a deprivation must also be reasonable and justified in an open and democratic society.

It is submitted that the internal limitations, that exist in the property clause, are merely additional requirements to be met over and above those of the general limitations clause. Any legislative action which limits or authorises a limit of a fundamental right (in this case property) in terms of a validly enacted law, would also have to be tested against the requirements of the general limitations clause - considering that it is the limitation that has to be reasonable and justifiable in an open and democratic society based on freedom and equality. It is further submitted that, if I am incorrect in this conclusion, the two clauses are composite, given the fact that s24(1) of option 2 makes reference to a 'law of general

⁴⁷ op cit @ 122-3.

⁴⁸ Corpus Juris Secundum col 16A paragraph 451 (@ 465-6) as quoted by Tebbut J in Park-Ross @ 2141, in respect of the US constitution.

application' as does s35(1).⁴⁹

Limitation clauses give expression to the simple truth that fundamental rights and freedoms are not absolute, but need to be restricted, in certain instances, to safeguard other important societal interests.⁵⁰ It provides that state action may be tested against the principles enunciated in the clause, failing which it may be declared null and void by the courts.⁵¹

Chaskalson P in the Constitutional Court decision of S v Makwanyane and Another⁵² interpreted the limitations clause as follows:

"The limitation of Constitutional Rights for a purpose that is reasonable and necessary in a democratic society, involves the weighing up of competing values,⁵³ and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard that can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of such a purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the courts is not to second-guess the wisdom of policy choices made by the legislators.'"

49 With respect to the term 'arbitrary' in s24(2) of option 3, it is submitted that, read in the light of the rest of s24, it is most certainly possible to deem this as requiring a law of 'general application.'

50 see Rudolph v Commissioner for Inland Revenue 1994 (3) SA 771 (W) @ 774D. According to Tebbutt J in Park-Ross @ , fundamental rights had to yield when in conflict with powers properly granted for the protection, safety and general welfare of the public. This is in accordance with the American approach (Laitos op cit @ 904) and the Indian approach (see Das J as cited in Murphy op cit @ 366) with regards to the exercise of police power.

51 Matiso case 1994 (3) BCLR 80 (SE) see interpretation.

52 1995 (6) BCLR 665 (CC) @ 708.

53 for the present discussion, the right of the individual to use and enjoy his property and society's right to environmental protection through conservation measures.

This decision was based on an interpretation of the Canadian decision of R v Oakes.⁵⁴ For sake of brevity,⁵⁵ the Canadian Supreme Court in Re Reference re Public Service Employee Relations Act,⁵⁶ restated the Oakes test. To establish that a limit is reasonable and demonstrably justifiable in a free and democratic society, two central criteria (the means-ends test⁵⁷) must be satisfied:

"First the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant overriding a constitutionally guaranteed right: it must be related to 'concerns which are pressing and substantial in a free and democratic society'. Second, the means chosen to advance such an objective must be reasonably and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: (a) there must be a rational connection between the measures and the objectivity they are to serve; (b) the measures should impair as little as possible the rights or freedom in question; and (c) the deleterious [damaging or injurious] effects of the measure must be justifiable in light of the objective which they are to serve."

Consequently four criteria have to be satisfied before a limitation will be deemed reasonable and justifiable:⁵⁸

1. *Sufficiently important objective*: The law must pursue an objective that is sufficiently important to justify limiting a charter right.
2. *Rational connection*: The law must be rationally connected to the objective.
3. *Least drastic means*: The law must impair the right no more than is necessary to accomplish the objective.
4. *Proportionate effect*: The law must not have a disproportionately severe effect on persons to whom it applies" [my emphasis].

This in turn involves an analysis of three separate factors:

- (a) the measure adopted must be carefully designed to achieve the objective in question;
- (b) they should impair as little as possible the constitutional rights or freedom sought to be curtailed by the measure;
- (c) there must be a proportionality between the effect of the measures and the objective sought to be achieved by the curtailment.⁵⁹

We now turn to the question of whether this permits an inquiry into the substantive merits of the law. There is no doubt that reasonableness is a precondition for a valid exercise of

⁵⁴ (1986) 26 DLR (4th) 200 ((1986) 1 SCR 103; 24 CCC (3d) 321).

⁵⁵ the full test is set out by Tebbutt J in Park-Ross @ 215B-H.

