

Property and "Human Flourishing": A Reassessment in the Housing Framework

S Viljoen*

Online ISSN
1727-3781

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Author

Sue-Mari Viljoen

Affiliation

University of South Africa

Email maasss@unisa.ac.za

Date Submission

27 August 2018

Date Revised

15 July 2019

Date Accepted

15 July 2019

Date published

26 August 2019

Editor Prof C Rautenbach

How to cite this article

Viljoen S "Property and "Human Flourishing": A Reassessment in the Housing Framework" *PER/PELJ* 2019(22) - DOI <http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5619>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2019/v22i0a5619>

Abstract

In South Africa, land/housing is a finite non-shareable type of property that must yield to stringent constitutional control to meet land reform and housing objectives, which is high on our constitutional agenda to redress injustices of the past and allow the previously dispossessed to take their rightful place in society. This article considers the normative framework that underlies the types of property that must be regulated for the purposes of section 25 of the *Constitution of the Republic of South Africa, 1996*, since very few cases have been decided in such a way as to consider, from a normative perspective when land/housing should be subject to greater governmental control and when not. Even in the context of expropriation without compensation, certain types of land/buildings are being flagged for this purpose, but the normative reasons for such propositions remain unclear. The purpose of this article is to offer a theoretical perspective, based on work done by progressive-property scholars, on the normative foundation of some property rights, with the object of initiating a dialogue concerning whether or not such rights should be regulated. The notion of human flourishing, as developed by Alexander, should arguably be essential in determining whether land/housing rights should be subject to greater constitutional scrutiny; the more property contributes to the individual's autonomy and ability to partake in social relations, the more sceptical we should be of severe governmental interference; whereas the lesser the notion of human flourishing appears, the greater governmental interference should be. An approach of this kind adheres to the systemic purpose of section 25 of the *Constitution*, because the property clause is intended to regulate established rights just as much as it is intended to meet certain societal needs.

Keywords

Human flourishing; property regulation; housing rights; land reform; progressive property theory.

.....

1 Introduction

In South Africa, the distribution of land, including the provision of housing, is high on the constitutional agenda, not only as a core function in our aim to redress the injustices of the past, but also as a means to allow the previously dispossessed to take their rightful place in society. Of course, land/housing is considered to be a finite, non-shareable type of property that must yield to greater constitutional control in order to meet land reform and housing objectives. Property rights of this kind must therefore be strictly regulated, as permitted in section 25 of the *Constitution of the Republic of South Africa*, 1996.¹ The purpose of this article is not to scrutinise the formal requirements for such governmental impositions, but rather to look at the normative framework that underlies the types of property that must be regulated. Limited scholarly work has been undertaken in this area of constitutional property law, because very few cases have in fact been decided in such a way as to consider, from a normative perspective, when land/housing should be subject to greater governmental control, and when not. In the recent politically-motivated milieu where the expropriation of land without compensation is being proposed, certain types of land/buildings are being flagged for this purpose, but the normative reasons for such propositions remain unclear.²

* Sue-Mari Viljoen. BComm (Law) LLB LLD (US), South Africa. Associate Professor in the Department of Public, Constitutional and International Law, UNISA, South Africa. E-mail: maasss@unisa.ac.za. A version of this paper was presented at the annual meeting of the Association for Law, Property and Society (ALPS) in June 2018, Maastricht. Thank you to the participants for their thoughts and discussions around this topic. I would also like to express my gratitude to the UNISA College of Law for the grant that enabled me to attend this conference. This work is based on research supported in part by the National Research Foundation of South Africa. The views expressed in this article are those of the author and should not be attributed to any of these institutions.

¹ Throughout this piece a distinction is drawn between "severe" regulatory interferences and non-intrusive, "everyday" deprivations. The former suggests the kind of governmental interference that affects the owner's entitlements in such a way that he is effectively deprived of all use and enjoyment. *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), and to some extent *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) serve as examples of such "severe" regulatory interferences. Expropriations also fall under this category.

² See specifically s 12(3) of the Draft Expropriation Bill, 2019 in GN 1409 in GG 42127 of 21 December 2018. Also see Mahlase and Madia 2018 <https://www.news24.com/SouthAfrica/News/gauteng-prepares-to-expropriate-privately-owned-land-without-compensation-20180615>, where it is suggested by the Gauteng Premier, David Makhura, that unused land will be expropriated without compensation. Also see Schreuder 2018 <https://citizen.co.za/news/opinion/1990467/which-land-is-most-likely-to-be-expropriated-first/>, where it is suggested that state-owned land, abandoned buildings in city centres, informal settlements, abandoned mines and smallholdings (and promising farms) will first be

The purpose of this article is to provide a theoretical perspective, based on the work done by progressive-property theorists (specifically the notion of human flourishing as developed by Alexander) on certain types of property and the ways in which they are used, to determine whether or not they should be subject to more severe forms of governmental control. An analysis of this kind is by no means premature since some cases already indicate some inclination to protect some kinds of property more stringently than others. However, the reasons for doing so remain obscure. From a theoretical perspective, the justification for protecting some types of property more rigorously than others may take the form of a fact-based, circumstantial analysis. Predetermined rules in the context of socio-economic reform are likely to be counter-intuitive, because every case must be scrutinised in accordance with its unique circumstances. This does not mean that we should refrain from taking part in a constructive dialogue to set certain standards that are particularly relevant to this sensitive part of our journey towards constitutional reform. Some suggestions are made in this regard to initiate a way forward that is equitable, fair and mindful of everyone's human dignity.

2 Human flourishing as part of the progressive property theory

In stark contrast to the classical liberal theory of property, which is embedded in the idea that the core purpose of property is to provide the material substratum to allow individuals to express themselves within their given communities and consequently serve individual autonomy, is that of the social function of property.³ From the beginning of the twentieth century, authors such as Duguit⁴ argued that property is more a social function than a right. In terms of this concept, property is both internally and externally limited, a notion which sits well with the idea that owners have obligations with respect to their property. They cannot simply do with their property as they please. Within this framework, the state is tasked with protecting owners when they fulfil this social function, whereas owners who fail to adhere to the social obligations placed upon them (by the mere fact of their ownership) should either be punished or encouraged by the state to adhere to their obligations. Governmental tools such as taxation and expropriation are useful measures in this regard. Overall, the social function of property suggests that the state has both positive and negative duties with respect to property.⁵ Central to the theory that property serves a social function is

flagged for expropriation without compensation. It is also suggested that houses in suburban areas will likely not be targeted first.

³ Foster and Bonilla 2011 *Fordham L Rev* 1003-1004.

⁴ See Duguit *Las Transformaciones del Derecho Publico y Privado* 236.

⁵ Foster and Bonilla 2011 *Fordham L Rev* 1005.

the dismissal of the assumption, anchored in classical liberal property, that property exists to serve individual interests. Instead, property must be put to the service of the community, which means that it should be put into production.⁶ More recently, a number of property law scholars have reiterated the social function of property in their theoretical work on the "social obligation" norm of property, which centres on the idea that property owners have social responsibilities to others.⁷

Alexander⁸ defines "human flourishing" as the opportunity for a person to live as fulfilling a life as possible,⁹ which is also the normative foundation of property.¹⁰ In terms of this theory, the purpose of property law is to promote human flourishing for owners as well as non-owners.¹¹ Peñalver¹² explains that human flourishing has a strong individualistic dimension since property, and the very purpose thereof, is to enable individuals "to foster the goods of practical reason and autonomy". The individual is essentially unable to flourish if he is denied some physical space where he can exercise the most basic activities necessary for human survival.¹³ Arguments have been put

⁶ Foster and Bonilla 2011 *Fordham L Rev* 1007, referring to Duguit *Las Transformaciones del Derecho Publico y Privado* 237.

