The constitutional protection of tenants' interests: a comparative analysis

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Abstract

The purpose of this article is to explore the constitutional recognition of tenants' interests in South Africa, the United States, and Germany and critically analyse why these interests are in some instances accepted as constitutional property and protected as such. Flowing from an analysis of the judicial acceptance of tenants' interests as constitutional property in German law on the basis that the purpose of property is to promote self-development, and similar theoretical arguments that have been voiced in US law that promote the protection of property rights in light of their function to promote human advancement and self-realisation, it is argued that arguments of this kind have no place in a constitutional framework where the right to housing is recognised. The South African housing provision, its enabling legislation, and the judicial interpretation thereof provide sufficient protection for tenants' interests within the constitutional framework. It shows that in the case of an incomplete Bill of Rights the concept of constitutional property might have to be interpreted widely to make way for the protection of these and similar interests.

INTRODUCTION

During the 1970s and 1980s, the United States (US) saw a revolution in the landlord-tenant regime resulting in tenants' interests being accorded greater protection, specifically against landlords. As a result of statutory amendments to the landlord-tenant relationship and its interpretation and

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affirmation by the courts, landlords were burdened with increased servicing obligations in combination with severe restrictions regarding rent-setting and repossession of their properties upon expiry of their leases. Even though this revolution applied throughout the US, the US Supreme Court was reluctant to consider tenants' interests as fundamental within the constitutional framework. Consequently, a contradiction surfaced between the actual transformation of tenants' rights in the private law realm – mainly brought about by the democratically elected legislature – and the Supreme Court's rejection of tenants' interests as a value worthy of constitutional recognition and protection.

The South African landlord-tenant regime has also undergone some changes as a result of the courts' interpretation of laws specifically enacted to give effect to the constitutional housing provision. Tenants can now challenge the termination of their leases and evictions if they can prove that the landlord's reason for termination is unfair, or if they will be rendered homeless as a result of the eviction order, respectively. These amendments initiate significant departures from private-law doctrine, despite the fact that there remains room for further development – especially in light of the US revolution. Nevertheless, the two jurisdictions differ quite substantially if one considers the role that the respective Constitutions play.

In South African law, the changes brought about by the legislation are grounded in the housing provision in the Bill of Rights. Housing is considered a fundamental right, often directly related to the human dignity of the socio-economically weak, and the state must give effect to it in a progressive manner. If the laws fail to give effect to this right, a challenge can be brought to have them amended accordingly. In comparison, the basis and reason for the landlord-tenant revolution in the US is unclear. The contradiction between the statutory developments in private law, and the resistance to change in the constitutional sphere, raises concerns about the challenges that vulnerable tenants can lodge in the absence of legislation. Even in the wake of a nation-wide revolution to strengthen tenants' rights, it is likely that certain vulnerable groups can be excluded or perhaps not adequately protected. The question is whether such individuals or groups would find a suitable constitutional avenue for their challenge against evictions – especially in a society where the constitutional property clause serves an economic role and socio-economic rights are rejected.

Following from an analysis of the judicial acceptance of tenants' interests as constitutional property in German law on the basis that the purpose of property is to promote self-development, and similar theoretical arguments that have been voiced in US law and which promote the protection of property rights in light of their function to promote human advancement and self-realisation, it is argued that arguments of this kind have no place in a constitutional framework where the right to housing is recognised. The South African housing provision, its enabling legislation, and the judicial interpretation thereof provide sufficient protection for tenants' interests within the constitutional framework. This shows that in the case of an incomplete Bill of Rights, the concept of constitutional property might have to be interpreted widely to make way for the protection of these and similar interests.

PRIVATE LAW POINTS OF DEPARTURE IN SOUTH AFRICA AND THE UNITED STATES

The contract/property divide

In South African law, the nature of tenants' rights in the private law domain is usually contractual since most residential leases are short-term rental agreements.[1] The terms and conditions of the lease are enforceable against the landlord, while the lease is also enforceable against third parties for the duration of the lease. The nature of the regime is generally not regulatory,[2]

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1 More than twenty per cent of the South African population rent their homes, while more than nineteen per cent of this group live in informal settlements. Unsurprisingly, the majority of households that rent dwellings in informal settlements are poor or low-income: Tissington *A resource guide to housing in South Africa 1994–2010: legislation, policy, programmes and practice* (2011) 38. It is safe to assume that tenants in informal settlements would be short-term tenants, since it would be basically impossible for these tenants to have their leases registered. See specifically Van der Walt & Maass 'The enforceability of tenants' rights: part I' 2012 *TSAR* 35 and Van der Walt & Maass 'The enforceability of tenants' rights: part II' 2012 *TSAR* 228 for the argument that short-term tenants' rights are mainly personal and the registration thereof is necessary in order to convert them into real rights.

2 Chapter 3 of the Rental Housing Act 50 of 1999 regulates the relationship between the parties and to some extent codified a number of common law rules. However, it suffices to note here that the effect of the Act is not a complete codification of the common law, nor does it establish major changes in the existing regime. A couple of notable changes that were introduced by the Act are the general prohibition against discrimination and the requirement that the landlord may only terminate the lease on a ground that does not constitute an unfair practice: s 4 of the Act. The latter provision has been interpreted by the Constitutional Court to provide enhanced tenure protection for tenants. See specifically *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) and Maass 'Conceptualising an unfair practice regime in landlord-tenant law' (2012) 27 *SAPL* 653. With regard to the landlord's maintenance responsibility as well as his freedom to set rents, the Act is silent.

although a couple of notable changes were introduced by the Rental Housing Act. A significant intervention is the requirement that the landlord may only terminate the lease on a ground that does not constitute an unfair practice[3] – interpreted by the Constitutional Court to provide substantive tenure protection for tenants.[4] The parties are generally free to negotiate the terms and conditions of the lease, provided that they comply with the listed miscellaneous duties, which generally relate to inspection of the dwelling, the payment of a deposit, and concluding the agreement in writing.[5]

By contrast, the point of departure in US law is that the tenant acquires the possessory estate for a certain period in return for periodic rental payments, while the landlord holds the larger estate in the same land.[6] Ever since Blackstone's eighteenth century scheme, the nature of the tenant's right has been described as 'an estate *in* real property',[7] which was distinguished from personal property and contracts. In due course the common-law features of the landlord-tenant relationship, which always consisted of both contract- and property-based rules, were gradually displaced by the parties' contract.[8]

The traditional conceptualisation of a lease as primarily a transfer of possession that is governed by property-based rules, rather than contract-based rules, had two consequences: the covenants were independent,[9] and that implied warranties were restricted to the sale of goods, not real property.[10] In relation to the independence of covenants, this doctrine was largely abolished throughout the US in the residential landlord-tenant sector.

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3 Section 4 of the Act.

4 See specifically *Maphango v Aengus Lifestyle Properties (Pty) Ltd* n 2 above and Maass n 2 above. This decision is discussed in more detail later in this article. See also Maass & Van der Walt 'The case in favour of substantive tenure reform in the landlord-tenant framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele City of Johannesburg Metropolitan Municipality v Blue Moonlight* ' (2011) 128 *SALJ* 436 for the difference between substantive and procedural protection.

5 Section 5 of the Act.

6 The relationship between landlord and tenant therefore concerns a division of property interests: Singer *Property law: rules, policies and practices* (3ed 2002) 735. The earliest of leases were treated as contractual and not proprietary. This position changed during the fifteenth century when tenants were allowed to bring a 'real action' for eviction and recovery of possession: Glendon 'The transformation of American landlord-tenant law' (1982) 23 *Boston College LR* 503 505–06.

7 Glendon n 6 above at 506.

8 *Id* at 508.

9 If covenants are independent, breach by one party does not relieve the other party from its obligation to perform. In the case of dependent covenants the effect of a breach by one party would relieve the other party from performing its obligations in terms of the lease: Singer *Introduction to property* (2005) 438.

