Tenure Security in Urban Rental Housing

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Declaration

By submitting this dissertation, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly stated otherwise) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

S Maass, 28 July 2010, Stellenbosch

Summary

The dissertation considers the tenure rights of urban residential tenants in the post-1994 constitutional dispensation. The 1996 Constitution mandates tenure reform in two instances. Firstly, section 25(6) (read with section 25(9)) mandates the legislature to enact legislation that would provide legally secure tenure rights for a person or community whose tenure of land is insecure as a result of past racially discriminatory laws or practices. This form of tenure reform is race-based. Secondly, section 26(3) mandates the courts to consider all relevant circumstances during eviction proceedings. In terms of this provision the court can refuse to grant the eviction order on the basis of the occupier's socio-economic weakness, which is a more general form of class-related tenure reform.

The Constitution also ensures the right to have access to adequate housing, while the legislature must introduce measures that would give effect to this right (sections 26(1) and 26(2)).

To determine whether the current landlord-tenant regime in South Africa is able to provide tenants with secure occupation rights and access to rental housing, it is compared to landlord-tenant regimes in pre-1994 South Africa, the United Kingdom, New York State and Germany. The landlord-tenant regimes are considered in light of changing socio-economic circumstances where the state had to assist households during housing shortages. The dissertation assesses the efficiency of landlord-tenant law, combined with regulatory measures that ensure substantive tenure rights and rent restrictions, as a form of tenure that could help alleviate housing shortages and initiate a new landlord-tenant regime for South Africa that would give effect to the Constitution.

The dissertation concludes that the current substantive tenure rights of urban residential tenants are largely based on the common law, which is associated with weak tenure security. The landlord-tenant laws, namely the Rental Housing Act 50 of 1999 and the Social Housing Act 16 of 2008, fail to provide urban residential tenants with substantive tenure rights. The legislature has failed to enact a law that gives effect to section 25(6) in the landlord-tenant framework. The legislature did enact the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

(PIE) in order to give effect to section 26(3). Recently the courts interpreted PIE to provide marginalised tenants with substantive tenure protection during eviction proceedings. However, to give effect to section 25(6) legislation should grant residential tenants substantive tenure rights that are legally secure prior to eviction.

The legislature enacted the Rental Housing Act and the Social Housing Act to give effect to the right to housing (section 26 of the Constitution) in the landlord-tenant framework. These laws fail to promote access to rental housing as a form of tenure that could help alleviate housing shortages.

Opsomming

Die proefskrif oorweeg die okkupasieregte van stedelike residensiële huurders in die post-1994 konstitusionele bedeling. Die 1996 Grondwet bepaal dat okkupasieregte in twee gevalle hervorm moet word. Eerstens gee artikel 25(6) (gelees met artikel 25(9)) opdrag aan die wetgewer om wetgewing te verorden wat okkupasieregte met verblyfsekerheid aan ‘n person of gemeenskap sal verleen indien so ‘n person of gemeenskap tans grond okkupeer met okkupasieregte wat onseker is as gevolg van vorige rasgebaseerde wetgewing. Hierdie tipe hervorming is rasgebaseer. Tweedens gee artikel 26(3) opdrag aan die howe om alle relevante faktore te oorweeg as deel van enige uitsettingsprosedure. In terme van hierdie bepaling is die howe gemagtig om ‘n uitsettingsbevel te weier op die basis van die okkupeerder se sosio-ekonomiese kwesbaarheid. Hierdie tipe hervorming is ‘n meer algemene klasgebaseerde hervorming.

Artikel 26(1) (gelees met artikel 26(2)) van die Grondwet bepaal dat elkeen die reg op toegang tot geskikte behuising het, terwyl die staat redelike wetgewende en ander maatreëls moet tref om hierdie reg te verwesenlik.

Ten einde te bepaal of die huidige huurbehuisingstelsel in Suid-Afrika voldoende is, met inagneming van die stelsel se vermoë om huurders te voorsien van okkupasieregte met verblyfsekerheid en van toegang tot huurbehuising, word dit vergelyk met die huurbehuisingstelsels in Suid Afrika voor 1994, die Verenigde Koninkryk, New York Staat en Duitsland. Hierdie huurbehuisingstelsels word bespreek met inagneming van veranderinge in die sosio-ekonomiese omstandighede waartydens die staat gedurende behuisingstekorte huishoudings moes ondersteun. Die doeltreffendheid van huurbehuising word beoordeel met verwysing na regulasies wat substantiewe okkupasieregte verseker en beperkings plaas op huurpryse om ‘n vorm van verblyfreg daar te stel wat die behuisingstekort kan verminder ten einde ‘n nuwe huurbehuisingstelsel vir Suid-Afrika te inisieër wat gevolg aan die Grondwet sal gee.

Die proefskrif lei tot die gevolgtrekking dat die huidige substantiewe okkupasieregte van stedelike residensiële huurders grotendeels op die gemenereg gebaseer is. Die gemenereg maak nie voorsiening vir sterk substantiewe

okkupasieregte nie. Die huidige huurbehuisingswetgewing, naamlik die Wet op Huurbehuising 50 van 1999 en die Wet op Maatskaplike Behuising 16 van 2008, slaag nie daarin om substantiewe okkupasieregte vir stedelike residensiële huurders te voorsien nie. Die wetgewer het nie daarin geslaag om ‘n wet te promulgeer wat in die huurbehuisingsraamwerk aan artikel 25(6) effek gee nie. Die wetgewer het wel die Wet op die Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond 19 van 1998 verorden om effek te gee aan artikel 26(3) van die Grondwet. Hierdie Wet is onlangs so deur die howe geïnterpreteer dat dit kwesbare huurders tydens uitsettingsprosedures met substantiewe okkupasieregte beskerm. Om aan artikel 25(6) te voldoen moet wetgewing egter substantiewe okkupasieregte met verblyfsekerheid aan residensiële huurders verskaf voordat hulle uitgesit word.

Die wetgewer het die Wet op Huurbehuising en die Wet op Maatskaplike Behuising verorden ten einde effek aan die reg op behuising (artikel 26 van die Grondwet) in die gebied van huurbehuising te gee. Geeneen van hierdie wette slaag daarin om toegang tot behuising, en veral huurbehuising as ‘n vorm van okkupasie, te bevorder ten einde die behuisingtekort te verminder nie.

Acknowledgements

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1. Introduction

1.1 Research questions

1.1.1 Weak tenure rights: The constitutional obligation of tenure reform

The following section is a description of the main questions that underlie the entire dissertation. These questions are explained with reference to two recent cases, which are discussed in some detail because they highlight the extent of the uncertainty that result from the legal issues, which could also be defined as problems.

In the recent case of *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*[1] the South African Supreme Court of Appeal had to decide whether to dismiss an application for rescission of an eviction order granted by default against the appellants.[2] The appellants occupied the respondent's residential property in terms of an oral periodic tenancy and the rent was paid on a monthly basis. The respondent allegedly decided to renovate the building, because it had become dilapidated and overcrowded.[3] The respondent terminated all the leases and gave the appellants notice of termination of their leases. According to the notice the appellants had to vacate the premises within three months, but they failed to do so. The respondent instituted eviction proceedings and the high court granted the eviction, even though the appellants failed to oppose the proceedings. The appellants applied for rescission of the eviction order.[4]

In order to succeed in the application for rescission at common law the appellants had to show good cause for their default, which can usually be established with a reasonable explanation, and "a bona fide defence to the plaintiff's claim which prima facie has some prospect of success."[5] In support of the rescission application one of the appellants explained the personal circumstances of the appellants. Most of the appellants have resided in the property for a number of years

[1] [2010] ZASCA 28 (SCA).
[2] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 1.
[3] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 2.
[4] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 3.
[5] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 4.The Court referred to *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.

in overcrowded conditions. The appellants include children, disabled persons and households headed by women, but all the occupiers were poor and unable to find affordable alternative accommodation in the inner city.[6] The appellants explained that they had, unsuccessfully, taken steps to secure legal assistance to oppose the eviction application and the Court found that their explanation was reasonable.[7]

In order to succeed the appellants had to show that they had a bona fide defence to the plaintiff's claim. The appellants contended that the eviction order would render them homeless and in terms of sections 4(6) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[8] (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 sections 26(1) and 26(3) of the Constitution. Section 26(1) guarantees the right to have access to adequate housing, while section 26(3) ensures at least due process in eviction proceedings as the court must consider all relevant circumstances before granting an eviction order.[9] As part of the eviction proceedings, the courts can interpret section 26(3) to grant the occupier substantive tenure protection if the court finds that the eviction order would be unjust as a result of the occupier's weak socio-economic circumstances. The court would usually base its decision to grant substantive tenure protection on the occupier's personal circumstances.

Important to note at this stage, substantive tenure protection is different from procedural protection. The essence of substantive tenure security is generally to allow the tenant (or any occupier) to continue occupying the leased premises as a lawful occupier. Procedural protection is aimed at providing tenants with due process during eviction proceedings. Substantive tenure security entails that the tenant is protected from the possibility of eviction for consecutive periods. Procedural protection ensures that evictions take place in a just and equitable fashion. However, if the circumstances of tenant justify more stringent protection during eviction proceedings, then the courts can refuse to order eviction and allow the tenant to

[6] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 5.
[7] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) paras 6-8.
[8] Act 19 of 1998.
[9] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 9.

remain in the premises as an unlawful occupier. In such a case the court can use due process measures to grant the tenant additional substantive tenure protection. If a marginalised tenant has limited substantive tenure rights and faces eviction, the court can use the section 26(3) due process measures (the procedural safeguards) to grant the tenant substantive tenure security, usually by refusing to grant the eviction order.

The Court considered the constitutional duty of the state in light of the housing provision (section 26) and highlighted the importance of PIE as a mechanism that strives to give effect to section 26(3).[10] The Court emphasised the duty of the courts to consider all relevant circumstances before granting an eviction order and held that the high court failed to discharge its statutory and constitutional obligations. Although the high court was not informed of all relevant facts in order to make a just and equitable decision, it should have taken steps to obtain the necessary information.[11] In light of the appellants' personal circumstances, and specifically the fact that the eviction order might render the households homeless, the Court found that the appellants had established a bona fide defence with some prospect of success and therefore also succeeded to show good cause for a rescission order in terms of the common law.[12] The default eviction order was rescinded and the appellants were granted leave to oppose the eviction application.[13]

From the case it is evident that the substantive tenure rights of urban tenants are restricted by the common law, which provides them with weak tenure security. In terms of the common law the landowner in the case discussed above was entitled to unilaterally terminate the periodic tenancy at any point, for any reason, and the effect

[10] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA (SCA) 28 para 10.
[11] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA (SCA) 28 paras 11-15. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) the Constitutional Court held that the courts should ensure that they have the necessary information to adjudicate eviction cases. At para 32 Sachs J found that "[t]he obligation on the court is to 'have regard to' the circumstances, that is, to give them due weight in making its judgment as to what is just and equitable. The court cannot fulfil its responsibilities in this respect if it does not have the requisite information at its disposal … Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances."
[12] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA (SCA) 28 paras 16-17.
[13] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA (SCA) 28 para 18.

was that the appellants had to vacate the premises within three months, without any chance of having the justifiability of the eviction being considered on the basis of their personal circumstances or the effect that eviction would have on their lives.

The case illustrates the problem of insufficient substantive tenure security in the current South African landlord-tenant regime. As a result of the appellants' weak substantive tenure rights, the private landowner could effortlessly terminate the periodic tenancy and demand that the appellants vacate the residential property within a couple of months. When the respondent served the notice to terminate the lease the appellants' right to continue occupying their home immediately ceased to exist. The appellants occupied the premises in terms of a common law periodic tenancy, which provides weak substantive tenure security as the landlord is at liberty to decide when to terminate the lease, without consulting the tenants and without taking their circumstances into account. The appellants had no legal means to oppose termination of the tenancy. Once the lease ended the appellants became unlawful occupiers and as such their protection was restricted to due process in terms of PIE and section 26(3) of the Constitution.

Section 25(6) (read with section 25(9)) of the Constitution mandates the legislature to enact legislation that would provide legally secure tenure rights for a person or community whose tenure of land is insecure as a result of past racially discriminatory laws or practices. To date, the legislation promulgated as a result of these sections predominantly makes provision for tenure security in rural areas or for unlawful occupiers. The law is currently not providing any effective substantive tenure protection for urban black[14] tenants against termination of the tenancy, thereby restricting the protection they do enjoy to due process during the process of eviction, once the tenancy has been terminated. The question is whether the legislature has failed in its constitutional duty to enact legislation that would provide strengthened substantive tenure rights for urban black tenants.

In terms of the common law the landowner was entitled to an eviction order, but the Supreme Court of Appeal refused to approve the default eviction order, because it was not just and equitable in light of the occupiers' personal circumstances. The most important consideration was the fact that the eviction order

[14] The term "black" is used throughout the dissertation and refers to all racial groups other than white persons.

might have rendered the households homeless. The Court refused to approve the eviction order in consequence of the occupiers' socio-economic weakness. The Court provided the appellants with an opportunity to oppose application for their eviction, but the only basis for their opposition would be their personal circumstances and the fact that the eviction order might result in their homelessness. The procedural safeguards enshrined in PIE (and section 26(3) of the Constitution) ensure due process in eviction proceedings and the Court's interpretation of PIE temporarily protected the appellants (who form part of the group of most vulnerable occupiers in South Africa) from becoming homeless. The Court interpreted PIE, which gives effect to section 26(3), to grant the occupiers substantive tenure protection, because an eviction order would not have been just and equitable, based on the occupiers personal circumstances.

The Court had to prevent an unjust eviction, but was unable to provide the occupiers with a new tenancy. The occupiers' status changed from being lawful tenants to becoming unlawful occupiers and the Court was unable to delay or prevent this result, but the Court did grant the occupiers a certain level of temporary substantive tenure protection in their capacity as unlawful occupiers. This result was justified in light of the occupiers' socio-economic weakness rather than their race. The Court therefore interpreted PIE (and section 26(3)) to afford substantive tenure protection for marginalised occupiers, which is a form of class-related tenure protection afforded particularly to socially and economically marginalised occupiers of residential property. The appellants' lack of substantive tenure protection is evident in light of the decision, because the Court had to construe strengthened tenure protection as part of the procedural safeguards in order to suspend the eviction order. The circumstances of the appellants necessitated more stringent substantive tenure security, but this form of protection was unavailable.

The question is whether these occupiers should fight eviction in court, and the very real possibility of becoming homeless, whereafter the courts must decide how to accommodate such households (because they have a right of access to adequate housing (section 26(1) of the Constitution) during a period when South Africa is facing a housing crisis, or whether the legislature is not obliged to provide these occupiers with substantive tenure security. Should vulnerable households be afforded temporary tenure protection, based on overburdened due process

measures, or should such households occupy land with substantive tenure security? Importantly, procedural safeguards are not aimed at providing occupiers with substantive tenure security, substantive tenure rights should grant legally secure tenure by means of legislation.

If the legislature can strengthen the substantive tenure rights of urban tenants, specifically the more vulnerable tenants, then the possibility of eviction would diminish. If the tenancy could continue for consecutive periods and the urban tenant had the means to oppose termination of the tenancy, the tenant would enjoy substantive tenure security, because she would be protected against the possibility of eviction. The result would be to give effect to section 25(6), as strengthened occupation rights for all urban tenants would include previously disadvantaged households. It follows that if the tenant can oppose termination of the tenancy (instead of eviction), she would be able to continue living in the same dwelling and the right to have access to adequate housing (section 26(1) of the Constitution) would be given effect to. Section 26(1) of the Constitution is the housing provision and it states that "[e]veryone has the right to have access to adequate housing." Strengthened occupation rights for marginalised tenants would give effect to section 26(1) of the Constitution and it would also combat the housing shortage. Rental housing is a form of tenure that could help alleviate housing shortages, because the right to have access to adequate housing does not equate homeownership. The question is what the role of rental housing should be in light of the housing shortage and whether the government should use rental housing as a form of tenure that could alleviate housing shortages.

In order to ensure tenure security for tenants, the rights of property owners have to be restricted in accordance with the Constitution. A certain tension will evolve between the strengthened rights of tenants and the constitutionally guaranteed rights of owners (section 25(1) of the Constitution). The issue is how this tension can be solved within the constitutional framework.

1.1.2 The housing crisis: The role of landlord-tenant law

In the recent case of *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another*[15] the applicant was the owner of commercial property. The respondents had occupied the property for a number of years and paid rent.[16] The applicant served the occupiers with notices to vacate the premises and upon their failure to comply claimed an eviction order. The occupiers were living in extreme poverty, as the average household income was R790 per month and it was apparent that they would not be able to acquire affordable alternative accommodation in the Johannesburg Central Business District, where they were living and working at that time.[17] 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 to have access to adequate housing and the state's duty to introduce measures to give effect to this right (sections 26(1) and 26(2)); the National Housing Legislation (the National Housing Act 107 of 1997 and Chapter 12 of the National Housing Code); and the Prevention of Illegal Eviction from and Unlawful Occupation of Land 19 of 1998 (PIE).[18] The City claimed that it does not make available accommodation to persons evicted from privately owned land, because emergency housing is only made available to persons evicted from government land, and that it does not have the financial resources to provide housing to the respondents.[19] In response, the applicant introduced a new notice of motion seeking an alternative form of relief against the City, which consisted of an order that the City should pay "an amount equivalent to the fair and reasonable monthly rental for the premises should an eviction order not be granted."[20]

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[15] [2010] JOL 25031 (GSJ).
[16] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 10-13.
[17] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 14-15.
[18] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 22-24.
[19] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 4.
[20] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 6.

The question the court had to decide was whether private landowners could be compelled to provide housing for unlawful occupiers who are unable to acquire affordable alternative accommodation, or whether the state should be burdened with this duty.[21] The court discussed the state's duty to accommodate vulnerable occupiers (and thereby give effect to section 26 of the Constitution) in depth and concluded that in this case the City had breached its constitutional and statutory obligations. The court also emphasised private landowners' constitutional right not to be arbitrarily deprived of property without compensation[22] and concluded that the right to have access to adequate housing should not impose an obligation on private landowners to make their property available for this purpose.[23] The court took into consideration previous rent control legislation that restricted landlords' right to evict tenants from certain buildings without receiving any compensation. The court also referred to a common law principle according to which the courts can allow an occupier (after termination of the lease) "a period of grace within which to find alternative accommodation … [that] seems to have its foundation in the application of the court's entitlement to ensure real and substantial justice."[24]

In light of the importance of the right of access to adequate housing and its direct relationship with the right to human dignity;[25] the lack of urban housing stock for African people as a consequence of apartheid land laws, which forced African people to occupy dilapidated buildings in the inner city of Johannesburg;[26] and the responsibility of the state, and not private landowners, to introduce measures that would give effect to the right of access to adequate housing,[27] the court fashioned an order that provided relief for the unlawful tenants whose constitutional rights have

[21] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 6.
[22] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 93.
[23] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 96.
[24] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 102.
[25] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 114.
[26] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 114-117.
[27] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 127.

been breached.[28] The court held that the private landowner was entitled to an eviction order, although the eviction order was suspended until the respondents could find alternative accommodation, and the state was ordered to pay the applicant an amount equivalent to the fair and reasonable monthly rental of the premises until the occupiers vacated the premises.[29] The order follows the logic of the Constitutional Court in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*,[30] where the Court confirmed the decision in the Supreme Court of Appeal[31] that unlawful occupiers could remain on private land, until the state made alternative accommodation available, provided that the state pay compensation to the landowner for the period during which he was denied use of his land.

Similar to the previous case, the decision highlights the effect of vulnerable urban tenants' insufficient substantive tenure rights. The occupiers' personal circumstances and history of insecure tenure necessitated legally secure tenure, but in fact they occupied the land with insufficient substantive tenure security. The decision also highlights another problem, namely the South African housing crisis. In this case the private landowner was entitled to an eviction order in terms of PIE, but the court refused to grant the order, because it would have rendered the occupiers homeless. The court underlined the duty of the state to introduce measures that would give effect to the right of access to housing. Despite the City's duty to accommodate vulnerable occupiers who are facing homelessness, the obvious problem remained that the City did not have alternative accommodation available. The court was unwilling to grant the eviction order, because it would have resulted in vulnerable households becoming homeless and would therefore not have been just and equitable. Similar to the previous decision, the court refused to grant the eviction order based on the socio-economic weakness of the occupiers. Consequently, the court was forced to burden the private landowner with the temporary duty to make housing available for the occupiers, provided that the state had to pay compensation

[28] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 156. The court refers to *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 713 (CC) para 102.
[29] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 191, 194, 196.
[30] 2005 (5) SA 3 (CC).
[31] See *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

in the form of rental payments. The court had to balance the rights of both parties and therefore decided to construe some form of payment for the private landowner in return for allowing the unlawful occupiers to remain on the property on a temporary basis.

South Africa is facing a housing crisis and the state is obliged to introduce measures that would alleviate housing shortages. Section 26(2) of the Constitution mandates the state to introduce measures that would give effect to the right to have access to adequate housing. The state can introduce different forms of housing, including rental housing, for a range of households with diverse needs, to comply with this constitutional obligation. The case illustrates the problem of the housing shortage and the state's inability to make adequate housing available for homeless persons. As a result of the lack of housing options that are available and the state's inefficient policy to provide all homeless persons with homeownership, marginalised households are forced to live in informal settlements or are in fact homeless. Consequently, the role of private landowners is overemphasised. The case also illustrates this uncertainty regarding the obligation of private landowners to become involved in the provision of housing in future. The case furthermore highlights the undeveloped role of rental housing in the post-1994 dispensation. The question is what the role of landlord-tenant law should be in light of the housing crisis and whether private landowners should be encouraged, or compelled, to provide rental housing. Rental housing could help alleviate housing shortages, but the role of private landowners in the provision of rental housing is unclear. The role of the state in the provision of rental housing, or in encouraging the private sector to make available rental housing, is also unclear in light of the decision, although it is apparent that landlord-tenant law should play a role in the alleviation of housing shortages. The rental housing market in South Africa is diverse and all urban tenants are not entitled to the same level of tenure security. In terms of section 25(6) black urban tenants are entitled to legally secure tenure, while marginalised tenants could be afforded substantive tenure protection by the courts on the basis of their socio-economic weakness in terms of section 26 and PIE. The extent of substantive, and procedural, protection for different urban tenants is therefore also undeveloped and unclear. The detail regarding landlord-tenant law as a form of housing requires comprehensive consideration.

In order to formulate some answers to these questions and develop possible solutions to the identified problems in the current South African landlord-tenant regime, the methodology I use consists of three analyses, in three sections of the dissertation, namely a historical survey of tenure security in South African landlord-tenant law (Chapter 2); a post-1994 constitutional analysis of tenure reform in South African landlord-tenant law (Chapter 3); and a comparative study, including English, American and German landlord-tenant law (Chapters 4-7).

1.2 Demarcation of research field

1.2.1 Historical survey: The common law, rent control and apartheid

Chapter 2 provides a historical background of landlord-tenant law in South Africa since the beginning of the twentieth century, focusing on tenure security (and to some extent rent control) afforded to tenants by means of the common law and legislation. The Chapter is divided into three main sections, which respectively illustrate the initial common law position, subsequent legislative amendments and the eventual resurfacing of the common law position.

In consequence of housing shortages caused by the First and Second World War, the legislature promulgated anti-eviction legislation that restricted the common law rights of landowners to end the lease and claim eviction upon termination of the contractual tenancy. Urban white tenants were afforded substantive tenure security by these legislative interventions. Private landowners were deprived of their right to evict the tenant upon termination of the lease, because the lease continued by force of law with the aim to provide white tenants with substantive tenure security. In order to understand the impact of these measures, reference to the common law position is imperative, because the common law afforded insufficient substantive tenure rights. The common law mainly provided tenure security for tenants in three different situations, namely upon the death of either party; when the landlord became insolvent; and upon alienation of the leased premises. Post-war legislation extended this protection to other situations. The pre-1994 regulatory measures that imposed substantive tenure rights for white tenants were not aimed at promoting access to

rental housing. It ensured substantive occupation rights for tenants who were already occupying rental housing in the private market.

Racially discriminatory legislation was introduced by successive white minority governments since the beginning of the twentieth century. The occupation rights of black persons were regulated in terms of the racially discriminatory apartheid laws, which excluded them from the landlord-tenant legislation that afforded secure occupation rights, and some form of rent control, for white tenants. The racially discriminatory legislation made provision for the identification of certain racially defined areas for exclusive occupation by different racial groups. The occupation rights of black households in urban areas were weak and insecure, because they were only allowed in the urban areas on a temporary basis. This formed part of the government's policy to restrict the presence of black persons in the urban areas.

At the end of the 1980s the government decided to deregulate the private rental market, because the housing shortage for the white minority ceased to exist. When the Rents Acts were abolished, the common law position with regard to the termination of urban tenancies resurfaced, which was associated with weak tenure security for all urban tenants, irrespective of their race or socio-economic background. In terms of the common law the court does not have a discretion to refuse the eviction order on the basis of the tenant's personal circumstances. The Chapter concludes with the resurfacing of the common law at the beginning of the 1990s. The Chapter therefore explains the development of landlord-tenant law in South Africa, but it places emphasis on the different tenure rights of diverse categories of tenants during changing socio-economic circumstances. The substantive tenure rights of the white minority group are important to consider in light of the current absence of substantive tenure security for all urban tenants.

1.2.2 The Constitution: Tenure reform and access to housing

In the late 1980s the pre-1994 government was pressurised to introduce political and social transformation, which included land reform. The entire political, social, economic and legal field was re-evaluated and restructured in order to rectify the

imbalances of apartheid. The new government was adamant in its undertaking to rectify and transform the apartheid-type laws and this transformative goal is evident from the Constitution, especially with regard to the new values introduced in land law. Chapter 3 is a constitutional analysis of tenure reform, which forms part of the land reform programme, in the post-1994 landlord-tenant regime.

Section 25(6) of the Constitution makes provision for tenure reform and it states that a person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure that is legally secure. Parliament must enact legislation in order to give effect to this right (section 25(9)). The focus of the legislature has been to provide black rural occupiers with legally secure tenure rights. PIE (read in terms of section 26(3)) can be interpreted by the courts to grant substantive tenure rights for unlawful occupiers, including unlawful black occupiers, but the basis for granting substantive tenure rights is the socio-economic weakness of the occupier. The legislature has not enacted a law that affords substantive tenure protection for lawful black occupiers in urban areas. The current landlord-tenant laws, including the Rental Housing Act 50 of 1999 and the Social Housing Act 16 of 2008, are also not aimed at providing previously disadvantaged tenants with substantive tenure security, even though these households are entitled to legally secure tenure. The constitutional failure of the current landlord-tenant laws, especially with regard to previously disadvantaged individuals' right to occupy land with legally secure tenure (section 25(6)), is illustrated throughout this Chapter.

Section 26(3) of the Constitution is an important procedural safeguard for all persons facing eviction as it states that no person may be evicted from his home without an order of court made after considering all the relevant circumstances. Section 26(3) ensures due process during eviction proceedings, although it can also be interpreted by the court to grant strengthened tenure protection to occupiers. The interpretation of section 26(3) by the courts is discussed at length in Chapter 3 in order to determine in what circumstances the court would provide a tenant with increased tenure protection. The potential of this section in analysed through a case law discussion. The courts can interpret section 26(3) to grant the tenant substantive tenure rights, based on the personal circumstances of the tenant. One could argue that this section therefore amended the common law position, because at common

law the courts cannot refuse to grant the eviction order on the basis of the tenant's personal circumstances.

Sections 26(1) and 26(2) of the Constitution is the housing provision and it states that everyone has the right to have access to adequate housing and that the state must take measures to achieve the realisation of this right. An important consideration in the landlord-tenant framework is the success of the laws enacted to give effect to the housing provision and whether these laws afford *adequate* housing. The current landlord-tenant laws are not aimed at promoting increased access to rental housing that could help alleviate the housing shortage. The government has apparently not seriously considered the potential of rental housing as a form of tenure that could accommodate low income households. Nevertheless, Chapter 3 considers rental housing as a form of housing that could help alleviate housing shortages, although it follows from the analysis in Chapter 3 that it is doubtful whether rental housing would be able to provide marginalised households with *adequate* housing as long as it is associated with insufficient substantive tenure security.

The effect of the landlord-tenant legislation promulgated in terms of section 26 is analysed in Chapter 3 and the general conclusion is that the effect of the Rental Housing Act and Social Housing Act is insubstantial, because these statutes merely reinforce the common law, which is associated with weak tenure rights. The post-1994 landlord-tenant laws do afford some procedural protection, although one of the questions in Chapter 3 is whether these procedural amendments are sufficient in light of the constitutional goals and whether more radical changes regarding substantive tenure security are not necessary. The common law remains significant in the area of landlord-tenant law. The result is that urban tenants continue to occupy land with weak tenure rights, which is problematic in light of the new constitutional dispensation. The tension between the common law, Constitution and legislation is highlighted through a case law discussion, while the subsidiarity[32] approach is used to understand and apply the relationship between these bodies of law. However, application of the subsidiarity approach also identifies certain areas in the landlord-tenant framework that fail to give effect to the constitutional obligations. The most

[32] See Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *CCR* 77-128.

problematic area of law is the weak tenure rights of black and marginalised tenants. Black and vulnerable urban tenants still occupy land with insufficient tenure rights, because their occupation rights are primarily based on the common law and the current landlord-tenant laws (the Rental Housing Act and the Social Housing Act) merely entrenched the weak common law tenure rights. It is doubtful whether these areas of law could be developed in order to give effect to the constitutional obligations, because the essence of these laws is to provide tenants with weak tenure security, while the aim of the Constitution is to provide black and marginalised occupiers with substantive tenure security.

The pre-1994 legislature afforded tenants substantive protection in the form of continued occupation rights, while the current legislation focuses on ensuring due process in the event of eviction. The current landlord-tenant framework is therefore insufficient because it is not providing substantive tenure security. There is a need to create a secure form of tenure for the urban poor in order to adhere to the constitutional obligations. The questions are firstly, whether the legislature would be able to give effect to section 25(6) of the Constitution if it could provide legally secure occupation rights for urban black tenants who were previously denied any security of tenure and secondly, whether the government would be able to fulfil its constitutional obligation in section 26(1) if it made affordable rental housing available as a form of tenure for marginalised occupiers. These questions are further analysed and discussed in Chapter 3 with reference to the current landlord-tenant laws and case law.

1.2.3 Comparative analysis

The aim of Chapter 4 is to investigate and examine the English landlord-tenant system, especially in relation to tenants' tenure security, because it provides answers to numerous questions regarding the failure of the current landlord-tenant laws in South Africa to make available adequate housing and afford tenure security in accordance with the post-apartheid constitutional obligations.

The pre-1994 position in South Africa with regard to the reasons for regulation of the landlord-tenant relationship is comparable to the English position after the

Second World War. Housing shortages that developed in Europe as a result of the First and Second World War motivated the English legislature to enact legislation in order to grant substantive tenure rights for tenants, thereby statutorily interfering in the relationship between landlord and tenant. The aim of the pre-1994 South African statutes was also to grant continued occupation rights for tenants upon expiration of the lease, combined with rent control, although the position in the two jurisdictions were different. The Rents Acts in South Africa only afforded tenure security for white tenants, while the English landlord-tenant legislation applied (and still applies) to tenants according to the type of landlord, being either a social or private landlord.

The security principles underlying the English landlord-tenant statutes remained on the statute book for most of the twentieth century (during which period Britain also experienced economic prosperity) and some of these principles are currently still enshrined in the landlord-tenant regulatory framework, which is also different from the South African position. A significant difference between the two regulatory systems is that the English landlord-tenant system is differentiated in terms of different sectors that provide diverse levels of tenure security for various tenants.

Through the operation of these statutes, depending on the relevant sector, some urban tenants are practically enabled to enjoy a tenancy for life at reasonable rents, as some of the statutes also restrict the rent. All eviction proceedings are subjected to procedural controls that ensure due process and fairness. In some instances the court has a wide discretion to consider various circumstances, mostly related to the personal circumstances of the tenant and the impact that the eviction order might have on the tenant and his family.

The substantive tenure rights of English tenants and the procedural safeguards during eviction proceedings are analysed in Chapter 4 as a comparative jurisdiction, because the result of the English landlord-tenant laws is to allow certain tenants to continue occupying residential property for consecutive periods and enjoy tenure security. Throughout Chapter 4 the context-sensitivity of the English landlord-tenant scheme is emphasised, as it caters for most members of society while continually adapting the aim of the various statutes to respond to changes in the housing policy that reflect the socio-economic circumstances.

Chapter 4 is divided into five broad sections to a) explain the fundamental English leasehold concepts; b) describe the nature of a tenancy in English law, since the English land law system differs substantially from the South African one; c) clarify the importance of housing policy with regard to the extent of statutory intervention through legislation (this relationship has not received enough consideration by the South African legislature); d) discuss some of the policies that were introduced in English law and their effect on previous legislation and the rental housing market in general; and e) provide an in-depth discussion of the current statutes regulating landlord-tenant law in England and Wales, focusing on the level of tenure security afforded and, to a lesser extent, the limited use of rent control.

From Chapter 4 it appears that the English parliament has consistently adapted and developed an extensive landlord-tenant legislative scheme in line with changing socio-economic circumstances. Within this scheme, certain tenants enjoy strong tenure security associated with continued occupation rights, while others occupy residential property with hardly any security of tenure. One could argue that weak domestic occupation rights of tenants, in terms of the legislation, are not incidental, but rather the result of a conscious policy decision of parliament, because the extent of statutory tenant protection is a central aspect of housing policy and landlord-tenant law.

The English parliament has solely been responsible for formulating correct housing policies that reflect the housing needs of society and until 2000, when the Human Rights Act 1998 came into force, parliament could introduce housing policies and enact legislation that regulates the occupation rights of residential tenants, without restraint or approval by any other body of law. This position changed when the Human Rights came into force and made the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) applicable to English law.

The role of the Convention is similar to the South African Constitution 1996, as all law (common law and legislation) must be in line with the Convention. In terms of the Human Rights Act 1998 all “primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention

rights",[33] while "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right".[34] Where a landlord is a "public authority", it has to exercise his duties in compliance with the Convention, although where a landlord is a registered social landlord, the position is unclear. A "public authority" also includes a court or tribunal and any person whose functions are of a public nature.[35] The Convention right that has the most profound impact on the termination of lease relationships and therefore also the most profound impact on tenants' tenure security is article 8(1), which provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". Importantly, the right enshrined in article 8(1) is not absolute but qualified by article 8(2), which states that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of the … economic well-being of the country … or for the protection of the rights of and freedoms of others".[36] Apart from the complex statutory landlord-tenant scheme developed by the English parliament, various tenants have relied on article 8(1) for protection against eviction.

Chapter 5 considers English case law where the courts had to reconsider the domestic occupation rights of certain occupiers, including tenants, in light of article 8(1) of the Convention. From the case law discussion it is clear that the courts (in South Africa and the UK) are sometimes uncomfortable with establishing and upholding the hierarchy of laws and the case law discussed in Chapter 5 is therefore a useful comparative source if one considers different laws that address a legal issue, such as the tenure rights of tenants.

Judging from the case law, the relationship between the English common law, the domestic legislative scheme and article 8 of the ECHR, with regard to the protection of existing occupation rights (or interests) for tenants and unlawful occupiers, is complicated and fraught with uncertainty. The tension between these three bodies of law is similar to the position in South Africa, primarily because the English courts are also uncertain about the impact of the Convention (similar to the

[33] Section 3(1). This section is similar to section 39(2) of the South African Constitution, which states that "[w]hen interpreting any legislation, and when developing the common law … every court … must promote the spirit, purport and objects of the Bill of Rights."
[34] Section 6(1).
[35] Section 6(3).
[36] Bright S *Landlord and Tenant Law in Context* (2007) 610.

South African Constitution) on domestic law. The role of the Convention in the area of landlord-tenant law, and more specifically the occupation rights of tenants, is therefore to test whether the legislative scheme (rather than the common law) that was developed by parliament is in line with the rights enshrined in the Convention. The role of the South African Constitution is also to test the constitutional validity of the common law and legislation, but – as explained in Chapters 2 and 3 – the South African common law is more significant with regard to the eviction of tenants.

However, the South African Constitution also mandates the state to give effect to certain constitutional rights, including legally secure occupation rights for the previously disadvantaged majority group (section 25(6)), and the right to have access to adequate housing (section 26(1)). The aim of these provisions is to address the South African housing shortage, which is currently affecting numerous marginalised households who either live in informal housing or are homeless. It was previously mentioned that in order to give effect to these constitutional obligations in the landlord-tenant framework, the rights of private landowners must in some instances be restricted. All property restrictions must be in compliance with the property clause (section 25(1) of the Constitution), which guarantees that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." The imposition of strengthened tenure rights for tenants must therefore be justified and in compliance with the Constitution.

An important question is when the imposition of rent control (consisting of continued occupation rights for tenants and restrictions on rent increases) would be justified. The aim of Chapter 6 is to consider the justification for rent control in American landlord-tenant law. The law of New York State, and more specifically New York City, is used as a comparative jurisdiction, because New York State is one of the few US states where the courts have acknowledged a right to shelter and New York City has extensive rent control measures that provide tenure security for tenants. The United States Constitution protects private property, similar to section 25(1) of the South African Constitution, which also justifies American law as a useful comparative source.

The initial justification for regulating the private landlord-tenant relationship in the United States of America was similar to the pre-1994 South African position (and the initial English position) as it was based on extreme housing shortages that

resulted from the First and Second World War, which led to landlords exploiting the dire socio-economic circumstances by increasing rents. The United States Supreme Court repeatedly upheld the restriction on the right of landowners to evict tenants upon expiration of the lease as a constitutional regulation (and not a taking of property), because rent control was justified in light of the socio-economic circumstances. In due course, the majority of states abolished rent regulation, whereafter landlord-tenant law on evictions returned to the common law position, according to which the landlord could rely on summary eviction proceedings to evict the tenant once the lease had terminated. Generally, state intervention in the private landlord-tenant market is justified in the presence of a housing crisis, although rent regulation could also be justified where it is in the public interest for some other reason.

The State of New York, and more specifically New York City, initially introduced rent regulation measures in response to the extreme housing shortages that resulted from the war. The nature of the regulations changed throughout the post-war decades and transformed from being a broad-spectrum form of protection for countless New Yorkers towards being a form of social protection for a specific group of individuals in a specified area. The residential landlord-tenant system in New York City could be categorized into different sectors with different levels of tenure security. The private landlord-tenant relationship is currently still regulated quite extensively, with the aim to place restrictions on rent increases while providing security of tenure for a various group of tenants. Public rental housing is aimed at providing affordable, secure housing for households through the provision of either government housing or rental subsidies. The aim of public rental housing is therefore to increase access to affordable secure rental housing for marginalised occupiers. In New York City, funds are made available to not-for-profit companies to construct and in due course provide rental housing for low-income households. The cooperation between the government and private actors in the provision of low-cost rental housing is an important mechanism to help alleviate housing shortages.

The residential landlord-tenant system in New York City has developed and become increasingly complex over decades, since it is regulated by various laws that function on different government levels. Collectively, the laws make available secure homes to different members of society, although the laws that regulate the private

rental market are applied generally. These laws are therefore not context-sensitive in protecting only the vulnerable members of society, but apply to all households that occupy certain buildings in the private rental market. If landlord-tenant laws could grant secure occupation rights for tenants in certain dwellings, but the dwellings are accessible to all persons, then it follows that vulnerable households would be accommodated. In the South African context previously disadvantaged households are entitled to legally secure occupation rights (section 25(6) of the Constitution). If landlord-tenant laws could provide increased access to rental housing with substantive tenure rights for all persons, then previously disadvantaged households would be able to occupy rental housing with legally secure tenure.

The landlord-tenant system in New York City is indispensable as a comparable jurisdiction for a number of reasons. Collectively, the laws protect different households with diverse income levels, although the underlying aim could be to address the high percentage of homelessness in New York City, especially in comparison to other major cities. The continued imposition of rent regulation in the private rental market could therefore be justified in light of this socio-economic problem. The Supreme Court and other courts have found that the rent regulation laws are constitutionally justifiable. The courts have held that the restrictions placed on the common law rights of landowners must be considered within the specific socio-economic circumstances. These restrictions serve a legitimate public purpose in protecting tenants while balancing the interests of the parties. The regulatory systems in the private and public sector aim to provide protection for weak tenants, which form part of the public welfare. The courts have found that the public interest justifies some degree of public control in the sphere of rental housing.

Rent control is justified during emergency housing shortages, although it is also justified in New York City for other reasons, namely to prevent an increase in homelessness, which forms part of the public interest. Chapter 6 aims to explain the continued justification for rent control in New York City. From the Chapter it is evident that rent control is currently justified, because it affords substantive tenure protection for vulnerable tenants. The socio-economic weakness of some of the tenants in New York City justifies the imposition of rent control even though the rent control measures are applied generally.

In American law (and pre-1994 South African law) rent regulations are perceived as temporary measures that interfere with the strong common law rights of landowners with the aim to provide strengthened tenure rights for marginalised occupiers in times of extreme need or hardship.

In German law the justification for rent regulations is based on the importance of tenure security that enables tenants to participate in society, make their own decisions and achieve personal autonomy, which is a general rather than a temporary, emergency justification. Chapter 7 considers the role of landlord-tenant law in Germany since the beginning of the twentieth century. It highlights the German approach to the function of property and the importance of tenure security for tenants, which is different from the other comparative sources. German landlord-tenant law is an important comparative jurisdiction because it provides a different perspective in consideration of tenants' occupation rights as an essential human right. The exact balance between the constitutional rights of private landowners and tenants is analysed in Chapter 7 with reference to the German Civil Code, the German Basic Law and a case law discussion.

The German private rental housing market was subjected to state intervention since the outbreak of the First and Second World Wars in order to accommodate households in dire need of affordable housing. The initial introduction of tenant protection measures and rent control had detrimental consequences for landowners and the housing market in general, because it was disproportionate in relation to building costs and inflation. After the Second World War new rental housing measures were introduced that restricted the rights of landowners with the aim to accommodate tenants, but these measures were combined with state assistance in the form of public funds. These funds attracted private investment in the rental housing market, which resulted in an increase in residential property stock, while allowing rent control and tenant protection measures to continue. The aim of landlord-tenant laws in Germany was to provide tenants with substantive tenure security, while making available public funds that encouraged private actors to develop rental housing stock. Increased rental housing stock was as important as the strengthened occupation rights of tenants. The South African government has not introduced measures that encourage private actors to become involved in the

provision of affordable secure housing. This is problematic in light of the housing backlog.

Social housing made provision for affordable, secure rental housing combined with access control, in order to accommodate the more vulnerable and marginalised group of households. Currently, this form of housing is being phased out, because of the government's financing system.[37]

Landlord-tenant law in Germany is presently regulated in the Civil Code.[38] The Civil Code makes provision for tenant protection and restricts rent increases, although rent control as such has been phased out. The market is presently being deregulated, but security of tenure for tenants is upheld. These provisions apply to all tenants, irrespective of their income. However, where cancellation of the lease could cause a hardship for the tenant or a member of the tenant's household, the tenant can resist eviction on that basis. This provision indirectly ensures that vulnerable tenants are protected against unjustifiably harsh circumstances that result from eviction. The Civil Code specifically includes the example where a tenant would become homeless after cancellation as a form of hardship. The tenure protection measures for tenants in Germany is significant for the South African context, because it shows how all tenants could lease property with substantive tenure security, while providing additional tenure protection for some tenants who are in special need thereof. In the South African context not all tenants are necessarily in need of stringent tenure protection, although some tenants are entitled to legally secure occupation rights. The preferred landlord-tenant regime in South Africa should be context-sensitive to tenants' needs and therefore also flexible to the extent that it should be able to provide better tenure protection for some tenants than for others.

Throughout the twentieth century the provision of housing, and more specifically the protection of tenants' occupation interests in Germany, has developed from being a "public concern" towards becoming an interest that forms part of the general public interest. The public interest is protected in the German Basic Law to such an extent that it has to be weighed against the interests of

[37] Droste C & Knorr-Siedow T "Social Housing in Germany" in Whitehead C & Scanlon K (eds) *Social Housing in Europe* (2007) 90-140 at 93-95.
[38] *Bürgerliches Gesetzbuch (BGB)*. Landlord-tenant law is regulated in Book 2, Title 5 of the *BGB*.

property owners. In the landlord-tenant context the property rights of landowners are therefore constitutionally balanced with the socially protected interests of residential tenants.

In the American courts, including the United States Supreme Court, it has been argued that rent regulations amount to an unconstitutional taking of property, but in most cases these regulations have been upheld as constitutionally valid regulatory law because they are in the public interest. The German Federal Constitutional Court has also considered landlord-tenant disputes regarding rent regulations, although the German disputes have always concerned the extent of the regulations rather than the constitutional justifiability of these laws.

The German courts therefore have to consider whether the legislature correctly weighed up the interests of the parties when it regulates and determines the contents of property rights. The nature of residential property, and more specifically leased residential property, justifies strict regulation by the legislature because it serves a social function in the provision of housing. The social importance of the property providing housing to society might then outweigh the private property rights of landowners. However, the restrictions placed on the rights of landowners are not perceived as exceptional or emergency statutory interventions or interferences, as the tenant protection measures are included in the German Civil Code and therefore form part of the private law on a permanent basis.

1.3 A preliminary proposition

The social importance of residential property is recognised in most jurisdictions, especially when facing housing shortages, but the tension between the rights of landowners and tenants is perceived and analysed from different perspectives, which results in different landlord-tenant regimes. It is also clear that the role of landlord-tenant law, combined with better tenure security for tenants, is amplified during housing shortages, because the government can use rental housing as a form of housing to accommodate vulnerable occupiers, while regulating the occupation rights of such tenants. All the comparative jurisdictions highlight the relationship between increased housing shortages and the importance of the rental housing market as a form of housing that could help alleviate housing shortages. However,

substantive tenure security is mostly combined with measures that aim to increase access to rental housing.

In South Africa the current landlord-tenant regime has not transformed in line with the constitutional obligations as stated in sections 25(6) and 26 of the Constitution. The existing landlord-tenant laws, specifically the Rental Housing Act and Social Housing Act, are insufficient because the laws fail to provide substantive tenure protection for black and marginalised tenants. The current landlord-tenant laws also fail to promote access to rental housing as a form of tenure that could assist the alleviation of housing shortages. The existing landlord-tenant regime requires some well-considered changes in order to comply with the state's constitutional obligations and mandates. The substantive tenure rights of urban residential tenants should be strengthened, while the government should make available rental housing in order to give effect to the right of access to adequate housing.

My hypothesis is that the legislature should promulgate new landlord-tenant legislation that would provide substantive tenure rights for tenants, while placing restrictions on rent increases. However, the legislation must be context-sensitive to the extent that it should not necessarily grant equal tenure protection for all urban tenants, as all tenants are not entitled to the same level of legally secure occupation rights. Substantive tenure security could be improved by affording the tenant certain rights to continue the leasehold relationship after termination of the lease, while placing restrictions on the rights which the landlord normally would have had at common law to end the relationship. In order to alleviate housing shortages the government must become actively involved in the provision of public rental housing. This form of housing must accommodate low-income households. However, the government must also encourage private actors to become involved in the provision of housing by making available public funds. This form of housing should function as social housing and the government must be involved in the provision of social housing. Social housing should generally be associated with substantive tenure rights, which would result in restrictions placed on private landowners' right to evict tenants. Landlord-tenant law must be differentiated in terms of housing sectors that afford different levels of tenure security to various households. These sectors should

be regulated in order to give effect to the constitutional obligations, while responding to changing socio-economic circumstances.

The constitutionally guaranteed rights of property owners have to be restricted if the tenure rights of tenants are strengthened, which will result in a tension between the improved rights of tenants and the well established rights of land owners. Such a tension can successfully be dealt with by introducing new legislation that balances the rights of property owners and tenants within the constitutional framework.

In order to efficiently promulgate new landlord-tenant legislation it is essential that consideration be given to previous South African legislation, which awarded tenure security for tenants in urban areas during housing shortages. English, American and German landlord-tenant legislation afforded similar tenure protection for tenants during housing shortages. An important consideration from English law is the context-sensitivity of the entire landlord-tenant regime, as it provides different levels of tenure security to different households with diverse needs. The imposition of strengthened occupation rights for tenants has to be justified, which is explained by analysing the American, and more specifically New York City, landlord-tenant laws and rent control jurisprudence. The German courts have also upheld rent control as constitutionally valid, although the courts' perception of tenants' interests and the function of property is an important consideration to determine how to balance the rights of tenants and private landowners. The German approach regarding the alleviation of housing shortages is also important to consider in light of South Africa's housing crisis.

2. Historical Survey of Tenure Security in South African Landlord-Tenant Law

2.1 Introduction

The purpose of this chapter is to provide a historical background of landlord-tenant law in South Africa since the beginning of the twentieth century, focusing on tenure security (and to some extent rent control) provided for tenants by means of the common law and legislation. In consequence of socio-economic developments that encouraged policy changes, the legislature at various times promulgated anti-eviction legislation that restricted the common law rights of landowners. These statutory amendments were initially inspired by housing shortages caused by the First and Second World War. The legislation restricted landlords' common law grounds for termination of tenancy and in some cases forced landlords to adhere to the lease when the contract had already expired. The effect of the legislation was to afford tenants substantive tenure security.

[1] Landlords were in fact deprived of their right to evict the tenant upon termination of the lease. The result was that eviction became impossible because the lease continued by force of law. In order to understand the impact of these measures, reference to the common law position at various points in time is imperative. The socio-economic conditions constantly changed from 1920 until 1990 and the legislature adapted landlord-tenant legislation accordingly.

The political conditions also changed during this period. Successive white minority governments introduced racially discriminatory legislation since the beginning of the twentieth century. The legislation made provision for the identification of certain racially defined areas for exclusive occupation by different racial groups. In due course, black persons were compelled to occupy dwellings in the defined locations. Their occupation rights in urban areas were weak and insecure, because black persons were only allowed in the urban areas on a

[1]Substantive tenure protection is different from procedural protection, because the essence of substantive tenure security is generally to allow the tenant to continue occupying the leased premises as a lawful tenant, while procedural protection is aimed at providing tenants with due process during eviction proceedings. Substantive tenure security entails that the tenant is protected from the possibility of eviction for consecutive periods. Procedural protection ensures that evictions take place in a just and equitable fashion. However, if the circumstances of the tenant justify more stringent protection during eviction proceedings, then the courts can refuse to order eviction and allow the tenant to remain in the premises as an unlawful occupier. In such a case the court can use due process measures to grant the tenant additional substantive tenure protection.

temporary basis. The group areas legislation identified parcels of land for the occupation of members of specified racial groups. The black (and to a certain extent also the coloured) population group was obliged to occupy the identified parcels of land set aside for them. Their occupation rights were also regulated under these laws, which excluded them from the landlord-tenant legislation that afforded secure occupation rights and some form of rent control for white tenants. This formed part of the government's policy to control the occupation rights of non-white[2] persons in order to restrict their presence in the urban areas. The racially discriminatory legislation and the impact it had on the occupation rights of non-white persons is referred to in various sections of the chapter, because the majority of the statutes made provision for public sector tenancies.

The chapter is divided into three main sections which respectively illustrate the initial common law position, subsequent legislative amendments and the resurfacing of the common law position. The common law mainly provided tenure security for tenants in three different situations, namely upon the death of either party; when the landlord became insolvent; and upon alienation of the leased premises. Although these events seemed quite unrelated they all occurred during the lease. The common law thus focused on keeping the relationship between the parties intact as long as the lease still existed, assuming that the relationship between the parties ceased to exist when the lease ended.

In contrast with the common law, the various statutory amendments overrode the contract in order to provide security of tenure for tenants upon termination of the lease. The legislative amendments fitted uneasily with the common law rights of landowners because ownership was still perceived as inherently unrestricted. The anti-eviction legislation restricted the institutional domination of landownership[3] over tenants' interests in residential and commercial property. Landowners found it difficult to accept these legislative changes and assumed that the measures were exceptional, expecting that the common law position would resurface once the

[2] The term "non-white" is used throughout the chapter and refers to all racial groups other than white persons. The reason for the use of this term is to simplify the explanation of the tenure position of the racial group in question, as the group of persons referred to as non-white includes all race groups other than white persons. This term was used in the apartheid statutes, although the legislature later defined the rights of different racial groups in relation to their skin colour, such as black and coloured. The term "black" is used in the other chapters and refers to all racial groups other than white persons.
[3] Van der Walt AJ *Property in the Margins* (2009) 78.

housing shortages came to an end. Judges also found it difficult to respond to these socio-economic changes, as appears from their unwillingness to restrict the rights of landowners any further than the applicable legislation clearly required. The chapter concludes with the resurfacing of the common law at the beginning of the 1990s, associated with weak tenure security for tenants and dominant rights of landowners.

2.2 Common law

2.2.1 Lease and ownership

A contract which entails that one party agrees to grant another the use of his immovable property, while the other party agrees to pay a price in return, is known as a lease. This term, originally borrowed from English law, was in common use in South Africa since the beginning of the twentieth century. The parties, known as landlord and tenant (terms also adopted form English law), had to agree on at least the object of the contract, the identified property as well as the fixed rent in order to constitute a valid lease.[4] The parties acquired contractual rights[5] against each other, but they also became subject to certain duties.[6]

The validity of the lease was not subject to an agreed period of time, although the duration of the lease usually took one of five forms, namely that the lease would (a) continue for a definite period of time; (b) continue until a certain event took place; (c) run from period to period; (d) expire at the will of the landlord, or (e) expire at the will of the tenant.[7] In the case of a lease for a definite period (later known as a fixed-

[4] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 1-2.
[5] In the case of a short term lease the lessee would acquire a personal right. However, if the parties entered into a long-term lease, the lease could be registered and the lessee would then acquire a real right. Short term residential leases therefore provide the lessee with a contractual right. For a more detailed discussion on the rights of tenants, especially in relation to impact of registration and the *huur gaat voor koop* rule, see section 2.2.2 below.
[6] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 7. The duties of the lessor would generally include the duty to deliver the thing to the lessee that would enable the lessee of immovable property to take occupation, to maintain the premises and to ensure the lessee's undisturbed possession. The lessee is obliged to pay the rent, to take proper care of the thing and to restore the property to the landowner upon termination of the lease: Kahn E, Havenga M, Havenga P & Lotz J *Principles of the Law of Sale and Lease* (1998) 53-74.
[7] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 36. For present purposes only two forms will be discussed, namely (a) the lease for a definite period and (c) the lease that ran from period to period, because the impact of the relevant legislation which provided security of tenure could be best

term tenancy), the lease terminated, under common law, *ipso jure* upon expiration of the agreed period.[8] A lease that ran from one period until another, also known as a periodic lease, continued, under common law, for consecutive periods until it was terminated by notice given by either party.[9]

The initial position stated by Wille was that the tenant had a duty to vacate the leased property upon termination of the lease. Once the temporary use right of the tenant ceased to exist, the landlord's strong right to exclusive possession entitled him to reclaim his property. If the tenant refused to vacate the property, the landlord was not entitled to take the law into his own hands and forcefully remove the tenant. If the landlord took the law into his own hands and illicitly ejected[10] the tenant he not only committed an act of spoliation but the tenant could also claim damages for loss caused to his personal property.[11] If the tenant remained in occupation after the lease terminated, he was said to hold over and could be ejected by means of a court order in addition to being held liable in damages if the landlord sued in delict for violation of his ownership rights.[12] During this period ownership was regarded as being inherently unrestricted,[13] which could have assisted the owner in the case of a tenant holding over, providing the owner with a strong right to reclaim his property.

At the end of the nineteenth century, academic writers such as Savigny and Windscheid described private ownership as the "unrestricted and exclusive domain over property", although it could "tolerate" restrictions.[14] This concept of ownership

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explained with reference to these two positions. The foreign landlord-tenant law chapters primarily refer to these two forms.

[8] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 36.

[9] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 37.

[10] The term "eject" is used throughout this chapter, because it was mostly used in the pre-1994 legislation and literature. The meaning of "eject" is analogous to "evict".

[11] Wille G *Landlord and Tenant in South Africa: A Treatise on the Law of Lease, or Letting and Hiring of Immovable Property in the Cape Colony, the Transvaal, Natal and Orange Free State* (1910) 474-476.

[12] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 248.

[13] Visser DP "The Absoluteness of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39-52 at 47.

[14] Visser DP "The Absoluteness of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39-52 at 47. This view was to a certain extent adopted by Wessels J in *Johannesburg Municipal Council v Rand Townships Registrar and Others* 1910 TS 1314 at 1319 and confirmed by Steyn CJ in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 106. In the later case of *Gien v Gien* 1979 (2) SA 1113 (T) 1120C Spoelstra AJ confirmed that ownership is the most complete right that an individual can have in relation to a thing and that the starting point in any dispute relating to the right of the owner is that the owner of land can do on his property whatever he likes. However, the court also acknowledged that this definition is a misnomer, as the owner must exercise his rights in accordance with the law. Ownership is the most complete right that an individual can have in relation to a thing, even though it is not absolutely unrestricted. See also Van der Walt AJ "Gedagtes oor die

as an absolute right found its way into South African law during the twentieth century.[15] However, in reality civil-law private ownership has always been affected by the changing needs and perceptions of society and by social, economical, political and cultural factors.[16] The economy does not only influence society's perception of private ownership but also justifies restrictions resulting from state action such as the allocation of housing, in that economic and other policies inevitably affect the regulation of private property.[17]

A market-orientated economy would idealise private ownership for all citizens, but economic realities reveal the impossibility of such a model. In order to provide housing for all citizens, the law introduces institutions that separate legal title from the beneficial/enjoyment components of ownership, the contract of lease being one of these institutions. The rent agreed upon would be the result of the relation of tension between supply and demand,[18] although state interference has become an ever present reality in market economies. State interference takes place when it becomes apparent that the public interest demands intervention in the process of supply and demand. Excess demand for rental housing in relation to insufficient supply will result in an increase in rent. By means of legislation, the state can intervene in the market and place restrictions on rent (known as rent control) and on the right of landlords to evict tenants. Rent control "usually originates when war or

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Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip" (1988) 21 *De Jure* 16-35, 306-325 at 17; Van der Merwe CG *Sakereg* (2nd ed 1989) 169; Van der Merwe CG & De Waal MJ *The Law of Things & Servitudes* (1993) para 104; Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 657-699 at 695-696.

[15] Visser DP "The Absoluteness of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39-52 at 46-47.

[16] Visser DP "The Absoluteness of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39-52 at 47.

[17] See Chapters 4, 6 and 7 for examples in England and Wales, America and Germany where housing shortages justified (and in some countries still justifies) the regulation of private property.

[18] According to Hirsch WZ *Law and Economics: An Introductory Analysis* (1979) 44-45 rent is different from the price per unit of goods. Instead of speaking about the price per unit, economists use the abstract term "housing service units" and the rent would be the price of such a unit. A dwelling, being housing stock, is defined as an ever-changing concept which represents the flow of housing services. The flow of housing services is difficult to define because it is a heterogeneous concept, which is why it is even more difficult to measure the quantity of housing services delivered by one dwelling during a certain period of time. The particular features of a certain dwelling, such as size and location, are seen as distinct economic commodities. By combining all these commodities within the dwelling, we arrive at the concept of housing services. When these commodities change, the goods consumed by the occupier (or consumer) also change. One can conclude that a better allocated, larger dwelling would in effect deliver more housing service units, offering higher quality to the occupier (or consumer). The outcome would be higher rent paid by the consumer for the higher quality housing service. See Hirsch WZ *Law and Economics: An Introductory Analysis* (1979) 45-59 for detail on the interaction between supply and demand in the rental housing sector.

emergency conditions suspend the normal operation of market forces."[19] One can thus conclude that, regardless of the domination of ownership over other interests in land and its resistance against statutory intervention, "governments routinely use (and have always used) legislation to amend or regulate the hierarchical domination of property ownership in response to social, economic and political circumstances and requirements. One significant example of such intervention is the embodiment of anti-eviction policies in legislation".[20] In the landlord-tenant framework, these interventions usually take the form of rent control and increased tenure security.

Over the years, various South African governments enacted a range of statutes to protect insecure tenure rights of tenants and to place restrictions on rent,[21] although the common law still applied where a tenant did not comply with the statutes.[22] The common law did provide tenure security for tenants, although the extent of protection was limited. The common law focused on the enforcement of the lease in order to preserve the relationship between the parties for the duration of the lease. The common law also allowed substitution of parties in certain circumstances in order for the lease to continue. The essence of the common law was to give effect to the full period of the lease.[23] The common law did not make provision for continued occupation rights upon termination of the lease; such protection was provided for by the legislature.[24]

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[19] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 349. Visser mentions how different countries impose restrictions on rent but the general effect of rent control is that the state can limit the freedom of a lessor to set rent levels. Hirsch WZ *Law and Economics: An Introductory Analysis* (1979) 64 is of the same opinion where he states that rent-control ordinances can take various forms in order to assist low income tenants, although the general effect of these measures is to reduce the landlord's freedom to set rent levels. According to Penny P "Rent Control" (1966) 83 *SALJ* 493-502 at 494 only abnormal economic conditions can justify the implementation of rent control by the state. The author mentions how these abnormal economic circumstances could interfere with the law of supply and demand with regard to space, implying market failure. Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 352-353 argues that justification for state intervention by means of rent control is context sensitive, stating that in some circumstances justification could be more acceptable that in others. Market failure is therefore justification for state interference, although Radin introduces morality considerations in a context-sensitive background. This concept will be discussed in future Chapters.

[20] Van der Walt AJ *Property in the Margins* (2009) 78.

[21] The South African rent legislation is discussed in section 2.3 of this chapter.

[22] The following discussion provides an overview of the common law in relation to landlord-tenant law for the greatest part of the twentieth century. The discussion therefore covers the initial common law position and later amendments.

[23] See sections 2.2.2 and 2.2.3 later in this chapter for an explanation of these common law measures.

[24] See section 2.3 of this chapter for a discussion of South African rent legislation.

Where the lease expired and the tenant did not comply with the legislation (which ensured for continued occupation rights upon termination of the lease), the owner could rely on his right of ownership and make use of the *rei vindicatio* to reclaim possession.[25] The *rei vindicatio* is to date generally available to an owner and could be instituted against any person who is in possession of the owner's property. If the owner institutes the *rei vindicatio* to reclaim immovable property, the owner would generally apply for an eviction order. The owner must prove that he is the owner; that the property still exists and is identifiable; and that the defendant is in possession of the property at the time when the action is instituted. The defendant can raise three defences, namely that a third party is the owner; that the property is destroyed; or that he has a right to possession.[26] Where the landlord proves the above-mentioned requirements and institutes the *rei vindicatio* against the tenant, the onus would be on the tenant to prove that he had a right of occupation.[27] If the tenant is unable to allege and prove a right of occupation, he is in breach of contract because the tenant's right to use and occupy the property ended upon termination[28] of the lease, whereafter he is required to restore the property to the landlord. Apart from demanding return of the property, the lessor could claim damages for the value of the use and enjoyment of the property for the period the lessee unlawfully occupied the premises.[29] The amount of damages was initially determined by the primary residual rule, formulated by Corbett JA in the case of *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd*,[30] where he stated that "the fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly

[25] According to Kerr AJ *The Law of Sale and Lease* (1984) 269 the lessor could reclaim the property and rely on his rights as possessor if he was not the owner. Kerr relied on *Pretoria Stadsraad v Ebrahim* 1979 (4) SA 193 (T) 195G-196D, where Spoelstra AJ found that the landlord, who was not the owner of the leased property but rather the lessee, had possession and a possessory right. The lessee sublet the property and temporarily gave his right of possession to the sublessee. When the sublease terminated, the limitation that the sublease placed on the lessee's possessory right disappeared and the lessee once again had a right to possession. According to Spoelstra AJ this justified cause of action for an ejectment order, except if the sublessee had a stronger right which he could prove in court. This position was initially introduced by English law and its feasibility is debatable in the South African context.

[26] Van der Merwe CG & De Waal MJ *The Law of Things & Servitudes* (1993) par 183.

[27] *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

[28] The lease automatically terminated by effluxion of time in the case of a fixed-term tenancy. A periodic tenancy could be terminated by either party by serving reasonable notice to the other party. Reasonable notice depended on the discretion of the judge or local custom. See Kerr AJ *The Law of Sale and Lease* (1984) 181-182, 310-311.

[29] Kerr AJ *The Law of Sale and Lease* (1984) 268-270. The claim was based on breach of contract.

[30] 1977 (3) SA 670 (A) 687C.

performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party".[31]

In the later case of *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd*[32] Nestadt J found that, in the case of holding over, the landlord would be entitled to an amount of damages which represented the difference between the current position of the landlord and the position had there been no breach. Apart from that, the court found that any court must consider both the detrimental and beneficial consequences the landlord experienced from the breach.[33] Cooper mentions that a tenant who wilfully holds over commits an *injuria* and could be held liable for exemplary damages.[34] The landlord is not allowed to charge rent instead of damages for the holding over period, because the contract came to an end and therefore the obligation to pay rent also ceases to exist.[35]

Apart from the strong right of the landowner to reclaim his property upon termination of the lease, the common law did provide short term tenants with security of tenure throughout the twentieth century. However, the extent of tenure security was limited, because it occurred in one of three incidences,[36] namely where the landlord sold the property to a third party, where the landlord became insolvent and where the tenant died during the lease.

[31] According to Kerr AJ *The Law of Sale and Lease* (1984) 272 the general rule was that the lessor could rather claim damages than rent for unlawful occupation.
[32] 1985 (1) SA 248 (W).
[33] *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) 253A-C. Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 374 mentions that the landlord's claim for damages could consist of the value of the use and enjoyment for the holding over period, what the landlord had to disburse and his loss of profits. See Kerr AJ & Harker JR "Damages for Holding Over. The Rule on Mitigation of Loss" (1986) 103 *SALJ* 176-184 for a discussion on the *Sandown* case. At 177 the authors point out that the "normal" measure for damages is the market rental value for the premises during the period the tenant held over.
[34] Cooper WE *Landlord and Tenant* (2nd ed 1994) 234.
[35] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 377-378.
[36] One should note that the three incidents only applied to short term tenants. Long-term leases were generally registered and provided tenure security to long-term tenants in itself, because these tenants acquired real rights and did therefore not require additional protection.

2.2.2 Huur gaat voor koop

In cases where the landlord sold the property, the common law protects the tenant by way of the the *huur gaat voor koop* rule,[37] which was adopted in South Africa at the end of the eighteenth century.[38] The rule literary means "lease takes precedence over sale", which implies that the tenant can continue to occupy the leased premises upon alienation of the property if he continues to pay the rent. It is therefore required that the tenant is in occupation of the premises at the time when the landlord alienates the property. The purchaser is prohibited from terminating the tenancy and evicting the tenant other than on the terms of the lease between the tenant and the original owner.[39] The purchaser in fact replaces the existing owner and acquires all the rights and obligations of the original lessor. The purchaser therefore entirely substituted the previous owner with regard to the contractual relationship with the tenant.[40]

In the case of *Mignoel Properties v (Pty) Ltd v Kneebone*[41] Friedman AJA found that the previous owner would *ex lege* be replaced by the purchaser. Accordingly, no cession of rights or assignment of obligations was necessary, which meant that the original contract continued.[42] The purchaser accordingly stepped into the shoes of the previous owner and obtained the rights and obligations of the lessor.[43] In consequence of this rule, tenure security was afforded to tenants in

[37] See section 7.3.2.2 in Chapter 7 for similar tenant protection in German law.
[38] In the case of *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 931H the Court (Appellate Division) referred to the *locatio conductio rei* in Roman law. Such a contract merely conferred a personal right on the lessee and not a real right. The contractual relationship existed between landlord and tenant, which meant that third parties were not bound by the lease. In the event of a sale, the purchaser could accordingly end the tenancy and evict the tenant. As a result of the tenant's weak tenure security, in the event of alienation of the premises, the law adopted the rule *huur gaat voor koop* in certain parts of the Netherlands and the principle became part of Roman-Dutch law. The rule applied to land and houses, granting occupying tenants real rights. The rule was adopted in South Africa and applied to land and buildings: *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 932D-G. According to Kritzinger KM "May a Lessee Discontinue the Lease on the Sale of the Leased Property? Is Genna-Wae here to Stay?" (1994) 111 *SALJ* 221-232 at 222, the *huur gaat voor koop* rule "is not based on legal principle but is merely an expression embodying the general effect which custom and legislation had introduced into the law governing the lease of lands and houses."
[39] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 932D-G.
[40] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 932G-H. This was confirmed in *Sasfin Bank Ltd v SOHO Unit 14 CC t/a Aventura Eiland* 2006 (4) SA 513 (T) 520C-D; *SAB Ltd v Van Zyl* 2006 (1) SA 197 (SCA) 201F-G.
[41] 1989 (4) SA 1042 (A).
[42] *Mignoel Properties v (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) 1050J-1051B.
[43] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 932G-H.

general and not by means of legislation applicable at the time.[44] It is also important to note at this stage that the *huur gaat voor koop* rule enabled the lessee to continue occupying the leased premises upon sale of the property and that this right was only enforceable against the purchaser. The rule therefore made an exception to the general rule that a tenant with a personal right could only enforce his right of occupation against the landlord. The rule was an exception, because the tenant could enforce his right of occupation against a third party, although limited to one party, namely the purchaser. The only requirement for the rule to apply was that the tenant had to occupy the premises, but mere occupation did not grant the tenant with a real right.

The common law differentiated between long and short leases in order to determine whether a purchaser would be bound by the lease.[45] In the case of a short lease, the initial opinion raised by Wille was that a purchaser would be bound by an oral short lease if he either had notice of the lease or if the tenant was in occupation of the property. Where the tenant of a short lease did not occupy the leased property and the purchaser did not have notice of the lease, but the lease was in writing, the law was uncertain. According to Wille, Grotius stated that the lease conferred a real right upon the tenant, which might have led to the conclusion that due to the fact that the short lease was never registered, possession by itself could confer this real right on the tenant.[46] At a later stage, Kerr[47] argued that a lessee occupying leased property under a short term tenancy was protected from ejectment upon the sale of the property by means of the *huur gaat voor koop* rule, if such a lessee was in occupation of the property. If the lessee was not in occupation and the purchaser

[44] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 79.
[45] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 77. Leases for less than ten years were known as short leases while leases for ten years or more were known as long leases or leases *in longum tempus*. Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 131 differentiates between real and personal rights and concludes that a registered long lease conferred a real right on a lessee while if the lease was not registered, the lessee would have a personal right. In the case of a short lease Wille stated that the lessee obtained a real right if he received occupation of the property. This view was contested by later authors as discussed later in this chapter.
[46] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 79-83. In Wille G *Landlord and Tenant in South Africa* (4th ed 1948) 89 the author departed from this view and argued that if the lessee was not in occupation of the leased property and the purchaser was unaware of the lease, the lease was not binding on the purchaser, whether the lease was in writing or not. The author also stated that if the first-mentioned scenario (the 1927 opinion) was the case, the tenant would be awarded a "preferential right to performance of his contract, to claim occupation of immovable property, against all successors of the landlord. In other words the lessee would obtain a real right by virtue of a contract alone without any additional act or proceeding. This proposition is contrary to the elementary principles of our law."
[47] Kerr AJ *The Law of Sale and Lease* (1984) 278.

had knowledge of the lease, the purchaser or gratuitous successor (a successor who gave no value for the item)[48] of the lessor would be bound by the lease.[49]

Uncertainty with regard to the position of the short-term tenant in the case where the property is sold to a third party developed from the unresolved question regarding the rights of tenants. According to Kerr (and various other authorities) a short-term tenant had to occupy the premises in order to acquire a real right.[50] The principle with regard to the acquisition of a real right by a tenant was introduced in the early case of *Green v Griffiths*,[51] where the court found that the lessee of immovable property acquired a real right through occupation or by means of registration.[52] The court referred to English law, although the relevant section discusses the position relating to the transfer of rights and obligations. The court could therefore have been influenced by the English position, where a lessee acquires a real right without registration; in English land law this is possible as a result of the system of estates in land.[53] Van der Merwe mentions that the mere contractual agreement between landlord and tenant is not sufficient to grant the tenant a real right, although once the tenant takes occupation (*besitsverkryging*), he acquires a real right in terms of the *huur gaat voor koop* rule.[54] If this argument was accurate it would follow that the tenant would be able to enforce her real right against third parties, including purchasers. The question whether the purchaser had knowledge of the tenancy would also become irrelevant.

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[48] Kerr AJ *The Law of Sale and Lease* (1984) 185. An heir or legatee would be classified as a gratuitous successor.

[49] As a result one can confirm that the position, as set out by Wille with regard to successors, was unchanged.

[50] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 384. Cooper WE *Landlord and Tenant* (2nd ed 1994) 277 agrees with Kerr and refers to numerous decisions in support of this view. In *Kessoopersadh v Essop* 1970 (1) SA 265 (A) 278F-279 Rabie AJ stated that a short term lessee of immovable property acquires a real right through occupation. Fourie JSA "Saaklike Regte by Huur en Onderhuur" (1978) 41 *THRHR* 299-306 at 300 also agrees with this view where he stated that the real right of the lessee would be transferred to a new lessee in the event of cession. The mere occupation would therefore grant a real right to the new lessee.

[51] (1885-1886) 4 SC 346 at 351.

[52] The discussion of long leases follows in the next section, which includes a discussion on registration of leases.

[53] See a discussion on English land law, and more specifically English landlord-tenant law, in Chapter 4. In English law a term of years absolute is known as a lease and is an estate in land for a fixed period. A term of years absolute is a proprietary interest in land: Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 306.

[54] Van der Merwe CG *Sakereg* (2nd ed 1989) 597.

A couple of authors[55] disagree with the argument that mere occupation granted the short-term tenant a real right and contend that registration is necessary to afford the tenant a real right, even though registration is unlikely in the case of short term tenancies. Lewis argues that if the tenant acquires a real right through occupation, section 16 of the Deeds Registries Act 4 of 1937 would be pointless because it provides that no real right may be conveyed from one person to the other without registration.[56] Sonnekus raises the question regarding the position of the tenant where he occupied the property and attained a real right but thereafter left the property. The question then is whether the real right, which he acquired through occupation, changed back to a personal right which he had before occupation.[57] One can conclude that Sonnekus and Lewis agree on this point, namely that a short term lessee cannot acquire a real right purely on the basis of occupation, even though he is protected by the *huur gaat voor koop* rule.

The purpose of the *huur gaat voor koop* rule would be questionable if one agreed with Kerr and Van der Merwe. If tenants acquired limited real rights through occupation and could consequently enforce the lease against third parties, what would the use of the *huur gaat voor koop* rule be?[58] Occupation is an important requirement for the application of the *huur gaat voor koop* rule, but it does not afford the tenant with a real right. Tenants who occupy property under short leases are protected by the *huur gaat voor koop* rule exactly because these leases are usually not registered and therefore do not afford them real rights.[59] The essence of the *huur gaat voor koop* rule is to provide tenure security for tenants against purchasers, because the right that tenants usually acquire, being a personal right, would not enable them to enforce the lease against a purchaser (third party). The *huur gaat voor koop* rule was developed as an exception to protect tenants and it is therefore doubtful whether this rule could provide a tenant with a real right that would be enforceable against all third parties. The logic of the rule is similar to legislation that aims to protect weaker parties by suspending the workings of the common law at a

[55] Lewis C "Real Rights in Land: A New Look at an Old Subject" (1987) 104 *SALJ* 599-615; Sonnekus JC "Herklassifisering van die Aard van die Huurder se Reg" 1987 *TSAR* 223-236.
[56] Lewis C "Real Rights in Land: A New Look at an Old Subject" (1987) 104 *SALJ* 599-615 at 600.
[57] Sonnekus JC "Herklasifisering van die Aard van die Huurder se Reg" 1987 *TSAR* 223-236 at 228.
[58] See fn 38 above concerning the implementation of the *huur gaat voor koop* rule and the initial purpose thereof.
[59] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 431-432. See also Van der Walt AJ *Property in the Margins* (2009) 116.

specific period in time and for a particular situation. The remaining question is whether this suspension of the common law is justified.

The common law rule is that a short-term lease creates creditor's rights (personal rights) and that the tenant can only enforce this right against purchasers in two cases, namely where the new owner was aware of the lease (in terms of the doctrine of notice) and on the basis of the *huur gaat voor koop* rule.[60] The *huur gaat voor koop* rule is therefore applicable in cases where the purchaser was unaware of the lease. If tenants did acquire real rights through occupation, there would be no use for the *huur gaat voor koop* rule because a real right can be enforced against third parties, including a purchaser. If tenants did acquire real rights through mere occupation, section 16 of the Deeds Registries Act would also be futile.

To consider the rights of long-term tenants it is important to distinguish between registered long-term leases and unregistered long-term leases. In the case of a registered long lease, the initial opinion provided by Wille[61] was that the lease would be binding on both onerous successors (a successor who gave value for the item)[62] and gratuitous successors (a successor who gave no value for the item).[63] The later opinion formulated by Kerr contended that the lease had to be registered in order to give effect to the *huur gaat voor koop* rule, which granted tenure security for the tenant.[64] Cooper disagrees and correctly points out that when the lessee acquires a real right by means of registration, the lease would be enforceable against third parties regardless of whether the purchaser had knowledge of the lease, how he acquired the property and whether the *huur gaat voor koop* rule applies.[65] Registered long-term leases create limited real rights, which are enforceable against all third parties, including new owners. The doctrine of knowledge and the *huur gaat voor koop* rule are irrelevant in these cases.

In the case of unregistered long-term leases the early opinions raised by Wille and Kerr were rather confusing. Wille argued that unregistered long-term leases would bind only the gratuitous successors (a successor who gave no value for the

[60] Van der Walt AJ & Pienaar GJ *Introduction to the Law of Property* (6th ed 2009) 290.
[61] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 79-83.
[62] Cooper WE *Landlord and Tenant* (2nd ed 1994) 282. This would include a purchaser and a person who acquired the property by means of exchange.
[63] Kerr AJ *The Law of Sale and Lease* (1984) 185. An heir or legatee would be classified as a gratuitous successor.
[64] Kerr AJ *The Law of Sale and Lease* (1984) 278.
[65] Cooper WE *Landlord and Tenant* (2nd ed 1994) 276-277, 281.

item)[66] of the landlord. If an onerous successor had notice (actual or constructive) of the unregistered lease, the lease would be binding.[67] Kerr[68] later contended that if the lease was not registered, the lessee could still enjoy protection if the purchaser or gratuitous successor of the lessor had knowledge thereof.[69] The lessee's right was described as "effective" if it was not a real right but enforceable against successors as a consequence of their knowledge. If the tenant's right was neither real nor "effective", the successor could eject the tenant by means of the *rei vindicatio.*[70]

Section 1 of the Formalities in Respect of Leases of Land Act[71] now provides that unregistered long-term leases are enforceable against new owners in two cases. Firstly, in terms of the *huur gaat voor koop* rule the tenant will be able to enforce the lease for the first ten years of its existence. It is required, similar to short-term tenancies, that the lessee must be in occupation of the property in order for this rule to apply. The unregistered long-term lease will also be enforced against a new owner, on the basis of the doctrine of notice, where the new owner had prior knowledge of the lease. However, in this case the lease will be enforced for its whole term and not only for ten years.[72] The Formalities Act re-established the position as it existed before the General Law Amendment Act,[73] eliminating the uncertainties

[66] Kerr AJ *The Law of Sale and Lease* (1984) 185. An heir or legatee would be classified as a gratuitous successor.
[67] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 79-83.
[68] Kerr AJ *The Law of Sale and Lease* (1984) 278.
[69] In this regard Kerr's opinion differs from Wille's in that the gratuitous successor had to have knowledge of the lease in order to bind him. If he did not have knowledge of the unregistered lease he would not be bound merely because he was a gratuitous successor.
[70] Kerr AJ *The Law of Sale and Lease* (1984) 278. In the case of *Graham v Ridley* 1931 TPD 476 at 478-479 Greenberg J relied on the unreported case of *Gordon v Kamaludin* TPD 15.9.27 where the court found that: "One of the rights arising out of ownership is the right to possession; indeed *Grotius* (Introd. 2, 3, 4) says that ownership consists in the right to recover lost possession. *Prima facie,* therefore, proof that the appellant is owner and that respondent is in possession entitles the appellant to an order giving him possession, i.e., to an order for ejectment." Application of the *rei vindicatio* and the position with regard to the onus of proof was confirmed in the later case of *Chetty v Naidoo* 1974 (3) SA 13 (A) 20B-D. The *rei vindicatio* was described by Van der Merwe CG *Sakereg* (2nd ed 1989) 347 as the most important remedy of the owner, enabling him to recover his property from any person who unlawfully withheld his property from him.
[71] Act 18 of 1969.
[72] Van der Walt AJ & Pienaar GJ *Introduction to the Law of Property* (6th ed 2009) 290-291.
[73] Act 50 of 1956. The position before the 1956 Act was described by O'Hagan J in the case of *Hitzeroth v Brooks* 1964 (4) SA 443 (E) 447 where the court found that for a long lease "to be binding upon onerous successors and creditors of the lessor [it] must be registered against the title of the leased property, unless the successor has had notice of the lease. An unregistered long lease is always binding as between the immediate parties thereto and upon gratuitous successors of the lessor, and is binding upon a purchaser who had no notice of the lease, for a period of not more than ten years, if the lessee was in occupation of the property when it was sold."

brought about by section 2[74] of the Act. (Section 2 in effect extinguished the rule that registration was unnecessary against a successor who had knowledge of the long lease. It also implied that "third parties" included gratuitous successors.[75]) When the legislature repealed the General Law Amendment Act it restored the common law position that the gratuitous successor was "bound by an unregistered long lease even though he did not know of its existence."[76] Cooper correctly mentions that in the absence of registration, the successor could still be bound by the lease, depending on whether the *huur gaat voor koop* rule applied or whether he had knowledge of the lease.[77]

In conclusion, the position is that in the case of a long-term lease, tenants are protected in terms of the Formalities in Respect of Leases of Land Act,[78] which clarifies the function of the doctrine of knowledge and the *huur gaat voor koop* rule. Unregistered long leases are enforceable against third parties for the first ten years by operation of the *huur gaat voor koop* rule, although the tenant must be in occupation of the premises for the rule to apply. If the purchaser had knowledge of the unregistered long lease, the protection would extend beyond the first ten years.[79]

However, the position was still uncertain where the purchaser obtained knowledge of the lease after the date of purchase, but before transfer took place. In his minority judgement in *Kessoopersadh v Essop*[80] Ogilvie Thompson JA relied on Wille and found that the purchaser who obtained knowledge of the lease after purchase was not bound by the lease. Shortly thereafter, in the case of *Total South Africa (Pty) Ltd v Xypteras*[81] Cillie JP relied on the minority decision in *Kessoopersadh* and found that the second respondent (the purchaser) was "not in law bound to recognise the lease entered into between appellant [the lessee] and first respondent [the lessor]." The court concluded that the "second respondent [was] entitled to transfer of the property free from the burden of the lease, and that

[74] Section 2 provided that "no lease of land which is entered into for a period of not less than ten years … shall be valid as against third parties if executed after the commencement on this Act, unless registered against the title deeds of the leased land."
[75] McLennan JS "Formalities for Long Leases – A Fresh Start?" (1969) 86 *SALJ* 345-348 at 346.
[76] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 260.
[77] Cooper WE *Landlord and Tenant* (2nd ed 1994) 276-277, 281.
[78] Act 18 of 1969.
[79] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 430-431; *Ismail v Ismail* 2007 (4) SA 557 (EC).
[80] 1970 (1) SA 265 (A) 285H.
[81] 1970 (1) SA 592 (T). The facts of the case were similar to the facts in *Kessoopersadh*.

appellant [was] accordingly not entitled to the relief claimed by it."[82] According to Cooper this view was not based on credible authority.[83]

In *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd*[84] the question was whether the lessee was at liberty to decide whether he wanted to continue with the lease upon alienation of the leased premises. In the court *a quo*[85] Squires J found that the tenant had a right to decide whether he wanted to remain in occupation, based on the fact that it was a "personal obligation". Squires J relied on the common law, placing emphasis on the choice of the lessee to pay rent, which would, only upon payment, require the new owner to recognise the lease.[86]

On appeal Corbett CJ criticized this contention, stating that in such an event the lessee would be in breach of contract, whereafter the new owner could claim damages. Accordingly this couldn't have been regarded as an election.[87] Corbett CJ concluded that the new owner was obliged to recognise the lease, which meant that he couldn't evict the lessee, provided that the lessee complied with the original lease and continued to pay the rent. If the new owner recognised the rights of the lessee, the lessee was prohibited from cancelling the lease other than in accordance with the contract.[88]

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[82] 1970 (1) SA 592 (T) 598E.
[83] Cooper WE *Landlord and Tenant* (2nd ed 1994) 286.
[84] 1995 (2) SA 926 (A).
[85] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 (1) SA 106 (D) 110H-I.
[86] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 (1) SA 106 (D) 109E-H. In *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 (1) SA 106 (D) 110H-I Squires J relied on *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) 1050J where Friedman AJA found that "once the lessee elects to remain in the leased premises after the sale, the seller *ex lege* falls out of the picture and his place as lessor is taken by the purchaser." According to Squires J this passage indicated that the lessee had a right of election to decide whether he wanted to continue occupying the premises. On appeal Corbett CJ disagreed and correctly pointed out that the right of election was not an issue in *Mignoel Properties*: Genna-*Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 933H. De Wet JC "Huur Gaat voor Koop" (1944) 8 *THRHR* 74-87, 166-194, 226-251 at 193 interpreted Voet 19.2.17 and according to him Voet stated that the lessee could leave the land and claim damages from the previous landlord. The remarks made by De Wet was followed by Rabie AJA in *Kessoopersadh v Essop* 1970 (1) SA 265 (A) 283H-284A and by Cooper WE *Landlord and Tenant* (2nd ed 1994) 294. According to Kritzinger KM "May a Lessee Discontinue the Lease on the Sale of the Leased Property? Is Genna-Wae here to Stay?" (1994) 111 *SALJ* 221-232 at 224-226 Voet actually meant that before the *huur gaat voor koop* rule applied, the lessee could claim damages from the seller in the event of eviction upon sale. This remedy was accordingly replaced by the *huur gaat voor koop* rule, which afforded the lessee continued occupation rights. Kritzinger argued that if Voet did imply such an election, he would have been the only one of the authorities to do so. According to Kritzinger, Squire J's conclusion would be unjust against purchasers and therefore not equitable.
[87] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 938E.
[88] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 939A-C.