⁷ See for instance Alexander 2009a *Cornell L Rev* 745-819; Singer *Entitlement*.

⁸ Alexander 2014 *Iowa L Rev* 1260. Alexander's human flourishing theory rests on two characteristics, firstly that human beings can develop the capabilities that are necessary for a well-lived life only within society with other human beings; and, secondly, that human flourishing includes the ability to make choices among alternative life horizons. The individual should be able to deliberate about differences between such alternatives and the values that they represent: Alexander and Peñalver 2009 *Theoretical Inquires in Law*; Alexander 2009a *Cornell LR* 760-773. According to Alexander, human flourishing is both pluralistic (meaning that there is no single moral value to which all other values can be reduced) and objectivist (meaning that value determinations are not simply a matter of "agent sovereignty").

⁹ Alexander 2013 *HKLJ* 453. Human flourishing includes "individual autonomy, personal security/privacy, personhood, self-determination, community and equality". Human flourishing is concerned with what an individual can do, rather than what he/she has. A life worth living is measured by the individual's capabilities, more so than his/her possessions. However, a person's life "cannot go well unless he at least possesses certain essential capabilities": Alexander 2013 *HKLJ* 456.

¹⁰ Alexander 2013 *HKLJ* 451 mentions that the "moral foundation" of property is human flourishing. Elsewhere, Alexander also stresses that the core of property is complex and that it cannot be depicted as the right of owners to exclude others from their property. Instead, Alexander's idea of property is intrinsically complicated since he posits that property serves a number of values that should be understood in pluralistic terms. These values include individual liberty, human dignity, just social relations and self-development: Alexander 2009b *Cornell L Rev* 1064-1066.

¹¹ Peñalver 2008 *Cornell L Rev* 828. Alexander 2013 *HKLJ* 452.

¹² Peñalver 2008 *Cornell L Rev* 870. Also see Underkuffler 2007 *Cornell L Rev* 1244, where property is explained as a right that "not only protects us against government interference, but also against all others. It is by its very nature, bound up with ideas of individual separation, individual isolation, individual autonomy, and individual control."

¹³ Peñalver 2008 *Cornell L Rev* 880.

forward to suggest that certain property interests should receive greater protection on the basis that they allow their holders to flourish since they provide a platform where self-realisation can take place.¹⁴ The home is considered to be an essential property interest in the overall pursuit of allowing individuals to flourish since it is considered to be "the central locus for developing and experiencing all, or nearly all, of the capabilities necessary for human flourishing".¹⁵

On the other hand, non-owners are also, as a matter of human dignity, entitled to flourish.¹⁶ Alexander's¹⁷ social-obligation norm is inherent in the very concept of ownership, meaning that

... when the law, whether by way of statutes, administrative action or judicial decisions, announces some restriction on an owner's use of her land or building, insofar as that announcement restates what is already part of the social-obligation norm, it is simply a legal recognition of a restriction that is inherent in the concept of ownership rather than being externally imposed and engrafted upon the owner's bundle of rights.

Human flourishing is therefore not purely individualistic since the realisation thereof is largely dependent on a material as well as a communal infrastructure, which is mainly established by others. In this framework of allowing individuals to live a life of purpose and value, decisions that relate to the use of property, and even more so land (as well as buildings), impact on the ideal of human flourishing, since these types of property constitute an important element of human activities.¹⁸ Moreover, owners' social obligations towards members of various communities are not static. They will adapt to changes in a given society as the society grows and becomes more complex.¹⁹

Alexander²⁰ further argues that the values that are associated with the institution of private property, including individual autonomy, personal security and self-determination, are not at odds with fundamental public

¹⁴ Foster and Bonilla 2011 *Fordham L Rev*. See specifically Radin 1982 *Stan L Rev* for the argument that "personal" property, which is "bound up" with a person's personhood, should receive a heightened level of protection than "fungible" property, which is held by persons for purely commercial reasons. Personal property is on some level "personally" connected to the individual on the basis that it both contributes to the holder's self-development and allows him to participate in society as a fulfilled individual.

¹⁵ Alexander 2009a *Cornell L Rev* 816.

¹⁶ Alexander and Peñalver 2009 *Theoretical Inquiries in Law* 140-141. Also see Rose 1995 *Notre Dame L Rev* 329-330 for the argument that property is generally perceived as an economic right on the basis that it generates wealth, suggesting that this right is not at the core of the government.

¹⁷ Alexander 2013 *HKLJ* 453.

¹⁸ Peñalver 2008 *Cornell L Rev* 876.

¹⁹ Alexander 2013 *HKLJ* 453.

²⁰ Alexander 2014 *Iowa L Rev* 1260.

values. The notion of human flourishing therefore includes private and public values, suggesting a different perspective from that of the libertarian property-vs-regulation logic. Alexander's²¹ concept of a property institution usually includes some sort of governance property that requires governance norms. This is in stark contrast to the idea that governance strategies²² exist only on the periphery of the property system.²³ Inherent to the idea of human flourishing is its relational character, defined as a social-obligation norm – property holders must make the same normative commitment to developing others' capabilities that are required for human flourishing, as they commit to developing those capabilities in themselves.²⁴

This means that private property holdings are essentially entrenched in larger social structures that are geared towards the development of such capabilities that ensure human flourishing for all.²⁵ The notion of human flourishing therefore requires some version of distributive justice that will provide individuals with certain forms of property that they need to develop the essential capabilities necessary for living a life with purpose.²⁶ In Alexander's²⁷ view, property owners must share

... from their surplus, and in ways that are appropriate to them as property owners, to the communities to which they belong ... those benefits that the community reasonably regards as necessary for development of the capabilities essential to human flourishing.

Elsewhere Alexander²⁸ clarifies that the state affords legal recognition to "asserted claims to resources". Human flourishing is therefore founded on

²¹ Governance property is described by Alexander as "multiple-ownership property", whereas governance norms are devices that regulate the internal relations of ownership: Alexander 2012 *U Pa L Rev* 1856.

²² Governance strategies are defined with reference to regulations that restrict the owner's essential right to exclude others. See specifically Merrill and Smith 2001 *Columbia L Rev* 791-792, where they explain the choice between exclusion and governance as strategies for regulating the use of resources.

²³ Merrill and Smith 2001 *Yale LJ* 359; Merrill and Smith 2007 *Wm & Mary L Rev* 1850; Smith 2009 *Cornell L Rev* 963-971.

²⁴ Alexander 2009a *Cornell L Rev* 769. At 770 Alexander acknowledges that the social obligation cannot be a matter of strict reciprocity, at least not in the particulars of what we give back or to whom. The reciprocal obligation finds expression in the more abstract notion of citizenship: Alexander 2009a *Cornell L Rev* 771.

²⁵ Alexander 2009a *Cornell L Rev* 773-815 argues that private and public American property law has internalised as legal doctrines that are best explained as social-obligation practices, meaning that private property owners owe "thick responsibilities" to their communities. He refers to the following examples to support his theory: eminent domain, nuisance remedies, land reform (particularly in South Africa), environmental conservation regulation, historic preservation regulation, access restrictions on the right to exclude, and some intellectual property law examples.

²⁶ Alexander 2013 *HKLJ* 457.

²⁷ Alexander 2013 *HKLJ* 458-459.