10 Singer n 9 above at 438.

Currently, the breach of a material covenant in the lease has the effect that the other party can end the relationship unilaterally.[11] With regard to the consequence of implied warranties, real property was initially governed by the principle of *caveat emptor* ('let the buyer beware'), which basically meant that landlords had no servicing obligations.[12] This situation has also been altered throughout the US with regard to leases because the 'warranty of habitability' places an obligation on the landlord to ensure that the premises are habitable once the tenant is placed in occupation and throughout the lease.[13] It therefore seems that the property-based rules failed to provide the type of protection that tenants required at the time, which arguably steered the entire regime in a contract-based direction. This movement came to be known as a 'revolution' in landlord-tenant law. Rabin explains this revolution with reference to seven categories: a) the limitation on the landlord's common-law right to offer substandard housing;[14] b) the limitation on the landlord's common-law right to determine rent (rent control);[15] c) the expansion of the landlord's tort liability; d) the limitation of the landlord's common-law right to choose tenants;[16] e) the limitation on the landlord's common-law right to evict the tenant upon termination of the lease;[17] f) the limitation of the landlord's common-law remedies for the

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11 Uniform Residential Landlord and Tenant Act 7A ULA 499 (1978) (last amended 1974) §§ 4.101, 4.102, 4.107, 4.201 & 4.202. This principle was also confirmed in *Javins v First National Corp* 428 F2d 1071 (DC Cir 1970) 1082 where the court held that tenants' obligation to pay rent was dependent on the landlord's duty to maintain the premises.

12 Prior to the 1970s, it was generally accepted that landlords had no implied obligation to repair the premises, nor was there any representation made that the premises would be habitable upon the tenant's occupation. These types of obligations had to be bargained for: Singer n 6 above at 814.

13 Singer n 9 above at 439. See also *Javins v First National Corp* n 11 above at 1076–77 where Wright J held that the 'old no-repair rule' must be abandoned since it is in conflict with the obligations imposed by a typical new housing code, which usually includes a warranty of habitability.

14 This limitation was brought about by the implied warranty of habitability, as established in *Javins* where the court found that the landlord had a duty to offer and keep the leased premises free of substantial housing code violations. Wright J also overturned the doctrine of independence of covenants in landlord-tenant law and replaced it with the contract-based principle of dependence of covenants: Rabin 'The revolution in residential landlord-tenant law: causes and consequences' (1983–1984) 69 *Cornell LR* 517, 524.

15 The courts upheld rent control measures that imposed severe restrictions on landlords' abilities to determine their rent: Rabin n 14 above at 527–29.

16 In terms of the common law, a landlord could select tenants in an arbitrary manner. However, the 1968 Fair Housing Act 42 USC §§ 3601–19 proscribed discrimination on the basis of 'race, colour, religion, sex, or national origin': 42 USC § 3604(a) (1976).

17 The landlord's common law right to evict the tenant upon termination of the lease has been restricted quite severely as a result of three developments. First, landlords are prohibited from evicting tenants in retaliation for the tenant's complaint regarding housing code violations: This rule was established by Justice Wright in *Edwards v Habib*

tenant's breach;[18] and g) diverse increased duties for landlords and tenant protections.[19]

The landlord-tenant revolution in US law took place during the 1980s, and authors have argued that it was based on a partial reconceptualisation of leases as contractual relations, rather than conveyances of real property.[20] Others have argued that a number of contract-based notions had already been imposed in landlord-tenant case law since the end of the nineteenth century,[21] while landlord-tenant law was in fact at no point 'pure property law'.[22] Prior to the revolution, the field of law consisted of real and personal property principles together with both property- and contract-law concepts.[23] As Glendon notes, '[t]he decisive element in the transformation of the residential landlord-tenant relationship has been its subjection to pervasive, mostly statutory, regulation of its incidents.'[24] The change in landlord-tenant law was largely from 'private ordering to public regulation' and not from one private law domain to another.[25]

A key principle that should be kept in mind throughout the analysis of the revolution, is the notion that housing is a basic human necessity and that the regulation of the terms and conditions on which it is founded is, therefore, justified. Acceptance of this principle has made the regulation of the

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397 F2d 687 (DC Cir 1968). Secondly, a number of statutes now contain provisions that limit the landlord's right to evict the tenant in relation to the reason for the eviction. Thirdly, a number of laws restrict landlords' common law right to convert either unoccupied or existing leased premises to condominiums: Rabin n 14 above at 534–36.

18 Three common law remedies were abolished, namely: a) the landlord's self-help remedies to obtain possession; b) the landlord's right of distress in terms of which the landlord could take possession of the leased premises by force until the tenant paid the outstanding rent; and c) the 'no duty' of the landlord to mitigate damages when the tenant abandoned the premises before the end of the lease: Rabin n 14 above at 537–39.

19 Finally, Rabin refers to two modifications aimed at protecting tenants, namely: a) the increased regulation of the use of security deposits and b) the duty of the landlord to ensure that the tenant is placed in actual possession: Rabin n 14 above at 539–40.

20 Singer n 9 above at 439. Leases are currently also interpreted to include additional obligations, such as good faith and fair dealing. These obligations stem from consumer protection laws and general housing codes.

21 Glendon n 6 above at 503–04. Others have argued that the change was in fact based on the moral principle of redistribution 'wealthier' landlords to tenants.

22 *Id* at 504.

23 *Ibid*.

24 *Id* at 504–05.

25 The standard lease form has consequently been replaced with terms that are justified with reference to the public interest rather than with terms that resemble the parties' expectations: *id* at 549.

landlord-tenant relationship inevitable.[26] Also, the statutory reforms were largely directed at alleviating housing problems (the standard of housing conditions, security of tenure, and rent control) experienced by the urban poor. In light of a number of changes regarding the eviction of tenants and the general reluctance to place tenants on the street, Glendon argues that the tenant's right to continued possession resembles something more than a possessory interest – perhaps even a 'determinable life estate'. The overall effect of the revolution has conceivably been a transformation of the court's angle of approach by placing greater emphasis on what the 'tenant owns' rather than on what the landlord owns.[27] This notwithstanding, the Supreme Court has made it clear that tenants' 'need for decent shelter' and their interest in remaining in their homes, are not fundamental interests that are recognised as such[28] by the Constitution of the United States of America 1787.[29] As a point of departure, the leased property remains the landlord's property for purposes of the Constitution.[30]

Whether the US landlord-tenant revolution is explained as a movement from property-based rules to contract-based rules, or from the private-law system to the public domain, the outcome has been to strengthen tenants' rights, mainly in relation to landlords. However, the general strengthening of tenants' rights and the indirect acknowledgement of tenants' home interests took place independently, without any corresponding development in the constitutional framework. One can even say that the landlord-tenant revolution was in contradiction to the Supreme Court's understanding of tenants' interests and the role that they play in the broader constitutional scheme. From a South African perspective, this kind of development would raise concerns about the directional role of the Constitution of the Republic of South Africa, 1996 and its place as the supreme law.[31] The basis for the

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26 *Id* at 505.

27 *Id* at 544.

28 *Lindsey v Normet* 405 US 56 (1972) 74. However, this does not mean that the state can arbitrarily deprive tenants of their interests. See specifically *Devines v Maier* 665 F2d 138 (7th Cir 1981), discussed in more detail below.

29 Fifth Amendment 1791; Fourteenth Amendment 1868.

30 Glendon n 6 above at 569.

31 Section 1 of the Constitution provides as follows: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' In terms of Van der Walt's subsidiarity argument, a litigant must first rely on legislation that was promulgated with the aim to give effect to a constitutional right if that person wishes to enforce that right: Van der Walt 'Normative pluralism and anarchy: reflections on the 2007 term' (2008) 1 *CCR* 77 100. This principle was developed in *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51–2. In such a case the litigant may not rely directly on the

changes in the US landlord-tenant regime is therefore unclear.[32] Nevertheless, one can speculate that during this period the legislature and a number of brave judges reacted to certain political and socio-economic conditions that they regarded as unfair.[33] Arguably, this reaction resulted in a welfare-orientated transformation of an entire regime, despite lack of constitutional support.

A transformation of the South African landlord-tenant system like that in the US, would undoubtedly have happened as a result of directional constitutional demands. Such a transformation has not yet taken shape, but some recent changes regarding the strengthening of tenants' security of tenure, have indicated that there is room for interpretation to initiate some movement.[34] Even though tenants' rights are still categorised in private law as mere personal rights, these changes have opened up possibilities for specifically vulnerable tenants to fight both termination of their leases and homelessness in general.[35]

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constituional provision, except where the constitutional validity of the legislation is challenged: Van der Walt at 101, referring to *South African National Defence Union v Minister of Defence* par 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) par 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) par 248; *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC) par 15. The alternative would result in the creation of parallel systems of law that are likely to end up contradicting each other.

32 The cause for this revolution was arguably based on the misconception of an increasing housing crisis. This perception was largely based on the findings made by both the Kaiser Committee and the Douglas Commission: Rabin n 14 above at 543–45. Another major force behind the landlord-tenant revolution was the civil rights movement, which 'created a climate of activism that demanded prompt, dramatic changes': 546–47. Glendon argues that the rise of the administrative state in the US during the twentieth century was a major factor that contributed to the landlord-tenant transition: Glendon n 6 above at 518. In addition, the economic growth experienced during this period placed poverty and the continued existence of slums in a disgraceful light. A war against poverty was feasible during this economic prosperity, while in the landlord-tenant framework '[j]udges and legislators believed that landlords could afford to give up some of their profits for the benefit of slum dwellers because the landlord's economic position, like that of everyone else, was improving:' Rabin n 14 above at 554.