⁵⁶ (1987) 1 SCR 314 @ 373-4. As quoted by Tebbutt J in Park-Ross @ 215 H-J

⁵⁷ see chpt.3 Part 1 supra.

⁵⁸ as per Hogg, quoted with approval by Tebbutt J @ 216.

⁵⁹ see Tebbutt @ 216C-E.

the police power from the point of view of the limitations clause. Naturally, this is important from an environmental point of view, if substantive reasonableness is deemed a precondition for validity under the deprivations clause, this may have the effect of inhibiting social reform measure, as expounded by *Lochnerism* in the US. Chaskalson,⁶⁰ on the other hand,⁶¹ hopes to limit the inquiry to procedural reasonableness.⁶²

In the past South African courts have been loathed to declare Acts of Parliament invalid on any grounds except non-compliance with the constitutional formalities laid down for their enactment.⁶³ Yet our courts have held that non-Parliamentary or subordinate legislation is treated differently.⁶⁴ The inclusion of a limitations clause appears to go some way in alleviating this problem. The Canadian courts in assessing legislative objectives, as required by the test set down in *R v Oakes* (and formally adopted into our constitutional law), have adopted a view contrary to Chaskalson's proposal. The objective sought to be attained by the limitation must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' and that, at a minimum, requires the 'objective relate to concerns which are pressing and substantial'.⁶⁵ Such an inquiry clearly permits an inquiry into the substantive merits of a law. Likewise, de Ville⁶⁶ points out that the German, Canadian and the European Court of Human Rights have required that any law limiting, or authorising a limitation on a constitutionally entrenched right in addition to fulfilling the requirements of accessibility and foreseeability, there must be a reasonably close nexus between the means adopted and the end sought to be achieved, before such a law will qualify as a law for purposes of the constitution.

⁶⁰ op cit @ 134.

⁶¹ although dealing specifically with the deprivations clause.

⁶² if our courts are to follow the European Court of Human Rights, which requires accessibility, foreseeability and a reasonable relationship between the means and objective, he hopes that our courts will limit the inquiry to merely the last mentioned requirement, that merely the relationship between the means and objective is reasonable.

⁶³ the approach adopted by the Privy Council.

⁶⁴ Boule et al op cit @ 350-1.

⁶⁵ *R v Big M Drug Mart*; *R v Oakes op cit*; *In Re Reference re Public Service Employee Relations Act op cit*; *R v Edward Books & Art Ltd* 35 DLR (4th) 41.

⁶⁶ op cit @ 292. Also see Chaskalson op cit @ 134.

de Ville,⁶⁷ after a through analysis of the limitations clause and how they have been interpreted in Canada, Germany and the European Court of Human rights, concludes by pointing out that the following facts will *inter alia* have to be addressed before a court will decide whether a limitation will be justified:

- (a) The purpose of the impugned law, that is, why the measure was undertaken and what it was intended to achieve.
- (b) Whether the law will, in fact, achieve its objective. This will enjoin an inquiry into the practical effect of the measure.
- (c) What other means are open to the government to attain its chosen objective ?
- (d) Whether these alternative measures would be as effective , more effective or less effective in obtaining their government objective than is the measure under attack.
- (e) Whether the alternative measures would place a greater or lesser burden on constitutional rights than the measure under attack.
- (f) What the disadvantages to the individual are and whether the effect of the measure on the individual is not out of proportion to the purported aim thereof.'

These incorporates substantive inquiries into the merits of a particular piece of legislation.

It is submitted that if the courts take this substantive requirement to its logical conclusion this will have the effect of thwarting social reform legislation. As has already pointed out, after much judicial activism, the Indian Supreme Court eventually gained the power to strike down legislation on such vague criteria as reasonableness. Baumann⁶⁸ points out that *Lochner*, in introducing a substantive requirement into the inherent procedural requirement, lead 'the US Supreme Court to invalidate many, though not all, State and Federal laws involving deprivation of property ... for failing to meet the due process requirement under the Fifth and Fourteenth Amendments. These judgements had the effect of retraining 'progressive and redistributive social and economic legislation throughout the early twentieth century,' which, if followed by South African courts, will inevitably lead to the striking down of environmental conservation measures in the name of private property.

However every coin has two sides. Murphy, correctly, points out that whilst

'there is considerable virtue and short term advantage in Chaskalson's interpretation when examined from the perspective of wanting to secure legitimate social objectives from conservative judicial

⁶⁷ op cit @ 311.