²⁸ Alexander 2009a *Cornell L Rev* 749.

the idea that certain "property" resources are required by each and every individual to nurture the capabilities that in fact constitute what is believed to be a well-lived life.²⁹ This rationale also justifies distributive justice, which is centred on the principle that we should give people the required resources necessary to develop their capabilities in order to live a fulfilled life.³⁰ Even though Alexander's exposition of human flourishing suggests at least to some extent that a range of essential values is embedded in the protection of property, which might be interpreted as some variation of the idea that property serves as a guardian of other rights, such a construal would be in contrast with the overall progressive-property argument.³¹

The idea that property governance forms part of the institution of property is taken a distinctive step further by another progressive-property scholar, Singer,³² who argues that even though property is important for the attainment of individual liberty, the regulation of property forms an inherent part thereof. Private ownership brings about security and independence to its holder, which fosters individual liberty and the concomitant opportunity to acquire resources to live a meaningful, purpose-driven life, but individual ownership and a free market society will inevitably leave some outside of this individualised property system. State regulation is therefore called upon to mitigate such inequalities.³³ According to Singer,³⁴ the property system itself is a form of regulation, rather than an institution that stands in opposition to governmental strategies. The point of departure is therefore to consider ownership as consisting of both rights and obligations for an individual who operates in a free and democratic society,³⁵ which differs from libertarian (defensive) or utilitarian (balancing) metaphors.³⁶ Within this "law of democracy"³⁷ model, property is structured in accordance with the fundamental choices that are made for living in a democracy that is characterised by dignity and equality.³⁸ According to the progressive-

²⁹ Alexander 2009a *Cornell L Rev* 768.

³⁰ Alexander 2009a *Cornell L Rev* 768.

³¹ Van der Walt and Viljoen 2015 *PELJ* 1037.

³² Singer 2006 *Harv Envtl L Rev* arguably describes the role of state regulation in more expansive terms.

³³ Singer 2006 *Harv Envtl L Rev* 311. Also see Michelman 1992 *U Chi L Rev* 99; Singer *Entitlement* 141; Waldron *Right to Private Property* 4-5; and Barros 2009 *NYU J L & Liberty* 50-51.

³⁴ Singer 2006 *Harv Envtl L Rev* 312: "government action is needed to allocate initial entitlements, to define the bundles of rights that accompany ownership, and to adjudicate conflicts among owners and between property rights and other legal entitlements. Moreover, many forms of regulation exist precisely because they protect property rights".

³⁵ Singer 2006 *Harv Envtl L Rev* 314.

³⁶ Singer 2006 *Harv Envtl L Rev* 314.

³⁷ Singer 2014 *Duke LJ*. Also see Singer 2009 *Cornell L Rev*.

³⁸ Elsewhere Singer argues that "the democratic model of property focuses our attention on the need to make normative judgments about the appropriate contours

property theory,³⁹ as articulated by scholars such as Alexander and Singer, the concept of property is defined by the fundamental values and obligations that underlie social citizenship as well as life in a democracy that enables all citizens to live life to the full.

The social obligation inherent in the very concept of property finds expression in state regulation (common law or legislation) of the range of entitlements associated with property, including its acquisition, use and disposal. The regulation of property should ideally express the interplay between the protection of extant property holdings, being a locus for its holders' human flourishing, and the entrenchment of social obligations, which is part of social citizenship.⁴⁰

The progressive-property theory is well-crafted for not only the American constitutional framework, but also for South Africa, where rights to land and housing are entrenched as justiciable, positive rights. Property is included, like its American counterpart, as a negative right, however. Even though the constitutional protection of property can create the impression that property concerns the autonomy/enhancement of the individual and that the regulation of property poses a threat against such liberty and personhood, the progressive-property theory explicitly precludes this impression by way of its conceptualisation of property as being inherently regulatory. The portrayal of property as the law of democracy implies that the regulation of property does not threaten extant property holdings, but rather forms part of a web of tensions between property rights and other fundamental rights and values that are embedded in the very fabric of a constitutional system.⁴¹

of property relationships in a free and democratic society": Singer 2009 *Cornell L Rev* 1057.

³⁹ Progressive property scholars mainly argue that there is more to property than just exclusion; inherent to property is the idea that the institution of property should be changed to be in line with societal interests. "Progressive property can be understood as both a reaction against the particularly strong influence of economic approaches to the law and an assertion that property law making must be more nuanced, more expressly political, and less preoccupied with the owners right to exclude. By rejecting the idea that the scope of concern should be limited to efficiency and utility maximization, scholars create more space to contest values": Rosser 2013 *CLR* 109, 110. In contrast, conservative scholars such as Thomas Merrill and Henry Smith argue that the informational value of rules such as the right to exclude cautions against amendments to existing rules and principles: Rosser 2013 *CLR* 108-109.

⁴⁰ Van der Walt and Viljoen 2015 *PELJ* 1042.

⁴¹ Van der Walt and Viljoen 2015 *PELJ* 1042-1043. This construal is also in line with the German Federal Constitutional Court's interpretation of the *Grundgesetz* (*GG*) – *Basic Law of the Republic of Germany* (*Grundgesetz für die Bundesrepublik Deutschland*) 1949. In Germany the property guarantee "creates and protects a sphere of personal freedom, described in the laws that determine the content and limits of property, within which private property holding is both possible and justified

Unique to the South African legal framework is the constitutional protection of land and housing rights, which are both high on the constitutional agenda. "Explicitly guaranteeing land and housing rights in the bill of rights also creates the interpretative and strategic problem of sorting out the relationship between the general property guarantee and specific land and housing rights."⁴² The point of departure when considering the relationship between the protection of property and the strengthening of land and housing rights should be to avoid the libertarian and rights-based property theory that suggests that these constitutional aims are necessarily in conflict with each other. The constitutional analysis of these rights should also side-step the facetious assumption that other constitutional rights, such as land and housing, should be brought under the protective realm of the property clause due to the popular belief that it is the "strongest" right.⁴³

3 The South African framework: property and housing

3.1 A progressive-property approach

Alexander⁴⁴ expresses the opinion that the South African property clause incorporates a "thick" social-obligation norm that is directed at land reform and social justice. In addition, and perhaps even more strikingly, is the socio-economic right of access to adequate housing. The South African property clause, section 25, protects extant property rights against unconstitutional state actions by prohibiting arbitrary deprivation (subsection 25(1)) and uncompensated expropriation (subsection 25(2) and 25(3)). The remainder of section 25 entrenches the constitutional commitment to land reform (subsections 25(5)-(9)), which includes the restitution of land rights;⁴⁵ the redistribution of land;⁴⁶ and the general strengthening of insecure land rights.⁴⁷ As argued elsewhere, section 25 should be read as a coherent whole, taking into account its historical and constitutional context,⁴⁸ to both protect property and serve the land reform objective. In terms of the progressive-property theory, land reform statutes that regulate existing property rights should not be considered to be extraordinary interferences with established rights, but rather part of the

in its proper social context, which explicitly includes the promotion of social welfare":
Van der Walt and Viljoen 2015 *PELJ* 1043.

⁴² Van der Walt and Viljoen 2015 *PELJ* 1044.

⁴³ Van der Walt and Viljoen 2015 *PELJ* 1044.

⁴⁴ Alexander 2009 *Cornell L Rev* 782-783.

⁴⁵ Section 25(7) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

⁴⁶ Section 25(5) of the *Constitution*.

⁴⁷ Section 25(6) of the *Constitution*.