33 In a letter from Justice Wright to Rabin he wrote the following: 'I was indeed influenced by the fact that, during the nationwide turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord and tenant decisions.' Rabin n 14 above at 549.

34 See specifically the discussion of *Maphango v Aengus Lifestyle Properties (Pty) Ltd* n 2 above below.

35 These developments are discussed below.

The question that will be analysed in the remainder of this article is whether tenants' interests are, or perhaps should be, recognised for constitutional purposes and, if so, in terms of what constitutional provision. In US constitutional law, tenants' rights are recognised as constitutional property and protected as such against state action. This is also the position in South African law. Nevertheless, the recognition and protection of tenants' interests as constitutional property against private landowners' claims for eviction are more complicated. The recognition and protection of tenants' interests as constitutional property have been upheld against a private landlord's claim for eviction in German law. The theoretical foundation for this acknowledgement is interesting when compared to theoretical arguments in favour of more stringent protection of certain property interests in US law, and recent landlord-tenant developments in South Africa.

THE CONSTITUTIONAL RECOGNITION OF TENANTS' INTERESTS

US law

How the concept of constitutional property relates to the private-property-law tradition differs in a number of jurisdictions. In Anglo-American law the private-law notion of property is relatively wide, while in Romano-Germanic private-law systems, property is defined more absolutely (with regard to its nature and application) and narrowly (in relation to the specific objects involved).[36]

A number of rights are regarded as property for constitutional purposes in Anglo-American law, although this does not mean that *every* property interest qualifies as constitutional property.[37]

The Fifth Amendment of the US Constitution states that '[n]o person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation,' while the Fourteenth Amendment, section 1, provides that '[n]o State shall … deprive any person of life, liberty, or property, without due process of law'. The regulation of the use of property in the US is associated with

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[36] Van der Walt *Constitutional property law* (3ed 2011) 85–6. At 95–6 Van der Walt mentions that in German constitutional law a generous approach is adopted with regard to what qualifies as constitutional property under the Basic Law, while a similar approach is followed in US law where emphasis is placed on the legitimacy of the effect of the regulation on property interests.

[37] *Id* at 135.

federal and state restrictions on the use of property, also referred to as the police power. These restrictions are imposed legitimately in order generally to protect the 'health, safety and morals' of the community, and are therefore not accompanied by compensation.[38] The legality of a regulation may be constitutionally challenged on the basis that the regulation amounts to a 'regulatory taking' or 'inverse condemnation', which could be defined as a regulation that 'assumes the form of a mere regulatory control of the use of property, but in effect amounts to a taking of the property without compensation'.[39] The aim of the challenge would be either to claim compensation or to invalidate the regulation. It is therefore important to distinguish between the mere regulation of the use of property, and the taking of property, since only the latter attracts the payment of compensation.[40] However, the identification of the specific 'property' affected by the state action is just as important since some rights can be abrogated by the state through its police power without the action amounting to a taking.[41]

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38 Van der Walt *Constitutional property clauses: a comparative analysis* (1999) 410. Where the public health and safety is under threat, it is generally accepted that the exercise of police power is justified regardless of the impact on individual property rights. However, where the police power is exercised in the regulation of property not directly threatening the health and safety of the public, the government action can more easily be described as a regulatory taking: 412. See also Radin *Reinterpreting property* (1993) 72 and Singer n 6 above at 1086 & 1091–102.

39 Van der Walt n 38 above at 411. In *Pennsylvania Coal Co v Mohan* 260 US 393 (1922) at 415 the majority held that property may be regulated, although 'if a regulation goes too far it will be recognized as a taking'. What separates a legitimate government regulation from an unconstitutional taking is therefore determined by the degree of diminution in property value – caused by the state regulation. This distinction is based on the economic effects of the regulation: Minda 'The dilemmas of property and sovereignty in the postmodern era: the regulatory takings problem' (1991) 62 *University of Colorado LR* 599 606.

40 The test to determine when a regulation amounts to a taking is based on the question whether the burden of the regulation has been unfairly placed on one or a small group of persons rather than the public at large: Singer & Beerman 'The social origins of property' (1993) 6 *Canadian Journal of Law and Jurisprudence* 217. In order to answer this question the courts have developed a number of factors to take into account, including the character of the government action, whether the regulation amounts to a permanent physical invasion, whether an essential property right has been abrogated and the extent of the owner's diminution in value.

41 Tedrowe 'Conceptual severance and takings in the federal circuit' (1999–2000) 85 *Cornell LR* 586, 592. If the property interest is too narrowly defined any regulation that affects that interest will be held to constitute a taking. The definition of the actual property is therefore essential in takings disputes: Minda note 39 above at 609, referring to *Keystone Bituminous Coal Association v DeBenedictis* 480 US 470 (1986). Fee 'Unearthing the denominator in regulatory taking claims' (1994) 61 *University of Chicago LR* 1535 1536 makes a similar argument, although also mentions that if the property interest is defined too broadly, a regulatory taking will never occur. Fee refers

Non-proprietary rights, including leasehold interests, have been recognised as property for constitutional purposes.[42] For purposes of this article, it is important to consider the context in which the taking occurred. In *Devines v Maier*,[43] a number of private-sector tenants were ordered to vacate their homes because the City of Milwaukee found that their dwellings were unfit for human habitation.[44] In light of the fact that the orders effectively extinguished the tenants' primary benefit – the right to occupy the property – the Seventh Circuit decided that the City's decision constituted a taking of the tenants' property.[45] In contrast, *Devines v Maier*, *Swann v Gastonia Housing Authority*[46] involved the eviction of tenants who rented private housing with the help of a section 8 subsidy, which is regulated by Federal law.[47] The Fourth Circuit found that the tenants' subsidy justified due process protection of their interests,[48] and that these tenants had a constitutionally-protected expectation to remain in their homes in the absence of good cause for the eviction.[49] However, a section 8 tenant is generally assured by statute that he will continue in occupancy in the absence of good cause for eviction, which is protected as a property interest

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to the identification of the property in a takings issue as 'defining the appropriate denominator in the regulatory taking "equation"'.

42 *Devines v Maier* n 28 above; *Swann v Gastonia Housing Authority* 675 F2d 1342 (4th Cir 1982). See also Allen *The right to property in commonwealth constitutions* (2000) 123; Alexander *The global debate over constitutional property: lessons for American takings jurisprudence* (2006) 69. With reference to *Pennell v City of San Jose* 485 US 1 (1988) and *Yee v City of Escondido* 503 US 519 (1992), Van der Walt mentions that even though the United States Supreme Court has confirmed that rent control does not amount to a taking, it has not made it clear that the tenant's interest is a constitutionally protected property interest: Van der Walt n 36 above at 137. In *United States v General Motors Corp* 323 US 373 (1945) at 378 the Supreme Court held that the effect of a regulation amounted to the temporary taking of an 'estate or tenancy for years' and therefore amounted to a compensable taking in terms of the Constitution.

43 Note 28 above.

44 *Id* at 140–41.

45 *Id* at 142.

46 Note 42 above.

47 The Section 8 Program, which is administered by public housing authorities, generally enables low-income tenants to rent private housing through federally funded subsidies: 42 United States Code Annotated § 1437f. Admittance to the Section 8 Program is similar to Public Housing, except that private landlords are responsible for screening prospective tenants and not the public housing authority: 24 Code of Federal Regulations § 982.307(a). 'Low income' and 'very low income' households are eligible for the Section 8 Program: Scherer *Residential landlord-tenant law in New York* (2008) 318.

48 *Swann v Gastonia Housing Authority* n 42 above at 1346.