⁶⁸ op cit @ 355; as does Chaskalson op cit @ 403-4.

assessments⁶⁹ ... will it always be advantageous to exclude the courts from pronouncing on the objectives of laws depriving people of their wealth [or, for that matter, rights of ownership] ?'⁷⁰

A further repercussion is inevitable and hits to the heart of the human rights doctrine. Talking from extremes, if the court adopts a similar approach to Indian jurisprudence at the time of the Bank Nationalisation Case, and subjects both police power regulations and exercises of eminent domain (expropriations) to procedural and substantive reasonableness, this will elevate property right to a level not intended by the Constitutional Assembly. On the other hand, if the courts adopt an approach parallel to that adopted by the Privy council, this may well relegate property right to the realm of insignificance:

"The linguistically truncated provision in the Malaysian Constitution has meant that review has been restricted to ensuring fair compensation for eminent domain. Other legislation restrictive of property rights [amounting to the exercise of the police power] has had only to comply with the formalistic requirement that the act of interference be cloaked with legislative authority. The protection for the property holder, if anything, is symbolic."⁷¹

Consequently in answer to the question, 'does the general limitations clause permit an enquiry into the substantive merits or demerits of the enactment,' the answer is yes, the possibility does exist. Consequently the courts, when applying the limitations clause to property rights generally or to the institution of ownership *per se*, would do well to 'to observe a measure of deference and restraint' when applying the limitations to property rights and trying to reconcile them with environment rights.⁷²

We would do well to heed Marais J's caution, expressed in Nortje,⁷³ with regards to the limitations test:

"What needs to be emphasised ... is that the criteria which have to be taken into account require value judgements to be made, and priorities to be determined *ad hoc*, whenever a problem is presented for a court's consideration. Once having determined what the reach of the conferred and entrenched right was intended to be (*essentially a question of interpretation*),

69 obviously Chaskalson fears an possible adoption of Lochnerism or the approach eventually adopted by the Indian Supreme Court, which struck down a lot of industrial and social reform legislation.

70 op cit @ 121.

71 Murphy op cit @ 541

72 see Murphy op cit @ 123-4.

73 op cit @ 248J-249G

one has to consider whether a limitation of that right is "reasonable", whether it is "justified in an open and democratic society based on freedom and equality", sometimes whether it is "necessary", and always whether it "negates" the "essential content" of the entrenched right.

Those are *questions of judgement* rather than questions of interpretation. While the criteria themselves may not be malleable or elastic, *they are eminently capable of accommodating shifts in societal attitudes over the years*. That is ... both their weakness and their strength. Their *strength*, because none but those who are ignorant of the enormous shifts in societal attitudes to all manner of things.⁷⁴ A change in attitude towards ownership is required. Ownership has a social function to perform as well as an individual function to perform. The property clause realises this by requiring the court to balance the public interest and the interests of those effected], which have occurred over relatively short periods of time, would deny that such shifts do occur, and a constitution that seeks to strait-jacket society in its efforts to move with the times will excite, in the end, public dissatisfaction.⁷⁵ Their *weakness*, because they provide some scope for those who may be so inclined, to tinker too frequently with the law in response to short term societal concerns which are likely to prove to be transient and ephemeral, and may even be the superficial product of something resembling public hysteria. When all is said and done, *what more can reasonably be expected from a Court* than that it approach these questions with an honest mind, as open to reasoned argument as human frailty allows, that it consciously suppresses any *a priori* bias or prejudice which it may have, that it acquaint itself with such learning as is truly relevant, that it examine the pros and cons of the competing contentions dispassionately and critically, that it remind itself that the power of decision which society has entrusted to it, is not to be used for the advancement of its own personal agenda, or for the foisting upon the public of its own possibly idiosyncratic credo, that it does not neglect to identify and consider the wider implications for society of any decision which it might take, *and* that it remain alive to the importance of the judicious balancing of conflicting societal interests and concerns in an intellectually and ethically and principled way, which is seen to be mindful of the view points of those concerned, and not capricious or self-indulgent. I regard it as unwise to settle too dogmatically now upon any one methodology at this very early and embryonic stage of applying our newly devised Constitution to concrete situations. Indeed, it is questionable whether it would be wise to do so at any stage" [*my emphasis*].