⁴⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 15-23.

constitutional concept of property in a transformative setting that is driven by the constitutional values of human dignity, equality and freedom.⁴⁹

The socio-economic right of access to adequate housing is included in section 26 of the *Constitution* and is phrased as a positive right which the state is obliged to fulfil within its available resources. As mentioned in the preceding section, arguments have been put forward by progressive-property scholars to suggest that certain kinds of property are worthy of more extensive protection than others, on the basis that they allow the individual to develop and experience the capabilities that are necessary to live a fulfilled life. The only kind of property that has been explicitly identified to fulfil this function is the home. For progressive-property theorists, property rights that relate to one's home require greater protection since this kind of property is constituent of the individual's self-development. In the South African framework, questions that relate to a heightened level of protection for extant property rights that relate to the home (or even another type of property) have not been adequately dealt with by the courts, nor has this matter been theorised by constitutional law scholars.⁵⁰ The Supreme Court of Appeal has rejected the notion that the "home" deserves greater protection than other rights or societal values, however.⁵¹ Instead, the section 26 right of access to adequate housing has been interpreted, on many occasions, as providing protection to vulnerable occupiers of a range of dwellings, including shacks erected on vacant land, absent any rights to property.⁵² Basic forms of protection from eviction have been located under

⁴⁹ Van der Walt and Viljoen 2015 *PELJ* 1046-1047.

⁵⁰ The only case that has touched on this issue is *Lester v Ndlambe Municipality* 2014 1 All SA 402 (SCA), which is dealt with in the subsequent footnote.

⁵¹ In *Lester v Ndlambe Municipality* 2014 1 All SA 402 (SCA) para 17 the Supreme Court of Appeal decided that eviction proceedings (s 26(3)) must be interpreted against the backdrop of the right of access to adequate housing (s 26(1)). Households who face eviction orders can rely on s 26(3) only if they are so socio-economically weak that they might be rendered homeless due to the eviction order. The principle established in *Lester* is that the protection of the owner's home does not necessarily carry a greater value, from a normative perspective, than other public values, which in this case concerned the need to uphold the law and allow for a demolition order where building works were illegal. Any alternative allowance would have condoned a criminal offence: para 27. In *Malan v City of Cape Town* 2014 6 SA 315 (CC) the majority of the Constitutional Court also held that an elderly woman's home interest is not necessarily more important than the City's "zero-tolerance approach to drug dealing being conducted at any of its rental housing units": para 57.

⁵² The ways in which the courts provide protection to vulnerable occupiers varies from deciding against an eviction order to granting the eviction order, whilst placing a positive duty on the state to provide the evictees with alternative housing. See for instance *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC).

the housing provision rather than the property clause,⁵³ probably because the rights/interests are in fact not recognised as established property rights.

3.2 *Uncertainties in the regulatory context*

Considering the progressive-property theory, which describes the purpose of property as both to protect extant property rights and to allow for the distribution of property, fundamental questions emerge about the regulation of property in the South African framework. It is not clear whether land rights, including that of the home, should necessarily be subject to severe forms of state regulation in order to give effect to the land reform and housing provisions. Within this transformation-orientated setting, where extant property rights are protected to some extent, Singer suggests that a range of choices must be made to reflect both pragmatic economic and political needs as well as fundamental values. As a point of departure, it cannot be assumed that all "established property rights" must be protected.⁵⁴ Instead, the property system must make it realistically possible for each person to acquire the resources necessary to live a full, humane life. If this structural objective cannot be obtained, individuals are deprived of the freedom that justified the creation of property rights in the first place. "In a society that has chosen to reject apartheid as a way of life, property rights must not only be redistributed but also tailored to enable equal liberties to emerge."⁵⁵ Moreover, decisions that relate to the regulation of property, including expropriations, are not necessarily concerned with the "singling out" of certain cases, but rather founded on fundamental normative choices regarding the rights (and obligations) of owners in a specific political arena.⁵⁶ Central to the progressive-property theory is the tension that exists between stability (the protection of established property rights) and change (the need for regulation, taking the form of distribution), which requires some dialogue on when regulatory actions would be permissible and when not; and for what purposes. A dialogue of this kind has arguably not taken the form that it should in South Africa.

Foundational questions remain before we can make any real claim on our constitutional concept of property, its purpose and the way in which it relates (or should relate) to the constitutional right of access to adequate housing.⁵⁷

⁵³ See Van der Walt and Viljoen 2015 *PELJ* 1062-1063 for the argument that housing interests should be protected in terms of s 26 of the *Constitution*, rather than s 25, because the protection of property interests should play a modest, secondary role as against s 26. The argument is also put forward to suggest that the South African property clause is not intended to allow individuals to flourish.

⁵⁴ Singer 2014 *Duke LJ* 1312.

⁵⁵ Singer 2014 *Duke LJ* 1312.

⁵⁶ Singer 2014 *Duke LJ* 1321.

⁵⁷ This right is directly related to the state's mandate to distribute land. Once access to land has been established it is highly likely that the beneficiaries will also be able to

Firstly, it is essential for us to at least start to think about different types of property and the concomitant levels of protection that should be afforded to them. Some types of property should arguably receive a heightened level of protection on the basis that they are constituent of their owners' autonomy, identity and place in society. The state should therefore be cautious to regulate rights of this kind, beyond the levels that one would expect in our sensitive constitutional and political arena. This does not mean that the property clause is mainly intended to allow individuals to flourish, regardless of the circumstances.⁵⁸ Instead, stringent regulatory interferences with established property rights should allow for a context-sensitive approach to determine the purpose of the specific type of property and the place that it fulfils in society.⁵⁹

On the other hand, the second, related question is when should property rights be regulated more extensively? Certain types of property should arguably be prone to more severe forms of regulation, depending on the relevant circumstances. Finally, it is inconceivable that a clear distinction could be drawn between the protection of property and the realisation of the section 26 right of access to adequate housing, because a direct connection exists between these constitutional rights once beneficiaries have been provided with some form of housing. Such beneficiaries will mostly, if not always, be provided with a property right that relates to a residential structure. The constitutional protection that the beneficiary would be entitled to would consequently be located under the realm of the property clause rather than the housing provision, because the latter is concerned with the right of access to adequate housing, more than with the protection of established housing rights.⁶⁰

From a human flourishing perspective, one should fairly easily be able to argue that a section 26 beneficiary's established housing interest must

reside on the land. Stated differently, it is inconceivable to provide both land (in terms of s 25) and housing (in terms of s 26) to the same beneficiary by way of two different state-sanctioned programmes; the one would necessarily have to rebut any claim to the other.

⁵⁸ In *Lester v Ndlambe Municipality* 2014 1 All SA 402 (SCA), the Supreme Court of Appeal was arguably correct to state that a housing interest will not necessarily trump other public interests or values. However, this does not mean that the value of the home, of any individual (socio-economically weak or not), should be ignored when it becomes subject to stringent regulatory control. The home of the ill, disabled or elderly, regardless of financial standing, may be critical to the holder's very survival. A residential structure of this kind is constituent of its holder's very existence and cannot be compared with what was essentially a holiday home in Lester's case.

⁵⁹ This idea is explained in more detail in subsequent paragraphs.

⁶⁰ Plenty of eviction cases have been decided in terms of s 26 to provide some protection to vulnerable evictees, although none of these cases concerned the protection of established housing rights that were awarded in terms of s 26(1). Also see Van der Walt and Viljoen 2015 *PELJ* 1075.

receive a heightened level of constitutional (property) protection on the basis that it constitutes a person's home and it exemplifies more than one of our fundamental constitutional objectives.⁶¹ If this argument stands, can we say that some homes should receive greater protection than others, simply because they typify transformation-orientated, redistributive efforts? If so, are we adhering to the constitutional values of human dignity and equality?