49 *Id* at 1346–347. See also Glendon n 6 above at 542–43 for an explanation regarding public sector tenants' rights to a hearing when facing eviction. This right to a hearing has been described as a constitutionally protected right.

under the due process clause.[50] In addition, the court decided that the eviction of section 8 tenants would constitute state action in light of the state's involvement in these tenancies.[51]

In both *Devines v Maier* and *Swann v Gastonia Housing Authority,* the tenant's constitutional property interest warranted protection as constitutional property on the basis of either the state's action, or the state's participation in the housing programme. Despite the state's involvement, the courts' description of the tenants' interests appears to differ in the two cases, which raises questions as to the underlying reasons for the decisions. In *Devines v Maier,* the court described the tenants' property interests as the right to occupy the property, which mirrors the classic description of the tenant's interest in private-law doctrine, namely exclusive possession and use. In private law, the tenant's possessory interest is acknowledged as a property right and it is therefore hardly surprising that it carries economic value that should be protected as such from state action. The tenants' interests in *Swann v Gastonia Housing Authority* were described as a constitutionally-protected expectation to remain in their homes in the absence of good cause for their eviction, which seemingly carries a different value than the one described in *Devines v Maier*. The constitutional protection of low-income tenants' expectation to remain in their homes is justified because the property interest that requires protection is the tenants' home interest. It is doubtful that this home interest is analogous to other, perhaps more affluent tenants' economic interest in their leases. The underlying reason for the constitutional protection of tenants' interests might, therefore, differ, depending on the nature of the landlord-tenant relationship as well as the socio-economic status of the tenant. Nevertheless, the constitutional avenue for protection remains constitutional property.

This notwithstanding, the constitutional protection provided for in *Swann v Gastonia Housing Authority* was construed in a derivative fashion from the laws that established the 'Section 8 Programme'. The recognition of the tenants' constitutional property interests was limited to due process in the sense that they could not be evicted in the absence of the landlord following the correct statutory procedure. The landlord had to establish good cause for the eviction, and anything contrary thereto was defined as a constitutionally-protected property interest. It therefore appears that these tenants would have no due process case – and consequently no constitutional property interest

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50 *Swann v Gastonia Housing Authority* n 42 above at 1346.

51 *Ibid*.

– were the landlord to establish a good cause for the eviction. More generally, tenants would not be able to defend their interests on a constitutional basis in the absence of a law that opened up a due-process claim. The position as established in *Lindsey v Normet*[52] therefore seems unaltered.[53]

South African law

In South African law it is important to distinguish between real and personal rights in the private-law realm, because the two categories are exercised, protected, and acquired differently.[54] However, in constitutional property law both real and personal rights could enjoy more-or-less the same constitutional protection, once they qualify as constitutional property. As already mentioned, short-term tenants generally acquire mere personal rights in relation to the subject matter of the lease – the right temporarily to use and enjoy the particular property. For purposes of section 25 of the Constitution, the question is whether this right qualifies as constitutional property and, more specifically, whether the constitutional property concept should be interpreted as similar to or different from the private-law tradition. A right should only qualify as constitutional property, and consequently acquire constitutional protection, if it is justifiable in light of the constitutional values of an open and democratic society based on human dignity, and the promotion of equality and freedom.[55] However, a right that

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52 Note 28 above at 74.

53 The Supreme Court decided that tenants' need for decent shelter' and their interest in remaining in their home are not fundamental interests that are recognised by the Constitution as such. In addition, the Court held that there is not a federal constitutional guarantee to adequate housing. This decision was supported in *San Antonio School District v Rodriquez* 411 US 1 (1973).

54 Mostert *et al The principles of the law of property in South Africa* (2010) 46. However, Van der Vyver 'The doctrine of private-law rights' in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 223 argues that 'the distinction between real rights and personal rights has remained significant for purposes of deeds registration only'.

55 In German law the constitutional property concept, *Eigentum*, was developed by interpreting it in line with the constitutional question of whether the specific right or interest that might qualify for protection under the constitutional property clause 'would serve the constitutional purpose of creating and protecting a sphere of personal freedom where the individual is enabled (and expected to take responsibility for the effort) to realise and promote the development of her own life and personality, within the social context': Van der Walt n 36 above at 104–05. See specifically *BVerfGE* 51, 193 (1979) (*Warenzeichen*). In US law Michelman has argued that the US Supreme Court has protected property rights that were 'directly rooted in the Constitution', termed direct or constitutional property rights. These rights were consequently not derived from 'standing law', despite the fact that a wide range of interests are included in private law: Van der Walt n 36 above at 105.

qualifies for protection under section 25, is a social construct that is subject to public-interest regulation, in that it does not qualify as a pre-social right.[56]

Van der Walt argues that in light of foreign examples, one would expect that certain 'rights in rights' – including leases in general – would be included as constitutional property.[57] Commercially valuable interests, such as leases, are not included as 'property' (or '*eiendom*') in private law, but they can, and perhaps should, be included as such in the wider notion of constitutional property. This argument finds support in both the Romano-Germanic and Anglo-American systems where some non-proprietary rights and interests are included as property for constitutional purposes.[58]

In light of the Expropriation Act 63 of 1975, it appears that leases are recognised as constitutional property, as they are rights which can be expropriated. Section 13 provides that the holder of a lease, either registered or unregistered, must be compensated where the state expropriates the property over which the lease applied.[59] Logically, a right can only be expropriated if it is recognised as constitutional property. The Act, therefore, indirectly acknowledges that these rights are constitutional property. One can consequently infer that leases are generally recognised as constitutional-property interests worthy of protection against state action.

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56 Van der Walt n 36 above at 102.

57 *Id* at 127. The German Basic Law refers to *Eigentum*, although it does not define the objects of property. The German Federal Constitutional Court has developed a wider notion of constitutional property in light of the purpose of the constitutional property clause. Rights included in the property clause extend to intellectual property rights, commercial property interest, which includes contractual interests and 'new property' interests. The inclusion of these interests are justified against the backdrop of the Bill of Rights and the question whether the inclusion of the right would serve the purpose of creating and protecting a sphere of personal freedom and autonomy where the individual is placed in a position where she can take responsibility for the development of his/her life and personality. This development should take place in social context: Van der Walt n 36 above at 118–19. The traditional tendency in US law is to perceive property in terms of rights as relationships between legal subjects rather than in terms of objects. This is the tendency even if the right relates to a specific object. A wide range of objects are included as property for purposes of the US property clause, including personal or creditor's rights: Van der Walt n 36 above at 122.

58 Van der Walt n 36 above at 129.

59 This provision would therefore apply to both unregistered short-term leases and registered long-term leases. The Constitutional Court recently decided that an applicant's enrichment claim, which is a personal right, qualifies as constitutional property for purposes of s 25 of the Constitution: *National Credit Regulator v Opperman* 2013 2 SA 1 (CC). This supports the proposition that tenants' personal rights can qualify as constitutional property and be protected against arbitrary state actions.

However, both the state action and the property interest of the tenant would be similar to the situation in *Devines v Maier* in the sense that the decision to expropriate the property would likely form part of the state's overall governance objectives, while the tenant's interest would require compensation on the basis of its economic value. It is also plausible that a tenant would be able to raise a defence against a landlord (either the state,[60] a social-sector landlord,[61] or a private landlord) on the basis of section 25, because it applies horizontally.[62] Such a defence would most likely be indirect in the sense that the tenant would argue that either the applicable legislation, or the common law, allows an arbitrary deprivation of her property in the event of eviction.[63] However, in light of the purpose of section 26 of the Constitution and the Constitutional Court's recent interpretation of the Rental Housing Act, it doubtful that a tenant would gain any additional protection if he or she decided to plead an infringement of his or her constitutional-property right where the owner claims eviction.

The constitutional housing provision (section 26) provides that everyone has the right to access to adequate housing, and that the state must take reasonable measures to achieve the progressive realisation of this right.[64] On more than one occasion the Constitutional Court has confirmed that this provision places – at least – a negative obligation on the state (and all other entities and individuals) to desist from action that would impair the right of access to adequate housing.[65] In fact, 'any measure which permits a person

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60 See the discussion of the South African public rental sector in Maass 'Rental housing as adequate housing' (2011) 22 *Stell LR* 759.

61 See the discussion of the South African social rental sector in Maass 'The South African social housing sector: a critical comparative analysis' (2013) 29 *SAJHR* 571.

62 See specifically Van der Walt n 36 above at 57–66.

63 The majority of authors agree that the effect of the Constitution on private law would take place in an indirect manner (through the interpretation of legislation and development of the common law) rather through a direct manner (instances where private parties rely directly on constitutional provisions to defend their rights against other private parties): *Id* at 58–61.

64 Van der Walt *Constitutional property law* (2005) 356 states that the constitutional obligation to give effect to the right of access to adequate housing often exists within policy frameworks, legislation and executive action. A range of programmes and legislation, such as the Housing Act 107 of 1997 and Rental Housing Act were introduced in order to give effect to the right to housing. See Van Wyk 'The relationship (or not) between rights of access to land and housing: de-linking land from its components' (2005) 16 *Stell LR* 466 for a discussion on the relationship between ss 26(1) and 25(5) of the Constitution.