This statement is all too true particularly to the inherent conflict between property and the environment. The court has a lot of factors to consider. Environmental rights, particularly those pertaining to conservation, are going to conflict with a lot of fundamental necessities which are protected by the constitution - eg: environmental rights and the right to housing and land.⁷⁶ The courts cannot settle these issues by merely applying a test. As Marais J *supra* points, out something more is required of the courts, and, in the environmental field, guidance must be sought in the interpretations and limitations clauses:

⁷⁴ this is particularly obvious in environmental issues.

⁷⁵ as was the case in India.

⁷⁶ s25; in this regard see O'Regan 'Informal Housing, crisis management and the environment' (1993) 8 SAPL/PR 192; van der Walt op cit (1992) SAPR/PL 201.

"[G]overnment limitations upon private ownership in the course of promoting social or public interests, like ... land use legislation, will be justified if they are proportional. Proportionality is conducive to good government. The virtue of the principle of proportionality is that it aims at achieving the highest degree of consensus by advancing the public interest in the best possible way. Accordingly, property rights can be construed as advancing the cause of social justice in that they are the medium for striking a fair balance between collective and personal welfare." ⁷⁷

3.7.2 Administrative Reasonableness:

Does the administrative justice clause permit an enquiry into the substantive merits or demerits of an administrative decision? The answer to this question is important from an environmental point of view since most environmental decisions taken, are taken by administrative bodies.⁷⁸

Corbett CJ's in Administrator, Transvaal v Traub,⁷⁹ started the ball rolling, extending the *audi alteram partem* maxim⁸⁰ to apply 'in all cases where a statute empowers a public official to do an act or give a decision prejudicially affecting an individual in his liberty, property or existing rights,⁸¹ or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary'.⁸² This was subsequently followed and elaborated on in Administrator, Transvaal & others v Zenzile & others⁸³ and South African Roads Board v Johannesburg City

⁷⁷ Murphy op cit @ 57.

⁷⁸ But as has been pointed out time and time again, from an environmental perspective this has been plagued by administrative inaction.

⁷⁹ 1989 (4) SA 731 (A)

⁸⁰ 'to hear the other side'; ie: the right to a fair hearing.

⁸¹ see Corbett CJ @ 761E.

⁸² Purshotam 'The Expropriatee's Right to a Hearing Before the Decision is Made to Expropriate' (1994) 111:2 SALJ 237 @ 238.

⁸³ 1991 (1) SA 21 (A)

Council.⁸⁴ It appears to be settled law that any person effected by an expropriation, since it is the exercise of a public power (the exercise of eminent domain), has to be afforded a hearing before any decision is made. This is in accordance with both the Interim constitution⁸⁵ and the working draft.⁸⁶ Indeed Spoelstra J in Podlas v Cohen and Others⁸⁷ when dealing with s24(b) of the interim constitution held that⁸⁸ the *audi alteram partem* principle applies when a statute empowers a public official to make a decision prejudicially affecting an individual in his liberty, property or existing rights.⁸⁹

Farlam J in Van Huyssteen,⁹⁰ dealing specifically with land use and environmental issues, held that

"That there is a link between section 24(b) of the Constitution and the duties of a functionary deciding a rezoning application under the Ordinance is indisputable, because section 24(b) of the Constitution applies to all administrative action whereby any person's rights or legitimate expectations are affected or threatened ... [T]he applicants have the right to procedural fairness in respect of the rezoning decision⁹¹ ... [and] a party entitled to procedural fairness under [s24(b) of the Interim Constitution] is entitled in appropriate cases to more than just the application of the *audi alteram partem* and the *nemo iudex in sua causa*⁹² rules. What he is entitled to is, in my view, ... described as "the principles and procedures ... which, in (the) particular situation or set of circumstances, are right and just and fair."⁹³

84 1991 (4) SA 1 (A). See generally Purshotam op cit @ 237-9; for a more detailed discussion see Hoexter '1991 Supplement to Baxter's Administrative Law Part III: Administrative Law in the Courts' @ 74-78.

85 s24(b).

86 s32(1) of option 1 and s32(2) of option 2.

87 1994 (3) BCLR 137 (T) @

88 although it did not apply in this case.

89 Pickering J in Transkei Public Servants Association v Government of the Republic of South Africa and Others 1995 (9) BCLR 1235 (Tk) set down certain factors to be taken into consideration when deciding whether a public body is required to comply with the *audi alteram partem* principle when conducting a preliminary investigation, including the proximity between the investigation and the final decision, the construction of the statute, the importance of the subject matter for the individual and the need for administrative efficiency.