3.3 *The way forward*

The South African evictions framework shows that property rights are often regulated to provide some form of protection to destitute groups' housing rights/interests. Deprivations of this kind are mostly temporary, non-intrusive limitations that are placed on landowners' property rights and they are easily justifiable since they are non-arbitrary and in accordance with larger constitutional imperatives. Such regulatory actions are authorised in terms of anti-eviction strategies that are provided for in the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 on an *ad hoc* basis due to destitute households' pure desperation.⁶² Interferences of this kind are not part of the state's formal housing programme, since they arise at random to prevent increased homelessness.⁶³

A more severe form of regulatory interference can, and arguably should, be specifically tailored to give effect to section 26. Some of the protective measures in section 25 (section 25(1)-(3)) as well as the transformation-driven provisions in section 25 (section 25(4)-(9)) authorise the state to expropriate property to provide permanent housing solutions to the marginalised. Strategies of this kind are already authorised in section 25(2)-(3), supported in enabling legislation and geared to fulfil the redistribution mandate (section 25(5)) as well as the housing obligation (section 26(1) and (2)).⁶⁴ Intrusive regulatory state actions that do not necessarily amount to

⁶¹ The housing imperative is deeply connected with the s 10 right of human dignity and the s 25(5) right of access to land.

⁶² In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 37 the Constitutional Court stated that "[u]nlawful occupation results in a deprivation of property under s 25(1). Deprivation might, however, pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary. Therefore, PIE allows for eviction of unlawful occupiers only when it is just and equitable."

⁶³ Van der Walt and Viljoen 2015 *PELJ* 1070.

⁶⁴ In terms of the *Housing Act* 107 of 1997, municipalities can expropriate land (by notice in the *Provincial Gazette*) if it is required for a housing development. S 9(3) of the Act stipulates the requirements, such the inability of the state to purchase the land. S 6 of the *Housing Development Agency Act* 23 of 2008 allows the Minister to expropriate land for the development of human settlements. S 25 of the *Constitution* requires that compensation must be paid, and the expropriation must be in the public interest. Both the redistribution programme and the progressive realisation of access

formal, permanent expropriations can also be construed in terms of section 25(2), which is traditionally considered to form part of the "protective" measures in the property clause.⁶⁵

A core purpose of the South African *Constitution* is to redress the grave injustices of the past, which were to a large extent orchestrated by way of the unfair, race-based regulation of property (specifically with regard to land). The property clause is therefore unsurprisingly instrumental in permitting severe forms of regulatory state action to provide the previously dispossessed not only with access to land/housing, but also with the means to live fulfilled lives. The regulation of property by way of both deprivation and expropriation is therefore not only in accordance with land reform imperatives and the right to acquire adequate housing, but is instrumental in giving effect to these constitutional rights. This does not mean that established property rights should not be protected. It means that, in addition to placing the protection of property rights in a modest role secondary to the fulfilment of vulnerable groups' housing rights,⁶⁶ the regulation of property should receive ample revision from both the executive and the legislature to suggest ways in which innovative, purpose-driven regulatory state actions can address housing needs on a permanent basis. In order to take the conversation further and analyse the dual role of our constitutional property clause, specifically in a transformative setting, a more concise concept of property is called for.

4 A purpose-driven interpretation of property

In response to the idea that property serves as the most important right in the American constitutional order,⁶⁷ Underkuffler⁶⁸ acknowledges that

to adequate housing, which is included as a socio-economic right, are in the public interest: Viljoen 2014 *TSAR* Part 1 360-362.

⁶⁵ The state is, for instance, able to expropriate an owner's right to use his land, albeit temporarily if it is in the public interest. A regulatory interference of this kind would amount to a formal expropriation, but it will affect the owner's right to use his land only temporarily. In terms of the *Expropriation Act* 63 of 1975, the Minister of Public Works is empowered to "expropriate any property for public purposes or take the right to use temporarily any property for public purposes". S 12 of the Act makes a clear distinction between the expropriation of an owner's property and the taking of a right to use property; which affects the way in which compensation should be calculated. If the state decides to expropriate the holder's use right, the amount of compensation shall not exceed "an amount to make good any actual financial loss caused by the expropriation or the taking of the right". See specifically Viljoen 2014 *TSAR* Part 1 366-367, 371-376; Viljoen 2014 *TSAR* Part 2 528-533.

⁶⁶ Van der Walt and Viljoen 2015 *PELJ* 1069.

⁶⁷ Rose 1996 *Notre Dame L Rev*.

⁶⁸ Underkuffler-Freund 1996 *Notre Dame L Rev* 1034. Underkuffler expresses the opinion that property should not be protected more rigorously than other rights on the basis that it is special.

property is indeed a special right, but only in the sense that the institution of property is the most compromised; having often to adhere to other constitutional rights and values. This means that property should be given a more complex, contingent interpretation than other constitutionally protected rights. Property is also special in the sense that it involves a choice regarding the allocation of resources, which means that whenever resources (sometimes finite, non-shareable resources) are given to some, they are inevitably denied to others.⁶⁹ The allocation of such resources is essential since some types of property are necessary for human survival, which renders property, once again, special in the sense that the realisation of other constitutional rights may depend on one having some property.⁷⁰

Based on this reasoning, Underkuffler⁷¹ calls into question the constitutional protection of property as a negative right. If property is indeed foundational to one's ability to exercise other constitutional rights, should a right to property not be included as a positive claim? Furthermore, does it even make sense to protect extant property holdings if the state is required to upset such holdings for the sake of social and economic reform?⁷² The constitutional protection of property may place it beyond the reach of democratic power, which is contrary to the overall need to amend property allocations.⁷³ Overall, Underkuffler⁷⁴ argues that property which involves goods critical to life should in fact be "less protected as a right, not more. If property is to be less protected, how much less protected should it be?"

Several uncertainties highlighted by Underkuffler in the American framework are addressed to some extent in the South African *Constitution* by way of the property clause and the housing clause. Together these provisions place a positive obligation on the state to progressively ensure that previously dispossessed persons are provided with land/housing.⁷⁵ Access to land by way of the redistribution programme and access to adequate housing are *a priori* considered fundamental in the overall transformation imperative, but these positive rights are also indicative of the types of property that are essential if individuals are to be allowed to take

⁶⁹ Underkuffler-Freund 1996 *Notre Dame L Rev* 1038. In comparison with other constitutional rights, such as free speech, which does not carry any allocation costs, Underkuffler believes that the allocation aspect of property necessarily involves some cost to society: 1039.

⁷⁰ Underkuffler-Freund 1996 *Notre Dame L Rev* 1039-1040.

⁷¹ Underkuffler-Freund 1996 *Notre Dame L Rev* 1041.

⁷² Underkuffler-Freund 1996 *Notre Dame L Rev* 1042.

⁷³ See specifically Michelman 2016 *Brigham-Kanner Prop Rts Conf J* for concerns raised in relation to the inclusion of a property clause.

⁷⁴ Underkuffler-Freund 1996 *Notre Dame L Rev* 1043.

⁷⁵ Sections 25(5) and 26 of the *Constitution*.

their rightful places in society.⁷⁶ It is indeed difficult to imagine how individuals would be able to reap the benefits of the range of constitutionally recognised rights if they do not have a place to live.⁷⁷

That being said, it remains unclear when and to what extent the regulation of extant property rights should allow for the realisation of both land reform and housing imperatives. Embedded in the idea of property is the notion that owners bear social obligations towards not only their direct communities, but also to society at large.⁷⁸ By way of state-ordained impositions, which take the form of both deprivations and expropriations, the state is tasked to regulate property in order to give effect to its land reform and housing objectives, which essentially means that the state should determine, in an ongoing manner, where owners' obligations should begin and end. It is within this context of establishing an acceptable balance in a variety of cases between the protection of extant rights and the fulfilment of constitutionally endorsed land-related objectives that we need to initiate a dialogue that aims to provide clarity on when certain types of property should be subject to severe regulation and when not.⁷⁹ The work undertaken by progressive-property theorists, specifically that of Alexander, should arguably be taken as our point departure to think about the purpose of property and how it should influence our approach to regulating it.