65 In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 33 the Constitutional Court rejected the contention that s 26(1) imposed a minimum core obligation on the state. The court found that individuals' needs are too diverse to determine a minimum core threshold for all homeless members of society and that the

to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)'.[66] Subsequently, this court[67] postponed the eviction of unlawful occupiers from private land until alternative accommodation could be provided by the state, mainly to ensure that the occupiers would not be displaced and rendered homeless.[68] Against this background, a number of Supreme Court of Appeal decisions[69] have involved constitutional disputes between private landlords and low-income tenants[70] in terms of which the tenants' constitutional right of access to

court is unable to create such a threshold without the necessary information. See also Liebenberg *Socio-economic rights: adjudication under a transformative Constitution* (2010) 163–73; Russell 'Introduction – minimum state obligations: international dimensions' in Brand & Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 11–21; De Vos 'The essential components of the human right to adequate housing – a South African perspective' in Brand & Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 23–33.

66 *Jaftha v Scoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) par 34 *per* Mokgoro J. The state should only be allowed to interfere with an individual's access to housing when it is justifiable to do so: paras 26, 28. Van der Walt n 64 above at 361–62 argues that from the decision one can infer that any legislation or action, by an individual or state body, that impairs indigent peoples' existing housing rights is perceived as a limitation on the negative obligation provided for in s 26(1). See also Liebenberg 'The application of socio-economic rights to private law' 2008 *TSAR* 464 467 on the negative obligation as developed in the case law.

67 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

68 The same logic was followed in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* [2010] JOL 25031 (GSJ) and *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA).

69 *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* n 68 above; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2011 4 SA 337 (SCA); and *Maphango v Aengus Lifestyle Properties* 2011 5 SA 19 (SCA). The essence of *Blue Moonlight* was confirmed by the Constitutional Court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* 2012 2 SA 104 (CC) par 104.

70 To succeed with their application for rescission, the appellants in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* n 68 above had to show that they had a *bona fide* defence against the plaintiff's eviction claim. The appellants contended that the eviction order would render them homeless and in terms of ss 4(6) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) the court may only grant an eviction order if it would be just and equitable to do so. They alleged that they were entitled to protection in terms of ss 26(1) and 26(3) of the Constitution of the Republic of South Africa, 1996. S 26(1) guarantees the right to have access to adequate housing, while s 26(3) ensures at least due process in eviction proceedings, as the court must consider all relevant circumstances before granting an eviction order: par 9. In the court *a quo*, the occupiers contended that the effect of the eviction order would be to render them homeless and argued that the City must provide them with alternative accommodation. They relied on their constitutional right of access to adequate housing and the state's duty to give effect to this right: *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* n 68

adequate housing,[71] was raised as a defence against the private landowners' claim for eviction on termination of the lease. This defence was based on the effect that the eviction order would have had in each case, namely to render the unlawful tenants homeless since there was no affordable alternative accommodation available.[72] For the eviction order to be just and equitable, and therefore in line with section 26(3)[73] of the Constitution and PIE,[74] the court in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39*[75] suspended the eviction order to allow time for the City to arrange accommodation for the evictees.[76]

These cases highlight an underlying tension between the common-law right of landowners to evict tenants on termination of their leases, and the tenants' constitutional housing rights, namely the right of access to adequate housing and the right not to be arbitrarily evicted.[77] The case law has developed the

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above at paras 22–24. The Supreme Court of Appeal and Constitutional Court confirmed the point of departure that the landowner was entitled to an eviction order, because he complied with PIE. The remaining question was the time of eviction since the state first had to provide alternative accommodation. The question whether the state has a responsibility to provide alternative accommodation to vulnerable evictees was the core issue in the Supreme Court of Appeal and Constitutional Court: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (SCA) n 69 above at par 74; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (CC) n 69 above at paras 30, 74, 75 & 96. In *Maphango v Aengus Lifestyle Properties* n 69 above at par 26, the unlawful tenants argued that termination of their periodic leases was contrary to public policy, because it infringed their s 26 right.

71 S 26(1) of the Constitution.

72 *Maphango v Aengus Lifestyle Properties* n 69 above at par 2; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (SCA) n 69 above at par 17; *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* n 68 above at par 9. For this reason the state was joined in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (SCA) n 69 above and forced to accommodate the evictees: par 53. In the Constitutional Court, Van der Westhuizen J held that the City should make accommodation available fourteen days before the date of eviction: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (CC) n 69 above at paras 99–100.

73 This provision provides that no one may be evicted from their home without a court order and that the court must first consider all relevant circumstances.

74 In *Ndlovu v Ngcobo / Bekker v Jika* 2003 1 SA 113 (SCA) the Supreme Court of Appeal decided that tenants holding over should be protected under PIE.

75 n 69 above.

76 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (SCA) n 69 above at par 74. Two months was found to be sufficient time. The Constitutional Court confirmed the Supreme Court of Appeal decision, but four and a half months was deemed enough time for the City to make available alternative temporary accommodation: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (CC) n 69 above at par 104.

77 Ss 26(1) and 26(3) respectively. This tension was explicitly mentioned in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (CC) n 69

notion that unlawful occupiers, including tenants holding over should generally not be evicted if the effect of the eviction order would be to render the occupiers homeless.[78] This development has resulted in substantive protection against homelessness in that the state is obliged to accommodate the evictees.[79]

In *Maphango*,[80] the Constitutional Court held that a tenant can contest termination of his or her lease on the basis that the landlord's ground or reason for the termination constitutes an unfair practice since it prejudices the tenant's rights or interests.[81] It is noteworthy that the court emphasised the broad spectrum of rights and interests of both parties which the Rental Housing Tribunals should take into consideration to decide whether the ground for termination amounts to an unfair practice.[82] Cameron J held that the Tribunals should decide all unfair practice disputes; determine whether termination of the lease should be invalidated or not; and set aside termination of the lease if they find in favour of the tenant.[83] The implication is that the Tribunals are empowered to overturn the termination of leases and reinstate tenants as lawful occupiers. Consequently, the court interpreted the Rental Housing Act to construe better security of tenure for tenants in the constitutional dispensation.[84]

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above at par 35, although Van der Westhuizen J referred to the required balance between landowners' right not to be arbitrarily deprived of property (s 25 of the Constitution) and households' right of access to adequate housing and right not to be arbitrarily evicted. The Court confirmed the point of departure that a private landowner is entitled to an eviction order if the tenant's occupation is unlawful (para 96) and that Blue Moonlight Properties should not be burdened with the duty to provide free accommodation indefinitely (para 100). The Court decided that a suspended eviction order would be just and equitable for both parties, because the City should be granted enough time to comply with the order.

78 See specifically *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39* (SCA) n 69 at par 74.

79 See Maass & Van der Walt n 4 above at 29 for the difference between substantive and procedural protection.

80 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* n 2 above.

81 *Id* at paras 47, 50 & 52. S 4(5)(*c*) of the Rental Housing Act states that the landlord has the right to 'terminate the lease in respect of rental housing property on grounds that do not constitute an unfair practice and are specified in the lease'. S 13(1) empowers any tenant or landlord to lodge a complaint with the Rental Housing Tribunal concerning an unfair practice, which is defined as 'a practice unreasonably prejudicing the rights or interests of a tenant or a landlord'.

82 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* n 2 above at par 52. See ch 4 of the Rental Housing Act for details regarding the establishment and functions of these Tribunals.

83 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* n 2 above at par 68.

84 *Maphango v Aengus Lifestyle Properties (Pty) Ltd* n 2 above at paras 29–31. See also Michelman 'Expropriation, eviction and the gravity of the common law' (2013) 24 *Stell*

In South African law, the current position regarding tenants' tenure security is relatively strong. From a private-law perspective, tenants can enforce the currency of their leases against third parties despite the fact that they hold personal rights. In addition, the Constitutional Court has interpreted the Rental Housing Act to allow tenants, *in general*, to contest termination of their leases on the basis that the reason for such termination unfairly prejudices the tenants' rights or interests. This statutory amendment of the common law derives directly from section 26 of the Constitution, which serves as the founding force for the transformation of all areas of law that are not in line with the constitutional values of an open and democratic society based on human dignity and the promotion of equality and freedom. Based on a similar logic, the courts have interpreted PIE – which is based on section 26(3) of the Constitution – as placing a positive obligation on the state to ensure that socio-economically weak tenants are not rendered homeless after their eviction. Even though these changes have not reached a revolutionary point, similar to the change in the US regime, they have been systemic and context-appropriate to give effect to section 26 in the landlord-tenant framework.