90 see generally 1211H-1214H.

91 @ 1212 F-H.

92 'no one shall be judge in his own cause;' ie: the rule against bias; see generally Boulle et al op cit @ 322-326; Baxter op cit @ 557-568.

93 @ 1214 B.

In addition to the compliance with the *audi alteram partem* requirement, the Interim Constitution⁹⁴ and the Working Draft⁹⁵ bestow the right on the individual to be furnished with written reasons for administrative action. Hancke J in Moletsane v Premier of the Free State and Another⁹⁶ concluded that it is the gravity or seriousness of the administrative action that determines the degree of peculiarity required in the reasons furnished: 'the more drastic the action taken, the more detailed the reasons which are advanced should be.'⁹⁷

In addition to this the courts, by way of the judgement handed down by Frieman JP in Standard Bank of Bophuthatswana Ltd v Reynolds NO & Others,⁹⁸ are entitled to set aside an action undertaken by a statutory body on the grounds of failing to comply with the requirement of "reasonableness." The common law rule that unreasonableness *per se* is not a ground for judicial review, and that the unreasonableness must be "gross"⁹⁹ is inconsistent with the increased powers granted to courts by the Constitution to invalidate action as repugnant to the Constitution. The new constitutional dispensation requires that the less stringent test of "unreasonableness" rather than "gross unreasonableness" be adopted. The result is that the courts, where previously loathed to consider the subjective ground of unreasonableness,¹⁰⁰ will now be able to inquire into the substantive merits or demerits of administrative action. Friedman JP¹⁰¹ points out that recent judicial decisions reveal that the courts are prepared and willing to *analyze, examine and probe* the factual basis upon which powers, where a discretion is given, have been applied and executed.

94 s24(c) and (d).

95 s32(2) of option 1 and s32(3) of option 2.

96 1995 (9) BCLR 1285 (O) @ 12888

97 expropriation is a drastic action since it infringes the owners right to property (a constitutionally entrenched right) and ownership (which at common-law is deemed to be absolute).

98 see particularly @ 319G-326C where Friedman JP sets out the general principles applicable to review.

99 of a disturbing degree so as to suggest arbitrariness or the like; see Boule et al op cit generally @ 341-50; and Baxter op cit @ .

100 Boule et al op cit @ 340.

101 @ 324G.

CHAPTER 6

CONCLUSION

"From a legal point of view, an area set aside for conservation is an area where specific land-use restrictions have been established to preserve certain or all natural features present in the land or waters concerned. These restrictions will generally be stricter than those which may be applied in other parts of the national territory ...

Three basic factors have to be taken into consideration when setting aside areas for conservation: [1] the ownership of the land, whether public, private or sometimes common [and customary land]; [2] the persons affected by the land-use restrictions, such as the landowner or occupier, the public in general and Government agencies; and [3] the constitutional or other [common law or customary] rights of the person affected which may be curtailed by the conservation measures.

The interplay of these three factors is at the very basis of all legislation relating to conservation areas."¹

Property law plays a dynamic role in a society which guarantees individual property rights. These laws protect, *inter alia*, a realm of individual autonomy and individuality as well as encouraging the capitalist *laissez-faire* society in which we live. However, property rights also exist to engineer and regulate conflicts over scarce resources. Indeed 'property rights are defined when there is a scarcity of something ... we do not concern ourselves with property rights when a lot of something is available'. It was pointed out that, over the past 350 years, South African has lost much of its environmental resources primarily due to man's intervention. It was further noted that most of our natural and semi-natural habitats lie in the hands of private owners.

There is clearly no doubt that there are two conflicting camps in modern thought with respect to property rights and its concomitant rights of ownership:

¹

de Klemm & Shine 'Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems. IUCN Environmental Policy and Law Paper No. 29' (1993) @ 165.

- (i) in one camp there are those who advocate the property rights position. Accordingly landownership is considered to be 'absolute' comprising primarily of rights to the use and enjoyment of one's property and any limitation or restriction on those rights are deemed to be exceptions (to the rule rather than the rule itself).
- (ii) In the other camp, we find those who promote the regulatory regime position which expounds the view that ownership consists of both rights and obligations exercised in the interest of society.