The *huur gaat voor koop* rule developed as part of South African landlord-tenant law, although from the discussion it is clear that it has caused some confusion regarding the rights of tenants. At common law, and in terms of the Deeds Registries Act, the rule is that a tenant can only acquire a limited real right in land through registration. This rule applies to both short-term and long-term tenants, but long-term leases are usually registered whereas short-term leases are rarely registered. Once the lease is registered the lessee acquires a real right and this right can be enforced against the whole world, including purchasers. It is therefore clear that the *huur gaat voor koop* rule has no relevance in such a case. If the purchaser was aware of the lease before the sale took place, the doctrine of notice applies and the tenant (of either a short-term or long-term lease) will be able to enforce the lease for its entire period. In such a case it is again clear that the *huur gaat voor koop* rule has no relevance. The *huur gaat voor koop* rule is a mechanism that was developed to protect the tenant's mere personal right of occupation in the case where the property was sold to a third party. The rule does therefore not provide the tenant with a real right, but rather aims at ensuring that the lease stays intact for the period of the lease in the absence of a limited real right. It affords tenure security, although limited to the original period of the lease. In this regard the rule is similar to the other common law forms of tenure protection. The essence of the huur gaat voor koop rule is to provide tenure security for the tenant where the original landlord alienates the property during the term of the lease. The original owner as landlord is substituted with the new owner in order to give effect to the full term of the lease and provide tenure security for the tenant.

2.2.3 Additional tenure security

In addition to the *huur gaat voor koop* rule the common law provides tenure security for tenants upon death of either party and if the landlord becomes insolvent.[89]

Sources ranging from the beginning of the twentieth century indicate that the death of a party did not end a fixed-term tenancy because the estate of the

[89] See section 7.3.2.2 in Chapter 7 for similar tenant protection in German law.

deceased was bound by the lease.[90] The exception to the rule was where the landlord's title to the property was one for his life. A lease at the will of either party and a lease for the life of either party terminated upon death of that party. A tenant could specify in the lease that the lease would terminate upon the occurrence of his death (or that of his successor in title). This provision would be binding on his executor or his successor's executor.[91] Kerr agreed that in accordance with a general rule of contract, the lease did not dissolve upon the death of either party, but rather automatically passed to the heirs of the tenant if he died during the term of the lease.[92] This position was changed in the later case of *Lorentz v Melle*,[93] where the court found that contractual duties (and rights) could be transmitted by operation of law on the death of a contracting party to his executor and administrator. A lease could therefore not automatically pass to an heir; he would first have to accept the inheritance.[94] Upon acceptance of the lease the descendants of the tenant would be able to continue occupying the leased premises.

Early twentieth century sources also indicate that tenure security was granted in the case where the landlord became insolvent,[95] because the lease could only terminate in exceptional cases. The trustee had a duty to sell the leased property although, if the lease complied with the necessary formalities and the landlord had sufficient title to grant the lease, the purchaser would be bound by the lease. Wille argued that a purchaser was bound by a short lease if the tenant was in occupation of the premises while registration of a long lease bound the purchaser in all cases.[96] The later view of Kerr's with regard to the rights of occupying tenants was that a short term tenant would acquire a real right through occupation, while a long-term

[90] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 243-244. This position was changed by the 1942 Rents Act. According to the Act the deceased lessee's rights in terms of the lease would pass to his widow if she lived with him at the time of his death. The rights would therefore not pass to his estate or executors: Wille G *Landlord and Tenant in South Africa* (4th ed 1948) 252.
[91] Wille G *Landlord and Tenant in South Africa* (4th ed 1948) 252-253.
[92] Kerr AJ *The Law of Lease* (2nd ed 1976) 182-183. This was the position in the case of a fixed-term tenancy as well as a periodic tenancy. Kerr agreed with Wille that a "lease at the will of a party" terminated upon the death of that party. The position was the same in the case where the tenant rented from a lessor whose title was limited to his lifetime.
[93] 1978 (3) SA 1044 (T) 1058C.
[94] Cooper WE *Landlord and Tenant* (2nd ed 1994) 325 agrees where he states that according to contract law principles, the lease vests in the estate of the deceased tenant.
[95] See section 7.3.2.2 in Chapter 7 for similar tenant protection in German law.
[96] Wille G *Landlord and Tenant in South Africa* (4th ed 1948) 252. Although the author implied that the tenant could enforce his rights against third parties, such as a purchaser, the author did not state that a short term tenant acquired a real right by means of occupation. Kerr agreed with this position.

tenant would acquire a real right by means of registration.[97] The established real right of the tenant would trump the rights of the purchaser in the event of a sale. If the tenant merely had a personal right, the purchaser would be bound by the lease if he had notice thereof. If the property was sold in order to abide by a prior real right, such as a mortgage,[98] and the holder of the real right did not consent to the lease, the property would be "put up for sale first subject to the lease and thereafter, if the amount bid on the first occasion was not sufficient to cover the bond, free of the lease."[99] The lease would therefore automatically terminate in the case of a sale free of the lease, whereafter the trustee could cancel the lease and claim ejectment of the tenant. Kerr mentioned that if the tenant's real right was prior to the mortgage, such a right would appear incontrovertible.[100]

In the case of *Velcich v Land and Agricultural Bank of South Africa*[101] the owner of a farm mortgaged it to the Land Bank, whereafter the farm was let to lessees. During the lease the owner's estate was sequestrated and the bank proceeded to sell the farm by public auction. The sale was advertised free of the lease and the auction was conducted accordingly. Eventually the farm was "bought in" by the bank due to the deficiency of the highest bid made.[102] The procedure required by law was that the farm should first be put up for sale, subject to the lease. If the highest bid was enough to realise the debts secured by the mortgage, the farm must be sold subject to the lease. If the highest bid was insufficient, the farm could be sold free of the lease at the instance of the mortgagee.[103] According to this principle the appellants (lessees) argued that the lease survived the public auction because the required procedure was not followed. Joubert JA upheld the decision in the court *a quo* and found that the lease did not survive the sale in execution of the

[97] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 384. See section 2.2.2 above for a discussion on real and personal rights of tenants with regard to short leases.
[98] According to Kerr AJ *The Law of Sale and Lease* (1984) 318 the mortgagee still had a choice whether he wanted to sell the property. If it was the mortgagee's choice not to realise his security (for his own benefit), the property would remain unsold. The lease would remain intact, and bind the purchaser, if the property was sold for the benefit of other creditors.
[99] Kerr AJ *The Law of Lease* (2nd ed 1976) 184-185. If the first sale did not bring a satisfactory result, the trustee, acting on behalf of the creditors, could even cancel the lease by himself and claim ejectment of the tenant prior to the second sale. Cooper WE *Landlord and Tenant* (2nd ed 1994) 323 agrees where he states that if a prior real right vested in the property, the property could be sold free of the lease, depending on the amount of the bid.
[100] Kerr AJ *The Law of Sale and Lease* (1984) 318.
[101] 1996 (1) SA 17 (A).
[102] See *Velcich v Land and Agricultural Bank of South Africa* 1996 (1) SA 17 (A) 19F-20G for detail on the facts.
[103] *Velcich v Land and Agricultural Bank of South Africa* 1996 (1) SA 17 (A) 20H-20I.

farm. The court based its decision on a certain "assumption" which entailed that in the event of a sale in execution of immovable property, the price that would be realized on a sale free of the lease would obviously be higher than the price that would be realized if the property was sold subject to the lease.[104]

2.2.4 Conclusion

One can conclude that the common law made provision for tenure security for tenants at the beginning of the twentieth century, and to a certain extent throughout the century. The essence of the common law was to keep the contractual relationship intact, which granted some protection for both parties. Security of tenure is primarily provided for tenants through the operation of the *huur gaat voor koop* rule and the doctrine of knowledge in the case where the property is alienated during the term of the lease. Where either party dies during the lease, or where the landlord becomes insolvent, the lease continues despite the substitution of one of the parties. The lease therefore continues for the remainder of the lease period even though the original parties are no longer involved in the agreement.

Termination of the lease has always been left to the will of the contracting parties, especially to the will of the landlord. Initially ownership granted the landlord a unilateral freedom of choice in relation to his object. Ownership was distinguished from other rights by the scope of its exclusivity. The owner was therefore entitled to exclusive possession and any limitations (such as a lease) on the rights of owners were perceived as exceptional and temporary.[105]

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[104] *Velcich v Land and Agricultural Bank of South Africa* 1996 (1) SA 17 (A) 21A-21D. Kritzinger KM "Forced Sale of Let Property Subject to a Prior Mortgage" (1996) 113 *SALJ* 209-214 at 211 criticizes this proposition where he states that such an assumption was unjustified. The profile of the purchaser could determine whether the property would be sold at a higher price, subject to the lease, instead of the assumption that the property would in all circumstances be sold at a higher price where the property would be sold free of the lease. Kritzinger distinguishes between two types of purchasers and asserts that a purchaser who bought the property for his own use would rather buy property free of lease while a purchaser who bought property for investment purposes would prefer to purchase let property.

[105] Van der Walt AJ "Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid's Theory of Ownership" (1993) 56 *THRHR* 569-589 at 576 discusses the fundamental tenets of Windscheid's theory of ownership and concludes that these characteristics were still accepted in modern South African law.

When the lease terminates the landlord is entitled to eject the tenant by means of a court order. If the tenant is holding over, the landlord is not allowed to forcefully eject the tenant.[106] If the parties included a stipulation in the lease which stated that the landlord could eject the tenant without resource to legal process, the stipulation is illegal and the court can order the landlord to restore occupation to the lessee.[107] Where a court, without hearing argument on its competence to do so, gave the defendant-lessee a certain time to vacate the premises, an Appellate Division decision could suspend implementation of such a decision. This position has been queried because the legal right of the landowner is delayed without the necessary statutory authorization.[108] Kerr agreed that in certain circumstances a period of suspension could be justified if such suspension could avoid "undue hardship for the lessee and not cause such hardship to the lessor".[109]

At common law, tenure security has been afforded to tenants upon the occurrence of three events, namely sale of the leased property, insolvency of the landlord and death of the landlord. However, these forms of tenure protection are limited as they are contract-based with the aim to give effect to the lease. Once the lease expires, the landlord is generally entitled to reclaim his property. The common law applied to all tenants, irrespective of their race, in the absence of statutory interference.

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[106] Cooper WE *Landlord and Tenant* (2nd ed 1994) 233. See text accompanying ffn 10-11 above for a discussion on the earlier position as stated in Wille G *Landlord and Tenant in South Africa: A Treatise on the Law of Lease, or Letting and Hiring of Immovable Property in the Cape Colony, the Transvaal, Natal and Orange Free State* (1910) 474-476.

[107] Cooper WE *Landlord and Tenant* (2nd ed 1994) 18-19 mentions that the lease would still be intact although the stipulation would be void. See text accompanying ffn 10-11 above regarding the position of the parties as stated in Wille G *Landlord and Tenant in South Africa: A Treatise on the Law of Lease, or Letting and Hiring of Immovable Property in the Cape Colony, the Transvaal, Natal and Orange Free State* (1910) 474-476. During this period ejectment by the landlord without recourse to legal process was regarded as an act of spoliation and the tenant could claim damages. In the early case of *Nino Bonino v De Lange* 1906 TS 120 the court found that a clause that allowed the landlord to unilaterally cancel the lease and deprive the tenant of access to the premises without recourse to law was against public policy and therefore invalid. The lessee was entitled to reoccupy the property. See also *Yeko v Qana* 1973 (4) SA 735 (A).

[108] Cooper WE *Landlord and Tenant* (2nd ed 1994) 376.

[109] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 448-449. See *Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes* 1992 (1) SA 649 (W) 651C-D where the court found that in the event of lawful termination of the contract, the fact that there was a related question before the court is not a ground for suspending an ejectment order. Where the contract was lawfully terminated, the right to remain on the premises also came to an end.

2.3 Statutory intervention in landlord-tenant law (1920-1980)

2.3.1 Introduction of statutory tenancy

After the First World War South Africa experienced a housing shortage that led to the potential exploitation of tenants. In 1920 the Tenants Protection (Temporary) Act[110] was enacted to prevent such exploitation by restricting the landlord's right to eject the tenant of a dwelling upon expiration of the lease.[111] The legislation created a statutory lease at the end of a fixed-term tenancy by converting the contractual lease into a periodic lease. If the tenant continued to pay the rent upon expiration of the lease, while complying with the other conditions of the tenancy, the landlord could not eject the tenant except on certain grounds, as stated in the Act.[112] According to section 1(1) the court could order ejectment of the tenant if he damaged the property or if the landlord reasonably required the property for his own use.[113] These provisions could be described as the core around which all the subsequent legislation developed.[114]

The Act drastically amended the original lease by overriding the terms of the agreement. The landowner's ownership rights were restricted by preventing the owner from ejecting the tenant upon contractual termination of the lease. In terms of the common law the tenant had a duty to vacate the property upon expiration of the lease, but this position was amended by affording the tenant a statutory right to continue occupation upon expiration of his contractual right. The Act restricted the common law rights of private landowners in order to ensure substantive tenure security for tenants during an acute housing shortage.

Initially the Tenants Protection (Temporary) Act was intended as a temporary[115] measure to address the exploitation of lessees, but in the same year

[110] Act 7 of 1920.
[111] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 1.
[112] Section 1(1).
[113] See section 1(1) of the Act for two additional grounds on which the court could order ejectment of the tenant.
[114] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 1.
[115] The Act was intended to apply from 19 March 1920 until 19 June 1920, although it only commenced on 5 May 1920.

the Rents Act of 1920[116] was passed,[117] hardly a month after the Tenants Protection (Temporary) Act. This indicates that parliament had underestimated the housing shortage when the Tenants Protection (Temporary) Act was enacted.[118] The Rents Act commenced on 21 June 1920 and was intended to be in force until 30 June 1921.[119] Various acts[120] extended the application of the Rents Act until the Rents Act Extension Act 1924[121] provided that it should continue in operation until repealed by an act of parliament.[122] The Tenants Protection (Temporary) Act had no information with regard to the nature of the dwellings or the nature of the tenant it applied to. The Rents Act 13 of 1920 made provision for the establishment of rent boards[123] and stated that the Act would only apply to dwellings situated in an area where a rent board was constituted,[124] although this hardly indicated the nature of the tenant to whom the Act applied. The Housing Act 35 of 1920 enabled the local authority to borrow money in order to construct dwellings and carry out approved schemes.[125] The local authority could also let some of the dwellings on conditions prescribed by the administrator.[126] One can question whether these local authority lettings were included under the protection of the Rents Act. The nature of the tenant occupying local authority housing is also uncertain.

The Rents Act 13 of 1920, similar to the Tenants Protection (Temporary) Act, placed a restriction on the landlord's right to approach the court and eject the tenant upon termination of the lease but made provision for additional grounds on which a tenant could be ejected. According to section 11 the court could also eject the tenant if the premises were reasonably required by an employee of the landlord or if the tenant had been guilty of creating a nuisance for neighbouring occupiers.

The difference between the Tenants Protection (Temporary) Act and the Rents Act was that the Rents Act mandated the Governor-General to constitute rent

[116] Act 13 of 1920.
[117] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 1-2.
[118] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 2.
[119] This once again indicated the tentative and uncertain attitude of parliament with regard to the seriousness of the housing shortage.
[120] Rents Act Extension and Amendment Act 30 of 1921, Rents Act Extension and Further Amendment Act 10 of 1922 and Rents Act Extension Act 20 of 1923.
[121] Act 29 of 1924.
[122] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 2-3.
[123] Section 1.
[124] Section 13.
[125] Section 2 of the Housing Act 35 of 1920.
[126] Section 5 of the Housing Act 35 of 1920.

boards.[127] The function of the rent boards was to receive and investigate complaints, reduce fixed rent, fix reasonable rents[128] for dwellings and order a refund of excess rent.[129] The Rents Act also differed from the Tenants Protection (Temporary) Act as certain dwellings[130] were excluded from the Rents Act. The Rents Act did not apply to dwellings situated in an area for which no rent board had been constituted, nor did it apply to dwellings completed after the first day of April 1920.[131] The primary function of the Rents Act was to control rent, while the Tenants Protection (Temporary) Act did not differentiate between different classes of rent; the tenant was protected as long as he paid the rent, focusing on strengthened tenure rights for tenants.[132]

The Rents Act Extension and Amendment Act 1921[133] reduced the rent boards' powers, because the Act repealed sections 4, 5 and 6, which empowered the boards to obtain returns from landlords of rent paid and to investigate the reasonableness thereof.[134] The Act also made provision for an offence if the landlord (or his employee) failed to occupy the dwelling within one month after recovery under the Act and failed to continue to occupy the dwelling for three consecutive months. In such a case the landlord would be liable to pay a fine as well as compensation for any loss sustained by the tenant by reason of his removal.[135]

Section 3(a) of the Rents Act Extension and Further Amendment Act 1922[136] added an additional ground for ejectment, namely that if the premises were reasonably required for the purpose of a reconstruction or rebuilding scheme, the tenant could be ejected. The Rents Extension Act 1923[137] also introduced a new

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[127] Section 1 of the Rents Act 13 of 1920.
[128] According to section 14 "reasonable rent" meant the amount of rent which a rent board declared to be reasonable, taking into account certain factors (see section 14).
[129] Sections 2, 6 and 7 of the Rents Act.
[130] Section 14 of the Act defined a "dwelling" as "any room or place occupied as a human habitation"; one can assume that the Act only applied to residential property. This assumption was confirmed in the case of *Wylie v Singer* 1923 EDL 368 where the court confirmed that "personal occupation" meant residential occupation and not occupation for business purposes.
[131] Section 13. According to this section the Act did also not apply to a "dwelling let at a rent which included any payment in respect of a board and attendance" nor a "dwelling let as a fully furnished dwelling".
[132] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 1.
[133] Act 30 1921.
[134] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 3.
[135] Section 1(d).
[136] Act 10 of 1922.
[137] Act 20 of 1923.

ground, namely that if the landlord's major or married child reasonably required the property upon termination, the tenant could be ejected.[138]

The Rents Acts[139] transformed the weak common law occupation rights of tenants in occupation of dwellings to strengthened tenure rights. The landowner could not claim ejectment of the tenant, based on the occurrence of the lease having expired either by effluxion of time (in the case of a fixed-term tenancy), or in consequence of notice duly given (in the case of a periodic tenancy), as long as the tenant complied with the requirements set out in the different acts.[140] The acts consequently applied to two types of lease, the one being a lease for a fixed period which would run from one fixed date to another fixed date or from one fixed date for a definite period of time or even from no specific date of commencement for a definite period of time. The other type of lease was known as a "lease to be from period to period", which would continue on a periodic basis (for instance from week to week, month to month, year to year) until either party terminated the lease by giving notice to the other party.[141]

The provisions of the acts, specifically the sections aimed at providing substantive tenure security, did not only apply to the immediate parties who entered into any of the abovementioned leases, but also to a purchaser. If a third party would purchase the leased property from the landlord and accept rent from the tenant, he would be bound by the lease and by the statutory requirements.[142]

Apart from the protection provided for by the legislation, the common law principle *huur gaat voor koop* was still applicable.[143] The common law also protected tenure rights of tenants upon death of either party or where the landlord became insolvent.[144] Where the tenant did not enjoy the statutory substantive tenure protection in terms of the anti-eviction laws and the tenant was holding over, the

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[138] Section 3.
[139] Act 30 of 1921, Act 10 of 1922, and Act 20 of 1923.
[140] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 40.
[141] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 36-37.
[142] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 40.
[143] See text accompanying ffn 46 and 61-63 above concerning the initial common law position with regard to the *huur gaat voor koop* rule, as stated by Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 79-83. See also fn 46 for the later view of the author in Wille G *Landlord and Tenant in South Africa* (4th ed 1948) 89.
[144] See text accompanying ffn 90-92 above for the initial common law position regarding the death of either party and text accompanying ffn 95-96 above for the position where the landlord became insolvent.

landlord was entitled to an ejectment order and could claim damages.[145] The common law placed no limitations on rent and the landlord could easily evict a tenant holding over by means of legal process.[146]

The purpose of the acts was to protect tenants occupying residential property, although certain non-residential premises[147] were held to constitute dwellings.[148] The rationale behind the Rents Act of 1920 was to strengthen tenure rights and control rents, although these objectives became partly unsubstantiated due to section 13, which excluded certain dwellings from statutory protection. It would seem that the Act was in fact "kept on ice" until a housing shortage made its reinforcement necessary. Rosenow and Diemont argued that in order to afford tenants some form of protection through the imposition of rent control, including rent restrictions and tenure protection measures, the act had to apply to all dwellings.[149]

2.3.2 Introduction of non-white[150] statutory regulation

In terms of the Natives (Urban Areas) Act 21 of 1923,[151] any urban local authority may identify land[152] for the occupation of "natives".[153] The land with the necessary

[145] See text accompanying ffn 10-11 for the initial common law position where the tenant was holding over.
[146] See text accompanying fn 10 above concerning due process during this period.
[147] For instance premises used as a boarding house, a private hotel, a building let and even a police station: Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 27.
[148] Wille G *Landlord and Tenant in South Africa* (2nd ed 1927) 26-27.
[149] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 4.
[150] The term "non-white" is used throughout the chapter and refers to all racial groups other than white persons. The reason for the use of this term is to simplify the explanation of the tenure position of the racial group in question, as the group of persons referred to as non-white includes all race groups other than white persons. This term was used in the apartheid statutes, although the legislature later defined the rights of different racial groups in relation to their skin colour, such as black and coloured. The term "black" is used in the other chapters and refers to all racial groups other than white persons.
[151] In due course the Act was also referred to as the Blacks (Urban Areas) Act 21 of 1923.
[152] The land identified by the urban local authority was referred to as "urban areas". These urban areas formed part of what was previously known as "White South Africa". It is important to distinguish between the *urban areas* and the *scheduled* (and *released*) *areas*. The scheduled areas were allocated for the exclusive occupation by black persons in terms of the Black Land Act 27 of 1913. See Olivier N "Property Rights in Urban Areas" (1988) 3 *SA Public Law* 23-33 at 23-24 for a discussion of the scheduled areas. The urban areas (also known as the locations) were identified for black occupation, although black individuals could in principle not obtain rights to land in these areas. This formed part of the government's policy to enforce racial segregation, especially between white and black persons. Black individuals could only occupy the urban areas on a temporary basis, because the government regulated access of black persons in the urban areas (also known as influx control). The assumption was that the black community should develop their own urban areas within the *released areas*: Van der Walt AJ "Towards the Development of Post-*apartheid* Land Law" (1990)

dwellings constructed on it was known as a location. The local authority could by regulation prescribe that black persons can lease lots in the location and construct huts or houses for their own occupation.[154] The local authority could also provide the buildings or huts within the location for the accommodation of black families on such terms and conditions the urban local authority may by regulation prescribe.[155] The rent charged by the urban local authority for the occupation of any lot, house, hut or building in the location was determined by the Minister. The Minister had to consider the rent fair and reasonable.[156] Sections 4 and 5 of the Act stated that the identified locations could only be occupied by black households, and to a certain extent coloured persons,[157] and that all black persons within the limits of any urban area had to reside in a location.[158]

One can assume that the occupation rights of the coloured individuals who occupied land in the locations were similar to that of the black individuals who occupied property within the locations. The Coloured Persons Settlement Areas (Cape) Act 3 of 1930 made provision for the establishment of certain areas that coloured individuals could occupy. Section 1 of the Act allowed the governor-general to declare any area of Crown land in the Province of the Cape of Good Hope to be a coloured persons settlement area. Section 5 of the Act stated that the occupation rights granted in terms of the Act would be personal and therefore not capable of

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23 *De Jure* 1-45 at 16; Olivier N "Urbanisation: Policy/Strategy with Particular Reference to Urbanisation and the Law" (1988) 53 *Koers* 580-599 at 588-589.

[153] Section 29 of the Natives (Urban Areas) Act 21 of 1923 defines a "native" as "any person who is a member of an aboriginal race or tribe of Africa." This definition refers to black persons and the term "black" is used throughout this dissertation.

[154] Section 1(b) of the Natives (Urban Areas) Act 21 of 1923.

[155] Section 1(d) of the Natives (Urban Areas) Act 21 of 1923. The provision of housing for black individuals was traditionally considered as the responsibility of the central authority: Granelli R *Urban Black Housing: A Review of Existing Conditions in the Cape Peninsula with some Guidelines for Change* (1977) 32. The legislation that regulated the occupation rights of black individuals in the black urban areas differed from the other population groups as a result of the government's policy that black individuals were "deemed to be present in those areas on a temporary basis only": Olivier N "Property Rights in Urban Areas" (1988) 3 *SA Public Law* 23-33 at 25.

[156] Section 9 of the Natives (Urban Areas) Act 21 of 1923. The terms of the lease were not stipulated in the legislation, although according to Olivier a system of unregistered 30-year leasehold was permitted in the black urban residential areas until 1967: Olivier N "Urbanisation: Policy/strategy with Particular Reference to Urbanisation and the Law" (1988) 53 *Koers* 580-599 at 582.

[157] Section 29 of the Natives (Urban Areas) Act 21 of 1923 defined a "coloured person" as "any person of mixed European and native descent and shall include any person belonging to the class called Cape Malays". During this period housing was provided by the state out of the National Housing Fund for some of the coloured population: Republic of South Africa *Official Yearbook of the Republic of South Africa* (1976) 330.

[158] See section 5(2) of the Natives (Urban Areas) Act 21 of 1923 for the classes of black persons exempted from the operation of section 5(1).

transfer. The occupation right could be transferred if the occupier applied for a transfer and the board approved the application. The right could only be transferred to another coloured person. In the event of insolvency, the right would cease to exist, while in the event of death the board could grant the right to the occupier's widow. Section 6 stated that upon termination or surrender of any right of occupation, the possession of the land "shall revert to and the ownership of all improvements made thereon and material annexed thereto shall vest in the Government and … no compensation shall be payable to the occupier". The Act also made provision for the constitution of local committees for any coloured persons settlement area. The committee would be elected by the coloured community within the settlement area and be responsible for matters concerning management, health and welfare of the community (section 9). Section 11 of the Act stated that the Minister could regulate the qualifications of coloured persons that applied for the allotment of a right of occupation within one of these areas. The Minister could also determine the period and conditions for which occupation rights was granted and the rental (or any other charges) paid in respect thereof. In terms of this section the Minister could also prescribe the circumstances under which rights of occupation could be cancelled.

It is doubtful whether the land allocated by the urban local authorities for the development of a location would have fallen within the jurisdiction of rent boards as regulated under the Rents Act because the aim of the Natives (Urban Areas) Act was to segregate residential areas for black and white persons in urban areas. The identified coloured settlement areas were also regulated by legislation, uniquely enacted for the regulation of coloured individuals' occupation rights. One can therefore assume that the Rents Act did not apply to black (or coloured) individuals who occupied dwellings in the locations (or the identified coloured areas) because the Native (Urban Areas) Act and the Coloured Persons Settlement Areas (Cape) Act regulated the occupation rights of these non-white households. As a result of section 5 one can also assume that the Rents Act did not apply to any black individuals because they were prohibited from occupying dwellings in the metropolitan areas, which fell outside of the identified locations. However, the position of coloured persons was unclear because they could occupy property in the identified coloured areas, the locations (primarily allocated for black persons) or any other area.

2.3.3 Landlord-tenant regulation from 1940 to 1976

2.3.3.1 White rental housing

In 1940, sixteen years after the last amendments to the Rents Act, the Rents Amendment Act 1940[159] extended and amended the Rents Act due to the new housing shortage that resulted from the Second World War.[160] The housing shortage was more severe than the one brought about by the First World War, putting pressure on the legislature to address the problem. The Rents Amendment Act 1940 provided that all dwellings should fall under the ambit of the Act. The 1940 Rents Act therefore gave effect to the original objective of the 1920 Rents Act. Parliament realised that sufficient tenure security for tenants could only be ensured by means of efficient legislation, applicable to all dwellings[161] occupied by white (and some coloured) tenants. One should note that the Natives (Urban Areas) Act 21 of 1923 was still applicable during this period and that it regulated the position between the urban local authorities and black (and some coloured) occupiers in identified locations. As mentioned previously in this chapter, one can assume that the Rents Acts did not apply to dwellings occupied in these locations because they were regulated under the Natives (Urban Areas) Act.[162] The Rents Amendment Act temporarily extended application of the Rents Act to business premises until 31 August 1942.[163] The amendments between 1940 and 1942 also tried to identify the functions of rent boards with regard to the definition of reasonable rents and the investigation thereof.[164] During this period War Measure 42 of 1941[165] made provision for the establishment of rent control boards.[166]

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[159] Act 26 of 1940.
[160] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 4; Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 4.
[161] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 4.
[162] Section 3(d) of the Natives (Urban Areas) Amendment Act 25 of 1923 provided that where any black persons resided outside a location he could be found guilty of an offence, although he must have been served with the required notice and one month must have passed after the notice was served.
[163] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 4.
[164] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 4-5.
[165] Proc 195 of 1941 (*Government Gazette* 2952 p127 13 October 1941).
[166] These boards were empowered to give advice to the various rent boards and review their decisions. The rent control boards also served as a court of appeal from the decisions of rent boards.

Section 23(1) of the new Rents Act[167] repealed previous rents legislation,[168] consolidating and amending landlord-tenant law with regard to dwellings.[169] The Act was applicable to dwellings situated in areas for which rent boards were constituted.[170] Rent boards were set up in all the principal cities and towns in South Africa.[171] According to case law[172] prior to 1942, a tenant would only be protected by the Rents Act[173] if the tenant paid a reasonable rent[174] as declared by a rent board. In *Clark v Findlay*[175] the Court (Appellate Division) found that a tenant would be protected upon termination of the lease under the 1942 Rents Act, even if a rent board had not declared the rent reasonable. The landlord's right to claim ejectment of the tenant upon expiration of the lease was restricted even more severely by War Measure 37 of 1943,[176] which afforded special protection for soldiers.[177] The families of soldiers were also provided greater tenure security by means of War Measures.[178]

The Act applied to dwellings, defined as "a place occupied as a human habitation", although the meaning of "dwelling" gave rise to extensive case law and uncertainty.[179] The rent boards had jurisdiction over the control of rents for residential leases, while the National Supplies Control Board had jurisdiction over business premises. Difficulties arose when property was used partly for business purposes and partly as a dwelling, which gave rise to War Measure 59 of 1946.[180] This Measure declared business premises subject to the provisions of the Act.[181]

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[167] Act 33 of 1942.
[168] Act 13 of 1920, Act 30 of 1921, Act 10 of 1922, Act 20 of 1923, Act 29 of 1924, Act 26 of 1940 and War Measure 42 of 1941 (Proc 195 of 1941 (*Government Gazette* 2952 p127 13 October 1941)).
[169] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 5.
[170] Section 21.
[171] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 7. See Appendix A at 93 for the list of towns and cities with a rent board.
[172] *Herison v South African Mutual Life Assurance Society* 1942 AD 259; *Secco v Johannesburg City Council* 1943 TPD 199 at 202-204.
[173] Act 13 of 1920.
[174] See section 1 of the Act for a definition of reasonable rent.
[175] 1946 AD 224 at 231.
[176] Proc 103 of 1943 (*Government Gazette* 3203 4 June 1943).
[177] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 6.
[178] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 6.
[179] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 8-22.
[180] Proc 219 of 1946 (*Extraordinary Government Gazette* 3723 p1 1 November 1946).
[181] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 6.

The Act's main purpose was to prevent "rack-renting", which meant that where an order of a rent board was not in force rent was frozen,[182] subject to such an order.[183] The Act was described as a "drastic piece of legislation", aimed at providing the tenant with continued occupation rights upon termination of the lease.[184] When the contractual relationship between the parties terminated, the tenant became a "statutory tenant"[185] and ceased to be a common law tenant. Due to the Rents Act, and not the lease, the tenant could continue to occupy the dwelling upon termination of the lease.[186] It was submitted that the landlord's common law right to cancel the tenancy where the tenant seriously damaged the property, was not affected by the Act.[187]

In terms of section 14(2) of the Act, the landlord could not claim ejectment of the tenant upon termination of the lease by effluxion of time or in consequence of notice duly given,[188] if the tenant continued to pay the rent within seven days of the due date and continued to perform the other conditions of the tenancy, except if additional grounds[189] existed. If none of these grounds were present, the tenant automatically became a statutory tenant and the tenancy converted into a lease at the will of the lessee. The tenant could cancel the lease by merely leaving the premises without even giving notice to the landlord. The court could only eject the statutory tenant if he lost the statutory protection in terms of the anti-eviction legislation as a result of his failure to pay the rent or non-compliance with the conditions of the tenancy. The nature of the lessee's obligations was derived from

[182] According to section 16 the landlord was not entitled to require a tenant to pay a rent higher than the lowest rent charged by any landlord for that dwelling at any time subsequent to the 31st of March 1940. In the event of a complaint by a tenant, the rent board could investigate the fixed rent and reduce the rent even further. The rent board could also increase the fixed rent on the application of the landlord. (Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 47.) See 46-59 for more detail on rent.
[183] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 5.
[184] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 61.
[185] The term "statutory tenant" was imported from English Law.
[186] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 64.
[187] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 70.
[188] The Act was similar to its predecessor to the extent that it also applied to two types of tenancy, namely a lease for a definite period and a periodic tenancy. The lease for a definite time included a lease which would terminate upon the occurrence of a certain event which was bound to take place.
[189] Section 14(2) provided that the landlord could claim ejectment of the lessee if "the lessee has done or is doing material damage to the premises; or that the lessee has been guilty of conduct which is a nuisance to occupiers of adjoining or neighbouring property; or that the premises are reasonably required by the lessor for his personal occupation or for that of his major or married child or children or any person in his employ; or that the premises are reasonably required for the purpose of a reconstruction or rebuilding scheme". The way in which the legislature consolidated previous rents legislation was evident in this section.

the contract, although the contract was no longer in force. The landlord had no equivalent obligation to perform any duties under the lease. The effect of statutory tenancy, with regard to duties performed under the original lease, could thus have been described as "one-sided".[190]

In the case of *John Orr & Company v Eagar,*[191] the appellants (the landlord) gave notice to terminate the lease on 31 August 1928 but the respondents remained in occupation. The respondents' status converted into statutory tenants in terms of the Rents Act of 1920.[192] The initial agreement provided that the tenants were entitled to free electricity, hot water and also free attendance to clean the leased property, which consisted of two rooms and the use of a bathroom. After 31 August the landlord did not supply an attendant, electricity or hot water. In consequence thereof the respondents sued the appellant for damages for breach of contract.[193] The court found that section 11 of the Act imposed specific obligations on the statutory tenant but not necessarily on the landlord. According to Gey Van Pittius J, the Act already curtailed the common law rights of the landowner and there was no reason why the rights of the landowner should be limited any further.[194] The court concluded that the landlord's obligation to supply the statutory tenant with hot water, electric power and an attendant came to an end with the termination of the lease. The decision made it clear that the contractual relationship was not preserved.

In *Aggouras v Macfarlane*[195] the respondent let to the applicant property which consisted of three living rooms, a kitchenette, a combined bathroom and a lavatory containing a gas meter. The respondent gave notice to the applicant to vacate the premises but the applicant refused to do so, whereafter the respondent instituted action in the magistrate's court for ejectment. While that claim was pending, the respondent disconnected the electric current and locked the bathroom door. The lavatory was inside the bathroom, as was the gas meter.[196] The applicant continued to pay the rent and to perform the other conditions of the tenancy and therefore acquired the right to remain in possession and occupation of what had

[190] Rosenow REG & Diemont MA *The Rents Act in South Africa* (1945) 64.
[191] 1929 TPD 985.
[192] Act 13 of 1920.
[193] See *John Orr & Company v Eagar* 1929 TPD 985 at 986-989 for more detail on the facts.
[194] *John Orr & Company v Eagar* 1929 TPD 985 at 991.
[195] 1943 CPD 103.
[196] See *Aggouras v Macfarlane* 1943 CPD 103 at 105-107 for more detail on the facts of the case.

been let to him, as stated in section 14(2) of the Rents Act of 1942. The court found that the landlord could not deprive the tenant of some of the essentials to continued occupation, thereby forcing him to vacate the leased property. The bathroom, lavatory and gas meter formed part of the premises and were essential for suitable occupation of the premises. Judge Jones acknowledged that the Rents Act curtailed the common law rights of the landlord, thus requiring strict interpretation, although the courts were "also required to avoid interpreting a statute so as to bring about an absurdity".[197] The court therefore found that the statutory tenant was entitled to remain in possession and occupation of what had been let to him and that the landlord acted unlawfully.[198]

A similar approach was followed in *Fernandes v Dawood,*[199] where the court found that certain fixtures and equipment were incidental to the tenancy and the statutory lessor was not allowed to deprive the tenant of such furnishings. The court concluded that the legislature intended to protect the tenant, not only in bare occupation of the premises, but in "the beneficial exercise and enjoyment of all rights flowing from the lease".[200]

The position was resolved by means of War Measure 97 of 1944,[201] which provided that the statutory tenant was entitled to all the benefits of the original lease as if the said lease was still in force, as long as he remained in occupation of the premises.[202]

The courts were initially under the impression that the landlord simply had to put up with the tenant occupying his property, without consensus between the parties, because the landlord was in effect statutorily deprived of his right of ejectment.[203] According to Cooper, this deprivation was imposed by "placing a clog upon the court's power to grant an order for ejectment".[204] If one agrees with Cooper, one can conclude that the deprivation was initiated by the legislature, an act of state

[197] *Aggouras v Macfarlane* 1943 CPD 103 at 109.
[198] *Aggouras v Macfarlane* 1943 CPD 103 at 107-109.
[199] 1943 CPD 414 at 417-418.
[200] *Fernandes v Dawood* 1943 CPD 414 at 418.
[201] Proc 244 of 1944 (*Government Gazette* 3422 1 December 1944).
[202] Burchell EM "Statutory Tenant's Rights" (1950) 67 *SALJ* 211-213 at 212.
[203] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 156.
[204] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 156.

interference with the rights of owners, although the effect was rather seen in the courts because the courts' powers were limited where a landlord applied for an ejectment order. One can also conclude that some courts were reluctant to give effect to statutory interference with the rights of landowners (and contractual relationships) and accordingly limited their interpretation of the legislation to what the legislature explicitly strived to accomplish. The legislature was therefore forced to continually intervene, clarifying the objective of the statutes by means of proclamations and war measures. However, the duty of the courts is to apply the law and the powers of the courts in a given case are outlined by the laws, including the legislation. A different view would be that the courts merely applied the landlord-tenant laws and the effect of these statutory interventions was apparent in consideration of the weakened common law power of landowners to evict tenants upon expiration of the lease.

The Rents Amendment Act 1947[205] made provision for the protection of lessees of business premises, although the extent of the protection was not as substantial as for lessees of residential property. Section 2(i) of the Act provided that a lessee (of business or residential property) could be ejected upon termination of the lease if the lessor reasonably required the property for his own use and if "suitable alternative accommodation has been offered to the lessee … and has been refused by him for reasons which to the court seem inadequate". In section 2(j) the legislature relaxed the provisions of the principal Act in favour of the lessor[206] and granted the lessor a right to claim ejectment of the lessee (of business premises) upon termination of the lease, if the premises were "reasonably required in the public interest (having due regard to any hardship or damage that may be suffered by a lessee as a result of such ejectment) for the purpose of a reconstruction or rebuilding scheme".[207]

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[205] Act 53 of 1947.

[206] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 7.

[207] This was a very peculiar section for two reasons, the first being that the various Rents Acts practically never referred to the public interest, although the underlying purpose of the Acts was to address a housing shortage, which one can assume effectively relates to the public interest. Paradoxically this section only applied to business premises and the public interest referred to by this section could obviously not relate to the housing shortage. The specific reference to the hardship suffered by the lessee as a result of the ejectment was also an unfamiliar insertion made by the legislature. In principle the Rents Acts tried to disregard the personal conditions of lessees and rather focused on the conditions of the lessor. See *Johannesburg Board of Executors & Trust Co Ltd v*

In 1950 the new Rents Act[208] repealed previous rents legislation[209] as well as applicable war measures.[210] The effect of the 1950 Rents Act was to (again) amend and integrate landlord-tenant law.[211] The Act applied to dwellings and business premises,[212] although the Act did not apply to (a) properties controlled by the state,[213] (b) properties with spacious grounds and farms, (c) new premises,[214] or state-owned premises.[215] The Act did not apply to premises which were being dealt with by a local authority under the provisions of the Slums Act 53 of 1934 either.[216] Section 33(1)(d) of the Act excluded all dwellings of which the rent was being controlled or determined under the provisions of another law.[217]

During this period the Housing Act 35 of 1920 was still applicable. In terms of section 5, the local authority may borrow money in order to construct dwellings and carry out approved schemes within its jurisdiction. These dwellings could be sold or let by the local authority on conditions prescribed by the administrator. The Act does not provide any information with regard to the amount of the rent or the level of tenure security afforded to these tenants. The nature of the tenant occupying local

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Gordon 1947 (1) SA 92 (W) 96; *Rose's Car Hire Co Pty Ltd v Harris & Co* 1944 WLD 159; Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 139.

[208] Act 43 of 1950.

[209] Rents Act 33 of 1942, Rents Amendment Act 53 of 1947 and the Rents Amendment Act 7 of 1948.

[210] Section 34.

[211] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 8.

[212] The definition of dwellings and business premises still gave rise to uncertainty. See Rosenow REG & Diemont MA *The Rents Act in South Africa* (2nd ed 1950) 17-30.

[213] Properties that fell under this division included premises erected and let by the National Housing and Planning Commission, a local authority in terms of the Housing Act 35 of 1920, or a company or society in terms of section 6 of the Housing Act (with the approval of the National Housing and Planning Commission). See Rosenow REG & Diemont MA *The Rents Act in South Africa* (2nd ed 1950) 11-12.

[214] The effect of section 33 (1)(f) of the Act was to exclude all new buildings or new units (added to existing buildings), because the section provided that the Act did not apply to dwellings or business premises unoccupied before 21 October 1949.

[215] The state is not bound by a statutory enactment unless the legislature clearly intended to do so. The Rents Act gave no such indication and state-owned properties were therefore excluded from the provisions of the Act: Rosenow REG & Diemont MA *The Rents Act in South Africa* (2nd ed 1950) 14.

[216] Section 33(1)(d). The aim of the Slums Act was to identify slum areas in order to direct the owner to remove the nuisance or to demolish the dwelling. The local authority could declare any premises a slum. Once the building was declared a slum, the town clerk would serve a notice on the owner of the slum directing him to remove the nuisance or directing him to demolish the dwelling without compensation being paid by the local authority. The local authority could also notify the owner that it intended to acquire the property by expropriation. The local authority had to notify any occupier of the slum of the intended demolition. The Act provided that no person may enter the slum after the date was fixed for commencement of demolition. The owner was prohibited from allowing any person to occupy the slum on or after the said date.

[217] The effect of this provision is evident in consideration of the racially discriminatory laws. Where the apartheid laws determined the rent of non-white persons in the identified areas, application of the Rents Acts was excluded.

authority lettings is also uncertain. One can assume that the Rents Act did not apply to local authority lettings because the Housing Act stated that the conditions of the lettings, including the determination of the rent, would be prescribed by the administrator.

The central principles of the 1950 Rents Act were similar to previous rents legislation, focusing specifically on the right of the owner to claim ejectment of the tenant upon expiration of the lease where the owner reasonably required the property for his own use.[218] The Act additionally forced landlords to charge reasonable rents in accordance with the 1942 Rents Act. As a result of section 2 of the Act, landlords were forbidden to charge rents higher than the rate charged on the first day of April 1949.[219] The essential object of the Act was to provide tenants with reasonable rentals, although substantive tenure rights were a "necessary corollary" of the Act.[220]

Section 21 of the 1950 Rents Act made provision for substantive tenure protection for lessees of residential premises. The court could not eject the tenant when the lease expired by effluxion of time or in consequence of notice duly given, as long as the lessee complied with the provisions under the Act.[221] In the case of non-compliance, according to common law principles, the tenancy would automatically terminate upon effluxion of the fixed term, which meant that not only did the contract terminate but "with it the relationship of lessor and lessee cease[d]."[222] The position was similar in the case of a periodic tenancy, where either party could end the periodic lease by giving notice, which ran parallel with a period of the lease.[223]

Section 23 incorporated War Measure 97 of 1944 as it stated that the statutory tenant would observe all the conditions of the original contract of lease, as if it was still in force. The juristic relationship between the parties changed to the extent that their relationship now originated in statute law and not in agreement, although their responsibilities still derived from the original contract. The relationship

[218] Rosenow REG & Diemont MA *The Rents Act in South Africa* (2nd ed 1950) 9.
[219] See Rosenow REG & Diemont MA *The Rents Act in South Africa* (2nd ed 1950) 62-83 for a discussion on rent.
[220] Rosenow REG & Diemont MA *The Rents Act in South Africa* (2nd ed 1950) 85.
[221] Section 21(1) of the Act required the lessee to pay the rent and perform the other conditions of the tenancy, upon expiration of the "consensual" lease.
[222] *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325.
[223] Kerr AJ *The Law of Lease* (2nd ed 1976) 180.

resembled a *quasi contract*, a term used in Roman law to describe a contractual relationship lacking *consensus*. This term was contextualised by Kerr in landlord-tenant law, which resulted in a new definition of the contract, the *quasi lease*.[224]

According to section 23(1) the statutory tenant could end the *quasi lease* by giving notice, as required under the original lease or at least one month's notice if the contract did not specify any notice. The Act made provision for numerous grounds upon which the lessor could end the statutory tenancy. Kerr[225] divided these grounds into five classes, namely (a) the conduct of the lessee;[226] (b) the needs of the lessor;[227] (c) previous landlord occupation and the lessee's agreement;[228] (d) reconstruction, rebuilding and town planning[229] and (e) a saving clause.[230] The "needs of the lessor" were interpreted by the legislature in such a way that it had preference. This was illustrated in the case of *Johannesburg Board of Executors & Trust Co Ltd v Gordon,*[231] where the court found that the landlord merely had to show that he reasonably required the leased premises for his own use. Whether the

[224] Kerr AJ *The Law of Lease* (2nd ed 1976) 198.
[225] Kerr AJ *The Law of Lease* (2nd ed 1976) 198-201.
[226] Section 21(1)-21(1)(b) provided that the lessee had to pay the rent within seven days after the due date and perform the other conditions of the tenancy. The court could also eject the statutory tenant if he damaged the property or was found guilty of causing nuisance for neighbouring occupiers. Section 23(2) added an additional ground, namely that the landlord could eject the statutory tenant if he sublet the premises for the first time after expiration of the original lease.
[227] Section 21(1)(c)-(d) of the Act provided that the court could eject the lessee if the lessor (or his parent or child) reasonably required the entire premises for his personal occupation or use, provided that the lessee has been given three month's notice in writing to vacate the premises and such period of notice has expired. This section also gave the lessor a right to claim ejectment of the statutory lessee if the lessee was a former employee of the lessor and the lessor required the premises for the occupation or use of a person in his employ. Section 21(3) made it a criminal offence if the lessor did not occupy the premises within one month and continuously occupied it for a year thereafter. In the case of *Dundas v Seeligsohn* 1960 (1) SA 249 (C) 252 the court found that the words "required by the lessor" in section 21(1)(c) meant the lessor's needs and not only his desires. The court further found that the enquiry with regard to the definition of the word would in each case be a factual one, regard being given to the needs of the lessor in the specific circumstances.
[228] According to section 21(1)(e) the court could eject the lessee on a specified date if the lessee agreed in writing to vacate the premises on that date and if the lessor previously personally occupied the premises.
[229] Section 21(f) provided that if the premises were reasonably required for the purpose of, for instance (see section 21(1)(f) for other grounds listed), a reconstruction scheme for which the vacation of the premises was essential and the lessee has been given six months' notice to vacate and such period of notice had expired, the court could eject the lessee. Section 21(1)(f) added that the lessor should furnish security, as the court may consider sufficient, for the purpose of meeting any claim for compensation by the lessee if the scheme was not undertaken. The lessee could also be ejected by means of section 21(1)(g) if the local authority reasonably required the premises in a scheme of town improvement or public work, had the lessee been given six months notice and such period of notice has expired.
[230] Section 21(1) contained a saving clause, which gave the court the discretion to add an additional ground if it was deemed necessary in the circumstances.
[231] 1947 (1) SA 92 (W) 96. The case dealt with business premises although the principle was adopted in landlord-tenant law in general.

hardship to be suffered by the lessee upon ejectment exceeded the hardship to be suffered by the landlord if he couldn't get possession and occupation of the premises,[232] was a question the court found unnecessary to answer due to the lessor's preference.[233] The reasoning of the court seems counter-intuitive as the landlord only had to show that she reasonably required the property for her own use. However, the aim of the Act was to provide substantive tenure rights for tenants upon expiration of the lease and not to give some preference to the landlord during eviction proceedings.

In the subsequent twenty-five years the Act was amended by twelve different amendment acts[234] that led to important developments, such as the abolition of rent control of business premises and the extension of the provisions of the Act.[235] In 1966 the State President made the provisions of the Act applicable to all dwellings (as well as garages and parking spaces) used for residential purposes for the first time after 20 October 1949 and before 1 June 1966, situated in an area for which a rent board had been constituted.[236] The Rents Amendment Act 1975[237] amended 21 sections of the Rents Act. Certain grounds on which the lessor could claim ejectment of the lessee were amended,[238] while a new form of protection for the lessee was adopted, namely that the lessee could not be ejected as long as he performed certain conditions of the tenancy which in the courts' opinion were not trivial.[239]

One should note that even though the range of Rents Acts enacted during this period applied to a large number of dwellings, some dwellings fell outside the scope

[232] See Chapter 7 for more detail regarding the balancing of the parties' interests, especially in relation to the hardship that could be suffered by the tenant.
[233] Kerr AJ *The Law of Lease* (2nd ed 1976) 199.
[234] As amended by Rents Amendment Act 53 of 1951, Rents Amendment Act 47 of 1964, General Law Amendment Act 98 of 1965, Rents Amendment Act 54 of 1966, General Law Amendment Act 102 of 1967, General Law Amendment Act 70 of 1968, Rents Amendment Act 64 of 1969, General Law Amendment Act 101 of 1969, Rents Amendment Act 56 of 1970, Rents Amendment Act 20 of 1971, Rents Amendment Act 51 of 1972 and Rents Amendment Act 30 of 1975.
[235] Initially the Act was only applicable to premises occupied before 21 October 1949, although this was amended and the Act was made applicable to premises used for the first time after 20 October 1949.
[236] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 8-9.
[237] Act 30 of 1975.
[238] The amended grounds included where the premises were reasonably required for the lessor's personal occupation or use, where the premises were required for an employee of the lessor, or where the premises were reasonably required for a reconstruction or rebuilding scheme.
[239] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 9-11.

of these statutes. The tenure rights of these white households[240] fell under the ambit of the common law, as discussed earlier in this chapter. The common law provided some tenure security for tenants in order to maintain the contractual relationship between the parties. Tenure security was granted in the case where either party died during the term of the lease; where the landlord became insolvent; or where the landlord sold the property to a third party during the term of the lease.

Where either of the parties died during the lease Kerr stated that the lease survived and automatically passed to the heirs of the tenant if the tenant passed away.[241] This position was adapted in *Lorentz v Melle*,[242] where it was decided that the contractual duties of a party would pass to his executor and administrator. If the landlord became insolvent during the period of the lease, the common law ensured protection for tenants occupying such premises.[243] The real right of the tenant who held a registered long lease would trump the rights of the purchaser in the event of a sale, while if the tenant merely had a personal right, the purchaser would be bound if he had knowledge of the lease or if the *huur gaat voor koop* rule applied. If the property was sold in order to abide by a prior real right, such as a mortgage, the amount of the bid could influence the rights of the tenant to the extent that the property would be "put up for sale first subject to the lease and thereafter, if the amount bid on the first occasion was not sufficient to cover the bond, free of the lease."[244] Apart from the legislation, security of tenure was primarily provided for tenants by means of the *huur gaat voor koop* rule. The tenure rights of the tenant would rely on the type of successor he was, the period of the lease and whether the tenant had a real or personal right.[245]

In the 1946 case of *Clark v Findlay*[246] the Court found that the statutory tenant would be protected under the common law rule, *huur gaat voor koop*. Judge

[240] The group of households who rented property in terms of the common law were white households, because the apartheid legislative scheme regulated the occupation rights of all other racial groups.
[241] Kerr AJ *The Law of Lease* (2nd ed 1976) 182-183. See text accompanying fn 92 above.
[242] 1978 (3) SA 1044 (T) 1058C.
[243] See section 2.2.2 above for a discussion on real and personal rights of tenants with regard to short leases.
[244] Kerr AJ *The Law of Lease* (2nd ed 1976) 184-185. See text accompanying ffn 95-100 above for more detail with regard to the rights of the tenant and mortgagee. Cooper WE *Landlord and Tenant* (2nd ed 1994) 323 agreed.
[245] See section 2.2.2 above concerning the *huur gaat voor koop* rule and the implementation thereof.
[246] 1946 AD 224.

Watermeyer CJ made specific reference to section 14(2)[247] of the 1942 Rents Act, which was applicable at the time, and found that:

> "[section] 14(2) was intended to protect a statutory tenant from ejectment, not only at the suit of the original lessor but also at the suit of anyone else, whose application for ejectment could successfully have been resisted under Common Law by a tenant, on the ground that he was in occupation under a valid lease at the time when application for his ejectment was made."[248]

According to Cooper this authority was never departed from, which led to the presumption that the legislature was aware of this when Act 43 of 1950 as well as the Rent Control Act[249] were enacted. If the lessor sold the leased property, the purchaser would, by means of the common law rule and the Rent Control Act (or any other Rents legislation), step into the shoes of the previous owner as the new lessor and be prohibited from claiming ejectment of the statutory tenant.[250]

From the discussion it is clear that the Rents Acts drastically amended the relationship between the landlord and tenant. The aim of these laws was to provide the white minority group with substantive tenure rights. In order to give effect to this aim the laws trumped the weak common law rights of urban residential tenants, while also disregarding the contractual nature of a lease. Instead of reinforcing the contractual agreement between the parties, the Rents Acts allowed the tenant to continue occupying the leased premises upon expiration of the lease without having any right to do so contractually or at common law. The common law forms of tenure security were different, because it was aimed at keeping the contract intact.

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[247] "No order for the recovery of possession of a dwelling or for the ejectment of a lessee there from based on the fact of the lease having expired either by effluxion of time or in consequence of notice duly given shall be made by any Court so long as the lessee continues to pay, within seven days after the due date, the rent agreed upon with the lessor or the rent prescribed by, or determined under this Act in respect of the dwelling, and performs the other conditions of the tenancy."

[248] *Clark v Findlay* 1946 AD 224 at 232.

[249] Act 80 of 1976.

[250] Cooper *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 161-162.

2.3.3.2 Non-white urban housing

As mentioned previously, the Rents Act 43 of 1950 did not apply to dwellings of which the rent was determined under the provisions of another law.[251] The Natives (Urban Areas) Consolidation Act 25 of 1945[252] was similar to the Natives (Urban Areas) Act 21 of 1923. Section 2 of the Act provided that the local authority may define areas of land for the occupation of black households[253] and may by regulation lease lots for the erection of buildings. The local authority could also provide buildings for the accommodation of black persons. The terms and conditions of these arrangements were regulated by the urban local authority with the approval of the Administrator and the Minister.[254] Section 20(1) of the Act stated that the rent charged for the occupation of any lot, house, hut or building let for residential purposes would be determined by the Minister. The Minister had to consider all the circumstances in order to ascertain a fair and reasonable rent. Where a black tenant failed to pay the rent, the magistrate of the district in which the location was situated could warrant an execution against the movable property of that tenant.[255] The effect of section 5 of the Natives (Urban Areas) Consolidation Act was that only black individuals could acquire land in locations and section 6 restricted the right of such households to acquire land outside the locations. Section 9 made provision for the segregation of the black population group in urban areas. In terms of this section the Governor-General could declare that all black persons within the limits of any urban area must reside in a location. The effect of the Act was that all black individuals had to reside in the locations and their occupation rights, including the rent they had to pay for either the lots or the premises, were regulated under the Act. This meant that the Rents Act 43 of 1950 did not apply to black tenants. Rosenow and Diemont state

[251] Section 33(1)(d) of the Rents Act.
[252] The Act was also referred to as the Blacks (Urban Areas) Consolidation Act 25 of 1945.
[253] The Act differed from the Natives (Urban Areas) Act 21 of 1923 because it did not mention whether coloured persons could reside in the locations. Section 5 specifically stated that only black persons could occupy land in the locations and one can assume that the Act did not apply to coloured persons.
[254] Similar to its predecessor, the Act did not stipulate the terms of the lease. According to Olivier a system of unregistered 30-year leasehold still applied to black urban residential areas during this period: Olivier N "Urbanisation: Policy/strategy with Particular Reference to Urbanisation and the Law" (1988) 53 *Koers* 580-599 at 582.
[255] Section 20(5) of the Natives (Urban Areas) Consolidation Act 25 of 1945. In terms of this section the warrant would be executed once it is found that the rent is in arrears, provided that due notice must have been given to the black tenant and he must have had an opportunity to be heard.

that the Rents Act did not intend "to interfere with the rents charged by local authorities for location sites in terms of the Natives (Urban Areas) Consolidation Act 1945".[256]

The Coloured Persons Settlement Act 7 of 1946 was similar to the Coloured Persons Settlement Areas (Cape) Act 3 of 1930 as it made provision for the establishment of certain areas that could be occupied by coloured persons. In terms of section 6 of the Act, no person other than the state or a coloured person could acquire or hold any right or interest in land allocated for coloured persons. Section 7 of the Act stated that the only persons who could reside in a coloured persons settlement were lessees, probationary lessees or owners of the land.[257] Similar to its predecessor, the Act did not oblige coloured persons to reside in the identified areas. One can assume from the terminology of the Act that coloured persons could also occupy land in other parts of South Africa. If a coloured person occupied a dwelling, regulated under the provisions of the Rents Acts, one would have to assume that the relevant statute also regulated her tenancy.

In 1950 the legislature introduced group areas legislation. The initial act was the Group Areas Act 41 of 1950, followed by the Group Areas Act 77 of 1957 and the Group Areas Act 36 of 1966. The legislation made provision for the allocation of certain parcels of land for the exclusive occupation (and /or exclusive ownership) by a specified racial group. Members of other racial groups were prohibited from owning land, acquiring land for occupation or using land (or premises) within such an area.[258] The initial act made provision for the white group, the coloured group[259] and

[256] Rosenow REG & Diemont MA *The Rents Act in South Africa* (3rd ed 1965) 10. Calderwood DM *Native Housing in South Africa* (1953) 17 mentions that the regulations that applied to black persons did generally not apply to white individuals and other laws that were normally applicable in white areas did not apply to black individuals.

[257] Section 7 also stated that the wife, husband and minor children of the lessee, probationary lessee or owner could reside in the settlement. If any person contravened this section, she would be guilty of an offence and liable on conviction to a fine or imprisonment for the maximum period of twelve months.

[258] These measures, and some of the previous legislation discussed, made racial segregation possible, which resulted in major relocation of Africans. The aim (and effect) of the group areas legislation was the development of "'independent states' and 'national states' politically and territorially divorced or semi-divorced from the rest of South Africa on an ethnic or tribal basis": Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 84.

[259] Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 78 explains that the coloured group was later divided into subgroups, consisting of Indians, Malays and Chinese.

the black group.[260] The group areas legislation affected the coloured and Indian population to the extent that the legislation served as a form of influx control. The legislation contributed to the housing shortages experienced by these groups and one can therefore argue that the legislation acted "as a de facto influx control measure".[261] However, the group areas legislation did not have such a profound impact on the occupation rights of black individuals as it had on the occupation rights of coloured households. The territorial segregation of black persons was regulated under a different statutory regime. The Black Land Act 27 of 1913 regulated occupation and ownership of land for black individuals in rural areas (also known as the "homelands"), while the Native (Urban Areas) Consolidation Act 25 of 1945 regulated the allocation of land in urban areas for occupation by black persons. The black urban areas identified and regulated under the Native (Urban Areas) Consolidation Act 25 of 1945 were excluded from the ambit of the group areas legislation.[262]

The rights acquired under the group areas legislation included ownership (also conceptualised as the *acquisition* of *immovable property*); a right to *occupy land* and *premises*; and a right to *use land* and *premises*. Individuals of a specified race group could acquire immovable land in the allocated areas and could acquire a permit "authorizing - (i) the acquisition or holding of immovable property in a group area or in the controlled area; or (ii) the occupation of or the granting of permission to occupy any land or premises in a group area, in the controlled area or in a specified area".[263] The right to occupy land in the allocated areas was usually through the acquisition of a permit, which constituted a weak, insecure personal right.[264] The ownership that could be acquired in terms of the legislation could be described as a

[260] Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 77-78.
[261] Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 85.
[262] Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 78. Olivier N "Urbanisation: Policy/Strategy with Particular Reference to Urbanisation and the Law" (1988) 53 *Koers* 580-599 at 590 explains that the group areas legislation regulated the whole of South Africa except for scheduled areas, which were regulated under the Black Land Act 27 of 1913 (followed by the Development Trust Land Act 18 of 1936), and the identified locations in urban areas, regulated under the Native (Urban Areas) Act 21 of 1923 (followed by the Native (Urban Areas) Consolidation Act 25 of 1945.
[263] Section 14(1) of the Group Areas Act 41 of 1950. See also section 18(1) of the Group Areas Act 77 of 1957 and section 21(1) of the Group Areas Act 36 of 1966 for subsequent similar provisions.
[264] See also Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 91-93 for a more detailed discussion on the common law terminology used in the group areas legislation.

"'weak model of ownership" because the right was inherently limited. In order to give effect to certain government policies and political aspirations, ownership could be extinguished through executive decision-making.[265] The discretion to terminate ownership and other rights in land was exercised on a *de facto* basis and therefore created uncertainty, especially because procedural controls were also absent. The legislation undermined the absolute notion of ownership and the extent of security usually associated with this right, although this "weakening" of ownership did not affect all South Africans equally. The white minority group was not affected by the group areas legislation because (white) ownership remained the most secure form of tenure as it was traditionally perceived.[266]

In 1968 the Regulations Concerning the Administration and Control of Land in Black Urban Areas of 14 June 1968[267] was introduced and applied to black urban residential land. The regulations provided that black individuals could occupy urban land under three different forms of tenure, namely "(i) a permit to erect a private dwelling; (ii) a resident's permit to rent a house from the Local Government; and (iii) a certificate of occupation of a house".[268] The rights allocated to black individuals were all personal rights. The rights derived from the contractual relationship between the local authority and the specific individual. The occupier could therefore only enforce his personal right against the local authority, because he did not obtain a real right.[269]

One can conclude that the occupation rights of non-white households were weak, because the government's policy was aimed at establishing racial segregation. In order to sufficiently segregate different racial groups the legislature

[265] Section 3(1)(b) of the Group Areas Act 41 of 1950 provided that the Governor-General could proclaim in the Government Gazette that a certain area should be occupied by the members of that racial group as owners. The group would therefore acquire the rights associated with ownership. However, section 22(1) of the Act restricted the registration of these rights. The subsequent statutes contained similar provisions. As mentioned by Visser, the meaning of ownership has always been influenced by various factors, including in this case political aspirations of racial segregation: Visser DP "The Absoluteness of Ownership: The South African Common Law in Perspective" 1985 *Acta Juridica* 39-52 at 47.

[266] Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77-118 at 107.

[267] Government Notice R1036 of 1968 (*Government Gazette* 2096 p1 14 June 1968).

[268] Olivier N "Urbanisation: Policy/Strategy with Particular Reference to Urbanisation and the Law" (1988) 53 *Koers* 580-599 at 582.

[269] Olivier N "Property Rights in Urban Areas" (1988) 3 *SA Public Law* 23-33 at 26; Olivier N "Urbanisation: Policy/Strategy with Particular Reference to Urbanisation and the Law" (1988) 53 *Koers* 580-599 at 582. See also Olivier N "Property Rights in Urban Areas" (1988) 3 *SA Public Law* 23-33 at 26-29 for more detail regarding the various personal rights provided for in the Regulation.

had to regulate the occupation rights of non-white households. To facilitate straightforward eviction and relocation of these racial groups, their occupation rights had to be insecure and a mere permit, license or personal right was granted through the statutes. The common law did not apply to non-white households, because the nexus of apartheid laws regulated the occupation rights of all racial groups other than the white minority. The changing socio-economic circumstances that influenced housing policy and landlord-tenant legislation in South Africa during this period did not affect the occupation rights of non-white members of South Africa, because the apartheid laws and policies trumped any possible correlation between housing shortages in general and increased tenure rights for all households in South Africa.

2.3.4 Rent Control Act 1976

In 1976 the Rent Control Act repealed the 1950 Rents Act and its amending legislation. The Rent Control Act once again amended and consolidated landlord-tenant law, although the difference between the acts mainly related to form and not substance.[270] The scope of the protection offered to tenants under the Rent Control Act seemed quite far-reaching due to the broad definition of "controlled premises".[271] Looking at these definitions and section 28 of the Act, it seems as if the Act applied to roughly all residential and business premises, which would have provided wide-ranging substantive tenure security for tenants in the whole of the rental sphere. However, similar to previous rents legislation, application of the Act was restricted by section 51.

The Act was not applicable to controlled premises situated in an area for which a rent board had not been established.[272] Residential or business premises built under the provisions of the Housing Act[273] that were being let by the National

[270] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 11.
[271] In section 1 the Act defined "controlled premises" as any dwelling, garage, parking space or business premises. These premises were further extensively defined in this section.
[272] Section 51(a)-(b).
[273] Act 4 of 1966.

Housing Commission or the local authority were exempted from the provisions of the Act.[274]

In terms of section 61 of the Housing Act, the local authority could borrow money and construct approved dwellings and carry out approved schemes. The local authority could also sell or let any of the dwellings constructed by it. Section 65 of the Housing Act stated that where a local authority tenant failed to pay his rent the local authority could institute action in court with the aim to recover the rent. The local authority could also enter upon and take possession of the dwelling without having obtained judgement. However, a notice must have been delivered to the tenant and seven days must have passed.

The Rent Control Act did not apply to any property dealt with under the provisions of the Slums Act[275] or premises of which the rent was determined under the provisions of another law.[276] The Natives (Urban Areas) Consolidation Act 25 of 1945, the Group Areas Act 36 of 1966 and the Regulations Concerning the Administration and Control of Land in Black Urban Areas of 14 June 1968[277] were still applicable during this period[278] and the relevant legislation and regulations regulated the relationship between black (and coloured) tenants and the local authority. The Rents Act did therefore not apply to black and coloured tenants because the Natives (Urban Areas) Act and Group Areas Act regulated these tenancies.[279]

Section 51(f) of the Rent Control Act provided that premises used or occupied for the first time after 21 October 1949 were exempted from the provisions of the Act, which meant that all new buildings fell outside the ambit of the Act. The result was that a large number of tenants were excluded from the Act and only occupying tenants were protected. This affirms what Van den Heever found in *Josuub Ltd v Ismail*,[280] namely that only a section of the community was protected under the Act.

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[274] Section 51(c).
[275] Act 53 of 1934.
[276] Section 51(d)-(e).
[277] Government Notice R1036 of 1968 (*Government Gazette* 2096 p1 14 June 1968).
[278] See section 2.3.3.2 above for a discussion on the relevant racially discriminatory statutes and regulations.
[279] The Natives (Urban Areas) Consolidation Act 25 of 1945 was repealed by the Black Communities Development Act 4 of 1984.
[280] 1953 (2) SA 461 (A).

Application of the Act was further limited by section 51(g), which exempted old buildings.[281] Dwellings ordinarily occupied by the owner or lessee which were let by the owner or sublet by its lessee for a period not exceeding six months, were also excluded from the provisions of the Act.[282] State property was exempted from the Act, which meant that any property let by a State Department would fall outside the ambit of the Act. According to Cooper[283] section 28(d)(i) of the Act was not applicable to a sectional title section if that section fell under the ambit of the Sectional Titles Act.[284]

The State President was entitled, upon recommendation of the Minister, to extend application of the Act by means of proclamation in the *Government Gazette*,[285] while according to section 51(g), the Minister was also entitled to exempt premises from rent control by means of notice in the *Government Gazette*. Thereafter the effect of the notice could still be amended or withdrawn by means of similar procedure.[286]

The biggest imperfection of the Act, and more specifically the system of rent control in conjunction with statutory tenancy, was that only a small sector of the population could reap the benefits of the system because they occupied controlled premises. The Act and its predecessors were supposed to provide substantive tenure rights for tenants occupying residential property in order to protect vulnerable tenants against exploitation by landowners.[287] Paradoxically, the Native (Urban Areas) Consolidation Act 25 of 1945, the Group Areas Act 36 of 1966 and the relevant regulations excluded black (and coloured) people, the vast majority of the population and of marginalised people, from access to the rent control system in urban areas because it regulated the relationship between these tenants and the local authority. The extent of tenure security provided for urban non-white occupiers

[281] In order to exempt the building the owner had to satisfy the Minister, apart from two further requirements, that the building was at least 100 years old.
[282] Section 21(i).
[283] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 30-31.
[284] Act 66 of 1971.
[285] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 27.
[286] In 1966 the State President declared the provisions of the 1950 Rents Act applicable to all dwellings (including garages and parking spaces) occupied or used for the first time after 21 October 1949 and before 1 June 1966. The effect was to extend application of the Act with regard to residential property.

[287] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 357.

under these statutes was decisively limited in order to give effect to the government's policy of the temporariness of black occupiers in urban areas. With regard to coloured persons, the rights acquired under the Group Areas Act were also insecure in order to make relocation possible in future.

The aim of the Rent Control Act was to control the rent of "controlled premises"[288] and to provide substantive tenure security for tenants occupying such premises. The effect of the Act was to disallow the courts to grant eviction orders in certain circumstances. In order to control rentals, the Act froze the rent at the rate charged on the first day of April 1949, although Proclamation 317 of 1966[289] provided that rentals of controlled residential premises, occupied or used for the first time between 21 October 1949 and 31 May 1966, were frozen on 31 May 1966. The legislature introduced certain factors (such as values and services) that the rent control boards had to take into account in order to determine the rent.

The rent control boards could therefore resolve an issue with regard to the amount of the rent and disregard the predetermined "frozen rent". [290]

Similar to section 21 of the 1950 Rents Act, the Rent Control Act placed a restriction on the ejectment of tenants. When a lease of controlled premises expired in consequence of notice given (in the case of a periodic tenancy) or effluxion of time (in the case of a fixed-term tenancy) and the lessee continued to pay the rent within seven days after due date while performing the other conditions of the tenancy, the court could not eject the lessee from the premises except on certain grounds.[291]

Again, one should note that not all tenants were protected under the Rent Control Act and a number of urban residential tenants leased housing in terms of the common law. The common law did not make provision for continued occupation rights for tenants upon termination of the lease. If the tenant did not comply with the requirements set out in the acts and the tenant continued to occupy the property after expiration of the lease, the tenant was holding over and could be evicted by the

[288] Section 1(iii) defined "controlled premises" as "any dwelling, garage, parking space or business premises".
[289] *Government Gazette* 1586 p177 4 November 1966.
[290] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 80. See Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 80-114 for a discussion of rent control.
[291] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 117.

landlord. The landlord would rely on his rights as owner to institute the *rei vindicatio* and reclaim the property. The landlord could also claim damages.[292]

If the tenant did comply with the provisions of the Rent Control Act, a new relationship emerged between the statutory lessee and statutory lessor upon expiration of the lease. Cooper described the relationship as a "statutory relocation", akin to a tacit relocation because "those provisions of the lease incident to the relation of lessor and lessee [were] renewed but the provisions that [were] collateral, independent and not incidental to the relation of lessor and lessee [were] not incorporated in the new letting."[293]

The Rent Control Act granted lessees a continued occupation right. The lessor could only claim ejectment of the lessee if he complied with one of the grounds stipulated in section 28. The lessor also had to give written notice in accordance with section 27(1).[294] Section 27(1) was applicable where the landlord wanted to evict the tenant. It was not a notice to terminate a periodic lease. The lessee became a statutory tenant by means of section 28 and the landlord could consequently only obtain an ejectment order if he complied with section 27(1) and could prove one of the grounds stipulated in section 28. Section 27(1) required that landlords had to notify the rent boards of their intention to claim ejectment of the lessee, which protected uninformed lessees. The lessor was required to clearly state the statutory ground he was relying on in the notice in order to sufficiently inform the rent board of his objective. If the lessee forfeited the tenure protection in terms of the Act, either by breach of contract or as a result of non-compliance with the provisions of section 28,[295] the lessor was exempted from section 27(1).[296]

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[292] See section 2.2.1 above concerning the position of the parties. See also *Chetty v Naidoo* 1974 (3) SA 13 (A) 20 concerning the onus of proof and *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) 687C concerning the amount of damages claimable by the landlord.

[293] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 159.

[294] The Rent Control Act was the first Act to oblige the landlord to give notice to the lessee and rent board of his intention to evict the lessee.

[295] The statutory tenant could also forfeit his rights if he sublet, assigned or transferred his right to occupy under the Act, even if he was entitled to do so under the original contract of lease.

[296] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 149-151. Section 27(2) provided that where a lessor failed to comply with section 27(1), he could be guilty of an offence and held liable on conviction to a fine not exceeding R200. A lessor who knowingly made a false statement or stated a false reason in the required notice, could be held liable on conviction to a fine not exceeding R400.

A statutory lessee of controlled premises could face an ejectment order if he caused material damage to the leased property or was found guilty of conduct which amounted to nuisance.[297] A statutory lessee of a dwelling, garage or parking space could be ejected on additional grounds.[298] If the lessor reasonably required the entire premises for his own use and the lessee was given three months notice, the court could order ejectment of the tenant.[299] In order to determine whether the needs of the lessor were reasonable, the courts applied an objective test, which consisted of an examination of the lessor's needs and circumstances.[300] In the case of *Rose's Car Hire Co Pty Ltd v Harris & Co*[301] the court found that the hardship suffered by the lessee, in such a case of eviction, was not a factor to be taken into consideration when the court had to decide whether the lessor should have occupation to which he was otherwise legally entitled.

The statutory lessee of a dwelling, garage or parking space could also be ejected if he was formerly employed by the lessor and the lessor required the premises for the occupation of a person in his employ.[302] The third additional ground made provision for the ejectment of the lessee if he agreed in writing to vacate the premises upon a specified date and such date has arrived.[303] The lessor could only make use of this section if he could prove that he previously personally occupied or used the premises and that the agreement was undertaken in writing at the commencement of the lease.[304]

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[297] Section 28(b).
[298] These grounds were stipulated in sections 28(a)-(d), while sections 28(a)-(c) and section 28(e) regulated business premises.
[299] Section 28(d)(i). The Act provided that required occupation or use by the parent or child of the lessor could also establish grounds for ejectment. Section 28(e)(i) made provision for the ejectment of a lessee of business premises where the lessor reasonably required the premises for his own use, and such lessee was given twelve months written notice to vacate the premises, and the said period of twelve months had expired. If a lessor caused a lessee to vacate premises (residential or business) in accordance with the above-mentioned sections and failed to take occupation within one month, for an uninterrupted period of twelve consecutive months, such a lessor could be guilty of an offence and liable to a fine on conviction: section 31(1). Section 31(2) made provision for additional compensation claimable by a lessee who could prove loss suffered as a direct consequence of his loss of the controlled premises.
[300] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 129.
[301] 1944 WLD 159.
[302] Section 28(d)(ii).
[303] Section 28(d)(iii).
[304] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 138.

Section 28(d)(iv) provided that the lessor of a dwelling, garage or parking space could claim ejectment of the statutory lessee if the premises were reasonably required for the purpose of a reconstruction, rebuilding scheme, repairs, restoration or conversion for which vacation of such premises was essential.[305] In order to decide whether the lessor reasonably required the premises, the court applied the test of the reasonable man and considered whether the reasonable man would for instance wish to reconstruct his property. The lessor had to prove that reconstruction would convert his property from unprofitable into profitable. Any inconvenience or hardship suffered by the lessee was, once again, not taken into consideration by the court.[306] If the premises were reasonably required for a reconstruction, rebuilding scheme or conversion, the lessee was not at liberty to reoccupy the premises upon completion. If the lessee was ejected for the purpose of repairs or restoration, the lease was merely pendant and the lessee could return to the premises as a statutory lessee.[307] If the premises were reasonably required in connection with any scheme of town improvement or any other public work, which the local authority was by law entitled to undertake, the landlord could claim ejectment of the lessee from such a dwelling, garage or parking space.[308]

Section 28(d)(v) was similar to section 21(1) of the 1950 Rents Act in that it could have been described as the saving clause of the Rent Control Act. This section granted the courts a discretion to allow an application by a lessor who wished to eject a lessee of a dwelling, garage or parking space upon termination of the lease, even though he failed to comply with any of the grounds in section 28. The court

[305] This section was subject to the provisions of section 29 of the Act, which provided additional requirements for such an ejectment application. Section 28(d)(iv) also required six months written notice to be given by the lessor as well as security, as the court may deem sufficient, if the lessee might have a claim for compensation in terms of section 30(2) of the Act. Section 28(e)(ii) was applicable to business premises required for a reconstruction or rebuilding scheme. The substance of the section was very similar to section 28(d)(iv), although twelve months written notice was required and the section did not specifically state that vacation of the premises should be essential. Section 30 was applicable to residential and business premises, making provision for certain offences where the lessor caused the lessee to vacate premises without commencement or completion of the scheme in accordance with the Act.

[306] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 139.

[307] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 138.

[308] Section 28(d)(c). The lessor had to give six months notice in writing, while in the case of business premises twelve months notice was required.

could eject the lessee if it found any other sufficient reason to do so, regard being had to all the circumstances.[309]

In the early case of *Paul v Youley*[310] the court found that section 11 of the Rents Act 13 of 1920 made provision for three circumstances in terms of which the court could eject a tenant. One of these grounds was where the landlord reasonably required the property for his own use or for the use of his employee. The section also contained a saving clause, similar to section 28(d)(v) of the Rent Control Act. The plaintiff required the premises for the occupation of her son and daughter. The court found that where the Act specifically defined the occupation which it preferred, such as personal occupation by the landlord or his employee, it was not permissible to thereafter enable the court to make an order for ejectment to provide occupation for anybody else, other than the two persons favoured by the legislature.[311]

The courts did not easily eject a lessee by means of the saving clause, although in the few cases where the courts did exercise their discretion in favour of the lessor, factors such as the age and condition of the leased premises,[312] the amount of time granted to the lessee to find alternative accommodation and the personal use of the premises by the lessee were taken into account.[313]

In consideration of these provisions and their effect on the rights of the parties, one can conclude that the Act severely interfered with the common law rights of landlords and was therefore interpreted in a strict manner.[314] In *Josuub Ltd v*

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[309] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 141-142.

[310] (1920) 41 NPD 191 at 195-196.

[311] This position was followed by the case of *Wylie v Singer* 1923 EDL 368 at 373, where the court found that the words "some or other ground" must be read in the light of the earlier provisions of that section. Otherwise the object of the Act could become valueless.

[312] In *Smith v Coulon* 1956 (1) SA 163 (N) 166G-167 Holmes J found in favour of the landlord and ejected the tenant in terms of section 21(1) of Rents Act 43 of 1950. The landlord required possession in order to renovate the old and dilapidated building. The tenant had reasonable notice to find alternative accommodation and she previously gave notice of her intention to vacate the premises. The court also considered the fact that the landlord's son wanted to use the property after the renovations were completed.

[313] In *Klerksdorp Town Council v Jassat* 1961 (3) SA 20 (T) the lessee operated a business and leased rooms and dwellings on the stand hired by him. The lessee no longer occupied the stand and the sublessees had taken up alternative accommodation. The Council established a new coloured township which provided accommodation possibilities for the previous occupants. Due notice was given to the tenant and compensation was tendered. In light of these circumstances the court ejected the tenant and all the persons in occupation of the stand in terms of section 21(1) of the 1950 Rents Act (24F-25).