The notion of human flourishing, as a theoretical approach to the justification for having property rights, suggests that certain types of property are constituent of the individual. One could even say that properties of this kind are at the core of people's ability to flourish and take their rightful places amongst others. Alexander identifies the home as such a type of property, without taking the matter any further. The paradox in the arguments raised by progressive-property scholars, which they themselves acknowledge, is that the very foundation for protecting properties of this kind is also the

⁷⁶ Sections 25 and 26 of the *Constitution* therefore establish a public right/claim to the existence of a property system in respect of certain valued objects. Land/housing is considered to be such an object, although it is not entirely clear whether these provisions necessarily provide beneficiaries with private property rights. Nevertheless, property is undoubtedly a systemic right. See specifically Michelman 1981 *Clev St L Rev* 585.

⁷⁷ A place where one can reside can take the form of either a residential structure or a piece of land which can be put to such use.

⁷⁸ See specifically Alexander 2013 *HKLJ* 451-462.

⁷⁹ It is generally accepted that minor interferences with owners' property and specifically land rights are non-arbitrary and in line with s 25 of the *Constitution* when the purpose is to provide some protection for vulnerable evictees: Van der Walt and Viljoen 2015 *PELJ* 1069. It remains unclear, however, what normative considerations should be taken into account when more intrusive regulatory interferences would be directed at landowners' rights in order to give effect to ss 25(5) and 26.

justification for regulating them.⁸⁰ Others are also, as a matter of human dignity, entitled to flourish, meaning that the state should regulate such resources to ensure access for all. In the South African framework, the finite resource that the previously dispossessed are entitled to is land, which can also take the form of a home. The value of this type of property is by no means contested. Neither is the political will to conform to the constitutionally recognised redistribution and housing mandates.

It is doubtful, however, whether the value that is attached to land in terms of section 25 (and section 26) extends to extant land holdings, even when the land also constitutes the holder's home. Should the normative commitment to allowing others to flourish as a matter of human dignity not also apply to "ourselves"? If so, certain types of property should require greater constitutional scrutiny when being subjected to severe regulatory action, based on the notion of human flourishing. If we agree that the home is an important type of property for the purpose of self-development, surely other types of property, such as family farms held across generations, should also be considered essential in the pursuit of living a fulfilled, meaningful life. Depending on the circumstances, the latter type of property may justify even greater protection on the basis that it is often constituent of more than one family's autonomy.⁸¹ It may be integral to other constitutional rights, such as the right to practise one's religion by visiting burial sites,⁸² and it may form an important part of our economy, contributing not only to food security but also to job security. From a human flourishing perspective, properties of this kind cannot be isolated from the unique socio-economic purpose that they fulfil by simply categorising them as "land".

In the US takings framework, Michelman⁸³ makes a similar point with reference to *Poletown Neighborhood Council v City of Detroit*,⁸⁴ which he uses as an example of a "case in which the compensation solution for a conflict between property and police power [was] unavailable even in principle". Michelman⁸⁵ describes *Poletown* as "the sort of case in which the injury suffered by the aggrieved owner is one for which money cannot compensate, because the injury is to some interest of the owner's apart from economic net worth". The state's use of its eminent domain power was in

⁸⁰ Underkuffler-Freund 1996 *Notre Dame L Rev* 1044.

⁸¹ Farms that provide housing to labour tenants or farm workers, often for one generation after the other, are arguably constituent of the occupiers' individual autonomy in the sense that the farm, which represents the occupiers' homes, place of work and immediate community, enables such occupiers to enhance their self-development and rightful place in society.

⁸² See for example *Nhlabathi v Fick* 2003 ZALCC 9 (8 April 2003) and specifically s 6(2)(dA) of the *Extension of Security of Tenure Act* 62 of 1997.

⁸³ Michelman 1981 *Wash & Lee L Rev* 1111.

⁸⁴ *Poletown Neighborhood Council v City of Detroit* 304 NW 2d 455 (1981).

⁸⁵ Michelman 1981 *Wash & Lee L Rev* 1111-1112.

this case directed at entire neighbourhoods, which included individuals' homes. The purpose of the taking was to convey the land to General Motors in order to construct an assembly plant. In this instance, the affected property represented more than what a monetary payment could remedy; it represented "things" that money could not buy:

... place, position, relationship, roots, community, solidarity, status – yes, and security too, but security in a sense different and perhaps deeper than that of ... 'reasonable investment-backed expectations'.⁸⁶

In the end, a choice had to be made, either giving effect to the owners' property and security or allowing the police power to serve the general welfare, because compensation was unable to mediate the conflict.⁸⁷ *Poletown* serves as an example of a case where the type of property that was subject to the state's power of eminent domain constituted part of the owners' ability to take their rightful places in society because it represented not only their homes but also their way of life as a thriving community. Michelman believes that the payment of compensation could not remedy the taking of this type of property and what it effectively represented, suggesting that when certain types of property are being put to use to reach certain ends, severe governmental interference may be inappropriate, regardless of the public purpose it intends to serve.⁸⁸

On the other end of the spectrum, certain types of land, including some residential premises, are by no means constituent of the holder's individual autonomy. Land and buildings that are left vacant over lengthy periods of time, often subject to deterioration, thereby constituting a threat to others' health and safety, serve as an example of the type of property that should perhaps be subject to more severe forms of regulatory control.⁸⁹ Landowners who fail to maintain their premises, produce from their land or simply neglect to adhere to what one would generally refer to as their social obligations should arguably be exposed to some or other "punishment" in the form of either stringent taxation or expropriation.⁹⁰ Land, and specifically well-located residential premises,⁹¹ are finite non-shareable resources that

⁸⁶ Michelman 1981 *Wash & Lee L Rev* 1112.

⁸⁷ Michelman 1981 *Wash & Lee L Rev* 1112.

⁸⁸ Michelman 1981 *Wash & Lee L Rev* 1112.

⁸⁹ See specifically Strydom and Viljoen 2014 *PELJ* 1207-1261 for the argument that vacant inner-city buildings should be expropriated by the state. This argument is supported by some comparative analysis.

⁹⁰ See Strydom and Viljoen 2014 *PELJ* 1207-1261 for the argument that unlawfully occupied, neglected buildings should be expropriated by the state and Viljoen 2014 *TSAR* Part 1; Viljoen 2014 *TSAR* Part 2 for the proposition that the state should also consider its power to take control of neglected inner-city buildings for housing purposes by expropriating owners' use rights, albeit temporarily.

⁹¹ See for instance *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *City of Johannesburg*

lie at the heart of our constitutional challenge. The protection of these resources means that we consciously decide not to allocate them to others.⁹²

From the perspective of human flourishing, it seems incoherent and illogical to simply talk about "land" or "buildings" when trying to seriously converse about our concept of property and its constitutional purpose in relation to redistribution and housing objectives. The actual use of land or buildings, representing the type of property that is high on our constitutional agenda, indicates the extent to which the property forms part of its holder's ability to self-develop and lead an active, purpose-driven life. In the light of our evictions jurisprudence, it seems that we are already inclined to protect some types of property that are being put to certain uses more stringently than other types when faced with the challenge of having to weigh property rights against vulnerable groups' housing interests, although the reasons for doing so remain obscure.⁹³ What we arguably require is more concise standards, not rules, to determine when and to what extent property should be protected more strictly and when property should be subject to more severe forms of regulatory action to give effect to long-term land and housing solutions.⁹⁴ Key to this conversation is the factual purpose of the piece of property in society, which is intrinsically linked to the notion of human flourishing.