Both views have found support in modern day South African legal theory and case law.

Furthermore, both the interim and working draft constitutions entrench property and environmental rights. Whilst it appears that environmental rights have booked their ticket in the final draft, property rights have, as yet, to book their place. Whether or not property rights are constitutionally entrenched, at the end of the day, the environment stands to gain more than it has already lost. Given the scarcity of land and the need to promote conservation, the State is inevitably going to step on the toes of private landowners and infringe both their common and constitutional rights to the use and enjoyment of their property. The 'absolutist' approach to ownership does not readily allow for such interference with these rights. However, the concept of 'absoluteness' no longer reflects the pattern of behaviour regarding land-use. It was pointed out that this absolutist approach is gradually being eroded due to the influence of various factors:

- (a) It was pointed out that the views advanced by 17th century jurisprudence are no longer conducive in a society in which land is not only considered to be a commodity but also a scarce resource. However, this is not to say that neither Roman nor Roman-Dutch law could not accommodate such measures as environmental conservation. Indeed, there was no *theoretical* obstacle preventing the Roman or Roman-Dutch State from embarking on such schemes, it was submitted that the reason why these states did not embark on such schemes was that (i) land was not a scarce resource, nor (ii) was environmental conservation high on the list of State priorities.

- (b) Recent case law reflect the courts effort to break out of the mould of 'absolutism' in favour of a more liberal functional approach to ownership by acknowledging the public interest in the conservation of our natural environment.
- (c) Environmental rights have now received constitutional protection. This protection effectively allows the courts to strip ownership of its supremacy in the system of land rights and allows environmental rights to compete on an equal footing with ownership, and, as such, no longer have to compete as vigorously with property rights as they did in the past. The result is that limitations on ownership become inherent rather than exceptional.
- (d) It was further pointed out that whilst property rights *per se* may not find a place in the final draft this is not to say that property rights will not find constitutional protection. Indeed common law rights in property are protected, however, the 'absolutist' paradigm of the past is unlikely to promote the spirit, purport and objects of the Bill of Rights, given the growth of environmental concern worldwide and the fact that South Africa is party to various international agreements, particularly the Convention on Biological Diversity, in which the social function of property is now becoming increasingly obvious. This is further reflected in decisions handed down by various international and municipal tribunals.

It was further mooted and acknowledged with reference to

- (a) the common law,
- (b) South African case law,
- (c) private and public law, and
- (c) South African commentators (which have influenced at least one other Southern African state)

that the State has '*dominium eminens*' (overriding ownership) and, is accordingly, imbued with the powers of eminent domain (its power to expropriate) and the lesser police power (the power to regulate, restrict and limit land-use in the name of environmental conservation). It was further pointed out that these concepts are not novel concepts in South African law.

Likewise, this distinction between police powers and eminent domain broadly resembles "deprivation" and "expropriation" as embraced in the property clauses of both the interim and working draft constitutions. However, two pre-liminary points have to be made in this respect:

- (a) Does a distinction exist between the deprivations clause and expropriations clause ? Based on foreign *dicta* this is not an easy question to answer. If a distinction does exist, and it is submitted that it does, this may have the effect of promoting environmental conservation schemes since each clause is subject to its own *internal* limitations which, in the case of the deprivations clause, is merely the adherence to legislative authority for which no compensation is payable. But if no distinction exists, then both clauses are subject to the same limitations; ie: public interest/purpose, legislative authority, and compensation.
- (b) While the constitutional entrenchment of property rights is at the very least a psychological aid in allaying the fears of landowners, it was suggested that the use of the term "deprived" was indeed a poor choice of word given the mayhem displayed in foreign jurisprudence. It was submitted that possibly the use of the terms "control the use of" or "impose reasonable restrictions on" may go some way to alleviating the interpretational dilemma our courts are going to be faced with.

Expropriations and land-use regulation (in the name of environmental conservation) are amongst the more visible instances of an individual property owner confronting the awesome power of the State and the way in which the courts resolve this inevitable confrontation is a matter of immediate consequence to all parties concerned (ie: the individual land-owner, the public and the State). The reason being that :-


- (a) whilst the State is entitled to exercise its inherent powers of eminent domain to expropriate land in the interest of the environment, *this may only be done against the payment of compensation*. However, it was suggested that expropriation is not the answer to environmental conservation given the fact that
 - (i) the 'public purse' is hopelessly inadequate to provide such funds; and

- (ii) informal housing settlements are not exactly conducive to environmental conservation schemes.
- (b) in exercising its lesser police powers, the State is entitled to impose restrictions on land-use *without the fear of having to pay compensation* for such regulation.