[314] *Herison v South African Mutual Life Assurance Society* 1942 AD 259 at 263; *Wellworths Bazaars Ltd v Chandler's Ltd* 1947 (2) SA 37 (A) 43.

Ismail[315] Van den Heever JA relied on English case law and found that "where a statute deprives a landlord of a part of his common law right to distrain 'the words must not be strained so as further to restrict his rights'".[316] Restrictions on the common law rights of landlords were therefore predetermined by the legislature. Courts were not at liberty to weaken these rights any further and were compelled to interpret the Act "so as to minimize diminution."[317]

From the discussion it is clear that anti-eviction legislation drastically interfered with the rights of landowners to the extent that the landlord couldn't evict the tenant when the lease expired. The legislation did not place limitations on a landowner's right to cancel the lease where the tenant was in breach; the contractual lease converted into a statutory lease where the tenant complied with the original lease and with the requirements as set out in the acts. The legislation did therefore not protect "unlawful *mala fide*" tenants but rather a certain class of tenants who abided by the contract and the legislation. Apart from the abiding character of the tenant, the landlord could still apply for an ejectment order on certain grounds stipulated in the acts. If the tenant did breach the contract or did not comply with the legislation or where the landlord successfully relied on one of the grounds set out in the acts, the landlord was entitled to an ejectment order. Where the tenant for instance breached the contract and the landlord wished to eject the tenant in terms of the common law, the landlord still had to have recourse to legal process. Section 27(1) of the Rent Control Act[318] introduced a new requirement that ensured due process if the tenant enjoyed protection under the Act. According to section 27(1) the landlord could only obtain an ejectment order if he complied with section 27(1) and one of the grounds stipulated in section 28 of the Act.

Where the tenant did not comply with the requirements in the acts he was still afforded some tenure security by means of the common law. The common law

[315] 1953 (2) SA 461 (A) 473A-B.
[316] *Josuub Ltd v Ismail* 1953 (2) SA 461 (A) 472G-H concluded that the legislation was enacted in response to a housing shortage and that the provisions drastically interfered with the common law rights of landowners. The tenant was protected by what Van den Heever JA described as "virtually a proscription of private rights". This protection was in the interest of a certain section of the community, not in the interest of the whole community or the state. The protection was afforded to that section of the community without regard to the individual tenant, which led Van den Heever JA to believe that "such a measure should [have been] beneficially construed in favour of the tenant."
[317] Cooper WE *The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant)* (1977) 12-13.
[318] Act 80 of 1976.

differed from the anti-eviction legislation as it did not restrict the right of landowners to evict tenants upon expiration of the lease. When the lease expired, according to contract law principles, the landlord was entitled to claim an eviction order. The courts were not at liberty to extend occupation rights of tenants if they were not protected in terms of the anti-eviction legislation. The common law focused on keeping the contract between the parties intact, which is why the tenure security provided for by the common law was aimed at fulfilling the lease, not overriding it.[319] The common law also upheld the rent agreed upon between the parties. The parties were at liberty to agree on the rent, while the anti-eviction legislation differed as it placed restrictions on rent increases. In terms of the anti-eviction legislation, security of tenure was in due course subsidiary to rent control.

2.3.5 Conclusion

The initial enactment of the Rents Acts was inspired by the housing shortage that resulted from the First World War and the aim of the legislature was to intervene in the relationship of private landlord and tenant in order to protect tenants from exploitation. The legislation extended urban white tenants' occupation rights upon termination of the lease, although rent control was also imposed. The core of these anti-eviction measures was to restrict the strong common law rights of landowners to reclaim their property when the lease expired.

It is interesting to mention Visser's attempts at defining the legal nature of statutory tenancy, although his view is speculative and does not correspond with the majority of modern authors or case law. Visser argued that the statutory tenant enjoyed a new type of real right because his right of occupation was enforceable against descendants in title to the landlord under the original lease.[320] Another

[319] One of the reasons for such an approach by the courts could have been the general notion of sanctity of contract. Courts did not feel at liberty to override contracts. For literature on the sanctity of contract see Hopkins K "Insurance Policies and the Bill of Rights: Rethinking the Sanctity of Contract Paradigm" (2002) 119 *SALJ* 155-173; *Barkhuizen v Napier* 2007 (5) SA 323 (CC); Hopkins K "The Influence of the Bill of Rights on the Enforcement of Contracts" (2003) August *De Rebus* 22-25.

[320] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 354. The author came to this conclusion after considering the property rights system of the North American Indians. Upon completion of that study it was argued that "the appropriateness of the recognition of a real right in a resource is a function of its scarcity relative to the costs of enforcing such a right."

contention made by Visser, aimed at defining the legal nature of the right of the statutory tenant, was to describe this right as a new form of ownership.[321] As a result of the mid-nineteenth century shift from individual towards society it was asserted that, during this period, the notion of ownership, or rather the rights derived from ownership, altered into a right to revenue.[322] In this context revenue meant "immaterial revenue" rather than material revenue. The rent received by the landlord, as a mere return on his investment, was seen as a material revenue while the statutory tenant's right to continued occupation was typified as ownership, the right to "revenue of enjoyment of the quality of life".[323] The attenuation of the rights of the legal owner was evident in landlord-tenant law as a result of the economic shift towards the statutory tenant.[324] Visser's ideal with regard to the occupation rights of tenants in conjunction with the weakened rights of landowners typifies the purpose of the legislature to a certain extent, although the courts resisted this shift towards inherently stronger rights for tenants. The courts refused to take into account the personal circumstances of the tenant and explicitly stated that the hardship suffered by the tenant as a result of eviction is a factor the courts refuse to consider. The attitude of the courts was therefore contrary to Visser's view, because morality related issues, especially in relation to the position of tenants, were never considered

[321] According to Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 354 the political demand for access to economic resources extended the definition of ownership in the social context, which led to the allocation of individual rights. These rights should rather be perceived as "non-property based rights secured by the law and implemented through a system of administrative justice." See the discussion of the German constitutional case, *BVerfGE* 89, 1 [1993], in section 7.4.2 (Chapter 7) where the Federal Constitutional Court held that the tenant's tenancy constituted a constitutional property right, because "the tenant's right fulfils the same purpose that all property serves for its owners": Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 at 35. The Court did not find that the tenant acquired ownership, but held that the tenant's right was protected under the Basic Law as a constitutionally recognised property right, because it served the same purpose for the tenant as ownership did for landowners.

[322] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 354 made this conclusion in consideration of a short historic background with regard to the relationship between a person and a specific object. The substance of this relationship was altered in due course as a result of the continued "adjustment of competing interests through the social regulation of the owner's use and enjoyment of the object concerned." The Roman law notion of ownership was relative as the individual's liberty "was tempered by the claims of others on the basis of social conditions." During the seventeenth and eighteenth century the concept of ownership radically changed from relative towards absolute, continual, uninterrupted and exclusive as a result of the demands of the capitalist economy.

[323] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 355. The terminology used by Visser also corresponds with the German perception of the fundamental feature of property, which is to enable the holder of the right to secure a sphere of freedom where he can take control and responsibility for his own life: *BVerfGE* 89, 1 [1993] at 7-8. See section 7.4.2 in Chapter 7 for more detail in this regard.

[324] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 354-355. See also Van der Walt AJ "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (2006) 12 *Fundamina* 1-47 at 14 & 32 for literature on the shifting of ownership in Roman-Dutch law. This theory is speculative and not followed in modern literature or case law.

by the courts. The landlord was at liberty to institute an ejectment order and could rely on the grounds set out in the acts. The impact of the rents legislation and the effect it had on landowners' rights could be seen in the courts due to the fact that owners' common law power to claim eviction upon expiration of their leases was restricted through the application of the legislation. The courts applied the acts, which limited the rights of landowners, although the courts' point of departure was to apply the legislation in a strict manner. The courts didn't feel at liberty to restrict the rights of landowners any further than the legislation allowed, which is why the personal circumstances of tenants were never considered.[325]

The statutory interventions in landlord-tenant law throughout the twentieth century were in favour of the minority group of weak, poor, white tenants. The government attempted to provide tenure protection for tenants during a housing shortage. This aim of the South African government is important to consider in the upcoming chapters that discuss foreign landlord-tenant laws. The Rents Acts were not intended to address the housing shortage as the application of these laws were restricted to existing private rental housing. The aim of the laws was not to increase access to rental housing. Before the outbreak of the Second World War, the legislature restricted application of the Act. While the anti-eviction laws provided secure occupation rights for the minority group of white residential tenants, the discriminatory apartheid-type laws applied to the non-white majority. These households were forced to occupy land with weak tenure security, as the racially discriminatory laws made segregation possible. The correlation between continued housing shortages and government involvement through the creation of policy and enactment of legislation to improve security of tenure for tenants existed in the white private landlord-tenant framework. (The extent of the laws was however limited, because it primarily provided substantive tenure protection for tenants who already had lease agreements and were in occupation of rental housing.) However, it is also apparent that the apartheid policy did not allow this association to form in the development of non-white landlord-tenant legislation, as the tenure rights of these households remained insecure, irrespective of housing shortages or economic misfortune.

[325] See in this regard *Johannesburg Board of Executors & Trust Co Ltd v Gordon* 1947 (1) SA 92 (W) 96; *Rose's Car Hire Co Pty Ltd v Harris & Co* 1944 WLD 159.

A second housing shortage resulted from the Second World War. The legislature responded and increased tenure security for the white minority. The legislation was drastic to the extent that it restricted the common law rights of landowners to evict tenants upon termination of their lease, while it also placed restrictions on rent increases. Initially these laws applied to the majority of urban dwellings (and even commercial properties at some point), but in due course its application was restricted to a few dwellings occupied by white households. The success of the Rents Acts could be analysed as a legislative measure that was imposed by the legislature with the single aim to provide white tenants, in the private rental market, with secure tenure during housing shortages. In consideration of this specific context one can conclude that these laws were successful. However, in light of foreign landlord-tenant laws that were enacted during housing shortages it becomes clear that the government was not actively involved in solving the housing shortage, because it only focussed on the existing private, white rental market. The Rents Acts granted white tenants in the private rental market with secure occupation rights, but failed to accommodate white households without housing, as these laws did not address access to housing. From the discussion it is also clear that as a result of the government's apartheid policy the legislature was not aimed at ensuring any tenure security for the non-white majority.

2.4 Phasing out statutory tenancy (1980-1990)

Application of the 1976 Act was restricted explicitly when the government started to phase out rent control. The Fouche Commission was appointed by the government in 1976 to investigate and report on the need to sustain rent control. The Commission recommended that rent control be phased out over a period of time.[326] These recommendations were made in 1978, a period known for its economic depression, which led to thousands of apartments being unoccupied. The Commission specifically evaluated the position from 1974-1978 and based their recommendations on that period. It also seemed as though the South African Property Owners Association had an impact on the Commission's recommendations

[326] Republic of South Africa *First Report of the Select Committee on Rent Control* (January 1983).

because of the pressure they placed on the Commission to phase out rent control.[327] "Vigorous campaigns by landlord's representatives who had considerable support in the apartheid parliament"[328] led to the phasing out of numerous dwellings from rent control between 1978 and 1980.

The government approved the Commission's recommendations and by means of Proclamation 83 of 1978[329] started to phase out rent control over residential property. According to this Proclamation, the Rent Control Act applied to residential property, occupied or used for the first time after 20 October 1949 and before 1 January 1960, provided that the property had to fall within an area for which a rent board had been constituted. Apart from that, residential property occupied for the first time after 31 December 1959 and before 1 June 1966, situated in an area for which a rent board had been constituted and which were occupied on the date of issue of the Proclamation by a tenant, fell within the ambit of the Act. Tenants who occupied the mentioned premises could only enjoy tenure protection in terms of the Act if they fell within the income category as determined in section 19(1)(a) of the Housing Act.[330] The tenant had to remain in occupation of the leased premises on the date of issue of the Proclamation.

Proclamation 87 of 1979[331] amended the situation to the extent that only residential property occupied or used for the first time after 20 October 1949 and before 1 January 1955 would fall under the ambit of the Act. Tenants who occupied residential property for the first time after 31 December 1954 and before 1 June 1966 could also fall under the ambit of the Act although they had to comply with the income requirement and continue to occupy the premises on the date of issue.

Proclamation 91 of 1980[332] withdrew Proclamation 87 of 1979 and restricted the number of tenants protected under the Act quite considerably. It stated that the Rent Control Act would afford protection to tenants who occupied residential property for the first time after 20 October 1949 and before 1 June 1966, situated in an area for which a rent board had been constituted. The property had to be occupied on the

[327] Republic of South Africa *Debates of Parliament (Hansard)* (3 February 1981) 588.
[328] Mohamed SI *Tenant and Landlord in South Africa* (2003) 3-4.
[329] *Government Gazette* 5970 p1 6 April 1978.
[330] Act 4 of 1966.
[331] *Government Gazette* 6421 p1 26 April 1979.
[332] *Government Gazette* 7040 p1 23 May 1980.

date of issue of the Proclamation by a tenant who fell within the income category as determined by the Housing Act and the tenant had to remain in the property.

The government and the Fouche Commission tried to establish a balance between the interests of landowners and tenants. The government realised that the residential rental market, with reference to the law of supply and demand, was no longer "normal" and that it had a duty to intervene in order to rectify the imbalance in the market.[333] This imbalance was evident especially when the economy strengthened at the end of 1980. During this period there was a shortage of housing instead of a surplus, as was the case at the end of the 1970s.[334] Paradoxically, Proclamation 32 of 1983[335] withdrew Proclamation 91 of 1980 and stated that the Rent Control Act would apply to residential property occupied for the first time after 20 October 1949 and before 1 June 1966, situated in an area for which a rent board had been established. The Proclamation also required that the dwelling had to be occupied on 23 May 1980. Such a tenant's income couldn't exceed the amount of R300 per month in the case of a tenant who was a single person and R540 per month in the case of a tenant with dependants.[336]

The elderly were given additional protection when the Proclamation included that tenants who were 70 years or older (on the date mentioned in the Proclamation) would be protected under the Rent Control Act regardless of their income, as long as they otherwise complied with the provisions of the Proclamation. The Proclamation explicitly emphasized that the provisions of the Act would be amended by the Proclamation "in so far as it [applied] in any area declared by or under any general law as an area for the use of the White population group." Proclamation 51 of 1991[337] substituted the date of 1 February 1987 with that of 1 June 1991 and

[333] Republic of South Africa *Debates of Parliament (Hansard)* (3 February 1981) 590.
[334] Republic of South Africa *First Report of the Select Committee on Rent Control* (January 1983).
[335] *Government Gazette* 8616 p9 25 March 1983.
[336] The Proclamation made provision for an increase on 10 September 1980. The income limit for single tenants was raised to R360 per month and R650 per month in the case of a tenant with dependants. Proclamation 99 of 1983 (*Government Gazette* 8782 p1-2 1 July 1983) amended Proclamation 32 of 1983 in order to change the date of 10 September 1980 to 1 July 1983. The amounts of R360 per month and R650 per month were increased to R450 per month and R850 per month, respectively. Proclamation 24 of 1987 (*Government Gazette* 10614 p5 20 February 1987) amended Proclamation 32 of 1983, as amended by Proclamation 99 of 1983, in order to change the date to 1 February 1987 and increase the amounts to R750 per month and R1250 per month, respectively.
[337] *Government Gazette* 13285 p1-2 30 May 1991.

increased the amounts to R1200 per month in the case of a tenant without dependants and R2000 per month in the case of a tenant with dependants.

The impact of the phasing out of statutory tenancy was seen in numerous pleas addressed to the government, signed by thousands of South Africans who urged the government to re-impose the provisions of the Rent Control Act on their premises. Tenants were given notice to vacate premises shortly after their building or apartment was phased out of rent control, leaving them in fear of eviction with hardly any tenure security.[338] A large number of tenants lost rent control protection as well as tenure security within merely three years.[339] It was contended that the effect of rent control was to restrain rental housing development, but the phasing out of rent control did not result in any improvement in the private sector rental market.[340]

The proclamations systematically phased out the old Rents Acts and eventually only properties built before October 1949 (or surviving tenants who were either over 70 years of age or with incomes under R1500 a month) were still subject to rent control.[341] Rent control and statutory tenancy was phased out because "there was an adequate supply of housing for Whites in most metropolitan areas".[342] By 1990 rent control was phased out in all white residential areas.[343] The Rent Control Act was still applicable during this period, but the Act became irrelevant due to the effect of the proclamations.

It is important to note that important apartheid legislation was also abolished during this period. The Black Local Authorities Act 102 of 1982 empowered the Minister and the local authority to make by-laws. Section 23(1)(l) provided that the local authority could make by-laws with regard to the allocation and administration of the letting of dwellings under the control of the local authority.[344] The Native (Urban Areas) Consolidation Act 25 of 1945 was replaced by the Black Communities Development Act 4 of 1984. The Black Communities Development Act, as amended by the Black Communities Development Amendment Act 74 of 1986, was the first legislation to make provision for the registration of leasehold and the acquisition of

[338] Republic of South Africa *Debates of Parliament (Hansard)* (3 February 1981) 584-585.
[339] Republic of South Africa *Debates of Parliament (Hansard)* (30 May 1983) 8424.
[340] Mohamed SI *Tenant and Landlord in South Africa* (2003) 4.
[341] CBN Archive "Plan to Re-implement Rent Controls" *Cape Business News* November 1998.
[342] Republic of South Africa *First Report of the Select Committee on Rent Control* (January 1983).
[343] Mohamed SI *Tenant and Landlord in South Africa* (2003) 3-4.
[344] Olivier N "Property Rights in Urban Areas" (1988) 3 *SA Public Law* 23-33 at 29.

ownership.[345] The Act obliged the local authority to award certain sites to competent persons in order for them to occupy urban residential land as owners or registered leaseholders.[346] The Regulations Concerning the Administration and Control of Land in Urban Areas of 14 June 1968[347] was repealed by the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988,[348] although the regulations remained in operation for some period after the enactment of the Conversion Act because the permits could only be upgraded to leasehold after the provincial secretary had investigated the dwelling.[349]

Rent control and substantive tenure protection was phased out, because the housing demand had changed from excessive to moderate. During the economic depression apartments were vacated and left empty. The need for extensive rent control and security of tenure lessened, although through the creation of proclamations the focus shifted from providing rent control and tenure security for the

[345] The positive urbanisation policy and the abolition of influx control in 1986 made it necessary for black individuals to acquire more secure occupation rights in these urban areas: Van der Walt AJ "Towards the Development of Post-apartheid Land Law" (1990) 23 *De Jure* 1-45 at 19. Influx control was abolished through the operation of the Abolition of Influx Control Act 68 of 1986. The policy shift from providing rental accommodation to ownership for black persons encouraged the government to sell more than 350 000 government houses to black (and other) occupiers in black townships during 1983. The purchase price was related to the original construction costs and therefore much cheaper than the resale value: Republic of South Africa *Official Yearbook of the Republic of South Africa* (1987/1988) 559.

[346] See Olivier N "Property Rights in Urban Areas" (1988) 3 *SA Public Law* 23-33 at 30-31; Van der Walt AJ "Towards the Development of Post-apartheid Land Law" (1990) 23 *De Jure* 1-45 at 19 for more detail on the leasehold system and the acquisition of ownership. Van der Walt explains that the leasehold provided the occupier with a stronger right than a mere permit, as it could be used to provide security in order to obtain financing. The local authority controlled the rent and service fees for property leased in the development areas. See also section 57A of the Act, which made provision for the conversion of leasehold into ownership upon the payment of a conversion price.

[347] Government Notice R1036 of 1968 (*Government Gazette* 2096 p1 14 June 1968).

[348] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 587 state that through the operation of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 "residential permits were converted into contracts of lease". Calderwood DM *Native Housing in South Africa* (1953) 101 explains that the leasehold granted to black individuals in urban areas was 30 year leasehold subject to renewal for another 30 years.

[349] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 587. During this period white housing was regulated by the Development and Housing Act 103 of 1985, Indian housing was controlled by the Housing Development Act (House of Delegates) 4 of 1987 and coloured housing policy was embedded in two acts, namely the Housing Act (House of Representatives) 2 of 1987 and the Development Act (House of Representatives) 3 of 1987. Act 2 of 1987 provided that some dwellings could be sold, although the alienation of property was restricted in terms of sections 23-24. Other properties were leased by the local authority (see sections 18, 25-27 of the Act). See also section 31 of Act 3 of 1987 for some of the provisions pertaining to rental housing. Section 29 of Act 4 of 1987 enabled local authorities to erect dwellings and thereafter sell or let the dwellings within their jurisdiction. Section 38 of Act 4 of 1987 regulated the position where tenants failed to pay the rent. White housing was controlled by the white house of assembly as a "white own affair", while Indian housing was administered by the Indian house of delegates as an own affair and the coloured house of representatives administered coloured housing: Van der Walt AJ "Towards the Development of Post-*apartheid* Land Law" (1990) 23 *De Jure* 1-45 at 21-22.

majority of white tenants to the poor and elderly. During the final stages of these interventions the government's focus was therefore to protect the white marginalised, although the government's apartheid policy also transformed as the discriminatory laws were abolished and non-white households were beginning to occupy land with secure forms of tenure.

2.5 Position after 1990

Rent control, and statutory tenancy, served as an example of direct state control, or restrictions on ownership, when certain conditions compelled the government to suspend the normal operation of market forces.[350] Taking this into account one can conclude that these restrictions on ownership were generally perceived as exceptions to the view, still popular during this period, that ownership was absolute and unrestricted in principle.[351] However, Van der Walt argues that some limitations, especially social legislation with regard to land, had become so extensive that they could no longer be seen as mere exceptions. The concept of ownership could also no longer be described as inherently unrestricted and a new formulation or redefinition of ownership was in fact taking place.[352]

The government's mandate and the variety of proclamations between 1920 and 1980 resulted in the phasing out of rent control and statutory tenancy because of the changes that were taking place in the economy at the end of the 1970s. State intervention was no longer considered necessary and owners could enjoy the entire range of entitlements they associated with ownership.[353] Once rent control was

[350] Visser C "Rent Control" 1985 *Acta Juridica* 349-368 at 349. Visser points out that any commodity's price in a free-market economy will be determined by the relation between supply and demand, although in certain circumstances the state can intervene in economic activity described as a "pervasive fact of life in many market-orientated economies."

[351] Van der Walt AJ "Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip" (1988) 21 *De Jure* 16-36, 306-325 at 23-24. See also 27-28 for the comparable Western European position at this time.

[352] Van der Walt AJ "Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip" (1988) 21 *De Jure* 16-36, 306-325 at 324-325.

[353] Van der Walt AJ "Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip" (1988) 21 *De Jure* 16-36, 306-325 at 18 points out that there are examples of the definition of ownership where this concept is explained by reference to a number of entitlements, although most academic writers do not agree with such a description. Van der Walt (at 325) points out that it was in principle still acceptable to define ownership as the right which entitled an owner to use his property in a way he deemed fit. In the case of *Chetty v Naidoo* 1974 (3) SA (A) 20B Jansen JA

phased out, the strong common law position of the landlord resurfaced, as appears from the strengthened rights of landowners and the weakened rights of tenants. During this period important apartheid legislation was also abolished. Black and coloured persons' freedom of movement was no longer suppressed through influx control and they could therefore freely occupy land and dwellings in the urban areas. The common law that resurfaced during this period was therefore not specifically race-related and applied to all tenants. In the case where a black or coloured person leased a dwelling, the terms of the tenancy, including the rent and extent of tenure security, would be subject to the common law.

In terms of the common law the landowner could again, at any point in time, initiate ejectment proceedings in terms of the *rei vindicatio*; merely alleging that he is the owner and that the defendant is in occupation of his property. The *onus* would then be on the tenant to allege and prove a right to continue occupation. In the event of a dispute, the tenant had to prove the disputed term in order to oppose the landlord's claim for ejectment.[354]

A fixed-term tenancy (also known as "a lease for a definite period") terminated upon the expiration of the agreed period, while a periodic lease terminated where either party served notice to terminate the lease to the other party.[355] According to Kerr, a lease that ended by effluxion of time could only truly terminate if neither party was in default and if all the obligations in terms of the contract were complete. In that case, the lease automatically terminated through effluxion of time.[356] The tenant's right to use and enjoy the premises automatically ceased upon expiration of the lease (whether it was through effluxion of time or by notice), obliging him to immediately restore the property to the landlord.[357] If the tenant failed to return the property he would be guilty of holding over, which meant that he committed not only breach of contract but a delict. By means of legal process, the landlord could obtain

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pointed out the difficulty with regard to defining the concept ownership although he found that one of the distinct entitlements an owner possessed was the "right of exclusive possession of the *res*".

[354] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 434. See section 6.2.1 in Chapter 6 for a discussion of the common law rights of landowners and tenants in American law.

[355] Cooper WE *Landlord and Tenant* (2nd ed 1994) 61-65.

[356] Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 435. Kerr refers to *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325 where the Court confirmed that the lease expired through effluxion of time, which also meant that the relationship between the parties ceased to exist.

[357] Cooper WE *Landlord and Tenant* (2nd ed 1994) 217.

an ejectment order along with a claim for damages *ex contractu*.[358] The amount of damages would represent the difference between the current position of the landlord and the position had there been no breach.[359]

During this period common law tenure security for tenants was primarily provided for in terms of the *huur gaat voor koop* rule. The point of departure was that the lease in itself couldn't constitute a real right for a tenant, who held a personal right, which meant that the lease was unenforceable against third parties. The tenure rights of the tenant depended on the type of successor, the period of the lease and whether the tenant had a real or personal right. The right of the tenant would also influence the impact of the doctrine of notice. Where the doctrine of notice was relevant *Kessoopersadh v Essop*[360] and *Total South Africa (Pty) Ltd v Xypteras*[361] were applied with regard to the time when the purchaser became aware of the lease.[362] In *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd*[363] Corbett CJ decided the issue whether the lessee was at liberty to decide whether he wanted to continue with the lease upon alienation of the property. Corbett found that if the new owner recognised the rights of the lessee, the lessee was prohibited from merely cancelling the lease.[364] The common law granted tenure security for tenants

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[358] Cooper WE *Landlord and Tenant* (2nd ed 1994) 233. According to Kerr AJ *The Law of Sale and Lease* (2nd ed 1996) 373-375 the landlord was entitled to use any action available. The landlord could either rely on his rights as owner or, in the case of a possessor, his rights as possessor. According to case law, the basis of the claim was for breach of contract, although this meant that only the foreseen losses were recoverable. Sonnekus JC "Herklasifisering van die Aard van die Huurder se Reg" 1987 *TSAR* 223-236 at 230 argues that the lessee's personal right would enable him to claim possession of the leased premises from third parties if he is entitled to occupy it by means of the lease. Sonnekus relies on *Godongwana v Mpisana* 1982 (4) SA 814 (TkS) 816C, where the court found that interference with the contract would constitute infringement of the rights of the contracting parties. According to Sonnekus, the *ius in personam* would enable the tenant to reclaim property from third parties. It is important to note that the existence of the lease and the personal right which the lessee acquires enable him to reclaim the property. The tenure security embedded in the lease itself will contribute to the right of the lessee to reclaim the leased property, provided the lease is still intact, because common law tenure security is aimed at enforcing the lease. Tenure security at common law is aimed at giving effect to the contract and ensures that the term of the lease is adhered to, but tenure security is not enforceable against all third parties. Where the tenant has a real right the lease is registered and therefore enforceable against all third parties.

[359] *Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd* 1985 (1) SA 248 (W) 253A-C. See also text accompanying ffn 32-35 above for more detail regarding the amount of damages claimable.

[360] 1970 (1) SA 265 (A) 258H.

[361] 1970 (1) SA 592 (T) 598E.

[362] See section 2.2.2 above for more detail on the *huur gaat voor koop* rule during this period.

[363] 1995 (2) SA 926 (A).

[364] *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) 939A-C. See section 2.2.2 above for a discussion on the *huur gaat voor koop* rule with reference to the impact of the Formalities in Respect of Leases of Land Act 18 of 1969 and more detail on the *Genna-Wae* case.

(and tenants' families) upon death of either party as the lease vested in the estate of the deceased party. Insolvency of the landlord could not bring the lease to an end either. Where a prior real right, such as a mortgage, vested in the property the amount of the bid could affect the occupation rights of tenants.[365] Apart from the common law tenure protection, the only protection afforded to tenants against landlords before 1994 was that the landlord couldn't evict the tenant without recourse to legal process.[366] The extent of tenure protection for tenants in terms of the common law was (and currently still is) limited to these three incidents, namely where the landlord alienated the property during the lease, where the landlord dies during the term of the lease or where the landlord became insolvent. The common law is therefore aimed at giving effect to the lease to the extent that it agreed to between the original parties, even if this requires substituting one of the parties. The common law is not aimed at providing substantive tenure rights for tenants and one can conclude that the common law rights of urban residential tenants is currently insubstantial and weak. The personal circumstances of the tenant and the effect that eviction will have on her and her family play no role in the granting of the eviction order, since the common law does not grant the courts any discretion in deciding whether to allow eviction once the landowner has proved the formal requirements for an eviction order.

The tenure rights of tenants are currently influenced by the Constitution[367] and more specifically the Bill of Rights. Tenure reform was introduced by section 25(6) (read with section 25(9)) to secure rights on land where these rights were previously insecure as a result of past racially discriminatory laws.[368] Section 26 of the Constitution corroborates this obligation as section 26(1) (read together with section 26(2)) mandates government to increase access to adequate housing. Section 26(3) provides that no person may be evicted from their home without an order of court, made after considering all the relevant circumstances and no legislation may permit arbitrary evictions. The impact, and potential impact, of these constitutional provisions on the tenure rights of tenants are discussed at length in Chapter 3,

[365] See section 2.2.3 above for more detail regarding a prior mortgage vested over leased property and specifically the discussion of *Velcich v Land and Agricultural Bank of South Africa* 1996 (1) SA 17 (A).
[366] Van der Walt AJ *Property in the Margins* (2009) 117.
[367] Constitution of the Republic of South Africa 1996.
[368] Tenure reform forms part of the overall land reform programme in section 25 of the Constitution.

although it is important to note at this stage that urban residential tenants' tenure rights are currently defined in terms of the common law as discussed in the preceding paragraphs. The uncertainty with regard to this issue and the reasons provided for in land reform literature is discussed in Chapter 3.

2.6 Conclusion

The initial Rents Acts were introduced by the legislature as a result of housing shortages experienced by the white minority population group of South Africa and the aim of the statutes was to protect these tenants against exploitation by private landlords. The public interest required interference with the law of supply and demand and the initial legislation focused on the provision of substantive tenure rights. In order to provide tenants with secure occupation rights the landlord-tenant statutes drastically interfered with the common law rights of landowners. In terms of the common law the landlord could easily evict the tenant upon expiration of the lease if he acquired an order of court. The common law protected the tenant's occupation rights in the event of sale, insolvency of the landlord or death. The effect of the Rents Acts was to suspend expiration of the lease to such an extent that the landlord had to prove certain grounds in order to terminate the lease and evict the tenant, while placing restrictions on rent increases.

The legislation afforded the tenant continued occupation rights upon termination of the lease, even though none of the acts focused on the needs or personal circumstances of tenants. The hardship suffered by the lessee was a factor the courts deliberately ignored. However, eventually by means of certain proclamations, the income category of the tenant and the question whether he was elderly became relevant factors. The legislature's focus thus shifted from general tenure protection for the majority of (predominantly) white tenants towards tenure security for the white marginalised. The nature of the protection therefore changed towards a welfare-based form of protection to the extent that the laws ensured substantive tenure protection where the tenant was poor or elderly. The impact of the Rents Acts on the common law rights of private landowners was therefore initially justified by the general housing shortage that affected the majority of the white

minority group, because tenants were protected from private landlords who exploited the housing shortage. Through the statutory landlord-tenant measures the legislature could provide households with security of tenure in private rental housing during periods of housing shortages even though the government did not directly provide the housing.

Throughout the century, the Rents Acts did not apply to black tenants because the occupation rights of black individuals were strictly regulated in terms of the racially discriminatory apartheid statutes. Black persons who wished to reside in the urban areas could only do so as public sector tenants, associated with limited security of tenure. These tenancies were strictly regulated and permitted black occupiers in the metropolitan areas on a temporary basis. The legislation that regulated black urban tenancies did not provide any form of tenure security or rent control, because the apartheid government had to reserve the opportunity to evict any black occupier at will. If black occupiers' tenure security was similar to that of the white minority group, as regulated under the Rents Acts, the government would not have been able to orchestrate racial segregation successfully. The initial position of coloured persons was different from that of black persons, because these households could choose to reside in the black locations, coloured areas or in dwellings that were regulated in terms of the Rents Acts. The area in which these persons chose to live determined the relevant legislation and therefore also their occupation rights. In due course, coloured persons could no longer choose the area in which they wanted to reside, nor the form of tenure. In some cases coloured persons became landowners, although the legislation restricted the registration of these rights. The occupation rights of black and coloured tenants formed part of the apartheid government's racial segregation policy throughout the twentieth century and did therefore not reflect any correlation with the changes in the socio-economic circumstances, because apartheid land laws were politically inspired and served a political purpose.

At the end of the twentieth century the Rents Acts were abolished and the common law position with regard to the termination of tenancies resurfaced. The rights of tenants no longer depended on the area in which they resided or the population group to which they belonged. In terms of the common law the landlord could evict the tenant upon termination of the lease if he obtained an eviction order.

When the lease terminated, the landlord was entitled to evict the tenant and claim damages for holding over. The tenant's aspiration of continued occupation rights ceased to exist and the landlord could no longer be forced to adhere to the lease that had expired. Tenure security was merely provided for in three forms; *huur gaat voor koop*, upon death of either party or where the landlord became insolvent. The Rent Control Act was still applicable, although its operation became futile due to the enactment of the various proclamations. The weak (common law) tenure rights of urban residential tenants therefore resurfaced after the legislature abolished the Rents Acts. The common law again provided landlords with strong rights to reclaim their property upon expiration of the lease and at the end of the twentieth century the common law applied to all racial groups. It could be argued that the resurfacing of the common law in the private rental sector was suitable for the white minority, because the previous severe housing shortages no longer existed and the market was functioning efficiently for this minority group. This assumption is speculative, although one could conclude that the resurfacing of the common law must have had a detrimental impact on the majority of non-white households who were (and currently is) in need of secure rental housing, especially in urban areas.[369] The common law does not provide substantive tenure protection for tenants as it merely ensures that the term of the contract (and the terms of the contract) is given effect to. The common law does not provide continued occupation rights for tenants upon expiration of the lease, because it enables the landlord to evict the tenant as soon as the lease terminates.

The underlying purpose of the anti-eviction measures introduced after 1994 was very different from the Rents Acts that regulated white private sector tenancies during the twentieth century. Black (and to some extent coloured) land interests were weak as a result of the pre-1994 apartheid land laws, which denied these occupiers legal recognition of their rights in land. The post-1994 land reform process requires a redefinition of the occupation rights of these occupiers, together with a process to strengthen these rights and provide substantive tenure security.[370] The necessary level of tenure security should therefore be ensured for all tenants within this transformative constitutional context, especially since a large percentage of the population was previously denied any tenure security. The current housing shortage

[369] See section 3.5 in Chapter 3 for more detail in this regard.
[370] Van der Walt AJ *Property in the Margins* (2009) 117-118.

experienced by a large number of marginalised households is to some extent a relic of apartheid landlord-tenant law. The question is whether a new landlord-tenant framework could be developed to rectify the imbalances that stemmed from racially discriminatory laws. One should also consider the role of the newly elected government in the provision of housing and the various forms of tenure that are available. Against this background it is clear that substantive tenure rights for especially non-white households is required in the landlord-tenant sphere, because these individuals were denied any form of tenure security during the apartheid era.

3. Tenure Reform in South African Landlord-Tenant Law

3.1 Introduction

In the late 1980s the pre-1994 government was pressurised to introduce political and social transformation, which included land reform. The post-apartheid political era commenced in 1994 when the newly elected ANC government came into power. The entire political, social, economic and legal field was re-evaluated and restructured in order to rectify the imbalances of apartheid. This transformative goal is evident from the 1993 and the 1996 Constitution, drafted by the Constitutional Assembly, especially with regard to the new values introduced in land law. The new government was adamant in its undertaking to rectify and transform these apartheid-type laws, which included legislation and the common law, because of the impact it had on the socio-economic rights of black[1] South Africans. The previous racially discriminatory apartheid land laws assisted the government in its aim to accomplish racial segregation, which was the cornerstone of apartheid. These laws were uniquely drafted with the aim to deprive black individuals of secure occupation rights. The lack of tenure security afforded to black users of land enabled the apartheid government, and white landowners, to effortlessly evict black occupiers of land in South Africa. A significant number of these occupiers were tenants of urban residential housing.

Part of the 1996 Constitution's goal is to promote and enforce socio-economic rights such as access to housing. Sections 26(1) and 26(2) of the Constitution states that everyone has the right to have access to adequate housing and that the state must take measures to achieve the realisation of this right The legislature has enacted laws to provide access to adequate housing in terms of the housing provision. The state's obligation and the laws enacted to give effect to this right is discussed and analysed in 3.4. An important consideration in the landlord-tenant framework is the success of the laws enacted to give effect to the housing provision and whether these laws afford *adequate* housing.

Another part of the Constitution's focus is on providing better land and housing rights for black occupiers, which includes better tenure security. However, the new constitutional values and policies in the area of land law apply to all

[1] The term "black" is used throughout the dissertation and refers to all racial groups other than white persons. The term "non-white" is used in Chapter 2 exclusively, because the term was used in the pre-1994 racially discriminatory laws.

landowners and occupiers, except where the Constitution and legislation specify that particular occupiers should be privileged by reconstruction or affirmative action. An occupier cannot be evicted without a court order made after considering all the relevant circumstances.[2] The general constitutional property provisions are discussed in 3.2. Better tenure security for various occupiers, including black occupiers, has been granted through the enactment of various statutes that strive to give effect to the transformative purpose of the Constitution. Some of these statutes are applicable to rental housing, but the level of tenure security is problematic. The Rental Housing Act 50 of 1999 is the principal Act that regulates rental housing in urban areas and is discussed in 3.6. The Act grants some procedural protection for tenants, although it fails to afford substantive occupation rights for urban residential tenants. The legislature has introduced security of tenure for occupiers in rural areas in terms of section 25(6) of the Constitution, while the tenure rights of urban occupiers is based largely on the common law. Section 25(6) and the legislation promulgated under this section are discussed in 3.3.

The focus of the Rental Housing Act and other anti-eviction legislation applicable in urban areas has been on ensuring due process in the event of eviction proceedings instead of transforming the substantive rights of weak occupiers. Section 26(3) of the Constitution, discussed in 3.7, is an important procedural safeguard for all persons facing eviction as it states that no person may be evicted from his home without an order of court made after considering all the relevant circumstances. However, it can also be interpreted by the court to provide substantive protection to occupiers. From the case law discussion in 3.8 it follows that the courts are reluctant to directly give effect to this provision as the level of tenure security enjoyed by unlawful residential occupiers (including tenants) are limited. However, in recent case law the courts granted substantive tenure rights for tenants holding over, but the basis for the courts' decision was Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), which gives effect to section 26(3). The courts interpreted PIE to afford marginalised tenants holding over substantive tenure protection. The courts applied PIE in order to give effect to section 26(3). This method is in accordance with the subsidiarity approach, which is discussed in 3.9, although by applying this approach it becomes apparent

[2] Section 26(3) of the Constitution.

that there are certain areas in the landlord-tenant framework that fail to give effect to the housing provision.

According to case law on administrative law there is only one legal system and the Constitution, not the common law, is the primary source of law.[3] This approach takes into account the purpose, spirit and objects of the Constitution, which ensures that transformation will take place. The Constitution will therefore override the common law where the common law comes into conflict with the Constitution.[4] Apart from the fact that the Constitution takes precedence over any law and that section 26(3) of the Constitution amended the common law with regard to eviction by requiring that no person may be evicted without an order of court made after considering all the relevant circumstances, the majority of landlord-tenant evictions still function within the principles of the common law. The reason for this state of affairs is that the primary landlord-tenant legislation that was enacted to give effect to section 26 reinforced the common law. The effect of the primary landlord-tenant legislation promulgated in terms of section 26 is insubstantial, although it does grant some procedural protection. The question is whether these procedural amendments are efficient in light of the constitutional goals and whether substantive changes in the area of secure tenure are not necessary.

The constitutional protection ensured for occupiers in the event of eviction is undermined as a result of the strong common law rights of landowners. The common law principles focus on the contractual and property rights of the stronger party, the landowner (or landlord in landlord-tenant disputes). The significance attached to the common law has generally not been departed from in the area of landlord-tenant law and still endures in the new constitutional dispensation. The tension between the common law, Constitution and legislation is highlighted through a case law discussion in 3.8, while a possible approach to understanding and applying these bodies of law is discussed in 3.9, namely the subsidiarity approach.

The pre-1994 government enacted legislation as a result of housing shortages to ensure better tenure rights for white tenants by depriving landowners of

[3] *Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the RSA* 2000 (2) SA 674 (CC). Section 2 of the Constitution states that the "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."

[4] Section 2 of the Constitution.

their right to evict unlawful tenants and thereby providing tenants with continued occupation rights upon termination of their leases.[5] The post-1994 government's goal is similar to the pre-1994 legislature's goal with regard to providing better tenure security for residential occupiers, although the current aim is to ensure the necessary level of tenure protection for all occupiers and especially black occupiers. However, the pre-1994 legislature afforded tenants substantive protection in the form of continued occupation rights, while the current legislation focuses on ensuring due process in the event of eviction. The current landlord-tenant framework is therefore inefficient because it is not providing substantive tenure rights for urban tenants. The post-1994 government created various forms of tenure for the rural poor to occupy land with enhanced tenure security, but failed to afford similar secure occupation rights in the urban areas. There is a need to create a secure form of tenure for the urban poor in order to adhere to the constitutional obligations.

The courts have recently turned their focus to the socio-economic circumstances of tenants during eviction proceedings. However, the economic repercussions of weak tenure security in urban housing have not been sufficiently appreciated by the government. The effect of insecure tenure rights, especially for urban residential tenants, is explored in 3.5.

3.2 Constitutional dispensation

3.2.1 Introduction: Historical background

Prior to 1993 much of the debate about constitutional property was whether the Bill of Rights should contain a property clause.[6] During this period some also feared that including a property clause would frustrate land reform.[7] In these early debates

[5] See Chapter 2 for a detailed discussion of the pre-1994 Rents Acts.
[6] Van der Walt AJ *Constitutional Property Law* (2005) 2.
[7] Van der Walt AJ "Towards the Development of Post-apartheid Land Law: An Exploratory Survey" (1990) 23 *De Jure* 1-45 at 43 explains that the inclusion of a property clause might amount to a "mummification of what is perceived to be the law at the time of codification." During this period South African land law was entering a phase of transformation and any codification of the law at the time could exclude the necessary transformative development. The socially responsible duties of ownership could be unable to develop if it is enshrined in the Constitution. See Van der Walt AJ "Towards a Theory of Rights in Property: Exploratory Observations on the Paradigm of Post-apartheid Property Law" (1995) 10 *SA Public Law* 298-345 at 336ff for the author's subsequent change of opinion. See also Nedelsky J "Should Property be Constitutionalized? A Relational and Comparative

about the 1993 and 1996 constitutions the legality of land reform was also a matter of discussion, although land reform was always seen as part of the transformation process because of the injustices of apartheid with regard to land distribution and insecure tenure rights[8] of black occupiers.[9] During the late 1980s pressure for political and social transformation forced the pre-1994 government to introduce land reform measures. The *White Paper on Land Reform*, introduced in March 1991,[10] upgraded tenure rights of certain black occupiers while it also provided for restitution of land and made provision for the establishment of new townships for black individuals in need of land.[11]

The initial land reforms focused on three areas, namely restitution of land; improved tenure security; and redistribution.[12] In terms of the restitution process individuals who were dispossessed of land as a result of apartheid laws and practices could apply for the restitution of land and reclaim their land, be given other land or receive compensation. Better tenure security was provided for individuals

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Approach" in Van Maanen GE & Van der Walt AJ (eds) *Property on the Threshold of the 21st Century* (1996) 417-432 at 422ff for convincing arguments against the constitutionalisation of property.

[8] See section 2.3.3.2 in Chapter 2 for a discussion of the insecure tenure rights of black persons during the apartheid era. The nexus of apartheid legislation, including the Group Areas statutes, prohibited black and coloured persons from acquiring secure occupation rights. These individuals could acquire, occupy and use land in terms of permits and licenses. Their rights were restricted to being personal and not enforceable against the state. The reason for their weak tenure rights was to allow the state to conduct evictions at any period in time.

[9] Van der Walt AJ *Constitutional Property Law* (2005) 285. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 586 state that until 1991, just before the De Klerk government introduced the *White Paper on Land Reform* (1991), the land tenure system in South Africa was dominated by legislation that drastically interfered with common law, and communal, tenure rights. The land tenure system was based on race and legislation provided the government with the means to construct territorial segregation. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 586-587 for a historic background on land tenure before 1991.

[10] Republic of South Africa *White Paper on Land Reform* (1991).

[11] The purpose of the new policy, introduced by the *White Paper on Land Reform*, was to provide equal opportunities for all individuals with regard to the acquisition, use and enjoyment of land within the social and economic realities. The government was convinced that these objectives could only be achieved within the system of private ownership and by maintaining existing securities and patterns in the community: Republic of South Africa *White Paper on Land Reform* (1991) 1. One of the aims of the White Paper was to abolish racially-based land laws by means of legislative measures: Republic of South Africa *White Paper on Land Reform* (1991) 18-24. According to Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 588, the Abolition of Racially Based Land Measures Act 108 of 1991 repealed most racially discriminatory statutes. Shortly thereafter the Upgrading of Land Tenure Rights Act 112 of 1991 was introduced to make it possible to upgrade certain rights to ownership. The Act could be described as the first step towards better protection of tenure rights.

[12] The mere abolition of racially discriminatory laws was insufficient to address the inequalities created by apartheid. The land reform programme was thus described as the "next logical step", although it could only be made successful by the post-apartheid government: Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 590.

whose land rights were weakened by apartheid land laws and practices, while redistribution entailed that certain measures were introduced to increase access to land and housing for individuals deprived of it during apartheid.[13] The division between these three areas is still reflected in the new government's land reform programme, as stated in the *White Paper on South African Land Policy 1997*.[14] The aim of the new government's land reform programme could be better understood by referring to the ANC's *Reconstruction and Development Programme (RDP).*[15] The RDP, read with the *White Paper on Reconstruction and Development 1994,*[16] strives to address access to urban infrastructure and access to land and housing that resulted from apartheid. Land reform was one of the key areas of concern which urgently had to be addressed.[17] According to the RDP, tenure reform is aimed at providing security of tenure for all citizens, regardless of their current system of land-holding.[18] Apart from the post-1994 government's policy framework, the local administration was obliged to redress the consequences of apartheid in urban and rural areas.[19] The RDP distinguished between the three areas, as introduced by the pre-1994 government, and confirmed the three elements of land reform.

[13] Van der Walt AJ *Constitutional Property Law* (2005) 285-287.
[14] Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) 9 specifically states that the land reform programme consists of three elements. The White Paper defines the purpose of land tenure reform as to "improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure." This definition of land tenure reform is much wider than section 25(6) of the Constitution 1996 because the White Paper does not limit the scope of occupiers included under tenure reform by adding the requirement that their land tenure should be legally insecure as a result of past racially discriminatory laws. Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) 64 provides examples of tenure reforms, such as securing lease agreements, protection against eviction and the award of independent land rights.
[15] African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994).
[16] Republic of South Africa *White Paper on Reconstruction and Development* (1994).
[17] Van der Walt AJ *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 152.
[18] African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) 2.4.4 Land Reform.
[19] Donaldson R & Marais L "Preface: Transforming Rural and Urban Spaces" in Donaldson R & Marais L (eds) *Transforming Rural and Urban Spaces in South Africa during the 1990s – Reform, Restitution, Restructuring* (2002) 1-10 at 1.

3.2.2 The property clause

Section 25 of the 1996 Constitution, known as the property clause, provides for the protection of existing property rights together with provision for land reform.[20] Sections 25(1)-(3) legalizes the state power with regard to regulation (deprivation) and expropriation of property, while sections 25(4)-(9) regulates land reform and mandates the government to promote land reform in various forms.[21] These forms of land reform are similar to the areas defined in the above-mentioned white papers. Section 25(5) makes provision for better access to land;[22] section 25(6) for improved tenure security in conjunction with section 25(9), which mandates the government to enact legislation to give effect to section 25(6); and section 25(7) ensures restitution.[23] The most difficult feature of the property clause is the relationship between sections 25(1)-(3), which protects existing property rights, and sections 25(5)-(9), which reflects the obligation towards land reform and gives effect to the public interest. Part of the public interest is to improve the current maldistribution of land. Section 25 generally requires an equitable balance between the public interest

[20] The 1993 Constitution differed from its successor to the extent that the provision that protected existing property rights was separate from the land reform provision. The land reform provision was not included in the Bill of Rights, while the provision protecting property rights was. This created an imbalance between the two provisions and attracted criticism: Van der Walt AJ *Constitutional Property Law* (2005) 287.

[21] In order to acquire the best result from the programme, association between the programmes are necessary. Although the programmes might seem diverse, some legislation promulgated in order to give effect to one of the programmes could overlap with other programmes. One act could therefore serve the goals of two programmes: Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 593.

[22] According to Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 594-607 the Land Reform (Labour Tenants) Act 3 of 1996, the Provision of Land and Assistance Act 126 of 1993 and the Transformation of Certain Rural Areas Act 94 of 1998 fall under the land redistribution programme, while Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 398-455 add the Development Facilitation Act 67 of 1995. Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 525-551 and Van der Walt AJ *Constitutional Property Law* (2005) 312-315 include the Land Reform (Labour Tenants) Act 3 of 1996 under the tenure reform programme. This illustrates how diverse some of the legislation is to the extent that it serves two programmes even though it may have been promulgated initially to give effect to only one programme.

[23] The restitution programme is subject to the Restitution of Land Rights Act 22 of 1994, which provides for the establishment of a Commission on Restitution of Land Rights to investigate claims lodged by previously deprived parties. The Act also instituted the land claims court for the adjudication of such claims: Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 629-651. See also Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 313-397; Van der Walt AJ *Constitutional Property Law* (2005) 289-307.

and the interests of existing property holders.[24] Van der Walt proposes that such balancing should be achieved by protecting the established rights of landowners with regard to the "public interest in control over the use of the property and the distribution and exploitation of property."[25] Such balancing is of great importance in the context of tenure reform[26] that involves anti-eviction measures, which limit the normal entitlements of landowners.[27] Sections 26(1) and 26(2) of the 1996 Constitution forms part of the socio-economic rights and is aimed at reinforcing the right of access to housing. A certain tension will evolve between existing property rights and the realisation of this socio-economic right.[28] Section 26(3) forms part of the anti-eviction measures and at least ensure due process in eviction proceedings, although the courts can interpret section 26(3) to provide substantive tenure protection for occupiers facing eviction.

3.2.3 The common law

Sections 25(9) and 26(2) of the Constitution mandate the government to enact legislation that would give effect to tenure reform and the progressive realisation of the right of more equitable access to adequate housing. The transformative nature of land-based reform statutes can be seen in light of the impact they have on the

[24] The tension between the rights of landowners and tenants is briefly referred to in 3.8 of this chapter and further analysed in Chapter 8. Balancing the landowner and tenant's interests is similar in German landlord-tenant law, which is discussed in section 7.4.2 in Chapter 7.

[25] Van der Walt AJ *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 163.

[26] Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 456 define tenure reform as the reform of the legal basis of land holding, motivated by transformation in order to acquire social change. The authors state that land reform is also a process according to which the basis on which land is held should be upgraded, moving away from a permit-based approach towards a rights-based approach. Consequently, new forms of landholding are introduced. According to the Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) VI, tenure reform is the most complex aspect in the land reform programme because it aims to bring all citizens under a legally validated system of landholding, although not implying that everyone should hold land under one form of tenure. Such land holding should also be secure. Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 459 confirm that one of the objectives of tenure reform is to offer diverse forms of landholding that allows individuals to choose a form of tenure appropriate to their circumstances. A variety of tenure forms should still be unitary to the extent that they comply with the underlying values of the Constitution.

[27] Van der Walt AJ *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 161.

[28] Pienaar JM & Muller A "The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework" (1999) 10 *Stell LR* 370-396 at 375.

common law rights of landowners. The strong common law right of landowners to evict occupiers is rooted in the "normality" assumption[29] that landowners are entitled to the exclusive possession of their property. This would seem to be the "normal state of affairs" and any contrary position is regarded as exceptional.[30] The "normality" assumption therefore presupposes that landowners should normally be in possession of their property although, if an occupier can raise and prove a right to occupy the premises, the right of the landowner is restricted temporarily. This was also the position in Roman-Dutch law and still forms part of the South African private law. The strong common law right of landowners to use the *rei vindicatio* to evict occupiers was confirmed in *Chetty v Naidoo*.[31] One of the issues the Court considered was the onus of proof where the landowner wanted to evict an occupier. Jansen JA found that one of the incidents of ownership is the right to exclusive possession, which meant that the owner could reclaim his property from any person at any time. The Court confirmed that the property should "normally" be with the owner.[32] When the owner wants to reclaim his property, he can institute the *rei vindicatio* by merely proving ownership and that the defendant is in possession of his property. The onus would be on the defendant to prove a right of occupation.[33] If the occupier succeeds or if the landowner admits that the occupier has or had a right of occupation, the landowner has to prove that the occupier's right to possession has terminated. This would for instance be the case where a lease expired and the tenant is holding over. The strong right of the landowner is evident, although the landowner is not allowed to evict the tenant without recourse to legal process.[34] In terms of the common law, the personal circumstances of the tenant and the effect that eviction will have on her and her family play no role in the granting of the eviction order, since the common law does not grant the courts any discretion in

[29] Coombe RJ "'Same as it ever was': Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603-652.
[30] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289 at 257-258.
[31] 1974 (3) 13 (A).
[32] One can clearly see a connection with legislation discussed in Chapter 2 where the courts were hesitant to restrict the rights of landowners in the event of eviction proceedings, even though the legislation specifically limited these rights.
[33] *Chetty v Naidoo* 1974 (3) 13 (A) 20A.
[34] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289 at 257.

deciding whether to allow eviction once the landowner has proved the formal requirements for an eviction order.[35]

The strong common law right of landowners, rooted in Roman-Dutch law, assisted the apartheid government to enforce their objective of race-based segregation of land. The state power of eviction was also used to realise this political objective.[36] The landowner's right of vindication, being the most prominent common law right that assisted landowners and the government to evict unlawful occupiers, has been restricted as a result of the post-1994 statutory development and strengthening of weaker rights. This transformation was achieved as a result of a reconsideration of the preconceived idea that the strong right of landowners to vindicate their property should not be challenged. The revised method "seeks to determine the balance in accordance with policy reflecting the relevant priorities of the Constitution."[37] The fact that ownership is no longer perceived as an absolute right is evident from the current restrictions on an owner's right to vindicate his property, although one should keep in mind that the new system of property is still "working within the basic principles of the common law."[38]

3.2.4 Conclusion

Despite the superiority of the Constitution, the new land law has to function and develop within the framework of the common law. This does not mean that the

[35] Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 343.

[36] See further Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289 at 259-263 for a discussion on apartheid legislation, the manner in which it was implemented and the initial transformation towards land reform. See also Van der Walt AJ "Dancing with Codes -- Protecting, Developing and Deconstructing Property Rights in the Constitutional State" (2001) 118 *SALJ* 258-311 at 274-275 for a discussion on the common law and the way in which its hierarchical vision of property was adopted in the apartheid policy.

[37] Carey Miller DL & Pope A "South African Land Reform" (2000) 44 *JAL* 167-194 at 191-192.

[38] Carey Miller DL & Pope A "South African Land Reform" (2000) 44 *JAL* 167-194 at 194. The courts have struggled to understand the relationship between the common law, Constitution and anti-eviction legislation because of the continued significance of the common law. The importance of the common law has developed over decades and is evident in Chapter 2, which illustrates the courts' resistance to restrict the common law rights of landowners, despite the explicit intention of the legislature to do so. The courts' resistance forced the legislature to continually intervene and draft new legislation, which expressed the need to limit the common law rights of landowners in order to provide better substantive tenure protection for tenants.

common law is superior law, but rather that one should take the common law into consideration when developing land law. In some instances common law principles can assist constitutional objectives, while in other cases these principles might require trivial amendments in order to give effect to constitutional obligations.[39] However, in the area of land law, and especially the right to housing, one has to be careful in developing the common law, because the pre-1994 apartheid government used the common law principles with regard to land to accomplish racial segregation. The common law was infused with apartheid objectives and therefore to a certain extent reflects the legacy of apartheid.

There is therefore a tension between the constitutionally guaranteed property rights of landowners, the land reform objectives and the right of access to housing, just as there is a tension between the common law rights of landowners and the transformative constitutional objectives in the land reform programme. It is imperative to take into account the strong common law rights of landowners in relation to the development of the land reform objectives, because the continued strength of the common law is an important measure in determining the efficiency of the land reform statutes. Land reform, and specifically tenure reform, can only succeed through the accurate enactment and consistent enforcement of transformative legislation.[40] In some instances the common law rights of landowners would have to be overruled or restricted by the legislation in order to give effect to the constitutional objectives. However, this will not always be the case, as in some instances the common law can continue to co-exist with land reform statutes.

3.3 Section 25(6)

One of the aims of this chapter is to determine the efficiency of tenure reform, specifically with reference to section 25(6), which states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure which is legally secure. Section 25(9) must be read with section 25(6); it states that parliament must enact legislation in order to give effect to the

[39] See the discussion in section 3.9 below.
[40] See justification for new legislation in section 3.9 below and Chapter 8 for more detail regarding the proposed legislation.

constitutional commitment in section 25(6). This section's application could seem quite restricted due to the fact that only insecure tenure of land, which is insecure because of past discriminatory laws, falls to be reformed under this section. However, this section applies to the majority of black persons who currently occupy land with insecure tenure, because it has been accepted[41] that these households' insecure tenure is either a direct or indirect consequence of apartheid land laws. It is irrelevant whether their insecure tenure is a direct or indirect consequence of apartheid laws.

One could argue that tenure rights (of specifically white occupiers) that are currently insecure as a result of inadequate protection, provided for by either legislation or the common law, but not related to past discriminatory laws or practices, will not necessarily justify protection under section 25(6). Tenure reform rather plays an important transformative role for black occupiers who occupy land with insecure tenure. Tenure reform aims to rectify and abolish some of the effects of apartheid as it strengthens existing tenure forms weakened by apartheid land law and introduces new forms of tenure that revise the common law. However, tenure reform is also central in all eviction cases, because anti-eviction measures strengthen tenure rights.

The tenure reform process therefore consists of two strategies, namely the transformation of weak tenure forms by implementing individual structural reforms; and general anti-eviction provisions that prevent forced removals, which are associated with apartheid.[42] The first-mentioned strategy is provided for in section 25(6). Section 25(6) is aimed at adapting and amending existing weak forms of tenure and introducing new forms of tenure to replace weak tenure that cannot be reinforced. In both instances the focus is on providing better, secure tenure rights for previously disadvantaged black occupiers. The emphasis is on the development of continued occupation rights for these individuals who previously occupied land with

[41] Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 291; Budlender G "The Constitutional Protection of Property Rights" in Budlender G, Latsky J & Roux T (eds) *Juta's New Land Law* (1998) 1-70.

[42] Van der Walt AJ *Constitutional Property Law* (2005) 309-310. The Republic of South Africa, Department of Land Affairs *White Paper on South African Land Policy* (1997) 64 affirms this contention where it states that tenure reform is aimed at delivering tenure security in diverse ways, including secure lease agreements and protection against eviction.

insecure tenure.[43] The aim is to ensure that black occupiers occupy land with substantive tenure rights. Tenure reform in terms of section 25(6) could be defined as a race-related form of tenure protection. The lack of secure tenure made evictions possible or easier for the government, and for white property owners, during the apartheid era.

Tenure reform is aimed at strengthening weak tenure rights and abolishing apartheid-type threats of eviction. This includes the introduction of substantive tenure protection and strict due-process controls in eviction proceedings. However, the statutes introduced by the legislature to give effect to the mandate set out in section 25(6), read with section 25(9) of the Constitution, differ quite drastically with regard to the level of protection afforded to different categories of occupiers. Van der Walt mentions that the time-frame in which the statutes were promulgated and the different aims of the statutes might influence the extent of tenure security they provide.[44]

The legislation promulgated in order to give effect to the tenure reform programme, based on the authority of sections 25(6) and 25(9), includes the Extension of Security of Tenure Act 62 of 1997, the Interim Protection of Informal Land Rights Act 31 of 1996, the Communal Property Associations Act 28 of 1996, the Communal Land Rights Act 11 of 2004, the Land Reform (Labour Tenants) Act 3 of 1996 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

The Extension of Security of Tenure Act (ESTA) aims to grant lawful rural occupiers better tenure security by protecting them from unfair eviction. The Act applies to lawful occupiers who have permission to occupy the property of the landowner.[45] The purpose of the Interim Protection of Informal Land Rights Act is to

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[43] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 607. Van der Walt AJ *Constitutional Property Law* (2005) 309 explains that "tenure reform is a technical process through which the legal status and protection of existing land interests and rights are upgraded and strengthened".

[44] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289 at 263-264.

[45] The Act also brings stability in these land tenure situations because it created measures according to which these occupiers can acquire independent land rights. The relationship between occupier and landowner is also stabilized: Van der Walt AJ *Constitutional Property Law* (2005) 316-317. See also Van der Walt AJ *Constitutional Property Law* (2005) 318-326; Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 492-515; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 608-619 for a more detailed discussion of the Act. See

protect “informal land rights”, which could be defined as a wide-ranging collection of legally unrecognized and therefore insecure rights and interests in land, in the same manner that legally recognized property rights are protected. Even though these rights were never registered, they receive protection as if they are property rights because of the low status they enjoyed during the apartheid era. The protection of these rights is not permanent; application of the Act was initially meant to last until 31 December 1997, but its validity has been extended repeatedly and the Act is currently still in operation. The Act applies to a range of land holdings and provides that such occupiers may not be deprived of their land rights without their consent, although they may be deprived of their “right in communal land in accordance with the customs of the particular community”.[46]

By means of the Communal Property Associations Act individuals, acting as part of a community, can acquire, hold and manage property within their community by means of a written constitution. The communities can acquire newly created secure tenure within a legal framework.[47] The Communal Land Rights Act’s main purpose was to transform “old order rights” into “new order rights”,[48] but the Act was declared unconstitutional in *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*.[49]

The Land Reform (Labour Tenants) Act’s aim is to strengthen labour tenants’ land rights and to increase access to agricultural land. Application of the Act is limited as it only applies to labour tenants. Labour tenants are different from farm

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Keightley R “The Impact of the Extension of Security of Tenure Act on an Owner’s Right to Vindicate Immovable Property” (1999) 15 *SAJHR* 277-307 for a discussion of the impact of ESTA on rural landowners’ common law right to vindicate their immovable property. The author introduces two approaches to answer this question.

[46] Van der Walt AJ *Constitutional Property Law* (2005) 311. See also Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 461-467; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The Law of Property* (5th ed 2006) 619-620 for detailed discussions on the Act.

[47] The Act requires that communal property associations should be established and registered in accordance with the Act. The association must draft a constitution based on principles such as equality and democratic decision-making: Van der Walt AJ *Constitutional Property Law* (2005) 315-316. See also in this regard Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The Law of Property* (5th ed 2006) 620-622; Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 467-491.

[48] See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman’s The Law of Property* (5th ed 2006) 622-629 for a detailed discussion of the Act.

[49] [2010] ZACC 10 (CC).

workers because they acquire occupation rights on landowners' farms in exchange for providing labour.[50]

In light of the new tenure forms introduced in the above-mentioned statutes one can applaud the legislature for creating and developing a transformative land tenure system in rural areas, because the majority of the statutes succeeded in amending the common law and consequently improving the security of land holding. However, the statutes promulgated under sections 25(6) and 25(9) of the Constitution mostly focus on rural tenure security.[51] The tenure reform programme places emphasis on securing tenure in rural areas by focusing on labour tenants and farm workers.[52] This could be the result of the approach in the *White Paper on Land Policy*, which states that one of the "key areas of concern" is the "rights in land of the people living in rural areas".[53] Another reason could be that the Department of Human Settlements[54] is responsible for the urban housing programme, while the Department of Rural Development and Land Reform[55] is responsible for the land reform programme and therefore also for tenure reform. Urban tenure reform has been neglected from policy and implementation due to its uncomfortable position between and within these two departments.[56] In the urban sphere, tenure security is predominantly provided through formal housing delivery because it is seen as part of

[50] Van der Walt AJ *Constitutional Property Law* (2005) 312. See further Van der Walt AJ *Constitutional Property Law* (2005) 312-315; Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 525-551; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 594-603.

[51] Donaldson R, Marais L, Rambali K, Maharaj B, Bob U & Kwaw I "Land Restitution and Land Tenure: An Introduction" in Donaldson R & Marais L (eds) *Transforming Rural and Urban Spaces in South Africa during the 1900`s – Reform, Restitution, Restructuring* (2002) 11-24 at 12; Republic of South Africa, Department Land Affairs *White Paper on South African Land Policy* (1997) 60-61; Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 173; Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 24.

[52] Donaldson R, Marais L, Rambali K, Maharaj B, Bob U & Kwaw I "Land Restitution and Land Tenure: An Introduction" in Donaldson R & Marais L (eds) *Transforming Rural and Urban Spaces in South Africa during the 1900`s – Reform, Restitution, Restructuring* (2002) 11-24 at 13.

[53] Ntsebeza L *Land Tenure Reform, Traditional Authorities and Rural Local Government in Post-Apartheid South Africa: Case Studies from the Eastern Cape* (1999) 42.

[54] The Department of Human Settlements was previously known as the Department of Housing.

[55] The Department of Rural Development and Land Reform was previously known as the Depart of Land Affairs (DLA). Presently it is clear from the new name of the department that the aim of the department is to develop rural land and that land reform forms part of this goal.

[56] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 176.

the housing package.[57] It has been argued that tenure security in urban areas is not as much of a politicized issue as it is in rural areas, although during the apartheid era influx control in especially urban areas was made possible through weak occupation rights of black persons. The laws that regulate security of tenure in urban areas have always been tied to influx control and segregation because it forms part of planning laws for land development.[58] These laws favour individual ownership.[59]

Tenure security for previously disadvantaged occupiers in urban areas has not been addressed under the tenure reform programme. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) does provide some form of protection for unlawful occupiers in urban areas. The aim of the Act is not to improve the weak tenure rights of black occupiers who occupy land with insecure tenure as a result of previously discriminatory laws, but rather to ensure that evictions take place in a certain fashion. The courts can interpret PIE, during eviction proceedings, to grant substantive tenure protection for marginalised occupiers who occupy land without any rights at all (unlawfully). This form of tenure protection is based on the socio-economic weakness of the occupier. As defined earlier, tenure reform consists of two strategies, namely the transformation of weak tenure forms (race-based tenure protection under section 25(6)) and anti-eviction provisions that are based on the socio-economic weakness of the occupier (welfare-based tenure protection under section 26(3)). PIE forms part of the anti-eviction measures under section 26(3) of the Constitution, while tenure reform under section 25(6) seems to be focused mainly on rural land.

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[57] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 196.

[58] Donaldson R & Marais L "Preface: Transforming Rural and Urban Spaces" in Donaldson R & Marais L (eds) *Transforming Rural and Urban Spaces in South Africa during the 1990s – Reform, Restitution, Restructuring* (2002) 1-10 at 4-5 state that the post-apartheid policies forced urban planners to reconstruct the urban society by means of negotiations, policy formulation, reconciliation and reconstruction. The aim of reconciliation was to desegregate the society in all areas while the aim of reconstruction was to redevelop marginalised and undeveloped areas in order to create new, uplifted urban areas. Currently South African cities are divided into enclaves of expensive, upmarket gated communities in the suburbs and the inner city, where renovations take place. The inner city is known for rental accommodation, although it is mostly occupied by the former whites-only group. The poor and marginalised households find accommodation in the form of squatting in abandoned city areas. In these cities "the social divide occurs mainly between enclave and tenement and the abandoned city."

[59] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 173-174.

As yet, the legislature has not enacted legislation with the aim to provide a form of tenure that would secure substantive occupation rights for marginalised, lawful occupiers of residential property in urban areas. The absence of such a development, especially in light of the transformative goal of section 25(6), is problematic in light of the tenure rights of urban occupiers in general, and specifically urban residential tenants. The weak occupation rights of black urban occupiers during the apartheid era also emphasise the required tenure reform in urban areas, especially for tenants, because black households were afforded the weakest forms of tenure in urban areas.

3.4 Sections 26(1) and 26(2)

3.4.1 Obligation of the state

Section 26 of the Constitution is known as the housing provision. Section 26(1), read with section 26(2), provides that everyone has the right to have access to adequate housing and that the state must take reasonable measures to achieve the realisation of this right.[60] In *Government of the Republic of South Africa and Others v Grootboom and Others*[61] the Constitutional Court held that sections 26(1) and 26(2) must be read together and that section 26(1) 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.[62] The Court also found that in terms

[60] Van der Walt AJ *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 50 of 1999, were introduced in order to give effect to the right to housing. See Van Wyk J "The Relationship (or not) between Rights of Access to Land and Housing: De-linking Land from its Components" (2005) 16 *Stell LR* 466-487 for a discussion on the relationship between sections 26(1) and 25(5) of the Constitution.

[61] 2001 (1) SA 46 (CC) para 34 per Yacoob J.

[62] In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 33 the Court rejected the contention that section 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 court is unable to create such a threshold without the necessary information. See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 163-173; Russell S "Introduction – Minimum State Obligations: International Dimensions" in Brand D & Russell S (eds) *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives* (2002) 11-21; De Vos P "The Essential Components of the Human Right to Adequate Housing – A South African Perspective" in Brand D &

of section 26, the government must create a public housing programme aimed at realising the right of access to adequate housing. The government must attempt to realise this right within its available means.[63] In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[64] the Constitutional Court confirmed its decision in *Grootboom* and held that the right of access to adequate housing (part of the socio-economic rights) does contain a negative element, which means that "any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)".[65] Shortly after the *Jaftha* decision, in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*,[66] the Constitutional Court postponed the eviction of unlawful occupiers from private land until alternative accommodation could be provided by the state.[67] Van der Walt argues that the decision indirectly implies that the state has a positive obligation in certain circumstances to make available

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Russell S (eds) *Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives* (2002) 23-33.

[63] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 41 per Yacoob J. This contention was affirmed in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) para 226 per Ngcobo J.

[64] 2005 (2) SA 140 (CC).

[65] *Jaftha v Scoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 34 per Mokgoro J. At paras 25-26 the Court emphasised that the aim of section 26 in relation to security of tenure had to be interpreted against the historical background of apartheid-type evictions and forced removals. The focus of section 26 is twofold, namely to reject the previous approach followed by the apartheid government with regard to evictions and to create a new dispensation in which the state must desist from interfering with individuals who occupy property. The state should only be allowed to interfere with an individual's access to housing when it is justifiable to do so: *Jaftha v Scoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) paras 26, 28. Van der Walt AJ *Constitutional Property Law* (2005) 361-362 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 section 26(1). Such limitations must be justified under section 36(1) of the Constitution. The right to have access to adequate housing and security of tenure is part of the reform process. See also Liebenberg S "The Application of Socio-economic Rights to Private Law" 2008 *TSAR* 464-480 at 467 on the negative obligation as developed in the case law. Liebenberg argues that in the light of section 8(2) of the Constitution one should rather refrain from relying on a rigid distinction between positive and negative duties. A contextual approach should rather be followed in every case in order to determine whether a positive or negative duty should be imposed on (specifically) a private actor: Liebenberg S "The Application of Socio-economic Rights to Private Law" 2008 *TSAR* 464-480 at 468-469. See also Van Heerden CM & Boraine A "Reading Procedure and Substance into the Basic Right to Security of Tenure" (2006) 39 *De Jure* 319-353 on the *Jaftha* case and the problematic consequences of the decision. See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 215-218.

[66] 2005 (5) SA 3 (CC). See Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 281-286 for a discussion of the case.

[67] The same logic was followed in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) and *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA).

housing to homeless individuals in terms of sections 7(2),[68] 26(1) and 26(2) of the Constitution. The state was liable to compensate the owner of the affected land in this case because it failed to supply the necessary housing.[69] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing rights and Evictions and Another, Amici Curiae)*[70] Ngcobo J stated that the government does have a constitutional duty to "facilitate the progressive realisation of the right of access to adequate housing imposed by section 26(2) of the Constitution".[71] At this stage one can confirm that the state does not have a positive duty to provide homeless persons with access to adequate housing, although the government is responsible for ensuring that the correct laws (generally taking the form of legislation), policies and incentives are developed and sufficient to give effect to the duty enshrined in section 26 of the Constitution.[72]

A variety of tenure forms should have been created under the housing subsidy policy in order to provide access to adequate housing, but at the moment individual ownership is the main form of tenure that is delivered in terms of existing legislation.[73] Tenure security in South African urban areas could be defined as "formalizing land rights through full formal private tenure."[74] The most complete form of such tenure is private ownership, which is why this is the main form of tenure delivered.[75] The perception that ownership is the most important and valuable

[68] Section 7(2) of the Constitution states that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights."
[69] Van der Walt AJ *Constitutional Property Law* (2005) 367-368.
[70] 2010 (3) SA 454 (CC). See Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 303-311 for a discussion of the case.
[71] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) para 224.
[72] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 40 per Yacoob J.
[73] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 176.
[74] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 196. Conversely, the 1994 White Paper on housing, stated that "[o]ne of the most significant and short-term interventions required of the Government will be to provide the widest range of options for the rapid attainment of secure tenure": Republic of South Africa, Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994) 3 2 2. This variety of tenure forms was never developed. At 5 3 3 the White Paper also states that the "Government rejects the elevation of the individualised private home ownership above other forms of secure tenure."
[75] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 196.

property right (as a right and a question of redress) has prevented a variety of tenure options from being developed and delivered. This perception has its roots in the apartheid era when most South Africans were denied ownership. Apart from this, some legislation makes provision for individual and group ownership as well as lease in order to introduce different forms of tenure.[76]

The post-1994 government promised "houses for all" and intended to build "one million houses" within the first five years. The rate of delivery was very slow as only 123 000 houses were built in the first two years. However, by December 2008, government had built 2.8 million houses.[77] At the moment, the government's prime target is to eradicate or upgrade all informal settlements by 2014/2015 through housing delivery, including the development of low-cost housing, medium density accommodation and rental housing.[78] Apart from the fact that the government does not have a direct positive obligation to provide access to adequate housing for all homeless individuals, one can be certain that the government must facilitate the realisation of this right through the enactment of transformative land law legislation, policies and development programmes.

Part of the initial housing policy was to develop a variety of tenure forms that would grant secure tenure, but individual ownership has been the main form of tenure delivered.[79] Currently government is again emphasising the need to develop

[76] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 176-177. At 177 Royston refers to the Development Facilitation Act 67 of 1995 that makes provision for "initial ownership" that entitles the occupier to use the land as owner. At a later stage this form of occupation could be converted to ownership upon registration. Nonetheless, this form of tenure has not been used due to land development problems. Royston also mentions social housing that makes provision for cooperative tenure and rental as alternatives to owner-occupation. These forms of tenure are not being delivered at a large enough scale.

[77] Republic of South Africa *Housing* (http://www.info.gov.za/aboutsa/housing.htm (accessed 3 August 2009)). The government's budget for the building of houses in order to provide occupiers with ownership increased from R4.8 billion in 2004 to R9 billion in the 2007/08 financial year. There has therefore been an average growth of 23,2 percent per year. "The housing budget is projected to grow from R9 billion in 2007 to R10,6 billion in 2008/09 and R15,3 billion by 2010/11, at an average annual rate of 19,4%": Republic of South Africa *Housing* (http://www.info.gov.za/aboutsa/housing.htm (accessed 3 August 2009)).

[78] Republic of South Africa *Housing* (http://www.info.gov.za/aboutsa/housing.htm (accessed 5 August 2009)). The Department of Housing launched the Breaking New Ground policy in September 2004, which strives to eradicate informal settlements. The aim is to upgrade informal settlements or relocate occupiers of informal settlements where development is impossible: Republic of South Africa, Department of Housing *Breaking New Ground Policy* (2004).

[79] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 176.

different forms of tenure, especially in the area of rental housing through the development of differentiated public and social housing sectors.[80] There has therefore been a change in policy, because one could argue that government realised that private home ownership is not possible for all South Africans and that in light of the immense percentage of homelessness a new form of housing must be afforded to those in need of housing. The continued involvement of the state in the provision of housing in the form of social (or public) rental housing, especially during acute housing shortages, is evident from the United States of America and Germany.[81] In the England and Wales social rental housing is a key form of housing for low-income households, but this form of housing is associated with strong tenure security.[82]

3.4.2 Housing legislation

Since 1994 the legislature has enacted a limited number of statutes in terms of its mandate as stated in section 26(2) of the Constitution in order to give effect to the right of access to adequate housing in urban areas. The Housing Act,[83] Rental Housing Act[84] and Social Housing Act[85] are the most important statutes.[86]

The Social Housing Act is a direct result of the government's social housing policy.[87] The preamble of the Act refers to sections 26(1) and 26(2) of the Constitution and states that "there is a dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market".[88] Section 2(1)(i)(xv) of the Act makes provision for the creation of social

[80] Republic of South Africa *Housing* (http://www.info.gov.za/aboutsa/housing.htm (accessed 5 August 2009)). Until now, public rental housing has not been introduced as a form of tenure that could help alleviate housing shortages by the Department of Human Settlements.
[81] See Chapters 6 and 7 respectively.
[82] See Chapter 4.
[83] Act 107 of 1997.
[84] Act 50 of 1999.
[85] Act 16 of 2008.
[86] The Housing Development Agency Act 23 of 2008 was also enacted in terms of section 26(1). Section 2 of the Act states that the aim of the Act is to establish an agency, "which will facilitate the acquisition of land and landed property … for the purpose of creating sustainable human settlements."
[87] Republic of South Africa *A Social Housing Policy for South Africa* (July 2003).
[88] Preamble of the Social Housing Act 16 of 2008.

housing institutions,[89] responsible for the provision and management of social housing stock,[90] while section 1 defines a "lease agreement" as "a standard lease agreement utilised by a social housing institution". In terms of section 3(1)(e) the national government must fund the social housing programme in order to promote the supply of social housing stock for low to medium income persons.[91] One can applaud the Act for introducing measures that strive to promote access to rental housing, while increasing rental housing stock.

At this stage one can assume that the aim of the Act is to introduce a social housing sector that can provide rental housing through the creation of social housing institutions, acting as social landlords. The aim of the Act is to make available rental housing for low to medium income households and not for the most vulnerable in society. Section 2(1)(h) states that government and social housing institutions must ensure secure tenure for residents in social housing stock. The extent of tenure security must be based on the general principles as stated in the Rental Housing Act 50 of 1999. In section 3.6.2 below it is argued that the Rental Housing Act does not give adequate security of tenure for urban residential tenants and one can consequently infer that the Social Housing Act does not provide sufficient security of tenure either.

The Rental Housing Act can also be included under the list of statutes promulgated to give effect to sections 26(1) and 26(2) of the Constitution, as the Act forms part of the government's aim to deliver housing for the urban poor.[92] Sections

[89] Sections 13(1) and 13(5) define a social housing institution as a institution that has already undertaken housing developments with the benefit of an institutional subsidy; a company registered under the Companies Act 61 of 1973, or a co-operative registered under the Co-operatives Act 14 of 2005, or any institution acceptable to the Regulatory Authority; or a municipality wishing to participate in social housing. However, section 13(3) provides that such an institution must apply to the Regulatory Authority in the prescribed format for accreditation.

[90] Where there is a demand for social housing stock within a municipality's area, the municipality must take measures to facilitate the delivery of social housing within that area and encourage development of social housing through the conversion of existing non-residential stock and upgrading of existing stock: sections 5(a) and 5(b). In terms of section 5(c) the municipality is obliged to provide access to land and buildings for social development and to provide access for social housing institutions to municipal rental stock.

[91] In terms of sections 6(1)(c) and 6(1)(d) the National Housing Finance Corporation must, subject to directives issued by the Minister in the *Government Gazette*, facilitate (or provide access to) guarantees for loan funding from financial institutions and explore "mechanisms aimed at facilitating public funding for social housing". One of the functions of the Regulatory Authority is to provide financial assistance to social housing institutions through the provision of grants to service providers. This would develop institutional capacity: section 11(3)(a).

[92] Republic of South Africa *Housing* (http://www.info.gov.za/aboutsa/housing.htm (accessed 6 August 2009)). Thomas PJ "Rental Housing" in Joubert WA, Faris JA & Harms LTC (eds) *The Law of South*

26(1) and 26(2) are also mentioned in the preamble of the Act. The Act affords some tenure security for lawful tenants in rural and urban housing.[93] The Act aims to introduce stability in the rental housing market and also to encourage investment in the market. Both growth and stability are intended to benefit the previously disadvantaged. The Act mandates the government to address apartheid-type patterns in residential areas while a general improvement of conditions in the rental market is also important.[94] The Act reaffirms the common law position of the parties with regard to some of their rights and duties, although in some instances these rights and duties are changed and adapted in order to balance the rights of landlord and tenant.[95] The Rental Housing Act does not provide substantive tenure security for tenants as it reinforces the strong common law right of landowners to evict tenants upon expiration of the lease.[96] The detail of the Rental Housing Act and its relation to the common law is discussed in section 3.6 of this chapter. However, at this stage one can conclude that the Rental Housing Act does not promote access to rental housing and does therefore not give effect to sections 26(1) and 26(2) of the Constitution sufficiently. The Act also fails to encourage an increase in rental housing stock.

The Housing Act 107 of 1997 aims to give effect to sections 26(1) and 26(2) of the Constitution. The Act reflects the government's aim in promoting "housing development", which is a key phrase in the Act. Section 1(a) of the Act generally defines "housing development" as the establishment of residential environments in which citizens will have access to residential structures with secure tenure. One can infer from the phraseology of the Act that housing development is vital in giving effect

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Africa vol 23 (2nd ed 2009) 101-120 at 107 explains that the Rental Housing Act obliges the state to promote the rental housing market in order to make rental housing available to the poor and previously disadvantaged. However, the private sector should also be involved in the realisation of this duty and should therefore participate in the provision of rental housing. The exact method to give effect to these obligations is uncertain.

[93] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289 at 264-265. Mohamed SI *Tenant and Landlord in South Africa* (2003) 6 states that the Act is applicable to all dwellings used for rental housing purposes. The Act is therefore not applicable to commercial property. See further Mohamed SI *Tenant and Landlord in South Africa* (2003) 7 for the broad scope of premises that fall under the definition of "dwelling".

[94] Legwaila T "An Introduction to the Rental Housing Act 50 of 1999" (2001) 12 *Stell LR* 277-282 at 277; Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 326.

[95] Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 326. At 328 the author gives an example of the unchanged common law position by referring to the definition of a lease.