A factual enquiry directed at the use of the property over a lengthy period of time not only by the landowner but also by other affected parties should arguably be made to determine the "place" that the specific piece of property

Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 2 SA 104 (CC).

⁹² Underkuffler-Freund 1996 *Notre Dame L Rev* 1038.

⁹³ In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) the Court decided against the eviction of unlawful occupiers who invaded vacant, unused land. A key consideration in the case was the fact that the owners never asserted that they required the land for their own use. It was also clear that the land was not being put to any use at the time that the occupiers took occupation, nor during the eight years that the occupiers resided there: paras 55-51. In contrast, see for instance *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 4 SA 337 (SCA) para 24, where the Court granted the eviction of unlawful occupiers who resided in a inner-city building that had been purchased with the intention to develop it. At no point did the owner fail to maintain its building or neglect to use it. Instead, it motivated the eviction of the occupiers in order to both use it in a productive manner and to maintain it.

⁹⁴ Underkuffler 2015 *Tex L Rev* 2020 states that "there must be some situations in which government can permanently, physically invade private land without the payment of potentially ruinous compensation". The US Supreme Court has even held that the value of property may be destroyed, without compensation, if it is in the public interest: *Miller v Schoene* 276 US 272, 277-279 (1928). Underkuffler 2015 *Tex L Rev* 2027 questions the approach of the US courts when dealing with takings issues on the basis that it is "devoid of articulated, explored, or principled guidelines".

occupies in society. The proposition here is that such an enquiry cannot be made in the abstract.⁹⁵ Instead, a factual analysis considering all relevant circumstances should be made in every case to determine whether or not a specific piece of property should be subjected to severe regulatory control, and to what ends. This does not mean that we should refrain from taking part in some dialogue that is intended to provide standards when regulating property for certain constitutional objectives.⁹⁶ Property is indeed a social right and we as a society need to converse about the reasons why we decide to reward the claims of some individuals to finite goods when we also decide to deny claims to the same goods by others.⁹⁷

As articulated by Underkuffler,⁹⁸ we need to determine, in each contested case:

- What are the values, theoretical and practical, that underlie the protection of the individual's interest in this case?
- What are the values, theoretical and practical, that motivate the public (collective) to institute change?
- Taking what we have found – the reasons for the protection of this property, and the reasons for change – should we require the payment of compensation?

5 Concluding remarks

Embedded in the very notion of any property institution is the idea that holders of property have rights and obligations. The latter is inherently connected to the social demands of society; property must not only be put to the service of the community, but it must also be regulated in accordance with its needs. Property will also be protected, but not all types of property in all instances. Some property is necessarily subject to greater governmental control, whereas other property requires more stringent protection. The notion of human flourishing as a normative foundation for property suggests that property is intended to allow individuals to take their

⁹⁵ See Michelman 1981 *Wash & Lee L Rev* 1109, where Michelman states that the idea of property is nonspecific, and that judges must supply content to the term. When doing so, judges help to resolve conflicts between state power and property rights, provided that the concept of property must be understood as an essential component of holders' opportunity to participate in political processes where fundamental values are accommodated.

⁹⁶ Underkuffler 2015 *Tex L Rev* 2028 expresses the opinion that the core function of the US takings clause is to protect private property "from radical changes in the *status quo*, without sufficient justification." It is not always clear, however, what property is, what qualifies as a radical change, and what one would consider to be sufficient justification. What might be required in this area of constitutional law is perhaps therefore "fewer rules and more standards": 2028.

⁹⁷ Underkuffler-Freund 1996 *Notre Dame L Rev* 1046.

⁹⁸ Underkuffler 2015 *Tex L Rev* 2036.

rightful place in society and enhance their self-development. This justification applies to owners and non-owners, which means that the distribution of property forms an essential part of the very concept of a private property institution. Certain types of property are constituent of individual autonomy, which seems to justify greater protection than those that are not, but a "type" of property can surely not be decisive in determining whether or not it is conducive to the idea of human flourishing. We can all agree that once a residential dwelling is indeed used as a home, it will probably constitute a type of property that allows the household to take its rightful place in society and flourish.⁹⁹ The particular use of a certain type of property should arguably be taken into account when determining whether or not stringent governmental control should be allowed.

In South Africa the type of property that is subject to strict governmental control due to its previous use and ability to provide individual autonomy is land/housing. This type of property must be distributed to the previously dispossessed by way of regulatory state action, but it remains unclear in what circumstances it would be justifiable to simply reallocate property rights of this kind. The purpose of this paper is to offer a theoretical perspective on the normative foundation of some property rights, based on work done by progressive-property scholars, with the purpose of initiating a dialogue concerning whether or not such rights should be regulated. The notion of human flourishing should arguably be essential in determining whether land/housing rights should be subject to greater constitutional scrutiny. The more property contributes to an individual's autonomy and ability to partake in social relations, the more sceptical we should be of severe governmental interference, whereas the lesser the notion of human flourishing appears, the greater governmental interference should be. An approach of this kind adheres to the systemic purpose of section 25 of the *Constitution*, because the property clause is intended to regulate established rights just as much as it is intended to meet certain societal needs. Its "protective" clauses are instrumental in meeting land reform and housing objectives. It is surprising, however, that we have not seen cases that deal with the state's power to expropriate property, nor severe forms of regulatory control to meet land/housing objectives.

Perhaps the time is ripe for us to deliberate not only on the types of property that must yield to severe governmental interference to meet the state's land

⁹⁹ This is not necessarily always the case; there are instances where the home is not conducive to the individual's development. The home can also be a place of violence and oppression: Schnably 1993 *Stan L Rev*. Being mindful of this important qualification, the proposition is still that when certain types of property are being utilised accordingly, they may very well be constituent of individual autonomy and self-development. An in-depth, factual analysis is required in each instance to determine whether this is indeed that case.

reform and housing objectives, but also the purposes that they fulfil from a human flourishing perspective. We cannot allow for finite non-shareable resources to remain unused, unproductive or even under-utilised. Such an allocation, whether deliberate or unintentional, would be at odds with our vision of a transformed legal order, since it would effectively sanction irresponsible landownership. Singer is correct in saying that all established property rights cannot be protected, but then of course some must be protected. The determination of such a class of property rights is arguably just as important as determining those that should yield to greater regulatory interference. It is inconceivable to think that property rights that are constituent of the individual's self-development and place in society should be treated as any other form of property. Such a construal would lead not only to inhumane, unjust outcomes, similar to those we saw in *Poletown*,¹⁰⁰ but also to the unequal application of the law.

Bibliography

Literature

Alexander 2009a *Cornell L Rev*

Alexander GS "The Social-obligation Norm in American Property Law" 2009 *Cornell L Rev* 745-819

Alexander 2009b *Cornell L Rev*

Alexander GS "The Complex Core of Property" 2009 *Cornell L Rev* 1063-1071

Alexander 2012 *U Pa L Rev*

Alexander GS "Governance Property" 2012 *U Pa L Rev* 1853-1888

Alexander 2013 *HKLJ*

Alexander GS "Ownership and Obligations: The Human Flourishing Theory of Property" 2013 *HKLJ* 451-462

Alexander 2014 *Iowa L Rev*

Alexander GS "Property's Ends: The Publicness of Private Law Values" 2014 *Iowa L Rev* 1257-1296

¹⁰⁰ Also see *Kelo v City of New London* 454 US 469 (2005), where the US Supreme Court of Appeal allowed the taking of private land (the affected individual's home) to be given to another private owner for the sake of economic development.