German law

The German *Grundgesetz* of 1949, or Basic Law, serves as a constitution. Article 14.1 of the *Grundgesetz* states that '[p]roperty and the right of inheritance shall be [are] guaranteed. Their substance [content] and limits shall be [are] determined by law',[85] while in terms of article 14.2, '[p]roperty entails obligations [imposes duties]. Its use should serve the public interest'.[86] The main objective of this right is to secure an 'area of personal

LR 245, 255 where he points out that the Court opted to rule in favour of the tenant on the basis of the procedural aspect of the statutory claim and consequently resisted the question whether there was a violation of the tenant's constitutional right of access to adequate housing. In addition, the Court also side-stepped the common-law based claims raised by the tenant and *amicus*, since the protection awarded to the tenant was grounded in the Court's interpretation of the Rental Housing Act. At 256 Michelman refers to this selection of the statute rather than the common law – as the route for constitutional protection – as the gravity of the common law. In the remainder of the article Michelman explains this selection with reference to the subsidiarity rule and some deference to parliamentary decision-making.

85 Van der Walt note 38 above at 121. See also Kommers *The constitutional jurisprudence of the Federal Republic of Germany* (2ed 1997) 250 where the author mentions that US law does not impose obligations on private property owners.

86 Van der Walt n 38 above at 121. Article 14.3 regulates expropriations and requires that expropriations must be in the public interest. Expropriations can only take place in terms of a law that determines the compensation. The amount of compensation must reflect a balance between the interests of those affected and the public interest.

liberty' for the holder of the right within the 'patrimonial sphere',[87] which should enable him to take responsibility for the development of his life within the social (and legal) context.[88] This property guarantee must be interpreted as a constitutional right and distinguished from private-law property rights that are controlled by the German Civil Code (BGB).[89] Despite the fact that the same term, *Eigentum*, is used to define property in the German Civil Code and in article 14 of the *Grundgesetz*, the scope and meaning of this term are not identical in the two areas of law. [90]

The meaning of constitutional property is wider than the civil-law concept.[91] The courts have even included non-proprietary rights as property for purposes of the *Grundgesetz*, which is justifiable if one considers the purpose of constitutional property, namely to enable individuals to create a sphere of personal freedom where they can promote the development of their lives within the social context. Residential leases have been included as property for constitutional purposes in consequence of this test.[92]

The initial *Kleingarten* decision established two important principles regarding the nature of tenants' interests in small, urban tenement gardens they rented. These were, first, that the protection of the tenants' interests was directly related to the protection of their individual freedom; and secondly, that the use and occupation rights of the tenants were acknowledged as constitutional property for purposes of article 14 of the Basic Law.[93] The latter principle was taken one step further in *Besitzrecht des Mieters*[94] where

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87 *Id* at 124. See also Alexander n 42 above at 112–13; Sontheimer 'Principles of human dignity in the Federal Republic' in Kirchhof & Kommers (eds) *Germany and its Basic Law: past, present and future – a German-American symposium* (1993) 215–16.

88 Van der Walt n 38 above at 124. See also Kommers n 85 above at 251.

89 Van der Walt n 38 above at 126; Alexander n 42 above at 124–25.

90 See *BVerfGE* 51, 193 n 55 above at 218.

91 Van der Walt n 38 above at 127.

92 Van der Walt n 36 above at 130. See specifically *BVerfGE* 37, 132 [1974] (*Wohnraumkündigungsschutzgesetz*); BVerfGE 38, 248 (1975) (*Zweckentfremdung von Wohnraum*); BVerfGE 68, 361 (1985) (*Wohnungskündigungsgesetz*); BVerfGE 79, 292 (1989) (*Eigenbedarfskündigung*); BVerfGE 89, 1 (1993) (*Besitzrecht des Mieters*); BVerfGE 89, 237 (1993) (*Eigenbedarfskündigung*); BVerfGE 91, 294 (1994) (*Fortgeltung der Mietpreisbindung*). Seemingly, the point of departure in German law is that a right will be recognised as constitutional property if it qualifies as a valuable right that a person can use to better her life in the given social context, provided that the right must be vested and specific.

93 Van der Walt n 36 above at 132 referring to BVerfGE 52, 1 (1979) and BVerfGE 87, 114 (1992).

94 Note 92 above. See also Kommers n 85 above at 255; Youngs *English, French & German comparative law* (2ed 2007) 309–10; Alexander n 42 above at 125–126; See also Wendt '*Eigentum*, *Erbrecht und Enteignung*' in Sachs (ed) *Grundgesetz Kommentar*

the tenant instituted a constitutional complaint in the Federal Constitutional Court arguing that his eviction order was unconstitutional because it infringed on his property right in terms of article 14 of the Basic Law.[95] The court had, therefore, to determine whether the tenant had a constitutional property right.[96] The court held that the tenant acquired a constitutionally protected property right, recognised under article 14.1.[97] An important consideration in this case was the fundamental feature of constitutional property, namely a concept which enables the holder of the right to secure a sphere of freedom where he can take control and responsibility for his own life.[98] In light of the purpose of the guarantee, the nature of the property – being the family home – was an important factor since it is essential to human existence.[99] Consequently, the court decided that 'the tenant's right fulfils the same purpose that all property serves for its owners'.[100] In addition to this finding, it held that the tenant enjoyed a right of disposal similar to that of the owner. For purposes of article 14, the tenant qualified as an 'owner',[101] while his continued possessory interest was classified as a private law property right because the interest included the right of disposal.[102]

The parties therefore held comparable property rights. A number of property rights are included in the term *Eigentum* for purposes of the *Grundgesetz,* and these rights can compete with the owner's right.[103] Consequently, various property rights held by different persons in relation to a particular

(4ed 2007) 582 591–92 & 621.

95 *Besitzrecht des Mieters* n 92 above at 3–4. Van der Walt 'Ownership and eviction: constitutional rights in private law' (2005) 9 *Edinburgh LR* 32 33. The respondent was the owner of a house and the complainant leased an apartment in the house. The respondent lived in an apartment in the same house, while her son lived in an apartment next to the house. The respondent, who was in poor health, needed to have her son nearby to assist her and therefore wanted to cancel the lease with the complainant in order for her son to live in the rented apartment: *Besitzrecht des Mieters* n 92 above at 1–2. See also Van der Walt n 38 above at 138. The tenant refused to vacate the apartment and the court *a quo* found in favour of the landlord. The court declared the cancellation permissible and granted the eviction order.

96 *Besitzrecht des Mieters* n 92 above at 6–8.

97 Van der Walt n 38 above at 139; Van der Walt *Property in the margins* (2009) 92–3.

98 *Besitzrecht des Mieters* n 92 above at 7–8.

99 *Id* at 7.

100 Van der Walt n 97 above at 35.

101 *Besitzrecht des Mieters* n 92 above at 8. Van der Walt n 97 above at 35. The second argument elicited criticism, as the core of this argument was a functional splitting of ownership between the owner and the tenant: at 35–6.

102 *Besitzrecht des Mieters* n 94 above at 7. See also Van der Walt n 99 above at 93. See 93–4 for a discussion on the criticism raised against this argument.

103 Van der Walt n 37 above at 134.

thing can qualify as constitutional property.[104] Nevertheless, the decision met with a great deal of criticism based on the court's description of the tenant's non-proprietary right as a form of ownership rather than a form of property.[105]

A COMPARATIVE ANALYSIS OF CONSTITUTIONALLY RECOGNISED TENANTS' INTERESTS

International human rights law recognises three 'generations' of rights. The first generation rights are negative rights and include political and civil rights. The second generation rights are usually positive rights and comprise socio-economic rights that place certain obligations on the state, while third generation rights are commonly referred to as 'green' rights because they primarily involve the right to a clean and healthy environment.[106] A general assumption about the United States Constitution is that it protects negative rights, while the United States Supreme Court has been unwilling to acknowledge socio-economic rights in the US Constitution mainly as a result of separation-of-powers concerns.[107] In *Jackson v City of Joliet,*[108] Judge Posner held that the US Constitution 'is a charter of negative rather than positive liberties … The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment … sought to protect Americans from oppression by state government, not to secure them basic governmental services.'[109] In addition, if the drafters wished to include some affirmative obligation on the state to provide services or take positive action towards individuals, they surely would have made this clear.[110] Despite the fact that the state does not have a positive duty to provide certain services, and the Supreme Court's reluctance to acknowledge socio-economic rights in the Constitution, the recognition of certain interests as 'property' for purposes of the due process clause, has created an avenue through which these interests have received a form of constitutional recognition. This was clearly the case in *Swann v Gastonia Housing Authority*.