However, this is complicated by the issue of inverse condemnation. Clearly there are conceivable cases in which land-use regulations imposed in the interest of environmental conservation, are merely a disguised ‘taking’ for which compensation is payable. It is, therefore, up to the courts to decide whether to either declare such infringing regulation or enactment unconstitutional or to cause the state to pay compensation - both options are clearly available to the court and foreign *dicta* point to both interpretations.

This problem which the courts are going to have to resolve can best be described diagrammatically as follows:

Table 4: An Overview of the Problem

Eminent Domain	Grey Area	Police Power
Expropriation	Inverse Condemnation	Regulatory
Compensation	Regulation goes too far, compensation becomes payable.	No Compensation
Extensive Protection of Property rights		Minimal Protection of Property Rights
Property rights are substantive		Property rights are symbolic

As the line (|) shifts say from regulation to expropriation so the possibility that compensation becomes payable increases. This shift is caused through the courts interpretation of the deprivations clause (which in turn is effected by the courts own socio-economic-political whims). This interpretation is pivotal to environmental legislation which is essentially regulatory in nature, consequently, the courts are left the unenviable task of

having to draw the line between an exercise of the states police power and an exercise of its eminent domain powers. This division is essential primarily for two-reasons:

- (a) to establish when compensation is indeed payable; and
- (b) it will assist the court, and the landowner, in establishing when an apparent regulation is indeed a disguised taking for which compensation is payable.

However this has proved to be an extremely difficult task in foreign jurisprudence, particularly the United States, where the success of the complainants particular claim appears to depend on :-

- (i) the time period in which one brought their particular claim (pre-1922; 1922-1978; or post-1978);
- (ii) post-1978, which one of five tests the courts decide to adopt in assessing the claim; and
- (iii) how far the courts are prepared to scrutinise legislative enactments and administrative action?

A possible, although not a fool proof solution, to this chaos was provided. It was submitted that Lunney offers a sound analytical framework based on a property *rights* approach within which our courts can find a working solution (both within the framework of (i) our constitution and (ii) our more recent case law dealing specifically with land-use and environmental issues). However, all this could be avoided if Government agencies avoid "semi-conscious" regulatory regimes which increasingly place the burden on private owners. Just as we must move away from the "anything goes" approach for landownership, so we must avoid the "anything goes" approach to land use regulation.

This has further been exacerbated by the issue of judicial review. Whilst the State is entitled to regulate property, it is not allowed to exercise these powers unreasonably or arbitrarily, but, subject to legal rules. The legislature or administrative body enacts or acts; the courts scrutinise. The question which arises is how far are our courts willing to take reasonableness as a requirement of judicial review ? The answer to this is important for two reasons :-

- (i) if mere legislative authority is all that is required for the state to embark on regulatory schemes (such as environmental conservation schemes), then, in effect, the State would effectively have *carte blanche* to embark on any scheme it pleased without fear of having to pay compensation. Whilst this may be good for the environment this would be at the expense of individual property rights, a fundamental human right. The risk that is run is that a constitutional right would effectively be relegated to the realms of a 'paper tiger'.
- (ii) But, if the courts are willing to scrutinise regulatory legislation on the grounds of substantive reasonableness, this, in the hands of a conservative judiciary, may well hinder environmental conservation schemes, since the courts may well strike down such legislation as being unconstitutional, thereby elevating property rights to an unprecedented height of supremacy.

It was pointed out that historically South African courts have generally been loathed to look into issues of reasonableness and unreasonableness primarily due to their hopeless subjectivity. But with the passage of the Constitution it has become apparent that

- (i) it is possible for the courts, with the help of the limitations clause, to look into the substantive reasonableness of enactments. But this may, if taken to its logical conclusion, result in the striking down of legislation aimed at promoting environmental conservation. Consequently it was submitted that the courts, as one author put it, would do well to observe a measure of deference and restraint when interpreting the property clause; and
- (ii) it appears from recent judgements that the courts appear willing to inquire into the reasonableness (as opposed to "gross" unreasonableness) of administrative action or inaction. Furthermore it was submitted that when the administration embarks on environmental schemes or schemes which effect the environment, the aggrieved party is entitled to justice and fairness which include:

- (a) ensuring a fair hearing where administrative action prejudicially affects one's property or where such person has a legitimate expectation entitling him to such a hearing;
- (b) ensuring administrative impartiality; and
- (c) the furnishing of reasons for administrative action infringing one's property rights.