[96] See section 3.6.2 below.

to sections 26(1) and 26(2), but the mere supply of residential structures to homeless individuals is inadequate as this will not necessarily afford occupiers with secure tenure. In *Government of the Republic of South Africa and Others v Grootboom and Others*[97] the Constitutional Court decided that section 26(1) recognises that housing requires more than a residential structure. The Court does not mention security of tenure, although considering the basis upon which the pre-1994 government, and private landowners, could evict occupiers occupying land without tenure security one can infer that security of tenure must form part of the provision of adequate housing.

The Social Housing Act and the Housing Act aim to give effect to the right of access to housing, because the Social Housing Act mandates the government to fund the social housing programme in order to promote the supply of housing while the Housing Act aims to promote housing development. Both these laws are therefore concerned with the promotion of increased housing stock that would provide housing. The Rental Housing Act forms part of the housing laws, but it does not promote an increase in rental housing stock. One could argue that the Rental Housing Act is defective in this regard, because the legislature could have introduced certain incentives for private developers to invest in the provision of rental housing and thereby increase private rental housing stock.[98] The correlation between increased housing stock and the provision of tenure security for occupiers has also been neglected by the legislature, which has implications concerning the right of access to *adequate* housing.

3.4.3 Adequate housing

The meaning of “adequate housing” as stated in section 26(1) is not defined in the Constitution; neither could it be derived from the case law. In order to construe some definition for “adequate housing” reference to international law is justifiable as section 39(1) of the Constitution states that a court, tribunal or forum must consider international law when interpreting the Bill of Rights.

[97] 2001 (1) SA 46 (CC) para 35 per Yacoob J.
[98] See especially Chapter 7 for some incentives that were introduced in Germany to promote private rental housing development.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)[99] was signed by South Africa on 4 October 1994, although it has not been ratified yet.[100] The ICESCR is an important international instrument to consider when construing a definition for adequate housing in terms of section 26(1) of the Constitution, because Article 11(1) of the ICESCR recognises a right to an adequate standard of living, including housing. The right to adequate housing as ensured in Article 11(1) is defined in General Comment 4 of the ICESCR.[101] In General Comment 4, the Committee on Economic, Social and Cultural Rights (CESCR)[102] states that the right to adequate housing should not be interpreted narrowly as merely a "roof over one's head",[103] but that it should rather be seen as the right to occupy property with security.[104] The CESCR also states that the "adequacy" of a housing condition depends on various factors, although there are "certain aspects of the right that must be taken into account … in any particular context".[105] One of these aspects is legal security of tenure, stipulated in paragraph 8(a) of General Comment 4. This paragraph states that any type of tenure, including public and private rental accommodation, should ensure a degree of security of tenure. The extent of tenure security is not defined except that the CESCR refers to the guarantee against forced evictions.[106]

[99] United Nations *International Covenant on Economic, Social and Cultural Rights* (1966). In *S v Makwanyane and Another* 1995 (3) SA 391 (CC), and later confirmed in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the Constitutional Court found that the court must consider international law that has been ratified by the government, although the court can also consider international law that has not been ratified by the government.

[100] See Craven MCR *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995). The ICESCR came into force on 3 January 1976 and has been ratified by 160 countries.

[101] United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* (1991).

[102] United Nations *Committee on Economic, Social and Cultural Rights* (1985) (http://www2.ohchr.org/english/bodies/cescr/ (accessed 6 August 2009)).

[103] This phrase is similar to the opinion of Yacoob J in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35.

[104] United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* (1991) para 7. Later in this paragraph the committee also refers to the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000, where it was stated that adequate shelter includes adequate security. See also United Nations Commission on Human Settlements *Global Strategy for Shelter to the Year 2000* (1988) for the Global Strategy for Shelter report.

[105] United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* (1991) para 8.

[106] United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* (1991) para 8(a).

If the aim of the government is to provide housing in the form of rental housing in order to give effect to section 26 of the Constitution, the question is how such housing would equate "adequate housing" as defined in section 26(1). The Constitution does not define "adequate housing", neither have the courts construed a fixed meaning for this term, except that government must refrain from depriving occupiers of existing housing and that government must enact legislation in order to give effect to this right. According to General Comment 4 of the ICESCR, security of tenure is a key component of the right to adequate housing. The question is whether the current housing legislation, and specifically rental housing legislation, gives effect to the constitutional obligation as stated in section 26(2). The fact that the legislation does not make provision for tenure security is problematic considering its importance in international law and the repercussions that insecure tenure had for vulnerable occupiers during the apartheid era.[107] The effect of insecure tenure rights for vulnerable urban tenants is important to take into account, considering the growth in urbanisation and the increasing demand for urban rental housing. It is doubtful whether the provision of urban rental housing would comply with section 26 if the tenure rights of tenants are insecure.

3.5 Urban rental housing

In 1995 the *Urban Development Strategy*[108] estimated that by 2020 at least 75 percent of the population would be living in urban areas and that these areas deliver 80 percent of the country's gross domestic product (GDP). Urban housing has become a major concern because of the correlation between the limited space available in the metropolitan areas and increasing urbanisation. Individuals move to metropolitan areas to look for better job opportunities, which is not necessarily problematic because urbanisation is associated with economic growth. There is a connection between increased urbanisation and higher GDP per capita. Urbanisation has been associated with high rates of economic growth and "[t]he statistical correlation internationally between levels of urbanisation and GDP per capita is very

[107] See Chewi L "Recommendations of the United Nations Special Rapporteur on Adequate Housing Following his Mission to South Africa" (2008) 21 *ESR Review* 24-25.
[108] Republic of South Africa *Urban Development Strategy of the Government of National Unity* (1995).

strong".[109] Currently one can see that a shift has taken place in the area of tenure reform, specifically in relation to the meaning of tenure security. The focus should no longer be on providing better tenure security in rural areas exclusively, but also in urban areas because of increased urbanisation. This shift is economically beneficial and should be supported and encouraged by the government. The government should introduce measures that would improve tenure security in urban housing, especially through the enactment of legislation. Tenure security for all South Africans can only be successful if it is provided in urban areas, because the majority of occupiers (white and black) are not interested in living in rural areas as they are not interested in farming. The concept of "land" for especially black occupiers has changed to the extent that it is now defined as "a place to stay" instead of "a place to farm".[110]

There is also a definite link between urban poverty and tenure status, because tenure status is one of the core elements in the poverty cycle. Weak tenure security therefore reinforces poverty.[111] Weak tenure rights create problems such as unstable communities and it discourages investment, which has an effect on socio-economic factors such as poverty, social exclusion and limited access to urban services.[112] Secure tenure affords occupiers better investment opportunities, which encourage economic activity and combat poverty.[113] Secure occupation rights have been described as the "main component of the right to housing".[114] The government realised the importance of secure tenure when it proclaimed that security of tenure is a cornerstone in its approach to provide housing for homeless persons.[115] The government formulated a vision for its strategy to alleviate poverty and subsequently

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[109] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 44.

[110] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 73.

[111] Durand-Lasserve A & Royston L "International Trends and Country Contexts – From Tenure Regularization to Tenure Security" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 1-36 at 7.

[112] Durand-Lasserve A & Royston L "International Trends and Country Contexts – From Tenure Regularization to Tenure Security" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 1-36 at 9.

[113] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 195-196.

[114] Durand-Lasserve A & Royston L "International Trends and Country Contexts – From Tenure Regularization to Tenure Security" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 1-36 at 9.

[115] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 172.

identified certain objectives. One of these objectives was to ensure better tenure security for urban residents.[116] However, the importance of urbanisation and the connection thereof with better tenure security has been neglected by the South African development policy.[117]

Two of the post-1994 government's challenges with regard to tenure security in urban housing were to provide better protection against eviction and to address tenure security in public rental stock,[118] although tenure insecurity in urban areas is an increasing problem which has not been addressed by the government sufficiently.[119] One of the challenges in urban land reform is to create statutory forms of tenure that would include substantive tenure security, although such protection should not be limited to existing tenure forms but should be extended and applied to a diverse variety of tenure options.[120] An improved approach to land reform requires better tenure security in urban areas and increased housing delivery in specifically metropolitan areas.[121]

The state has not been successful in delivering housing to the urban poor and research has shown that ownership is not the ideal form of tenure occupiers necessarily prefer. The primary focus of providing all homeless persons with ownership does not necessarily suit the needs of poor urban occupiers.[122] There is a preference amongst at least some of the urban poor to rent accommodation instead of acquiring ownership, because by renting accommodation individuals do

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[116] Pienaar JM "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation Have a Positive Impact?" (2002) 17 *SAPL* 336-370 at 341.

[117] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 44. It is argued in the report that urbanisation makes land reform easier to realise and this advantage should be exploited. South Africa also has a number of cities that can absorb the urbanisation pressure which should also be used to facilitate land reform: Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 81.

[118] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 169.

[119] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 29.

[120] Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston L (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 179. The author argues that this challenge can only be resolved by "getting the relationship right" between the Department of Human Settlements (previously the Department of Housing) and the Department of Rural Development and Land Reform (previously the Department of Land Affairs) with regard to the responsibility of urban tenure.

[121] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 68-69.

[122] Watson V & McCarthy M "Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa" (1997) 22 *Habitat International* 49-56 at 51-52. The authors state that globally, home ownership is not necessarily the best tenure option amongst poor urban dwellers.

not have to take on all the responsibilities of ownership.[123] Marginalised occupiers who hold land under private tenure could easily be surprised by hidden costs which could lead to distress sales.[124] An estimated one third[125] of South African households live in rented accommodation, while one third of these households live in backyard shacks or flats.[126] Home ownership is not possible for most South Africans due to a lack of financial resources. Rental housing is thus a key component of the housing sector.[127] Cape Town has a large rental housing market that consists of private and public housing stock. This provides housing for a large number of black households. The occupiers have secure leases that afford them security of tenure.[128] Despite the preference of urban occupiers to rent housing one could also argue that rental housing is a better form of tenure (in comparison to owner-occupation) for poor and vulnerable occupiers, because the state can regulate, assess and control the market to the extent that it is involved in the provision thereof. If the state is directly involved in the provision of rental housing, as a social landlord, the state would be able to provide marginalised occupiers with secure (adequate) housing without having to place any unwanted financial burdens on these tenants. The success of such a form

[123] Pienaar JM "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation have a Positive Impact?" (2002) 17 *SAPL* 336-370 at 361. See also Watson V & McCarthy M "Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa" (1997) 22 *Habitat International* 49-56 at 53 for percentages of the population preferring rental housing, established during a survey in Cape Town.

[124] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 207.

[125] See Republic of South Africa, Department of Statistics *General Household Survey* (2007) 120.

[126] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 93. According to Gilbert A, Mabin A, McCarthy M & Watson V "Low-income Rental Housing: Are South African Cities Different" (1997) 9 *Environment and Urbanisation* 133-147 a large number of black South Africans who live in urban areas rent in backyard shacks. The pre-1994 public sector provided rental housing for urban black persons, but that sector no longer functions. In the late 1960s and 1970s the government started to accommodate black occupiers in urban areas by providing rental housing instead of building houses as a result of urbanisation. During this period some of these occupiers started to move into backyard shacks as tenants. Watson V & McCarthy M "Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa" (1997) 22 *Habitat International* 49-56 at 50 state that the aim of public rental housing was tied to the apartheid government's objective of political control over the African labour force. The government withdrew this policy during the 1980s because emphasis was placed on relocating black occupiers into their "homeland" areas. Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 165-181 at 167 state that during this period state owned rental stock was privatized to the occupants at no charge, known as the "transfer of houses" process. This was the result of demands made by civic associations.

[127] Thomas PhJ "The Rental Housing Act" (2000) 33 *De Jure* 235-247 at 235.

[128] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 200.

of housing depends on the enactment of efficient legislation that affords tenure security, while also being context-sensitive to the personal needs of the individual households.[129]

The Constitution ensures a right to have access to adequate housing, which means that the state is not obliged to make available housing for all homeless members of the public, although the state must take reasonable measures to facilitate the realisation of this right. De Vos identified three stages through which the state can realise this obligation.[130] The tertiary obligation of the state to promote and fulfil human rights could be carried out in the area of housing by assisting people in acquiring housing in the form of rental housing.[131] The pre-1994 government realised that the private sector had to be involved in the provision of housing for all citizens,[132] while the post-1994 government has failed to include the private sector in its pursuit of providing housing, especially in the area of rental housing.[133] The government's previous policy with regard to the provision of housing was to control and exploit the private sector's capacity, which was suitable at the time, but currently a new approach is necessary to the extent that more emphasis should be placed on the "public-private partnership".[134] There is a need to improve the extent of urban rental housing delivered by the private sector.[135] One could argue that the legislature failed to develop incentives for private developers to invest in the provision of private rental stock.[136]

Urban poverty could be lessened if the legislature granted substantive tenure security for the urban poor. If measures are introduced with the aim to improve tenure security in urban rental housing, the right to have access to adequate housing

[129] See Chapter 4 in this regard.
[130] De Vos P "Pious Wishes or Directly Enforceable Rights?: Social and Economic Rights in South Africa's 1996 Constitution" (1997) 13 *SAJHR* 67-101 at 79-91.
[131] Pienaar JM & Muller A "The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework" (1999) 10 *Stell LR* 370-396 at 376 & 395.
[132] Pienaar JM "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation have a Positive Impact?" (2002) 17 *SAPL* 336-370 at 339.
[133] The government is ignoring household rental because any recognition of such a policy (especially in backyard shacks) might be interpreted as the government reneging on its promise to provide houses to the population: Watson V & McCarthy M "Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa" (1997) 22 *Habitat International* 49-56 at 54. See Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 54 for a list of private sector initiatives.
[134] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 105.
[135] Bernstein A *Land Reform in South Africa: A 21st Century Perspective* (2005) 93-94.
[136] See Chapter 7 where Germany developed a range of incentives for private investors.

could be given effect to. Better tenure security in urban rental housing would contribute to alleviation of poverty and enhance better economic growth. As yet, the legislature has enacted the Rental Housing Act and the Social Housing Act in order to regulate the urban rental market and give effect to section 26(1) of the Constitution, but these laws fail to afford sufficient tenure rights for urban tenants.[137]

3.6 Rental Housing Act

3.6.1 Introduction

The Rental Housing Act[138] is the most important statute with regard to the protection of tenant's tenure rights in urban housing. Section 18 of the Act repealed the Rent Control Act 80 of 1976, although certain provisions, such as section 28 which provided for continued occupation rights upon termination of the lease, were still applicable until 1 August 2000. On 31 July 2003 all protection in terms of the previous rent control legislation ended.[139] During the three years following commencement of the Act the Minister of Housing had to monitor and assess the impact of the phasing out of both rent control and substantive tenure rights on poor and vulnerable tenants. The Minister also had to respond to suffering tenants and alleviate their hardship by means of a newly introduced special national housing programme to assist such tenants. Vulnerable tenants could be categorised on the basis of their age, income or any other form of vulnerability.[140] According to the Western Cape Rental Housing Tribunal *Annual Report* (April 2002 to March 2003), no official steps had been taken to comply with this obligation and no steps were taken by the Minister to monitor or assess the impact of the repeal of rent control on tenants. No action has been taken to alleviate any hardship suffered by vulnerable tenants because the government did not assess the rental housing sector while phasing out rent control and the security of tenure it provided for tenants.[141]

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[137] See the discussion on the inadequacy of landlord-tenant legislation in section 3.9 of this chapter.
[138] Act 50 of 1999.
[139] Mohamed SI *Tenant and Landlord in South Africa* (2003) 7.
[140] Stassen K & Stassen P "New Legislation: Rental Housing Act 50 of 1999" (2000) March *De Rebus* 55-59 at 56.
[141] Western Cape Rental Housing Tribunal *Annual Report* (April 2002 to March 2003). The report indicates that approximately 3000 properties in the Western Cape were affected by the repeal. In

Judging from the preamble of the Act it clearly strives to give effect to section 26 of the Constitution.[142] The Act regulates access to rental housing in a manner which is fair to both parties.[143] The balancing of rights of landlord and tenant is mentioned in the preamble, which indicates that the legislature was aware of the need to restrict the rights of landowners in order to strengthen tenure rights of tenants.[144] The preamble also mentions that rental housing is a key component of the housing sector, from which one can infer that the state acknowledges the importance of rental housing. Rental housing is a key component of the housing sector because home ownership is not possible for most South Africans due to financial constraints. The government accepted this reality when it enacted the Rental Housing Act.[145] In the white paper titled *A New Housing Policy and Strategy for South Africa*[146] the government stated that a key consideration in the process of providing adequate housing was the low incomes earned by numerous South Africans. The government also recognised the impossibility of providing housing for all South Africans (especially to the weak and marginalised) on its own because of insufficient resource. Investment from the private sector is therefore necessary.[147]

3.6.2 Security of tenure

Apart from these realities the Rental Housing Act provides limited tenure protection because it does not override the landlord's common law right to evict the tenant upon

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Jackpersad v Mitha 2008 (4) SA 522 (D) 532A-G the court discussed sections 19(2) and 19(3) of the Rental Housing Act and the obligation of the Minister with regard to this section which enforced the Minister's obligation. At 532I-533A Swain J held that the "crux of the obligation imposed on the Minister is that the tenants in question must be 'poor and vulnerable'", whereafter he concluded that the tenants did not establish that they were in fact "poor and vulnerable", despite the fact that some of them were elderly and in poor health. See section 3.8.5 below for a discussion of the case.

[142] Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 325 states that the Act was enacted in accordance with section 26 of the Constitution.

[143] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 429.

[144] Thomas PhJ "The Rental Housing Act" (2000) 33 *De Jure* 235-247 at 237 states that the Act clarifies the rights and duties of landlords and tenants by means of lease agreements. The tenant also has a right to challenge the landlord to provide a certain standard of accommodation that is compatible with the rent asked.

[145] Thomas PhJ "The Rental Housing Act" (2000) *De Jure* 235-247 at 235.

[146] Republic of South Africa, Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994).

[147] Republic of South Africa, Department of Housing *White Paper: A New Housing Policy and Strategy for South Africa* (1994) 4.5.

termination of the lease.[148] In terms of section 4(5)(d) the landlord is entitled to reclaim his property upon termination of the lease by means of a court order.[149] Where the tenant fails to redeliver the property upon termination of the lease the landlord has his usual remedies for breach of contract, because the tenant is holding over.[150] The lease terminates on one of the grounds stipulated in the lease, provided the stipulation does not constitute an unfair practice as defined in the Act.[151] The Act consequently introduces preliminary requirements that landlords are compelled to comply with before the lease can be terminated. Once the lease is terminated in accordance with the Act, the landlord can approach the court for an eviction order.[152] The common law rules with regard to cancellation are amended as the lease must contain a *lex commissoria*, which means that the landlord will not be able to cancel

[148] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation" 2002 *TSAR* 254-289 at 266. Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 329 agrees that the rights of the parties listed in the Act is not a *numerus clausus*, which means that the common law rights will remain in force if they are not explicitly amended by the Act. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 428.

[149] Legwaila T "An Introduction to the Rental Housing Act 50 of 1999" (2001) 12 *Stell LR* 277-282 at 281 states that the common law position is unchanged to the extent that the landlord can claim repossession of his property upon termination of the lease by means of a court order. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 429 where the authors state that the landlord can eject the tenant by means of a court order or claim damages for breach of contract in the event of a tenant "holding over".

[150] Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 337-338. Mohamed SI *Tenant and Landlord in South Africa* (2003) 28 mentions that where the tenant refuses to vacate the premises upon termination of the lease, the landlord can lodge a complaint with the Rental Housing Tribunal because the Act of the tenant amounts to an unfair practice. The tenant is obliged to pay the rent while the landlord can only recover arrears after a ruling was obtained from the tribunal. This position was amended by section 7(b) of the Rental Housing Amendment Act 43 of 2007.

[151] Section 4(5)(c). The definition of an unfair practice was substituted by section 1 of the Rental Housing Amendment Act 43 of 2007. An unfair practice is now defined as "a) any act or omission by a landlord or tenant in contravention of this Act; or b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord." Section 15(1)(f)(i)-(xvi) of the Rental Housing Act contains a list of matters that might relate to being an unfair practice, although this section was amended by section 7(b) of the Rental Housing Amendment Act. Section 7(b) deleted section 15 (1)(f)(v), which included eviction as an example of a unfair practice. Eviction is therefore no longer listed as a matter that might constitute an unfair practice, which means that the Tribunal no longer has exclusive jurisdiction over evictions. In the event of an unfair practice, the aggrieved party can lodge a complaint with the Rental Housing Tribunal. The purpose of the Tribunal is to facilitate dispute resolution in order to solve differences between the parties and negotiate fair rental. Any ruling by the Tribunal is regarded an order of the magistrate's court: Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 343.

[152] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 429.

the lease, in the case of *mora*, by giving notice of rescission to the tenant.[153] The common-law right of landlords with regard to the termination of the lease is accordingly amended by the Rental Housing Act.[154]

However, where the parties enter into a fixed-term tenancy and the period of the lease ends through effluxion of time the lease automatically terminates, provided that neither party was in default.[155] In these circumstances the position is unchanged to the extent that "[t]he contract expires by effluxion of time and with it the relationship of lessor and lessee ceases."[156] In the case of a periodic lease, the lease continues until terminated by due notice.[157] The lease will only continue upon expiration of the contract if the tenant remains in the dwelling with the express or tacit consent of the landlord. In these circumstances the parties are deemed to have entered into a periodic lease on the same terms and conditions as the expired lease. The periodic lease could be terminated by either party by giving one month's notice.[158] The point of departure is that the landowner must consent to the renewed lease. The landlord is entitled to terminate the lease on the expiration date without good reason. The renewal is voluntary and neither party could be forced to continue with the periodic lease.[159]

The Rental Housing Act supports a free-market approach to rental housing. The Act protects the rights of the parties in light of their contractual rights and duties, as it reinforces the terms of the contract. The legislature therefore assumes that the parties have equal bargaining power when entering into the lease and that this would remain their position throughout the term of the lease. The Act does not make provision for continued occupation rights for tenants upon expiration of the lease.

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[153] Mukheibir A "The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant" (2000) 21 *Obiter* 325-350 at 337.

[154] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 429. The authors refer to section 4(5)(c) and state that the Act changes the circumstances under which a landlord can evict a tenant. The common law rights of landlords are thus changed in order to provide tenure security for tenants in the form of due process.

[155] Kerr AJ *The Law of Sale and Lease* (3rd ed 2004) 488.

[156] *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325.

[157] Kerr AJ *The Law of Sale and Lease* (3rd ed 2004) 488. The notice must be given to end the lease at the end of a period. The notice must also run with a period of the lease. In *Varalla v Jayandee Properties (Pty) Ltd* 1969 (3) SA 203 (T) 206E-G Colman J found that if the landlord gave notice to terminate the lease and the claim was "well-founded in law" the lease ended, although where the landlord's claim was "ill-founded in law" such notice would amount to repudiation of the contract. The tenant can then cancel the lease.

[158] Section 5(5). See also Legwaila T "An Introduction to the Rental Housing Act 50 of 1999" (2001) 12 *Stell LR* 277-282 at 281.

[159] Thomas PhJ "The Rental Housing Act" (2000) 33 *De Jure* 235-247 at 241.

The extent of tenure security granted to the tenant depends on the contract and therefore the will of both parties. The Act does not intervene in the relationship between the parties in order to provide substantive tenure rights for tenants, but rather reinforces the notion of sanctity of contract.

In comparison to the level of substantive tenure security enjoyed by tenants during the pre-1994 era, one can confirm that the Rental Housing Act is currently not providing substantive tenure rights for urban residential tenants. The pre-1994 Rents Acts statutorily intervened in the relationship between landlord and tenant in order to grant tenants rights to enforce continuation of the lease upon expiration of the contractual term. During this period statutory intervention in the landlord-tenant sphere was justified as a result of the housing shortages. The question is whether the post-1994 government is currently not facing similar housing shortages that justify some form of statutory intervention in the landlord-tenant field, especially in light of the constitutional obligations provided for in sections 25(6), 26(1) and 26(2).[160] The Act is also too market-orientated and enhanced government involvement might lead to some stability.[161] One can confirm that the Act is insufficient because it does not make provision for substantive tenure protection. In light of section 26(1) of the Constitution it is apparent that the Act is also unsatisfactory regarding the provision of rental housing as a form of tenure that could help alleviate housing shortages. The Act does not have any mechanism that encourages development in private rental housing that might result in increased housing stock.

3.6.3 Eviction proceedings

Once the landlord terminates the lease on one of the grounds stipulated in the contract (for instance where the contract expired by effluxion of time, which is unlikely to constitute an unfair practice) the Act has no relevance because the common law, read with section 26(3) of the Constitution, regulates the eviction. The Act does not afford substantive or procedural tenure protection for tenants facing

[160] See section 3.9 of this chapter and Chapter 8 for more detail regarding potential legislation.
[161] Pienaar JM "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation have a Positive Impact?" (2002) 17 *SAPL* 336-370 at 358.

eviction, because once the lease terminates the landlord can approach the court for an eviction order. This is evident in the case law,[162] as the Rental Housing Act is not taken into consideration where the courts have to consider the position of a tenant holding over. However, the procedural safeguards in section 26(3) of the Constitution are relevant in all eviction cases and should afford direct or indirect protection[163] to tenants facing eviction in urban rental housing.[164] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)[165] is concerned with the regulation of eviction proceedings for unlawful occupiers and incorporates the aim of section 26(3). The cooperation between PIE and section 26(3) has been quite challenging for the courts in the event of tenants holding over.[166] The difficult question before the courts has been whether tenants who are holding over should be classified as unlawful occupiers who are protected under PIE or, alternatively, whether these tenants should enjoy direct constitutional protection as provided for by section 26(3) in the event of eviction. The issue whether tenants may rely directly on section 26(3) is addressed in section 3.9 below in terms of the subsidiarity approach. The inadequate tenure rights of tenants is a direct cause for this confusion and one can consequently argue that the Rental Housing Act needs to be amended in order to give effect to the Constitution.

[162] See the case law discussion in section 3.8 below.

[163] See the discussion in section 3.8 below regarding direct and indirect application of section 26(3) and other constitutional provisions.

[164] Section 26(3) states that "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." From the wording it is clear that the section applies to all occupiers, lawful and unlawful. It is also clear that no occupier, including tenants who are holding over, may be evicted without considering all relevant circumstances. The Constitution does not elaborate on what these circumstances are, neither does it provide an example, which might indicate that the drafters of the Constitution deliberately gave the courts a discretion to decide in each case what circumstances should be considered. The Constitution does state that such circumstances must be relevant although the inclusion of the word "relevant" hardly impairs the court's discretion to decide what to consider. See also Budlender G "Justiciability of the Right to Housing – The South African Experience" in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-219 at 211-212.

[165] Act 19 of 1998.

[166] Section 4 of the Act regulates the procedure that has to be followed to evict an unlawful occupier by an owner or person in charge. The procedure is time-consuming, which is why owners would prefer not to evict an unlawful occupier under the Act. Common law evictions are much quicker and less complicated. Section 5 of the Act regulates urgent evictions. See Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 652-660 for a detailed discussion of the Act and the proceedings regulating evictions.

3.6.4 Conclusion

The effect of the Rental Housing Act is that it places emphasis on the sanctity of contract, because the Act constantly refers to the relationship between the landlord and the tenant as regulated by the contract. Apart form the emphasis placed on the contract, the common law position regarding termination of the tenancy is confirmed in the Act. Landlord-tenant relationships in urban residential areas are therefore currently regulated in terms of the private law notions of contract law and property law.

The constitutional obligations provided for in sections 26(1) and 26(3) of the Constitution are not sufficiently given effect to in the Rental Housing Act. The Act does not promote secure rental housing as a viable option for adequate housing in terms of section 26(1), nor does the Act give effect to potentially enhanced tenure security in terms of section 26(3) by restricting evictions due to the personal circumstances of tenants. Based on these grounds one can conclude that the Rental Housing Act is inadequate, as it does not adhere to the constitutional obligations relating to access to adequate housing and eviction proceedings. In light of the discussion regarding the meaning of adequate housing in 3.4.3 and the need for secure rental housing in 3.5, one can conclude that the Rental Housing Act is in need of rectification and the legislature is obliged, in terms of sections 25(9) and 26(2), to promulgate more efficient landlord-tenant legislation.

It is also important to note the difference between the pre-1994 legislature's aim to provide substantive tenure rights for tenants and the post-1994 legislature's failure to afford secure occupation rights for urban residential tenants. The pre-1994 legislature was motivated by housing shortages to create some form of continued occupation rights for tenants upon expiration of the lease. The statutory interventions amended the strong common law rights of landowners in order to afford some form of continued occupation rights for tenants. The post-1994 legislature is obliged in terms of section 25(6) of the Constitution to enact legislation that would secure occupation rights for occupiers whose tenure of land is legally insecure as a result of past racially discriminatory laws. In terms of sections 26(1) and 26(2) of the Constitution, the legislature is also obliged to enact legislation that would promote access to adequate housing.

The legislature has failed to give effect to these constitutional obligations within the landlord-tenant framework, as the Rental Housing Act is the primary Act that regulates rental housing in urban areas and the Act does not promote access to adequate rental housing, nor does it afford secure tenure rights for tenants. The strong common law rights of landowners therefore prevail as it is confirmed in the Rental Housing Act, instead of being amended in order to give effect to the constitutional obligations. This is in conflict with the constitutional aims and the legislature is obliged to rectify this inadequacy through amending the Act or enacting new legislation.

3.7 Section 26(3)

Section 26(3) of the Constitution ensures that no person may be evicted from his home without an order of court, made after considering all the relevant circumstances, and that no law shall permit arbitrary evictions. Section 26(3) is the constitutional provision that ensures at least due process for occupiers in the event of eviction.[167] Section 26(3) can also be interpreted by the courts to afford substantive protection for occupiers.[168]

The meaning of "all relevant circumstances" has given rise to a number of different interpretations by the courts which are discussed later in this chapter. Budlender identified four possible interpretations of this provision.[169] The first possibility is that the phrase has no real meaning. The second possibility is that the legislature must prescribe what circumstances would be relevant in a given situation. The third interpretation is that the phrase reverses the onus of proof in eviction proceedings, while the fourth possibility is that the phrase provides the court with a discretion to refuse an eviction order, therefore overriding the owner's common law

[167] Van der Walt AJ *Property in the Margins* (2009) 119.
[168] See the case law discussion in section 3 8 5 where the courts interpret PIE, which gives effect to section 26(3), to provide substantive tenure protection for marginalised tenants holding over.
[169] Budlender G "Justiciability of the Right to Housing – The South African Experience" in Leckie S (ed) *National Perspectives on Housing Rights* (2003) 207-219 at 211-212.

right to evict. Roux argues that no matter which interpretation one uses, section 26(3) on its own has so far had no direct impact on the common law.[170]

The core of the tenure reform anti-eviction strategy is nevertheless section 26(3).[171] The anti-eviction provision supports sections 25(6) and 25(9) in order to provide better tenure security for persons whose tenure is legally insecure because of past racially discriminatory laws, although section 26(3) applies to all occupiers and not only to persons whose land tenure is legally insecure because of past racially discriminatory laws. Occupiers whose tenure rights are insecure because of inadequate statutory protection or because the common law does not make provision for sufficient tenure security will at least enjoy the anti-eviction protection in terms of section 26(3) of the Constitution. The complexities associated with this form of land reform stretches beyond the temporary rectification of apartheid, because tenure reform is important in all eviction cases and therefore a time-consuming process that aims at providing permanent solutions for individuals occupying land with insecure tenure. The recognition and strengthening of existing rights are imbedded in land reform and is evident in the legislation promulgated to give effect to tenure reform.[172]

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[173] is concerned with the suitable regulation of eviction proceedings for unlawful occupiers. Suitable regulation of eviction proceedings entails that evictions can only take place in a fair and equitable manner. The Act is essentially not concerned with the granting or strengthening of rights, but rather guarantees that evictions are conducted in a proper legal fashion.[174] Nevertheless, the courts have interpreted PIE

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[170] Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) on South African Law" (2004) 121 *SALJ* 466-492 at 473-474. After considering the four meanings of the phrase, Roux introduces a fifth possibility, namely that section 26(3) might confer on the court "an equitable discretion to stay the execution of the eviction order for a period of time." See *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) in this regard.

[171] Van der Walt AJ *Constitutional Property Law* (2005) 310.

[172] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 607. See also Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 456-461; Van der Walt AJ *Constitutional Property Law* (2005) 308-311.

[173] Act 19 of 1998.

[174] Van der Walt AJ *Constitutional Property Law* (2005) 326-327. See Van der Walt AJ *Constitutional Property Law* (2005) 327-333 and Carey Miller DL (with Pope A) *Land Title in South Africa* (2000) 516-525 for more detail on the Act. See also Pienaar JM & Mostert H "Uitsetting onder die Suid-Afrikaanse Grondwet: Die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)" 2006 *TSAR* 277-299 at 283-299 for a discussion on the role of PIE with reference to case law. See

to provide substantive tenure protection for marginalised occupiers facing eviction. The Act emphasises fairness to all unlawful occupiers and defines an unlawful occupier as:

> "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act".[175]

The strong common law position of landowners to evict tenants was limited by the introduction of section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[176] Pienaar proposes a method in dealing with the common law, anti-eviction legislation and the Constitution, although one should first determine whether PIE (or any other reform statute) is applicable. If there is no applicable legislation, the common law will prevail and the *rei vindicatio* will be applied. One should then determine whether section 26(3) of the Constitution has an impact on the application of the *rei vindicatio*.[177] Van der Walt argues that the general expectation is that section 26(3) of the Constitution should be the point of

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also *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 (2) SA 1074 (SE) 1079A-J, where Horn AJ explains the complex socio-economic background against which PIE was promulgated and emphasises the importance of this background in order to understand the application of PIE. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) 222A-229G Sachs J contextualised the aim and application of PIE in light of various factors. The workings of the Prevention of Illegal Squatting Act 52 of 1951 (PISA) in conducting forced removals is discussed as historical background. Sachs J explains the aim and application of PIE as a measure, which ensures that evictions are in line with the Constitution. The provisions of PIE have to be interpreted against the background of forced removals and the newly developed aim of transformation. Sachs J concludes that PIE therefore functions within a constitutional matrix, which includes sections 26(1) and 26(2) of the Constitution that ensures a right to adequate housing, and section 26(3) of the Constitution that ensures due process in the event of evictions. Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 277 mentions that the Court in *PE Municipality* did "not confine the circumstances which are considered relevant in eviction applications to the legal grounds justifying an eviction of an unlawful occupier in terms of the common law."

[175] Section 1. The question whether occupiers who initially occupied the property with a legal right but whose occupation became unlawful should fall under the ambit of the Act is an issue the courts continually struggle with (see the case law discussion later in this chapter). Purshotam R "Equity for Tenants" (1999) June *De Rebus* 27-30 argues that tenants who are holding over should be protected as unlawful occupiers in terms of the Act. See also Guthrie C "Defaulting Tenants" (2000) January *De Rebus* 24-25 for the opposite view.

[176] Act 19 of 1998.

[177] Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 144.

departure in all eviction cases.[178] All eviction cases, whether based on land reform statutes or the common law, might seem subject to the direct application of section 26(3).[179] However, the question whether section 26(3) could be relied on directly, or whether a party should first rely on the applicable legislation drafted in terms of section 26(3), is controversial in consideration of the case law. This complicated issue is addressed in section 3.9 later in this chapter.

3.8 Case law

3.8.1 Introduction

One of the aims of this chapter is to analyse the sufficiency of the legislation that was introduced with the aim to give effect to tenure reform in urban housing, and more specifically urban rental housing. The amended common law right of landowners to evict tenants holding over is an important consideration, which could help determine the efficiency of the legislation. The tension between the legislation, Constitution and common law is evident in the case law, which provides an interesting framework to evaluate the efficiency of tenure reform in urban rental housing.

The egalitarian reformist view is that the existing patterns of land holding are based on the common law, regulating land law in a manner that entrenches apartheid-type patterns of social domination and marginalisation. Land reform is aimed at transforming these patterns, which means that the common law has to be amended. One of the complexities within this process is to understand and accept the uncertainties caused by the land reform process while maintaining certainty regarding existing property rights and protecting such rights.[180] The relationship between the legislation, Constitution and common law is unclear and intricate in landlord-tenant eviction cases as the courts are unfamiliar with the hierarchy of potentially conflicting laws under the Constitution. In some of the cases the courts applied section 26(3) of the Constitution, while in other cases PIE was applied

[178] See section 8(1) of the Constitution: "The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state."
[179] Van der Walt AJ *Property in the Margins* (2009) 119.
[180] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 373.

without reference to section 26(3). Tenure reform includes procedural and substantive controls in the event of eviction proceedings that strive to provide occupiers with better tenure security.

Importantly, in none of the cases where the courts had to consider the eviction of unlawful tenants did the courts refer to section 25(6) of the Constitution. Initially, the courts did not refer to sections 26(1) and 26(2) of the Constitution, despite the fact that an eviction would deprive the tenant or her home. However, in the recent cases the courts considered the effect of eviction orders in light of the unlawful tenants' right to have access to adequate housing. It is noteworthy that the Rental Housing Act 50 of 1999 does not play a significant role in the eviction of unlawful tenants.

The relationship between the common law right of the landowner to evict an occupier and the strengthened, reform-orientated right of occupiers under the land reform legislation could be described as a "head-on conflict that forces the courts to choose between two irreconcilable political goals or value-systems."[181] This conflict is evident where anti-eviction legislation strives to give effect to the transformative purpose of the Constitution. However, the impact of the legislation on the common law rights of landowners was initially insubstantial because the courts refrained from interpreting the legislation in such a way as to give full effect to the spirit, purpose and object of the Constitution. In the case law it is clear that the high courts desist from exercising a dramatic impact on common law rights of landowners and the Supreme Court of Appeal initially also preferred to uphold the common law.[182]

One could pose the question whether section 26(3) applies directly to landlord-tenant situations.[183] Section 26(3) is drafted in general terms and it does not state whether it applies to the eviction of lawful or unlawful occupiers, nor does it state what the relevant circumstances are or whether the court has the discretion to refuse an eviction order on any of the circumstances it decided to consider.[184] The effect of section 26(3) is unclear from the early case law. Initially, it was unclear

[181] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 374.
[182] Van der Walt AJ *Property in the Margins* (2009) 119. See Chapter 2 for reference to pre-1994 decisions where the courts refrained from giving full effect to anti-eviction measures, because it would impair the common law rights of landowners.
[183] This issue is further analysed in section 3.9.
[184] Van der Walt AJ *Property in the Margins* (2009) 119-120.

whether section 26(3) could for instance have changed the pleadings, given that the landowner could no longer only prove ownership but should also provide the court with the relevant circumstances of the occupier, or section 26(3) could have changed the substantive law, providing the occupier with a form of continued occupation rights. In the latter case, the court would have the discretion to refuse eviction based on the circumstances of the occupier. In the more recent cases the courts interpreted PIE, which gives effect to section 26(3), to afford substantive tenure protection for marginalised tenants holding over.

3.8.2 Case law preceding Brisley and Ndlovu

Absa Bank Ltd v Amod[185] was the first case concerning the question whether PIE was applicable in the event of a tenant holding over. The tenant occupied the property in terms of an oral lease. When the lease terminated the owner applied for an eviction order. The tenant's occupation was initially lawful but became unlawful when he continued to occupy the premises after termination, which raised the question whether PIE was applicable, given that the Act applies to unlawful occupiers. The tenant argued that the court couldn't grant an eviction order because the owner did not comply with the provisions regulating eviction proceedings as provided for under PIE.[186] In order to decide whether the Act applied to tenants holding over, Schwartzman J gave an in depth analysis of the Act and its purpose.[187] The judge considered the principles governing the interpretation of statutes and decided on this point that the Act should not be presumed to alter the common law position regulating landlord-tenant law; if that was the intention of the legislature it would have been made clear.[188] Schwartzman J found that the Act does not apply to

[185] [1999] 2 All SA 423 (W).
[186] *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W) 426.
[187] *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W) 426-428. At 428-429 the court considered the purpose of the Act with reference to the various acts it repealed and the class of occupiers these acts protected.
[188] *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W) 428. Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 145 mentions that the impact of the decision is that the agreement between the parties must be given content to. When either party breaches the contract, the aggrieved party must seek a remedy according to contract law principles. If he is unsuccessful he can rely on the common law and make use of the *rei vindicatio*.

unlawful occupiers of immovable property lawfully built on land.[189] In the context of PIE, the court decided, "land" means vacant land and not permanent structures on land.[190] The effect was that the Act was not meant to apply to formalized housing or to "normal" common law landlord-tenant situations.[191] The court held that the Act could not be interpreted to turn the common law of landlord and tenant on its head; such interpretation would lead to an absurdity.[192] The court concluded that the Act applied to unlawful occupiers, whose occupation was never lawful, of vacant land and that the Act did not amend the common law position of landlord and tenant because the legislature did not specifically indicate such an intention.[193] The judge decided that PIE limits the common law right of landowners to evict unlawful occupiers and this limitation has to be applied restrictively.[194] The court did not consider section 26(3) of the Constitution; the only question was whether PIE applied to tenants holding over.[195] This restrictive interpretation of PIE dilutes the transformative purpose of the Act as the court should rather have evaluated the specific provisions of the Act, keeping in mind the history of land law and the aim of land reform.[196]

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[189] The court rejected the view of Purshotam R "Equity for Tenants" (1999) June *De Rebus* 27-30 that PIE, read with section 26(3) of the Constitution, should apply to common law eviction orders.

[190] *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W) 429.

[191] Van der Walt AJ *Constitutional Property Law* (2005) 328 mentions that the approach of the court was based on the "fallacious" view that the apartheid land laws, characterized by unfair evictions, were only applicable to unlawful occupation of land and not to "normal" landlord-tenant situations. Various decisions followed the *Amos* court's approach, which led to the eviction of unlawful occupiers without the protection they should have enjoyed under PIE. See further *Joubert v Van Rensburg* 2001 (1) SA 753 (W); Van der Walt AJ *Constitutional Property Law* (2005) 328-329; Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 379-385.

[192] *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W) 429.

[193] *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W) 429-430. See further Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 387.

[194] The reasoning of the court is similar to previous decisions discussed in Chapter 2 to the extent that the courts were then also under the impression that if the common law had to be restricted because of explicit legislation forcing the courts to do so, the necessary limitation must be enforced as cautiously as possible.

[195] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 387 states that the fact that the court did not consider section 26(3) of the Constitution has a bearing on the case. The author also mentions that if the court did consider section 26(3), the interpretation might have been similar to the one adopted in the later case of *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W), where the court found that section 26(3) does not apply to "normal" rent situations.

[196] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 388. At 389 the author mentions that PIE is interpreted in the same framework as the Prevention of Illegal Squatting Act 52 of 1951. Van der Walt argues that the Act could be applied to all categories of unlawful occupiers, whether the

Josman AJ handed down judgment in *Ross v South Peninsula Municipality*[197] in the Cape Provincial Division. Mrs Ross unlawfully occupied property that belonged to the respondent. The respondent relied on *Graham v Ridley*,[198] where Greenberg found that "proof that the appellant is the owner and that respondent is in possession entitled the appellant to an order giving him possession".[199] The *Ross* case seems similar to the *Absa* case but it was more complicated as the court took into account section 26(3) of the Constitution. Josman AJ held that the common law, as established in *Graham*, was amended by section 26(3).[200] The court raised a couple of questions with regard to the impact of section 26(3) on the rights of landowners; the extent of the limitation on such rights; and whether the landowner had to make any allegations in order to evict an unlawful occupier.[201] After extensive consideration of the latter question the court found that the issue of where the onus lies is determined by substantive law.[202] The court decided that section 26(3) modified the common law and that any owner who claims an eviction order must allege relevant circumstances which would enable the court to give such an order.[203]

According to the common law the owner can sue for eviction because he is entitled to recover lost possession. The cause of action would be that he is the owner and therefore *prima facie* entitled to possession. The mere fact that he is the owner constitutes grounds for possession and it is unnecessary to allege that the defendant is in unlawful occupation. After the owner proved his ownership by

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occupation was unlawful from the beginning or whether it changed from being lawful to unlawful, unless a other land reform statute applies to the given situation.

[197] 2000 (1) SA 589 (C).

[198] 1931 TPD 476.

[199] *Graham v Ridley* 1931 TPD 476 at 479.

[200] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 592B.

[201] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 592F-G.

[202] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 593E. See also *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 593E-595H for the discussion on case law regarding onus of proof.

[203] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 596G-H. See also Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 395, where the author states that the plaintiff must place before the court all relevant circumstances even if the defendant does not enter appearance or even if the information is in the knowledge of the occupier. At 397 the author states that such a burden might be uncalled for in an undefended eviction case, although this might be justified where the plaintiff is a state organ. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32 the Court found that the interested parties must make available all the relevant circumstances. However, in order to obtain the necessary facts, the court is also "entitled to go beyond the facts established in the papers before it. Indeed, when the evidence submitted by the parties leaves important questions of fact obscure, contested or uncertain, the court might be obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to relevant circumstances." See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 344.

producing a title deed in court the onus shifts to the defendant to prove his right of occupation.[204] According to the common law, the owner is obliged to prove ownership, not to allege unlawful occupation of the defendant or any relevant circumstances.

Keightley argues that the effect of the decision is that section 26(3) alters common law evictions, because the onus that rests on the owner is amplified.[205] The court did not make a ruling in relation to the relevant circumstances, although it did refer to PIE and found that section 4(6) of the Act could guide the court in determining what circumstances should be considered.[206] Josman AJ discussed the *Absa* case and agreed with its interpretation of PIE, which is why the Act was not an issue in the *Ross* case.[207] The impact of the judgment regarding the legal position of the respondent was uncertain, because Mrs Ross was still an unlawful occupier even though the court refused to grant the eviction order and awarded her a certain degree of protection. Pienaar argues that the basis of her occupation right remained unlawful, because it was against the wishes of the landowner.[208] The case raised the question concerning the extent to which section 26(3) of the Constitution amended the common law right of owners to evict occupiers and what allegations should be made by the owner. The court did not address these issues and only decided that the Constitution did change the content of the summons or the onus of proof.[209]

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[204] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 585.

[205] Keightley R "When a Home becomes a Castle: A Constitutional Defence against Common-law Eviction Proceedings: *Ross v South Peninsula Municipality*" (2000) 117 *SALJ* 26-31 at 31.

[206] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 596H-I. Section 4(6) of PIE protects unlawful occupiers who occupied the land for less than six months. It provides that "a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women." See section 4(7) applies where the unlawful occupier occupied the land for more than six months. Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 396 mentions that reference to PIE is confusing, especially where PIE does not apply because the occupation was based on contract.

[207] *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C) 597I-599B. The court decided *obiter* that PIE does apply to normal landlord-tenant situations: Van der Walt AJ *Constitutional Property Law* (2005) 422.

[208] Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 154.

[209] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 586-587.

In the same year judgment was handed down in the Witwatersrand Local Division by Flemming DJP in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*[210] where the court held that section 26(3) of the Constitution is not applicable to tenants holding over. The applicant instituted action in the magistrate's court for damages, claiming overdue rent and an eviction order. The court *a quo* refused to grant the eviction order because the mere fact of unlawful occupation was not sufficient grounds for an eviction order.[211] Flemming DJP referred to the *Ross* decision and found that the object of section 26(3) "does not cover cases of ordinary trespass, whether in the form of squatting or holding over or otherwise."[212] The court adopted a conservative approach, stating that section 26(3) was aimed at protecting parties against a repetition of apartheid-type evictions.[213] The court ignored one of the aims of land reform, namely that the eviction of unlawful occupiers must comply with the "minimum requirements and standards of due process, equity and fairness."[214] The court decided that section 26(3) applies vertically, referring to the section's content, context and wording.[215] Flemming DJP held that PIE had no relevance in the case. The court relied on the *Absa* case and criticised the *Ross* decision for obtaining guidance from PIE in order to define "relevant circumstances".[216] The court also disagreed with the previous decisions where it is was found that the common law right of ownership, onus of proof and adequacy about pleadings have been changed.

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[210] 2000 (4) SA 468 (W).

[211] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 1. The landlord instituted action in the magistrate's court, where default judgment was granted for damages and outstanding rent, although the court was influenced by the *Ross* decision to the extent that the court refused to grant the eviction order: Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 585.

[212] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 7.2. The court defined section 26(3) as a "never again" provision, aimed at providing better rights for occupiers in cases such as District Six (Cape Town) and Sophiatown (Johannesburg) where people's homes were taken from them by means of legislation which affected principles underlying ownership, possession and occupation. Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) on South African Law" (2004) 121 *SALJ* 466-492 at 480 states that the court's limited interpretation of section 26(3) as a backward-looking provision fails to give content to its historical meaning.

[213] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 399. Here the court is stating that the section does not protect unlawful occupiers, which does not give effect to tenure reform. The author argues that this interpretation was too narrow and that the section serves a wider tenure reform purpose.

[214] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 399. The purpose of land reform is two-fold, namely that is must ensure that unauthorised evictions will not be repeated and it must ensure that evictions will comply with certain requirements.

[215] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 7.3.

[216] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 8.2.

The court referred to *Graham v Ridley*[217] and *Chetty v Naidoo*[218] and found that one of the entitlements of private ownership is that the owner is entitled to exclusive possession, that any other person could be excluded from the owner's property and that this right had not been amended by the Constitution.[219] The court's point of departure with regard to the relationship between the common law and the Constitution was therefore that there is no need to restrict the common law right of owners to evict unlawful occupiers in order to promote the spirit, purport and object of the Constitution.[220]

Flemming DJP relied on contract law principles and stated that in this case the contract of lease was cancelled. Consequently, the tenant was obliged to restore the property to the landowner; these principles were not amended by the Constitution but were in fact a "relevant circumstance" the court had to consider and apply.[221] The court protected the notion of private ownership and the owner's right to possession where the defendant was in illegal possession of the owner's property, instead of developing the common law in order to give effect to the Constitution.[222] According to the court's reasoning, anything contrary to this would deprive the owner of ownership as the most important entitlement, namely the owner's exclusive right to possession would be lost. The effect would be to protect the land grabber and not

[217] 1931 TPD 476.
[218] 1974 (3) SA 13 (A).
[219] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) paras 9-10.1. This reasoning indicates that the court was unwilling to amend the common law position, that the "normality assumption" is still relevant and that the strong right of landowners to evict tenants is still favoured by the courts despite of the constitutional obligation provided for in section 26. Van der Walt AJ "Dancing with Codes -- Protecting, Developing and Deconstructing Property Rights in the Constitutional State" (2001) 118 *SALJ* 258-311 at 277 states that one can conclude that the impact of the Constitution and land reform initiatives on the dominant common law concept of ownership is still uncertain. See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 345; Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law" (2004) 121 *SALJ* 466-492 at 482.
[220] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 588.
[221] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) paras 13.1-13.2. See further Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 155, where the author mentions that the fact that the occupier occupies the property of the owner is also a factor the court has to consider as part of all the relevant circumstances because the position of the landowner should also be considered.
[222] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 588.

the owner.[223] The court decided that the applicant was entitled to an eviction order (based on contract law principles)[224] and that the relevant circumstances, which had to be considered by the court, had to appear in the pleadings. The only relevant fact was that the owner's property was occupied by the respondent without a sustainable reason.[225] The court presupposed that the structure of property holdings, as regulated by the common law, was normal and generally accepted unless the opposite was proven. The court therefore assumed that the common law is the primary source of law with regard to landlord-tenant disputes.[226] The court found that section 26(3) merely amended the pleadings while the substantive rights of the parties remained unaltered.[227]

According to Hawthorne, Flemming DJP was in the unfortunate position where he had to adjudicate a case of deliberate abuse of the development of landlord-tenant law. The tenant was *mala fide*, which forced the court to focus on the commercial interests at risk rather than on the social implications of the rights enshrined in section 26(3) of the Constitution. The court's view that courts are required by the Constitution to consider factors such as the sanctity of contract, sanctity of ownership, the sense of equity of "right-minded" South Africans and the reception of a court's decision in society, instead of the hardship suffered by the parties in every individual case, was unconvincing.[228]

In *Ellis v Viljoen*[229] the same restrictive approach was followed by the court. The appellant occupied the respondent's property with the consent of the previous owner. The arrangement between the previous owner and the appellant was that of *precarium*.[230] When the respondent bought the property and wanted to take

[223] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 589 mentions that this restrictive approach is in line with 19th century liberalism instead of social constitutional developments.
[224] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 13.4.
[225] *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) paras 15.4.1-15.4.2.
[226] Van der Walt AJ *Constitutional Property Law* (2005) 348. See also Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 399-401 for a discussion of the case.
[227] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 589 disagrees with this approach and states that the "conclusion that the Constitution would protect land grabbers over owners is not based on any generally accepted interpretation of the Constitution and/or statutes."
[228] Hawthorne L "The Right to Access to Adequate Housing-Curtailment of Eviction?" (2001) 34 *De Jure* 584-592 at 591.
[229] 2001 (4) SA 795 (C).
[230] See *Ellis v Viljoen* 2001 (4) SA 795 (C) 796H-798D for the facts of the case. The occupier never paid rent. She never made payments for water or electricity either.

possession of the house the appellant occupied at the time, she refused to vacate. The court was uncertain on what basis the appellant alleged that she had a right to continue occupation, because she never leased the property.[231] Thring J gave a lengthy discussion of the *Absa*, *Ross* and *Betta* decisions[232] and found that PIE had no relevance in the case.[233] The court then considered the application of section 26(3). Thring J briefly referred to the *Ross* decision and disagreed with the contention that the owner, seeking eviction, should allege relevant circumstances.[234] The court rather agreed with the *Betta* decision, in particular with the contention that the Constitution did not amend the common law position of landowners. Where the occupier unlawfully occupies the property of the owner, the owner should be entitled to an ejectment order. If this is the only relevant fact raised before the court, the owner is not under an obligation to raise any other "relevant circumstances", although the occupier is at liberty to do so.[235] Thring J held that anything contrary to this would impede section 25(1) of the Constitution, which protects property rights where it states that no person may be deprived of property, except in terms of law of general application.[236]

Roux argues that the underlying assumption in this decision was that any alteration of the common law pleading requirements would constitute an infringement on the owner's property right, as protected in section 25(1) of the Constitution.[237] The common law right of landowners to evict tenants upon termination of the lease is classified by the court as a protected property right under section 25 of the Constitution. Any interpretation that would amount to a deprivation of this right would be in conflict with section 25(1), because it would amount to an arbitrary deprivation of property.[238] The court agreed with the court *a quo* that no valid defence was raised by the appellant against the *rei vindicatio* of the landowner and that no further

[231] *Ellis v Viljoen* 2001 (4) SA 795 (C) 798F.
[232] See *Ellis v Viljoen* 2001 (4) SA 795 (C) 800I-802A.
[233] *Ellis v Viljoen* 2001 (4) SA 795 (C) 802B. The court agreed with the reasoning of the court *a quo* on this matter.
[234] *Ellis v Viljoen* 2001 (4) SA 795 (C) 804H-I.
[235] *Ellis v Viljoen* 2001 (4) SA 795 (C) 805A-E.
[236] See in this regard Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 156.
[237] Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) of the Constitution on South African Law" (2004) 121 *SALJ* 466-492 at 484. The author argues that the import of section 26(3) is less clear than that of section 25(1), which is why the "doctrinal force" of section 26(3) should give way to the protection of existing property rights.
[238] Van der Walt AJ *Constitutional Property Law* (2005) 348-349.

relevant circumstances were pleaded by the parties which the court had to consider.[239]

Van der Walt argues that the approach followed in *Betta* and *Ellis* is incorrect because the Constitution amended the common law position with regard to onus of proof. If one agrees that the Constitution is the primary source of law and the common law exists as subsidiary law, as it only applies to such an extent that it does not come into conflict with the Constitution, the decisions in *Betta* and *Ellis* must be inaccurate. The court can no longer grant an eviction order on the basis that the landowner simply proved that he is the owner and that someone else is in occupation of his residential property; section 26(3) of the Constitution states that all relevant circumstances must first be considered before an eviction order may be granted.[240] The constitutional issue in *Betta* and *Ellis* could be approached in terms of sections 1 and 8 of the Constitution,[241] combined with principles regulated in administrative law, as there is only one legal system and the Constitution is the primary source of law and not the common law. This approach takes into account the purpose, spirit and object of the Constitution, which ensures that transformation will take place. The impact of section 26(3) is that the court must consider the relevant circumstances (including the harm to the landowner and harm to the occupier), balancing the rights of both parties in a context-sensitive process, in order to decide whether an eviction order should be granted.[242] In light of the *Ellis* decision, Liebenberg explains that:

> "The Court fails to develop a balanced normative framework in which the purposes and values underlying both property and housing rights are recognised. Instead, the common-law position in which property rights are accorded overriding significance is simply reaffirmed. This effectively denudes s

[239] *Ellis v Viljoen* 2001 (4) SA 795 (C) 806I-807A. Pope A "Eviction and the Protection of Property Rights: A Case Study of *Ellis v Viljoen*" (2002) 119 *SALJ* 709-720 discusses the case and concludes that where land reform statutes are not applicable to a certain situation, the courts are still under a obligation to develop the common law, irrespective of whether the parties requested the court to do so. "Relevant circumstances" should also include more than the common law requirements for an eviction application.

[240] Van der Walt AJ *Constitutional Property Law* (2005) 349.

[241] Section 1 of the Constitution states the supremacy of the Constitution, while section 8 outlines the application of the Bill of Rights as supreme law in relation to the common law.

[242] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 402.

26(3) of much of its potential to transform the common law pertaining to the eviction of people from homes."[243]

3.8.3 Brisley v Drotsky

In 2002 the Supreme Court of Appeal handed down judgment in the much debated case of *Brisley v Drotsky*.[244] The respondent entered into a lease with the appellant and it provided that the appellant was entitled to occupy the property of the respondent in exchange for an amount of rent which had to be paid on the first day of every month. Mrs Brisley fell in arrears and the landlord cancelled the lease and instituted eviction proceedings. One of the questions the Court had to consider was whether section 26(3) of the Constitution was applicable. In terms of section 26(3) the court must consider all the relevant circumstances before granting an eviction order. The court could therefore be prohibited from granting an eviction order, even after the lease expired.[245] The appellant relied on the *Ross* decision and alleged that the relevant circumstances the Court had to consider amounted to the circumstances under which the lease was cancelled and her (and her mother's) socio-economic circumstances.[246] The majority disagreed with the *Ross* decision where the court held that PIE should give guidance in relation to the meaning of "relevant circumstances" in section 26(3) of the Constitution.[247] The majority found that section 26(3) applies horizontally and should therefore apply to landlord-tenant evictions, contrary to the *Betta* decision.[248] However, the majority decided that only those circumstances that are legally relevant should come under consideration, which restricted the scope of circumstances the court must consider.[249] The Court found that due to the fact that the Constitutional Assembly did not specify which circumstances are relevant, the presumption is that those circumstances that would

[243] Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 345.
[244] 2002 (4) SA 1 (SCA).
[245] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 1. The Court also had to consider the relevance of the *Shifren* principle (see paras 6-10) and the importance of *bona fides* in contract law (see paras 11-34).
[246] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 35.
[247] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 38.
[248] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 39-40. Olivier JA concurred in para 81.
[249] In the minority judgment Olivier JA found that considerations such as reasonableness, equity and *bona fides* should form part of relevant circumstances (para 87).

have been relevant by means of the common law or applicable legislation will be considered relevant circumstances.[250]

Apart from the legal fact that the applicant is the owner and the respondent is in occupation of the applicant's property, is it unclear what other circumstances should be taken into account.[251] The housing provision of the Constitution forms part of the socio-economic rights, but the Court held that only legally relevant circumstances may be considered in terms of section 26(3). Based on this reasoning the Court found that it can only consider the fact that the applicant is the owner and the respondent is in unlawful occupation. Consequently, socio-economic conditions have no role in the evaluation.[252]

The Court's reasoning is problematic for two reasons. The first is that the Constitution was drafted to introduce certain constitutional values that would form the foundation for a new constitutional dispensation. The Constitution explicitly overrides the common law where these two bodies of law come into conflict. Section 26(3) of the Constitution introduced a new requirement in eviction proceedings, namely that all relevant circumstances should first be taken into account before a court can evict an occupier. The common law does not have a similar requirement and one can therefore accept that section 26(3) overrides the common law with regard to all eviction proceedings and that no court may evict a person from his home without first considering all the relevant circumstances. Taking this into account one could pose the question why the Court relied on the common law to decide what circumstances are relevant in terms of section 26(3) if the Constitution overrides the common law in eviction proceedings. Secondly, the Court created a paradox because section 26 is supposed to give effect to the right of access to housing, which forms part of the socio-economic rights, whereas the effect of the decision is the opposite, namely that socio-economic circumstances may not be evaluated even though section 26(3) states that "all relevant circumstances" must be evaluated. The Supreme Court of Appeal had the opportunity to define "relevant circumstances" in landlord-tenant law in order to promote the constitutional values, taking into account the purpose of the

[250] Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) on South African Law" (2004) 121 *SALJ* 466-492 at 485.
[251] Van der Walt *Constitutional Property Law* (2005) 349.
[252] Pienaar JM & Mostert H "Uitsettings onder die Suid-Afrikaanse Grondwet: Die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)" 2006 *TSAR* 277-299 at 289; Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 347.

housing provision. The Court ignored these realities and retreated towards the comfortable and familiar common law position, which effectively suppressed the object and purpose of the Constitution.[253]

The Court also found that it does not have the discretion to refuse an eviction order based on the personal circumstances (such as the availability of alternative accommodation) of the tenant, because personal circumstances are not legally relevant. The Court reasoned that if it took these circumstances into consideration it would deprive the landowner of an entitlement he had at common law.[254] The essence of *Brisley* is that the eviction of tenants still functions within the common law principles, because landowners are entitled to exclusive possession in the absence of an explicit legal or statutory right of occupation.[255] This right of the landowner is not restricted by section 26(3) of the Constitution because the personal circumstances of occupiers are, according to *Brisley*, irrelevant. The decision restrains the transformative purpose of section 26(3).[256] The decision was not concerned with the application of PIE, neither was it concerned with any other reform laws.

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[253] See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 348.

[254] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 42-46. See in this regard Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 403.

[255] See also Van der Walt AJ *Constitutional Property Law* (2005) 349-350 where the author states that the Court's point of departure is still the common law. The personal circumstances of the occupier can accordingly not restrict the landowner's exclusive right of possession except where the occupier has a statutory right of occupation. The common law right of landowners to evict unlawful occupiers therefore impairs the transformative purpose of section 26(3). See also Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 157 where the author states that the common law position with regard to the application of the *rei vindicatio* is unchanged. The effect of the judgment is that the common law requirements associated with the *rei vindicatio* must be complied with while the relevant circumstances provided for in section 26(3) must be considered only to the extent that all legally relevant circumstances must be complied with.

[256] Van der Walt AJ *Constitutional Property Law* (2005) 423; Van der Walt AJ *Property in the Margins* (2009) 121. The minority held that private bodies or individuals have a subsidiary role with regard to the government's responsibility to provide housing. If private parties frustrate the government's efforts in trying to provide housing, such efforts would be pointless: *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 82-85. Olivier JA relied on *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 35, where Yacoob J found that "[a] right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing."

3.8.4 Ndlovu v Ngcobo / Bekker v Jika

In *Ndlovu v Ngcobo / Bekker v Jika*[257] the majority of the Supreme Court of Appeal found that the anti-eviction provisions in PIE are applicable in the case of a tenant holding over after expiration of the lease.[258] In the *Ndlovu* appeal the lease terminated lawfully, but the tenant refused to vacate the property.[259] The applicant who instituted the eviction proceedings did not comply with the requirements set out in PIE and the only question before the Court was whether the applicant was obliged to do so. The Court considered the definition of an unlawful occupier in PIE and decided that if the legislature intended to exclude tenants holding over, an unlawful occupier would have been defined as "'a person who occupied and still occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'."[260] The Court therefore found that PIE applies to all unlawful occupiers, irrespective of the fact that their occupation was previously lawful.[261] The Court found that the purpose of the Act is to delay or

[257] 2003 (1) SA 113 (SCA). The decision seemed to contradict the *Brisley* decision, as the Court decided that it had to consider the personal and socio-economic circumstances of the occupier before an eviction order could be granted. However, the two situations were different because *Ndlovu* / *Jika* pertinently dealt with the application of PIE, which enumerates the considerations to be taken into consideration, thus overriding the *Brisley* Court's objection to sec 26(3), which was considered in that case (PIE was not applicable) and which does not enumerate the considerations to be considered.

[258] The minority disagreed where it stated that PIE and the Prevention of Illegal Squatting Act 52 of 1951 (PISA) differ considerably with regard to the wording of the two statutes and the categories of occupiers they apply to, which is why the "legislative intent" behind the two statutes also differ. Apart from that, the minority stated that the issue whether PISA applied to tenants who are holding over became irrelevant when the Extension of Security of Tenure Act 62 of 1997 (ESTA) was introduced. ESTA applies to persons who have or had consent to occupy the landowner's property, while PIE was enacted to deal with only one class of occupiers, namely squatters: *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) para 89.

[259] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) para 1. The *Bekker* appeal's facts differed as the property was sold in execution, after a mortgage bond was called up. The previous owner refused to vacate the property.

[260] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) paras 4-5. Harms JA interpreted the Act in the present tense and was therefore unwilling to depart from the ordinary meaning of the definition as provided for in the Act: Hopkins K & Hofmeyr K "The Constitutional Anomaly Created by Extending PIE" (2003) March *De Rebus* 14-17.

[261] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) para 11. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 254 state that PIE is now applicable to lease agreements, sale of execution cases and any other instance where a person is evicted from a home, dwelling or shelter. The effect of the decision is that the Act now applies to almost any form of unlawful occupation used for residential purposes. The authors also mention that it is doubtful whether this was the legislature's intention. Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 158 states that the decision might result in owners of apartments and houses desisting from renting out their property, because of the risk that rent will not be paid by tenants. The implication is that the

suspend an eviction order, in order for the court to determine whether it is just and equitable to evict the unlawful occupier in the given circumstances.[262] The court has a wide discretion to determine whether to grant the eviction order, or determine the date of eviction.[263] The aim of the Act is not to expropriate the landowner but rather to suspend his proprietary right to an eviction order.[264] Where the owner complied with the procedural requirements he is entitled to apply for an eviction order, relying on his right as owner and the fact that the respondent is unlawfully[265] in occupation of his property.[266] The occupier can disclose relevant circumstances, which means

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potential rental market will decrease. The case was extensively reported and criticized in the media, especially by the rental housing and banking industries: Hopkins K & Hofmeyr K "The Constitutional Anamoly Created by Extending PIE" (2003) March *De Rebus* 14-17 at 14. Costa A "Landlords and Les Miserables" (2003) March *De Rebus* 22-24 argues that landlords of property in poor residential areas might be prejudiced by PIE, especially landlords who did not screen prospective tenants with regard to their character, income and credit rating. Those occupiers protected by PIE (including disabled persons and the elderly) will most likely not be regarded as commercially desirable tenants. Taking this into account, one can conclude that a diligent property owner who leases residential property for commercial purposes will most likely not rent his property to the "protected" occupiers as provided for in PIE. It is highly unlikely that such a defaulting tenant would persuade a court that an eviction order would be unjust. Apart from this contention, section 4(1) of the Rental Housing Act 50 of 1999 prohibits discrimination to the extent that the landlord may not unfairly discriminate when advertising a dwelling or negotiating a lease. See also Stassen K & Stassen P "New Legislation: Rental Housing Act 50 of 1999" (2000) March *De Rebus* 55-59.

[262] Hopkins K & Hofmeyr K "The Constitutional Anomaly Created by Extending PIE" (2003) March *De Rebus* 14-17 argues that the decision is in conflict with section 25(1) of the Constitution, which protects property rights. Costa A "Landlords and Les Miserables" (2003) March *De Rebus* 22-24 disagrees, arguing that PIE has its roots in the core values of the Constitution and more specifically section 26(3). The Constitution strives to provide better tenure rights for occupiers and better access to adequate housing. The Constitution encourages the court to promote socio-economic values based on morality and justice.

[263] Costa A "Landlords and Les Miserables" (2003) March *De Rebus* 22-24 mentions that each case with its individual facts has to be considered by the court in order to determine whether an eviction order would be just and equitable. The court must consider the hardship to be suffered by the tenant in the case of an eviction order and the hardship to be suffered by the landlord if the court decides not to evict the tenant. The court must strike a balance between the social rights of the tenant, protected by section 26(3) of the Constitution, and the commercial interests of the landlord.

[264] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) paras 17-18.

[265] At common law the landowner was not required to prove that the occupier was unlawfully occupying the premises. See the next fn below.

[266] Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België* (2003) 141-159 at 150 mentions that the plaintiff must prove ownership and allege that the respondent is in unlawful occupation of his property, thereby amending the position stated in *Chetty v Naidoo*, where the plaintiff merely had to prove ownership and allege that the respondent was in occupation of his property. Hopkins K & Hofmeyr K "The Constitutional Anomaly Created by Extending PIE" (2003) March *De Rebus* 14-17 argues that the Court did not change the substantive requirements for obtaining an eviction order. The only impact of the case is that the owner should comply with the procedural requirements of PIE, which would result in extra costs and time. The authors also argue that the extension of PIE is unconstitutional because such an extension is arbitrary and therefore in conflict with section 25(1) of the Constitution. It is allegedly arbitrary because it fails the rational review enquiry and the proportionality enquiry.

that in principle the owner is entitled to an eviction order where the tenant does not oppose the application and disclose relevant circumstances.[267]

In 2008 the Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill was published.[268] The most important aim of the Bill is to amend section 2 of PIE by adding that the Act does not apply to tenants or persons who initially occupied the property with the consent of the owner. The aim of the Bill is to restrict PIE to such an extent that neither tenants nor previous owners whose occupation became unlawful would fall under the ambit of the Act, in other words to reverse the effect of the *Ndlovu* decision. Apart from this, the court has the discretion to direct that the proceedings ought to be under PIE although the application was brought under the common law.

One can conclude that *Ndlovu* did extend application of the Act because a landowner now has to comply with the strict eviction requirements provided for in PIE to obtain an eviction order. However, landowners can still bring eviction applications in terms of the common law. Case law following *Ndlovu* interpreted the decision as if it did not change the burden of proof. Currently, a landowner can still merely place before the court that he is the owner and that the respondent is in occupation of his property in order to obtain an eviction order.[269]

The majority in *Ndlovu* based their decision on PIE and refrained from deciding what the relationship between section 26(3) of the Constitution, PIE and the common law is. The impact of the Constitution on the common law with regard to landlord-tenant evictions was consequently still uncertain after the decision.[270] Roux

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[267] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) para 19. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The Law of Property* (5th ed 2006) 249 state that the relevant circumstances listed in PIE, such as the fact that children or elderly people are involved, will only be relevant if the respondent places the information before the court and these circumstances will only be relevant if the respondent is poor. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32 the Constitutional Court held that the interested parties must make available all relevant information to the court and if the facts are unclear, the court must establish ways in order to determine the true state of affairs.

[268] The 2007 Bill was published on 7 March 2008, being a direct consequence of earlier Draft Bills published on 16 November 2007 (*Government Gazette* 30459) and 22 December 2006 (General Notice 1851, *Government Gazette* 29501) respectively.

[269] See *Absa Bank v Murray* 2004 (2) SA 15 (C); *FHP Management v Theron* 2004 (3) SA 392 (C); *Nduna v Absa Bank* 2004 (4) SA 453 (C); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) for case law following *Ndlovu* with regard to the role and application of PIE.

[270] Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 404.

argues that after the *Ndlovu* decision the common law has very little application in eviction proceedings because either PIE, ESTA, the Land Reform (Labour Tenants) Act 3 of 1996 or the Interim Protection of Informal Land Rights Act 31 of 1996 will be applicable and therefore not the common law.[271] It is noteworthy that in neither *Brisley* nor *Ndlovu*, both dealing with tenants who refused to vacate the leased property upon termination of their right to occupy the premises, did the courts even mention the Rental Housing Act 50 of 1999, despite the fact that it commenced on 1 August 2000. This affirms the contention that the Rental Housing Act has had a limited impact on eviction proceedings. The Rental Housing Act is not concerned with the rights of tenants once the tenancy has terminated, but rather focuses on the validity of the tenancy and the contractual relationship between the parties. Once the lease terminates in accordance with the Act, the landlord can approach the court for an eviction order, whereafter the principles created in the case law will become applicable.

3.8.5 Case law succeeding Brisley and Ndlovu

In *Kendall Property Investments v Rutgers*[272] the applicant, the owner of property, had a tacit lease agreement with the respondent. After the landlord gave the tenant one month's written notice to vacate the premises and the tenant refused to vacate the property, the applicant instituted action for eviction.[273] Knoll J acknowledged that the Rental Housing Act 50 of 1999 and section 26(3) of the Constitution were relevant in the case and that the Act was enacted to give effect to section 26(3) in the landlord-tenant framework. The court mentioned that the aim of section 26(3) is to provide tenure security for tenants. Consequently, any legislation promulgated with the aim to give effect to section 26(3) has the object of strengthening tenure rights. The legislation ensures that eviction proceedings take place in a certain fashion, although one should also keep in mind that according to section 25 of the Constitution no owner may be arbitrarily deprived of property.[274] In order to

[271] Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) on South African Law" (2004) 121 *SALJ* 466-492 at 491.
[272] [2005] 4 All SA 61 (C).
[273] See *Kendall Property Investment v Rutgers* [2005] 4 All SA 61 (C) 63 for more detail on the facts.
[274] *Kendall Property Investment v Rutgers* [2005] 4 All SA 61 (C) 64.

understand what is meant by "relevant circumstances" the court referred to *Brisley v Drotsky*, although the court also referred to *Port Elizabeth Municipality v Various Occupiers*,[275] where Sach J explained the constitutional matrix established by PIE, section 25 of the Constitution and section 26 of the Constitution.[276] After referring to these decisions the court upheld the common law position, as confirmed in *Chetty v Naidoo*,[277] where the Court confirmed that if the landlord wishes to evict the tenant on the basis that the lease terminated and the tenant relies on the validity of the lease, the onus is on the landlord to prove that the lease terminated. Section 4(5)(b) and (c) of the Rental Housing Act limits the common law right of a landlord to terminate the lease, which means that, in conjunction with the common law, the landlord is under a obligation to prove the valid termination of the lease. Accordingly, the court found that the landlord had to prove that the grounds of termination were specified in the lease and that it did not constitute an unfair practice. The landlord can only institute an action for eviction once the lease is validly terminated. Knoll J held that this procedure was in accordance with the Constitutional Court's interpretation of the constitutional matrix which gave rise to the Rental Housing Act.[278]

Initially the judgment seemed to give content to the rights of unlawful tenants as protected under section 26(3) of the Constitution, especially where the court considered section 25(1) and the constitutional matrix as explained by the

[275] 2005 (1) SA 217 (CC).

[276] *Kendall Property Investment v Rutgers* [2005] 4 All SA 61 (C) 64-65. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) the Constitutional Court was concerned with the unlawful occupation of vulnerable occupiers. The Court found that in order to understand the application of PIE one would have to consider it in light of the relationship between sections 25 and 26 of the Constitution. The relationship between these sections concerns the intertwined recognition of the right of access to housing and land rights. The Court decided that the rights in section 26 do not grant independent property rights, but rather restrict landowners' right to evict. However, the eviction of occupiers in informal settlements can still occur, even when it results in people losing their homes. When the court is faced with difficult eviction proceedings, section 26(3) highlights the need for case-specific solutions in order to acquire fair and just results: paras 19–22. At para 23 the Court concluded that "the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law." This new obligation "counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa.* Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case."

[277] 1974 (3) SA 13 (A).

[278] *Kendall Property Investment v Rutgers* [2005] 4 All SA 61 (C) 70.

Constitutional Court. Knoll J also mentioned that the Rental Housing Act gives content to section 26(3) of the Constitution and that one of the objectives of the Act should be to provide tenure security for all tenants. In light of these observations one can conclude that the court did acknowledge the potential of the Rental Housing Act to the extent that the Act can afford better tenure security for tenants. However, this would depend on the court's interpretation of the Act. Knoll J also identified some form of balancing that could be done between the rights of landowners (section 25(1)) and the interests of tenants (section 26(3)).

Unfortunately, the court did not give content to section 26(3), nor did the court contextualise the meaning of the constitutional matrix in landlord-tenant law. The court had the opportunity to clarify and determine the relationship between section 26(3) of the Constitution, the Rental Housing Act and the common law with regard to the substantive rights of both landlord and tenant. Knoll J based his decision on the common law, in conjunction with the Rental Housing Act concerning the process that should be followed to terminate the lease. The court's focus was not on the substantive tenure rights of tenants after expiration of the lease as stated in the Constitution and partially acknowledged in *Brisley v Drotsky*.

In *Jackpersad v Mitha*[279] the court's point of departure was to balance the interests of the competing parties in a just and equitable way. In order to balance the interests of the parties, the court considered the personal and socio-economic circumstances of both parties. The owners of residential property wanted to evict sixteen tenants and applied for an eviction order.[280] The first to eighth applicants sold the property to the ninth applicant, who wished to demolish the building in which the respondents rented accommodation. The overall aim was to extend the City Hospital and the property in issue had to be demolished in order to extend the hospital.[281] The applicants complied with the provisions in PIE, although the respondents relied on section 4(6) of PIE, alleging that it was not "just and equitable" that they should be ejected. Swain J referred to the *Ndlovu* decision and decided that the respondents

[279] 2008 (4) SA 522 (D).
[280] See *Jackpersad v Mitha* 2008 (4) SA 522 (D) 524E-528F for a discussion of the facts and the court's finding with regard to the terms of the lease. The first issue dealt with section 19 of the Rental Housing Act 50 of 1999, known as the savings clause of the Rent Control Act 80 of 1976. The initial question was whether the new lease agreement would fall under section 28 of the Rent Control Act. The court found that the rights, as protected under the Rent Control Act, were not carried over to the new lease agreement after the expiration date of three years.
[281] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 529F-G.

had to place before the court circumstances relevant under section 4(6) of PIE in order for the court to exercise its discretion. The court acknowledged that it had a broad judicial discretion in light of the particular circumstances of the case. The court found that it "must have regard to the interests and circumstances of the occupiers and pay due regard to the broader considerations of fairness and other constitutional values, so as to produce a just result."[282] Swain J stated that the court is faced with the conflicting interests of the owner of a property and the interests of the tenants who occupy it. The court referred to *Port Elizabeth Municipality v Various Occupiers*[283] and held that these competing interests have to be balanced in a just way that would promote the constitutional vision of a caring society.[284] The court found that the respondents had a duty to disclose relevant circumstances which fell within their knowledge.[285]

The applicants alleged that the extensions to the hospital were urgent because of the increased demand from patients. If the extensions were not constructed instantly, the hospital would experience a decline in market share.[286] The court found that the applicants' interest in the matter was commercial, although the social value of the extensions to the broad public was also a factor the court had to take into account. Apart from the supplementary services that would be offered by the hospital, the court also considered the newly created job opportunities for construction workers in the short term and nursing staff in the long term. This indicates that the court considered the socio-economic consequences if the extensions were in fact undertaken.[287] Swain J also considered the position of the respondents. The length of time during which the various tenants occupied the building and the age of the tenants were factors the court took into account. The court acknowledged the fact that nine of the respondents were pensioners and that a number of them were in poor health.[288] The court therefore gave consideration to the personal circumstances of the respondents in terms of PIE.

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[282] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 529D. One can applaud the court for this type of reasoning, as it is in line with the transformative goals of the Constitution.
[283] 2005 (1) SA 217 (CC).
[284] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 529E. This reasoning by the court is also preferable and resembles German constitutional jurisprudence: see Chapter 7 in this regard.
[285] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 529F.
[286] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 529H-J.
[287] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 529I-J.
[288] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 530A-B.

Apart from these realities Swain J decided that the court received no information regarding the financial positions of the tenants and the effect that it would have on their ability to acquire other accommodation. This information was within the exclusive knowledge of the respondents, who chose not to disclose it to the court.[289] After considering the relevant circumstances of the competing parties, based on the information the court received, Swain J balanced the interests of the parties, "bearing in mind the constitutional vision of a caring society based on good neighbourliness and shared concern", and found that it was just and equitable to grant an eviction order.[290]

The case is an interesting but limited example of what contextual personal and socio-economic circumstances should preferably be disclosed by the parties in landlord-tenant eviction cases. It is unfortunate that the respondents did not provide the court with sufficient information regarding these circumstances which left the court with an uncomplicated decision.

Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another[291] and *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*[292] are the most recent cases where the courts had to consider the eviction of unlawful tenants. These cases are discussed at length in Chapter 1 in order to illustrate the problems of insufficient substantive tenure rights of urban tenants and the undeveloped role and landlord-tenant law in light of the housing crisis.[293] However, it is important to briefly mention some aspects of the decisions here, because the cases contribute to the development of landlord-tenant law.

In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another*[294] the owner of property was entitled to an eviction order at common law and upon the unlawful tenants' failure to vacate the premises, claimed an eviction

[289] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 530C-H.
[290] *Jackpersad v Mitha* 2008 (4) SA 522 (D) 531D-F.
[291] [2010] JOL 25031 (GSJ). See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 288-290 for a brief discussion of the case, specifically in relation to the duty of the municipality in eviction cases.
[292] [2010] ZASCA 28. See also *Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) for a similar decision and Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 286-287 for a brief discussion of the case.
[293] See section 1.1 in Chapter 1 for a detailed discussion of the cases.
[294] [2010] JOL 25031 (GSJ).

order.[295] The respondents were living in extreme poverty and it was apparent that they would not be able to acquire affordable alternative accommodation in the Johannesburg Central Business District, where they were living and working at that time.[296] The court considered the occupiers' constitutional right to have access to adequate housing, the state's duty to introduce measures to give effect to this right (sections 26(1) and 26(2)) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land 19 of 1998 (PIE).[297] The state was unable to make available alternative accommodation to the occupiers and question the court consequently had to decide was whether private landowners could be compelled to accommodate unlawful occupiers who are unable to acquire affordable alternative accommodation.[298] The court held that the private landowner was entitled to an eviction order, although the eviction order was suspended until the respondents could find alternative accommodation, and the state was ordered to pay the applicant an amount equivalent to the fair and reasonable monthly rental of the premises until the occupiers vacated the premises.[299]

In *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*[300] the South African Supreme Court of Appeal had to decide whether to dismiss an application for rescission of an eviction order granted by default against the appellants.[301] The respondent terminated the appellants' leases at common law and upon their failure to vacate the premises instituted eviction proceedings. The high court granted the eviction, even though the appellants failed to oppose the proceedings. The appellants applied for rescission of the eviction order.[302]

In order to succeed in the application for rescission at common law the appellants had to show good cause for their default, which included "a bona fide

[295] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 10-13.
[296] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 14-15.
[297] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 22-24.
[298] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 6.
[299] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) paras 191, 194, 196.
[300] [2010] ZASCA 28 (SCA).
[301] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 1.
[302] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28(SCA) para 3.

defence to the plaintiff's claim which prima facie has some prospect of success."[303] In support of the rescission application one of the appellants explained the personal circumstances of the appellants. All the occupiers were poor and unable to find affordable alternative accommodation in the inner city.[304]

The Court considered the constitutional duty of the state in light of the housing provision (section 26) and highlighted the importance of PIE as a mechanism that strives to give effect to section 26(3).[305] The Court emphasised the duty of the courts to consider all relevant circumstances before granting an eviction order and held that the high court failed to discharge its statutory and constitutional obligations. In light of the appellants' personal circumstances, and specifically the fact that the eviction order might render the households homeless, the Court found that the appellants had established a *bona fide* defence and therefore also succeeded to show good cause for a rescission order in terms of the common law.[306] The default eviction order was rescinded and the appellants were granted leave to oppose the eviction application.[307]

In both cases, the landowners was entitled to eviction orders in terms of the common law, but the courts refused to grant the eviction orders, because it was not just and equitable in light of the occupiers' personal circumstances. The most important consideration was the fact that eviction might have rendered the households homeless. Despite the City's duty to accommodate vulnerable occupiers who are facing homelessness, the obvious problem remained that the City did not have alternative accommodation available. The courts refused to approve the eviction orders in consequence of the occupiers' socio-economic weakness. The courts had to prevent unjust evictions and therefore interpreted PIE, which gives effect to section 26(3), to provide substantive tenure protection for marginalised

[303] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 4.The Court referred to *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) para 11.
[304] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 5.
[305] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 10.
[306] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) paras 16-17.
[307] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA) para 18.

occupiers, which is a form of class-related tenure protection afforded particularly to socially and economically marginalised occupiers of residential property.