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104 *Ibid*.

105 *Id* at 133; Van der Walt n 95 above at 32–40; Van der Walt n 97 above at 46–50.

106 Sachs 'Social and economic rights: can they be made justiciable?' (2000) 53 *SMU LR* 1381 1383–84.

107 Kende 'The South African Constitutional Court's embrace of socio-economic rights: a comparative perspective' (2003) 6 *Chapman LR* 137 137–38.

108 715 F2d 1200 (7th Cir 1983).

109 *Id* at 1203.

110 Currie 'Positive and negative constitutional rights' (1986) 53 *Chicago LR* 864, 864–65.

During the Lochner era, the Supreme Court provided protection for basically all private economic interests under the umbrella of the due process clause. Subsequent to the court's retreat from Lochner in 1937, 'property was pushed to the constitutional back burner' and remains a 'poor relation' to liberty interests for purposes of the due process clause.[111] Even though the Supreme Court has recently made some attempts to shift property back into the ranks of other fundamental rights,[112] this movement has been restricted to the takings clause.[113] Nevertheless, the court has expanded the range of interests that qualify as property for purposes of the takings clause without elaborating on the specific function of the interests involved, or why it is justifiable to protect them as such.[114] With reference to the German Constitutional Court, Alexander has argued that it draws a distinction between property interests that have a purely economic value, and those that serve a moral or political purpose in relation to the individual's self-development. Arguably, only the latter type of property interest is protected as a fundamental constitutional interest, because it serves fundamental constitutional goals, namely human dignity and self-governance.[115] This is contrary to the US position where no distinction is made between the different functions that property interests serve, which has led to a somewhat bizarre position where '[l]and held for the sole purpose of market speculation is as apt under the U.S. Constitution, perhaps more apt, to receive strong protection as is a tenant's interest in remaining in her home'.[116]

Considering the nature of the landlord-tenant relationship in US law, it is important to determine whether tenants' interests should generally qualify as constitutional property and, if so, why. Stated differently, should a tenant be able to raise a defence against a claim for eviction by a private landowner on the basis that the eviction order would infringe her constitutional property right? As was previously mentioned, lower courts have recognised section 8-tenants' expectation to stay in their homes as constitutional property that

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111 Sachs n 108 above at 1382 mentions that the classic liberty rights and civil rights are the rights to vote, speak freely, be elected, participate in government, enjoy some measure of privacy from state interference, to have certain rights to property and be a free person in a free society.

112 See for instance *Nollan v California Coastal Commission* 483 US 825 (1987) and *Dolan v City of Tigard* 512 US 374 (1994).

113 Alexander 'Property as a fundamental constitutional right? The German example' (2002–2003) 88 *Cornell LR* 733 734–36.

114 *Id* at 740.

115 *Id* at 739.

116 *Id* at 740.

is worthy of protection in terms of the due process clause, but this finding is restricted to a regulated welfare-orientated landlord-tenant scheme where the state is directly involved. Nevertheless, the underlying reason why the court in *Swann v Gastonia Housing Authority* decided to categorise the tenants' interests as constitutional property is interesting for the protection of tenant's interests *in general*.

Arguably, the value of the tenancies was considered worthy of constitutional protection because it was related to other fundamental constitutional values, specifically liberty. Some property interests might justify increased protection on the basis that the interests are necessary for individuals to exercise their individual autonomy since they provide a platform where persons can achieve self-realisation.[117] This explanation ties in with the theory that certain interests should receive a heightened level of protection if they enable their holders to flourish. In terms of this theory, the purpose of property law is to promote 'human flourishing' for both owners and non-owners,[118] while '[e]very person is entitled, as a matter of human dignity, to flourish'.[119] More specifically, '[t]he home is the central locus for developing and experiencing all, or nearly all, of the capabilities necessary for human flourishing'.[120]

Peñalver explains that human flourishing is not purely individualistic since its realisation is dependent on material and communal infrastructure, which is largely established by the contributions of others. However, the notion of human flourishing has an individual dimension as well since it must enable individuals 'to foster the goods of practical reason and autonomy.'[121] Decisions about the use of property, and specifically land (including buildings), impact human flourishing, because property is an important element of human activity.[122] More to the point, a person cannot flourish if he is denied some physical space where he can exercise essential

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117 Foster & Bonilla 'The social function of property: a comparative perspective' (2011–2012) 80 *Fordham LR* 1003.

118 Peñalver 'Land virtues' (2008–2009) 94 *Cornell LR* 821 828.

119 Alexander & Peñalver 'Properties of community' (2009) 10 *Theoretical Inq L* 127 140–41. On the other hand, Rose 'Property as the keystone right?' (1995–1996) 71 *Notre Dame LR* 329, 329–30 argues that despite libertarian arguments for property as essential for personal autonomy, property is generally perceived as an economic right since it generates wealth. This right is not central to the political core of the government, while political rights, such as the right to vote, are.

120 Alexander 'The social-obligation norm in American property law' (2008–2009) 94 *Cornell LR* 745 816.

121 Peñalver n 118 above at 870.

122 *Id* at 876.

activities.[123] The establishment of a home and the ability to occupy it for consecutive periods is, therefore, essential to this theory, which finds some support in Radin's personhood theory.

Radin argues that in some circumstances the tenant's non-commercial personal use of her home carries greater weight, on a moral basis, than the landlord's commercial interest in reclaiming the property.[124] 'Personal' property is 'bound up' with a person's personhood, because self-investment in the object has taken place.[125] On the other hand, 'fungible' property is held by persons for purely commercial reasons and is exchangeable.[126] There is an important connection between personal property and the individual, since this type of property not only contributes to the holder's self-development, it also enables the person to participate in society as a fulfilled person.[127] In the landlord-tenant framework, the tenant's home[128] is a form of personal property, because self-investment has taken place. The preservation of this interest consequently becomes 'a priority claim over curtailment of merely fungible interests of others'.[129] As a result this interest necessitates more stringent legal protection than the landlord's interest, because personal property is deemed more important by social consensus.[130]

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123 *Id* at 880. Owners have an obligation to assist those without such a space. This would at least be the case if there is a general obligation to promote human flourishing in society.

124 Radin 'Residential rent control' (1986) 15 *Philosophy and Public Affairs* 350, 360. The function of property for both private landowners and tenants are similar in German landlord-tenant disputes.

125 The notion of property being bound up with the holder was initially introduced by Radin in an earlier article where she extensively analysed the relationship between property and personhood: Radin 'Property and personhood' (1981–1982) 34 *Stanford LR* 957. At 959 the author argues that the strength of a person's relationship with a specific object could be measured by the pain that person would suffer once the object is lost.

126 Radin n 124 above at 362. Personal property has a unique value for the specific individual and can therefore not be replaced with another object without incurring some moral loss for the person. 'The notion that external objects can become bound up with personhood reflects a philosophical view of personhood.' Radin also mentions that the distinction between personal and fungible property should actually function on a continuum, because self-investment in property is a matter of degree. The extent to which self-investment took place also depends on the individual's subjective feelings: at 363.

127 The function of property in German law is similar to Radin's perspective regarding personal property. The function of property in German law is to enable individuals to participate in society and achieve human development. The point of departure is that tenants should be enabled to achieve human flourishing and secure tenure forms a vital role in giving effect to this ideal.

128 See also Fox *Conceptualising home: theories, laws and policies* (2007) 25–7 for a similar argument.

129 Radin n 124 above at 365.

130 Radin n 125 above at 978–79. Radin refers to her theory as a non-utilitarian moral theory, because certain claims are better protected based on their moral value: at 985.

Even though these theories advocate more rigorous protection of certain property interests on the basis that the interest at hand plays an important role for the individual's self-development and ability to participate actively, and politically, in society, it remains unclear whether such an interest would fall under the umbrella of constitutional property and be protected as such, solely for the individualistic role that it fulfils in a specific context. The statutory protection of these interests would surely be adequate provided that the democratically elected policy-makers and legislature find it justifiable do so. The US landlord-tenant revolution serves as an example of how this was done for tenants in general. However, in the absence of specifically enacted legislation that aims to protect tenants' interests, the question is whether a tenant would find *any* basis for her defence against the landlord's claim for eviction. The possibility that vulnerable tenants who face eviction orders, and perhaps even homelessness, would most likely have no constitutional recourse despite the fact that other fundamental constitutional rights might be at stake, therefore surfaces.[131] As has already been mentioned, the US Supreme Court decided that tenants' housing and security of tenure interests are not fundamental interests that are recognised by the Constitution as such. These types of interest can, therefore, only be acknowledged as constitutional property for purposes of the due process clause if specifically enacted legislation makes provision for their protection.[132]

In German law, property interests are constitutionally protected in positive terms, while the right to private ownership has been awarded the status of 'an elementary basic right'.[133] Property is an important right and can play an important role where its protection impacts fundamental rights such as the right to dignity. In some instances, *Besitzrecht des Mieters* serving as an example, the courts might interpret the property clause to function as a derivative tool in the greater constitutional scheme where the specific interest that requires protection is civic and moral, rather than economic.[134]

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131 As already mentioned, numerous theoretical arguments make the point that a person will be deprived of living a dignified life if he/she is denied some form of secure shelter. It is difficult to imagine how one can actively participate in society without such a basic necessity.