In the final analysis the constitution is a document "*sui generis*", and 'if a future judiciary wants to make a lasting contribution to building social cohesion it should endeavour to strike a fair balance between the competing interests of social justice and individual freedom'.² Froneman J, in Matiso,³ draws a distinction between a constitutional system based on parliamentary sovereignty and constitutional supremacy. The interpretive notion of ascertaining "the intention of the legislature" no longer apply's in a system of judicial review based on constitutional supremacy. Rather the purpose, and method of statutory interpretation, is to test legislation and administrative action against the values and principles imposed by the Constitution. Constitutional interpretation is directed at ascertaining the foundational values inherent in the Constitution, whilst legislative interpretation is directed at ascertaining whether a particular piece of legislation is capable of an interpretation which conforms with the fundamental values underlying an open and democratic society based on freedom and equality.

Whilst it is the duty of the court to give content to these values, or rights, and in so doing "create law", it is also under a duty to weigh up competing interests. This conflict is non more so viewed as between property and environmental conservation. By this the author does not advocate the complete removal of the individualistic nature of ownership *per se*, on the contrary, it is submitted that, by conceiving ownership as involving both rights and obligations, it would be possible to view restrictions imposed by environmental legislation

² Murphy op cit @ 39.

³ op cit @ 87B-88H.

on land use as being part and parcel of landownership (ie: its "clothed in the public interest"), rather than being an infringement of it.

Humanity is intrinsically dependant on the natural environment for its very existence, but yet has continued to exploit this scarce resource in reckless disregard for this dependence. This process has furthermore been exacerbated by 'the persistence of archaic concepts of ownership rights' and, whilst there is a need for a new conceptual approach to property, this need is likely to find little appeal to the landowner.

In addition to providing a rich financial reserve in the form of eco-tourism,⁴ nature also assists in

'meeting industry's expanding needs for new products such as fibres, resins, gums and chemical products. Furthermore, they may provide species for revegetation and land-reclamation projects, while plants and animals have contributed to medicines and medical research. Natural areas conserved as mountain catchments, play a decisive role in ensuring an adequate supply of water, in minimising flooding, preventing soil erosion and reducing irreplaceable laboratories for scientific research and in fulfilling in the growing need for recreation.'⁵

Clearly, there is no doubt that the global environment is deteriorating⁶ and that failure to alleviate the current environmental degradation may threaten human health and life. In response to this a growing number of global and regional instruments and national constitutions include an environmental right in one form or another. Both our interim constitution and the current working draft of the new constitution contain and environmental

⁴ 'It is widely acclaimed that travel and tourism together form the world's largest industry which is in turn the major contributor to the development of the global economy. In monetary terms this amounts to the staggering figure of some US\$ 3 trillion, or 6% of the world's GNP. And it is likely to double (if the rate at which our natural resources are plundered continues) by the year 2005 ! It is not surprising, therefore, that even a small slice of this huge pie is seen as the saviour of many impoverished destinations that have little else to offer the world economy other than access to places of great natural beauty. In Africa, tourism is already a pillar of many economies, but mostly it is an untapped resource. If exploited wisely, and therein lies the rub, it can bring great benefit to the continent and its teeming human millions' (Borchert 'Turning a dream into reality' Africa Environment and Wildlife (1995) 3:3 @ 27).

⁵ Rabie op cit @ 52; see also Rothwell op cit @ 24-25.

⁶ On a global scale, reference need only be made to the Rio conference of 1992, and, locally, its South African forerunner, the South African International Conference on Environmental Management (SAICEM) of 1991.

clause. This marks an important milestone for environmental protection in South Africa.

"We live in a climate of expectation and a culture of entitlement. Human rights declarations, cries for democracy, and advertising all shape our perspectives. We begin to believe that we are owed, entitled to things, and that we can simply '... come in and get our slice'. But common sense should tell us that nothing is free, that all resources are finite, and that the rights we demand for ourselves are but one side of a contract we have with others.'⁷

7

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CHAPTER 5

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