The courts refused to grant the eviction orders and consequently, were forced to burden the private landowners with the temporary duty to make available housing to the occupiers. In *Blue Moonlight* the court had to balance the rights of both parties and therefore decided to construe some form of payment for the private landowner in return for allowing the unlawful occupiers to remain on the property on a temporary basis. However, the state had to pay compensation in the form of rental payments.

3.8.6 Conclusion

The *Brisley* decision partially gave content to the meaning of section 26(3) where it held that "all relevant circumstances" meant all legally relevant circumstances. The *Ndlovu* decision made no reference to section 26(3), nor did the Court make any reference to the *Brisley* decision, while in *Kendall* the court based its decision on the common law and the Rental Housing Act, therefore not giving content to section 26(3) of the Constitution either. The courts limited the significance of section 26(3) by deciding that the only relevant circumstances any court currently has to consider is the legally relevant circumstances. Section 26(3) serves a much wider purpose because it forms part of the housing provision, which ensures a right to have access to adequate housing, an obligation on the state to realise this right and better procedural safeguards for all occupiers in the event of eviction proceedings. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[308] the Court decided that "any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1). Such a measure may, however, be justified under s 36 of the Constitution."[309] Section 26 thus "weighs against the eviction of people who already have access to housing."[310] This means that once a tenant is effortlessly evicted, without considering all relevant circumstances, the purpose of section 26(1) is undermined, because such an occupier will once again

[308] 2005 (2) SA 140 (CC).
[309] *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 34.
[310] Van der Walt AJ *Property in the Margins* (2009) 118.

be homeless, again joining the millions of homeless South Africans in dire need of housing.[311]

In *Jackpersad v Mitha* the court developed some insight in terms of what the court can consider when faced with an eviction order. In the recent cases of *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another*[312] and *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*[313] the courts interpreted PIE, which gives effect to section 26(3), in order to suspend eviction orders that would have resulted in occupiers being rendered homeless. In both cases the courts took into consideration the socio-economic circumstances of the occupiers and refused to grant the eviction orders, which the landowners were entitled to at common law.[314] In *Blue Moonlight* the court interpreted PIE to provide substantive tenure protection for the occupiers, even though the eviction order was suspended for a limited period.

A final issue that requires some brief consideration in this section is the tension between the constitutional property rights of landowners and the strengthened rights of occupiers. Section 25(1) of the Constitution states that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

From the discussion in 3.2.3 one can conclude that the common law does not provide strengthened tenure rights for tenants that might come into conflict with the constitutional rights of landowners. It is also clear from the discussion in 3.4.2 and 3.6.2 that the housing legislation applicable to urban landlord-tenant law, specifically the Rental Housing Act and the Social Housing Act, does not ensure strengthened tenure rights for tenants that might deprive private landowners of their property rights. In *Brisley*[315] the Court found that although section 26(3) of the Constitution applies horizontally in landlord-tenant evictions,[316] the court cannot refuse an eviction order based on the personal circumstances of the tenant as this would

[311] Van der Walt AJ *Property in the Margins* (2009) 118.
[312] [2010] JOL 25031 (GSJ).
[313] [2010] ZASCA 28.
[314] See also Wilson S "Breaking the Tie: Eviction from Private Land, Homelessness and a New Morality" (2009) 126 *SALJ* 270-290.
[315] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[316] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 39-40. Olivier JA concurred in para 81.

amount to depriving the landowner of an entitlement he had at common law.[317] In *Ndlovu*[318] the Court extended the application of PIE to tenants holding over,[319] which had the effect of suspending landowners' proprietary right to eviction.[320] The result was that PIE provided strengthened tenure rights for urban residential tenants, even though the extent of protection was largely procedural. The effect of *Blue Moonlight* and *Shulana Court* is that the courts must consider the socio-economic circumstances of the occupiers, including their personal circumstances, during eviction proceedings. In terms of PIE the courts can refuse eviction orders on the basis of the tenant's socio-economic weakness. The court can refuse to grant the eviction order if it would be unjust in light of the occupier's personal circumstances. The courts are therefore at liberty to grant tenants substantive tenure protection in terms of PIE, based on the socio-economic weakness of the tenants.

One should also note that the Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill was published[321] in 2008 and the most important aim of the Bill is to restrict the application PIE that tenants holding over would no longer fall under the ambit of the Act.

The effect of the most recent decisions is that urban residential tenants who face eviction can resort to protection under PIE in order to prevent or suspend eviction. If the tenant holding over relies on section 26(3) on the basis of the *Brisley* decision, the extent of protection would be limited because only the legally relevant circumstances could be considered by the court. If the tenant relies on PIE, he might be awarded more protection, although the extent of the tenure protection would depend on the occupier's socio-economic circumstances and the court would only grant substantive tenure protection if the occupier has a socio-economic weakness.

One can conclude from the discussion in 3.8 that the courts' efforts in developing strengthened tenure rights for urban residential tenants have developed quite extensively since the beginning of the post-1994 era.

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[317] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 42-46. See in this regard Van der Walt AJ "Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law" (2002) 18 *SAJHR* 372-420 at 403.
[318] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA).
[319] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) para 11.
[320] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) paras 17-18.
[321] The 2007 Bill was published on 7 March 2008, being a direct consequence of earlier Draft Bills published on 16 November 2007 (*Government Gazette* 30459) and 22 December 2006 (General Notice 1851, *Government Gazette* 29501) respectively.

However, new legislation in the urban landlord-tenant sphere that aims to provide substantive tenure protection for urban tenants is not unlikely, especially in consideration of the discussion in 3.9. The unavoidable question that arises is whether (current or future) legislation that strengthens the occupation rights of tenants, thereby restricting the property rights of private landowners, do (or could) not amount to a arbitrary deprivation,[322] in contravention of section 25(1) of the Constitution. As mentioned earlier, section 25(1) contains two requirements, namely that deprivation must take place in terms of law of general application and that no law may permit arbitrary deprivation. Van der Walt mentions that these requirements function as threshold requirements to the extent that non-compliance would render the limitation (deprivation) invalid.[323] It is important to note that "law of general application" includes the common law and customary law.[324] The common law can therefore authorize a regulatory deprivation of property. A law of general application that authorizes deprivation of property must be non-arbitrary, generally applicable, accessible and specific in order to be constitutionally valid.[325] Once it is confirmed that the law is generally applicable, the next question is whether the deprivation is non-arbitrary. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[326] the Constitutional Court proposed certain steps that should be followed when considering the constitutionality of any limitation of property rights, which includes the issue regarding arbitrariness, in order to determine whether the limitation was valid.[327] The essence of the decision was that deprivation would be arbitrary if there was insufficient reason for it or if it was procedurally unfair.[328]

The detail of this methodology is discussed in Chapter 8 in light of possible new legislation that would afford tenants strengthened tenure rights to give effect to

[322] See Van der Walt AJ *Constitutional Property Law* (2005) 121-178 for a detailed discussion regarding the definition, requirements and application of a deprivation. At 131 Van der Walt defines a deprivation as "properly authorized and fairly imposed limitation on the use, enjoyment, exploitation or disposal of property for the sake of protecting and promoting public health and safety, normally without compensation."
[323] Van der Walt AJ *Constitutional Property Law* (2005) 137.
[324] *S v Thebus and Another* 2003 (6) SA 505 (CC).
[325] Van der Walt AJ *Constitutional Property Law* (2005) 144.
[326] 2002 (4) SA 768 (CC).
[327] Van der Walt AJ *Constitutional Property Law* (2005) 149.
[328] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100; Van der Walt AJ *Constitutional Property Law* (2005) 153.

sections 25(6), 26(1) and 26(3). At this stage one can safely assume that the effect of anti-eviction statutes is to restrict the property rights of landowners as protected section 25(1). The constitutional justifiability of rent regulation, which includes strengthened tenure rights for tenants, is discussed in Chapter 6 by examining American landlord-tenant laws that include anti-eviction regulations. The question regarding the extent to which private property rights can be constitutionally limited is discussed in Chapter 7 by analysing German private and constitutional landlord-tenant law.

3.9 Constitutional analysis of legislation

In light of the methodology used by the courts to decide landlord-tenant cases, and specifically the rights of urban residential tenants who continue to occupy the premises upon expiration of their leases, it becomes clear that the relationship between the common law, anti-eviction statutes and the Constitution is uncertain. Through an in-depth analysis of the 2007 Constitutional Court decisions, Van der Walt proposes a methodology that could be used when applying legislation that was enacted to give effect to constitutional provisions, although it also explains the method that parties (and the courts) could follow in cases where there is no legislation or in cases where the legislation is insufficient.[329] The methodology is referred to as the subsidiarity approach (or principle). The questions that the courts struggle with, and that one can identify in the previous case law discussion, are formulated by Van der Walt as:

> "[w]hen should the Constitution or new legislation trump the common law; when should the common law be developed to promote the spirit, purport and objects of the Constitution …, [and] what should the effect of established common law norms and values be when it is unclear whether the Constitution or new legislation trumps the common law?"[330]

[329] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128.

[330] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 91. Some of the answers to these questions were initially developed by Du Plessis L "'Subsidiarity': What's in the Name for Constitutional Interpretation and Adjudication?" (2006) 17 *Stell LR* 207-231 where the author phrased the "subsidiarity principle". The subsidiarity approach that was further developed by Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007

The point of departure in terms of this methodology is that a litigant must rely on legislation that was promulgated with the aim to give effect to a constitutional right if that person wishes to enforce that right.[331] In such a case the litigant may not rely directly on the specific constitutional provision, except when the constitutional validity of the act is challenged.[332] If the legislation was enacted to give effect to the constitutional provision and to codify the common law, the litigant must rely on the legislation to enforce that right and may not rely directly on the Constitution or the common law.[333] However, legislation that was intended to codify the common law or give effect to a constitutional provision might sometimes leave what Van der Walt would refer to as "gaps"[334] in that specific area of law. These gaps are areas of constitutional rights that were not enacted in any legislation and were therefore left untouched by the legislature, either by mistake or on purpose.[335] In order to give effect to the right and thereby "fill the gap", Van der Walt argues that the court must first apply and develop the common law in line with the constitutional right of the

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term" (2008) 1 *CCR* 77-128 was criticised by Klare K "Legal Subsidiarity & Constitutional Rights: A Reply to AJ Van der Walt" (2008) 1 *CCR* 129-154.

[331] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 100. This principle was developed in *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51-52 (later referred to as the *SANDU* case).

[332] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 101, referring to *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another* as Amici Curiae) 2006 (2) SA 311 (CC) para 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 248; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15.

[333] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 103, referring to *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) para 23. Van der Walt also mentions that this is in line with section 39(2) of the Constitution, which states that "[w]hen interpreting any legislation, and when developing the common law …, every court … must promote the spirit, purport and objects of the Bill of Rights." In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 22 it was found that in these cases the common law must inform the interpretation of the legislation.

[334] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 106.

[335] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 106-107.

claimant.[336] If it is not possible or sufficient to develop the common law in line with the constitutional right, then the litigant can rely directly on the constitutional right.[337]

In the absence of legislation Van der Walt argues that the claimant must first resort to the common law, unless she wishes to challenge the constitutional validity of the common law. If the claimant relies on the common law and the common law fails to give effect to the claimant's constitutional right, then the courts should interpret and develop the common law in line with the spirit, purport and objects of the Constitution in order to give effect to the right.[338] However, if it is not possible to develop the common law sufficiently in line with the Constitution then the claimant should rely directly on the Constitution. If the common law is in conflict with the Constitution then the claimant would launch a constitutional attack to invalidate the common law, although this option is unlikely to occur. Where the common law is in line with the Constitution, but it does not give effect to the Constitution sufficiently, the court can either recommend legislation or provide the claimant with a constitutional remedy.[339] If the court recommends legislation it would usually give the state a period of time to promulgate or amend the statute, while providing the claimant with an immediate remedy.

One should note that in terms of the subsidiarity principle direct appeal to the Constitution is a last resort and could only follow once it is clear that the specific constitutional right has not been enacted in legislation and cannot be given effect to through the development of the common law.[340]

In the landlord-tenant framework, as discussed throughout this chapter, it is apparent that there are three main constitutional provisions, namely sections 25(6), 26(1) and 26(3) that relate to the tenure rights of urban residential tenants. In the

[336] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 109. This form of application and development of the common law in light of the Constitution is referred to as indirect horizontal application and is in line with section 39(2) of the Constitution.
[337] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 109-110. If a party in a civil dispute relies directly on a constitutional right for a remedy or a defence, it is referred to as direct horizontal application.
[338] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 114. See also the discussion at 115-125 for more detail on the tension between constitutional supremacy and the independence of private law.
[339] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 115-116. This approach adheres to section 39(2) of the Constitution and reinforces the role of the legislature in being able to either codify the common law or leaving it untouched.
[340] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 at 117.

following paragraphs these sections and the laws that were promulgated in order to give effect to these rights are analysed by means of the subsidiarity approach that was developed by Van der Walt.[341] The aim of this analysis is to identify areas of landlord-tenant law, specifically related to the tenure rights of urban residential tenants that are constitutionally protected, although not sufficiently given effect to in the legislative scheme. In some cases the shortcomings in existing legislation may be corrected through interpretation of the legislation (reading down, reading in), but in some instances gaps will remain that are too substantial for the courts to fill by way of judicial interpretation. According to the methodology developed by Van der Walt, once these areas of law (gaps) are identified the court should either develop the common law (indirect constitutional application) in line with the constitutional right in order to give effect to the right or construe a constitutional remedy (direct constitutional application) for the claimant.[342]

Section 25(6) of the Constitution states that "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled … to tenure that is legally secure". In 3.3 above it was argued that this section applies to all black persons who currently occupy land with insecure title. In terms of this section, these individuals are entitled to secure tenure. In 3.3 it was also found that the legislature enacted a number of laws to secure the occupation rights of rural occupiers. However, the tenure rights of urban residential occupiers, and more specifically urban residential tenants, have to date not been addressed sufficiently in terms of this constitutional provision. Even if the Rental Housing Act 50 of 1999 and the Social Housing Act 16 of 2008 were not enacted with the specific aim to provide urban tenants with secure tenure in terms of section 25(6), these laws still cover the landlord-tenant sphere that forms a large percentage of the general housing market and should therefore ensure secure tenure for black urban residential tenants with insecure tenure. In 3.6.2 it was argued that the Rental Housing Act does not give adequate security of tenure.

[341] Van der Walt AJ "Normative Pluralism and Anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128.

[342] One should note that in most of the cases where the courts are faced with evictions and the courts must provide occupiers with better occupation rights, the occupiers are mostly the respondents, as the owners claim eviction orders. In these circumstances the courts provide the occupiers with a defence rather than a remedy.

In terms of the subsidiarity approach one can confirm that there are gaps in the legislative scheme, because the insecure tenure rights of black urban residential tenants have not been addressed sufficiently in legislation and these households are entitled to redress in terms of section 25(6). Generally speaking, these gaps are of a nature and scope that cannot be rectified through judicial interpretation. The courts should therefore first aim at developing the common law in line with section 25(6), but the success of this option is doubtful because the essence of the common law is to enforce the strong right of the landowner to repossess the property once the right of the tenant has expired. This rule was entrenched rather than qualified in sections 4(5)(c) and 4(5)(d)(ii) of the Rental Housing Act.[343]

Another option is a direct constitutional approach, in which case the claimant tenant would rely directly on section 25(6) in order to acquire a constitutional remedy (or defence), based directly on the relevant constitutional provision, that would provide her with secure tenure. However, the diversity of tenants in South Africa and their different needs in relation to secure tenure renders this option unlikely, as large numbers of claimants and defendants would have to approach the courts repeatedly and on an ongoing basis in order to acquire an appropriate constitutional remedy for each specific case. From the discussion it becomes clear that new legislation could most easily and efficiently provide black urban residential tenants with secure occupation rights, while giving clarity for case law to follow. Legislation is a better solution because it can provide diverse tenants with different tenure rights.

A similar line of argument applies to section 26. Section 26(1) of the Constitution is known as the housing provision and it states that "[e]veryone has the right to have access to adequate housing." In 3.4.3 it was argued that security of tenure forms a key aspect of *adequate* housing. In 3.6.2 and 3.4.2 it was argued that the Rental Housing Act and the Social Housing Act do not afford urban residential tenants with secure tenure, as these laws reinforce the strong common law rights of landowners to evict tenants upon expiration of their leases. The preamble of both the Rental Housing Act and the Social Housing Act refers to section 26(1) and based on the discussion in 3.4.2 it is consequently clear that these laws form part of the nexus of laws that give effect to individuals' right to have access to adequate housing.

[343] See 3.6.2 above for a discussion on the codification of the common law right of landowners in the Rental Housing Act.

However, in section 3.4.2 it was also argued that the extent of increased access to housing as made available by these laws is inadequate. When the content of urban tenants' tenure rights, as included in the legislation, is considered in light of the international definition of *adequate* housing it is evident that these laws do not give effect to section 26(1) sufficiently, as urban tenants are not provided with *adequate* housing, because they occupy leased property with insecure tenure. The landlord-tenants laws also fail to introduce measures that would promote access to rental housing.

It follows that there is a gap in the legislative scheme that is in need of rectification. This could be done by either developing the common law in line with the Constitution (indirect constitutional application) or by relying directly on the Constitution (direct constitutional application) in order to acquire a constitutional remedy. Once again it is doubtful whether these options would be useful. The core of the common law is to protect the rights of landowners and not to strengthen the tenure rights of occupiers who usually acquire a mere personal right. In order to provide tenants with secure tenure rights and thereby aim to adhere to section 26(1), the common law would have to be amended drastically. Indirect constitutional application is consequently not a viable solution. Direct constitutional application might provide the claimant with the required constitutional remedy, although this may not result in the best long term solution due to the variety of tenants and their corresponding diverse tenure needs. New legislation that affords better tenure rights to urban residential tenants with the aim to give effect to section 26(1) is a more viable option in providing adequate rental housing. Legislation would also be able to solve the complexity of the urban rental market with regard to the extent of tenure security necessary for different tenants, as some tenants would require better tenure security than others. The issue regarding the extent of increased access to urban housing (and specifically rental housing) could also be addressed in legislation if the legislature can introduce and develop incentives for private developers to invest in the provision of rental housing. Some initiative has already been introduced in the Social Housing Act where the government must fund the social housing programme to promote the supply of rental housing stock. This initiative must be supported and developed to encourage private investment in the provision of housing.

In terms of section 26(3) of the Constitution "[n]o one may be evicted from their home … without an order of court made after considering all the relevant circumstances". Section 4(5)(d)(ii) of the Rental Housing Act requires that a landlord who wishes to repossess his property must first obtain an order of court. This provision is not necessarily in conflict with section 26(3), because a claimant-tenant would be able to argue that section 4(5)(d)(ii) must be read in light of section 26(3) and that eviction may then only follow once the court has considered all the relevant circumstances. The effect of *Ndlovu v Ngcobo / Bekker v Jika*[344] is that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1999 (PIE) applies to tenants holding over.[345] The Act gives effect to section 26(3) of the Constitution, as it mandates the courts to consider the relevant circumstances of unlawful occupiers before eviction may follow. According to *Blue Moonlight* and *Shulana Court*, the courts must consider the personal and socio-economic circumstances of unlawful tenants, in terms of PIE, during eviction proceedings. The courts can therefore refuse to grant eviction orders, based on the socio-economic weakness of tenants, and provide marginalised occupiers with substantive tenure rights. This position is bound to change as the 2008 Bill intends to limit application of PIE to unlawful occupiers who initially occupied the land unlawfully. As mentioned in 3.8.4 this would exclude tenants who are holding over. In such a case the eviction proceedings of urban tenants would be regulated under section 4(5)(d)(ii) of the Rental Housing Act, which would necessitate some interpretation in light of section 26(3) by the courts.

The application of the subsidiarity approach is different in consideration of section 26(3), because the Rental Housing Act (and Social Housing Act) supposedly gives effect to section 26(3) of the Constitution. These statutes did not codify the common law, because landlords can still rely on the common law to evict tenants. There would be a gap in the landlord-tenant scheme once PIE is amended, as these laws, namely the Rental Housing Act and the Social Housing Act, do not give effect to section 26(3), but rather allow common law evictions.[346] In terms of section 39(2) of the Constitution the court must promote the spirit, purport and objects of the Bill of

[344] 2003 (1) SA 113 (SCA).
[345] See 3.8.4 above for a more detailed discussion of the case.
[346] See also Liebenberg S *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 348-349 in this regard.

Rights when interpreting legislation. The court has the ability to read the aim of section 26(3) into the Rental Housing Act, although the question remains whether this technique would be sufficient to give effect to section 26(3), especially once PIE is amended and tenants holding over are no longer protected in terms of PIE, but only in terms of the Rental Housing Act. In light of section 26(3), read with section 39(2), the courts can afford protection for tenants in the event of eviction by reading some tenure security into the Rental Housing Act. The question is whether the courts would be able to sufficiently construe some protection for urban tenants by means of this method, because the tenure needs of all urban tenants are not necessarily similar. The diversity of tenants justifies new or amended legislation that would provide protection in the case of eviction, either through the provision of substantive occupation rights or through procedural protection. The extent of the protection must depend on the specific needs of the tenant.

From the discussion one can conclude that the enactment of new legislation is the best option to address the gaps that exist or that developed in the landlord-tenant legislation. New legislation would be able to address the different areas of law that are currently not giving effect to the constitutional obligations as stated in sections 25(6), 26(1) and 26(3), although the current landlord-tenant laws could also be amended to include new forms of secure tenure. At this stage it would be premature to suggest details regarding new legislation, or even an entirely new landlord-tenant framework, because it is unclear what forms of tenure security (and rent control) should be afforded to which tenants. The diversity of urban residential tenants in South Africa justifies different levels of tenure security, because these tenants' tenure needs are diverse. By analyzing foreign landlord-tenant laws that ensure substantive tenure security for diverse members of society during different economic, political and social periods in time, one can start to formulate possible forms of tenure rights for urban residential tenants in South Africa.

3.10 Conclusion

The post-1994 government formulated a vision of how it proposed to provide housing to all South Africans. This vision was drafted in various policy documents and was

amended during the last couple of years. The focus was initially to grant home ownership to homeless individuals, although lately the government realised that home ownership is not necessarily possible or preferable to all who are in need of housing. Currently the government is placing more emphasis on rental housing in the private and social sector as a form of tenure that could give access to adequate housing.[347] Rental housing could prove to be the more preferable form of tenure for marginalised occupiers, because the state can (and should) be proactively involved in the provision of housing. Through the provision of social rental housing where the state is involved and acting as landlord the legislature can more easily asses, evaluate and amend the laws to suit the needs of all occupiers. In the pre-1994 era the legislature also accommodated white marginalised tenants during housing shortages by regulating the private rental market. Rental housing is a key form of housing for vulnerable occupiers, because the state can actively act as guardian in the provision of secure housing. This is evident from the foreign law discussions in Chapters 4, 6 and 7.

From the discussion in 3.4.3 it is clear that *adequate* housing includes secure occupation rights and that if the government aims to make available housing in the form of rental housing then tenants would have to be afforded secure tenure.

In terms of section 26(2), the state has a positive obligation to introduce measures in the form of policy and legislation that would give effect to the right to have access to adequate housing. The rental housing legislation enacted in order to give effect to this obligation is the Rental Housing Act 50 of 1999 and the Social Housing Act 16 of 2008. The question is whether the legislation is efficient to alleviate housing shortages and provide individuals with adequate housing, thereby adhering to the transformative goal of the Constitution and rectifying the imbalances of apartheid. In terms of section 26(1) housing shortages can be alleviated by providing enough adequate housing. However, adequate housing includes secure tenure and the current tenure rights of urban occupiers, and more specifically urban tenants, are not secure, because these rights are still largely based on the common law. The provision of rental housing, either in the private or social sector, in order to satisfy the constitutional obligation in sections 26(1) and 26(2), would be suspect if it

[347] The right to have access to adequate housing is guaranteed in section 26(1) of the Constitution.

were not combined with secure occupation rights, since insecure tenure was the basis upon which the apartheid government could evict black occupiers.

The case law discussed in this chapter suggests that the anti-eviction measures introduced under section 26(3) of the Constitution and PIE can ensure substantive security rights for urban tenants. The courts failed to give content to the meaning of section 26(3) of the Constitution in the area of landlord-tenant law and rather suppressed the meaning of the section by relying on the common law to determine what "relevant circumstances" should be considered in order to make a fair eviction order. Recently the courts interpreted PIE to grant substantive tenure protection for marginalised urban tenants, which is a development that should be supported. However, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill proposes to amend section 2 of PIE by adding that tenants whose occupation became unlawful would not fall under the ambit of the Act, which would remove tenants from the protection of the Act. The substance of the primary landlord-tenant legislative measures introduced to give effect to the housing provision reinforces the common law. The majority of landlord-tenant measures merely provide occupiers, and more specifically tenants, with procedural safeguards. If landlords follow the procedural methods included in the statutes, tenants would usually be evicted. The landlord-tenant laws do therefore not afford substantive tenure protection in the form of continued occupation rights for tenants in general. The substantive tenure protection (in terms of PIE in the recent cases) was exceptional and derived from due process measures. The substantive tenure protection was granted during the eviction proceedings and had a limited protective effect, because it applied temporarily.

The history of forced removals, made possible through weak tenure rights of black occupiers; the current socio-economic state of homeless individuals; and the constitutional obligations to ensure secure tenure (section 25(6)), access to adequate housing (section 26(1)) and due process in the event of evictions (section 26(3)) require new landlord-tenant legislation in urban residential areas that would provide various occupiers with better tenure security in the form of continued occupation rights upon expiration of the lease in order to establish a home. The Rental Housing Act and the Social Housing Act, drafted under the positive obligation of the state in terms of sections 26(1) and 26(2) of the Constitution, refer to the

common law position of tenants upon termination of the lease. The legislation reinforces the common law position of urban tenants and private (or public) landowners when considering security of tenure. In terms of the subsidiarity approach one can conclude that the landlord-tenants laws, and some of the other anti-eviction measures, fail to give full effect to the Constitution. The case law also reflects this reality, as the courts struggle to sufficiently give effect to the constitutional measures through interpreting the legislation. From the discussion in 3.9 it is doubtful whether the courts would be able to provide urban tenants with substantive tenure rights by reading in the relevant rights, because the ambit and complexity of such a task is too complicated and wide. It would be more sufficient for the legislature to draft new legislation that gives effect to section 25(6) and section 26.

In order to develop new legislation to improve tenure security in urban rental housing, the government should give more consideration to previous South African rents legislation, which is discussed in Chapter 2. These statutes awarded substantive tenure security for tenants in urban areas during housing shortages by providing that the landlord could only terminate the lease upon expiration of the contract if certain circumstances prevailed, focusing primarily on the circumstances of the landlord. English, German, Dutch and American landlord-tenant legislation, which is discussed in Chapters 4-7, should also be considered because it affords similar tenure security. German legislation sometimes delays or prevents termination of a residential lease in order to avoid unjustifiable hardship for the tenant and therefore focuses on the personal circumstances of the tenant. English legislation makes provision for security of tenure in various sectors. These diverse sectors ensure different levels of tenure security, because the occupiers in each sector vary. Some tenants enjoy substantive tenure protection, while others are merely granted procedural safeguards. The latter is usually tenants in the private market, while the former is usually social sector tenants. The vulnerable and marginalised occupiers who usually occupy social housing enjoy substantive security of tenure and some form of rent control. At common law the landlord can only end the tenancy by means of a court order. However, through statutory intervention the legislature afforded some tenants continued occupation rights upon termination of the original tenancy.

In some cases reasonableness (which includes the personal circumstances of the tenant) is a factor the courts have to consider.

Tenure security for urban residential tenants could be improved by affording the tenant certain rights to continue the lease after termination of the lease, while placing restrictions on the rights which the landlord normally would have had at common law to end the relationship. At this stage it is important to note that a new legislative framework in the area of landlord-tenant law has to be context-sensitive. The diversity of tenants in South Africa necessitates a context-sensitive landlord-tenant framework that would provide some tenants with better security of tenure than others, among other things in an effort to protect the rights of landowners. The possible intricacies of this framework are discussed in Chapter 8. The balancing of rights between that of landlord and tenant is a core consideration in successfully drafting such a legal framework. The rights of landowners have to be restricted in a constitutionally justified manner without unfairly depriving landowners of such rights. The rights of landowners, as protected in section 25(1) of the Constitution, have to be balanced with the strengthened rights of tenants.

4. English Landlord-Tenant Law

4.1 Introduction

Housing shortages that developed in Europe as a result of the First and Second World War motivated the English legislature to enact legislation in order to provide better tenure rights for tenants, thereby statutorily interfering in the relationship between landlord and tenant. This statutory intervention was initially justified by dire socio-economic circumstances, although the security principles underlying the statutes remained on the statute book for most of the twentieth century (during which period Britain also experienced economic prosperity) and some of these principles are currently still enshrined in the landlord-tenant regulatory framework. The effect of the legislation is to place restrictions on termination of the tenancy, which in turn results in a prolonged tenancy as eviction becomes impossible. Through the operation of some statutes, tenants can practically enjoy a tenancy for life at reasonable rents, as some of the statutes also restrict the rent. Where the landlord succeeds in terminating the tenancy, eviction may follow, although it is subjected to procedural controls that ensure due process and fairness.[1] In all the rental sectors the landlord is obliged to claim possession in court in order to obtain an eviction order. In some instances the court has a wide discretion to consider various circumstances, mostly related to the personal circumstances of the tenant and the impact that the eviction order might have on the tenant and his family. The landlord's strong common law right to evict the tenant upon expiration of the lease, in accordance with an explicit provision in the lease, or through the operation of general property (or contract) law is in these instances restricted substantively to prevent an unjustifiably harsh impact on the tenant or his family.[2]

The pre-1994 position in South Africa with regard to the reasons for regulation of the landlord-tenant relationship is comparable to the English position after the Second World War.[3] The aim of the pre-1994 South African statutes was also to provide continued occupation rights for tenants upon expiration of the lease, combined with rent control, although the position in the two jurisdictions were different. The Rents Acts in South Africa only granted tenure security for white

[1] Van der Walt AJ *Property in the Margins* (2009) 83.
[2] Van der Walt AJ *Property in the Margins* (2009) 83.
[3] See Chapter 2.

tenants, while the English landlord-tenant legislation applied (and still applies) to tenants according to the type of landlord, either being a social or private landlord. In South Africa the strong common law right of landlords to repossess their property when the tenancy has terminated resurfaced during a period of economic upswing,[4] while the English legislature never abolished security of tenure or rent control in its entirety within the landlord-tenant framework (which includes the private and social sector), but rather amended the degree of security according to changing housing policy. The English legislative framework regulating landlord-tenant law is complex because the rental market is divided into various sectors, each providing different levels of tenure security to different members of society. The substance of the security afforded constantly changes in these various sectors, driven by the government's ever-changing housing policies in response to socio-economic circumstances.

The continued operation of these English statutes through periods of economic prosperity is noteworthy because the legislature chose not to abolish the legislation, since some individuals are still in need of affordable, secure rental housing during periods of economic prosperity.[5] Throughout the twentieth century the English legislature has developed a landlord-tenant scheme that is context-sensitive as it caters for most members of society while continually adapting the aim of the various statutes to respond to changes in the housing policy that reflect the socio-economic circumstances. It is therefore necessary to investigate and examine the whole of the English landlord-tenant system in some detail, because it presents answers to numerous questions regarding the failure of the current landlord-tenant laws in South Africa to provide adequate housing and tenure security in accordance with the post-apartheid constitutional obligations.

This chapter is divided into five broad sections. Sections 4.2 and 4.3 explain the fundamental English leasehold concepts and the nature of a tenancy in English law, since the English land law system differs substantially from the South African one. The importance of housing policy with regard to the extent of statutory intervention through legislation is discussed in section 4.4. In 4.5 some of the

[4] See section 2.4 in Chapter 2.
[5] The allocation of different forms of rental housing to diverse members of society is a complex set of rules and policies within the landlord-tenant framework. See Bright S *Landlord and Tenant Law in Context* (2007) 190-202 for the allocation of social and private rental housing in the UK.

policies that were introduced in English law and their effect on previous legislation and the rental housing market in general are discussed. Section 4.6 is an in-depth discussion of the current statutes that regulate landlord-tenant law in England and Wales, specifically in relation to the level of tenure security afforded and, to a lesser extent, the limited use of rent control.

4.2 Leasehold concepts

An important concept to take note of in English land law is the notion of an *estate in land* (analogous to an *interest in land*) because land cannot be owned.[6] One can therefore acquire an interest in land, comprising of certain rights and obligations. The rights and obligations will depend on the individual's interest in the land. Such an interest can be held for various periods of time, depending on the nature of the interest.[7] The Law of Property Act 1925 provides that only two estates in land are capable of existing at law, namely an estate in fee simple absolute in possession and a term of years absolute, although other estates can exist in equity.[8] The holder of a fee simple absolute in possession, commonly known as a freeholder, acquires an estate in the land for an unlimited time, which is the closest one can come to the civil-law notion of ownership of land in English law.[9] A term of years absolute is known as a lease or a leasehold estate[10] and is an estate in land for a fixed term, although it can also be held periodically.[11] The holder of a term of years is commonly

[6] Bright S *Landlord and Tenant Law in Context* (2007) 48-49 states that the law "is one of possession" and not ownership.
[7] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 3.
[8] Section 1.
[9] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 6 defines the position of the freeholder as the "holder of the greatest estate in land". The freeholder has the ability to create lesser estates in the land by renting out the property. If the freeholder decides not to occupy the property himself and grants a lease, he would be known as the landlord. If the freehold estate owner occupies the property, he is known as the "owner-occupier". A leaseholder would not be able to acquire the whole of the estate because the freeholder retains the reversion: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 9.
[10] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 307 mention that, according to the labour government, the law of leasehold is currently "flawed" because it has "its roots in feudal system", which is regarded as "heavily weighted in favour of one party (ie the landlord)". The tenant merely acquires a wasting asset for which he has paid the full market value.
[11] A lease could be defined as the transaction which enables the landlord to vest a term of years in the tenant, but the terms "tenancy", "lease" and "term of years" are currently all being used to describe the proprietary interest (or estate) vested on the land: Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 307.

known as the leaseholder.[12] A term of years absolute is a proprietary interest in land.[13] The holder of the term of years is also entitled to create a new, shorter, interest out of his tenancy[14] by sub-leasing the land.[15] Various individuals can each hold an estate in one piece of land at the same time, although their estates differ.[16] Clarke states that the purpose of a lease is to divide the interests of the property between various individuals by means of contract.[17] Clarke argues that such a division of interests is also known as "a split in ownership".[18] The tenant will acquire fundamental "property" rights in the leased land (such as the right to exclude), while the landlord will retain the reversionary[19] interest, along with certain other rights (including the right to alienate the reversionary interest). "Ownership" comprises of various rights and through lease these rights are divided between the landlord and the tenant (or tenants). It is central to English landlord-tenant law that policy must ensure a balanced split of "ownership" between the parties, taking into consideration the interests of all the parties involved.[20] The point of departure in English landlord-tenant law is the relationship between the landlord and the tenant in respect of the leased land and not merely the relationship between one of the parties and the land, nor the plain contractual relationship between the parties.[21]

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[12] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 307.
[13] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 306.
[14] Bright S *Landlord and Tenant Law in Context* (2007) 5 defines a tenancy as the tenant's interest in the land.
[15] Bright S *Landlord and Tenant Law in Context* (2007) 5. Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 306 mention that a term of years can be the subject of a range of transactions in the form of either assignment or sublease.
[16] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 3-4.
[17] Clarke D "Long Residential Leases: Future Directions" in Bright S (ed) *Landlord and Tenant Law. Past, Present and Future* (2006) 171-190 at 172.
[18] Clarke D "Long Residential Leases: Future Directions" in Bright S (ed) *Landlord and Tenant Law. Past, Present and Future* (2006) 171-190 at 172.
[19] Bright S *Landlord and Tenant Law in Context* (2007) 23 defines a reversion as "the landlord's interest in the property remaining after the lease has been granted".
[20] Bright S *Landlord and Tenant Law in Context* (2007) 49. See section 4.4 below for a discussion on housing policy.
[21] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 3-4. One should also take note of two other categories of occupiers at common law, known as the licensee and the trespasser. The licensee is an occupier who acquires the permission to use the property, although the possession of the land stays with the freeholder. The licensee can therefore not exclude the freeholder from the property. The main difference between a tenancy and a licence is that of exclusive possession. A licensee is not entitled to exclusive possession, while a tenant can exclude the landlord and third parties from the leased premises: Bright S *Landlord and Tenant Law in Context* (2007) 79. The trespasser uses the land without permission. The term "squatter" does not have a significant meaning in English land law because the lawfulness of the occupier's occupation will determine whether he is a licensee or a trespasser. The term squatter rather refers to a long-term trespasser: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 5, 10-12.

In order to create a tenancy (also known as a lease) there must be a landlord and a tenant; the tenant must have exclusive possession for a definite period of time;[22] the land must be identifiable and the landlord must preserve a reversion. Payment of rent is not a requirement for the creation of a tenancy, although the absence of rent will have the effect of excluding the tenant from Rent Act protection.[23]

The contractual nature of a lease persists in modern landlord-tenant law, although the creation of interests in land through the use of these contracts is central to understand and appreciate landlord-tenant law.[24] In *Rye v Rye*[25] Lord Denning stated that all tenancies contain covenants[26] and are created by means of agreement between the two contracting parties. One should distinguish between express and implied covenants. Express covenants are the obligations agreed upon between the parties, while implied covenants are enforced upon the contracting parties by means of the common law or statute.[27] Where the parties fail to reach an agreement with regard to certain obligations or where the parties forget to include certain covenants, such covenants will be implied by means of the common law in order to provide the tenant with a bare minimum of protection. If the implied common law covenant is in conflict with the express covenant, the express covenant will prevail; but where the express covenant is in conflict with a covenant implied by

[22] A tenancy can be for any period of time but it must be for a definite or determinable period: Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 4.

[23] See Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 6-9 for a discussion of these requirements. See also Bright S *Landlord and Tenant Law in Context* (2007) 67-77 for a discussion of the essential elements of a lease. See Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 22-27 with regard to the formalities for creating a valid lease.

[24] Bright S *Landlord and Tenant Law in Context* (2007) 28.

[25] [1962] 2 WLR 361 (HL) 514. The court had to consider whether a person can grant a tenancy to himself. Lord Denning found that this would be impossible because "every tenancy is based upon an agreement between two persons and contains covenants expressed or implied by the one person with the other."

[26] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 45 defines covenants as the terms of the contract, although initially this term was used to define a contractual term which formed part of a lease made by deed. A covenant is not akin to a contractual term because a covenant imposes obligations and rights on subsequent parties that acquire an interest in the land. Covenants are therefore binding on subsequent occupiers of the land after the original parties have departed, while contractual terms will only bind the two contracting parties.

[27] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 29. See also Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 28-29 for a discussion on the various implied and express covenants. An interesting express covenant to take note of, although not universally applied, is a rent review provision. This provision provided the landlord with the means to increase the rent during the tenancy at certain points in time in order for the rent to reflect market value. These review provisions only made provision for a rent increase: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 63.

statute, the covenant implied by statute will trump the express covenant. The purpose of these statutes is to grant some protection for tenants because of the unequal bargaining power between the landlord and the tenant. The parties can therefore not contract out of statutory covenants.[28]

The extent of tenant protection afforded by the legislature in English landlord-tenant law depends on various factors. It is primarily important to distinguish between long residential leases[29] at low rents and short-term tenancies.[30] A long leaseholder has the ability to create various interests in the leased property, analogous to the capability of the freehold estate owner, while a short-term tenant's right to create further interests in the land is limited because the period of his occupation is shorter and uncertain. The interests, in relation to land, allocated to long leaseholders are to a certain extent similar to that of freeholders. A long leaseholder will acquire substantial interest in the property, thereby assuming a position that closely resembles ownership in the land. However, the long leaseholder is still subject to certain constraints (including the terms on which the home is rented), whereas freeholders are completely free from such constraints. The short-term tenant can also acquire various interests in the property, combined with long-term tenure security, although such a tenant will never be thought of as the "owner-occupier" because continual payments are still required in order for him to occupy the land.[31] A long leaseholder usually pays a lump sum at the beginning of the tenancy, whereafter extremely low rent payments (known as ground rents) are made during the course of the long-term tenancy.[32] The long leaseholder can sell his interest in the property for a capital sum because the lease has a capital value, but a long lease is nevertheless still a "wasting asset" because the lease will depreciate as the remainder of the lease gets shorter.[33] The largest part of the capital value will

[28] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 59.
[29] A long residential lease is a lease exceeding 21 years. The lease is purchased for a premium, whereafter the lessee has to pay ground rent, and not necessarily a market rent (Bright S *Landlord and Tenant Law in Context* (2007) 225). See Bright S *Landlord and Tenant Law in Context* (2007) 226-227 for a discussion on long leasehold and the various problems associated with this form of tenure.
[30] Bright S *Landlord and Tenant Law in Context* (2007) 225 mention that the relationship between landlord and tenant is different in consideration of short-term tenancies and long-term tenancies.
[31] Bright S *Landlord and Tenant Law in Context* (2007) 50.
[32] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 249 refers to the Rent Act 1977, the Housing Act 1988 and the Housing Act 1985.
[33] See Bright S *Landlord and Tenant Law in Context* (2007) 12-13 for a background on policy considerations with regard to long leases.

usually be with the long leaseholder, while in the case of short-term tenancies the capital value remains with the freehold estate owner because the reversionary interest represents the capital value of the land. "Ownership" will therefore attach to the party that has the interest with the greatest capital value.[34] The focus of this chapter will not be on the position of the long leaseholder but rather on the statutory protection made available for short-term tenants, because long-term tenants are excluded from statutory protection provided for by the three main statutes[35] that apply to residential tenancies.[36]

The Rent Act 1977, the Housing Act 1985 and the Housing Act 1988 are the three main statutes that regulate tenure security for residential[37] short-term tenants. In order to determine which statute is applicable one has to look at the nature of the landlord. If the landlord is a local authority (also referred to as the housing authority), the Housing Act 1985 will apply. Initially housing associations[38] were also regulated under the Housing Act 1985, although these associations were moved into the private sector by the Housing Act 1988. After 1988 housing associations could borrow financing from the private sector, which enabled them to make housing available for tenants as "council tenants" instead of market-rent private tenants. A large percentage of these associations were registered with the Housing Corporation and became known as registered social landlords.[39] Recently the Housing and Regeneration Act 2008 was enacted, which now mainly regulates social housing and the delivery of affordable housing. Part 1 of the Act makes provision for the

[34] Bright S *Landlord and Tenant Law in Context* (2007) 50. Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 309 mention that the only real difference between the freeholder and the leaseholder with regard to the notion of "estate ownership" is duration, because both forms grant exclusive possession. The tenant is entitled "to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain conditions": *Street v Mountford* [1985] AC 809 at 816 per Lord Templeman.

[35] The Housing Act 1985, the Rent Act 1977 and the Housing Act 1988. Part 1 of the Landlord and Tenant Act 1954 provides some protection for the long leaseholder.

[36] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 162. For a detailed discussion of long residential leases see Bright S *Landlord and Tenant Law in Context* (2007) 225-234.

[37] Commercial property and agricultural land falls outside the scope of this chapter. See Bright S *Landlord and Tenant Law in Context* (2007) 235-256 & 257-270 for an explanation of business tenancies and agricultural tenancies respectively.

[38] Mullins D & Murie A *Housing Policy in the UK* (2006) 178 define housing associations as "independent, non-profit-distributing organizations governed by voluntary boards to provide mainly rented housing at below market rents".

[39] Bright S *Landlord and Tenant Law in Context* (2007) 7-8 explains how the number of associations expanded from providing rented accommodation to only a small group of individuals, especially the elderly or disabled, until the 1980s, whereafter the large-scale voluntary transfer programme was implemented, which transferred a large volume of local authority housing stock to housing associations.

establishment of a Home and Communities Agency (HCA), which is a combination of Housing Corporations and English Partnerships. The Office for Tenants and Social Landlords (TSA), introduced in Part 2, is a new system of regulation for social housing. In terms of the Housing and Regeneration Act 2008, the TSA is currently the regulator for social housing, while all registered social landlords (RSLs) are now referred to as "private registered providers of social housing".

Local-authority housing has always been part of public housing, forming part of the social sector. The aim of the local authority, in relation to the category of occupiers it wanted to provide housing for, transformed to providing accommodation to individuals who tended to be more vulnerable, where it previously granted homes to the more contented working class.[40] Social housing, made available by local authorities and registered social landlords, is usually occupied by the poor and marginalised on a long term basis, although the tenancy usually consists of short contractual terms.[41] The benefits of social housing was confirmed in 2007 by the Hills review,[42] which found that social housing provides stability and security for low-income tenants, as well as improved quality of housing (especially compared to the quality of housing these households could afford in the private market).[43]

The private rental sector is governed by two statutes, namely the Rent Act 1977 and the Housing Act 1988. If the tenancy was granted before 15 January 1989 the tenant would be protected by the Rent Act 1977, while if the tenancy was granted on or after 15 January 1989, the tenant would be protected by the Housing Act 1988.[44] The private rental sector underwent a drastic transformation during the last century as it provided twelve percent of housing in England during 2006 compared to ninety percent in 1914. The legislature introduced controls in 1915 to improve

[40] Local authorities were forced by central government to provide cheaper accommodation to lower-income individuals; adopting a "welfare-orientated" role instead of building good quality homes. By 1977 local authorities were statutorily forced to provide housing to the more marginalised. The Housing Act 1980 introduced the "right to buy" that enabled council tenants to buy their homes at a reduced price and become freehold owners. This led to a loss of housing stock. The quality of local authority housing stock currently occupied by the poorest of the poor deteriorated: Bright S *Landlord and Tenant Law in Context* (2007) 7.
[41] Bright S *Landlord and Tenant Law in Context* (2007) 8.
[42] Hills J "Ends and Means: The Future Roles of Social Housing in England" (Case Report 34, February 2007).
[43] Hills J "Ends and Means: The Future Roles of Social Housing in England" (Case Report 34, February 2007) 69-70.
[44] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 162-163.

security of tenure and impose rent control.[45] These statutes intervened in the law of supply and demand, which contributed to the drastic decline in the size of the private-rented sector. The Rents Acts contributed to the decline because landlords were unable to set their own rent levels, which meant that they could no longer make an adequate return on their investment.[46] However, various other policies also had an effect on the decline in the private sector.[47] The aim of the Housing Act 1988 is to deregulate the whole of the private sector by abolishing rent control in its entirety and to afford the landlord with an option to provide substantive tenure protection.[48] By "liberalising" the sector the government is removing security of tenure; giving landlords the means to force tenants from their homes upon expiration of the lease and consequently making it difficult for families to establish themselves in their surrounding community.[49] One could argue that especially low-income tenants would be detrimentally affected by this policy, but the social housing sectors are functioning as a form of housing for lower income households and do provide secure rental housing.

[45] Rent control basically provided that certain houses within the rateable value limits had their rents controlled according to a formula. Increases were permitted by exception: Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 245.

[46] See Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 285-292 for a discussion of the economic consequences of rent restrictions. According to a number of economic theorists, the imposition of rent control inevitably reduces the amount of accommodation available for letting. Lansley S *Housing and Public Policy* (1979) 117-119 concludes that the general effect of rent control is both positive and negative, as there will be a reduction in the cost of housing to existing tenants and a redistribution of income from landlords to tenants, although rent control will also discourage building of new rental accommodation and promote the deterioration of existing rental stock. The extent of each of these consequences is uncertain. As a result of the redistributive effect of rent control, "[t]enants are subsidised by their landlords, irrespective of their comparative incomes. By subsidising only one part of the rented market, rent controls also redistribute income away from landlords of controlled property to landlords of uncontrolled property". Hayek FA *Verdict on Rent Control: Essays on the Economic Consequences of Political Action to Restrict Rents in Five Countries* (1972) xi argues that the introduction and implementation of rent control, rent regulation or rent restriction has led to damaging social and economic consequences, including the encouragement of immobility; swamping consumer preference; eroding production incentives; and distorting land-use patterns and the allocation of scarce resources. Donnison DV *The Government of Housing* (1967) 265 explains how housing shortages develop through the growth of employment and population in areas where there are planning controls that prevent an increase in housing supply.

[47] Bright S *Landlord and Tenant in Context* (2007) 9 mentions the promotion of owner-occupation and the advent of council housing as contributory factors.

[48] The tenants who occupy private rental housing and the landlords who offer such accommodation are diverse, which poses challenges for regulation. The current housing situation necessitates an increase in private rental housing in order to provide housing to the economically weak (being unable to afford owner-occupation) and to those with the need to be mobile within the sector: Bright S *Landlord and Tenant Law in Context* (2007) 10-12.

[49] Bright S *Landlord and Tenant Law in Context* (2007) 12.

4.3 Nature of tenancy

In order to understand modern English landlord-tenant law one has to appreciate the multifaceted nature of a tenancy. Garner asserts that a tenancy is a contractual relationship, an interest in land[50] and to some extent a creature of statute.[51] Bright explains how the landlord-tenant relationship functions within a grid of housing laws, disability laws and human rights laws, combined with laws regulating anti-social behaviour and the improvement of social structures.[52] Together, these spheres of law, combined with economic and trade policies, influence the rights and obligations of landlord and tenant, in the process exercising a substantial impact on the relationship between the parties, despite the fact that their fundamental rights and responsibilities are still determined by the express agreement between the parties and the implied covenants.[53] Landlord-tenant law is not static and the government must be able to amend the law when necessary.

In English law a lease provides the tenant with a real right. The tenant's interest is a proprietary interest, enforceable against the landlord and his successors.[54] Leases were initially regulated as mere contractual agreements and this characteristic of a lease persists in modern landlord-tenant law, but it is now broadly acknowledged that a lease is also a proprietary interest.[55] In *Milmo v*

[50] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 130 mention that a tenancy bears certain characteristics beyond the mere contractual relationship because the consequences of the tenancy affect third parties.

[51] The statutory nature of a tenancy is evident in consideration of the termination of tenancies. In most cases the landlord has to comply with the relevant statutory requirements in order to evict a tenant upon expiration of the lease: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 130.

[52] Bright S *Landlord and Tenant Law in Context* (2007) 3.

[53] Bright S *Landlord and Tenant Law in Context* (2007) 26 also mentions that, although some laws influence the relationship of landlord and tenant, not all of these laws provide legal rights.

[54] Bright S *Landlord and Tenant Law in Context* (2007) 27 refers to Birks P "Before we Begin: Five Keys to Land Law" in Bright S & Dewar J (eds) *Land Law. Themes and Perspectives* (1998) 458-486 at 473-475. The South African position is similar, although the tenant only acquires a limited real right upon registration of the lease against the title deed. In the absence of registration the principle of *huur gaat voor koop* provides the tenant with additional protection in the event of sale. See section 2.2.2 in Chapter 2 for more detail on the *huur gaat voor koop* rule.

[55] A lease is therefore predominantly a contract, although it is also property, which means that "property-based" law will apply in leasehold disputes: Bright S *Landlord and Tenant Law in Context* (2007) 28-29. Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 307 mention that currently one can easily overlook the fact that the leasehold relationship is based on a contract, because the character of the lease is defined as proprietary rather than contractual.

Carreras[56] the court stated that all tenancies contain an element of tenure, even though such tenure is not purely contractual. In *Bruton v London and Quadrant Housing Trust*[57] the House of Lords disagreed where it stated that the relationship between landlord and tenant is "not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties."[58]

Historically, leases were seen as contracts providing one party with a right to possess land for a specified period of time. The covenants were primarily implied and the nature of the lease consisted of the tenant's obligation to pay the rent, while the landlord was obliged to provide the tenant with peaceful possession.[59] In *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd*[60] the court affirmed the complex interaction between compound contractual agreements and property as an interest in land. Lord Denning stated that in order to terminate an estate in land, one cannot rely on purely contractual methods such as repudiation and acceptance. The complex interaction (and sometimes tension) between contract-based rules and property-based rules was addressed in *Hammersmith and Fulham LBC v Monk*,[61] where the Court had to decide whether a joint tenant could terminate a joint tenancy unilaterally. Lord Browne-Wilkinson stated that the issue consisted of a tension between a property-based approach, asking whether one party can terminate the other's right to live in his home, and a contract-based approach, asking whether one

[56] [1946] KB 306 (CA) 311 per Lord Greene MR, where it was stated that one cannot have a purely contractual tenure and "[t]enure exists by reason of privity of estate."
[57] [2000] 1 AC 406 (HL).
[58] *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 (HL) 415. The court added that the lease usually creates a proprietary interest, although this will depend on whether the landlord had an interest out of which he could grant it. Bright S *Landlord and Tenant Law in Context* (2007) 29 mentions that statutory provisions generally only apply to leases and not to licences. This underlines the importance of determining whether a relationship is in fact a lease or a licence. The majority of leases do create an estate in land.
[59] Quinn TM & Phillips E "The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future" (1969) 38 *Fordham LR* 225-258 at 227-230. The point of departure was that the law protected the possession of the tenant: Bright S *Landlord and Tenant Law in Context* (2007) 31.
[60] [1972] 1 QB 318 (CA) 324. The recognition that leases provide more than a mere grant of possession was followed in the US during the 1960s and 1970s. In *Old Town Development Company v Langford* 349 N E 2d 744 (1976) (Court of Appeals Indiana) 753-756 the court redefined the core of leases in American law where it refers to the historical development of feudal English land law during the 16th century and the subsequent industrial revolution. The court remarks on the impact of these historical developments on the nature of a lease; how the essence of possession transformed into complex transactions which essentially resembled contract rather than the conveyance of property. Bright S *Landlord and Tenant Law in Context* (2007) 32 explains how this transformation of leases from contracts of "estate" to contracts of "estate plus" affected the common law principles of contract.
[61] [1992] 1 AC 478 (HL).

party could be bound to a contract against his will.[62] Bright explains that this tension didn't really present a legal tension between contract and property because the only real property issue (and approach which might have been significant) was the fact that the decision could influence an occupiers use of his "home"; bearing no legal significance at the time.[63] The Court concluded that, according to contract law principles, the joint tenant could unilaterally serve notice to quit and terminate the tenancy.[64]

The nature of a tenancy can therefore be described as a contract and an interest in land, although the different interests of the parties in relation to the tenancy are also important in order to understand the effect of such an arrangement on larger social structures. It could easily be assumed that most landlords have no more than a commercial interest in their leased property, maintaining their investment purely in order to receive profitable regular payments and a satisfactory capital value on the reversion.[65] However, some private-sector residential landlords have a "personal" attachment to the land. In this sense property takes on a distinct economic and social role in the larger society because it remains a limited resource necessary for human flourishing. The social value of the property will depend on the underlying intention of the landlord. A social landlord would for instance perceive the property as a social utility, enabling the landlord to participate politically and contribute to society on a "welfare-based" level.[66]

The interests of the tenant depend on the particular tenant. In the case of a long residential leasehold the lease could be perceived as his only financial asset and therefore represent some form of wealth for the tenant. In the case of short-term tenancies (usually accompanied by market rent payments) a different perception is more probable, as such a tenant would not perceive the property as a financial investment because he did not pay a premium. In either case, the lease will always

[62] *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 (HL) 491-492.
[63] Bright S *Landlord and Tenant Law in Context* (2007) 40. The position is currently different due to the human rights legislation and the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). See Chapter 5 for a discussion of the application of article 8 of the ECHR in English landlord-tenant law.
[64] *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 (HL). At 483 Lord Bridge approached the question from a contract law perspective, after which he posed the question whether there is any property principle applicable to the "contractual relationship of landlord and tenant which refutes the expectation".
[65] Bright S *Landlord and Tenant Law in Context* (2007) 46.
[66] Bright S *Landlord and Tenant Law in Context* (2007) 47.

carry a substantial worth exceeding any monetary value.[67] A residential tenant will also attach substantial value to the leased property as a home. The concept of "home" has received extensive consideration during recent years.[68] Currently, the concept of "home" resembles much more than the mere physical shelter associated with it. A secure home is also a means of connecting families within a community. It enables individuals to obtain some stability and a sense of belonging which would contribute towards better social structures and improved individual well-being.[69] The tenant's interest in the lease, especially with regard to the concept of home, depends on the level of tenure security afforded to him by the legislature. If the government's housing policy is aimed at providing better tenure security for tenants, allowing them to occupy leased property for continuous periods, depending on their will and good behaviour, these occupiers can experience a sense of connectedness and establish their place in society.[70] One should therefore ask, especially in the South African context, whether the government is pro-actively affording tenants the means to establish themselves in their communities through landlord-tenant legislation that provides better tenure security, which would allow occupiers to create a home.[71]

The law regulating landlord-tenant arrangements has been defined as a regulatory law.[72] The concept of regulatory law is not easily definable, although Bright mentions that it is concerned with "state control directed to social and individual action to address problems of social risk or market failure."[73] Blandy argues that regulatory laws either substitute private rights with state control through

[67] Bright S *Landlord and Tenant Law in Context* (2007) 47.
[68] See Fox L *Conceptualising Home: Theories, Laws and Policies* (2007).
[69] Bright S *Landlord and Tenant Law in Context* (2007) 48. Article 8 of the ECHR guarantees the right to respect for the home. See Chapter 5 for a discussion of the application of article 8 in English landlord-tenant law.
[70] Bright S *Landlord and Tenant Law in Context* (2007) 48 mentions how the "home experience" differs between private renters and social housing renters; statutory protection provides social tenants with greater tenure security and the opportunity to establish themselves in their immediate community.
[71] In the South African context this is extremely important because the poorest of the poor cannot acquire home ownership and, even if the vulnerable and marginalised are afforded home ownership, they often struggle to bear the costs associated with this responsibility. It is these struggling communities that require this sense of belonging within their social structures. See section 3.5 in Chapter 3.
[72] See Bright S *Landlord and Tenant Law in Context* (2007) 41; Blandy S "Housing Standards in the Private Rented Sector and the Three Rs: Regulation, Responsibility and Rights" in Cowan D & Marsh A (eds) *Two Steps Forward: Housing Policy in the New Millennium* (2001) 73-92 at 83-84, 87.
[73] Bright S *Landlord and Tenant Law in Context* (2007) 41.

the use of agencies[74] or subject private rights to less comprehensive regulatory restrictions. It is sometimes important for regulatory laws to co-exist with and supplement rights-based law. In the context of landlord-tenant it is sometimes necessary to grant tenants more than a regulatory right.[75] One should therefore consider the role and aim of parliament when examining housing policy, because the legislation might override the strong common law rights of landlords in rights-based law in order to provide better and more secure rights for tenants through regulatory law. The question then is whether landlord-tenant legislation, being regulatory law, is in conflict with rights-based law in the form of the common law rights of landlords, and whether the correct housing policy is being followed and developed by parliament in each rental housing sector in order to sustain the optimal balance and proportionality in the provision of rental housing.

4.4 Law and policy

Before considering the various statutes enacted by the government to afford better security of tenure for residential tenants, it is imperative to take note of the importance of policy in housing law. Bright defines policy as "the result of a decision taken as to how to achieve a particular objective."[76] Such an objective could take a general form, for instance promoting owner-occupation instead of leasehold, or it could be more specific, for example, "a decision about the particular approach to be taken towards the obligation to repair".[77] The government can also identify a broad objective and thereafter create various policies in order to achieve that objective. Where there is a lack of policy, it is possible that the law will develop in an unguided

[74] Blandy S "Housing Standards in the Private Rented Sector and the Three Rs: Regulation, Responsibility and Rights" in Cowan D & Marsh A (eds) *Two Steps Forward: Housing Policy in the New Millennium* (2001) 73-92 at 83-84, 87 describes how landlord-tenant law is regulatory law. She mentions the loss of tenure security for tenants in 1988, followed by the strengthening effect of the Protection from Eviction Act 1977 through local authority regulation, which countered landlords who evicted tenants unlawfully. In addition to this example she mentions the deregulation of rents through the Housing Act 1988 which, accompanied by Housing Benefit reforms, provided local authorities with a certain indirect power to regulate rents.

[75] Blandy S "Housing Standards in the Private Rented Sector and the Three Rs: Regulation, Responsibility and Rights" in Cowan D & Marsh A (eds) *Two Steps Forward: Housing Policy in the New Millennium* (2001) 73-92 at 85 explains that the mere regulation of private landlords is an insufficient method to enforce certain standards in the private sector.

[76] Bright S *Landlord and Tenant Law in Context* (2007) 143.

[77] Bright S *Landlord and Tenant Law in Context* (2007) 143.

manner. It is essential for government to develop consistent policies regarding housing, although some policies might conflict due to the fact that different policies benefit different members or groups of society.[78] Cullingworth explains that:

> "Every country's housing policies contain the seeds of several such conflicts, for housing is so central a feature of the economy and the way of life it supports that many of the competing aspirations at work in a society gain some expression in this field."[79]

The landlord-tenant legislation promulgated in England and Wales originated from policy considerations in relation to economic and social circumstances. These statutes could be described as an intervention in the rental housing sector because it placed restrictive controls on the landlord-tenant relationship. Tenants in the private rented sector faced uncertainty because of the social and economic conditions created by the First World War and the legislature had to intervene in order to provide some stability.[80] This illustrates the connection between social and political uncertainty and statutory intervention. Social and economic circumstances usually influence key reforms in the rental housing market, placing emphasis on policy considerations that could result in transformation,[81] although some of the major reforms are not necessarily connected with these conditions. In some instances reform can take place merely to provide the tenant with a stronger right.

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[78] Bright S *Landlord and Tenant Law in Context* (2007) 143. Bright provides some examples of policies that would enable the State to achieve the aim of "decent homes for all". The state can for instance make available "subsidies directed at the consumer in the form of tax relief on mortgage payments" in order to encourage cheap owner-occupation.

[79] Cullingworth JB *Problems of an Urban Society Volume II: The Social Content of Planning* (1973) 40.

[80] The housing shortages that developed after the First and Second World War motivated the government to intervene and create stronger protection for tenants in occupation. During the 1970s, when Europe experienced an economic upswing, the labour or social-democratic governments continued this protection, although motivated by tenant-friendly or social welfare-orientated housing policies rather than housing shortages: Van der Walt AJ *Property in the Margins* (2009) 83.

[81] The landlord-tenant relationship is constantly influenced by various factors, sometimes including conditions unrelated to law. During the last century the private rental market declined partially as a result of strict rent control and security of tenure laws. The statutory intervention made investment in the private rental market unattractive and investors chose to invest elsewhere. Even though these laws did have an impact on investors that influenced the decline, this was only one of many factors: Bright S *Landlord and Tenant Law in Context* (2007) 55. Factors such as slum clearance; housing rehabilitation; the increase in owner-occupation; and subsidies and tax allowances contributed to the decline: Balchin P & Rhoden M *Housing Policy: An Introduction* (4th ed 2002) 123-124.

Strengthened rights of tenants might result in some balance between the contracting parties with regard to the division of different interests.[82]

The state may intervene in the rental housing market for a variety of reasons, including the desire to grant better tenure security for tenants, to develop and improve the supply of affordable housing or to maintain economic production. The extent to which the state should intervene (for either economic or social reasons) is uncertain and an unavoidable issue in landlord-tenant law.[83] Statutory intervention manifestly restricts the rights of landowners to use their property in the way which they seem fit and, unsurprisingly, such intervention usually stimulate some form of debate opposing the restrictions by private sector landlords. Initially, the "powerful political and philosophical rhetoric of property" was used to oppose statutory restrictions.[84] This power of property rhetoric influenced the executive and parliament in placing a restriction on law making.[85] In the middle ages the majority of writers agreed that the right to property formed part of what was called "the fundamental law of England" which bound parliament and the Crown.[86] Irrespective of the lack of a written constitution, the right to property was included in the constitution (in the broader sense) which recognised that the state had a limited power to regulate property.[87] The state has intervened in both the social sector (including public and social housing) and private sector, placing restrictions on the contractual freedom of the parties and therefore effectively limiting the power of owner-occupiers. However, the power of property rhetoric is not undermined by these restrictions, because regulatory interference with property still requires justification.[88]

According to Reich, one of the functions of property is to distinguish between private and public power. Private power functions within the boundaries of property, because it provides the owner (or owner-occupier) with a greater degree of

[82] Bright S *Landlord and Tenant Law in Context* (2007) 51. The 1987 Law Commission found that an interference with the landlord-tenant relationship (and more specifically the contractual agreement between the parties) is justified when it is necessary to establish a balance between the contracting parties because the freedom to contract is in fact illusory as a result of the unequal bargaining power: United Kingdom Law Commission *Landlord and Tenant: Reform of the Law* (1987) Law Com No 162.
[83] Bright S *Landlord and Tenant Law in Context* (2007) 52. See Chapter 7 in this regard.
[84] Bright S *Landlord and Tenant Law in Context* (2007) 53.
[85] Bright S *Landlord and Tenant Law in Context* (2007) 53.
[86] Allen T *Property and the Human Rights Act 1998* (2005) 8.
[87] Allen T *Property and the Human Rights Act 1998* (2005) 8.
[88] Bright S *Landlord and Tenant Law in Context* (2007) 53. See Chapter 6.

freedom.[89] Within this "circle" the owner has authority and the state must justify any regulatory interference. These principles are similar in the common law, where the point of departure was to give effect to the property or economic interests of a person. If the state exercised state power, the interests of individuals had to prevail except where there was clear authority for these interests to be restricted. In such an event the statutory requirements for the restriction had to be strictly complied with.[90] It is questionable whether this logic of recurrent justification for state intervention in landlord-tenant law is ideal in a transformative setting.

Although the law is central to the process of transformation, one should keep in mind that economic, social and political factors also influence reform in a subsidiary manner. The law must constantly adapt and amend in order to efficiently adhere to the wider changing socio-economic and political context. If the legislature promulgates laws in order to achieve certain policies, without taking the economic, social and political context into consideration, the resulting policies might not be successful.[91] The "political will, energy and resources" of a country in relation to its housing system is important when applying regulatory laws. Regulatory measures will fail without the political will, to support (and initiate) the policies.[92]

The UK housing policy is currently receiving significant political attention, especially after the Barker report[93] of 2004 concluded that the instability of the housing market adversely affected macroeconomic volatility.[94] In 2007 two housing reports were initiated by the government. The Hills report[95] focused on the role of

[89] Reich C "The New Property" (1964) 73 *Yale LJ* 733-786 at 771. Reich explains how the institution of property draws a kind of "circle" that insulates the power of the individual against the state. If the individual functions outside the boundaries of the "private property circle", he has to justify his actions, but inside the circle the state must justify any interference with the right. The metaphor is further developed with reference to the burden of proof: if the owner functions within the boundaries of property, the state bears the burden of proof because it must justify intervention.

[90] *Landlords Association for Northern Ireland's Application for Leave to Apply for Judicial Review; Re Boyle, Greer, Jackson and Laird's Application for Judicial Review, Re* [2005] NIQB 22 at para 41. This was also the point of departure in pre-1994 case law: see Chapter 2 in this regard.

[91] Bright S *Landlord and Tenant Law in Context* (2007) 55, 56.

[92] Bright S *Landlord and Tenant Law in Context* (2007) 58. Housing measures introduced to address the housing problem during the nineteenth century failed because of the absence of a clear political goal.

[93] Barker K "Review of Housing Supply – Delivering Stability: Securing our Future Housing Needs" (HM Treasury and ODPM, March 2004).

[94] Bright S *Landlord and Tenant Law in Context* (2007) 149.

[95] Hills J "Ends and Means: The Future Roles of Social Housing in England" (Case Report 34, February 2007).

social housing and the Cave review[96] focused on the regulation of social housing. The underlying aim guiding the housing policy at the moment is to provide a decent home for every person. The primary goal is to guarantee an adequate supply of housing, while the subsidiary goal is to provide affordable houses in a decent standard. The government is also striving to create "sustainable communities" where individuals would choose to live.[97]

Apart from the government's aim to make available an adequate supply of housing, one should take note of the various housing sectors and their different functions within this process of supplying homes. The enhancement of owner-occupation still takes precedence in the housing policy, but it includes attention for different forms of shared ownership because not all occupiers can afford "full ownership".[98] The English legislature has developed a complex tenure[99] system that provides different kinds of homes, with different levels of security of tenure, in order to accommodate individuals with diverse needs. Of importance to the landlord-tenant framework is that there are four types of tenure: owner-occupation, council renting, housing association renting and private renting.[100] In order to understand the government's involvement in the process of providing housing, one should primarily distinguish between social renting and private renting. Social housing (including social renting) is provided by "not-for-profit" landlords at below-market rents, although "for profit" developers have recently become involved in this sector.[101] Social housing can usually be associated (or recognised) with supply-side subsidies from the state, consisting of financial aid for certain programmes; below-market rents imposed by legislation; provision of housing for low income candidates and enhanced tenure security when facing eviction.[102] The function of the government is central in social housing because this sector of housing provision is a form of

[96] Cave M "Every Tenant Matters: A Review of Social Housing Regulation" (June 2007).
[97] Bright S *Landlord and Tenant Law in Context* (2007) 150. See also HM Treasury and ODPM "Housing Policy: An Overview" (July 2005) 1.1. The planning system, release of land for building and financing of housing are important factors the government has considered in order to achieve these aims.
[98] Bright S *Landlord and Tenant Law in Context* (2007) 151.
[99] Tenure is generally referred to as the way in which an occupier takes hold of land, such as freehold or leasehold: Bright S *Landlord and Tenant Law in Context* (2007) 150.
[100] Bright S *Landlord and Tenant Law in Context* (2007) 150.
[101] Bright S *Landlord and Tenant Law in Context* (2007) 152.
[102] United Nations Economic Commission for Europe *Guidelines on Social Housing: Principles and Examples* (April 2006) chapter II.

"governance".[103] The concept of social housing creates a framework where it becomes possible for the government to regulate the sector in order to achieve social ideals, including responsible tenants (realised through moral regulation); the provision of decent standard housing to a diverse group (referred to as a redistributive agenda); and a "social integrationist agenda".[104] Social housing therefore serves a fundamental role in society in which the provision of affordable, decent housing is central.[105] Against this background one can conclude that social rental housing is a key form of housing for marginalised occupiers, because the state is proactively involved in the provision of housing. The state is at liberty to assess the market, amend the legislation where it is not functioning efficiently and provide secure homes to low-income households.

In order to understand the English rental housing framework, especially with regard to the level of tenure security provided for by the legislature, it is necessary to distinguish between different types of landlords. As mentioned previously, the Housing Act 1988 regulates housing association lettings and private lettings. However, the level of tenure security afforded to housing association tenants differs from the level provided for private sector tenants. Currently, housing associations prefer to give longer-term security of tenure for its tenants, while the private sector, functioning in the private market, is not providing long-term tenure security. The tenure security enjoyed by housing association tenants is similar to the rights enjoyed by council housing tenants, regulated by the Housing Act 1985. The social housing sector (including council housing and housing associations) is providing long-term tenure security for its tenants, because these tenants generally tend to be the vulnerable members of the community. The level of tenure security granted by the landlord is therefore a determining factor in the division of the rental housing framework.[106] The social sector (as phrased within this chapter) therefore consists of public housing, which is usually made available by the local authority, and social housing, which is provided by housing associations. The private sector consists of housing made available by private landlords. This distinction is useful in

[103] Cowan D & McDermont M *Regulating Social Housing, Governing Decline* (2006) 21.
[104] Bright S *Landlord and Tenant Law in Context* (2007) 153.
[105] Hills J "Ends and Means: The Future Roles of Social Housing in England" (Case Report 34, February 2007) 1. The sector also encourages work incentives while avoiding area polarisation.
[106] Bright S *Landlord and Tenant Law in Context* (2007) 153-154.

consideration of the level of tenure security afforded. The legal division, that is, the legislation applicable to the different relationships, is not as useful in practice.

4.5 Historical survey

4.5.1 Private sector

The changing social and political circumstances during the last century influenced statutory intervention in landlord-tenant law, although the interventions have been inconsistent and complicated.[107] Before the beginning of the twentieth century the relationship between landlord and tenant was based on the common law and custom, which placed strong emphasis on freedom of contract and property. During this period there was little or no government interference in the landlord-tenant relationship and the private sector represented more than ninety percent of the rental market.[108] At the end of the nineteenth century, increased urbanisation led to a shortage of housing supply in urban areas.[109] The Rents Act 1915[110] was enacted to provide security of tenure and rent control in the private rental sector, although it was intended as a temporary war-time "emergency" measure.[111] As a result of increased

[107] Bridge SB *Residential Leases* (1994) 1.

[108] Bright S *Landlord and Tenant Law in Context* (2007) 184. Bright S *Landlord and Tenant Law in Context* (2007) 155 explains that before the end of the nineteenth century the Cross Act (Artisans' and Labourers' Dwellings Improvement Act 1875) was introduced to provide for the establishment of housing associations, being the first "executors of state policy". These associations were involved in clearing slums and leasing to charities although the demand for affordable housing still increased.

[109] Bright S *Landlord and Tenant Law in Context* (2007) 155-156 explains that during this period the need to increase housing supply was seen as a public health issue. Private landlords were not encouraged through state subsidies to invest in building rental accommodation. At the beginning of the twentieth century government realised that some state action was required to alleviate the housing crisis, because neither private landlords nor housing associations could supply enough adequate, affordable housing.

[110] Bright S *Landlord and Tenant Law in Context* (2007) 156 mentions that in 1914 only one percent of the housing stock in Britain was council housing, while by 1979 32 percent of the stock was owned by local authorities. This increase was a result of state subsidies that were provided to local authorities so that they could build more houses without necessarily increasing rents.

[111] Bridge SB *Residential Leases* (1994) 1; Bright S *Landlord and Tenant Law in Context* (2007) 184-185. At 156 Bright explains that the result of state regulation in the private rental sector was a decline in the supply of housing, which led to a shift in policy with regard to the role of the landlord in the provision of rental housing - more emphasis was placed on the duty of the local government to provide housing. See Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 152-157 for a discussion of statutory tenant protection during 1915-1980, focusing on government policy and the socio-economic circumstances during this period. Partington concludes that the initial purpose of the Rent Act was to provide protection for the poorest tenants, although the scope of protection gradually extended to the majority of tenants by bringing different types of property into the pool. Another important conclusion is that the development of landlord-tenant law

inflation and continued housing shortages the legislature introduced further regulatory measures, which remained on the statute book for the largest part of the twentieth century. During the 1950s[112] deregulation of the private rental market led to the exploitation of tenants, but since the Protection from Eviction Act 1964 required a court order before eviction could take place, tenants enjoyed the protection of due process in eviction proceedings.[113] The 1965 Rent Act replaced the initial *rent control* provisions with a new system of *rent regulation*. Rent control was aimed at freezing rents at historic levels, although making provision for certain increases, while rent regulation included consideration of the value of the property when determining a "fair rent". The scarcity of housing was irrelevant when determining the rent.[114]

As a result of state regulation in the private rental sector the rental housing market became unattractive as an investment opportunity for landlords, which contributed to a decline in private rental housing during the twentieth century. At the end of the 1970s the private rental sector merely provided thirteen percent of housing. Government regulation contributed to this decline, although the absence of state subsidies also played a role.[115] The Rent Act 1977 consolidated the previous Rents Acts and provided long-term tenure security for tenants.[116] The law of residential leases was in a "reasonably coherent and comprehensive state" in 1979,[117] but after the Conservative Party was elected in 1979 the policy changed, moving away from the aim to grant better tenure security for tenants and towards increasing private rental housing supply.[118] The government created new forms of

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cannot be understood through consideration of the law in isolation; one has to consider housing policy "and the law that purports to give effect to that policy, has long been a matter of acute political controversy. Suggestions that 'politics should be taken out of housing' are inevitably misguided": Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 156-157.The Rent Act has a social function which is connected to underlying political issues.

[112] Between 1950 and 1960 Britain experienced good employment and economic prosperity, which led to an increase in owner-occupation, although the main political parties also encouraged owner-occupation: Bright S *Landlord and Tenant Law in Context* (2007) 158. Owner-occupation was politically, socially and economically more attractive than rental housing.

[113] Bright S *Landlord and Tenant Law in Context* (2007) 185. Landlords threatened tenants in order to evict them and replace them with higher paying tenants. If the landlord evicted the tenant without a court order, he could be criminally charged. Due process is currently still required in English and South African land law.

[114] Bright S *Landlord and Tenant Law in Context* (2007) 185. "Fair rent" was always less than market rent. See also Bridge SB *Residential Leases* (1994) 2 for a discussion of the various acts and policies during 1915-1965.

[115] During this period state subsidies were available to local councils: Bright S *Landlord and Tenant Law in Context* (2007) 159.

[116] Bright S *Landlord and Tenant Law in Context* (2007) 186; Bridge SB *Residential Leases* (1994) 2.

[117] Bridge SB *Residential Leases* (1994) 2.

[118] Bridge SB *Residential Leases* (1994) 3.

letting in the Housing Act 1980, although maintaining some regulation over rent through fair rent controls. Security of tenure was gradually phased out, especially through the introduction of "shorthold" tenancies, which afforded landlords the means to regain possession upon expiration of the lease.[119]

At the end of the 1980s the government was convinced that security of tenure, combined with rent control, had a major impact on the decline of private rental housing and therefore deregulated the sector through the enactment of the Housing Act 1988. The result was that long-term private tenants could be evicted at the end of their contractual tenancy and that the landlord could determine the rent.[120] Through the deregulation of the private rental market and the introduction of tax incentives,[121] the government anticipated some growth in the sector, combined with an increase in corporate investment. The private rental sector did increase by 25 percent from 1988 to 1999, but currently the sector represents merely eleven percent of the housing stock in Britain.[122]

4.5.2 Social sector

4.5.2.1 Housing association lettings

Public housing provided a small percentage of housing until 1945, when the mass house-building programmes led to an increase in the building of publicly owned dwellings.[123] The Rents Acts regulated housing association lettings, which practically formed part of the social sector, but were regulated under the private sector. In 1954 some of these social-sector tenancies fell outside of the private sector. The Housing Corporation was created in 1964 but only became significant in 1974, when housing associations were obliged to register with the Corporation in order to receive public funds. The role of social housing gradually increased through the enforcement of

[119] Bridge SB *Residential Leases* (1994) 4.
[120] Bright S *Landlord and Tenant Law in Context* (2007) 167-168.
[121] The Finance Act 1988 placed residential properties within the "Business Expansion Scheme" which provided "tax benefits to individuals buying shares in companies investing in rental properties": Bright S *Landlord and Tenant Law in Context* (2007) 168.
[122] Bright S *Landlord and Tenant Law in Context* (2007) 168.
[123] Bridge SB *Residential Leases* (1994) 2. Councils and similar bodies had a public duty to deliver a large volume of housing, which meant that this sector also had a duty to construct public rental accommodation.

registration. Housing associations could acquire capital from these funds to construct new housing developments.[124] The Rent Act 1977 provided that, if the association was registered with the Housing Corporation, the lease would not be regulated by the Rent Act.[125] The role of social housing was uncertain because it could either make available large-scale housing to various members of the community, or provide housing only to the most vulnerable as a "safety net".[126] Local authorities chose to make available quality housing to tenants with secure incomes,[127] which forced the government to make available subsidies.[128] In 1980[129] housing associations that were registered afforded secure tenure rights for tenants, although rent regulation was still enforced on all housing associations through the Rents Acts.

During 1986 the government realised that it had to reduce government subsidies to housing associations, but a general decrease in the funds that were available for the associations was not considered sensible. In order to enable housing associations to receive finance from private funders these associations had to be privatised, which led to the transfer of housing associations from the social sector to the private sector. On 15 January 1989[130] housing associations became part of the private sector, which meant that the Housing Act 1988 became applicable

[124] Bright S *Landlord and Tenant Law in Context* (2007) 164. Currently the Corporation has a regulatory role: it provides guidance with regard to issues such as rent setting and allocation policies.
[125] Bright S *Landlord and Tenant Law in Context* (2007) 188.
[126] Bright S *Landlord and Tenant Law in Context* (2007) 157. See in this regard Harloe M *The People's Home? Social Rented Housing in Europe & America* (1995) 71-72 where the author makes a distinction between three social housing models, namely the "residual" model, the "mass" model and the "workers" model. The mass model is characterised by large-scale housing that is provided for a wide variety of tenants, while the residual model focuses on the poorest members of society, providing accommodation to a smaller sector. According to Harloe, both models have been implemented in Britain at various points in time. The mass model was implemented after the First and Second World War (illustrating the character of the model as "abnormal" because it provides housing during a period of crisis), while the residual model dominated whenever the mass model was not enforced (illustrating that the residual model could be described as the "normal form of social housing").
[127] Local authorities had the discretion to allocate housing without any constraints from the state. Some local authorities adopted a bureaucratic approach (allocating housing on a fair and equal basis), although the procedures and rules had a discriminatory effect in some instances. This approach was unsatisfactory and the government introduced a "market-based mechanism" for the allocation of housing: Bright S *Landlord and Tenant Law in Context* (2007) 191, 197. Private-sector landlords are at liberty to choose their tenants as long as they comply with the non discrimination laws: Bright S *Landlord and Tenant Law in Context* (2007) 201.
[128] Bright S *Landlord and Tenant Law in Context* (2007) 157.
[129] After 1980 housing associations became more important in the provision of housing. Before 1960 the local authority took responsibility for the development of social rental housing, while shortly thereafter more emphasis was placed on the role of housing associations through the creation of the Housing Corporation and legislation: see further Bright S *Landlord and Tenant Law in Context* (2007) 159.
[130] Bright S *Landlord and Tenant Law in Context* (2007) 165.

to housing association tenants.[131] Housing association tenants received "assured tenancies" and therefore lost the tenure security they were afforded as local authority tenants. Housing associations were also at liberty to set their own rent levels because the "fair rent" requirement no longer applied to these associations.[132]

The nature of housing associations changed as a result of the stock transfer programme and the right to acquire (RTA) programme implemented in 1996, which was similar to the right to buy programme.[133] The stock transfer programme made provision for the transfer of council housing to housing associations, while the right to buy programme enabled council tenants to purchase council property at a discount.[134] Housing associations started off as non-profit organisations, providing a limited amount of housing, but recently these associations have doubled in size and are functioning like a business.[135]

4.5.2.2 Local authority lettings

Initially, council tenants had periodic leases that could be ended by notice to quit. The relationship was governed by the common law and local authority tenants did not enjoy the statutory security of tenure that was afforded to private tenants. Although there was no statutory system of protection, the local councils "exercise[d] their powers in a public-spirited and fair way in the general public interest".[136] Parliament retained its policy of non-intervention in public rental housing until the Thatcher administration introduced legislative measures to regulate the relationship between council tenants and the local authority. In 1966 the local authority housing stock had expanded to 27 percent of the housing stock (in comparison to the 24 percent of housing made available by the private sector).[137] The Tenant's Charter that was introduced in 1980 ensured protection for local council tenants in the event

[131] Bright S *Landlord and Tenant Law in Context* (2007) 189. The Housing Corporation encouraged assured tenancies instead of shorthold tenancies (which afforded weak security of tenure), although housing associations are still at liberty to lease property on a shorthold tenancy basis.
[132] Bright S *Landlord and Tenant Law in Context* (2007) 165.
[133] See Bright S *Landlord and Tenant Law in Context* (2007) 160-164 for more detail on these changes.
[134] Bright S *Landlord and Tenant Law in Context* (2007) 160.
[135] Bright S *Landlord and Tenant Law in Context* (2007) 165-167.
[136] *Shelley v London County Council* [1948] 1 KB 274 (CA) 283.
[137] Bridge SB *Residential Leases* (1994) 2-3.

of eviction although, according to Brandon LJ, this codification was not intended to meet any immediate housing crisis.[138] The Charter was to a large extent a codification of the local authority rental system and was adopted in the Housing Act 1985.[139]

After 1980 state intervention decreased and the role of the local authority became less dominant.[140] Owner-occupation increased through the implementation of various policies, especially the right to buy (RTB) scheme that was introduced in 1980. Secure council tenants who had occupied council housing for a period of at least three years could purchase the property at a generous discount, but the local authority was not allowed to use that capital to build new council houses, which again led to a shortage in public housing.[141] The restrictions placed on new building also contributed to this shortage. The RTB system was successful in its aim to increase owner-occupation,[142] but the social consequences were that only the very poor eventually occupied council housing by the end of the 1990s. The effect was that wealthier council tenants were enabled to buy the better quality council houses, while the marginalised and poor remained in the dilapidated remaining council housing stock. The absorption of the lowest income group in council housing led to social exclusion,[143] which resulted in social and economic problems.[144]

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[138] *Harrison v Hammersmith and Fulman London Borough Council* [1981] 1 WLR 650 (CA) 661.