132 Michelman's argument supports this notion where he highlights the gravity of the common law, pointing out that the courts are generally more inclined to interpret legislation to initiate some transformation than they would develop the common law to the same effect: Michelman n 84 above at 245.

133 Alexander n 113 above at 737 referring to BVerfGE 50, 290 (339) (*Codetermination* Case, 1979).

134 Alexander n 113 above at 739.

However, the protection provided by article 14 of the German Basic Law is inherently constrained by democratically enacted laws which indicate the direction the courts should take – either providing increased protection to certain interests under article 14, or not.[135] Article 14 is consequently not similar in kind to fundamental rights such as human dignity, which is not open to statutory limitation. To have control over specific property interests, as either an owner or non-owner, can be vital for an individual to lead a self-governing life,[136] but this is surely not always the case.[137]

The reason for the enhanced protection of certain interests under article 14 might in some instances seem similar to the human flourishing and personhood theories advocated in US law. The main difference is that the human flourishing and personhood theories do not argue for the recognition of these interests in the constitutional framework and specifically as constitutional property, perhaps because property continues to be seen as an economic, 'wealth-creating' right.[138]

'[S]ocial and economic rights are indivisible from and interdependent with civil and political rights.'[139] With regard to South Africans' right to housing, section 26 of the Constitution provides that the state has a duty to give effect to this right through the enactment of appropriate laws, and that this should be done in a progressive manner. The inclusion of this right in the Constitution means that it is indivisible from the other 'first generation' rights, such as human dignity, and that it is also a fundamental right.[140] In response to the concerns raised against the inclusion of socio-economic rights on the basis that it raises separation of powers issues, Sachs argues that the courts have a duty to address situations of homelessness, because it goes 'to the core of a person's life and dignity'.[141] The protection of human

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135 The last part of article 14.1 includes a significant qualification of the guarantee in the first part: '14.1 Property and the right of inheritance are guaranteed. Their substance and limits are determined by law.'

136 Alexander n 113 above at 746.

137 It has been pointed out that the constitutional protection of property in German law is controversial because the property guarantee simultaneously brings about and entrenches social inequalities that could threaten the freedom of others: Dietlein '*Die Eigentumsfreiheit und das Erbrecht*' in Stern, Sachs & Dietlein *Das Staatsrecht der Bundesrepublik Deutschland* vol IV *Die einzelne Grundrechte* part I *Der Schutz und die freiheitliche Entfaltung des Individuums* (2006) § 113 (2114–2344) 2126–27.

138 Alexander n 113 above at 769.

139 Sachs n 106 above at 1384, referring to the World Conference on Human Rights, Vienna 1993.

140 *Id* at 1387.

141 *Id* at 1388.

dignity is the main function of the courts. Even though the courts can compel neither the state nor the legislature to act in a specific manner, they can point out when the executive or legislature has failed to give effect to fundamental rights, including the right to housing.[142]

The Constitutional Court has stated as follows: 'All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enable them to enjoy the other rights enshrined in Chapter 2.'[143] Liebenberg argues that the inclusion of socio-economic rights in the Bill of Rights is important in light of what these rights enable human beings to do and to be. The deprivation of these rights, including the right to housing, 'impedes the development of a whole range of human capabilities, including the ability to fulfil life plans and participate effectively in political, economic and social life'.[144] If a society values the inherent dignity of all citizens, it follows that that society must ensure that its citizens enjoy civil and political liberties and have access to the socio-economic means necessary for the development of vital capabilities.[145]

This does not mean that socio-economic rights must be included in the Bill of Rights. It does mean that certain interests, including vulnerable tenants' interests in remaining in their homes, must somehow be protected as a constitutionally recognised interest if a court finds it justifiable to do so in the specific context. In South African law this objective is realised through the courts' interpretation of laws that give effect to section 26.[146] In German law. the position is different since the purpose of constitutional property can in some instances be interpreted to be similar to what the South African housing provision achieves in relation to the advancement of vulnerable tenants' human dignity and capabilities in living dignified lives. In some

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142 *Id* at 1390. In *Grootboom*, the Constitutional Court carefully structured its judgment to stay clear of separation of powers issues by finding that the state's housing policy was unreasonable and consequently required some amendment by the state. The Court did not prescribe how the state was supposed to go about the amendments, nor did it interfere with the allocation of state funds: *Government of the Republic of South Africa v Grootboom* n 65 above at par 66.

143 *Government of the Republic of South Africa v Grootboom* n 65 above at par 23.

144 Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1 at 2.

145 *Id* at 7.

146 As already mentioned, s 25 would most likely be irrelevant in light of the fact that the relevant laws that aim to protect tenants are founded on s 26 of the Constitution. However, s 25 would probably play a role in the case of commercial leases.

cases article 14 has to serve this purpose in German law, since there is no housing clause in the Basic Law. The US Constitution does not contain socio-economic rights and the US Supreme Court is reluctant to acknowledge these rights indirectly in the Constitution. The question is, therefore, whether the purpose of both the takings clause and the due process clause can be extended to protect tenants' interests as constitutional property against eviction claims by private landlords, and more specifically in the absence of legislation. Arguably, a private-sector tenant could argue that the state has failed to enact a law that ensures due process for tenants during eviction proceedings. Due process is required in light of the fact that the tenant's interest is a constitutionally recognised property interest, because the lease is essential for the tenant to participate actively in society and live a dignified life. Surely not all tenants would be able to make this argument, since not all leases serve such a derivative function? In fact, only the vulnerable and poor would be able to make such a claim and argue that a court should first consider due process during the eviction proceeding, because their 'first generation' rights are at stake. The extinction of the lease is possible, provided that a court finds it justifiable in the specific context, taking into consideration the possible infringement of the tenant's fundamental 'first generation' rights.

CONCLUSION

It is uncontested that human dignity is a fundamental right in South Africa, the US, and Germany. What is also reasonably accepted in all three jurisdictions, is that in order for a person to live a dignified life he or she will require a number of capabilities that are dependent on certain resources. One of these resources is decent shelter where the person can live with some degree of security of tenure. It is undeniable that the right to live with dignity in a society where a person can achieve self-development and flourish as an active, political participant, is directly related to that person's occupation rights. Any unwarranted or unfair dispossession of housing can likely result in an infringement of the occupier's right to dignity. In the absence of specific laws that ensure both fair termination of leases and just evictions, a constitutional avenue must exist for a tenant to challenge the lack thereof on the basis of the possible impairment of other fundamental rights.

In German law, the constitutional property clause serves as such an avenue since tenants can rely directly on this provision to defend their tenure interests against unfair evictions. In fact, it seems that the constitutional

property provision has direct horizontal application since the tenant's claim in *Besitzrecht des Mieters* was squarely based on this provision and the rights provided for in terms thereof, not on the lack of appropriate laws that should have given effect to the constitutional property rights. In the US, the most plausible constitutional route that a tenant would take to claim some form of tenure protection when facing eviction, boils down to the due process clause. It is probable that such an argument would be met with a great deal of criticism, mostly consisting of objections to the interpretation of the due process clause to point out the failure of the state to ensure procedurally fair termination of leases and eviction of tenants *by means of legislation*. If objections of this kind should succeed, mainly because this is not the purpose of the due process clause, an alternative constitutional avenue would seem even more unlikely. To avoid the risk of impairing 'first generation' fundamental rights in US law, the due process clause might have to be interpreted widely to ensure that tenants' rights are not unfairly abrogated. In South African law, a tenant would be able to argue that either the common law should be developed, or that legislation should be interpreted to be in line with his or her housing rights that are explicitly guaranteed in section 26 of the Constitution. This type of development has taken shape, but it remains to be seen whether further changes will emerge. Whichever way things go, section 26 plays a distinct directional role throughout this process and it is therefore unnecessary to interpret section 25 of the Constitution to fulfil a function it was never intended to serve.