Alexander and Peñalver 2009 *Theoretical Inquires in Law*

Alexander GS and Peñalver EM "Properties of Community" 2009 *Theoretical Inquires in Law* 127-160

Barros 2009 *NYU J L & Liberty*

Barros BD "Property and Freedom" 2009 *NYU J L & Liberty* 36-69

Duguit *Las Transformaciones del Derecho Publico y Privado*

Duguit L *Las Transformaciones del Derecho Publico y Privado* (Editorial Heliastrea Buenos Aires 1975)

Foster and Bonilla 2011 *Fordham L Rev*

Foster S and Bonilla D "The Social Function of Property: A Comparative Law Perspective" 2011 *Fordham L Rev* 1003-1015

Merrill and Smith 2001 *Columbia L Rev*

Merrill TW and Smith HE "The Property/Contract Interface" 2001 *Columbia L Rev* 773-852

Merrill and Smith 2001 *Yale LJ*

Merrill TW and Smith HE "What Happened to Property in Law and Economics?" 2001 *Yale LJ* 357-398

Merrill and Smith 2007 *Wm & Mary L Rev*

Merrill TW and Smith HE "The Morality of Property" 2007 *Wm & Mary L Rev* 1849-1895

Michelman 1981 *Clev St L Rev*

Michelman FI "Process and Property in Constitutional Theory" 1981 *Clev St L Rev* 577-593

Michelman 1981 *Wash & Lee L Rev*

Michelman FI "Property as a Constitutional Right" 1981 *Wash & Lee L Rev* 1097-1114

Michelman 1992 *U Chi L Rev*

Michelman FI "Liberties, Fair Values, and Constitutional Method" 1992 *U Chi L Rev* 91-114

Michelman 2016 *Brigham-Kanner Prop Rts Conf J*

Michelman FI "Good Government, Core Liberties, and Constitutional Property: An Essay for Joe Singer" 2016 *Brigham-Kanner Prop Rts Conf J* 27-43

Peñalver 2008 *Cornell L Rev*

Peñalver EM "Land Virtues" 2008 *Cornell L Rev* 821-888

Radin 1982 *Stan L Rev*

Radin MJ "Property and Personhood" 1982 *Stan L Rev* 957-1015

Rose 1995 *Notre Dame L Rev*

Rose CM "Property as the Keystone Right? " 1995 *Notre Dame L Rev* 329-370

Rosser 2013 *CLR*

Rosser E "The Ambition and Transformative Potential of Progressive Property" 2013 *CLR* 107-171

Schnably 1993 *Stan L Rev*

Schnably SJ "Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood" 1993 *Stan L Rev* 347-407

Singer *Entitlement*

Singer JW *Entitlement: The Paradoxes of Property* (Yale University Press New Haven 2000)

Singer 2006 *Harv Envtl L Rev*

Singer JW "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" 2006 *Harv Envtl L Rev* 309-338

Singer 2009 *Cornell L Rev*

Singer JW "Democratic Estates: Property Law in a Free and Democratic Society" 2009 *Cornell L Rev* 1009-1062

Singer 2014 *Duke LJ*

Singer JW "Property as the Law of Democracy" 2014 *Duke LJ* 1287-1335

Smith 2009 *Cornell L Rev*

Smith HE "Response: Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law" 2009 *Cornell L Rev* 959-989

Strydom and Viljoen 2014 *PELJ*

Strydom J and Viljoen S "Unlawful Occupation of Inner-city Buildings: A Constitutional Analysis of the Rights and Obligations Involved" 2014 *PELJ* 1207-1261

Underkuffler-Freund 1996 *Notre Dame L Rev*

Underkuffler-Freund LS "Property: A Special Right" 1996 *Notre Dame L Rev* 1033-1058

Underkuffler 2007 *Cornell L Rev*

Underkuffler LS "Property as Constitutional Myth: Utilities and Dangers" 2007 *Cornell L Rev* 1239-1254

Underkuffler 2015 *Tex L Rev*

Underkuffler LS "Property and Change: The Constitutional Conundrum" 2015 *Tex L Rev* 2015-2037

Van der Walt and Viljoen 2015 *PELJ*

Van der Walt AJ and Viljoen S "The Constitutional Mandate for Social Welfare – Systemic Differences and Links Between Property, Land Rights and Housing Rights" 2015 *PELJ* 1035-1090

Viljoen 2014 *TSAR* Part 1

Viljoen S "The Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 1)" 2014 *TSAR* 359-376

Viljoen 2014 *TSAR* Part 2

Viljoen S "The Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 2)" 2014 *TSAR* 520-535

Waldron *Right to Private Property*

Waldron J *The Right to Private Property* (Oxford University Press New York 1988)

Case law

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2011 4 SA 337 (SCA)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 2 SA 104 (CC)

Kelo v City of New London 454 US 469 (2005)

Lester v Ndlambe Municipality 2014 1 All SA 402 (SCA)

Malan v City of Cape Town 2014 6 SA 315 (CC)

Miller v Schoene 276 US 272 (1928)

Nhlabathi v Fick 2003 ZALCC 9 (8 April 2003)

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg 2008 3 SA 208 (CC)

Poletown Neighborhood Council v City of Detroit 304 NW 2d 455 (1981)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

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

Legislation

Constitution of the Republic of South Africa, 1996

Expropriation Act 63 of 1975

Extension of Security of Tenure Act 62 of 1997

Housing Act 107 of 1997

Housing Development Agency Act 23 of 2008

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Government publications

GN 1409 in GG 42127 of 21 December 2018 (Draft Expropriation Bill)

Internet sources

Mahlase and Madia 2018 <https://www.news24.com/SouthAfrica/News/gauteng-prepares-to-expropriate-privately-owned-land-without-compensation-20180615>

Mahlase M and Madia T 2018 "Gauteng Prepares to Expropriate Idle Privately Owned Land without Compensation" *News 24* (15 June 2018) <https://www.news24.com/SouthAfrica/News/gauteng-prepares-to-expropriate-privately-owned-land-without-compensation-20180615> accessed 3 September 2018

Schreuder 2018 <https://citizen.co.za/news/opinion/1990467/which-land-is-most-likely-to-be-expropriated-first/>

Schreuder N 2018 "Which Land is Most Likely to be Expropriated First?" *The Citizen* (6 August 2018) <https://citizen.co.za/news/opinion/>

1990467/which-land-is-most-likely-to-be-expropriated-first/ accessed 4
September 2018

List of Abbreviations

Brigham-Kanner Rts Conf J	Prop	Brigham-Kanner Property Rights Conference Journal
CLR		California Law Review
Clev St L Rev		Cleveland State Law Review
Columbia L Rev		Columbia Law Review
Cornell L Rev		Cornell Law Review
Duke LJ		Duke Law Journal
Fordham L Rev		Fordham Law Review
Harv Envtl L Rev		Harvard Environmental Law Review
HKLJ		Hong Kong Law Journal
Iowa L Rev		Iowa Law Review
NYU J L & Liberty		New York University Journal of Law and Liberty
Notre Dame L Rev		Notre Dame Law Review
PELJ		Potchefstroom Electronic Law Journal
Stan L Rev		Stanford Law Review
Tex L Rev		Texas Law Review
TSAR		Tydskrif vir die Suid-Afrikaanse Reg
U Pa L Rev		University of Pennsylvania Law Review
Wm & Mary L Rev		William and Mary Law Review
Yale LJ		Yale Law Journal
Wash & Lee L Rev		Washington and Lee Law Review
U Chi L Rev		University of Chicago Law Review