[139] Bright S *Landlord and Tenant Law in Context* (2007) 189. State control through legislation or subsidies in the public rental sector affected local authority autonomy in housing. Interference was inspired by welfare reasons rather than to establish direct state control over the implementation of policy. At the end of the 1970s council housing became a significant form of tenure which provided housing to a reasonably high percentage of tenants, while housing associations provided relatively less accommodation: Bright S *Landlord and Tenant Law in Context* (2007) 158-159.

[140] Bright S *Landlord and Tenant Law in Context* (2007) 160. The role of the local authority changed from providing housing towards developing policy and strategy in order to provide houses.

[141] Bright S *Landlord and Tenant Law in Context* (2007) 160-161. In 1982, 200 000 council houses were bought by council tenants: these houses were not replaced with new council houses. Currently more than 1.7 million houses have been bought through the RTB system. Government policy with regard to the availability of housing finance and subsidy changed in order to promote owner-occupation. Central government also increased rents in order to influence council tenants to become owner-occupiers. See sections 180-194 of the Housing Act 2004 for the amendments applicable to the exercise of a right to buy and sections 195-205 for the provisions relating to disposals attracting discounts other than under the right to buy.

[142] RTB enabled households that would not have been able to do so without the policy to become owner-occupiers. Council tenants could also remain in their homes and therefore did not have to move location. Owner-occupation increased from 55 percent in 1979 to 70 percent in 2000: Bright S *Landlord and Tenant Law in Context* (2007) 161.

[143] Social exclusion is the result of various problems including poor housing, unemployment, low incomes, discrimination and ill health: Bright S *Landlord and Tenant Law in Context* (2007) 162-163, referring to the Social Exclusion Unit of the ODPM (http://www.communities.gov.uk/housing/ (accessed 21 July 2009)).

These problems were addressed through various programmes,[145] including large-scale voluntary transfer (LSVT). In terms of this programme council stock was transferred to housing associations, while the introduction of registered social landlords (RSL) in 1996 made provision for the formation of non-profit bodies to take over council stock. RSL included housing associations and "local housing companies" that had local authority representation on their board. Through stock transfer the local authority could access new private finance to restore local authority housing.[146]

4.6 Current legislation

4.6.1 Rent Act 1977

The Rent Act 1977 regulates private sector tenancies, but generally it only applies to tenancies granted before 15 January 1989.[147] According to section 1, a "protected tenancy" is a tenancy[148] under which a dwelling house is let[149] as a separate dwelling.[150] Section 4(1) provides that certain dwellings will be excluded from the Act, based on the rateable value of the property. The section states that, if the property falls within one of the classes identified in section 4(2), it will be excluded from the ambit of the Act.[151] These sections illustrate the aim of the Act which is to afford protection for lower income tenants and not to provide protection for wealthy

[144] Bright S *Landlord and Tenant Law in Context* (2007) 162. At the end of the 1990s council housing represented 13 percent of the housing stock. See Malpass P & Murie A *Housing Policy and Practice* (5th ed 1999) 17-18 for a discussion of residualisation ("a process embracing changes in the social composition of council housing as well as the related policy changes") and marginalisation (referring to the decrease in demand for labour as machines replace labour, resulting in poor individuals relying on council housing because they cannot access housing elsewhere).

[145] Certain bodies called housing action trusts were formed to improve council housing and sell the houses to private landlords or housing associations, but this programme was not successful: Bright S *Landlord and Tenant Law in Context* (2007) 163.

[146] Bright S *Landlord and Tenant Law in Context* (2007) 164.

[147] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 165. There are three exceptions where the landlord can create a protected tenancy after 15 January 1989. See Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 165 in this regard.

[148] The tenancy may be for a fixed term or periodic: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 166.

[149] In order for a tenancy to fall within the scope of the Act, there has to be some form of rent paid and the rent has to be quantifiable in money terms: *Barnes v Barratt* [1970] 2 QB 657 at 667.

[150] See Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 240-244 for a discussion of the qualified conditions necessary to constitute a tenancy.

[151] See Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 245 for a discussion of these sections and the operation of the various classes.

occupiers who choose to rent high rateable value properties.[152] Contrary to section 4, section 5 excludes tenancies at a low rent. The aim of this section is to "exclude long leaseholders who pay a nominal ground rent to their freeholder" and not (necessarily) to exclude tenants occupying private rented accommodation on a periodic basis who pay low rents.[153] Sections 6-16 also exclude various other tenants, including a tenant who occupies a dwelling-house which is let with other land;[154] lettings to students;[155] holiday lettings;[156] agricultural holdings;[157] licensed premises;[158] assured tenancies;[159] and business tenancies.[160]

Section 2(1) provides that if the protected tenant remains in the property upon expiration of the protected tenancy, he becomes a statutory tenant.[161] The statutory tenancy commences when the protected tenancy concludes. The protected tenancy can end by notice to quit (in the case of a periodic tenancy), forfeiture,[162] effluxion of time (in the case of a fixed-term tenancy) or through any other common law

[152] Garner S A *Practical Approach to Landlord and Tenant* (2nd ed 1998) 170.
[153] Garner S A *Practical Approach to Landlord and Tenant* (2nd ed 1998) 172-173. According to section 5 the rent has to be less than £1000 per annum in London and £250 per annum elsewhere if the tenancy was commenced on (or after) 1 April 1990 in order for it to be excluded from the Act. See sections 5-16, 24 of the Act for the remaining exclusions.
[154] Section 6.
[155] Section 8.
[156] Section 9.
[157] Section 10.
[158] Section 11.
[159] Section 16A.
[160] Section 24(3). See Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 246-257 for a discussion of these exclusions. See also section 101 for the exclusion of overcrowded dwellings.
[161] There are four requirements for a statutory tenancy to commence: the tenant must have been a protected tenant as provided for under the Rent Act; the protected tenancy must have been terminated; the protected tenant must have occupied the relevant property before the tenancy ended; and the protected tenant must have continued to occupy the leased property after the protected tenancy has terminated: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 182. The terminology is similar to that used in the pre-1994 South African Rents Acts: see Chapter 2.
[162] Where the tenant has committed a breach of covenant the landlord can make use of a remedy called forfeiture. The remedy enables the landlord to re-enter the dwelling and forfeit the tenancy. Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 469 describe forfeiture as the "most draconian weapon in the armoury of the landlord". Through the exercise of this remedy the landlord can reclaim the property as part of his proprietary interest, clearly demonstrating the strong common law right of landlords to effortlessly repossess the leased property, also referred to as "the owner's absolute power of exclusion in civil-law systems": Van der Walt AJ *Property in the Margins* (2009) 99. Initially, this remedy was so extensive that the landlord did not even have to obtain a court order. Where the tenant refused to vacate the premises he could use force in order to physically re-enter the property: *Butcher v Poole Corporation* [1943] KB 48. The remedy has become ineffective recently as a result of due process regulation. The United Kingdom Law Commission *Termination of Tenancies for Tenant Default* (2006) Law Com No 303, Part 2: Overview of the Scheme recommended that the entire remedy should be abolished and replaced with a statutory scheme for termination of tenancies.

method.[163] Once the contract ends according to the common law, the statutory code affords the tenant continued occupation rights. The protected tenancy depends on the contractual relationship of the parties and can only exist as long as the contract is intact. The statutory tenancy also depends on the nature of the previous contract as a protected tenancy. The statutory tenancy will only arise through the operation of section 1 of the Rent Act or through succession.[164] If the landlord wishes to repossess his property he would have to terminate the protected tenancy (also referred to as the contractual tenancy), whereafter the tenancy would automatically convert into a statutory tenancy. The only way in which a landlord can terminate the statutory tenancy is to claim possession in court, based on one of the grounds for possession, as stated in the Act. The court can only grant the possession order if the landlord can prove a relevant ground for possession.[165] The Rent Act therefore amended the common law position according to which the tenant's right to occupy the premises terminated upon expiration of the contract.[166]

A statutory tenancy is a personal right and does not provide the tenant with a proprietary interest.[167] The tenancy is created by statute (and can therefore be

[163] Van der Walt AJ *Property in the Margins* (2009) 99 mentions that forfeiture, effluxion of time and notice to quit were the three most important ways in which to end a tenancy at common law.

[164] Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 290-294. See Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 197-200 for an extensive discussion of the succession of statutory tenancy as regulated by the Rent Act 1977 and the amended position regulated under the Housing Act 1988. The general rule is that the tenancy will not end as a result of the death of the tenant. At common law the residue of the tenancy will succeed in accordance with the tenant's will or intestate: Bright S *Landlord and Tenant Law in Context* (2007) 546-551; Van der Walt AJ *Property in the Margins* (2009) 97.

[165] Bridge SB *Residential Leases* (1994) 99. Where a landlord institutes a claim for possession based on one of the grounds listed in section 98, although excluding the grounds listed in Schedule 15 Part II, the court has a discretion to adjourn the proceedings, stay or suspend the execution of the order or postpone the date of possession: Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 289-290. See Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 196-197 for a discussion of the suspension or postponement of possession orders with reference to the Rent Act 1977 and the Housing Act 1980.

[166] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 187.

[167] In *Keeves v Dean* [1924] 1 KB 685 at 686 per Lush LJ the court found that a statutory tenancy does not provide the tenant with a proprietary interest but rather affords the tenant with a "status of irremovability". According to Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 181-182 a statutory tenancy cannot in general be assigned, disposed of by will or be sub-let (the whole of the property, see *Roe v Russel* [1928] 2 KB 117 (CA)). A statutory tenancy will bind a successor to the landlord's title but will not prevail against a mortgagee seeking possession in order to realise his security: *Britannia Building Society v Earl* [1990] 1 WLR 422 (CA). See Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 184-188 for a discussion of statutory tenancy through succession. The general rule is that the statutory tenancy can be transmitted to a member of the deceased tenant's family, although the Housing Act 1988 introduced restrictive rules governing succession. The nature of the transmission will also depend on when the tenant dies, who the successor is and which transmission it is (the Rent Act 1977 makes provision for a second

defined as a creature of statute)[168] and not by agreement, although the terms of the protected tenancy will remain relevant and will be adopted in the statutory tenancy, provided the terms of the tenancy are consistent with the Rent Act.[169] Considering these provisions one can conclude that the Act does grant substantive tenure rights[170] for the tenant through the mechanism of statutory tenancy and by allowing the landlord to repossess the property in limited, statutorily defined circumstances.[171]

If a statutory tenant does not voluntarily vacate the leased premises upon termination of the protected tenancy, the landlord will only be able to repossess the property by obtaining a court order.[172] Section 98 regulates the limited circumstances under which a landlord can obtain a possession order, although one should distinguish between section 98(1) and section 98(2). Section 98(1) regulates the "discretionary grounds", while section 98(2) regulates the "mandatory grounds". Section 98(1) states that the court can only grant a possession order if the court considers it reasonable and is convinced that there is either suitable alternative accommodation available for the tenant or one of the circumstances as specified in any of the cases in Part I of Schedule 15 (also known as the "discretionary cases") is satisfied.[173] Where the landlord proves one of the discretionary grounds, but the court does not consider the possession order reasonable, the landlord will not be able to repossess the property because reasonableness is an "overriding requirement".[174]

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transmission). See section 2.2.2 in Chapter 2 for a discussion of the *huur gaat voor koop* rule that applies in the South African context.

[168] According to Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 187, the statutory tenant is not a tenant in the true sense of the word because he has "no estate or interest in the premises, no existing contract of tenancy and no right at common law to retain possession".

[169] Bridge SB *Residential Leases* (1994) 105. Where the protected tenancy for instance states that the tenant is obliged to vacate the property upon termination of the contract, the term would be inconsistent with the Act and therefore be excluded from the statutory tenancy. One of the terms included in the statutory tenancy is that the tenant must give notice to quit, either as determined in the protected tenancy or for a period not less than three months. See also Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 294-296.

[170] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 181 defines "security of tenure" as rights acquired by a tenant through the operation of a statutory code which effectively overrides the common law in order to protect the tenant upon expiration of the lease. The extent of protection will depend on the statutory code and therefore also indirectly on government policy. See in this regard Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 275-277.

[171] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 181.

[172] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 197.

[173] This section therefore requires reasonableness and either the availability of alternative accommodation or one of the grounds as provided for in the schedule.

[174] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 202.

In *Cumming v Danson*[175] the court found that, in order to establish whether a possession order is reasonable, the court has to consider "all relevant circumstances as they exist at the date of the hearing", which gives the court a wide discretion in determining reasonableness.[176] The court is at liberty to consider any factor, "in a broad-common sense way", that might affect either the landlord or the tenant and may attach the appropriate weight to the given factor.[177] The question of reasonableness will vary in each case because the circumstances will differ. The court has to consider the unique circumstances of each case on a fact based approach.[178] From the case law it follows that the courts consider various circumstances, including the personal circumstances of both parties.[179] The tenant's emotional attachment to the property, considering the length of time during he occupied the premises, has also been taken into account.[180] In addition, the courts have considered circumstances not directly related to the parties, such as the general purpose of the Act[181] and the public interest.[182]

The alternative accommodation requirement[183] will be satisfied if the landlord obtains a certificate from the local authority certifying that it will provide the tenant with the necessary accommodation or if the landlord arranges accommodation for the tenants from another private landlord.[184] In terms of the Act, the alternative accommodation will only be suitable if it either offers full Rent Act protection or security of tenure that is reasonably equal to the extent of protection granted by the

[175] [1942] 2 All ER 653 at 655 per Lord Greene MR.
[176] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 190 state that the onus is upon the landlord to convince the court that a possession order would be reasonable.
[177] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 202. The reasonableness requirement therefore provides the court with the means to balance the rights of the parties, because the court must consider all the relevant circumstances that affect both parties in either a negative or positive way.
[178] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 202. In *Darnell v Millwood* [1951] 1 All ER 88 at 90 the court found that if a party is unsatisfied with the judge's finding regarding the reasonableness requirement, he would have to prove that the judge misdirected himself in law because each case is determined on its own set of facts.
[179] Personal circumstances would include the health of the parties (*Briddon v George* [1946] 1 All ER 609 at 610), the age of the parties (*Battlespring Ltd v Gates* (1984) 11 HLR 6 (CA) 11), the financial consequences of a possession order (*Williamson v Pallant* [1924] 2 KB 173 at 176-177), the loss of amenities for the tenant (*Siddiqui v Rashid* [1980] 1 WLR 1018 (CA) 1022) and the landlord's reasons for wanting possession (*Minchburn Ltd v Fernandez* (1987) 19 HLR 29 (CA) 33).
[180] *Battlespring Ltd v Gates* (1984) 11 HLR 6 at 11.
[181] *Redspring Ltd v Francis* [1973] 1 WLR 134.
[182] *Cresswell v Hodgson* [1951] 1 All ER 710.
[183] See also the general discussion on alternative accommodation with regard to the Rent Act 1977, Housing Act 1988 and Housing Act 1985 in Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 277-279.
[184] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 199.

Rent Act 1977.[185] The Housing Act 1988 makes provision for the continuation of a protected tenancy in alternative accommodation after 15 January 1989 if, "in the circumstances, the grant of an assured tenancy would not afford the required security".[186] The Rent Act also requires that the accommodation must be "reasonably suitable to the needs of the tenant and his family as regards proximity to place of work".[187] Paragraph 5 furthermore requires that the character and rental of the accommodation must be suitable. In order to satisfy this requirement the landlord would usually have to persuade the court that the accommodation is reasonably suitable to the "housing needs" of the tenant and his family.[188] There has been some controversy in the courts regarding this requirement. In *Hill v Rochard*[189] the court found that the Rents Acts were not intended to protect the tenant's particular taste for amenities. In *Redspring Ltd v Francis*[190] the court found that environmental factors such as the absence of a garden, a busy thoroughfare next to the premises and close proximity of a pub and fish and chip shop could render a property unsuitable. The court took a different view in *Siddiqui v Rashid*,[191] where it was found that the alternative accommodation proposed by the landlord was suitable even when the accommodation would place the tenant too far from his social connections, mosque and cultural interests.

If the landlord is unable to satisfy the alternative accommodation requirement he would have to prove one of the cases listed in Part 1 of Schedule 15, additionally to the reasonableness requirement in order to rely on section 98(1).[192] Case 1 incorporates the situation where the rent is in arrears or where the tenant breaches an obligation in the lease. If the landlord wishes to rely on case 1 he would have to give the tenant a fair opportunity (through a letter of demand) to pay the rent at a certain date before he can apply for a possession order.[193] Case 2 regulates the

[185] Schedule 15, Part IV, para 4.
[186] Section 34(1)(c)(iii).
[187] Schedule 15, Part IV, para 5(1).
[188] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 201.
[189] [1983] WLR 478 at 485.
[190] [1973] 1 WLR 134.
[191] [1980] 1 WLR 1018.
[192] See also Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 190-192 for a brief discussion of each of the cases.
[193] If the landlord fails to give such a "letter before action" the court would be unlikely to consider a possession order reasonable. If the landlord relies on a breach of the lease he would find it difficult to satisfy the reasonableness requirement if the breach has been remedied at the date of the hearing: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 203. The Housing Act 1988

position regarding nuisance or annoyance[194] to adjoining occupiers and usage of the dwelling for illegal or immoral purposes.[195] If the tenant or person residing with the tenant is found guilty of nuisance or annoyance to adjoining occupiers, the landlord would be able to rely on this ground although, if the landlord wishes to rely on the fact that any of these persons used the property for illegal (or immoral) purposes, he would have to prove that the person has been convicted. If the premises deteriorated as a result of the tenant's neglect or acts of waste, the landlord can rely on case 3.[196] Case 5 regulates the position where the tenant gives notice to quit 'but then subsequently decides to remain in the premises.[197] Case 6 may entitle the landlord to repossess the premises where the tenant sublet or assigned the property without the landlord's consent, even if there is no prohibition against subletting or assignment in the contract.[198] Case 8 applies to "service tenants" where an employer provides accommodation to a full-time employee as part of the working arrangement. Where the employee ceases to work for the employer/landlord he would be able to rely on case 8 to repossess the property in order to offer it to a new employee.[199] Where the dwelling is reasonably required by the landlord for residential occupation

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includes the case of rent arrears in its mandatory list. See also Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 280.

[194] The combined phrase has a wide, non-technical meaning which could include the usage of foul language, verbal abuse (*Cobstone Investments Ltd v Maxim* [1985] QB 140 at 143) and even the exercise of "undue familiarity" outside the premises (*Whitbread v Ward* (1952) 159 EG 494). It is not required that the adjoining occupier should be the tenant's direct neighbour (*Cobstone Investments Ltd v Maxim* [1985] QB 140).

[195] The landlord has to prove that the premises itself is connected with the crime: *Schneiders & Sons Ltd v Abrahams* [1925] 1 KB 301 per Scrutton LJ at 311.

[196] Case 3 provides that "[w]here the condition of the dwelling-house has, in the opinion of the court, deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any person residing or lodging with him or any sub-tenant of his and, in the case of any act of waste by, or the neglect or default of, a person lodging with the tenant or a sub-tenant of his, where the court is satisfied that the tenant has not, before the making of the order in question, taken such steps as he ought reasonably to have taken for the removal of the lodger or sub-tenant, as the case may be." The definition of "waste" includes unauthorised improvements: *Marsden v Edward Heyes Ltd* [1927] 2 KB 1 (CA). See case 4 for the position regarding the deterioration of furniture. For a discussion of cases 2-4 see Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 281-282.

[197] The landlord must have acted as a result of the notice to quit. The landlord should either have sold or leased the property to a third party, which would result in serious prejudice if he cannot obtain vacant possession of the premises. See Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 282.

[198] Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 282. This ground is only relevant for protected tenants because a statutory tenant cannot assign a tenancy or sublet the whole of the property.

[199] Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 283. The occupying tenant had to be a full-time employee and the right to occupy the premises had to be part of the working arrangement between himself and the employer/landlord. The employment must also have ceased. The dwelling must be reasonably required for the new employee, engaged in a full-time employment with the employer/landlord.

by himself, his children (provided that they are over eighteen years old), his parents or his wife's parents, the landlord can rely on case 9 to repossess his property.[200] In terms of case 9, the court will not necessarily make an order for possession even when the landlord satisfies this requirement, because the court has to consider all the relevant circumstances, including whether alternative accommodation is available for either of the parties. The court will take into account the extent of the hardship that would be suffered by the tenant in the event of a possession order and the possible hardship suffered by the landlord in the absence of a possession order.[201] If the court finds that the possible extent of hardship suffered by the tenant exceeds the hardship suffered by the landlord, the court will not make an order for possession.[202] Case 10 provides that where the tenant sublet part of the property under the provisions of the Rent Act and the rent payable by the sub-tenant exceeds the registered rent,[203] the landlord can claim repossession.

In terms of section 98(2), the landlord can also obtain a possession order if the circumstances of the case are as specified in any of the cases in Part II of Schedule 15 (also known as the "mandatory cases"). If the landlord can prove one of the cases in Part II, he will be entitled to a possession order without having to prove reasonableness.[204] When the court is faced with a claim for possession and the landlord relies on one of the mandatory grounds, the court does not have a discretion to refuse the eviction order, based on reasonableness. However, the landlord must serve written notice to the tenant before "the relevant date",[205] stating the possible mandatory ground for possession.[206]

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[200] It is interesting to note that the Act does not include the wife of the landlord. See the rest of this provision regarding certain time limitations. See also Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 283-285 for a discussion of this ground.

[201] Case 9, Schedule 15, Part III, para 1. In order to determine whether repossession of the premises is reasonably required the court will consider whether the landlord is currently occupying residential property, whether the leased property is close to the landlord's place of work and whether the landlord or a member of his family is unhealthy.

[202] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 208. The court has a wide discretion to the extent that it can consider any circumstances, including the personal circumstances of both parties.

[203] See text accompanying ffn 218-221.

[204] See Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 192-194 for a brief discussion of these grounds.

[205] Schedule 15, Part III, para 2 regulates the relevant date. In the majority of cases the relevant date is the beginning of the tenancy.

[206] If the court finds that it is just and equitable to disregard the notice requirement, it has the discretion to do so when considering cases 11, 12, 19 and 20: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 209.

Case 11 regulates the position where the owner-occupier, who previously occupied the premises as his residence, wishes to repossess his property. One of the requirements is that the owner-occupier has not let the property, after a specified date as stated in the Act, on a protected tenancy unless the necessary notice was served by the landlord. The landlord also has to satisfy one of the conditions mentioned in Part V of Schedule 15.[207] Case 12 enables the landlord to repossess his property where he purchased the property with the intention of occupying it when he retires, but rented out the property while he worked full-time.[208] The landlord had to have served notice on a new protected tenant who entered the tenancy after 14 August 1974 and one of the conditions in Part V of Schedule 15 (paragraphs (b)-(e))[209] must have been met. The landlord is also obliged to notify the tenant of the possible ground for possession on the relevant date, although the court can dispense with this requirement.[210] Case 13 provides the landlord with the means to regain possession of holiday accommodation where the landlord granted a longer tenancy, out of season, which falls within the protection of the Rent Act 1977.[211] In order to rely on case 13 the dwelling must have been let under a tenancy for a term of years certain not exceeding eight months; the landlord must have notified the tenant that possession might be recovered under this case; and the dwelling must have been occupied as holiday accommodation within a period of twelve months. Case 14 enables an educational institution to regain possession where it granted a

[207] These conditions provide that a) the dwelling is required for residential occupation by the owner-occupier or any member of his family who resided with him when he last occupied the premises; b) the owner-occupier retired from regular employment and requires the dwelling-house as his residence; c) the owner-occupier died and a family member who resided with him at the time of his death requires the dwelling for residential purposes; d) the owner-occupier died and his successor in title requires the premises for residential purposes or for the purpose of disposing of it with vacant possession; e) the dwelling is subject to a mortgage, granted before the tenancy, and the mortgagee is entitled to exercise a power of sale (conferred on him by the Law of Property Act 1925) and he requires vacant possession of the dwelling in order to exercise that power; and f) the owner-occupier requires vacant possession in order to dispose of the property and use the proceeds of that disposal to acquire a new residence which is more suitable to his needs. The reason should be that the current leased dwelling-house is no longer reasonably suitable to the needs of the owner, especially considering his place of work.

[208] Case 20 is similar as it enables a member of the armed forces to claim possession of his rented property which was purchased with the intention to occupy it in future. See case 20 for the necessary requirements and Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 212-213 for a discussion of this ground.

[209] See fn 207 above.

[210] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 210.

[211] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 210. Holiday accommodation is usually excluded from Rent Act protection through section 9.

tenancy, regulated under the Rent Act 1977, during for instance a college holiday.[212] The dwelling must have been let under a tenancy for a term of years certain not exceeding twelve months and the landlord must have notified the tenant that he might repossess the property under case 14. Case 15 is relevant where a landlord usually provides accommodation to a minister of religion and requires vacant possession for that purpose.[213] Case 16 enables a landlord to repossess property in order to accommodate his agricultural employee.[214] Case 19 grants the landlord with a right to claim possession where the premises were occupied under a protected shorthold tenancy[215] which terminated and converted into a statutory tenancy.[216] If the dwelling is overcrowded[217] in a way that renders the occupier guilty of an offence, the landlord can obtain a possession order in terms of section 101.

A major difference between the Rent Act 1977 and the Housing Act 1988 is the extent of tenure security granted, but also the inclusion of rent control in the Rent Act and the absence thereof in the Housing Act. The Rent Act makes provision for the establishment of "fair rents",[218] which is determined by a rent official.[219] The rent

[212] Section 8 of the Act usually excludes lettings to students.

[213] The landlord must notify the current tenant of the possible ground for possession; the court must be satisfied that the minister requires the premises for residential purposes in order to perform his duties and the dwelling must be held specifically for this purpose.

[214] The Act requires that the dwelling must have been occupied by such an employee before the current tenancy was granted and the landlord must have given notice to the current tenant (which is not an agricultural employee) of the possible ground for possession. See cases 17 and 18 containing provisions related to agricultural tenancies.

[215] The protected shorthold tenancy was created by the Housing Act 1980 and afforded the landlord the means to grant a short fixed-term tenancy without providing security of tenure for the tenant: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 212.

[216] In order to rely on this ground the landlord had to give notice to the tenant and no further tenancy may have been granted after the protected shorthold tenancy.

[217] The dwelling has to be overcrowded within the meaning of Part X of the Housing Act 1985.

[218] The determined fair rent is the highest rent the landlord can obtain from the tenant, although if the rent determined by the rent officer is higher than the rent agreed upon between the contracting parties, the tenant can pay the lowest rent, being the rent agreed upon in the contract. If the contract makes provision for rent increases the landlord is allowed to increase the rent, but the rent cannot be increased beyond the registered rent: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 193. Section 57 enables the tenant to recover the excess amount of rent paid after registration. The effect of registration is therefore retrospective. Rent regulation usually restricts rents, but with the conversion of tenancies from rent control to rent regulation rents did increase quit substantially: Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 284, Table 5.8. See also Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 258-259 for an outline of the fair rent system.

[219] In order to create a fair rent the tenant, landlord, both parties (section 67) or the local authority can apply for the registration of a fair rent in a prescribed form to the rent officer. The interest of the local authority would be to ensure that public funds are not being wasted through the payment of excessively high rents where the tenant receives housing benefits: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 189. The interest of the local authority takes the form of a public interest. See Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 262-265 for detail of the different application procedures.

determined by a rent official cannot be overruled by the contract or by market forces. The applicant (or applicants) must propose a fair rent, after which the rent officer will inform the other party to make recommendations and, if necessary, oppose the proposed rent.[220] When the rent officer decides on a fair rent he will inform both parties and register the rent in the registration area.[221] Once the rent is registered the rent will attach to the land and not to the parties.[222] The rent will be applicable to the property as long as the property is let under the Rent Act 1977. In *Hanson v Church Commissioners*[223] the court found that the fixing of fair rent is a matter in which the public interest is involved because the registered rent will affect the immediate parties and neighbouring parties when they determine their rent. Section 67(3) makes provision for a new application after two years, although it also states that the parties can apply for the registration of a new rent when the terms of the tenancy change or when the condition of the premises changes.[224] The parties can also jointly apply for the registration of a new rent.

The Rent Act 1977 does not define a fair rent, although it does provide some guideline in section 70 according to which the rent officer can verify a fair rent.[225]

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[220] After both parties had the opportunity to make proposals the rent officer usually consults with the parties and visits the premises: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 189.

[221] Section 66 makes provision for the registration of rents in a register created for various areas. The rent officers are obliged to keep the register up to date and make it available for inspection. The rent officer must record the rent payable, the particulars of the tenancy and specifications of the dwelling. If one of the parties is unsatisfied with the registered rent he can appeal to the rent assessment committee after which the committee will confirm the rent or determine a new rent: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 189-190.

[222] The registered rent will bind future lettings, irrespective of a change in tenant or landlord: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 189.

[223] [1977] 2 WLR 848 at 833 per Lord Denning.

[224] This section also contains a general provision which states that "any other circumstances which were considered at the time the rent was registered so as to make the registered rent no longer a fair rent" will enable a party to apply for a new rent. See *London Housing Properties v Cowan* [1977] QB 148 for a discussion of the effect of an application for re-registration. At 152 Lord Widgery found that one should "ask whether there have been changes in the condition of the house or in the other factors specifically referred to in the section [section 67(3)], and, if there have been, to ask the second question, which is whether as a result of those changes the registered rent is no longer a fair rent". Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 260 mentions that the effect of inflation would tend to increase the registered rent rather than to provide a mechanism according to which the tenant can reduce the rent.

[225] See Evans DL & Smith PF *Evans: The Law of Landlord and Tenant* (2nd ed 1985) 268-271; Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 201 for a discussion of the determination of a fair rent. See also Bright S *Landlord and Tenant Law in Context* (2007) 460-465 for a discussion on fair rent and some of the problems associated with this form of regulation. She mentions that the effect of the implementation of fair rents was in fact a rise in rents (at 460-461).

Section 70(1) explicitly excludes all personal circumstances[226] and then lists circumstances that the rent officer should take into consideration, including the condition of the dwelling;[227] the presence of furniture and the quality thereof; the payment of a premium; and the assumption that the number of persons seeking regulated tenancies[228] of similar dwellings in that particular locality is not greater than the number of dwellings available.[229] In *Mason v Skilling*[230] the Court found that the rent officer should determine a fair rent that would be fair to both landlord and tenant.[231] Section 70 affords the officer the discretion to adopt any method in determining the fair rent, provided that such a method is not unlawful or unreasonable.[232] The preferred method is to examine the registered rents of comparable properties[233] in the locality, although the officer can also consider whether the landlord will receive a fair return on the capital value of the property (being the value of the property with vacant possession).[234] In the *Mason* case the Court found that the security of tenure provided to the tenant is a personal circumstance and therefore irrelevant in determining the fair rent.[235]

Section 70 (2) provides that it shall be assumed that the number of persons seeking to become regulated tenants of similar dwellings in the area is not significantly greater than the number of dwellings available. This section demands that the scarcity value of the properties, being available for private rental housing as regulated under the Rent Act 1977, will be disregarded when the fair rent is

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[226] The rent officer will therefore not be allowed to consider the financial situation of the tenant: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 192.
[227] Section 70(1)(a) states that the "age, character, locality and state of repair of the dwelling-house" should be considered.
[228] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 187 define both protected and statutory tenancies as "regulated" tenancies.
[229] Section 70(1)(2). Section 70(1)(3) provides a list of factors the rent officer should disregard, including improvements conducted by the tenant; any defects attributable to failure by the tenant; and any improvement to the furniture by tenant.
[230] [1974] 1 WLR 1437 (HL).
[231] *Mason v Skilling* [1974] 1 WLR 1437 (HL) 1440 per Lord Reid.
[232] *Mason v Skilling* [1974] 1 WLR 1437 (HL) 1439 per Lord Reid.
[233] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 191-192 explains that the concept of comparable properties is complicated by the introduction of the Housing Act 1988. A rent officer should therefore distinguish between properties regulated by the Rent Act 1977 and the Housing Act 1988, because the rents of tenants occupying property that is regulated by the Rent Act 1977 will be considerably less than those leased under the Housing Act 1988. The rents of tenants occupying property under the Housing Act 1988 will be determined by market forces and will therefore be higher than fair rents determined by rent officers under the Rent Act 1977. Fair rents are immune from market forces and suppressed through the system of rent registration.
[234] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 191.
[235] *Mason v Skilling* [1974] 1 WLR 1437 at 1440 per Lord Reid.

determined.[236] The purpose of this section is to address the problem of landlords profiting excessively as a result of housing shortages.[237] In *BTE Ltd v Merseyside and Cheshire Rent Assessment Committee and Jones*[238] the court had to determine whether a rent officer should consider comparable properties in the locality which are regulated in terms of the Housing Act 1988 and therefore assured tenancies. The assessment committee only took into account the rents of comparable properties let as regulated tenancies (tenancies regulated under the Rent Act 1977). The court found that this was wrong and concluded that the rent officer should consider market rents where there is no scarcity of housing.[239] The result of the decision is that market forces will influence fair rents and increase the rent to a level comparable with assured tenancies.[240]

4.6.2 Housing Act 1988

The Housing Act 1988 came into operation on 15 January 1989 and is currently the principal act regulating private sector tenancies, because the Rent Act 1977 generally only applies to tenancies created before this date.[241] The Housing Act 1988 makes provision for two types of tenancies, namely the assured tenancy and

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[236] See Partington M *Landlord and Tenant. Text and Materials on Housing and Law* (2nd ed 1980) 246-258 for a discussion of fair rents and the effect of excluding scarcity. See in this regard *Metropolitan Property Holdings v Finegold* [1975] 1 WLR 349 at 352 per Lord Widgery, where he considers section 70(1)-(2) of the Rent Act and concludes that "[p]arliament is undoubtedly seeking to deprive a landlord of a wholly unmeritorious increase in rent which has come about simply because there is scarcity of houses in the district and thus an excess of demand over supply."

[237] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 192 states that "[t]he valuation should be based upon the inherent value of the property in question and should not reflect an increase in value brought about by a fluctuation in the market".

[238] [1992] 24 HLR 514.

[239] *BTE Ltd v Merseyside and Cheshire Rent Assessment Committee and Jones* [1992] 24 HLR 514 at 517-518.

[240] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 192. One can therefore also question the impact and the use of rent control in the private sector in general. Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 201 state that the fair rent regime will cease to exist in time due to the fact that one cannot create new protected tenancies.

[241] Bright S *Landlord and Tenant Law in Context* (2007) 203. The amount of regulated tenancies was lower than 200 000 in 2004/2005, while assured tenancies exceeded 200 000 and assured shorthold tenancies amounted to almost 1.6 million. Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 214 states that one of the main concerns of the Rent Act was that landlords couldn't regain their property for long periods of time. The result was that the Act effectively undermined their right to control the use of their property. The protected shorthold tenancy introduced by the Housing Act 1980 attempted to provide some relief to landlords, but it was unsuccessful because tenants could still apply for a fair rent.

the assured shorthold tenancy. The difference between the two categories is mainly the level of security of tenure afforded to the tenant in each case. Where the tenant occupies property with an assured tenancy the landlord would have to prove one of the grounds under Schedule 2 of the Act to obtain a possession order. Where the tenant occupies the property with an assured shorthold tenancy the landlord merely needs to prove that the tenancy has terminated and that notice requiring possession has been served to the tenant.[242] The result of the shorthold regime, introduced by the Housing Act 1988 and the Housing Act 1996, has been a general decline in assured tenancies. One can speculate that only housing associations would grant assured tenancies.[243] Currently almost ninety percent of the private rented sector consists of assured shorthold tenancies.[244]

In order to create an assured tenancy (including an assured shorthold tenancy) five conditions must be fulfilled.[245] Section 1 of the Housing Act 1988 requires that there must be a tenancy[246] under which a dwelling is let as a separate dwelling[247] to a tenant (who is an individual) as his only or principal home.[248] The tenancy must also not be excluded by one of the exceptions listed in Schedule 1 of the Act.[249]

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[242] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 214. The landlord is still obliged to obtain a possession order.

[243] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 204.

[244] Bright S *Landlord and Tenant Law in Context* (2007) 203.

[245] Bright S *Landlord and Tenant Law in Context* (2007) 204. See Bridge SB *Residential Leases* (1994) 9-25 for a detailed discussion of the definition of an assured tenancy and the requirements constituting this definition.

[246] A "tenancy" includes a fixed-term or periodic tenancy and a sub-tenancy or an agreement for a tenancy, although it will not include a licence: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 220.

[247] The dwelling can be let with other land, provided that the main purpose of the letting is the provision of a home. In order for the property to fall within the definition of a dwelling there must be some "degree of permanency in the siting of the structure": Bright S *Landlord and Tenant Law in Context* (2007) 206. A mobile home can fall within this definition.

[248] An individual can only claim protection under the Housing Act 1988 for one home, which must be his main residence, while section 2 of the Rent Act 1977 provided that the tenant had to occupy the property as his residence in order to acquire protection, which means that a person was able to claim protection for two homes: Bright S *Landlord and Tenant Law in Context* (2007) 206.

[249] Paragraph 1 of Schedule 1 excludes tenancies created before the commencement of the Act. Tenancies of dwellings with high values are excluded by para 2. Tenants who occupy tenancies that exceed £25 000 per year (now £100 000) can usually negotiate their own terms and do not need statutory protection because there is not a shortage of such dwellings: Bright S *Landlord and Tenant Law in Context* (2007) 207. The amount of £25 000 was increased to £100 000 by The Assured Tenancies (Amendment)(England) Order 2010 on 25 March 2010. Paragraph 3 excludes tenancies at a low rent (less than £1000 a year in the Greater London area or £250 elsewhere) or tenancies at no rent. Schedule 1 also excludes business tenancies (para 4), licensed premises (para 5), tenancies under which agricultural land is let with a dwelling (paras 6 and 7), lettings to students (para 8),

Subject to the contractual term, the assured shorthold tenancy provides no long-term security to the tenant because the landlord can regain possession after six months of commencement of the tenancy. Once the tenancy has terminated the landlord can give two months notice, provided that this is at least six months after the beginning of the tenancy.[250] Prior to the commencement of the Housing Act 1996 the landlord had to notify the tenant, in accordance with the guidelines contained in section 20 of the Housing Act 1988, that the tenancy would be an assured shorthold tenancy.[251] Section 19A of the Housing Act 1988 reversed this position by stating that all private tenancies concluded after 28 February 1997 will automatically be assured shorthold tenancies, except where the landlord wishes to create an assured tenancy by serving notice to the tenant prior to the commencement of the tenancy.[252] In terms of schedule 2 of the Act, notice could be served before the tenancy is granted or during the course of the tenancy to convert an assured shorthold tenancy into an assured tenancy.[253] The landlord may not deprive an assured tenant of security of tenure by giving him a new assured shorthold tenancy.[254] Upon the expiration of a fixed-term assured tenancy a statutory periodic tenancy arises[255] and, according to Schedule 2A (paragraph 8), such a tenancy will be an assured tenancy and not an assured shorthold tenancy.

An assured tenancy will only terminate if the landlord can convince the court that a statutory ground for possession exists.[256] The grounds for possession are

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holiday lettings (para 9) and tenancies where the tenant lives in close proximity to the landlord (para 10). Lettings by "public landlords", including the Crown, any government department or local authority, are also excluded from the Act (paras 11 and 12). For additional detail on these exclusions see Bright S *Landlord and Tenant Law in Context* (2007) 207-210; Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 182-186; Bridge SB *Residential Leases* (1994) 25-40.

[250] Section 21(5). See also Bright S *Landlord and Tenant Law in Context* (2007) 203.

[251] See Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 215-216 for the position before 28 February 1997 with regard to the creation of assured shorthold tenancies.

[252] Schedule 2A of the Housing Act 1988. Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 215 mentions that landlords were unfamiliar with the procedure set out in section 20 of the Act, which resulted in the creation of a vast number of assured tenancies instead of assured shorthold tenancies.

[253] Paragraph 2 of Schedule 2A. Paragraph 3 provides that an assured tenancy can be created if the tenancy states that the tenancy is not an assured shorthold tenancy. An assured tenancy will also arise where a family member succeeds to a Rent Act tenancy (Section 39 of Housing Act 1998; Schedule 2 para 4). Where a local authority transfers housing stock to the private sector the former secure tenant will become an assured tenant and not an assured shorthold tenant (para 5).

[254] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 218.

[255] Section 5.

[256] Section 5(1). The landlord is required to serve notice on the tenant before the possession proceedings can commence (section 8). See Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 207-208 for a discussion of the required procedure.

listed in Schedule 2 of the Housing Act 1988. The Act therefore provides substantive tenure security by overriding the landlord's common law right to end the tenancy. The way in which the Act functions depends on whether the tenant has a fixed-term tenancy or a periodic tenancy.[257] It is important to distinguish between three types of tenancies. The assured tenancy can either be a fixed-term contractual tenancy, a periodic contractual tenancy, or a statutory periodic tenancy. The last-mentioned tenancy is created by statute, while the other two tenancies are created by agreement.[258]

If the tenant occupies the property under a periodic assured tenancy and the landlord serves the tenant with a notice to quit, such a notice shall have no effect.[259] At common law a notice to quit would have terminated the tenancy. Under the statutory scheme, the tenancy will continue on its original terms until the landlord can prove a ground for possession in court. The original periodic assured tenancy will simply continue and not convert or change "status" from a contractual tenancy to a statutory tenancy, despite any notice served by the landlord.[260]

When a fixed-term tenancy terminates through effluxion of time the Act states that a periodic tenancy will automatically arise and afford the tenant continued occupation rights.[261] The new statutory periodic tenancy can only be terminated by an order of court if the landlord can prove a ground for possession.[262] The terms of the statutory periodic tenancy are determined by section 5(3) of the Housing Act. This section states that the statutory periodic assured tenancy will take effect immediately after the original fixed-term tenancy terminated. The tenancy is deemed to have been granted by the previous landlord to the previous tenant and the premises remain the same as was granted under the fixed-term tenancy. The periods of the tenancy are the same as those for which rent was last payable under the fixed-term tenancy and the other terms are the same as those of the fixed-term

[257] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 226.
[258] Bridge SB *Residential Leases* (1994) 41.
[259] Section 5(1).
[260] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 227.
[261] Section 7(6) makes provision for the termination of a fixed-term tenancy before the tenancy has expired in limited circumstances. An order for possession can only be granted where the landlord is seeking possession under grounds 2 or 8, or 10 to 15 of Schedule 2 and the terms of the tenancy must make provision for it to be brought to an end on the ground in question. The landlord therefore has to reserve the right to re-enter for a breach of the ground in question: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 229.
[262] Section 5(2).

tenancy,[263] except any term which makes provision for determination by the landlord.[264]

In order to terminate an assured tenancy (fixed term or periodic) the landlord first has to successfully notify the tenant of his intention to bring possession proceedings.[265] He then has to prove one of the grounds for possession listed in Schedule 2 of the Act. Section 7(3) states that if the landlord can prove one of the mandatory grounds listed in Part I (grounds 1-8), the court must grant the possession order, while section 7(4) states that if the landlord can establish one of the discretionary grounds listed in Part II (grounds 9-16), the court has to consider it reasonable to grant the possession order.

Part I of Schedule 2 lists the mandatory grounds for possession. Ground 1 makes provision for a landlord to repossess his property where he previously occupied the premises as his principal home. In order to rely on this ground the landlord must have served notice in writing to the tenant at the beginning of the tenancy, stating that possession might be recovered under this ground, although the court can dispense with the notice requirement if it finds it just and equitable to do so. The landlord can also rely on this ground if he is seeking possession for occupation by himself or his spouse. In such a case it is not required that the landlord or his spouse previously occupied the property.[266] Ground 2 regulates the position where a mortgage was granted before the beginning of the tenancy and the mortgagee requires vacant possession of the dwelling in order to exercise a power of sale conferred on him by the mortgage or by section 101 of the Law of Property Act 1925. The tenancy can therefore be terminated by relying on ground 2 prior to the expiration of the contract. The landlord can only rely on this ground if he served

[263] The terms of an assured tenancy is usually the terms agreed upon between the parties, illustrating the aim of the Act to afford parties the freedom to negotiate and enter into a tenancy on whatever terms they decide. The Act does, however, imply certain terms into an assured tenancy. See Bridge SB *Residential Leases* (1994) 42-43 for a discussion of the terms of an assured tenancy.

[264] Either the landlord or the tenant can alter the terms of the statutory periodic tenancy by following the procedure set out in section 6 of the Act, although section 6 only applies to a statutory periodic tenancy arising from a fixed-term tenancy. See Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 230-231 for a discussion of this procedure, including the alteration of rent.

[265] Section 8. See also Bridge SB *Residential Leases* (1994) 54-55 for a discussion of the requirements to comply with section 8.

[266] This ground is similar to case 11 of the Rent Act 1977, although it is not required that the landlord intends to occupy the premises once he repossesses the property: Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 208. Bridge SB *Residential Leases* (1994) 58 mentions that the landlord can use this ground to repossess the property in order to sell his interest in the property.

notice at the beginning of the tenancy, although the court is at liberty to dispense with this requirement.[267] Where a landlord let his holiday property for a period not exceeding eight months and wishes to regain the property, he can rely on ground 3, provided he notified the fixed-term tenant that possession might be recovered on this ground.[268] Ground 4 enables a landlord to regain student accommodation where the premises were leased during a holiday period,[269] while ground 5 permits a landlord to regain possession from a tenant in order to make accommodation available to a minister of religion.[270] Where a landlord intends to demolish, reconstruct or carry out substantial works on the dwelling, he can rely on ground 6 to repossess the leased property. The Act requires that there must be a genuine desire to undertake the work and a reasonable prospect that the work will take place. It is also required that the work could not reasonably be carried out with the tenant still in possession.[271] Where the landlord acquired his interest in the property after the tenancy was granted, he would not be able to rely on this ground.[272] If the landlord succeeds under this ground, he is compelled to pay to the tenant an amount equal to reasonable expenses likely to be incurred by the tenant in moving from the dwelling.[273] Ground 7 allows a landlord to repossess the property where the original tenant has died and

[267] In *Britannia Building Society v Earl* [1990] 1 WLR 422 the court found that where the mortgagee did not consent to the tenancy, the tenant will have no protection.

[268] Holiday lettings are usually excluded from the protection of the Act (Schedule 1, Part I, para 9), although in this instance the Act makes an exception for the letting of holiday accommodation out of season that will be protected under the Act. The court cannot dispense with the notification requirement. Ground 3 is similar to case 13, listed in Part II of the Rent Act 1977.

[269] Student lettings are usually excluded from Housing Act protection (Schedule 1, Part I, para 8) although the Act provides that the tenant will be an assured tenant if he rents the accommodation during holidays. In such an instance the landlord can regain possession if he notified the tenant that possession might be regained under this ground (the court cannot dispense with this requirement), if he afforded the tenant with a fixed-term tenancy not exceeding twelve months and if the premises was let as a student letting prior to the grant of the current tenancy. See case 14 for the similar position under the Rent Act 1977.

[270] In order to rely on this ground the landlord must have notified the tenant of the possible use of this ground and the dwelling must be held by the landlord for the purpose of being available for occupation by a minister of religion as a residence from which to perform his duties. The court must be satisfied that the minister requires the premises for this reason. Case 15 in the Rent Act 1977 makes provision for a similar ground for possession. See Bridge SB *Residential Leases* (1994) 60-61 for a discussion of the accelerated possession procedure. This procedure is only applicable to grounds 1, 3, 4 and 5 and it accelerates the possession proceedings.

[271] Where the tenant agrees to vary the terms of the tenancy in order to grant the landlord access to undertake the work, possession will not be granted by the court.

[272] The Act does state that where the landlord acquired his interest in the property after the tenancy was granted, he can rely on this ground, provided he did not acquire the interest for money or money's worth.

[273] Section 11. Where there are any disputes regarding the recovery of unpaid sums, the tenant can make use of judicial resolution through the civil process: Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 209.

the periodic tenancy (or the statutory periodic tenancy) passed on to another person by virtue of the deceased will or intestacy.[274] If the tenant is in serious rent arrears the landlord can rely on ground 8 to repossess the property, although ground 8 is exceptional (and similar to ground 2 in this regard) as the landlord can rely on this ground before the fixed-term tenancy terminates.[275]

The discretionary grounds for possession are listed in Part II of Schedule 2 of the Housing Act 1988. If the landlord can prove one of the discretionary grounds the court may only grant the possession order if it considers it reasonable to do so. To determine whether the possession order would be reasonable the court must consider all relevant circumstances and apply a broad, common-sense view, after which the appropriate weight should be attached to each factor.[276] If the landlord can prove that suitable alternative accommodation is available for the tenant or will be available when the order for possession takes effect, the landlord can rely on ground 9. The requirement for suitable alternative accommodation will be met if the landlord can either produce a certificate from the local housing authority, certifying that the authority will provide the necessary accommodation or if the landlord can prove that either he or another private landlord will supply suitable alternative accommodation.

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[274] The landlord will not be able to rely on this ground if the deceased tenant's spouse or cohabitee succeeded to the tenancy (see section 17 of the Act). Bridge SB *Residential Leases* (1994) 63 mentions that the successor can take occupation of the dwelling but the landlord has a discretion, for twelve months, to assess the new tenant and decide whether he can continue to occupy the premises. The landlord will assess the character and financial viability of the successor in order to make this decision. Once the landlord decides that he does not want the new tenant to remain in the dwelling he can seek possession without having to justify his decision, provided this is done within the twelve month period.

[275] To successfully rely on this ground the landlord has to convince the court that at the date of service of notice (see section 8) and at the date of the hearing that at least eight weeks' rent is unpaid, if the rent is payable weekly; or at least two months' rent is unpaid, if the rent is payable monthly; or at least one quarters' rent is more than three months in arrears, if rent is payable quarterly; or at least three months' rent is more than three months in arrears, if rent is payable yearly (as amended by section 101 of the Housing Act 1996). A tenant will be able to avoid repossession by paying some arrears after he received the section 8 notice or by counterclaiming that the rent was not paid due to breach of the landlord's covenant to repair: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 243-244. In such an instance the tenant can argue that he has a counterclaim against the landlord's claim for rent and that his counterclaim for damages can be set off against the whole of the landlord's claim: *British Anzani (Felixstowe) v International Marine Management (UK) Ltd* [1980] QB 137. The reason for rent arrears is often some failure in the administration of housing benefits rather than the tenant's unwillingness to pay: Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 209. This ground has raised some debate due to the harsh impact sometimes associated with this ground. See Bright S *Landlord and Tenant Law in Context* (2007) 614-616 for some detailed discussion on this ground and the social issues related to it.

[276] *Cumming v Danson* [1942] 2 All ER 653 at 655 per Lord Greene MR. Section 9 of the Act provides the court with a wide discretion to either adjourn the proceedings for a certain period; suspend or stay the execution of a order; or impose certain conditions as the court sees fit, provided that such conditions would not be unreasonable or cause exceptional hardship to the tenant.

In order to satisfy this requirement in the case where the local authority is not providing the accommodation, the proposed accommodation will be deemed suitable if it affords the tenant security of tenure which is reasonably equal to an assured tenancy. The proposed accommodation must also be reasonably suitable to the needs of the tenant and his family in consideration of certain factors, namely proximity to place of work, rental and extent of accommodation provided in the neighbourhood by the local authority to persons whose needs are similar to those of the tenant and his family; or reasonably suitable to the means of the tenant and to the needs of the tenant and his family concerning extent and character.[277] If the landlord succeeds in terms of this provision he is obliged to pay to the tenant reasonable expenses likely to be incurred by the tenant in moving from the dwelling.[278]

Ground 10 enables a landlord to claim repossession where rent is outstanding. The landlord is required to prove that some rent was outstanding at the date upon which proceedings were issued and at the date of service of the section 8 notice.[279] The rent must have been in arrears at the time when the section 8 notice was served. This notice has to be served by a landlord in order to succeed with possession proceedings.[280] Where the tenant constantly falls into arrears but pays the outstanding rent after the issue of proceedings but before the date of the hearing, the landlord can rely on ground 11 to repossess the property.[281] Where any obligation of the tenancy (other than one related to the payment of rent) has been broken or not performed, the landlord can rely on ground 12 to claim repossession, although a trivial breach will unlikely justify a possession order.[282] The court will determine the seriousness of the breach by considering whether the breach is remediable and whether it is continuing.[283] Ground 13 enables a landlord to

[277] Part III Schedule 2, paras 1-3.
[278] Section 11(1).
[279] There is no minimum amount of rent arrears required and the landlord does not have to show that the rent was still in arrears at the date of the hearing, although the court would unlikely grant the possession order where the rent was paid at the date of the hearing: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 245.
[280] See section 8 of the Act for more detail on the required notice.
[281] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 210 mention that "persistent delays" can be interpreted to deduce two meanings. It can either mean that the tenant has a long history of rent arrears or that one or two instalments have been in arrears for a long period of time.
[282] Ground 12 is similar to case 1 under the Rent Act 1977.
[283] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 246.

repossess the property where the condition of the dwelling or any other common parts of a building comprising the dwelling deteriorated through acts of waste by neglect or default of the tenant (or any other person residing in the dwelling).[284] The landlord can rely on ground 14 if the tenant or a person residing in or visiting the dwelling has been guilty of conduct causing or likely to cause a nuisance[285] or annoyance to a person in the locality; or has been convicted of using the dwelling for immoral or illegal purposes.[286] To determine whether the possession order would be reasonable, the court has to consider the effect that the nuisance has had on persons other than the person against whom the order is sought; any continuing effect the nuisance is likely to have on such persons; and the effect that the nuisance would be likely to have on such persons if the conduct is repeated.[287] Ground 14A is similar, as it makes provision for possession proceedings where a couple lived in the dwelling and one of the partners left the dwelling as a result of violence or threats of violence by the other partner.[288] Where the landlord can prove that he granted the assured tenancy in consequence of the tenant's employment, by the landlord, and that employment has ceased to exist, the landlord can claim possession by relying on ground 16.[289] Section 102 of the Housing Act 1996 introduced ground 17, which enables a landlord to claim possession where the tenant represented false

[284] Ground 15 is similar as it enables the landlord to claim possession where the condition of furniture, provided by the tenancy, has deteriorated as a result of ill-treatment by the tenant.

[285] "Nuisance" was defined in *Tod-Heatly v Benham* (1889) LR 40 Ch D 80 at 98 as "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and simple notions among the English people." The court stated that "annoyance" has a much wider meaning and defined annoyance as something which "reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant."

[286] The landlord can also rely on this ground where the tenant has been convicted of an arrestable offence in the dwelling or in the locality of the dwelling. This ground (and ground 14A) was introduced by section 148 of the Housing Act 1996 "as part of a number of changes intended to facilitate possession when occupiers or those for whom they have some responsibility commit anti-social behaviour": Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 210. The landlord can rely on this ground even where the behaviour is only likely to cause nuisance to any person in the locality, therefore not limited to neighbouring occupiers.

[287] Section 9A.

[288] The Act requires that the landlord must be a registered social landlord or a charitable housing trust. The couple must be a married couple or a couple living together as husband and wife. It is sufficient if one of the partners left the property as a result of violence towards himself/herself or a member of the family who resided with the partner. The court must also be satisfied that the partner who left is unlikely to return. In order to succeed the landlord must comply with the additional requirements provided for in section 8A. See *Metropolitan Housing Trust v Hadjazi* [2010] EWCA Civ 750.

[289] This ground is similar to case 8 in the Rent Act 1977, although in terms of ground 16 a replacement employee is not required.

statements, knowingly or recklessly, to the landlord in order to acquire the assured tenancy.[290]

It is important to clarify that an assured periodic tenancy can succeed to the assured tenant's spouse or civil partner if that person was occupying the dwelling as his only or principal home, while succession rights are granted to a broader range of persons if the tenancy is a protected tenancy regulated by the Housing Act 1985. The Housing Act 1985 includes the deceased tenant's spouse or civil partner or another member of the deceased tenant's family, provided that person occupied the dwelling with the deceased tenant throughout the twelve months preceding his death.[291]

4.6.3 Housing Act 1985

The Housing Act 1985[292] regulates local authority tenancies. A "secure tenant" acquires various statutory rights from the Act, combined to afford the tenant substantive tenure rights. A tenancy under which a dwelling is let as a separate dwelling is a secure tenancy[293] at any time[294] when the conditions described in

[290] This ground is similar to ground 5 as listed in Part I of Schedule II of the Housing Act 1985, regulating public sector tenancies.

[291] Bright S *Landlord and Tenant Law in Context* (2007) 547; Van der Walt AJ *Property in the Margins* (2009) 98.

[292] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 292 states that the aim of the Act is to "provide a regime within which the public sector can effectively perform the function of providing housing for the less privileged".

[293] For a discussion of the terms of a secure tenancy see Bridge SB *Residential Leases* (1994) 229-233; Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 269-272. The general rule is that the terms of the tenancy will be those agreed upon between the parties, although certain terms will be implied by statute, including terms related to the rent payable, assignment, sub-letting, repairs and alterations. The terms of the tenancy can also be varied through agreement, in accordance with the tenancy or in accordance with the Act. See sections 102-103 for detail regarding the variation of terms and the procedure prescribed by the Act. The Housing Act 1985 contains no system of rent control. Section 24(1) enables a local authority to make reasonable charges as it sees fit, provided that the authority review the rents as circumstances may require (section 24(2)). Section 24(3) requires that when the authority exercises its functions under this section it must "have regard in particular to the principle that the rents of houses of any class or description should bear broadly the same proportion to private sector rents as the rents of houses of any class or description". Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 318-319 states that this section's aim is to ensure that the differential between the rents charged for different types of dwellings in the public sector should be similar to the differential between the rents charged for the same types of dwellings in the private sector. Where a tenant is dissatisfied with the rent he can seek judicial review, although the local authority has a wide discretion to determine the rent. In *Luby v Newcastle-under-Lyme Corpn* [1964] 2 QB 64 at 72 Diplock LJ found that the courts are not allowed to interfere in the process of determining rent because the local authority is best equipped to make this decision,

sections 80 (also known as the landlord condition) and 81 (also known as the tenant condition) are satisfied.[295] In order to satisfy the landlord condition the landlord must be one of the prescribed bodies listed in section 80(1) of the Act. The landlord will usually be the local authority.[296] Prior to 1988 the list included registered social landlords (also previously known as housing associations), although Part I of the Housing Act 1988 amended the list to exclude housing corporations, charitable housing trusts, registered and unregistered housing associations. Since 15 January 1989 these bodies were removed from the list, after which all registered social landlords moved to the private sector.[297] The tenant condition will be satisfied if the tenant is an individual[298] who occupies the dwelling as his only or principal home.[299] Even if sections 79-81 are satisfied, the tenancy will not necessarily be a secure tenancy if one of the exclusionary paragraphs in Schedule I of the Housing Act 1985 is applicable.[300]

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although where the authority's discretion is exercised in a manner which no reasonable man would consider justifiable, the court is entitled to interfere. This decision was confirmed in *Backhouse v Lambeth BC* (1972) 116 SJ 802. Currently the government is striving to reduce the unjustifiable differences between public rents and rents set by registered social landlords. The government is implementing a "rent restructuring" process in order to achieve a coherent structure of social rents: DETR "Quality and Choice: A Decent Home for All, The Housing Green Paper" (April 2000).

[294] The words "at any time" imply that an occupier may change his status from being a secure tenant to losing that status as a result of changing circumstances: Bright S *Landlord and Tenant Law in Context* (2007) 210. The tenant will be a secure tenant if the conditions of sections 80 and 81 are satisfied. If one of the conditions is not satisfied the tenant will no longer be a secure tenant, although once that condition is later satisfied, the tenant will regain security: *Hussey v Camden London Borough Council* (1995) 27 HLR 5 (CA).

[295] Section 79(1). See also Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 264-266; Bridge SB *Residential Leases* (1994) 218-223 for a discussion of these requirements.

[296] The list also includes a development corporation, a housing action trust, an urban development corporation and certain housing cooperatives.

[297] The effect is that after this date "all new tenancies granted by registered social landlords will be held on assured rather than secure tenancies." Tenancies granted before this date will be tenancies regulated under the Housing Act 1985: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 294. See section 35 of the Housing Act 1988 for a list of exceptions regulating the status of tenants who acquire a secure tenancy after 15 January 1989.

[298] Where the tenancy is a joint tenancy each of the occupiers must be individuals and at least one of them must occupy the dwelling as his principal home.

[299] See Bright S *Landlord and Tenant Law in Context* (2007) 213-214 for a discussion of this requirement. One should also note that section 79(3) states that a licensee may be a secure tenant, although the effect of this section was restricted by *Westminster City Council v Clarke* [1992] 2 AC 288 (HL) 293, where the House of Lords found that a licensee could only be a secure tenant if he could exercise exclusive possession of a separate dwelling.

[300] The list in Schedule I includes long leases; introductory tenancies; employment related tenancies (referring to a tenancy granted by a public body as a result of the tenant's employment); short-term tenancies of land acquired for development, which enables the landlord to temporarily let land that was acquired for development; temporary accommodation for homeless persons, provided the tenancy is granted under the homeless duties in Part VII of the Housing Act 1996; short-term tenancies for persons taking up employment; temporary lettings while works are effected; agricultural holdings; student lettings; and commercial lettings. See Bridge SB *Residential Leases* (1994) 223-

Before considering the security of tenure provided for under the Act, one should take note of introductory and demoted tenancies. The local authority can choose to grant introductory tenancies, which are not secure tenancies, to new tenants.[301] An introductory tenant does enjoy some of the rights enjoyed by secure tenants,[302] but security of tenure is excluded. The introductory tenancy functions on a trial basis for one year, during which period the local authority can decide whether the tenancy should end or continue.[303] If the conduct of the tenant is acceptable, the introductory tenancy will continue after the probationary period and automatically convert into a secure tenancy. If the tenant misbehaves, the local authority is at liberty to end the tenancy for any reason, provided the correct procedure is followed.[304] Once a local authority decides to operate such an introductory tenancy regime, all new periodic tenancies entered into will initially be introductory tenancies.[305] The introductory tenancy will cease to exist if the circumstances are such that the tenancy would not otherwise be a secure tenancy; if a person other than the local authority becomes the landlord; where the landlord revokes the election to operate an introductory tenancy regime; or where the tenancy ceases to be an introductory tenancy because the tenant has died and there is no successor.[306] The landlord is at liberty to end the introductory tenancy at any point during the introductory period if the landlord is of the opinion that the tenant is unsuitable.[307] To end the tenancy the landlord must obtain an order for possession, after which the landlord serves notice to the tenant in accordance with section

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229; Bright S *Landlord and Tenant Law in Context* (2007) 215-217 for a discussion of these exclusions.

[301] Section 124(1) of the Housing Act 1996.

[302] Bright S *Landlord and Tenant Law in Context* (2007) 214 explains that introductory tenants will enjoy the right to succession and the right to be consulted on housing management issues, although they will not be able to alienate their rights under the tenancy, nor will they be able to exercise the right to buy option.

[303] Section 125(2) of the Housing Act 1996.

[304] Introductory tenancies promote the campaign against anti-social behaviour as they enable landlords to evict disruptive, anti-social tenants effortlessly, which resembles the policy that "secure status is something to be 'earned'": Bright S *Landlord and Tenant Law in Context* (2007) 214.

[305] Sections 124(2)-(3) of the Housing Act 1996 makes provision for three exceptions, namely where the tenant was a secure tenant immediately before the tenancy was entered into; where the tenant was an assured tenant of a registered social landlord in respect of the same dwelling prior to the new tenancy; or where the tenancy was entered into in pursuance of a contract made before the election was made.

[306] Section 125(5) of the Housing Act 1996.

[307] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 297.

128.[308] The court can order repossession without considering whether such an order would be reasonable. The landlord does not have to prove any ground for possession, nor must he establish whether suitable alternative accommodation is available.[309]

Where the secure tenant has been involved in anti-social behaviour or where he used the premises for unlawful purposes the county court can make a "demotion order" if the court considers it reasonable, following an application made by the landlord. Once the order is granted the secure tenancy will cease to exist and convert into a demoted tenancy, which will continue for a period of one year. During the demoted tenancy the landlord can easily end the tenancy by serving notice to the tenant. The notice must include the landlord's reasons for ending the tenancy and inform the tenant of his right to review. The court has to grant the possession order if these requirements are met.[310]

The Housing Act 1985 makes provision for security of tenure through section 82(1), which states that the landlord can only terminate the secure tenancy by obtaining a possession order.[311] The court can only make a possession order if the landlord can prove one of the grounds listed in Schedule II of the Act.[312] To provide substantive tenure rights for tenants, the Act overrides the landlord's common law right to terminate the tenancy upon expiration of the lease.[313] A fixed-term tenancy could be terminated, at common law, either by effluxion of time or through the exercise of a right of re-entry or forfeiture, as stated in the tenancy. If the tenancy is a secure fixed-term tenancy and the lease makes provision for a right of re-entry or

[308] The notice must include the landlord's reasons for ending the tenancy and it must inform the tenant of his right to request a review of the landlord's decision to evict the tenant, although where the landlord confirms this decision in court, the court has to order repossession: Bright S *Landlord and Tenant Law in Context* (2007) 214.

[309] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 297. See Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 266-268 for a detailed discussion of introductory and demoted tenancies. See also section 179 of the Housing Act 2004 for the necessary extensions provided for introductory tenancies.

[310] Bright S *Landlord and Tenant Law in Context* (2007) 214-215.

[311] One should note that the aim of the Act is to provide strengthened occupation rights for tenants through security of tenure. Where the landlord wishes to end the tenancy by serving notice to quit, such a notice will not be effective. Where the tenant gives notice to quit the Act will not provide security of tenure: *Greenwich LBC v McGrady* (1983) 6 HLR 36 at 40. Where a secure periodic tenancy is held by joint tenants, one of the tenants can end the tenancy unilaterally (*Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478 (HL)), although where one of the tenants wishes to end a fixed-term secure tenancy through surrender, he would have to acquire the consent of the other tenant (*Leek & Moorlands Building Society v Clark* [1952] 2 QB 788).

[312] Section 84(1).

[313] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 302.

forfeiture, the landlord is unable to forfeit the tenancy before expiration of the lease. Section 82(3) states that the court will not order possession of the dwelling in pursuance of the forfeiture provision but, if the tenancy was not secure and if the landlord can prove that the court would have made an order forfeiting the tenancy, the landlord will be entitled to an order terminating the tenancy.

If the court does terminate the fixed-term tenancy, the tenancy continues as a statutory periodic tenancy through the operation of section 86(1).[314] A statutory periodic tenancy will arise automatically upon expiration of the lease, either through effluxion of time or where the court terminated the fixed-term tenancy under section 82(3). The terms of the statutory periodic tenancy are determined by section 86(2), which provides that the periods of the tenancy are the same as those for which rent was last payable under the first tenancy and the terms of the tenancy are the same as those of the first tenancy. The section also states that the terms are confined to those that are compatible with a periodic tenancy and do not include any provision for re-entry or forfeiture. To obtain a possession order, terminating the statutory periodic tenancy (or the original periodic tenancy), the landlord would have to satisfy the requirements in sections 83 and 84.[315]

According to section 83 the landlord must serve a "notice seeking possession" to the tenant before he can start the proceedings for possession.[316] The notice must be in the prescribed form, specify the ground on which the court will be asked to make an order for possession and give particulars of that ground.[317] Through the operation of these sections the tenant will have the opportunity to rectify any breaches under the tenancy and avoid possession proceedings. It is essential that

[314] Where the landlord decides to grant the tenant a further secure tenancy (either fixed-term or periodic) of the same dwelling after expiration of the original tenancy, section 86(1) will not be applicable.
[315] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 264 state that a secure tenancy can be either a fixed-term tenancy or a periodic tenancy, although the latter is the norm.
[316] In terms of section 83(1)(b), the court can dispense of the notice requirement if it considers it just and equitable to do so. Section 83(4)(a) requires that the note must contain a specified date at which the proceedings may be begun, although this date may not be earlier than the date on which the tenancy could be brought to an end by notice to quit given by the landlord (section 83(5)). Section 83(3) makes provision for an exception when the landlord is relying on ground 2 in Schedule II (nuisance or other anti-social behaviour). According to this section the notice must state that proceedings for possession may be begun immediately. The landlord is therefore enabled to act quickly where the tenant is misbehaving.
[317] Section 83(2).

the landlord must stipulate sufficient particulars of the ground he intends to rely on in the notice.[318]

Once the landlord satisfies the section 83 requirements he can apply for a possession order by relying on one of the grounds listed in Schedule II of the Act. The grounds for possession are divided into three categories. Part I (grounds 1-8) is the discretionary grounds and the court may only grant the possession order if one of the grounds are proved and the court considers it reasonable to do so. Grounds 9-11, listed in Part II, will only be sufficient to obtain a possession order if the landlord can also prove that there will be suitable alternative accommodation available for the tenant when the order takes effect. If the landlord wishes to rely on one of the grounds listed in Part III, he would have to prove one of these grounds, convince the court that the possession order would be reasonable and that there is suitable alternative accommodation for the tenant when the order takes effect. The result is that the majority of "good" tenants will enjoy a life-long secure tenancy except where an estate management reason for eviction exists.[319]

The first discretionary ground enables a landlord to apply for a possession order where the rent is in arrears[320] or where the tenant is in breach of an obligation of the tenancy. In order to successfully rely on the first section of this ground the landlord would have to prove that some rent was outstanding at the date of the issue of proceedings. If the tenant pays the outstanding rent after the issue of proceedings but before the hearing, the court will usually not find it reasonable to grant the possession order except where there are unusual circumstances.[321] Where the tenant breached one of the obligations of the tenancy (which forms the second section of this ground), the court will consider all the circumstances in order to determine whether a possession order would be reasonable.[322] Ground 2 states that where a tenant, or a person residing in or visiting the dwelling, has been guilty of

[318] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 304.
[319] Bright S *Landlord and Tenant Law in Context* (2007) 218. The grounds listed in Part II could be defined as "estate management" grounds because they facilitate better estate management.
[320] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 275 mention that rent arrears is the most commonly used ground for possession proceedings.
[321] Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 305. Unusual circumstances would include where the tenant has a history of late payments.
[322] The court will consider the seriousness of the breach, whether there is a possible remedy, whether the tenant is likely to repeat the breach, whether there is an alternative remedy (Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 305-306) and whether the breach was deliberate or persistent (*Sheffield City Council v Jepson* (1993) 25 HLR 299).

conduct causing, or likely to cause, nuisance or annoyance to a person in the locality,[323] or has been convicted of using the dwelling for immoral or illegal purposes, or has been convicted of an arrestable offence, the landlord can apply for a possession order.[324] Ground 2A was introduced by the Housing Act 1996 and enables the landlord to apply for possession proceedings where one of the partners of a married couple (or a couple living together as husband and wife) left the dwelling as a result of domestic violence.[325] The aim of this ground is to allow the landlord to repossess the dwelling where a single person is occupying a family-size home. The landlord can rely on ground 3 if the condition of the dwelling or any common parts deteriorated as a result of acts of waste by the tenant or person residing in the dwelling.[326] If the tenant knowingly or recklessly made a false statement to the landlord in order to acquire the local authority accommodation and the landlord was induced by this statement, he can rely on ground 5 to apply for repossession.[327] Ground 6 is unique as it has no counterpart in the private sector. It makes provision for a landlord to seek a possession order where a tenant obtained a lump sum for exchanging his tenancy under section 92 of the Act.[328] Ground 7 is also unique to local authority tenancies as it allows a landlord to apply for a possession order where

[323] A person in the locality includes a resident, visitor or any other person engaging in lawful activity in the locality.

[324] Ground 2 has a wide scope because the tenant can face possession proceedings as a result of a visitor's conduct, exercised in the locality. It is not required that the conduct of a visitor must in fact amount to nuisance or annoyance. The conduct merely needs to be likely to cause a nuisance or annoyance. In order to determine whether the possession order would be reasonable the court has to consider the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought; any continuing effect the nuisance is likely to have on such persons; and the effect that the nuisance would be likely to have on such persons if the conduct is repeated. This ground is identical to ground 14, as provided for in the Housing Act 1988, which regulates private rentals.

[325] The Act requires that either one of the partners must have been a tenant; that one of the partners left the dwelling as a result of domestic violence by the other partner towards either that partner or a family member who resided with that partner; and the court must be satisfied that the partner will unlikely to return to the dwelling. This ground is identical to ground 14A of the Housing Act 1988, but section 83A requires that the landlord must serve a copy of the notice seeking possession on the partner who left the dwelling or has taken all reasonable steps to serve such a copy.

[326] Ground 4 is similar, but it regulates the condition of furniture included in the tenancy.

[327] This ground illustrates that the demand for public sector housing is greater than the supply and public sector landlords strive to accommodate applicants with the greatest need: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 308.

[328] This ground is included to prevent the exploitation of section 92, which makes provision for public sector tenants to exchange tenancies: Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 309. See Garner S *A Practical Approach to Landlord and Tenant* (2nd ed 1998) 315 for a discussion of section 92.

the tenant is an employee of the landlord and the tenant is guilty of misconduct.[329] It also requires that the dwelling must form part of a building which is held mainly for purposes other than housing purposes and the building must consist mainly of accommodation other than housing accommodation. Where a secure tenant was temporarily placed in alternative accommodation while works were being carried out in his principal home and the works are completed, the landlord can rely on ground 8 to repossess the temporary accommodation. In order to successfully rely on this ground the landlord should prove that the tenant agreed, at the time when the arrangement was finalised and before the works commenced, to move back into the original dwelling upon completion of the works. All of the above-mentioned grounds are included in Part I of Schedule II of the Act and the court must consider the possession order reasonable before it can grant such an order.

If the landlord relies on any of the grounds listed in Part II of Schedule II (grounds 9-11), the court can only grant the possession order if it is convinced that there is suitable alternative accommodation available. Part IV of Schedule II defines suitable alternative accommodation as premises let as a separate dwelling under a secure tenancy; premises let as a separate dwelling under a protected tenancy, although excluding a tenancy which might fall under one of the cases in Part II of Schedule 15 of the Rent Act 1977; or premises let as a separate dwelling under an assured tenancy, provided the tenancy is not an assured shorthold tenancy nor a tenancy under which the landlord might recover possession under any of grounds 1-5 in Schedule II of the Housing Act 1988. Part IV also requires that the accommodation must be reasonably suitable to the needs of the tenant and his family. A certificate from the local authority stating that it will provide the tenant with suitable alternative accommodation is sufficient evidence to satisfy this requirement, but it is insufficient where the landlord itself is a local authority.[330] If the landlord did not acquire a certificate from the local authority, the court shall consider the factors listed in paragraph 2 of Part IV, which includes the nature of the accommodation; the distance of the accommodation available from the place of work or education of the tenant and his family; the distance of the accommodation from the home of any

[329] The tenant can also be an employee of a local authority, a new town corporation, a housing action trust, an urban development corporation, the development Board for Rural Wales, or the governors of an aided school. It is therefore not required that the landlord must also be the employer.
[330] Paragraph 4 of Part IV of Schedule II of the Housing Act 1985.

member of the tenant's family;[331] the needs (concerning extent of accommodation) and means of the tenant and his family; the terms on which the accommodation is available and the terms of the secure tenancy; and the possibility of furniture to be given for use and, if so, the nature of the furniture.[332]

Ground 9 enables a landlord to apply for a possession order where the dwelling is overcrowded in a way that would render the occupier guilty of an offence.[333] Where the landlord intends to demolish or reconstruct the building or part of the building comprising the dwelling, or intends to carry out work on that building, and cannot reasonably do so without repossessing the dwelling, he can rely on ground 10 to claim a possession order.[334] If the landlord is a charity and the tenant's continued occupation of the dwelling would conflict with the objects of the charity, the landlord can rely on ground 11 to claim a possession order.

Where the landlord wishes to rely on one of the grounds listed in Part III of Schedule II, he would have to convince the court that such a possession order would be reasonable and that suitable alternative accommodation is available for the tenant when the possession order is made. Ground 12 enables the landlord to apply for a possession order where the tenant occupies accommodation in a building which is not primarily used for housing purposes and the tenant was an employee of the landlord. The landlord can repossess the premises if he reasonably requires the accommodation for someone engaged in his employment. If the dwelling has features that accommodate physically disabled individuals and it is occupied by a tenant who is not physically disabled, the landlord will be able to rely on ground 13 to claim a possession order if the landlord requires the accommodation for a physically disabled person.[335] Where the tenancy vested in the tenant by virtue of section 89

[331] This factor will only be considered if proximity to the family member's home is essential to the tenant or that member's well-being.
[332] The court will only consider this factor if furniture was provided by the landlord for use under the secure tenancy.
[333] The dwelling must be overcrowded within the meaning of Part X of the Housing Act 1985.
[334] Ground 10A is similar as it permits a landlord to gain vacant possession of a dwelling occupied by a secure tenant in order to sell it for redevelopment under a redevelopment scheme approved by the secretary of state. Redevelopment schemes were introduced by section 9 of the Housing and Planning Act 1986 and concerns the redevelopment of dwellings occupied under secure tenancies: Bridge SB *Residential Leases* (1994) 242.
[335] Ground 14 is similar, but the landlord must be a housing association or housing trust which lets dwellings only for occupation by persons whose circumstances make it especially difficult for them to satisfy their need for housing. Ground 15 is also similar as it enables a landlord to claim possession proceedings where the dwelling is one of a group of dwellings which is let by the landlord for occupation by persons with special needs and the tenant is not someone with special needs. It is also

(succession to periodic tenancy) and the accommodation is more extensive than is reasonably required by the tenant, the landlord may rely on ground 16 to obtain a possession order.[336] To determine whether the possession order would be reasonable the court has to consider the age of the tenant, the period the tenant occupied the property as his principal home and any financial or other support given by the tenant to the previous tenant.

Section 85 affords the court an extended discretion regarding the terms of the order in cases where the court has to consider reasonableness, including Part I and Part II under Schedule II of the Act. The court is at liberty to adjourn the proceedings for some period[337] or, on making an order for possession, the court may stay or suspend the execution of the order or postpone the date of possession for such a period as the court thinks fit.[338] On such an adjournment, stay, suspension or postponement the court must impose conditions with respect to the payment of rent (or rent arrears if applicable), unless such a condition would cause exceptional hardship to the tenant or would be unreasonable.[339] If the terms of the suspended order are breached, or when the court does make an order for possession, the secure tenancy will terminate. Previously, if the tenant remained in the dwelling and maintained a satisfactory rent account, the local authority would often allow the tenant to continue occupying the premises. These tenants were commonly known as "tolerated trespassers"[340] and it had been alleged that quite a substantial number of these tenants, until recently, occupied local authority housing.[341] In terms of Part 1 (Schedule 11) of the Housing and Regeneration Act 2008, a tenancy will cease to exist on the date that the tenant is evicted. The creation of new tolerated trespassers is therefore prevented in both the private and social sectors. Part 2 of the Act

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required that the landlord must require the dwelling for occupation by a person who has those special needs.

[336] It is also required that the notice of the proceedings for possession under section 83 must have been served more than six months, but less than twelve months, after the date of the previous tenant's death. This ground also requires that the successor must have been a family member, excluding the deceased tenant's spouse, and the tenant must have succeeded to a periodic tenancy.

[337] Section 85(1).

[338] Section 85(2).

[339] Section 85(3). Section 85(5) provides that where the dwelling is occupied by the tenant's spouse or former spouse, that spouse will have similar rights to an adjournment, stay, suspension or postponement, provided that spouse remains in occupation and has matrimonial home rights under Part IV of the Family Law Act 1996.

[340] *Burrows v Brent LBC* (1996) 1 WLR 1448 (HL) 1452 per Lord Browne-Wilkinson. See Van der Walt AJ *Property in the Margins* (2009) 102; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 344-345 for further discussion regarding the position of a tolerated trespasser.

[341] Wilkie M, Luxton P, Morgan J & Cole G *Landlord and Tenant Law* (5th ed 2006) 281.

provides that existing tolerated trespassers will receive new tenancies, similar to the previous tenancy.

4.7 Conclusion

Since the introduction of the Housing Act 1988 the level of tenure security afforded to tenants in the private sector has diminished considerably as a result of the general deregulation policy initiated by parliament. As a result of this policy private landlords and housing association landlords can choose the level of tenure security they would afford tenants. For the greater part of the twentieth century, private sector tenants enjoyed extensive security of tenure, combined with rent control (or rent regulation), while council housing tenants' security was legally insubstantial, because it was unregulated until the legislature enacted the Housing Act 1985. The Housing Act 1985 currently regulates local authority tenancies and provides them with substantive tenure rights. An important reality to consider in light of the policy decisions of parliament is the efficiency of the private rental housing market. One could argue that, if the market is functioning efficiently, there is no need to impose extensive regulatory security of tenure or rent control,[342] provided that there is some mechanism affording efficient tenure protection for those members of society who need it.

The efficacy of the British landlord-tenant system could be found in its ability to provide different forms of rental housing, with different levels of security of tenure, to various individuals with diverse needs. One could argue that the protection granted in the private sector has decreased because there is no longer a need to impose strict rent control or extensive security of tenure in this sector, while there is such a need in the social sector because this sector makes accommodation available for the most vulnerable and poorest members of society. Accordingly, it makes sense that social sector tenancies could only be terminated through the grant of a court order, provided the court considers it reasonable to do so, whereas assured shorthold tenancies could be terminated at the end of six months after

[342] See in this regard Penny P "Rent Control" (1966) 83 *SALJ* 493-502 at 494; Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 352-353.

commencement of the tenancy, without the court considering reasonableness. At the same time, the legislature did not abolish security of tenure or rent control in the private sector completely, but merely qualified its previously strict implementation. The landlord-tenant system in its entirety is therefore context-sensitive and adaptable to changing socio-economic circumstances.

Ultimately, one should also take into account the effect that legislation has on the common law by comparing the impact of the statutes. The Rent Act 1977 grants security of tenure through the creation of a statutory tenancy, which commences when the protected (contractual) tenancy terminates. The protected tenancy terminates, in accordance with the common law, through either effluxion of time or notice to quit, in the case of a periodic tenancy, or through the operation of any other common law method. The common law is therefore to a certain degree kept intact as it is still required to terminate the protected tenancy, although its effect is softened through the operation of the Act in its aim to provide continued occupation rights for tenants. The common law does play a role in the ultimate termination of the tenancy, as the commencement of the statutory tenancy is dependent on the termination of the protected tenancy, which allows the common law to still exist and function to a certain extent.

A fixed-term local authority tenancy, regulated under the Housing Act 1985, is similar because a statutory periodic tenancy will arise upon termination of the lease. The fixed-term tenancy must first end through effluxion of time (through the operation of the common law) before statutory intervention becomes applicable, but where there is a provision in the lease allowing forfeiture, such a provision will not necessarily be available to the landlord. The landlord can only terminate a secure periodic tenancy through the operation of the Act as he has to prove one of the grounds listed in Schedule II of the Act. A notice to quit will therefore have no effect.

Where a landlord wishes to terminate a private sector assured periodic tenancy under the Housing Act 1988, he would also have to prove one of the grounds for possession as listed in the Act and a notice to quit will have no effect. Upon expiration of a fixed-term assured tenancy, the Act makes provision for the continuation of the tenancy through the operation of the periodic assured tenancy. If the lease contains a forfeiture provision the landlord would not be able to rely on it to end the fixed-term tenancy. One could conclude that in some cases, especially

periodic tenancies, the legislation is so overpowering that it completely extinguishes the operation of the common law. In these cases the effect of the legislation is to alter the common law into a state of “non-existence”. The Rent Act 1977 grants substantive tenure security for tenants through the imposition of a statutory mechanism which only comes into operation after the termination of the contractual tenancy. The contractual tenancy expires through the operation of the common law. The Housing Act 1988 also provides security of tenure through assured tenancies, although its impact on the common law differs because the usual common law methods used in terminating the contractual tenancy are replaced by provisions of the Act that afford better tenure security through a continuation of the tenancy.

The unavoidable questions are to what extent parliament was intent on extinguishing the common law regarding security of tenure in landlord-tenant law; where the effect of the legislation is so drastic as to render the common law futile; and whether the common law can resurface in future.

From the discussion it follows that the efficiency of the English landlord-tenant framework could be identified in its ability to provide adequate, but different, levels of tenure security to diverse members of society. The extent of tenure security provided for by the statutes reflects parliament’s housing policies, which is context sensitive to the changing socio-economic circumstances. It is clear that the aim of the legislature was (and still is) to give effect to the housing policies in order to react to the changing socio-economic circumstances. The common law would not have been able to provide these different levels of tenure security to diverse households in the landlord-tenant sphere. When considering the complexity of the statutes individually and then as a whole nexus of laws, which aims to provide adequate housing, one can conclude that the common law would not have been able to respond to the housing needs of all tenants as successfully as the legislation has. In order to give effect to the housing policies and respond to the changing housing needs, the legislature had to either amend the common law to a certain extent or override the workings of the common law completely.

South African landlord-tenant law is different, but comparable on this point, as the Constitution mandates tenure reform (sections 25(6) and 26(3)) and access to adequate housing (section 26(1)) through the enactment of legislation (sections

25(9) and 26(2)). However, the laws[343] that have been enacted in the landlord-tenant sphere in order to give effect to these obligations largely reinforce the common law instead of correcting its shortcomings.[344] The weak tenure rights of urban residential tenants in South Africa is a direct result of the inadequacy of the legislation, because the legislation does not override the common law to provide continued occupation rights for tenants, nor does it amend the substantive occupation rights of tenants as developed in terms of the common law. In order to give effect to tenure reform and provide access to adequate housing in the South African rental housing market, the legislature would have to develop landlord-tenant legislation that provides different levels of tenure security to diverse households, based on their personal needs. When considering the complexity of the English landlord-tenant statutes and the effect it had on the common law, it becomes apparent that new landlord-tenant legislation in South Africa would have to override the common law in order to be suitably and sufficiently context-sensitive.

[343] See sections 3.4.2, 3.6.2 and 3.9 in Chapter 3 for a discussion of these laws.
[344] See sections 3.4.2 and 3.6.2 in Chapter 3.

5. Human Rights in English Landlord-Tenant Law

5.1 Introduction

Chapter 4 illustrated the impact of landlord-tenant legislation on the English common law, especially with regard to the protection of tenants. The Chapter also emphasised the continuous amendment of legislation to improve tenure security for various occupiers with diverse needs. Over the course of decades, the English parliament has consistently adapted and developed an extensive landlord-tenant legislative scheme in order to accommodate the changing socio-economic circumstances. Within this scheme, certain tenants enjoy strong tenure security associated with continued occupation rights, while others occupy residential property with hardly any security of tenure. One could argue that weak domestic occupation rights of tenants, as provided by the legislation, are not incidental, but rather a decision of parliament, because the extent of statutory tenant protection is a central aspect of housing policy and landlord-tenant law.

From the discussion in Chapter 4 it is clear that English landlord-tenant law has developed since the beginning of the twentieth century according to the policy aims of parliament and that the legislative scheme that currently regulates the entire residential landlord-tenant framework reflects the domestic needs of all tenants (and landlords) as comprehensively as possible. Parliament has solely been responsible for formulating correct housing policies that reflect the housing needs of society and until 2000, when the Human Rights Act 1998 came into force, parliament could introduce housing policies and enact legislation that regulate the occupation rights of residential tenants, without restraint or approval by any other body of law. This position changed when the Human Rights Act came into force to the extent that it made the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 applicable to English law.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) functions as an external examiner and can influence domestic landlord-tenant law that has developed over decades, reflecting well-researched and context-sensitive housing policies, according to certain rights enshrined in the Convention. The role of the Convention is therefore similar to the

South African Constitution 1996,[1] as all law (common law and legislation) must be in line with the Convention. In light of the case law it is clear that the courts (in South Africa and the UK) are sometimes uncomfortable with establishing and upholding the hierarchy of laws.[2]

The United Kingdom ratified the ECHR in 1951. However, the rights enshrined in the Convention only became enforceable in UK domestic law in October 2000, when the Human Rights Act 1998 came into force.[3] The Convention was made applicable through the operation of two sections, namely sections 3(1) and 6 of the Act. Section 3(1) provides that "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".[4] Section 6(1) of the Act states that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right". Where a landlord is a "public authority", it therefore has to exercise his duties in compliance with the Convention because the Human Rights Act 1998 is applicable. One can safely assume that all local authority landlords fall under the definition of a "public authority".[5]

Section 6(3) of the Act extended the definition of a "public authority" by providing that a "public authority" includes a court or tribunal and any person whose functions are of a public nature. Where a landlord is a registered social landlord, the position is unclear, because registered social landlords are treated as private landlords in the housing legislation, although they also receive state funding and exercise certain statutory housing duties, as regulated by the Housing Corporation.[6] In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,[7] Lord Woolf CJ found that a registered social landlord could be defined as a "public authority", depending on the context and function of the specific registered social

[1] See section 3.2 in Chapter 3.
[2] See sections 3.8 and 3.9 in Chapter 3.
[3] Bright S *Landlord and Tenant Law in Context* (2007) 271. The Council of Europe adopted the Convention in 1950, shortly after the United Nations (UN) implemented the Universal Declaration of Human Rights in 1948. The Declaration made significant international statements with regard to the protection of fundamental rights including the right to housing, although these rights were not legally enforceable: Bright S *Landlord and Tenant Law in Context* (2007) 271.
[4] This section is similar to section 39(2) of the South African Constitution, which states that "[w]hen interpreting any legislation, and when developing the common law … every court … must promote the spirit, purport and objects of the Bill of Rights."
[5] Bright S *Landlord and Tenant Law in Context* (2007) 274.
[6] Bright S *Landlord and Tenant Law in Context* (2007) 274.
[7] [2002] QB 48.

landlord.[8] In the case law following *Poplar*, the courts focused on the character of the function concerned rather than the nature of the body.[9] It is important to note that section 6(3) of the Human Rights Act 1998 also includes the courts as a "public authority". The courts must therefore exercise their duties in compliance with the Convention. In *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others*,[10] the House of Lords confirmed that "[t]he court's own practice and procedures must be Convention-compliant".[11]

The Convention right that has the most profound impact on the termination of lease relationships and therefore also the most profound impact on tenants' tenure security is article 8(1), which provides that "[e]veryone has the right to respect for his private and family life, his home and his correspondence". Apart from the complex statutory landlord-tenant scheme developed by the English parliament, various tenants have relied on article 8(1) for protection against eviction. Importantly, the right enshrined in article 8(1) is not absolute but qualified by article 8(2), which states that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of the … economic well-being of the country … or for the protection of the rights of and freedoms of others".[12]

The European Court of Human Rights has granted tenants and unlawful occupiers extended protection in terms of this provision. By contrast, the application of this provision has generated a lot of uncertainty in the English courts. Judging from the case law, the relationship between the English common law, the domestic legislative scheme and article 8 of the ECHR, with regard to the protection of existing occupation rights (or interests) for tenants and unlawful occupiers, is complicated and fraught with uncertainty. The tension between these three bodies of law is

[8] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 67-68. See the decision at 56-57 for the facts of the case and 69-70 for the determining factors that convinced the Court of Appeal that Poplar Housing Association was a "public authority" as provided for under section 6(3) of the Human Rights Act 1998. At 70 Lord Woolf CJ emphasised the importance of context when he concluded that "there is no clear demarcation line which can be drawn between public and private bodies and functions. In a borderline case … the decision is very much one of fact and degree."

[9] Bright S *Landlord and Tenant Law in Context* (2007) 276, referring to *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another* [2004] 1 AC 546 (HL); *YL v Birmingham City Council and Others* [2007] 3 WLR 112 (HL).

[10] [2006] 2 AC 465 (HL).

[11] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 456 (HL) at 501. See also *Weaver v London & Quadrant Housing Trust* [2008] EWHC 1377 (Admin).

[12] Bright S *Landlord and Tenant Law in Context* (2007) 610.

similar to the position in South Africa,[13] primarily because the English courts are also uncertain about the impact of the Convention (similar to the South African Constitution) on domestic law. The legislative landlord-tenant framework in English law is much more extensive than the landlord-tenant statutes in South Africa[14] and the common law is therefore more significant in South Africa than in Britain. The role of the Convention in the area of landlord-tenant law, and more specifically the occupation rights of tenants, is therefore to test whether the legislative scheme (rather than the common law) that was developed by parliament is in line with the rights enshrined in the Convention. The role of the South African Constitution is also to test the constitutional validity of the common law and legislation, but – as was explained in Chapters 2 and 3 – the South African common law is more significant with regard to the eviction of tenants.

5.2 Case law preceding article 8 success

Shortly after the Human Rights Act 1998 came into force the English courts were faced with questions regarding the application of article 8(1) of the ECHR in the event of evictions. The initial cases concerned the eviction of tenants whose tenancies terminated in accordance with domestic law. The tenants, in the different cases, relied on article 8 of the ECHR to oppose the landlords' right to possession in terms of the domestic law. In the initial cases, which were all heard by the domestic courts, the courts applied a restrictive approach when interpreting the role of article 8.

In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,[15] a local housing authority (London Borough of Tower Hamlets) granted a weekly non-secure tenancy[16] to the defendant in terms of the Housing Act 1985. The local authority created a housing association in order to transfer a portion of the

[13] See Chapter 3 for a discussion of the post-1994 South African position.
[14] See section 3.4.2 in Chapter 3 for a discussion of post-1994 South African landlord-tenant legislation.
[15] [2002] QB 48.
[16] Section 79(1) of the Housing Act 1985 defines a "secure tenancy" as "[a] tenancy under which a dwelling is let as a separate dwelling … at any time when the conditions described in sections 80 and 81 … are satisfied." See text accompanying ffn 293-300 in Chapter 4 and Bright S *Landlord and Tenant Law in Context* (2007) 210-218 for further detail on the definition of a secure tenancy.

local authority housing stock to the association. The housing association was known as Poplar and the property occupied by the defendant was part of the transferred housing stock. The local authority issued proceedings for possession against the defendant, but the proceedings were withdrawn because the property was transferred to the housing association and therefore no longer formed part of the local authority housing stock. The local authority notified the tenant that she held an assured shorthold tenancy[17] under the Housing Act 1988 and that the housing association was her new landlord. Shortly thereafter Poplar served a notice to quit to the defendant in terms of section 21(4) of the Housing Act 1988.[18] In the Court of Appeal, Lord Woolf CJ stated that the district judge had to make the order for possession "if the defendant had a tenancy which was subject to section 21(4) and the proper notice was served".[19] One of the remaining issues in the Court of Appeal was whether the defendant could rely on article 8 of the ECHR to oppose Poplar's right to possession under section 21(4) of the Housing Act 1988.[20]

The court acknowledged that an eviction order would have an impact on the defendant's family life and that the outcome of article 8(2) is consequently important.[21] In order to determine whether Poplar could rely on article 8(2), Lord Woolf CJ stated that the intention of parliament, when enacting section 21(4) of the Housing Act 1988, was to provide accommodation to a dependent group of individuals in need of social housing. Lord Woolf CJ found that this general aim should take preference over a case-related issue such as the defendants'.[22] The court emphasised the complexity and broad economic repercussions of housing (and specifically rental housing) policy and concluded that parliament is better equipped to decide what is in the public interest, especially with regard to housing policy. The question whether the courts should have a more distinct role to play in a section

[17] A private landlord can let property under the Housing Act 1988 either as an assured tenancy or as an assured shorthold tenancy. The latter does not provide extensive security of tenure, while the assured tenancy affords the tenant greater tenure security. See text accompanying ffn 245-250 in Chapter 4 and Bright S *Landlord and Tenant Law in Context* (2007) 187-188; 203-204 for more detail on assured shorthold tenancies.
[18] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 56.
[19] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 59.
[20] The court also had to determine whether Poplar was a "public authority" in terms of section 6(3) of the Human Rights Act 1998. Lord Woolf CJ identified important factors to take into consideration in the specific circumstances and found that the functions of Poplar were so similar to those of the previous local authority (Tower Hamlets) that it could be defined as a "functional public authority": *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 69-70.
[21] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 70.
[22] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 69.

21(4) possession claim was said to be a legislative policy decision made by parliament and as such the courts should treat this decision with deference. The application of the Human Rights Act 1998 does not provide the courts with a discretion to disregard the decisions of parliament in cases where there might have been a breach of the Convention.[23] Lord Woolf CJ found that section 21(4) is an essential procedural measure in a democratic society for recovering a tenant's property once the tenancy has terminated. The parliamentary decision to restrict the discretionary power of the court in a section 21(4) application forms part of policy and the courts should abide by this decision.[24]

In *Lambeth LBC v Howard*,[25] the appellant had a secure tenancy[26] in terms of the Housing Act 1985. The county court gave an outright possession order against the appellant on the grounds that he harassed his neighbour. Section 84, read with Part I of Schedule II of the Housing Act 1985, states that the court may make an outright possession order or a suspended possession order on grounds of nuisance or annoyance to neighbours if it is reasonable to do so.[27] In the Court of Appeal, the appellant argued that the outright possession order was unreasonable and an unjustifiable interference with his rights under article 8 of the ECHR.[28] The court had to consider the impact of the Human Rights Act 1998 and the ECHR on English domestic law, with regard to the statutory right of the local authority to evict the appellant on grounds of harassment to neighbouring occupiers.[29] Sedley LJ[30] found that there is no incompatibility between article 8 of the ECHR and section 84, read with Part I of Schedule II of the Housing Act 1985, if the court considers the outright possession order reasonable. The right to respect for a person's home provided for in article 8(1) is not "an absolute concept, nor, given Article 8(2), an unqualified right".[31]

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[23] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 71.
[24] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 71. The court found that section 21(4) of the Housing Act 1988 was not in conflict with the defendant's right to family life as stated in article 8(1) of the ECHR and that there was no other contravention of article 8.
[25] [2001] 33 HLR 58.
[26] See fn 16 above for the definition of a secure tenancy.
[27] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 638-639.
[28] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 638.
[29] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 643.
[30] See *Lambeth LBC v Howard* [2001] 33 HLR 58 at 647-648 for the concurring judgements of Hale LJ and Thorpe LJ.
[31] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 644.

The court also acknowledged that article 8(1) is applicable if there is a threat to an individual's home in the form of a claim for possession. If the landlord is a local authority, section 6(1) of the Human Rights Act 1998 will become relevant and raise the question whether the interference with the individual's home is justified.[32] Sedley LJ found that the court should apply the principle of proportionality to determine whether the interference is justified, even though the forthcoming decisions of the courts would unlikely change as a result of article 8 of the ECHR.[33]

The central question was not merely whether the outright possession order was in accordance with the law, but also whether the immediate eviction resulting from the order was necessary in a democratic society, in order to protect the rights and freedoms of others. The appellant had harassed his neighbour and thereby deprived her of the "freedom from fear and the right to live in peace".[34] Sedley LJ concluded that the outright possession order was necessary to protect the appellant's neighbour from his continuing harassment, because it was proportionate to the pressing social need of his neighbour in the sense that there was no other solution that the court could find in order to achieve the legitimate aim.[35]

In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,[36] the court acknowledged that any eviction order would have an impact on a tenant's right to respect for his home and article 8(1) would therefore become applicable. However, the court was not prepared to disregard parliamentary decision-making by overriding the statutory right of the housing association, because the Human Rights Act 1998 does not enable the courts to create Convention-compliant rights. In *Lambeth LBC v Howard*,[37] the court expanded the strength of article 8 of the ECHR by stating that once article 8(1) is applicable and there has been an infringement, article 8(2) requires that such interference must be justified. In order to determine whether the interference was justified, the court had to apply a

[32] Section 3 of the Human Rights Act 1998 also raises the issue whether the meaning of "reasonable", as provided for in the Housing Act 1988, is Convention-compliant: *Lambeth LBC v Howard* [2001] 33 HLR 58 at 645. The legislative construction of the Act must therefore comply with the Convention.
[33] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 645.
[34] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 645.
[35] *Lambeth LBC v Howard* [2001] 33 HLR 58 at 646-647.
[36] [2002] QB 48.
[37] [2001] 33 HLR 58.

proportionality test.[38] In *Poplar*, the legislation provided the landowner with a clear substantive right to possession. The court did not have a discretion to refuse the possessory claim and therefore merely had to apply the law as developed and enacted by the legislature. The *Lambeth* case was different, since the legislation included that the court had to consider the eviction order reasonable within the given circumstances before it could grant the possession order. The court therefore had a discretionary role in deciding whether to grant the possession order and could consider the proportionality of the order in the light of article 8 of the ECHR.

In *Harrow LBC v Qazi*,[39] the respondent and his former wife leased council housing from the local authority under Part IV of the Housing Act 1985 as joint secure tenants.[40] The joint tenancy was terminated by the wife's unilateral notice to quit the tenancy. (This form of termination forms part of the common law and is not provided for in the legislation.) The respondent continued to occupy the premises with his new partner, despite the fact that he had no legal or equitable proprietary right to remain in the house under the relevant English law.[41] Before Mrs Qazi served the notice to quit, Mr Qazi's occupation right was regulated under the Housing Act 1985, which affords reasonably strong tenure security for tenants.[42] However, the common law notice to quit bypassed this protection and granted the local authority a clear substantive common law right to possession. The local authority was entitled to possession and claimed the property from the respondent, but Mr Qazi argued that the Human Rights Act 1998 was applicable and required that the court had to consider whether the eviction order would be proportionate in the light of his article 8(1) right to respect for his home.[43] His claim was therefore based on the contention that the dwelling was his "home" in terms of article 8(1) and that the local authority

[38] See Luba J "Residential Possession Proceedings and Article 8 (Part 2): The Impact on the Private Sector" (2002) 6(2) *Law and Tenant Review* 9-12; Van der Walt AJ *Property in the Margins* (2009) 106-107.

[39] [2004] 1 AC 983 (HL). See also the recent cases of *Wandsworth LBC v Dixon* [2009] EWHC 27 (Admin); *Wilson v London Borough of Harrow* [2010] EWHC 1574 (QB) for similar cases.

[40] See fn 16 above for the definition of a secure tenancy and Bright S *Landlord and Tenant Law in Context* (2007) 670 for more detail on joint tenancies.

[41] In *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 94 Lord Millett mentions that the respondent could claim protection from any third party who did not have an immediate right, because he was still in actual possession of the premises.

[42] See text accompanying ffn 311-315 in Chapter 4 for a short explanation on the level of tenure security provided for secure tenants.

[43] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 125-126. See *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) paras 40-45 per Lord Hope of Craighead for further detail with regard to the facts of the case.

acted in breach of his article 8 right by claiming possession of the property. The local authority had to justify its actions in terms of article 8(2), because article 8(1) was "engaged".[44] The first question the House of Lords had to consider was whether the respondent occupied the property as his "home" in terms of article 8(1), even though he had no legal or equitable right to remain in the property. The Court unanimously found that Qazi did occupy the premises as his "home". His lack of a right to occupy the property could therefore not influence the fact that he did occupy the premises as his "home".[45]

The second, more complex question was whether a local authority could make use of a procedure to recover possession from a former tenant, which leads to a possession order being granted automatically, or whether the court should have the opportunity to consider the proportionality of the eviction order before it is granted. On this basis, the court will always have the discretion to decide whether or not to grant the possession order.[46] The test for proportionality requires that the local authority has to prove that the possession order is necessary in terms of article 8(2) of the ECHR.[47]

Lord Millett found that article 8(1) and 8(2) had to be read together because article 8(2) requires that the interference with the respondent's home must not be arbitrary and therefore in accordance with the law.[48] The interference with the respondent's right to respect for his "home" could be justified if a proportionate balance is struck between either the interference and the competing public interest or the interference and the necessary "protection of the rights and freedoms of

[44] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 59.
[45] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) paras 8-11 per Lord Bingham of Cornhill; para 29 per Lord Steyn; paras 60-68 per Lord Hope of Craighead; para 95 per Lord Millett; para 148 per Lord Scott of Foscote. At para 68 Lord Hope of Craighead states that the respondent's links with the property were continuous and sufficient. See also Bright S "Ending Tenancies by Notice to Quit: The Human Rights Challenge" (2004) 120 *LQR* 398-403 at 398.
[46] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 36. At para 36 Lord Hope of Craighead states that this discretion would be available to the courts in those cases where there are statutory safeguards that must be complied with; where there are no statutory safeguards other than the common law rule, the court must order possession.
[47] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 125-126. Article 8(2) ensures that any interference by a public authority with an individual's right to respect for his home must be necessary "in the interests of … the economic well-being of the country … or for the protection of the rights and freedoms of others".
[48] Lord Millett interpreted article 8 so as to provide some protection for the individual's right to live a normal life in peace without interference by public authorities, instead of affording the occupier a proprietary right: *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 89. At para 123 Lord Scott of Foscote referred to the general aim of the Convention and found that it was not intended to "engage in social engineering in the housing field", but rather to protect fundamental rights and freedoms.

others".[49] The possession order would interfere with Qazi's right to respect for his home, but his right to occupy the premises was confined to his tenancy and this right was terminated by his former wife's notice to quit the tenancy. The possession order was necessary to protect the rights of the appellant, leaving no question with regard to a balance to be struck.[50] Lord Millett concluded that the court, as a public authority, is not obliged in each case to consider whether a possession order would be justified in terms of article 8(2) and therefore proportionate. Once the court concludes that the landlord is entitled to a possession order as a matter of domestic law, taking into consideration the legislative scheme developed by parliament, "there is nothing further to investigate".[51] Nevertheless, the tenancy was terminated by the wife's notice to quit, which forms part of the common law, not the applicable legislation.

Lord Scott of Foscote argued that article 8(1) of the ECHR makes provision for a general right to respect for an individual's home life in all its aspects, including the "home". Article 8(2) sets out the "gateways" through which the public authority is allowed to interfere with the article 8(1) right. The interference will only be permissible if it is in accordance with the law and necessary in a democratic society for one of the reasons provided for in the article.[52] The aim of article 8 is to protect individuals' "home life" against arbitrary interference by the state or public authorities. However, article 8 was not intended to create additional proprietary rights for tenants in a way that would restrict landlords' property and contractual rights.[53] The

[49] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 101.
[50] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 103.
[51] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 108. It was clear that under domestic law the respondent had no defence against the appellant's claim for possession: *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 92. The court's argument is analogous to that in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48.
[52] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 120. The term "gateways" was subsequently developed into two article 8 defences against possession proceedings, namely gateway (a) and (b) in *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead.
[53] With reference to *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, Lord Scott of Foscote illustrated his argument against an article 8(2) balancing process in the case where possession is being claimed by the owner against an occupier with no legal right to remain on the premises. The contention is that if the facts in *Poplar* were different, the balance might have been favourable to the tenant. This would have amended the applicable legislation in favour of the tenant and provided him with a possessory right. Consequently, the landlord's contractual and proprietary right to possession would diminish: *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 141. In *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 50 Lord Hope of Craighead found that the essence of the right to respect for the individual's home "lies in the concept of respect for the home as one among various things that affect a person's right to privacy". The right to respect for the home is concerned with protection against public authority interference rather than the protection of the home

respective rights of landlord and tenant depend on a combination of common law rules and principles and the relevant legislation that forms part of the legislative scheme enacted by parliament. This is the case even in the event of eviction proceedings. If the tenant does not have a right under domestic law to remain in possession, he cannot rely on article 8 to invent such a right.[54] Lord Scott of Foscote concluded that article 8 should not have been applied in the case because "an article 8 defence can never prevail against an owner entitled under the ordinary law to possession".[55] Even when applying article 8 in the specific circumstances, the possession order would be in accordance with the law and necessary to protect the rights of the appellant.[56]

Lord Hope of Craighead agreed with Lord Millett and Lord Scott of Foscote that an individual's contractual and proprietary right to possession cannot be resisted by an occupier's right to respect for his home in terms of article 8.[57] The majority of the House of Lords therefore found that the proportionate balancing between the rights of landlords and the interests of tenants had already been done by parliament through the enactment of legislation (or the absence of the legislation and the relevance of the common law). Parliament is best equipped to give effect to the various policies, especially housing policies that take the form of complex statutory housing schemes. If the landlord is entitled to claim possession under domestic law, article 8 cannot be raised as a defence, because it was never intended to create proprietary rights for tenants. If that was the case the effect of article 8 would be to diminish the contractual and property rights of landlords without statutory authority. The ECHR does therefore not establish a "supra-national charter of rights" that renders it necessary to scrutinize the rights established by parliament in the relevant legislation.[58] Lord Millett and Lord Scott of Foscote did develop certain approaches in

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as a proprietary right and any interference with this right must be measured against the wider interests of the community: *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 51. See also Hughes D & Davis M "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] *Conveyancer and Property Lawyer* 526-552 at 530-532.

[54] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 125.

[55] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 149.

[56] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 149.

[57] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 84.

[58] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 127. One can assume that the position regarding the compliance of the common law is uncertain.

order to solve an article 8 defence against a claim for possession,[59] but these strategies were irrelevant in the case as a result of the emphasis that the House of Lords placed on the hierarchy of domestic law in relation to human rights law.[60]

The majority approach was challenged by strong dissenting speeches by Lord Steyn and Lord Bingham of Cornhill.[61] Lord Steyn argued that the views of the majority effectively emptied article 8(1) of any meaning, because it does not provide any purposive interpretation of the article as read against the composition and aim of the Convention. According to Lord Steyn, the majority approach "allows domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of article 8(1)".[62] The view of the minority was intended to endorse a human rights "landscape" through the operation of the Human Rights Act 1998 with the use of the proportionality requirement, in order to allow European scrutiny of domestic law.[63] Both Lord Bingham of Cornhill and Lord Steyn approved the acceptance of developing European jurisprudence in decisions such as *Sheffield City Council v Smart*,[64] where Laws LJ found that the courts should apply the standards in article 8(2) more strictly in eviction cases in order to comply with the tenant's Convention rights.[65]

Bright[66] explains that at this stage, the decision of the majority in *Qazi*[67] applied to all cases where possession proceedings were instituted against occupiers without a right to remain on the property in domestic law. The impact was also that an occupier's article 8 defence could never prevail against a landowner's mandatory right to possession. If the court did require a proportionality test and balancing exercise in every eviction case, the purpose of a mandatory right to possession that enables the landowner to quickly evict the occupier would be undermined. However,

[59] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 101 per Lord Millett; para 120 per Lord Scott of Foscote.
[60] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 108 per Lord Millett; paras 125, 149 per Lord Scott of Foscote.
[61] Lord Bingham of Cornhill endorsed the view of Lord Steyn, after referring to Court of Appeal and Strasbourg jurisprudence: *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 24. See *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) paras 14-23 for a discussion of the case law.
[62] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 27.
[63] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL) para 27; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 127.
[64] [2002] LGR 467.
[65] *Sheffield City Council v Smart* [2002] LGR 467 at 480-481.
[66] Bright S "Ending Tenancies by Notice to Quit: The Human Rights Challenge" (2004) 120 *LQR* 398-403.
[67] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL).

the problem with the majority approach is that it did not allow any possibility for review in order to ensure that the relevant domestic law was Convention-compliant.[68] Van der Walt[69] argues that the problem with all notice to quit cases involving a joint tenancy is that the remaining occupier is unaware of the other tenant's intention to end the joint tenancy. The remaining tenant will only realise that his right to occupy the property was terminated once he is served with possession proceedings from the landlord. At this point the tenant can no longer apply for a new tenancy or state a case for continued occupation rights.[70] In *Poplar*[71] the court found that the rights enshrined in the Convention cannot trump parliamentary legislative decision-making. This decision was taken one step further in *Qazi*,[72] where the majority found that the rights enshrined in the Convention could *never* trump English domestic law, including the common law. This decision restricted the operation of the ECHR to such a drastic extent that it was uncertain whether an article 8 defence could ever succeed.

5.3 Qualified success under the article 8 challenge

The issues addressed in *Harrow LBC v Qazi*[73] were revisited in the European Court of Human Rights in *Connors v United Kingdom.*[74] The applicant and his family had resided on a local authority gypsy site for thirteen years, with the necessary contractual license to occupy a plot. The local authority (the Leeds City Council) issued proceedings for summary possession against the applicant, based on the grounds that he occupied a plot without the necessary license. In the witness statement the site manager asserted that the defendants breached the license agreement, although no particulars of the breach were given. During the hearing, the

[68] Bright S "Ending Tenancies by Notice to Quit: The Human Rights Challenge" (2004) 120 *LQR* 398-403 at 399-400.
[69] Van der Walt AJ *Property in the Margins* (2009) 109.
[70] Van der Walt AJ *Property in the Margins* (2009) 109. One could argue that termination of a joint tenancy through a notice to quit, which forms part of the common law, is unlikely to be Convention-compliant, because it is a mechanism that could be used to bypass the Housing Act 1985, which provides strong tenure security for tenants facing eviction. This method for termination of the tenancy does not form part of parliamentary decision-making and is therefore more suspect to contravene the Convention.
[71] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48.
[72] *Harrow LBC v Qazi* [2004] 1 AC 983 (HL).
[73] [2004] 1 AC 983 (HL).
[74] [2005] 40 EHRR 189.

applicant requested that the Council would review its decision to terminate the applicant's license. Shortly thereafter the high court refused to permit an application for judicial review. The county court granted a possession order and the applicant and his family were evicted from the caravan site.[75] The European Court of Human Rights examined the relevant domestic law regarding the provision of gypsy sites; unauthorised stationing of caravans; and security of tenure on caravan sites. It was clear that the local authority was entitled, under domestic law, to summary possession without a judicial review process to determine whether the possession order was reasonable and justifiable.[76]

However, without referring to the decision of the House of Lords in *Harrow LBC v Qazi*,[77] the European Court of Human Rights found that article 8 was applicable and that the eviction of the applicant did interfere with his article 8(1) right to respect for his home. The parties agreed that the interference was in accordance with the law and that it protected the rights of the local authority and the rights of the other occupiers of the site, the remaining question being whether the eviction was proportionate and necessary "in a democratic society" in pursuit of a legitimate aim, namely to protect the rights and freedoms of the local authority and other occupiers.[78]

The Court found that the initial assessment of whether an article 8 interference is "necessary in a democratic society" for a legitimate aim, is made by the national authorities. The interference must answer a "pressing social need" and be proportionate to that aim. However, the relevance and sufficiency of the case-specific reasons for the interference remains subject to review by the courts in order to determine whether the interference is Convention-compliant.[79] The Court acknowledged that the national authorities are better equipped to assess local needs and conditions, specifically those related to social and economic policies. National

[75] *Connors v United Kingdom* [2005] 40 EHRR 189 paras 9-28.
[76] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 127. Pursuant to Part I of the Caravan Sites Act 1968 (as amended by the Housing Act 2004), individuals who resided on caravan sites received limited security of tenure. The Mobile Homes Act 1983 conferred some protection to gypsy occupiers by providing that such a person could only be evicted once the site owner had established one of the required grounds, including that the occupier was in breach of the license agreement: *Connors v United Kingdom* [2005] 40 EHRR 189 paras 43-44.
[77] [2004] 1 AC 983 (HL).
[78] *Connors v United Kingdom* [2005] 40 EHRR 189 paras 68-70; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 127-128.
[79] *Connors v United Kingdom* [2005] 40 EHRR 189 para 81.

authorities must therefore enjoy a wide margin of appreciation in these areas, although the margin will vary according to the nature of the specific Convention right in question. Where the Convention right is crucial for the individual's well-being and enjoyment of life, the margin of appreciation will be narrower. The margin of appreciation will depend on the circumstances of each case where social and economic policy considerations arise in the context of article 8, "with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant".[80] The Court emphasised that the procedural safeguards that are available to a citizen facing eviction proceedings, as determined by the national authority when developing the regulatory framework, will be an important indication of whether the national authority remained within its margin of appreciation.[81] The Court also found that the vulnerable position of gypsies justifies placing a positive obligation on national authorities, by virtue of article 8 of the ECHR, to facilitate the effective protection of their special needs within the regulatory framework.[82]

The Court found that there was a violation of the applicant's article 8 right because the eviction took place without the necessary procedural safeguards. The serious interference with the applicant's article 8 right requires justification in the form of providing reasons of public interest. The case was therefore concerned with the "policy of procedural protection for a particular category of persons".[83] The legal framework regulating the occupation rights of gypsies did not provide the necessary procedural protection for the applicant and therefore violated his article 8 right.[84] The local authority's power to summarily evict the applicant without giving reasons and

[80] *Connors v United Kingdom* [2005] 40 EHRR 189 para 82.
[81] *Connors v United Kingdom* [2005] 40 EHRR 189 para 83.
[82] *Connors v United Kingdom* [2005] 40 EHRR 189 para 84. Bright S "Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v Price" [2006] *Conveyancer and Property Lawyer* 294-308 at 303 mentions that this positive obligation might also appear in other situations, although it is uncertain in what context the obligation will arise. From *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL), one might speculate that the positive obligation will arise in the context of vulnerability of classes of individuals. Bright S "Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v Price" [2006] *Conveyancer and Property Lawyer* 294-308 at 305 distinguishes between public and private landlords with regard to "positive obligations", by stating that only public authorities (landlords) have a positive duty to protect vulnerable occupiers under article 8 of the ECHR.
[83] *Connors v United Kingdom* [2005] 40 EHRR 189 paras 86, 95.
[84] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 128.

without being subject to judicial review did not serve any "pressing social need" and was therefore found to be disproportionate.[85]

In *Harrow LBC v Qazi*,[86] Lord Millett and Lord Scott of Foscote developed certain procedures for an article 8 defence, but they did not include the necessary guidelines to determine in which cases an article 8 defence could be raised and possibly succeed. Therefore there was some uncertainty with regard to the relevance of article 8. In *Connors v United Kingdom*,[87] the European Court of Human Rights accepted that the national authorities must enact legislation in order to give effect to various policies. Through the enforcement of these complex housing schemes, Convention rights might be infringed. However, the courts must evaluate the interference in each case in order to determine whether it is proportionate and pursues a legitimate aim. This approach clearly altered and possibly developed the reasoning in *Qazi* to such an extent that one can conclude that the majority in *Qazi* was wrong to state that an article 8 defence can *never* prevail against an owner entitled to possession in terms of the domestic law.[88] It is also important to note that in *Connors*, the Court found that the legal framework regulating the procedural safeguards of the gypsy community in eviction proceedings was inadequate. The Court did not question the substantive right of the local authority to evict gypsies.

The apparent incompatibility between *Harrow LBC v Qazi*[89] and *Connors v United Kingdom*[90] was resolved in the conjoined decision of *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others.*[91] In the *Leeds* case a number of gypsy travellers entered a recreation ground without the permission of the local authority landowner. The local authority commenced proceedings for possession, based on the ground that the travellers were trespassers who refused to vacate its property. The travellers agreed to these facts and claimed no defence under municipal law, but relied on article 8 of the ECHR as a defence, arguing that Leeds was in breach of its statutory duty to provide gypsies with sites to park their caravans. They contended that the local authority had to show justification under

[85] *Connors v United Kingdom* [2005] 40 EHRR 189 paras 94-95; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 128.
[86] [2004] 1 AC 983 (HL).
[87] [2005] 40 EHRR 189.
[88] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 128.
[89] [2004] 1 AC 983 (HL).
[90] [2005] 40 EHRR 189.
[91] [2006] 2 AC 465 (HL).

article 8 of the ECHR before they could be evicted, because of their exceptional personal circumstances, namely their medical problems and history of forced evictions.[92] In the *Kay* case the local authority made residential property available to a number of occupiers for several years, although the property was later leased to a housing trust (LQHT) and the appellants were allowed by the trust to occupy the property with licenses. In *Bruton v London and Quadrant Housing Trust*,[93] the court found that all the occupiers, including the appellants, who had been allowed by LQHT to occupy properties under similar licenses, held tenancies[94] and was therefore tenants and not licensees. The local authority gave notice to LQHT to terminate the lease and subsequently initiated possession claims against the various occupiers of the property. The occupiers claimed that they have become tenants of the local authority and as an alternative defence relied on the article 8 right to respect for their homes.[95]

Against this background, the House of Lords, sitting as a panel of seven judges, had to reconsider its decision in *Harrow LBC v Qazi*.[96] All seven judges agreed that the proposition made by the majority in *Qazi*, namely that a landowner's unqualified right to possession in terms of the domestic law can *never* be challenged by an article 8 defence, must be reconsidered and brought in line with the *Connors* decision.[97] The Court unanimously found that courts can generally assume that the

[92] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) paras 124, 125 per Lord Scott of Foscote. The case was transferred from the county court to the high court, where the deputy judge of the high court held that contractual and proprietary rights to possession could not be defeated by an article 8 defence. The court gave the possession order but also gave leave to appeal: *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 126. See also Hughes D & Davis M "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] *Conveyancer and Property Lawyer* 526-552 at 528 for a brief summary of the facts of the *Leeds* case.

[93] [2000] 1 AC 406.

[94] These tenancies came to be known in subsequent case law and literature as "Bruton tenancies": *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 138; Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 128. See also Hughes D & Davis M "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] *Conveyancer and Property Lawyer* 526-552 at 527 for a brief discussion of the facts in Kay, especially with regard to the notion of a "Bruton tenancy".

[95] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) paras 132-137. The county court and the Court of Appeal rejected the occupier's reliance on article 8, following *Harrow LBC v Qazi* [2004] 1 AC 983 (HL). See Bright S "Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v Price" [2006] *Conveyancer and Property Lawyer* 294-308 at 295-296 for further detail on the facts of the case.

[96] [2004] 1 AC 983 (HL).

[97] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) paras 64, 98, 111 per Lord Hope of Craighead; para 179 per Lord Hale of Richmond; para 198 per Lord Brown of Eaton-under-Heywood.

domestic law had already struck a suitable balance between the competing interests and that the law is Convention-compliant, referring to article 8 and article 1 of Protocol 1 of the ECHR.[98] In general, courts can also assume that a landowner's proprietary entitlement to possession as stated under the domestic law provides the landowner with the necessary justification, as required by article 8(2), to interfere with the occupier's article 8(1) right to respect for his home.[99] A public authority landowner therefore does not have to prove justification for the defendant's eviction by referring to the "social merits" of the case in every possession proceeding. Such an approach avoids a "colossal waste of time and money".[100] All seven Law Lords agreed that the appellants in both cases must succeed with their respective claims for possession,[101] although the majority and minority's reasoning regarding when the defendant's article 8 defence could succeed differed.[102]

The majority identified two highly exceptional cases[103] where article 8 of the ECHR might provide the occupier with a successful defence against a landowner's undisputed municipal right to possession. The first case is where "a seriously arguable point is raised that the law which enables the court to make the possession

[98] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 55 per Lord Nicholls; para 109 per Lord Hope of Craighead; para 203 per Lord Brown of Eaton-under-Heywood. Article 1 of the First Protocol provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law … [t]he preceding provisions shall not … impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest …"

[99] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 173 per Lord Scott of Foscote; para 180 per Baroness Hale of Richmond.

[100] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) paras 54-55 per Lord Nicholls of Birkenhead. See para 109 per Lord Hope of Craighead and para 29 per Lord Bingham of Cornhill for concurring judgements. See also Bright S *Landlord and Tenant Law in Context* (2007) 611.

[101] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 48 per Lord Bingham of Cornhill, who found that the appellants in the *Price* appeal never occupied the premises as their "home" in terms of article 8 (1), because they only occupied the land for two days and could therefore not show "continuous links with the land as would be necessary if it were to be regarded as their home". All seven Law Lords also found that the occupiers in *Kay* never became tenants and therefore had no contractual or proprietary right to remain on the premises: Bright S "Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v Price" [2006] *Conveyancer and Property Lawyer* 294-308 at 297.

[102] The majority comprised Lord Hope of Craighead, Lord Scott of Foscote, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood; and the minority comprised Lord Bingham of Cornhill, Lord Nicholls of Birkenhead and Lord Walker of Gestingthrope. The preceding section is based on Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 129 summary of the "common ground" in the decision.

[103] The mentioned cases came to be known in subsequent case law as the two "gateways" through which an occupier can resist possession proceedings. The first case was later identified as "gateway (a)" and the second case as "gateway (b)": *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) paras 37-55.

order is incompatible with article 8".[104] In such a case the county court should either try and give effect to the law in a Convention-compliant manner or adjourn the proceedings and allow the high court to resolve the compatibility issue.[105] Lord Scott of Foscote made a similar proposition, although specifying that "the law" would include statutory and common law rules.[106] It is also important to note that "the law" consists of substantive rights and procedural controls. An article 8(1) defence could therefore challenge the landowner's substantive right to possession or the procedural safeguards regulating the eviction process.[107]

The second case is where the occupier disputes the "decision of a public authority to recover possession as an improper exercise of its power at common law on the ground that it was a decision that no reasonable person would consider justifiable".[108]

Considered together, these two grounds indicate that any article 8 defence must therefore challenge the law (either substantive or procedural law) or the decision of a public authority that allowed the eviction order. A defendant cannot raise an article 8 defence based on his personal circumstances.[109] If that was possible, the Human Rights Act 1998 would allow a "merits review" in cases where

[104] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead. According to the majority, the reasoning in *Connors* could be categorised under this case because the "legal framework" allowed the eviction without the necessary procedural safeguards and was therefore "defective". The law itself did not provide procedural safeguards, nor did it provide any special consideration for gypsies as a vulnerable minority group: *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) paras 67, 97-100. See also Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 130.

[105] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead.

[106] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 168.

[107] See Goymour A "Proprietary Claims and Human Rights – A Reservoir of Entitlement" (2006) 65 *CLJ* 696-719 at 702-703 and text accompanying ffn 147-152 below.

[108] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead. The Court required that the point should be seriously arguable. See also paras 208-211 per Lord Brown of Eaton-under-Heywood. The second case would not be brought under the Human Rights Act 1998, but rather be based on "conventional judicial review grounds", arguing that the local authority's decision was unreasonable and therefore unlawful: *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 208 per Lord Brown of Eaton-under-Heywood; see further Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 130.

[109] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead; para 174 per Lord Scott of Foscote; paras 189-192 per Baroness Hale of Richmond; para 212 per Lord Brown of Eaton-under-Heywood. The court would be able to consider the personal circumstances of the occupier in a case where the domestic law makes provision for such arguments.

the law (meaning the legislation) had already struck the proportionate balance.[110] To a large extent, the majority restated the *Qazi* decision, although admitting some exceptions. The effect of the majority decision reaffirms the nature of housing law as a body of law that upholds the right of the stronger party, namely the freeholder. The proprietary right of the landowner will trump the "home" right of the tenant,[111] except in highly exceptional circumstances where there is a deficiency in the law itself.

The minority strongly disagreed on this point, arguing that where a public authority seeks to evict a person from his "home", that occupier must be given a fair opportunity to contend that, given the facts of the specific case, the requirements of article 8(2) have not been met.[112] This does not necessarily mean that the public authority must prove in every case that the eviction order would be justifiable and in accordance with article 8(2), but rather that the occupier must be given the opportunity to raise an article 8 defence.[113] If the occupier does not make use of this defence, the public authority can rely on domestic property law and claim possession.[114] In the case where the statutory scheme, as developed by parliament, regulates the specific position of the occupier and the statutory prescribed conditions that allow the eviction order are met, it is highly unlikely that the occupier would gain any additional protection from article 8(1) of the ECHR. Where the relationship between the local authority landowner and tenant (or occupier) is not regulated by legislation, "[i]t cannot be said that the relationship between the parties … is the subject of a balance struck by parliament, but it is not unrealistic to regard the

[110] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 112 per Lord Hope of Craighead. Hughes D & Davis M "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] *Conveyancer and Property Lawyer* 526-552 at 538 mention that the majority, as in *Qazi*, was strict in their application of the hierarchy of private property rights against Convention-inspired human rights law.

[111] Hughes D & Davis M "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] *Conveyancer and Property Lawyer* 526-552 at 550.

[112] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 28 per Lord Bingham of Cornhill, who emphasised that article 8(1) does not guarantee a right to a home, but it does guarantee a right to respect for an individual's home. Any interference with this right must be justified by satisfying the "excepting conditions" under article 8(2).

[113] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 56 per Lord Nicholls of Birkenhead. See also Bright S "Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v Price" [2006] *Conveyancer and Property Lawyer* 294-308 at 300-301.

[114] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 29 per Lord Bingham of Cornhill.

general law as striking such a balance".[115] Lord Bingham of Cornhill for the minority concluded that the courts should follow its usual procedure and make a possession order if it is satisfied that the domestic law requirements are met, unless the occupier has a seriously arguable case contending that the law that requires the court to make the possession order is Convention-incompatible; or that the local authority's exercise of its powers in seeking a possession order is unlawful under section 6 of the Human Rights Act 1998 in light of the occupier's personal circumstances.[116]

Lord Bingham of Cornhill for the minority therefore identified two instances (similar to the majority) where an occupier can resist possession proceedings by relying on article 8 of the ECHR. The first instance is in essence identical to the first instance stated by the majority, namely that the occupier has to make an arguable case contending that "the law" is not Convention-compliant. The second instance seems similar to the one identified by the majority, although the effect is much broader. According to the majority, the occupier has to argue that the decision of the public authority to claim possession is an improper exercise of its duties and therefore unjustifiable, while the minority is of the opinion that any occupier can raise an article 8 challenge based on his personal circumstances. The decision of the local authority to claim possession can be justifiable, but nevertheless challenged by the occupier if his personal circumstances are of such a nature to substantiate a defence. The minority therefore adopted a much broader view of the types of circumstances that could be raised by an occupier facing eviction. According to the

[115] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) paras 35-36 per Lord Bingham of Cornhill. At para 203 Lord Brown of Eaton-under-Heywood agreed on this point, stating that where an owner's common law right to possession is unqualified and the occupier is not statutorily protected, the absence of such protection must be a deliberate decision by parliament. The balance between the rights of landowners and the interests of tenants (or occupiers) does therefore not necessarily have to be undertaken by the legislature, because one can assume that the general law does strike the required balance. See also para 53 per Lord Nicholls of Birkenhead. Van der Walt AJ *Property in the Margins* (2009) 111 explains that in the case where the legislature made provision for eviction and all the statutory requirements are met, the necessary weighing up of interests of landlord and tenant has been done by legislature and the courts should not easily interfere by creating additional Convention-type rights. In the case where the landlord claims possession based on discretionary grounds, the court will consider whether the eviction order would be reasonable by applying a balancing test, although where the landlord has a mandatory right to possession or a right to possession at common law, an article 8(1) defence might succeed in highly exceptional circumstances: Bright S *Landlord and Tenant Law in Context* (2007) 611.

[116] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 39 per Lord Bingham of Cornhill. See also Bright S *Landlord and Tenant Law in Context* (2007) 613.

minority the Human Rights Act 1998 enables any occupier to raise an article 8 defence and resist eviction on the basis of "social fact".[117]

In *McCann v United Kingdom*,[118] the applicant and his wife occupied local authority housing as joint secure tenants[119] under the provisions of the Housing Act 1985. The marriage broke down and Mrs McCann was re-housed elsewhere on grounds of domestic violence, while the applicant remained on the premises.[120] Mrs McCann terminated the tenancy by signing a notice to quit, whereafter the applicant was given notice to vacate the property.[121] The local authority instituted possession proceedings against the applicant in the county court, while he contended that the proceedings, in particular the grounds for eviction relying on the notice to quit, was incompatible with his article 8 right to respect for his home.[122] The county court found that, according to domestic law, the applicant had no defence against the local authority's right to possession, although, given the circumstances of the case, the judge held that the local authority did not act in compliance with article 8 of the Convention.[123] The Court of Appeal found that the applicant could not raise an article 8 defence and that the local authority "acted lawfully and within its powers in obtaining the notice to quit, which had the effect of terminating the secure tenancy".[124] The applicant was evicted, whereafter the decision came before the European Court of Human Rights.

The European Court of Human Rights briefly took into account the domestic law and relevant housing policy, referring to the notice to quit under common law;

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[117] Gray K & Gray SF *Elements of Land Law* (5th ed 2009) 130-131. The minority did qualify the types of circumstances that the court may consider when assessing an eviction order, stating that the occupier's personal problems should not benefit him where there are other means, including public services, available to alleviate those problems: *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 38 per Lord Bingham of Cornhill.

[118] (2008) 47 EHRR 40.

[119] See fn 16 above for a definition of a secure tenancy.

[120] *McCann v United Kingdom* (2008) 47 EHRR 40 paras 7-8, 10.

[121] See *McCann v United Kingdom* (2008) 47 EHRR 40 para 11 for further detail on the role of the local authority during the termination proceedings. Mrs McCann's decision to terminate the joint tenancy was initiated and encouraged by the local authority. She was not given any information regarding the effect of the notice to quit, especially considering its effect on the occupation rights of her former husband.

[122] *McCann v United Kingdom* (2008) 47 EHRR 40 para 13.

[123] See *McCann v United Kingdom* (2008) 47 EHRR 40 para 14. The county court acknowledged that the interests of both parties had been taken into account by the legislature. The court should abide by the decisions of parliament and enforce possession proceedings accordingly, except in exceptional circumstances. Given the unique circumstances of the case and the attitude of the local authority in obtaining the notice to quit, the court found that the local authority did not act in accordance with the Convention.

[124] *McCann v United Kingdom* (2008) 47 EHRR 40 para 15.

security of tenure under the Housing Act 1985; and the local authority's domestic violence housing policy.[125] The recent decisions of the House of Lords in *Harrow LBC v Qazi*[126] and *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others*[127] were taken into consideration[128] before the Court decided that the article 8 defence was the only part of the application which raised "questions of law which [were] sufficiently serious that their determination should depend on an examination of the merits".[129]

The European Court of Human Rights agreed with the national courts, and it was accepted by the parties, that the local authority house continued to be the applicant's "home" despite the fact that his right to occupy the premises under domestic law was terminated. It was also agreed that the effect of the notice to quit, together with the possession proceedings, interfered with his article 8(1) right to respect for his home.[130] The Court found that the interference was in accordance with the law and that it pursued a legitimate aim in protecting the rights of the local authority to reclaim local authority housing stock from former tenants with no contractual or proprietary right to occupy the property. The interference was also necessary to ensure that the statutory housing scheme, as developed by parliament, was efficiently applied.[131] The question was whether the interference was proportionate to these legitimate aims and therefore "necessary in a democratic society".[132]

The Court found that the loss of an individual's home is the most intrusive form of interference with the right to respect for the home and that any home-

[125] *McCann v United Kingdom* (2008) 47 EHRR 40 paras 19-21.
[126] [2004] 1 AC 983 (HL).
[127] [2006] 2 AC 465 (HL).
[128] See *McCann v United Kingdom* (2008) 47 EHRR 40 paras 22-28.
[129] *McCann v United Kingdom* (2008) 47 EHRR 40 para 33. The applicant also relied on article 6 and article 14 of the Convention, but the Court found that these applications were ill-founded within the meaning of article 35 of the Convention: *McCann v United Kingdom* (2008) 47 EHRR 40 paras 31, 37.
[130] *McCann v United Kingdom* (2008) 47 EHRR 40 paras 46-47.
[131] *McCann v United Kingdom* (2008) 47 EHRR 40 para 48.
[132] *McCann v United Kingdom* (2008) 47 EHRR 40 para 49. In the rest of para 49 the Court referred to *Connors v United Kingdom* [2005] 40 EHRR 189 paras 81-83, where the European Court of Human Rights previously determined the relevant principles in assessing the necessity of an interference with an individual's right to respect for his "home". At para 50 in *McCann*, the Court disagreed with the government's contention that *Connors* only applies to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself. The Court therefore agreed with the minority in *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 28 per Lord Bingham of Cornhill. See Griffiths GLH "Article 8 and Possession Proceedings – The Saga Continues" [2008] *Conveyancer and Property Lawyer* 437-441 at 439-440.

occupier facing this magnitude of interference should generally be able to have the proportionality of the interference tested by an independent tribunal, despite the fact that the occupier's right to remain on the premises has expired under domestic law. Such interference should be tested against the background of article 8 of the Convention.[133] The Court emphasised that the applicant's tenancy could have been terminated by the local authority in accordance with the Housing Act 1985, provided that one of the specified grounds in the Act was proven and the Court was satisfied that the possession order would be reasonable. If the local authority had initiated possession proceedings in accordance with the Housing Act 1985, the personal circumstances of the applicant would have been taken into consideration by the court in order to determine whether the possession order would be reasonable.[134] However, the local authority bypassed these provisions by obtaining a common law notice to quit the joint tenancy from the applicant's former wife. The Court concluded that through the course of this procedure, the local authority did not give "any consideration to the applicant's right to respect for his home".[135] The judicial review proceedings did not provide an opportunity for an independent tribunal to examine the proportionality of the interference in terms of article 8 of the ECHR and as a result of such inadequate procedural safeguards the Court found that there was a violation of article 8.[136] Once again, analogous to the European Court of Human Rights' decision in *Connors*, the Court found that "the law" was defective because it did not include the necessary procedural safeguards for the occupier to state his circumstances or present his case during the eviction proceedings. The Court did not question the substantive rights of the local authority, because the notice to quit had terminated the joint tenancy, whereafter the local authority had an undisputed right to reclaim the property. However, the Court indirectly questioned the common law rule that a joint tenant can unilaterally terminate a joint tenancy by serving a notice to quit.

In *Doherty (FC) and Others v Birmingham City Council*,[137] the House of Lords had to decide whether a local authority could obtain a summary possession order against a occupier who resided on the local authority's caravan site without a

[133] *McCann v United Kingdom* (2008) 47 EHRR 40 para 50.
[134] *McCann v United Kingdom* (2008) 47 EHRR 40 para 51.
[135] *McCann v United Kingdom* (2008) 47 EHRR 40 para 52.
[136] *McCann v United Kingdom* (2008) 47 EHRR 40 paras 53, 55.
[137] [2008] UKHL 57 (HL).

licence.[138] The local authority served a notice to quit on the appellant, who had been residing on the site for seventeen years.[139] The local authority asserted that they required vacant possession of the site in order to carry out essential improvement works. The appellant relied on article 8 of the ECHR to oppose the eviction, contending that the local authority would only be entitled to a possession order if it was proportionate in light of all the circumstances of the case and that, given the circumstances of the case, this test was not satisfied. The appellant therefore relied on the local authority's duty not to act in a way that would not be Convention-compliant in terms of section 6(1) of the Human Rights Act 1998.[140]

The House of Lords confirmed its previous decisions in *Harrow LBC v Qazi*[141] and *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others*,[142] making it clear that the decision was in line with the basic law as laid down by the majority in *Qazi* and *Kay*.[143] Lord Hope of Craighead confirmed the basic rule that an article 8 interference, which results from the application of the law, does not violate the Convention unless the law enabling the public authority's right to possession is defective. The local authority's unqualified right to possession should not be diminished or denied as a result of the occupier's personal circumstances.[144]

Lord Hope of Craighead confirmed that an occupier can only raise a defence against a possession order by challenging the law under which the order is sought and can therefore not challenge the eviction proceedings based on his personal circumstances.[145] However, the present case was exceptional as the law itself was defective. The legal framework that regulated the appellant's case excluded the

[138] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 1 per Lord Hope of Craighead.
[139] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 2 per Lord Hope of Craighead.
[140] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 4 per Lord Hope of Craighead. The appellant therefore relied on gateway (a) and (b) as a defence against the local authority's right to claim possession: Griffiths GLH "Article 8 and Possession Proceedings – The Saga Continues" [2008] *Conveyancer and Property Lawyer* 437-441 at 440.
[141] [2004] 1 AC 983 (HL).
[142] [2006] 2 AC 465 (HL).
[143] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 22 per Lord Hope of Craighead; para 61 per Lord Scott of Foscote; para 108 per Lord Walker of Gestingthorpe.
[144] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 22 per Lord Hope of Craighead.
[145] In *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 71 Lord Scott of Foscote stated that a responsible and reasonable local authority would have regard for the personal circumstances of the occupier when considering eviction proceedings.

gypsy community from the required procedural safeguards.[146] Lord Hope of Craighead affirmed the "gateways" to solving the applicant's case by stating that the courts should first try and find a solution through gateway (a) and, if unsuccessful, attempt to solve the problem through gateway (b).[147] Through part (i) of gateway (a) the courts should try and interpret the law (or give effect to the law) in a way that is compatible with the Convention right.[148] Lord Hope of Craighead found that the relevant legal framework could not be interpreted in a way that would be compatible with the appellant's article 8 Convention right.[149] The Court also found that a declaration of incompatibility under part (ii) of gateway (a) was unnecessary,[150] which led the Court to search for a possible solution under gateway (b).[151] Gateway (b) can provide the occupier with a defence in the form of a challenge to the public authority's decision to seek possession. The occupier can challenge the decision of the public authority on the ground that it was an improper exercise of the authority's power.[152] Lord Hope of Craighead concluded that it would be appropriate to examine the reasonableness of the local authority's decision to institute possession proceedings against the appellant, considering the aim to acquire vacant possession to carry out essential works and the length of time the appellant resided on the

[146] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 42 per Lord Hope of Craighead.
[147] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) paras 43-44 per Lord Hope of Craighead; paras 66-81 per Lord Scott of Foscote; paras 128-140 per Lord Mance.
[148] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 46 per Lord Hope of Craighead.
[149] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 50 per Lord Hope of Craighead. At paras 48-49 the Court found that the regulatory framework excluded gypsies from statutory protection and that this was a decision of parliament. The incompatibility that results from this framework is therefore a creature of statute, despite the fact that the local authority can evict gypsies in terms of the common law. The court is not at liberty to suspend or postpone an eviction order contrary to the legislative scheme. The court can interpret legislation, but cannot change the substance of a provision and thereby reverse the effect thereof.
[150] In *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 51 per Lord Hope of Craighead; the Court found that in *Connors v United Kingdom* [2005] 40 EHRR 189 the European Court of Human Rights indicated that there was an incompatibility in the legislation which had to be addressed by parliament. The decision whether to amend the legislation had to be taken by parliament and not by the courts. The making of a declaration of incompatibility was therefore unnecessary in *Doherty* as this issue was already raised in *Connors* and the law had already been changed. "Sections 325(3) and (4) of the Housing and Regeneration Act 2008 leave the choice of the commencement date for the relevant provisions to the Secretary of State. But there is no longer any need for the 1993 Act to be amended": para 51.
[151] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 51 per Lord Hope of Craighead.
[152] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 53 per Lord Hope of Craighead.

site.[153] The Court allowed the appeal and remitted the case to the high court in order to review the local authority's reasons for terminating the appellant's occupation right.[154]

The reasoning of the majority is somewhat confusing,[155] because Lord Hope of Craighead initially found that the law itself was defective, but then decided that "solving" the incompatibility issue through gateway (a) was impossible, which led the reasoning to gateway (b).[156] However, in *Kay* the majority found that an occupier can raise an article 8 defence in two highly exceptional cases. The first case is where the occupier argues that the law itself is defective (gateway (a));[157] and the second case is where the occupier disputes the decision of the local authority as an improper exercise of its power at common law (gateway (b)).[158] Lord Hope of Craighead initially argued that the law itself was defective but concluded that the occupier could challenge the decision of the local authority on the ground that it was an improper exercise of the authority's power, thereby relying on gateway (b).[159] It is interesting to note that the Court's eventual assessment was a proportionality balancing exercise. In order to determine whether the decision of the local authority was an improper exercise of its power at common law, the Court had to consider the reasonableness thereof in the light of the factual position of the occupier.[160] To determine whether the decision of a local authority is "improper", the courts would have to consider the local authority's reasons for making the decision to evict the occupier and the factual

[153] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 55 per Lord Hope of Craighead.
[154] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 57 per Lord Hope of Craighead; para 81 per Lord Scott of Foscote; para 89 per Lord Rodger of Earlsferry; para 124 per Lord Walker of Gestingthorpe; para 164 per Lord Mance.
[155] See Griffiths GLH "Article 8 and Possession Proceedings – The Saga Continues" [2008] *Conveyancer and Property Lawyer* 437-441 at 441 for a differing opinion.
[156] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) paras 42-44, 46, 50-51 per Lord Hope of Craighead.
[157] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead.
[158] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL) para 110 per Lord Hope of Craighead.
[159] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 53 per Lord Hope of Craighead. See also text accompanying ffn 147-152 above.
[160] *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) para 55 per Lord Hope of Craighead. See also text accompanying fn 153 above.

position of the occupier. It is unclear what the difference is between the factual position of an occupier and his personal circumstances.[161]

5.4 Conclusion

The legislative landlord-tenant scheme that has been developed by parliament is context-sensitive as it affords different levels of tenure security for diverse groups of members of society with different needs. Within this legislative framework some tenants enjoy better tenure rights than others. To argue that the weak tenure rights of some tenants, as provided for in the legislation, are accidental and therefore in need of rectification is unconvincing as a result of the complexity and extent of the legislative framework. The regulated tenure rights of tenants are a direct result of housing policy that reflects parliamentary decision-making. However, the English common law in the area of landlord-tenant law is not completely codified and some common law principles still apply. The common law and the legislation together form the domestic law and must be Convention-compliant. On this point the South African position is comparable, because the South African common law and legislation must comply with the Constitution, although it must also give effect to the Constitution, which entails certain obligations.[162] However, direct application of the South African common law might in some cases be suspect as a result of the influence of apartheid. The South African courts should therefore be more hesitant when applying the common law, especially in eviction cases, because forced evictions made racial segregation possible in terms of the common law as it was then interpreted.

One can conclude that the tenure rights of residential tenants in English law have received extensive consideration by parliament and by the legislature. The occupation rights of tenants are primary in English landlord-tenant law and are therefore mostly regulated. It is therefore unlikely that the English landlord-tenant statutes would be in contravention of the Convention, but this is not the case in

[161] For case law subsequent to *Doherty*, see *Doran v Liverpool City Council* [2009] EWCA Civ 146; *Manchester City Council v Pinnock* [2009] EWCA Civ 852; *Stokes v Mayor and Burgesses of London Borough of Brent* [2009] EWHC 1426 (QB).
[162] See section 3.9 in Chapter 3.

consideration of the common law. The tenure security of urban residential tenants in South Africa is different, as it has not been addressed extensively in legislation and one can conclude that it has not been taken into consideration by the South African government to the extent that it should have, especially in light of its constitutional obligation to do so. The tenure rights of South African urban tenants are currently limited to the common law forms of protection and therefore not necessarily in line with the Constitution.[163]

The South African Constitution is different from the ECHR, because it places certain obligations on the state. However, the role of the ECHR is similar to the South African Constitution to the extent that it also functions as a final examiner, testing whether the domestic law is Convention-compliant. According to the case law the courts are hesitant to question and challenge the decisions made by parliament, but there are limited areas ("gaps") in the legislative scheme that are in need of rectification. The role of the ECHR is therefore to identify those areas of law that require reconsideration, even if it only provides better procedural safeguards for weak occupiers.

From the case law discussion it is clear that the courts were initially uncertain regarding the application, and impact, of the ECHR on English domestic law. The first cases applied a restrictive approach when considering the role of article 8(1) and consequently found that in case of eviction the domestic law, including statutory and common law, had already struck the necessary balance between the rights of the parties. Article 8 therefore had no role to play, as it was not intended to create proprietary rights for tenants. In the subsequent cases, including cases decided in the European Court of Human Rights, the courts developed jurisprudence that gave more clarity regarding the application and role of article 8. The courts agreed to a certain extent that an article 8 defence could succeed in two cases, namely where the law is defective (substantive or procedural) or where the decision of the local authority was improper and unreasonable.

An alternative framework for analysing an article 8 defence against possession proceedings suggests that any claim for possession consists of three parts and any one of these parts could be incompatible with the occupier's article

[163] See Chapter 3 for an explanation regarding the common law tenure rights of tenants.

8(1) right to respect for his home.[164] A proprietary claim for possession consists of an established proprietary right to seek possession (part (i)); a decision to make the claim for possession (part (ii)); and the correct legal procedure (part (iii)). Part (i) concerns substantive property law, which consists of a complex body of law, including the common law and the statutory scheme developed by parliament. The decision of a local authority (acting as social landlord in the social housing sector)[165] to claim possession would fall under part (ii) and is regulated by domestic public law, while part (iii) forms part of procedural law.[166] When considering the case law against the background of this framework, a certain pattern emerges. In the case law[167] where the local authority landowner had a clear right to possession under domestic law and the occupier relied on article 8(1) to challenge the substantive right of the landowner, the courts applied the domestic law strictly and granted the possession order. The cases in which an article 8(1) defence succeeded either described the decision of the local authority as an improper exercise of its power at common law[168] or attacked "the law" for providing inadequate procedural safeguards.[169] Stated differently, it is highly unlikely that an occupier will succeed when arguing that the substantive property law violated his article 8 right, especially where the landowner's substantive right to possession is regulated in terms of statute law. If this was not the case and unlawful occupiers could rely on article 8(1) to resist eviction, based on their personal circumstances, article 8 could potentially "redistribute domestic

[164] Goymour A "Proprietary Claims and Human Rights – A Reservoir of Entitlement" (2006) 65 *CLJ* 696-719 at 702.
[165] The local authorities serve a social function, but their actions are regulated under public law. The framework developed by Goymour therefore only applies to local authority lettings.
[166] Goymour A "Proprietary Claims and Human Rights – A Reservoir of Entitlement" (2006) 65 *CLJ* 696-719 at 702-703.
[167] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; *Lambeth LBC v Howard* [2001] 33 HLR 58; *Harrow LBC v Qazi* [2004] 1 AC 983 (HL). In *Poplar* and *Lambeth* the landowner had a statutory right to possession, while in *Qazi* the local authority had a clear common law right to possession.
[168] *Kay and Others v Lambeth LBC; Leeds City Council v Price and Others* [2006] 2 AC 465 (HL); *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL). In *Kay*, the House of Lords stated that an occupier can raise an article 8 defence based on the decision of the local authority. This defence was confirmed in *Doherty*.
[169] *Connors v United Kingdom* [2005] 40 EHRR 189; *McCann v United Kingdom* (2008) 47 EHRR 40; *Doherty (FC) and Others v Birmingham City Council* [2008] UKHL 57 (HL) at para 42 per Lord Hope of Craighead, who found that the law was defective because the legal framework that regulated the appellant's case excluded the gypsy-community from procedural safeguards.

proprietary entitlement", possibly in conflict with considered policy decisions of the English parliament.[170]

One can conclude that an occupier may succeed with an article 8 challenge in the case where the law substantiating the possession order is defective; where the procedural safeguards regulating the eviction process are defective; or where the decision of the local authority (in the case where the landowner is a local authority) is an improper decision at common law or in terms of the relevant legislation. It is clear from the case law that the courts are hesitant to declare the substantive domestic law contrary to the Convention, because it would undermine parliamentary decision-making and sovereignty. In the case law where the courts did provide some form of protection through article 8 of the Convention, the decisive reason was either that the law was defective as a result of inadequate procedural safeguards or that the local authority's decision was an improper decision.

[170] Goymour A "Proprietary Claims and Human Rights – A Reservoir of Entitlement" (2006) 65 *CLJ* 696-719 at 704.

6. American Landlord-Tenant Law

6.1 Introduction

The imposition of rent regulation in the United States of America was initially justified by emergency conditions that resulted from the First and Second World War. The initial justification for regulating the private landlord-tenant relationship was based on extreme housing shortages that led to landlords exploiting the dire socio-economic circumstances by increasing rents. The emergency housing shortages existed in various states throughout the United States and rent regulation was not an unusual restriction on the common law rights of landowners during this period. On several occasions the United States Supreme Court upheld the restriction on the right of landowners to evict tenants upon expiration of the lease and the justification for rent control in light of the socio-economic circumstances. In due course, the majority of states abolished rent regulation, whereafter landlord-tenant law on evictions returned to the common law position, according to which the landlord could rely on summary eviction proceedings to evict the tenant once the lease had terminated. Generally, state intervention in the private landlord-tenant market is justified in the presence of a housing crisis, although rent regulation could also be justified where it is in the public interest for some other reason.

The State of New York, and more specifically New York City, introduced rent regulations in response to the extreme housing shortages that resulted from the wars, although the nature of the regulations changed throughout the post-war decades and transformed from being a broad-spectrum form of protection for countless New Yorkers towards being a form of social protection for a specific group of individuals in a specified area. The residential landlord-tenant system in New York City could be categorized into different sectors with different levels of tenure security. The private landlord-tenant relationship is currently still regulated quite extensively, with the aim to place restrictions on rent increases while providing security of tenure for a various group of tenants. To some extent, public rental housing in New York is also federally regulated in instances where the government is involved in the provision of housing for low to moderate income households. Public rental housing is aimed at providing affordable, secure housing for households through the provision of either government housing or rental subsidies. In the State of New York, and more specifically New York City, funds are made available to not-for-profit companies to

construct and in due course provide rental housing for low-income households. The provision of low-income rental housing is a form of social housing.

The residential landlord-tenant system in the State of New York, more specifically New York City, has developed and become increasingly complex over decades, since it is regulated by various laws that function on different government levels. Collectively, the laws provide secure homes to different members of society, although the laws that regulate the private rental market are applied generally. These laws are therefore not context-sensitive in protecting only the vulnerable members of society, but apply to all households that occupy certain buildings in the private rental market. The laws that regulate public rental housing are more context-sensitive, because they are aimed at alleviating hardship for low-income households through the provision of decent affordable housing, but the level of tenure security in public rental housing is nevertheless not as high as in the private market. This might seem counter-intuitive, but the public housing stock is limited and the state must be able to evict tenants on specified grounds as stated in the federal statutes and regulations. These laws ensure adequate procedural safeguards for public housing tenants.

The landlord-tenant system in New York, more specifically New York City, is indispensable as a comparable jurisdiction for a number of reasons. The laws that regulate the private and public rental market form a body of tenant protection. Collectively these laws protect different households with diverse income levels, although the underlying aim could be to address the high percentage of homelessness in New York City, especially in comparison to other major cities. The continued imposition of rent regulation in the private rental market could therefore be justified in light of this socio-economic problem. The Supreme Court of Appeal and other courts have found that the rent regulation laws are constitutionally justifiable, as will be shown below. The courts have held that the restrictions placed on the common law rights of landowners must be considered within the specific socio-economic circumstances. These restrictions serve a legitimate public purpose in protecting tenants while balancing the interests of the parties. The regulatory systems in the private and public sector aim to provide protection for weak tenants, which form part of the public welfare. The courts have found that the public interest justifies some degree of public control in the sphere of rental housing.

6.2 Justification for rent regulation

6.2.1 Common law[171]

Currently, the majority of residential common law leases[172] in the US are either fixed-term tenancies or periodic tenancies.[173] The "term" of the lease could either indicate the period of the lease or it could refer to the interest or estate that the tenant derives from the tenancy.[174] The commencement and end of the term of the lease must be indicated with reasonable certainty. This requirement is fundamental to the validity of the lease.[175] However, the inclusion of a rent obligation is not an essential part of the lease. A rent provision is generally included in most leases; and in such a case the amount of the rent is a vital part of the lease.[176]

The landlord is generally not obliged to renew the lease in the absence of an express covenant to offer a renewal.[177] Where a clause in the lease makes provision for an extension of the tenancy without any notice of acceptance required by the tenant, the mere act of the tenant holding over while paying rent which is accepted by the landlord, amounts to an extension of the lease. An extension is simply a continuation of the existing term of the lease, while a renewal constitutes the implementation of a new lease.[178] In the case where the lease does not make

[171] See section 2.5 in Chapter 2 for the similar common law position in South Africa after the Rents Acts were phased out.

[172] Singer JW *Introduction to Property* (2nd ed 2005) 437 defines leasehold as the "*transfer of possession* of real property for either a determinate or indefinite period." However, a leasehold is also a "bilateral contract" consisting of various terms and obligations. Leaseholds were initially governed by property law rather than contract law, because it was then rather conceptualized as transfers of estates in land: Singer JW *Introduction to Property* (2nd ed 2005) 437-438. Currently the courts rely on contract-based principles to reshape the modern landlord-tenant law: Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 374. Leaseholds are also defined as "nonfreehold estates": Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 363.

[173] Friedman MR *Friedman on Leases* Volume 1 (5th ed 2009) 4-4 – 4-5. See Singer JW *Introduction to Property* (2nd ed 2005) 437 for the historical origins of the leasehold relationship.

[174] Friedman MR *Friedman on Leases* Volume 1 (5th ed 2009) 4-1.

[175] Friedman MR *Friedman on Leases* Volume 1 (5th ed 2009) 4-2.

[176] Friedman MR *Friedman on Leases* Volume 1 (5th ed 2009) 5-2.

[177] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-1. The landlord's covenant to grant a renewal lease does not imply that the tenant is obliged to accept the renewal: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-4. In the case of renewal, the terms of the renewed lease are generally indicated in the renewal clause and are usually termed similar to the original tenancy: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-8.

[178] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-74. New York State law does not differentiate between an extension and a renewal: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-89. The New York Real Property Law (NYRPL) § 232-c states that a landlord's acceptance of rent, offered by a tenant holding over, creates a month-to-month tenancy unless an

provision for a renewal, the landlord is at liberty to refuse renewal, which would result in termination of the tenant's occupation rights.[179] At common law, the landlord could terminate the tenancy upon expiration of the lease without having to state any reasons for her decision, while the tenant was restricted in questioning the landlord's motive. Recently, this unilateral freedom of the landlord to merely terminate the tenancy or to refuse renewal has been restricted by general public policy concerns that resulted in legislation.[180] The core of this restriction is to prevent the landlord from evicting a tenant who enforced certain legal rights, which resulted in the landlord's motivation to evict the tenant. There has to be a link between the tenant's enforcement of rights and the landlord's motivation to evict the tenant. This form of eviction is referred to as a "retaliatory eviction" and the restriction on this form of eviction is currently an established common law principle in residential landlord-tenant law,[181] although it is also enacted in some legislation.[182]

Where the tenant remains in possession upon termination of the lease without any renewal or extension agreement with the landlord, the lease is generally referred to as a holdover tenancy.[183] At common law, the landlord has the options to either treat the tenant as a trespasser and commence eviction proceedings[184] or accept the

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express agreement indicates otherwise. The result of this provision is that acceptance of the rent by the landlord would not constitute a renewal in New York State: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-89.

[179] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-6.

[180] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-99.

[181] This common law principle that originated from policies that support housing codes has been adopted in case law, although in some courts where the state legislature has not adopted any significant landlord-tenant reform, the courts are more restrictive in interpreting "retaliatory eviction" as a policy concern: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-102. See also Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 439-440 for a discussion on retaliatory evictions.

[182] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 14-100 – 14-101.

[183] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-41.

[184] Previously the landlord could reclaim his premises by force: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-54. See Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-54 – 18-60 for more detail on the development of this rule. Currently, some states allow the landlord to make use of reasonable force to evict the tenant, or even permit the landlord to peacefully enter the premises, while other states regulate the right of the landlord through statutory remedies, which effectively excludes the right to self-help: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-56. Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 408 explain that even though self-help may be allowed theoretically, the restrictive interpretation followed by the courts in allowing this alternative has constrained the option of self-help and it is non-existent in practice. There are various objections against self-help. The greatest objection is that it is unnecessary because landlords from all states could make use of a speedy judicial remedy in order to acquire vacant possession: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-62. If the landlord decides to evict the tenant, she can also claim damages: Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 60. The landlord can claim damages for the fair rental value of the premises during the

continued occupation of the tenant as a new tenancy.[185] Once the landlord institutes eviction proceedings, the tenant's prior occupancy becomes one at sufferance.[186] The landlord would usually evict the tenant by relying on a summary proceeding, which is a quick and effective method to recover possession once the tenancy has terminated. This method is available in all states and would generally only require a couple of days' notice to the tenant before the landlord can institute the eviction proceedings.[187]

6.2.2 Landlord-tenant regulation

The modern perception of the landlord-tenant relationship has been influenced by various factors, including urbanization, industrialization, consumerism and social consciousness. This has led the courts to view a residential landlord as the party with superior knowledge of the "product" and therefore also with superior bargaining power. The position of tenants is seen in a very different light, since tenants are allegedly merely interested in establishing a home within the given "product" of the

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holdover period and any costs incurred by the landlord pertaining to the eviction proceedings: Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 64.

[185] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-41; Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 60. The decision to accept the holdover tenancy rests with the landlord, as the tenant would be bound by this election even in the case where the tenant did not necessarily intend to enter a renewed tenancy: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-42. The holdover doctrine has been modified by statutes in order to provide some relief for tenants, especially where the landlord could unilaterally raise the rent and enforce the succeeding term. These laws make provision for a shorter term for which the tenant is bound: Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 63. The position of the tenant is indeterminate for the brief period of time after termination of the lease and before the landlord enforces her election. The landlord's acceptance of rent (or any demand for rent) after termination of the lease indicates her intention in favour of a new tenancy: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-42. The holdover tenancy is generally deemed to be a new tenancy, although the terms of the original tenancy are generally incorporated into the renewed tenancy, except for those terms adjusted by the parties and the term of the lease: Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 62. Recently, holdover tenancies tend to be periodic tenancies instead of fixed-term tenancies: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-46 – 18-47.

[186] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 18-43. Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 60 defines a "tenant at sufferance" as "[a] tenant who originally entered into possession rightfully but wrongfully continues in possession after termination of his lease". Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 368 state that a tenancy at sufferance arises when the tenant holds over and that the landlord then has the option to allow renewal or to institute eviction proceedings. However, this common law rule has been altered by several jurisdictions: Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 368-369.

[187] Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 409.

landlord.[188] As a result of this new conception of the landlord-tenant relationship, the courts started to implement a warranty of habitability in residential rental housing, which has led to new regulations and housing codes throughout the metropolitan cities.[189] "Residential landlords have become a species of regulated public utility."[190] The majority of courts apply the warranty of habitability only to property leased for residential purposes. This distinction is not foreign to general landlord-tenant principles, as the laws (both the common law and legislation) do provide better protection for residential tenants. This could be as a result of the assumption that commercial tenants have greater bargaining power than residential tenants, because commercial tenants usually have better information when drafting the lease.[191] However, housing shortages also contribute to unequal bargaining power (also referred to as monopoly power) in the residential landlord-tenant market. At common law, landlords are at liberty to include certain terms and conditions in the lease that may have a harsh impact on tenants, thereby exploiting unequal bargaining power during periods of housing shortages. The courts can play a role in scrutinizing the contracts that are created on unequal bargaining power, but some argue that such a case-by-case approach could be inefficient.[192]

The implied warranty of habitability forms part of a corpus of various reforms[193] that strives to assist tenants (and specifically the poor) in finding affordable housing of decent quality. The risk in imposing these reforms, especially the warranty of habitability, is that landlords would respond by increasing the rents. The result would be a general improvement in the standard of rental housing, combined with rent increases, which could possibly be counter-productive in consideration of the initial problem of limited affordable housing of an acceptable

[188] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 1-13.
[189] The role of federal, state and local governments in "regulating, producing and financing … public and private housing tenements" has also been expanded as a result of this modern conception of the landlord-tenant relationship: Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 1-14. See also Singer JW *Introduction to Property* (2nd ed 2005) 439.
[190] Friedman MR *Friedman on Leases* Volume 2 (5th ed 2009) 1-14.
[191] Singer JW *Introduction to Property* (2nd ed 2005) 439.
[192] Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 376. The most obvious objection against a case-by-case approach is the time constraint involved.
[193] See Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 361-444 for a discussion of some of these reforms, including the warranty of habitability and the retaliatory eviction principle.

quality. The question is whether rent control, combined with some government-assisted housing programmes, could solve this predicament.[194]

Rent control legislation generally aims to alleviate undue hardship suffered by tenants as a result of housing shortages and the increased cost of housing, although these laws are also aimed at ensuring a fair return on the landlord's rental housing investment. Rent control is usually combined with housing code regulations that compel landlords to rehabilitate rental housing stock and it encourages the construction of new units.[195] The majority of rent control laws require some form of housing emergency as the foundation for justifying the imposition of these regulations, although in some states the existence of a housing emergency is not a requirement for such justification "if the statutes serve the public interest."[196] A shortage of decent low- and moderate-income housing stock, combined with a period of inflation, could firstly initiate new housing policy that aims to protect vulnerable tenants and then justify the enactment of rent control laws because it would be in the public interest. These collective socio-economic circumstances would have the most drastic long-term effect on low- and moderate-income households. These households would have to assign a greater portion of their income to remain in their current homes or move to lower cost housing.[197] The impact of these circumstances result in new housing policies that gradually develop over a period of time and eventually give effect to statutory intervention in the relationship between landlord and tenant. Rent controls are generally aimed at placing restrictions on the rent charged[198] and providing continued occupation rights for tenants through anti-eviction measures.[199] The strengthened protection of tenants' occupation rights could also be given effect to through the development of

[194] Dukeminier J, Krier JE, Alexander GS & Schill MH *Property* (6th ed 2006) 444.
[195] Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 295.
[196] Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 295.
[197] Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 295-296.
[198] Rents are usually set at historical levels (referred to as the base rent), which serves as the foundation for all rent increases. The base rent is typically the rent charged six months prior to the enactment of rent control laws. The majority of rent control laws allow annual rent increases, because the aim is to control rent increases, not to convert landlords into welfare providers: Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 299-300. The majority of rent control laws allow landlords to petition for higher rent increases in order to ensure that they receive a fair return on their investment. This would typically be the case where the landlord incurred additional costs pertaining to maintenance or major improvements: Singer JW *Introduction to Property* (2nd ed 2005) 476.
[199] Hill DS *Landlord and Tenant Law in a Nutshell* (4th ed 2004) 303 mentions that the protection of tenants is at the core of all rent control laws and that such protection is usually imposed by limiting the right of the landowner to evict the tenant.

the common law, although the necessary extent of tenant protection and the aim of providing strengthened tenure rights for a marginalised group of occupiers is more efficiently addressed through the progressive development of housing policy and enactment of landlord-tenant legislation.

6.3 Contextual background

6.3.1 Introduction

During the Second World War, rent control was introduced in various states and municipalities.[200] Since the 1970s, restrictions on rent increases were also enacted through a number of ordinances and by-laws in several municipalities. The imposition of rent control in municipal areas is usually initiated by state statutes and municipal charters that force the municipalities to enact rent control laws.[201] The imposition of rent control laws in various states was never an unusual statutory intervention.[202] During the Second World War, nationwide rent controls were introduced through the federal Office of Price Administration; this imposition was extended in 1947 by the federal Housing and Rent Act.[203]

The majority of the rental housing stock in the US is privately owned by for-profit landowners. The government has intervened in the private rental market on a

[200] Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 1 mentions that since the end of the nineteenth century, Americans have experienced difficulty with certain effects that resulted from capitalism. These results include monopolies and market failures that benefit some groups, while imposing additional burdens on others. Regulation is a response to market failure, although during certain periods, regulation was quickly followed by deregulation: Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 1-2.

[201] Singer JW *Introduction to Property* (2nd ed 2005) 476. Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 2 also mentions that "residential rent control operates within a political and organizational framework that is largely local".

[202] Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 3. Keating briefly explains that the government was cautious of federal regulation, because it might pose a threat to industrial production. See also Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 3-6 for a historical background of rent control in some of the states.

[203] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 118. The Act applied to all residential housing completed on or before February 1947: 50 United States Code Annotated (USCA) Appendix § 1892(c)(3).

state and local level, although the interventions were primarily aimed at regulating the condition of the premises. Federal housing policy has always been aimed at promoting homeownership (especially for middle-income households) and the necessary sustainability for this ideal was made possible through "mortgage insurance and tax deductibility of mortgage interest and property taxes. That remains the focus of the government's broad policy today."[204] However, various housing policies have emerged that address socio-economic concerns, such as the affordability of low-income housing.[205] In 1937, the government enacted the Public Housing Program, which provided federal subsidies to state and local governments to develop low-income housing. Since 1974, federal housing assistance escalated with the introduction of below-market-rent subsidies, provided through either the Section 8 Program or housing vouchers.[206] The main reason for the federal government's restrictive approach in developing more affordable housing options for low- to medium-income households is that the federal government is constitutionally not obliged to make housing available to all households, as the Constitution of the United States of America 1787 guarantees neither a right of access to housing, nor basic welfare needs.[207] Nevertheless, the individual states can make provision for some welfare-based rights.

6.3.2 New York City

In 1943 New York City introduced rent control in response to the extreme housing shortages. However, rent control was also introduced in New York City

> "to facilitate the mobilization of the civilian labour force needed by the defence industry during World War II. By imposing a firm ceiling on rents, rent control not only dampened upward price pressures and speculation in the existing housing stock, but also had the effect … of diverting investment capital from

[204] Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 8.
[205] Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 8.
[206] Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) *Rent Control: Regulation and the Rental Housing Market* (1998) 1-15 at 8. Federally subsidized housing programmes are discussed in section 6.5 below.
[207] Singer JW *Introduction to Property* (2nd ed 2005) 631. See section 3.4 in Chapter 3 for the South African position regarding the constitutional right of access to adequate housing.

> housing into productive sectors of the economy that were more closely allied with the war effort."[208]

In 1950, the New York State legislature decided not to discard rent control. This decision was based on the recommendation of a Temporary State Housing Rent Commission that observed the system of rent control in various communities.[209] The justification for the continued imposition of rent control was based on its temporary status and the persisting housing shortages that resulted from the war. Governor Harriman stated that rent control formed part of a "broader housing program" and that it was intended to operate on a temporary basis until the supply of adequate housing increased.[210] New York City introduced rent controls to address housing shortages that initially formed part of the emergency wartime measures, but rent control was also used for economic reasons, such as diverting capital from the housing sector to increase production. In 1950, the New York Emergency Housing Rent Control Act made provision for the continuation of rent control in New York State, although the rent regulation laws enacted during the 1960s could be identified as the core legislation on which the current New York City (including some communities outside the City) rent regulation system is based.[211]

The laws underwent some modification in the 1970s and 1980s, but the general aim was to "empower localities to impose rent controls and to govern the terms of the local laws."[212] In 1993, it was found that thirty percent of New York City's rent-stabilized tenants lived under the federal poverty line and that these households had a very slim chance of acquiring public housing. Deregulation therefore became less attractive, as it would lead to even more homelessness in a city where the

[208] Stegman MA "The Model: Rent Control in New York City" in Niebanck PL (ed) *The Rent Control Debate* (1985) 29-56 at 30.
[209] Stegman MA "The Model: Rent Control in New York City" in Niebanck PL (ed) *The Rent Control Debate* (1985) 29-56 at 31.
[210] Stegman MA "The Model: Rent Control in New York City" in Niebanck PL (ed) *The Rent Control Debate* (1985) 29-56 at 31.
[211] The legislation includes the Local Emergency Housing Rent Control Act, the Local Emergency Rent Control Act (§§ 8601-8617 delegated the authority for regulating rents in New York City to the city itself); and the Rent Stabilization Law (RSL) that was enacted in 1969: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 118. See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 119-121 for a discussion on the introduction and implementation of some of the other laws (also referred to later in this chapter).
[212] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 118. More than fifty municipalities in New York State have decided to maintain the imposition of rent control, since the housing emergency is still present. This includes the five boroughs of New York City and various other counties: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 123.

percentage of homeless individuals was already high in comparison to other major cities.[213] In 2003, the rent regulation laws in New York State were again extended for a period of eight years.[214] Rent control has not been phased out in New York City to date, even though it is obvious that the initial justification for rent regulation is no longer applicable.

In comparison to the rest of the major US cities, New York City has a low percentage of homeowners, during the 1980s amounting to less than three in ten.[215] The City has a large private rental housing market and thirty percent of the market is unregulated. Tenants in the unregulated section of the market are paying more than the market rent, while tenants in regulated apartments either pay ten to forty percent below the market rent or fifty to ninety percent below the market rent, depending on the type of rent regulation applicable.[216] Rent control was introduced as a temporary, emergency wartime measure aimed at encouraging economic development through increased production, but it was also necessary to alleviate some of the hardship suffered by the majority of New Yorkers in consequence of limited affordable rental housing. However, over the preceding half century rent control has developed into a form of social welfare. Rent control is a form of state intervention in the private market aimed at achieving certain social goals.[217] Rent control could therefore also be perceived as a form of social planning that acts as a "mediator between market forces and public needs."[218]

New York State is both interesting and useful as a comparative source, because Article V of the Constitution of the United States of America 1787[219] states that "[n]o person shall … be deprived of life, liberty, or property". The New York

[213] Gilderbloom JI & Appelbaum RP *Rethinking Rental Housing* (1988) 25 explain that in 1979 the availability of low-income housing was extremely low and rental housing was not a viable option for low-income households. In 1986 it was found that homelessness in New York City appeared to have become a long-term problem for a large number of persons. The shortage of affordable rental housing was found to be a direct factor in contributing to the growing percentage of homelessness: Gilderbloom JI & Appelbaum RP *Rethinking Rental Housing* (1988) 31.
[214] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 113.
[215] Stegman MA "The Model: Rent Control in New York City" in Niebanck PL (ed) *The Rent Control Debate* (1985) 29-56 at 29.
[216] Tucker W *Zoning, Rent Control and Affordable Housing* (1991) 49. The rent control and rent stabilization systems are discussed in section 6.4 below.
[217] Stegman MA "The Model: Rent Control in New York City" in Niebanck PL (ed) *The Rent Control Debate* (1985) 29-56 at 50.
[218] Stegman MA "The Model: Rent Control in New York City" in Niebanck PL (ed) *The Rent Control Debate* (1985) 29-56 at 53.
[219] Fifth Amendment 1791; Fourteenth Amendment 1868.

Constitution requires the state to provide some welfare benefits to the needy, although the implementation of this obligation is subject to legislation.[220] In *Callahan v Carey*[221] the New York Supreme Court created a right to shelter in New York City.[222] In New York, the state is therefore obliged to provide welfare benefits to the needy and homeless persons have a right to shelter. In comparison to South Africa, one can identify similarities regarding the protection of private property (section 25(1) of the Constitution) and the right to shelter (section 26(1) of the Constitution).[223] However, the imposition of rent regulation throughout the twentieth century and the progressive justification for limiting the private law rights of landowners in accordance with the federal and state constitutions is more extensively developed in New York (and more specifically New York City) than in South Africa. The initial justification for rent regulation in New York was similar to previous rent regulation in South Africa, although the progressive justification and continuous imposition of statutory intervention in landlord-tenant law in New York, and New York City as an urban setting, is different from South African landlord-tenant law. One of the consequences of deregulation in New York could be increased homelessness, which justifies rent regulation as it is in the public interest to alleviate homelessness. The question is whether the reduction of homelessness is in the public interest in South Africa and whether insecure tenure rights of urban residential tenants contribute to homelessness in South Africa.

[220] Constitution of the State of New York Art XVII § 1. The section provides that the "aid, care and support of the needy are public concerns and shall be provided by the state … as the legislature may from time to time determine."
[221] 831 NYS 2d 352.
[222] Tucker W *Zoning, Rent Control and Affordable Housing* (1991) 53 also mentions that New York City has the most extensive shelter system in the US. In *Callahan v Carey* 831 NYS 2d 352 (1979) the New York Supreme Court granted homeless men a preliminary injunction requiring the City to provide shelter. Based on the New York Constitution, the New York Social Services Law and the City's Administrative Code, the Court found that homeless men are entitled to a right to shelter and that this entailed clean bedding, adequate security and the necessary supervision to any homeless man who applied at the New York City Men's Shelter: Stoner MR *The Civil Rights of Homeless People: Law, Social Policy, and Social Work Practice* (1995) 30. In 1982 the right to shelter, as provided for in *Callahan*, was extended to women in *Eldridge v Koch* 98 AD 2d 675 (1983). See also Savas ES *Managing Welfare Reform in New York City* (2005) 289-292.
[223] See Chapter 3 for a discussion of the South African constitutional provisions relating to property and housing.

6.4 Rent regulation in New York City

6.4.1 Rent Control Law and Rent Stabilization Law

New York City enacted the Rent Control Law as well as the Rent Stabilization Law under the authority delegated to it by the State of New York, which enabled the City to create legislation. The New York City Rent Control Law is a continuation of federal and state control of rents.[224] The two systems regulate privately owned housing in New York City and outside the City, which effectively creates four systems of rent regulation. However, the differences between rent control and rent stabilization have become "muted" over the preceding years to such an extent that one can hardly establish which system is more stringent.[225]

The Rent Control Law applies to all housing units in buildings consisting of three or more units. The building had to have been completed or converted to residential use before 1 February 1947 and the unit had to have been occupied by the same tenant or the tenant's successor for continuous periods since 1 July 1971.[226] Rent-controlled apartments are subject to vacancy decontrol, which means that when the tenant voluntarily vacates the apartment, it will no longer be subject to the Rent Control Law and would therefore become deregulated.[227] In New York City,[228] primary residences in buildings with a minimum of six units are subject to the Rent Stabilization Law, although the units had to have been built prior to 1 January 1974. It is also required that the unit should not be regulated under the Rent Control Law.[229]

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[224] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 121-122. The Rent Control Law (RCL) was enacted in 1962, while the Rent Stabilization Law was enacted in 1969.

[225] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 113: "Rent control, which came first, was traditionally the more stringent with regard to rent setting, evictions, provision of building services, and enforcement."

[226] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 123. See 123-125 for some exceptions to this general application. Some units might be included, while others might be exempted even though it might seem as though such units should be covered.

[227] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 126-127. As a consequence, the number of rent-controlled units in New York City are diminishing quite rapidly, as there were only 43 000 rent-controlled apartments in 2005 by comparison to the 100 000 apartments in 1993.

[228] The coverage of rent-stabilized buildings outside New York City is analogous to the position in the City if the relevant locality adopted the Emergency Tenant Protection Act (ETPA), although some municipalities also require a higher number of units per building: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 127.

[229] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 128. This coverage is regulated in terms of the Rent Stabilization Law and the Emergency Tenant Protection Act. If an owner received

The Rent Stabilization system places a restriction on the rent charged by regulating the rent at the beginning of a tenancy as well as annual rent increases.[230] The annual rent increases are determined by the Rent Guidelines Boards (RGB), which are situated in New York City and some of the other counties (including Nassau, Westchester and Rockland). These boards establish maximum rent increases for new tenancies and for renewed leases, but special rent increases are also provided for in cases where a landlord is experiencing some form of hardship or where certain improvements were made to the premises.[231] The annual rent increase for rent-stabilized tenants can only be charged upon renewal of the lease. Rent-stabilized tenants are entitled to have their tenancy renewed for either one or two years and the maximum rent for the renewed period would be determined administratively by the Rent Guidelines Board.[232]

The Rent Control system introduced the maximum base rent (MBR) system in 1972, which allows the New York State Division of Housing and Community Renewal (DHCR) to set rent increases in the maximum base rent system for rent-controlled apartments,[233] although landlords are allowed[234] to increase rents annually to a

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some form of tax benefit, loans or other assistance, his property could also fall under rent stabilization even if the unit does not fit the general criteria: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 128. See also Scherer A *Residential Landlord-Tenant Law in New York* (2008) 137-138 for more detail on the laws regulating this inclusion. Some units that fit the general category of rent-stabilized apartments are exempted from rent stabilization (see Scherer A *Residential Landlord-Tenant Law in New York* (2008) 139-149 for a detailed discussion on these exemptions). This includes units owned by the government (§ 2520.11(b) New York City Rent Stabilization Code (NYC RSC)) and units owned as cooperatives or condominiums (§ 2520.11(l) New York City Rent Stabilization Code). In 1993 (and later in 1997), § 8625-a of the Emergency Tenant Protection Act amended the Rent Stabilization Law and the Emergency Tenant Protection Act to exclude high rent units occupied by high income tenants from rent stabilization: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 149. This form of deregulation is referred to as "luxury deregulation". The unit would be exempted from rent stabilization if the occupier's total household income exceeds $175 000 per year and if the monthly regulated rent is equal to (or more than) $2000: Emergency Tenant Protection Act § 8625-(b); New York City Administrative Code § 26-504.1; see also Scherer A *Residential Landlord-Tenant Law in New York* (2008) 150-153.

[230] The initial rent charged for a rent-stabilized unit has to be registered with the New York State Division of Housing and Community Renewal (DHCR) and is referred to as the "initial legal regulated rent" if the rent was registered after 1 April 1984: § 2521.1 New York City Rent Stabilization Code. See also the Emergency Tenant Protection Act § 8629(b); New York City Administrative Code § 26-513; § 2522.3 New York City Rent Stabilization Code for the procedures and requirements relating to rent increases.

[231] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 156-157.

[232] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 159.

[233] The Commissioner of the DHCR (also referred to as the Administrator) may increase rent-controlled rents through such an order: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 172.

[234] Landlords are not necessarily entitled to a maximum base rent increase, since the landlord must obtain an Order of Eligibility from the DHCR before the rent increase order can be confirmed by the Commissioner. In order to acquire the Order of Eligibility, the landlord must submit a certificate to the

maximum of 7.5 percent, also referred to as the maximum collectible rent (MCR).[235] Under all four systems of rent regulation, special rent increases[236] are permitted with the approval of the DHCR and are usually coupled with either some form of hardship suffered by the landlord (the landlord is for instance not making a profit)[237] or some investment[238] made by the landlord in relation to the premises.[239]

The New York City Rent Stabilization Code provides security of tenure for tenants, requiring that the owner of a rent-stabilized unit must offer a renewal lease to the tenant upon expiration of the original lease. The terms and conditions of the renewed tenancy must be identical to the expired lease,[240] although the landlord is at liberty to offer the tenant more favourable terms in the renewed lease.[241] The landlord is required to offer the renewed lease prior to the expiration of the original tenancy. This period is also referred to as the "window period".[242] However, the landlord is also required to notify the tenant (during the window period) of her

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DHCR six months before the rent increase order is given, wherein she confirms that all rent-impairing violations on the premises have been corrected or abated and that 80 percent of all other violations have been corrected: New York City Administrative Code §26-405(h)(6).

[235] New York City Rent and Eviction Regulations § 2201.6(a)(1); Scherer A *Residential Landlord-Tenant Law in New York* (2008) 172. Under the New York City Local Law 30 of 1970, rents have increased to a maximum of 7.5 percent in New York City. Outside New York City annual rent increases are determined by the DHCR.

[236] The New York City Rent Stabilization system for instance requires equitable considerations when determining whether to increase rents beyond the legally determined rent guidelines board levels. The DHCR must consider the effect of such an increase in relation to the protection of tenants (and the public interest), while also taking into account the purpose of the Rent Stabilization Law: § 2522.7 New York City Rent Stabilization Code; New York City Administrative Code §§ 26-511(b), 26-518(a); Scherer A *Residential Landlord-Tenant Law in New York* (2008) 174.

[237] The two formulae that a landlord of a rent-stabilized apartment may use to establish that the unit is generating insufficient profit are the "comparative hardship" formula and the "alternative hardship" formula: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 174-175. Where the landlord is successful, the tenant must be given the option to terminate the lease. The tenant may exercise this right 30 days prior to paying the increased rent: §2522.4(b)(4) New York City Rent Stabilization Code; §2522.4(c)(3) New York City Rent Stabilization Code.

[238] The Rent Stabilization Code and the Rent Stabilization Law make provision for certain rent increases where the landlord made "major capital improvements" to the building, but prior DHCR approval is required: §2522.4(a)(2) New York City Rent Stabilization Code; New York City Administrative Code § 26-511(c)(6)(b). All four systems of rent regulation make provision for rent increases where the landlord improved the dwelling space, the furnishings or added new equipment: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 188. See 189-195 for more detail on the rate of rent increase in relation to the cost of improvement.

[239] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 173.

[240] §2522.5(g) New York City Rent Stabilization Code. One exception to this requirement is that the landlord may include a provision in the lease to allow rent increases, although subject to the orders of the DHCR: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 197.

[241] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 198.

[242] This period is between 150 and 90 days prior to termination of the lease if the apartment is in New York City: §2523.5(a) New York City Rent Stabilization Code. If the apartment is outside the City, the period is between 120 and 90 days prior to expiration of the lease: §2503.5(a) Emergency Tenant Protection Regulations.

intention to refuse renewal and terminate the tenancy.[243] The tenant is obliged to respond to the landlord's offer within sixty days. Failure to respond within this period entitles the landlord to institute summary eviction proceedings upon termination of the lease.[244] The landlord is proscribed from refusing to renew the lease, except where there is a legal basis for refusal.[245] In the case where the landlord fails to offer renewal without relying on a specified ground for refusal, the tenant may continue to occupy the premises[246] because the tenant's continued occupation right is protected by the Rent Stabilization Law and the Rent Stabilization Code. Refusal of the landlord to renew the lease does not deprive the tenant of any rights provided for under the Rent Stabilization Law.[247] The continued tenancy is governed by the terms and conditions of the original tenancy and the landlord is prohibited from increasing the rent, as any rent increase requires a renewed lease.[248]

Where a fixed-term rent-controlled tenancy terminates and the tenant remains in the dwelling, the tenant automatically becomes a "statutory tenant". The terms and conditions of the new statutory tenancy are identical to the original tenancy, except for the provisions that are inconsistent with statutory restraints; the term of the lease; and the rent.[249]

6.4.2 General basis for eviction

If the tenant, occupying either a rent-controlled or rent-stabilized apartment, remains in the premises upon expiration of the lease and refuses to vacate the property, the landlord can seek to evict the tenant through a "holdover proceeding".[250] The

[243] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 200.
[244] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 200.
[245] The basis for refusal is provided for in the Rent Stabilization Law and the Rent Stabilization Code: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 201. The landlord is required to notify the tenant of her intention to terminate the lease by specifying the ground that she is relying on and providing facts to substantiate this ground. The notice should also notify the tenant when he is required to vacate the premises: §2524.2(b) Rent Stabilization Code.
[246] The tenant may file an administrative complaint with the DHCR to receive an order that would require the landlord to make an offer: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 202.
[247] § 2523.5(d) Rent Stabilization Code.
[248] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 203.
[249] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 205.
[250] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 540. The term "holdover" refers to a "summary eviction proceeding brought to evict on some basis other than nonpayment of rent."

relevant basis for the holdover proceeding is context-sensitive, because it would depend on the terms of the lease; the applicable statutory provisions;[251] and constitutional rights of the tenant.[252] Where the government is involved in the operation of housing or the ownership of the unit, the due process clauses of the Federal Constitution and the New York Constitution will place certain restrictions on the claimants.[253] According to the Real Property Actions Proceedings Law (RPAPL),[254] the basis for the tenant's eviction would depend on the form of housing involved, which includes privately owned housing and government involved housing. Where the tenancy is regulated, the rent regulation laws provide a number of other grounds for eviction, while publicly owned and subsidized housing is also regulated with its own basis for eviction.[255]

Where a tenant occupies an unregulated unit and the government is not involved in the operation of the dwelling (either through owning it or providing some form of assistance), the landowner may commence the holdover proceedings upon expiration of the lease by relying on a ground listed in the lease.[256] However, once a fixed-term tenancy expires due to lapse of time, the landowner may institute eviction proceedings by relying on the mere fact that the tenancy expired.[257] The common law right of the landowner to summarily evict the tenant upon expiration of the lease is therefore applicable in the absence of government and statutory intervention in the private landlord-tenant relationship.

The rights and duties of both landlord and tenant are usually included in the lease, although some obligations are derived from legislation. A tenant (including regulated tenants) may generally be evicted for non-compliance, a ground which

[251] These regulations include the Real Property Actions and Proceedings Law; the Rent Control and Rent Stabilization Laws; and various other laws that govern subsidized housing on different government levels: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 541.
[252] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 540-541.
[253] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 541.
[254] Section 711 of the Real Property Actions Proceedings Law generally provides that the tenant "shall not be removed from possession except in a special proceeding."
[255] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 551.
[256] See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 553-555 for more detail on the right of the landowner to evict the tenant by relying on one of the grounds provided for in the lease.
[257] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 551-552. Scherer mentions that the right of the landowner to evict the tenant once the tenancy has expired, without having to state any reasons, has its origins in the feudal, common law notion of the relationship between landlord and tenant. However, § 711(1) of the Real Property Actions Proceedings Law currently enables a landowner to institute a summary eviction order against a tenant holding over.

includes failure to comply with the terms of the tenancy or the tenant's obligations as provided for in the statutes.[258] Nevertheless, it is required that the tenant's obligation must be significant and that the violation should also be severe.[259] Violations of the lease include the installation of certain appliances without the consent of the landlord; the commission of waste or unauthorized alterations; overcrowding; and chronic late payment.[260] The Real Property Actions and Proceedings Law and the rent regulation laws enable the landlord to institute eviction proceedings in instances where the tenant failed to pay the rent,[261] although the tenant can avoid eviction by paying the rent prior to the issuing of a warranty of eviction. Chronic late payment is different, since the repeated failure to pay rent is considered to be a severe violation of the lease and therefore a ground for acquiring a holdover proceeding.[262]

A tenant may also be evicted if he creates a nuisance, although the tenant's conduct must be of such a nature that it threatens the life, health or safety of the other tenants or the landowner.[263] In terms of the Rent Stabilization Code and the Rent and Eviction Regulations, numerous types of behaviour can amount to a nuisance and form the basis for eviction, but the tenant's conduct must be unreasonable.[264] It is also required that the conduct must be "recurring, frequent, continuous, or extremely dangerous."[265] An allegation of an illegal activity on the premises is a ground for eviction, which is governed by a number of federal and

[258] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 555. A regulated tenant in New York may be evicted for failure to comply with the lease: § 2204.2(a) New York City Rent and Eviction Regulations; § 2524.3(a) Rent Stabilization Code.
[259] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 555. Where the tenant violated one of the terms of the tenancy, he is entitled to cure the breach prior to the commencement of the eviction proceedings.
[260] See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 561-568 for a detailed discussion on these violations and various other forms of non-compliance.
[261] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 653 mentions that several laws govern the eviction of a tenant where he failed to pay the rent. Article 7 of the Real Property Actions and Proceedings Law govern summary eviction proceedings in general, but it also specifically authorizes the institution of summary eviction proceedings where the tenant defaulted in payment of rent. However, before the landlord may institute such proceedings, he must have demanded the rent.
[262] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 569. Chronic late payment could also be perceived as a nuisance and therefore establish another ground for possession. A rent-stabilized tenant might be evicted where he consecutively failed to pay the rent, based on the fact that he violated an obligation of the lease. However, chronic late payment is not a ground that the landlord can rely on to refuse renewal of the rent-stabilized tenancy: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 570.
[263] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 572. Objectionable conduct is a ground for eviction in terms of § 711(1) of the Real Property Actions Proceedings Law and the rent regulation laws. This basis for eviction also applies to publicly subsidized housing.
[264] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 574.
[265] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 574.

state statutes.[266] Furthermore, landlords, law enforcement agencies and neighbours may institute eviction proceedings based on the allegation of a tenant's illegal activity.[267] Where it is found that the property was used for an illegal activity, the tenancy would be void.[268] The New York rent regulation statutes include additional provisions that regulate the eviction of rent-controlled and rent-stabilized tenants for illegal activity. A tenant occupying a rent-controlled (or rent-stabilized)[269] unit would be evicted if he used the premises for "immoral or illegal purposes".[270]

6.4.3 Eviction of rent-regulated tenants

Generally, all rent-regulated tenants who occupy units that are governed by the Rent Stabilization Law or the Rent Control Law, and who continue to pay their rent upon termination of the lease, may only be evicted if the landlord is able to establish a clear basis for eviction provided for in the relevant laws and regulations.[271] In some cases, depending on the ground for eviction, the landlord of a rent-controlled or rent-stabilized unit may institute eviction proceedings directly in court, although for other grounds the landlord is required to obtain the approval of the DHCR.[272] Where the landlord of a rent-controlled unit obtains approval for eviction from the DHCR after fulfilling the necessary criteria, the DHCR would issue a "certificate of eviction". Hereafter the landlord may bring a summary eviction proceeding.[273] The landlord of a rent-stabilized unit is generally obliged to offer the tenant a renewal lease, although

[266] See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 579-580 for a discussion on civil forfeiture, which relates to the illegal activities of tenants. See also Scherer A *Residential Landlord-Tenant Law in New York* (2008) 585-586 for a discussion of the federal statutes and regulations that pertain to the eviction of federally subsidized tenants where the tenant was involved in criminal activities.
[267] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 579. The Real Property Actions and Proceedings Law authorizes landlords (§711(5)) and certain other parties (§715) to commence eviction proceedings for illegal activities (or illegal occupation).
[268] New York Real Property Law § 231(1). The result is that the lease would terminate, but termination of the tenancy is not what the laws are premised on: See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 581.
[269] Rent Stabilization Code § 2524.3(d).
[270] New York City Rent and Eviction Regulations § 2204.2(a)(4).
[271] § 2204.1(a) New York City Rent and Eviction Regulations; § 2524.1(a) Rent Stabilization Code; Emergency Housing Rent Control Law § 8585(1).
[272] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 597-598. The grounds for eviction and the necessary DHCR approval differ between rent-stabilized and rent-controlled units. The location of the unit also has an influence on the DHCR approval requirement.
[273] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 598.

the landlord may seek permission from the DHCR, based on certain grounds, to refuse to renew the lease.[274] If the landlord is successful in obtaining permission, she may commence a summary eviction proceeding upon expiration of the lease.[275] Where the DHCR permits the landlord of a rent-stabilized unit to refuse renewal, the DHCR must mandate the landowner to pay the tenant's moving expenses to a "suitable" dwelling, offered at the same or a lower regulated rent, in a nearby area.[276] If the tenant is unable to find such a unit, the owner may be required to pay the difference in rent between the landowner's unit (from which the tenant has been evicted) and the new unit for a certain period as determined by the DHCR.[277]

The rent regulation laws provide a number of grounds that enable landlords of rent-controlled and rent-stabilized units to evict tenants. These grounds are discussed simultaneously, due to the large number of similar grounds, although reference is made to the relevant system (or systems).

The amended Rent Stabilization Code enables a landlord to bring an eviction proceeding based on the ground that the tenant engages in unwarranted behaviour that amounts to harassment. The conduct must be a continual unreasonable use of the property that aims to harass the owner; other tenants; or neighbouring occupiers.[278] The landlord of a rent-controlled or rent-stabilized unit may institute eviction proceedings based on the ground that the tenant occupies the premises in a manner that is illegal. The occupancy must subject the owner to civil or criminal penalty or violate a contract with government agencies.[279] Where the landlord of a rent-stabilized unit offers a renewal lease and the tenant refuses to renew the lease, the landlord may institute eviction proceedings.[280]

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[274] § 2524.5 Rent Stabilization Code.
[275] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 599.
[276] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 599.
[277] § 2524.5(c) Rent Stabilization Code.
[278] § 2524.3(b) Rent Stabilization Code.
[279] New York City Administrative Code § 26-408(a)(3); § 2204.2(a)(3) New York City Rent and Eviction Regulations; § 2524.3(c) Rent Stabilization Code. The landlord can institute eviction proceedings directly in court without having to obtain prior DHCR approval: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 601.
[280] § 2524.3(f) Rent Stabilization Code. The landlord is not required to obtain prior DHCR approval and may therefore institute eviction proceedings directly in court: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 602.

The subletting of private housing is generally regulated by the New York Real Property Law,[281] but the subletting of rent-stabilized units is governed by the Rent Stabilization Code[282] and any violation of this code is a ground for eviction.[283] Where the tenant legally sublets the unit, but violates the Rent Stabilization Code by overcharging the subtenant,[284] the landlord may rely on this violation as a basis for eviction, although the court will consider various factors (including the amount overcharged and the length of the sub-tenancy) to determine whether eviction is appropriate.[285] The tenant is also required to maintain the dwelling as his primary residence, while subleasing the premises. During this period he must have the intention to reoccupy the dwelling upon expiration of the sublease. Where the tenant does not fulfil this requirement, he could be evicted.[286]

The landowner of a not-for-profit institution may evict the tenant if the owner prefers to use the premises in relation to the work of the institution.[287] The landowner is not required to obtain prior permission from the DHCR.[288] However, it is required that the operation of the institution includes some charitable or educational aim and that repossession of the property is necessary for the institution to function properly.[289]

In terms of the Rent Stabilization Code, the landowner may evict the tenant if he unreasonably refuses access to the premises for the purpose of making certain repairs or for the purpose of inspection. The necessary repairs or improvements must be authorized by the DHCR or by law. The landlord may also evict the tenant if

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[281] § 226-b.
[282] § 2525.6 New York City Rent Stabilization Code.
[283] § 2524.3(h) New York City Rent Stabilization Code. Where the tenant of a rent-stabilized apartment violates the law by illegally subletting the premises, the tenant has a right to cure such unauthorized subletting: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 603. The landlord may institute the eviction proceeding directly in court without having to obtain prior DHCR approval: 604.
[284] The permissible amount is provided for in § 2525.6(b) New York City Rent Stabilization Code.
[285] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 604. § 2525.7(b) of the New York City Rent Stabilization Code provides that where the tenant charges his roommate in excess of "such occupant's proportionate share of the legal regulated rent", he would be in violation of the Rent Stabilization Code, although this would not amount to a ground for eviction. The Rent Control Law does not have a similar provision and the prime tenant may therefore make a profit by overcharging his roommates: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 606.
[286] § 2525.6(a) New York City Rent Stabilization Code.
[287] § 26-511(c)(9) New York City Administrative Code; § 2524.4(b) New York City Rent Stabilization Code. The Rent Control Law has a similar provision, although it is dealt with under the ground of "withdrawal from rental market".
[288] § 2524.4 New York City Rent Stabilization Code.
[289] § 26-511(c)(9) New York City Administrative Code; § 2524.4(b) New York City Rent Stabilization Code.

he refuses reasonable access for the purpose of making a showing to a person with a legitimate interest.[290]

The Rent Control Laws and the Rent Stabilization Laws that govern the eviction proceedings where the landowner reclaims the premises for "personal use and occupancy" are similar in certain respects,[291] although they differ in relation to the place where the proceeding should be brought; the burden of proof the landlord is required to satisfy; and the penalty involved in the case where the landowner fails to reoccupy the premises.[292] Both systems require that the landlord must be a natural person; the interpretation of the term "family member" is analogous.[293] Another similarity is the exemption of senior and disabled persons. The landlord is prohibited from claiming an eviction order, based on the ground of personal use, where the tenant (or the tenant's spouse) is a senior citizen or a disabled person, except if the landlord offers the tenant equal (or more superior) housing at the same or lower regulated rent in the neighbouring area.[294]

Generally the landlord of a rent-stabilized unit may evict the tenant and reclaim the property for her personal use and occupancy if her primary residence is New York City.[295] However, the landlord may rely on the basis of personal use to refuse renewal of the lease. The eviction proceeding may therefore only be brought once the original tenancy has terminated.[296] It is also required that the landlord (or

[290] § 2524.3(e) New York City Rent Stabilization Code. The landlord is required to notify the tenant of such inspection or showing and to arrange an appropriate time for all the parties involved: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 608. § 2524.3 of the New York City Rent Stabilization Code provides that the landlord is not required to obtain prior DHCR approval. § 26-408(a)(6) of the New York City Administrative Code and § 2204.2(a)(6) of the New York City Rent and Eviction Regulations make provision for eviction where the tenant of a rent-controlled unit unreasonably refuses access to the premises.

[291] The law that governs personal use evictions in rent-controlled units is the New York City Administrative Code § 26-408(b)(1), while the New York City Administrative Code § 26-511(c)(9)(b) regulates personal use evictions of rent-stabilized units.

[292] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 609.

[293] See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 610-611 for more detail about these similarities.

[294] § 2204.5 New York City Rent and Eviction Regulations; § 2524.4(a)(2) New York City Rent Stabilization Code. See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 611-613 for more detail on this exemption.

[295] New York City Administrative Code § 26-511(c)(9)(b); New York City Rent Stabilization Code § 2524.4(a). The term of the tenant's occupancy is of no relevance and the owner is not required to obtain prior consent from the DHCR: New York City Rent Stabilization Code § 2524.4.

[296] New York City Rent Stabilization Code § 2524.4. As mentioned previously, the landlord must notify the tenant of her intention not to renew the tenancy and the notice must be given to the tenant during the window period: New York City Rent Stabilization Code § 2524.4.

member of her family) prove her intention to actually reoccupy the premises.[297] Failure to reoccupy the premises and use the unit as her primary residence for a period of three years will deprive the landowner of rent increases for three years, unless the owner reoffers the unit to the tenant at the same terms and the tenant accepts the offer. The owner may also attempt to establish that certain circumstances prevented her (or her family member) from reoccupying the premises for three years.[298]

The owner of a rent-controlled unit must first acquire DHCR approval through obtaining a certificate of eviction before she may approach the Housing Court and seek a warranty of eviction based on the ground of personal use.[299] In order to succeed in acquiring the certificate, the landlord must show that she seeks (in good faith) to reoccupy the unit because of "immediate and compelling necessity" for her personal use or for the use of an immediate family member.[300] Where the landowner (or her immediate family member) fails to reoccupy the premises within thirty days, the landlord shall be liable to the tenant for three times the damage he sustained in relation to the removal.[301] Where the tenant has occupied the unit for a minimum period of twenty years, the landlord is prohibited from evicting the tenant on the basis of personal use and occupation. This exception does not apply to rent-stabilized tenancies and therefore only protects long-term tenants in rent-controlled units.[302]

The aim of the rent regulation laws is to provide security of tenure for tenants and to enable occupiers to create a home. Therefore, if the landlord can establish that the tenant is not using the unit as her primary residence, which basically is analogous to "the home", the tenant may be evicted.[303] However, the landlord of a rent-stabilized unit has to rely on this basis to refuse renewal and may therefore only bring the eviction proceeding once the tenancy has terminated. Failure by the tenant to use the unit as his primary residence is not a breach of the lease, but rather a

[297] The application must therefore be brought in "good faith": Scherer A *Residential Landlord-Tenant Law in New York* (2008) 614-615.
[298] New York City Rent Stabilization Code § 2524.4(a)(5).
[299] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 616.
[300] New York City Administrative Code § 26-408(b)(1); New York City Rent and Eviction Regulations § 2204.5(a).
[301] New York City Administrative Code § 26-408(g)(1); New York City Rent and Eviction Regulations § 2206.7.
[302] *Malafis v Rosario* 18 Misc 3d 1106(A), 856 NYS 2d 24 (NY City Civ Ct 2007).
[303] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 617. It is uncertain whether prior DHCR approval is necessary: See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 618.

ground for refusing renewal.[304] For the landlord to succeed, she must prove that the tenant is not using the premises as his primary residence. The Rent Stabilization Code includes certain factors[305] that form part of the evidence to determine whether the tenant used the unit as his primary residence.[306] Once the court establishes that the tenant of a rent-stabilized unit failed to use the property as his primary residence, the tenant cannot cure this past failure.[307]

The landlord of a rent-controlled unit may seek to evict the tenant when she requires the premises for substantial alterations or remodelling,[308] although the landlord would first have to acquire a certificate of eviction from the DHCR.[309] It is required that the aim of the alterations or remodelling must be to subdivide "an underoccupied housing accommodation containing six or more rooms … into a greater number of housing accommodations".[310]

Where the landlord of a rent-controlled or rent-stabilized unit seeks to demolish the premises, the landlord may institute eviction proceedings against the tenant,[311] although prior DHCR approval is necessary.[312] However, the owner does not require DHCR approval where the building contains three or fewer occupied units; or one occupied unit in a building containing ten or fewer units.[313] The landowner of a rent-controlled unit must secure the approvals for demolition as required by law; replace the demolished building with a new building; and show that the new building contains at least twenty percent more housing than the demolished building; show that the necessary arrangements are in place to relocate the tenants;

[304] New York City Rent Stabilization Code § 2524.4(c).
[305] The factors include the address (other than the relevant housing accommodation) of the tenant's tax return; the address of the tenant's vehicle registration; or the address used for other documents filed with a public agency. Where the tenant sublet the housing accommodation or occupied the premises for less than 183 days in the recent calendar year, these factors would also be taken into account. See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 620-623 for a discussion on case law regarding this basis for eviction.
[306] New York City Rent Stabilization Code § 2520.6(u).
[307] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 623.
[308] New York City Administrative Code § 26-408(b)(3); New York City Rent and Eviction Regulations § 2204.7.
[309] New York City Administrative Code § 26-408(b)(3); New York City Rent and Eviction Regulations § 2204.7.
[310] New York City Rent and Eviction Regulations § 2204.7(a). Where the landlord is successful in obtaining the certificate, she must provide relocation assistance to the tenant: § 2204.7(b).
[311] New York City Administrative Code § 26-408(b)(4); New York City Rent and Eviction Regulations § 2204.8; New York City Rent Stabilization Code § 2524.5(a)(2).
[312] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 624.
[313] Section 38 of the Rent Regulation Reform Act of 1997.

and obtain the required demolition and construction permits.[314] In terms of the Sound Housing Act 1974, the landlord is also required to prove that there is "no reasonable possibility of earning 8.5 percent net annual revenue on the property's assessed value."[315] Where the landlord is successful in obtaining the certificate of eviction, she is obliged to provide relocation assistance to the tenant.[316]

The landlord of a rent-stabilized unit must gain permission from the DHCR to refuse to renew the lease based on the ground of demolition. To obtain permission, the landlord must prove (at a hearing) that she is acting in good faith and seeks to recover possession of the housing accommodation in order to demolish the building and construct a new building. The landlord must also show that she has obtained approval of plans for the new building, or that the DHCR confirmed that she has submitted the plans to the city agency. Before the hearing, the landlord is obliged to provide some proof to the DHCR that confirms her financial ability to complete the demolition and the new construction.[317] Where the landlord succeeds in obtaining the necessary permission, she is required to pay the tenant's relocation expenses.[318]

Another basis that the landlord of a rent-controlled or rent-stabilized unit may rely on to evict the tenant is where the landlord seeks to withdraw the occupied premises from the housing (and non-housing) market.[319] The landlord of a rent-controlled unit is required to obtain a certificate of eviction from the DHCR in order to institute eviction proceedings based on this ground,[320] while the landlord of a rent-stabilized unit must acquire permission from the DHCR to refuse to renew the tenancy.[321] Both regulatory systems require that the landlord must show a lack of intent to "rent or sell all or part of the structure." The landlord must also show that she either requires the premises for a business which already exists[322] or show that

[314] New York City Administrative Code § 26-408(b)(4).
[315] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 625.
[316] New York City Administrative Code § 26-408(b)(4); New York City Rent and Eviction Regulations § 2204.8.
[317] New York City Rent Stabilization Code § 2524.5(a)(2). The DHCR may not approve the owner's application before the city agency had approved the building plans.
[318] New York City Rent Stabilization Code § 2524.5(c).
[319] New York City Rent and Eviction Regulations § 2204.9; New York City Rent Stabilization Code § 2524.5(a)(1).
[320] New York City Rent and Eviction Regulations § 2204.9.
[321] New York City Rent Stabilization Code § 2524.4(a)(1). The DHCR is also required to hold a hearing.
[322] New York City Rent and Eviction Regulations § 2204.9(a)(1); New York City Rent Stabilization Code § 2524.5(a)(1)(i). The landlord of a rent-stabilized unit must show that she requires the

there are substantial violations within the building. The violations must amount to fire hazards or conditions dangerous to the life and health of the tenants. The cost of removing such violations must be equal to, or exceed, the value of the structure.[323] Where the landlord of a rent-controlled unit is a non-profit institution that operates exclusively for charitable or educational purposes, the landlord must show that the institution requires the unit in connection with the aim of the institution and that the unit must therefore be withdrawn from the rental market.[324] Where the landlord of a rent-controlled or rent-stabilized unit is successful in obtaining permission from the DHCR, she is required to provide relocation assistance to the tenant.[325]

In terms of the Rent Stabilization Code, the landlord can seek permission to refuse to renew the lease where the landowner intends to remove certain unsafe conditions and rehabilitate or demolish the premises under provisions of the Private Housing Finance Law; the Housing New York Program Act; or the United States Housing Act of 1937.[326] In order to succeed, the landlord must indicate that she complies with the required financing and prove that the nature of the workings require vacant possession. However, the removal of the tenant is only temporary and the landlord must agree to reoffer the renovated unit to the tenant.[327]

Apart from the rent regulation laws pertaining to the private landlord-tenant market, tenure security and restrictions on rents are also provided for in the public rental market. In New York City the private rental market is regulated by the rent control and rent stabilization laws, although the federal government is also involved in the provision of public rental housing. From the preceding section it is clear that rent regulation in the private market is currently still quite extensive, as the rent control laws and rent stabilization laws restrict rent increases and afford substantive tenure rights for regulated tenancies. The central role of the government is apparent

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premises for a business necessity and not for mere business convenience: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 627.

[323] New York City Rent and Eviction Regulations § 2204.9(a)(2); New York City Rent Stabilization Code § 2524.5(a)(1)(ii).

[324] New York City Rent and Eviction Regulations § 2204.9(a)(3). § 2204.9(4) of the New York City Rent and Eviction Regulations provides that the landlord can also withdraw the unit from the market where the "continued operation of the housing accommodations would impose other undue hardship upon the landlord."

[325] New York City Rent and Eviction Regulations § 2204.4; New York City Rent Stabilization Code § 2524.5(c).

[326] New York City Rent Stabilization Code § 2524.5(a)(3). The landlord must obtain permission from the DHCR to rely on this basis.

[327] New York City Rent Stabilization Code § 2524.5(a)(3)(i)-(iii).

in light of the responsibility of the New York State Division of Housing and Community Renewal (DHCR) and one can confirm that the local authority is progressively involved in the provision of housing within the private rental market.

6.5 Public rental housing

6.5.1 Introduction

Where the government is involved in the provision of housing, either through regulation; subsidies; or direct ownership, certain principles become relevant that might have some restrictive impact on the actions of the landlord. Certain constitutional constraints, combined with the government's obligation not to act in an arbitrary manner, could limit government action. Any dispute that arises between the government (or government-assisted landlords) and tenants has to comply with these general procedural principles. Tenants who occupy housing that is funded by the government are entitled to due process of law when the landlord (or the government) takes an action that influences their rights, especially when rents are raised or when their tenancies are terminated.[328] Generally, where the government is involved in a housing unit, the tenant cannot be evicted from her home without proof of good cause. The federal government is involved in the provision of housing for low and moderate income households through federally subsidized housing that is either owned by the government (also referred to as the Public Housing Program) or owned by private for-profit or not-for-profit parties. The Section 8 Program involves the provision of rent subsidies and forms the greatest part of the Public Housing Program.[329]

[328] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 266-267.
[329] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 268.

6.5.2 Public Housing Program

The Public Housing Program is federally authorized and funded,[330] although state-chartered public housing authorities (PHAs)[331] are accountable for the development and management of the public housing projects. The public housing authorities are the owners of these projects and can obtain the necessary financing through the "sale of bonds backed by the United States Department of Housing and Urban Development (HUD)."[332] Public housing tenants are required to pay rent that is equal to the greater of either thirty percent of adjusted gross income; ten percent of gross income; or, where the tenant is a public assistance recipient, a state-established fixed amount of rent.[333] Public housing authorities are also allowed to implement ceiling rents that are lower than the mentioned formula and that reflect the reasonable market value of housing,[334] although the minimum rent that a public tenant is required to pay is 25 US dollars.[335]

Federal, state and local laws and regulations regulate public housing in New York State[336] and the public housing authority for New York City is the New York City Housing Authority (NYCHA).[337] In order to determine whether an applicant is eligible for public housing, the authority must consider the applicant's household income;[338] household composition;[339] citizenship status; and his probable behaviour as a public housing tenant.[340] The public housing authority is required to have an application

[330] Some projects in New York State are state funded, while some projects in New York City are city funded. Public housing projects that do not receive any federally subsidized funds are not subject to federal laws and regulations: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 269.
[331] In New York, the public housing authorities are municipal corporations: New York Public Housing Law § 401.
[332] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 268.
[333] 42 United States Code Annotated § 1437a(a)(1).
[334] 42 United States Code Annotated § 1437a(a)(1).
[335] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 268.
[336] 42 United States Code Annotated §§ 1437; Public Housing Law (statutes); 24 Code of Federal Regulations (CFR) Parts 912-999.
[337] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 270.
[338] The families' income must be categorized as "lower income" or "very low income" according to § 1437a(b) of 42 United States Code Annotated in order to qualify as a public housing tenant. However, there is no minimum income requirement and the applicant can therefore have no income and qualify for public housing: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 270.
[339] Since 1992, single persons may also qualify for public housing. Previously, only families and disabled (or handicapped) single persons could qualify for public housing: 24 Code of Federal Regulations § 5.403.
[340] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 270. In terms of § 960.203(b) of 24 Code of Federal Regulations, the housing authorities are permitted to consider the applicant's past credit record; his record with regard to disturbance of neighbours and destruction of property; and his

process for admission to the Public Housing Program.[341] Generally, admission is allowed on a "first come, first served" basis, although the local housing authority may determine that some groups should receive priority. Priority is given to persons in need, including the homeless.[342]

The size of the public housing unit allocated to a successful household depends on the personal circumstances of the family members and their diverse needs, which includes the age, sex and medical needs of all the household members.[343] The rent of the housing unit is determined as mentioned previously, although where there is a decrease in the household's income the housing authority must make provision for a rent redetermination during the period of the tenancy.[344] However, the household is obliged to report any income increase during the term of the lease and once the housing authority is informed of such an increase, it must consult with the family in order to make an appropriate adjustment.[345]

The terms of the lease between a tenant and a housing authority is restricted by federal statutes and regulations.[346] The lease must state the amount of the rent;[347] the services and utilities provided by the housing authority;[348] the responsibility of the housing authority to maintain the unit in relation to wear and tear;[349] and that the tenant may entertain guests.[350] The lease must also contain certain obligations of the tenant, which includes a prohibition against subleasing or provision of accommodation to boarders. The lease must include the tenant's duty to use the premises as a private dwelling; to comply with the relevant regulations (and codes) pertaining to the housing authority; to behave in such a manner as to not cause nuisance to other occupiers; to refrain from illegal activity; and to allow the

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criminal record. However, the housing authority must also consider the nature and extent of the conduct, especially in light of future rehabilitation: § 960.203(d) 24 Code of Federal Regulations.

[341] The housing authorities are required to apply ascertainable standards when considering tenant applications and to follow a fair procedure during the whole process: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 277.

[342] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 273. See also 273-277 for more detail on admission priorities.

[343] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 279.

[344] 24 Code of Federal Regulations § 960.257.

[345] 24 Code of Federal Regulations § 960.257.

[346] 24 Code of Federal Regulations § 966.4.

[347] 24 Code of Federal Regulations § 966.4(b)(1).

[348] 24 Code of Federal Regulations § 966.4(b)(2).

[349] 24 Code of Federal Regulations § 966.4(b)(2).

[350] 24 Code of Federal Regulations § 966.4(d).

housing authority access for repairs.[351] Housing authority accommodation is in high demand because the rents are low and the maintenance of the premises is good. When the tenant of a public housing unit relocates or dies, the remaining members of the household would therefore often prefer to remain in the unit. The housing authority is burdened with numerous applications for public housing and would regularly seek to evict unauthorized occupiers in order to accommodate the housing backlog. The succession rights of the remaining family members and the issue of whether they are entitled to tenancy status is a contested matter.[352]

Public housing is a property interest and the tenancy governing the relationship between the housing authority landlord and tenant may therefore not be terminated, nor may the tenant be evicted, without adequate procedural safeguards.[353] Where the housing authority seeks to terminate the tenancy, federal regulations require that the housing authority base its assertion on the fact that the tenant seriously or repeatedly violated the terms and conditions of the lease. However, the housing authority could also terminate the tenancy based on a good cause.[354] The housing authority is primarily required to give adequate notice of the proposed termination to the tenant and to state the grounds for eviction in the notice.[355]

The ground for eviction must be stated in the lease or in the housing authority's rules and regulations. Tenants occupying public housing in New York City may be evicted on the ground of "nondesirability", which includes behaviour of the tenant that constitutes some danger to the health and safety of neighbours; behaviour of the tenant that amounts to sexual or immoral conduct in the vicinity of the premises; the tenant's conduct that causes damage to the premises, property or employees of the housing authority; the tenant's conduct that disturbs the peaceful occupation of other tenants; or behaviour that amounts to common law nuisance.[356]

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[351] 24 Code of Federal Regulations § 966.4(f).
[352] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 288. For some discussion on this issue, see also 288-290.
[353] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 294.
[354] 42 United States Code Annotated § 1437f (d)(B)(v). The housing authority cannot base its claim on some provision in the lease that enables the housing authority to terminate the lease: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 295.
[355] 42 United States Code Annotated § 1437f (d)(B)(iv).
[356] NYCHA Management Manual, ch 7; "Termination of Tenancy Procedures" 3(b)(1)-(5).

Where the tenant breached one of the housing authority's rules or regulations, the housing authority may rely on this breach as a ground for eviction, although the tenant must be given an opportunity to meet with one of the housing authority's members to discuss the problem and cure the breach.[357] Where the tenant is experiencing problems in paying the rent, the housing authority is obliged to assist the tenant and take "all possible action to improve the tenant's rent paying records", prior to seeking eviction.[358] However, chronic rent delinquency remains a basis for eviction. Public housing tenants are obliged to inform the housing authority annually of all the occupiers in the given unit and notify the authority of any changes in the composition of the household. The housing authority may seek an eviction order where there are unauthorized occupiers in the unit.[359] The tenant is also obliged to inform the housing authority annually of the household income and notify the housing authority of any change in household income. Failure to submit such notifications could subject the tenant to termination of the tenancy, based on breach of rules.[360] Public housing tenants are generally prohibited from keeping pets and refusal to remove a pet may constitute a ground for eviction.[361]

In *Department of Housing and Urban Development v Rucker*[362] the United States Supreme Court found that where a member of a household; a guest; or any person under a household member's control, engages in criminal or drug-related activity, the public housing authority may evict the entire household, regardless of whether the other members were involved in the activity or even knew about the activity.[363] After this decision, the United States Department of Housing and Urban Development included a section in the regulations that authorizes the public housing authorities to use its discretion in determining such a case. The public housing authority must consider all the relevant circumstances of the case; the extent of the household's participation in the activity; the seriousness of the offense; and the effect that eviction would have on the innocent household members.[364] A public housing

[357] NYCHA Management Manual ch IV (vii)(4)(c)(l).
[358] NYCHA Management Manual ch IV (vii)(4)(C)(3)(c).
[359] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 297.
[360] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 297.
[361] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 297.
[362] 534 US 1111 (2002).
[363] The decision was made under the authority of § 1437d(l)(6) 42 United States Code Annotated, also referred to as the "one strike and you're out" rule: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 297.
[364] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 297.

tenant is always entitled to a notice of charges, which serves as a notice of termination. This notice must contain the ground for eviction that the housing authority is relying on to terminate the tenancy.[365] However, where the tenant is evicted on the basis of illegal use of the premises, the tenant is not entitled to a notice.[366]

6.5.3 Section 8 Program

The Section 8 Program, which is administered by public housing authorities and more specifically the New York City Housing Authority in New York City, generally enables low-income tenants to rent private housing through federally funded subsidies.[367] The subsidy usually pays for the difference between the "fair market rent" ("FMR") and thirty percent of the household income.[368] The benefits derived from the Section 8 Program are either tenant-based or project-based, although the majority of tenants that benefit from the Section 8 Program form part of the Existing Housing Program, which is tenant-based.[369] Where the tenant receives a certificate or voucher and has to find accommodation in the private market, the benefit would be tenant-based, while the benefit would be project-based if it is attached to a specific housing unit. The project-based subsidy would therefore benefit a succeeding tenant once the original tenant vacated the premises, since the benefit is attached to the unit and cannot relocate with the tenant.[370]

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[365] New York Public Housing Law § 156-c.
[366] Real Property Actions and Proceedings Law 711(5) and 715(1).
[367] 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 A *Residential Landlord-Tenant Law in New York* (2008) 318. Where the prospective tenant is generally eligible for the Program, he could still be denied admittance on several grounds. The grounds include the applicant's previous eviction from public housing, the applicant's breach of a repayment agreement, any violation of a family obligation in terms of the Section 8 Program, the applicant's engagement in drug-related or criminal activities, or the applicant's engagement in violent and abusive behaviour toward public housing authority personnel: 24 Code of Federal Regulations § 982.552; Scherer A *Residential Landlord-Tenant Law in New York* (2008) 319. Once the certificate or voucher is issued, the initial term of a voucher is for sixty days, although the public housing authority may extend this period for an additional period: 24 Code of Federal Regulations § 982.303(a), (b).
[368] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 310-311.
[369] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 311.
[370] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 311.

The Existing Housing Program is tenant-based and the largest programme in the Section 8 Program.[371] Once the tenant's application is successful,[372] he would receive the promise of a subsidy (paid out in the form of a voucher), whereafter he must secure a housing unit in the private market that he could rent. The owner of the unit and the public housing authority would agree upon a Housing Assistance Payment (HAP) contract. According to the Housing Assistance Payment contract, the public housing authority is required to pay the private landlord a section of the rent. Acceptance by the landlord "constitutes a waiver of the right to maintain a holdover proceeding."[373] The subsidy is either in the form of a certificate or a voucher. Where the tenant receives a certificate, he would generally have to pay thirty percent of the adjusted household income as his part of the rent. The owner of the housing unit must agree to charge the fair market rent (as established by the United States Department of Housing and Urban Development for the metropolitan region)[374] and comply with the required housing standards in order to be accepted for the Program.[375] The public housing authority is required to pay the owner the difference between the contracted rent, which would not be more than the fair market rent, plus a utility allowance and thirty percent of the tenant's income.[376] The public housing authority can pay the difference between thirty percent of the tenant's income and the legal rent where the fair market rent is higher than the legal rent. The public housing authority must approve the lease between the owner and the tenant[377] and inspect the dwelling on an annual basis to ensure that it does comply with the housing quality standards.[378]

The Section 8 Voucher Program differs from the Certificate Program, because vouchers are provided to the family participants in the form of rental subsidies. The

[371] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 311. The other Section 8 programmes are all project-based, including the Substantial Rehabilitation Program; New Construction Program; Moderate Rehabilitation Program; Set-aside Program; Housing through State Housing Agencies Program; and the Disposition of Previously HUD-owned Projects Program. See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 315-316 for a short discussion on the other Section 8 programmes.

[372] Once successful, the family's eligibility, based on the family's income, must be reconsidered annually by the public housing authority: 42 United States Code Annotated § 1437f(c)(3); 24 Code of Federal Regulations § 982.516.

[373] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 315.

[374] 24 Code of Federal Regulations Part 888.

[375] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 312-313.

[376] 24 Code of Federal Regulations Part 982 Subpart K. The contracted rent plus the utility allowance is known as the "gross rent".

[377] 24 Code of Federal Regulations § 982 Subpart K.

[378] 24 Code of Federal Regulations § 982.305(b).

subsidy amounts to the difference between thirty percent of the tenant's adjusted household income and the payment standard, which is based on the fair market rent and not the actual rent for the housing unit. The owner is not restricted in the amount of rent charged, such as the fair market rent that is annually adjusted for the Certificate Program. Therefore, the owner may charge any rent that is reasonable,[379] but the owner must comply with the "Housing Quality Standards".[380] Where the tenant leases an apartment and the rent is less than the payment standard, the tenant would be able keep the excess subsidy. However, in the case where the rent is higher than the payment standard, the tenant would be obliged to pay more than thirty percent of his adjusted household income.[381]

For both the Section 8 Certificate and Voucher Program, the "contract rent"[382] is the rent charged by the landlord, while the "tenant rent" is the portion of the rent that the tenant is responsible for.[383] Where the public housing authority fails to pay the remainder of the rent, the tenant is not obliged to pay that portion of the rent, because the public housing authority's obligation derives from the Housing Assistance Payment contract between the landlord and the public housing authority.[384] Therefore, the core of the Section 8 lease is that the tenant merely agrees to pay his share of the rent, while the public housing authority must cover the remainder of the rent charged. Even upon termination of the subsidy the tenant would not become liable for the public housing authority's portion of the rent, which is the subsidy portion of the rent.[385]

Section 8 vouchers or certificates that form part of the Existing Housing Program are available to tenants who occupy rent-regulated units. The mere fact that the tenant receives a Section 8 voucher or certificate does not influence the application of the rent regulation laws. A rent-regulated unit would remain subject to

[379] 24 Code of Federal Regulations § 982.305(a)(4).
[380] 24 Code of Federal Regulations § 982.305(a)(2); Scherer A *Residential Landlord-Tenant Law in New York* (2008) 313. See also 326-329 for a discussion of this requirement. Both the owner and the tenant are obliged to maintain the unit in compliance with the Housing Quality Standards. Failure to comply with this requirement could subject the landlord to penalties, while the tenant's Section 8 assistance could be terminated.
[381] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 313.
[382] Upon the household's request, the contract rent could be amended, based on a change in the family's income or any other reason: 24 Code of Federal Regulations § 982.516(b)(2).
[383] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 322.
[384] 24 Code of Federal Regulations §§ 982.310(b)(1), 982.451(b)(4)(iii).
[385] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 323.

the regulatory laws despite the Section 8 status of the tenant.[386] The Section 8 Program, which is federally regulated, and local landlord-tenant laws should function in accordance with each other, since federal law was not intended to obstruct (or conflict with) local rent regulation laws.[387] However, if the provisions of the Section 8 Program do conflict with local rent regulations, the provisions of the Section 8 Program are supreme law.[388] Where the unit is subject to the Rent Stabilization Law, the tenant is entitled to a lease renewal, because the owner's acceptance of the Section 8 subsidy does not exempt the unit from the Rent Stabilization Law and Code.[389] However, it is uncertain whether the landowner of a rent-stabilized unit is compelled to renew the lease with the continuation of the Section 8 subsidy as a result of the obligation in terms of the Rent Stabilization Law.[390]

Generally, leases subject to the Section 8 Program are no longer automatically renewed,[391] while automatic renewal was previously required.[392] A Section 8 lease must be for at least one year[393] and if the lease was entered into prior to 1997, the tenant may only be evicted for cause.[394] If the prime tenant[395] of a household dies or leaves the dwelling, the remaining household members may succeed to the prime tenant's Section 8 benefit, although the family member who wishes to succeed to this benefit must preferably be listed as an occupier on the household composition and income documentation.[396] In order to determine whether the remaining family members are entitled to succession, the public housing authority is required to hold an administrative hearing.[397]

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[386] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 325. Federal law does not exempt federally subsidized units (including Section 8 units) from any level of rent regulation, although in instances where there is any conflict between federal and state law, federal law remains supreme law: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 325.
[387] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 325.
[388] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 326.
[389] *Fishel v New York City Conciliation and Appeal Bd* 123 Misc 2d 841, 474 NYS 2d 908 (1984).
[390] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 326.
[391] 24 Code of Federal Regulations § 982.309(b). This general rule does not apply to rent-stabilized tenancies.
[392] In *Maia v Castro* 139 Misc 2d 312, 527 NYS 2d 154 (Dist Ct 1988), the court found that all leases subject to the Existing Housing Program entered into after 10 May 1984, were automatically renewed.
[393] 24 Code of Federal Regulations § 982.309(a)(1).
[394] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 331.
[395] The tenant is now defined as the person who executes the lease: 24 Code of Federal Regulations § 982.4(b).
[396] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 331.
[397] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 332.

One should distinguish between termination of the tenant's subsidy and termination of the lease. The tenant's Section 8 subsidy could be terminated where he violated a requirement as provided for in the Program,[398] while termination of the lease would generally occur where the tenant violated a term of the lease.[399] The landlord's decision to for instance demolish the building or use and occupy it herself could be a basis for termination of the lease. Where the lease expires, the subsidy would not necessarily expire, although termination of the subsidy could often lead to termination of the lease, because the tenant can rarely afford to pay the contract rent.[400] If the tenant's Section 8 subsidy terminates, he would not become liable for that portion of the rent, because he initially agreed to pay only the rent not covered by the subsidy. The landlord may not claim the subsidy-portion of the rent from the public housing authority either once the tenant is evicted.[401]

The tenant's Section 8 subsidy could only be terminated under the older regulations if he committed fraud under a housing assistance programme; violated certain "family obligations"; participated in illegal drug-related activity; or breached an agreement to refund the public housing authority in order to clear his debt.[402] In terms of the new regulations, the tenant's Section 8 subsidy may also be terminated in the case where he for instance failed to give the public housing authority a copy of an eviction notice or where he failed to occupy the premises.[403] Apart from the regulations that govern federally subsidized projects, there are additional provisions that regulate the Section 8 Program and especially termination of the tenancy.[404] Previously it was required that the landlord had to show "good cause" to successfully terminate an Existing Housing Program tenancy, but this requirement was suspended by the 1996 United States Department of Housing and Urban Development (HUD) Appropriations Bill.[405] If the tenant is not protected by State rent

[398] 24 Code of Federal Regulations §§ 982.551-982.553. The public housing authority is required to hold an administrative hearing where it seeks to terminate the tenant's subsidy: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 334.
[399] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 333. The landlord's decision to for instance demolish the building or use and occupy it herself could be a basis for termination of the lease.
[400] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 334.
[401] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 334.
[402] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 335 See also 335-339 for a discussion on the administrative requirements necessary to terminate the Section 8 subsidy.
[403] 24 Code of Federal Regulations § 982.312.
[404] 42 United States Code Annotated § 1437f(d)(1)(B).
[405] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 341.

regulation, such as the New York City Rent Stabilization Law, the landowner may institute eviction proceedings once the Section 8 tenancy expires.[406] However, if the tenant is protected, for instance by the New York City Rent Stabilization Law, which requires renewal of the lease, the landlord is prohibited from evicting the tenant upon expiration of the Housing Assistance Payment contract.[407]

6.5.4 Private Housing Finance Law: Mitchell-Lama housing

Apart from the federally subsidized housing and the rent regulation laws in New York State and more specifically New York City, New York State subsidizes and regulates the provision of housing under a number of other regulatory systems.[408] One of these subsidized systems of housing is the Mitchell-Lama housing programme, which forms part of the Private Housing Finance Law. Mitchell-Lama housing may be held by either a not-for-profit corporation or a not-for-profit cooperative corporation (also known as a mutual housing company) and is financed with loans authorized by the New York Private Housing Finance Law.[409] The loans are made directly by the state or by New York City. Where the loans are issued by the state, the DHCR would supervise the loans, while loans made by New York City would be supervised by the New York City Department of Housing Preservation and Development (HPD).[410] The tenant selection (based on income); rent charged; occupancy; and eviction are all government-supervised.[411]

In order to qualify for Mitchell-Lama housing (in both the State and the City), the tenant's (or household's) apparent aggregate annual income must not exceed

[406] Previously, the landlord could show good cause for not renewing the Section 8 tenancy: 42 United States Code Annotated § 1437f(d)(1)(B)(ii). This position was amended in 1996 by amendments to the United State Housing Act of 1937: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 341.
[407] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 341.
[408] These programmes include the Private Finance Housing Law; shelters for the homeless; mobile homes parks; and housing programmes for persons with HIV/AIDS: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 364. The focus of the following section will be on the Private Finance Housing Law, more specifically the Mitchell-Lama programme, because this programme is landlord-tenant based.
[409] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 365. Article II and IV authorize the provision of finances for Mitchell-Lama housing.
[410] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 365.
[411] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 365.

seven times the annual rent.[412] If the tenant's income increases to a level higher than the maximum eligible rent, he is obliged to pay surcharges. The rent is determined on a project-by-project basis, although the rent should cover the general costs of the project, which includes the maintenance; operation; and debt service costs.[413] The housing company that operates the specific project may require a rent increase, although such an increase must be based on an increase in the project's costs and the DHCR or New York City Department of Housing Preservation and Development[414] must approve the increase.[415]

The grounds for termination of the tenancy in state and city-supervised Mitchell-Lama housing are analogous, although the procedures are different.[416] The grounds for eviction include behaviour of the tenant that amounts to nuisance; violations of the agreement or failure to comply with the lease obligations; use of the unit for immoral or illegal purposes; refusal to allow reasonable access to the landlord; failure by the tenant to reveal his true income; or failure by the tenant to use the unit as his principal residence. The landlord may also evict the tenant when she requires the unit for a shareholder (or other person) who made a generous deposit.[417] Suspension of a non-profit company is made possible through "prepayment of government-aided assistance."[418] However, once the company is dissolved, the property may be withdrawn from Mitchell-Lama regulations.[419] The premises would then become subject to the Rent Stabilization Law and Code.[420]

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[412] 28 Rules of the City of New York (RCNY) § 3-03(a)(1), (3). Where the tenant's application is denied, he is entitled to due process.
[413] 28 Rules of the City of New York § 3-03(b).
[414] Rent increases for city-supervised projects can only occur once every two years: 28 Rules of the City of New York § 3-10(b)(2).
[415] The tenants must receive notice and a public hearing is required before such an increase can become effective: 28 Rules of the City of New York § 3-10(b)(1). If the landlord fails to provide the tenant with the necessary notice, the owner would be deprived of the right to increase the rent: Scherer A *Residential Landlord-Tenant Law in New York* (2008) 366.
[416] See Scherer A *Residential Landlord-Tenant Law in New York* (2008) 368-369 for a discussion on the different procedures pertaining to the termination of state and city-supervised tenancies. Generally, the landlord is required to obtain a "certificate of no objection" from the DHCR in order to lawfully evict a tenant from state-supervised housing: 9 New York Code Rules and Regulations § 1727-5.3(a). If the housing is city-supervised, the landlord is required to obtain a certificate of eviction from the New York City Department of Housing, Preservation and Development, following an administrative hearing, before summary eviction proceedings may be instituted: 28 Rules of the City of New York §3-18(a).
[417] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 367.
[418] Scherer A *Residential Landlord-Tenant Law in New York* (2008) 369.
[419] New York Private Housing Finance Law § 35(3).
[420] New York City Administrative Code § 26-504(a)(1)(b).

6.6 Constitutionality of rent regulation

6.6.1 Constitutional provisions

As Singer mentions,[421] various conflicts arise from the landlord-tenant relationship, but the constitutionality of rent regulation has become a topic of interest in certain communities because some have argued that the local government rent regulation laws amount to an unconstitutional taking of property. The argument that rent regulation provides some protection for low to moderate income households against displacement seems to be accepted as constitutional justification, considering the limited success of challenges against it in the case law. The property clause in the Constitution of the United States of America 1787[422] consists of two parts, known as the "Due Process Clause" and the "Takings Clause" respectively.[423] Article V of the 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."[424] The first section of this article is known as the due process clause because it states that no person shall be deprived of property without due process of law, while the second section of the article is referred to as the takings clause because it ensures that property shall not be taken for public use without just compensation.[425]

The regulation of the use of property in the US is associated with federal and state restrictions on the use of property, also referred to as the police power. These restrictions are imposed legitimately in order to generally protect the "health, safety and morals" of the community and are therefore not accompanied by compensation.[426] Van der Walt explains that 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

[421] Singer JW *Introduction to Property* (2nd ed 2005) 442.
[422] Fifth Amendment 1791; Fourteenth Amendment 1868.
[423] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398-399.
[424] See section 3.2.2 in Chapter 3 for a brief discussion of the South African property clause.
[425] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 399.
[426] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 410.

amounts to a taking of the property without compensation".[427] Singer explains that the ultimate criteria used by the courts to determine whether an exercise of police power amounts to a constitutional regulation or a unconstitutional taking, is to query whether the regulation wrongfully "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[428]

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.[429] Conventionally, the exercise of police power is associated with the first-mentioned form of regulation. This form is also referred to as regulation in the narrow sense, which includes regulations of the use of property with the aim to protect the public health, safety and wealth. Nevertheless, certain socio-economic regulations, including rent regulation, could fall under a wider concept of police power.[430]

6.6.2 Case law

In the 1921 United States Supreme Court case of *Block v Hirsh*[431] the defendant, Hirsch, instituted proceedings to recover possession of his premises from the plaintiff, Block, who remained in the leased premises upon expiration of the tenancy. Block refused to surrender possession, relying on the District of Columbia Rents Act of 1919.[432] Section 109 of the Act provided that the tenant could remain in the leased premises upon expiration of the lease if he continued to pay the rent and abided by

[427] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 411.The aim of the challenge would be either to claim compensation or to invalidate the regulation.
[428] Singer JW *Introduction to Property* (2nd ed 2005) 677 quoting *Armstrong v United States* 364 US 40, 49 (1960). Therefore, fairness and justice are key considerations.
[429] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 412.
[430] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 416. See also Radin MJ *Reinterpreting Property* (1993) 72; Singer JW *Property Law: Rules, Policies and Practices* (3rd ed 2002) 1086, 1091-1102; Fischer WW "The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights" in Lacey MJ & Haakonssen K (eds) *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991* (1991) 266-365 at 346; Coyle DJ *Property Rights and the Constitution: Shaping Society through Land Use Regulation* (1993) 121-123, 200-202.
[431] 256 US 135 (1921).
[432] *Block v Hirsh* 256 US 135 (1921) 153.

the terms of the tenancy. The Act also enabled the landlord to reclaim possession for his own use or the use of certain family members, if the tenant was given thirty days' notice. Even though Hirsh allegedly wanted the property for his own use, he failed to give the tenant adequate notice, since he denied the validity of the Act. Section 122 of the Act stated that certain provisions in the Act were necessary in response to the growing housing (and rental housing) emergencies resulting from the war. The rental housing conditions in the District of Columbia became dangerous to the public health.[433]

The Court found that in the given social circumstances during that period, the public interest did justify some degree of public control in the sphere of rental housing. The remaining question was whether the statutory regulation was excessive and therefore amounted to an unconstitutional taking.[434] Justice Holmes upheld the Act, finding that the Act protected tenants (and especially those who needed to work for the government) against unreasonable rent increases, which were made possible through war conditions. The only critique Holmes J mentioned in relation to the effect of the Act was that tenants could remain on the premises upon expiration of the lease at the same rent, unless it was modified by the Commission, thereby severely restricting the rights of the landowner.[435] Holmes J explained that this result was in fact necessary in light of the larger policy that if the tenant remained subject to the landowner's power to evict, the aim in limiting the rent charged would fail. This policy is also familiar in English law.[436]

In 1922, shortly after *Block v Hirsch*, the United States Supreme Court decided *Edgar A Levy Leasing Co v Siegel*,[437] which also concerned the constitutionality of rent regulation laws in the State of New York. The facts were similar to those in *Block v Hirsch*: the defendant-tenant was holding over and the anti-eviction laws protected him against eviction.[438] The question was whether the Emergency Housing Laws of the State of New York were constitutionally valid. The laws amended the substantive law with the aim to provide security of tenure for tenants in possession of residential property by allowing such tenants to remain in

[433] *Block v Hirsh* 256 US 135 (1921) 154.
[434] *Block v Hirsh* 256 US 135 (1921) 156.
[435] *Block v Hirsh* 256 US 135 (1921) 155.
[436] *Block v Hirsh* 256 US 135 (1921) 157-158.
[437] 258 US 242 (1922).
[438] *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) 248.

possession for a certain period while paying reasonable rents as determined by the courts.[439]

Justice Clarke found that the laws involved an emergency and that they were created by the legislature to promote the health, morality, comfort and peace of the people of New York State, thereby also promoting public welfare through the exercise of the police power.[440] Justice Clarke mentioned that if such an emergency existed, it would validate resorting to the police power to address the crisis and guard the public welfare.[441] Various committees were appointed by the Mayor of New York to determine whether there was a housing crisis. It was confirmed that there was a great shortage of housing, which led to landlords exploiting tenants through extreme rent profiteering. For the purpose of rent increases, "legal process was being abused and eviction was being resorted to as never before", which resulted in overcrowding, insanitary conditions, discomfort and general social discontent.[442] The Court upheld the anti-eviction law and found that it was not an unconstitutional taking of property, for that reason alone.[443] The state's discretion in protecting the public welfare through a constitutional substantive statute had not been exceeded by the State of New York.[444]

In *Loab Estates Inc v Druhe*,[445] the Court of Appeals of New York was faced with a similar constitutional challenge. The landlord disputed the validity of some provisions of the Administrative Code of the City of New York, which restricted the

[439] *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) 243-244.
[440] *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) 245. The Court also found that this form and extent of regulation was initiated by state legislators in response to a social emergency in the larger cities. The emergency was caused by a shortage of housing, constituting a "serious menace to the health, morality, comfort, and even to the peace" of the people of the State.
[441] *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) 245.
[442] *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) 245-246.
[443] Singer JW *Introduction to Property* (2nd ed 2005) 698.
[444] *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) 250. See also *Bowles Price Administrator v Willingham* 321 US 503 (1944), where the United States Supreme Court had to determine whether a Maximum Rent Regulation, established in terms of the Emergency Price Control Act of 1942, was unconstitutional because it required the Administrator to fix "generally fair and equitable" maximum rents for certain areas and not for the individual landlord. It was argued that such a general rent setting could have a very harsh impact on certain landlords and would therefore be unconstitutional: 516-517. The Court found that during the wartime period, Congress had to develop a system of rent control for specified areas, while taking into consideration inflation fluctuations. These conditions led to the development of a formula in terms of which the Administrator could amend the rent according to the socio-economic conditions. The Court consequently found that the rent regulation was not unconstitutional: 520.
[445] 300 NY 176 (1949).

rights of landowners to evict tenants from units within the City.[446] The landlord intended to evict twenty-nine families from apartment houses in order to demolish the building and convert it into a loading platform. The Administrative Code enabled a landlord to evict tenants and withdraw a building from the rental market, but it required a certificate of eviction. To acquire such a certificate, the landlord had to make provision for relocation of the tenants. The housing rent commission could not issue the certificate of eviction because the appellant failed to provide relocation assistance for the tenants.[447] The appellant consequently contended that the local law deprived a landowner of property without due process of law because it prohibited the landowner from withdrawing his property from the rental market.

The court found that the restrictions placed upon the landlord should be seen within the context of the state of emergency during that period. The court referred to *Block v Hirsch* and found that similar prohibitions were placed upon the rights of landlords during a period with even lesser emergency conditions. The court therefore decided that such restrictions fell within the scope of the police power in terms of which property rights could be limited without compensation.[448] As a result of the city council and legislature's decision to place restraints upon the rights of landowners to withdraw their property from the rental market, arising from the threat of "chaos and confusion" and the need to balance the opposing interests of landowners and occupying tenants, the legislation did not amount to a taking of the appellant's property without due process of law.[449]

In 1988, the United States Supreme Court was once again faced with a constitutional challenge regarding a rent regulation law. In *Pennell v San Jose*,[450] the appellants challenged a rent control ordinance that allowed a hearing officer to determine whether a proposed rent increase by the landlord would be allowable. The officer had to consider various factors, including the "hardship to the tenant".[451] The aim of the rent control ordinance was to accommodate certain needs created by the San Jose housing situation, which included the prevention of unreasonable rent

[446] *Loab Estates Inc v Druhe* 300 NY 176 (1949) 178-179.
[447] *Loab Estates Inc v Druhe* 300 NY 176 (1949) 179.
[448] *Loab Estates Inc v Druhe* 300 NY 176 (1949) 180, referring to *Block v Hirsch* 256 US 135 (1921) 155-158.
[449] *Loab Estates Inc v Druhe* 300 NY 176 (1949) 180.
[450] 481 US 1 (1988).
[451] *Pennell v San Jose* 481 US 1 (1988) 5.

increases; the alleviation of undue tenant hardship; and the assurance to landlords of a fair return on their investment. The ordinance made provision for annual rent increases, but where the annual rent increase exceeded eight percent, the tenant could object and a hearing would follow to determine whether the proposed increase was reasonable under the circumstances. The hearing officer would consider various circumstances, including "the hardship to the tenant", before making this determination. The economic and financial impact of the proposed increase had to be considered by the officer to establish whether there was in fact such a "hardship to the tenant".[452]

The appellant contended that application of the "tenant hardship" provision amounted to a taking of private property for public use without compensation, because an additional rent reduction based on the ground of "tenant hardship" constitutes a "transfer of the landlord's property to individual hardship tenants; the Ordinance forces private individuals to shoulder the 'public' burden of subsidizing their poor tenants' housing."[453] The appellant also contended that the just compensation requirement in the takings clause was created to prohibit government from forcing certain individuals to bear public burdens that should be borne by the public as a whole.[454]

Justice Rehnquist found that the scheme (created by the Ordinance) that allowed the officer to consider various factors relating to the economic and financial position of the landlord and the tenant was a rational attempt to equalise the opposing interests of the parties. The scheme was aimed at protecting tenants by placing a restriction on burdensome rent increases, while ensuring a fair return on landlords' investment.[455] The Ordinance was therefore not unconstitutional under the due process requirement because it served a legitimate purpose in protecting tenants, while balancing the interests of the parties by allowing reasonable rent increases.[456] Van der Walt explains that rent control, which is a form of price

[452] *Pennell v San Jose* 481 US 1 (1988) 6-7.
[453] *Pennell v San Jose* 481 US 1 (1988) 9-10.
[454] *Pennell v San Jose* 481 US 1 (1988) 10.
[455] *Pennell v San Jose* 481 US 1 (1988) 14.
[456] *Pennell v San Jose* 481 US 1 (1988) 14-15.

regulation, is generally constitutionally valid if it is legitimately aimed at protecting consumer welfare.[457]

The most recent constitutional challenge concerning a rent regulation law that was heard by the United States Supreme Court was *Yee v City of Escondido*,[458] although the law regulated mobile home tenancies rather than tenancies in general.[459] The claimants were the owners of mobile home parks in Escondido, California. They argued that a local rent control ordinance, viewed in light of the California Mobilehome Residency Law, constituted an unconstitutional taking of property without compensation, because it amounted to a permanent physical invasion of their property.[460] The Mobilehome Residency Law restricted the basis upon which a park owner could terminate mobile home owner's tenancy. The grounds for eviction included failure to pay rent; violation of park rules; and the park owner's decision to change the use of his land.[461] The disputed ordinance, adopted in the wake of the Mobilehome Residency Law, set rents back to their 1985 level and prohibited rent increases without the approval of the city council. The claimants contended that the effect of the rent control law was to deprive them of all use and occupancy of their property, while the residing tenants of the mobile homes acquired a right to physically use the property of the landowner on a permanent basis.[462] The petitioners concluded that the ordinance transferred an interest in the land, namely the right to occupy the land indefinitely at below market rent, from the mobile park owner to the mobile home owner, because the effect of the Mobilehome Residency Law in conjunction with the rent control ordinance was to increase the value of the mobile home, while converting the mobile park owner to a "perpetual tenant of the park".[463] The value of the mobile home would allegedly increase since the mobile

[457] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 417. See also Radin MJ *Reinterpreting Property* (1993) 72, 168, 175; Singer JW *Property Law: Rules, Policies and Practices* (1993) 1221-1222; Coyle DJ *Property Rights and the Constitution: Shaping Society through Land Use Regulation* (1993) 121-123, 200-202.
[458] 503 US 519 (1992).
[459] The Court found that a mobile home owner usually rents a pad (a plot of land) from the owner of the mobile home park. The park owner provides certain facilities within the park, such as roads; washing facilities; and basic utilities. Once the mobile home owner wishes to relocate, he would sell the mobile home and the purchaser would continue to rent the pad from the park owner: *Yee v City of Escondido* 503 US 519 (1992) 524. See also Scherer A *Residential Landlord-Tenant Law in New York* (2008) 430-437 for a brief discussion on mobile home parks.
[460] *Yee v City of Escondido* 503 US 519 (1992).
[461] *Yee v City of Escondido* 503 US 519 (1992) 525.
[462] *Yee v City of Escondido* 503 US 519 (1992) 525-526.
[463] *Yee v City of Escondido* 503 US 519 (1992) 527.

home owner could rent the pad at below market rents for consecutive periods without facing the threat of eviction.[464]

Justice O'Connor found that a physical taking only occurs where the government compels a landowner to accept physical occupation of his land, which is different from what happened in this case, because the mobile park owners voluntarily leased their land to mobile home owners and the park owners could still decide to withdraw their land from the rental market.[465] The Court concluded that the rent control ordinance, considered in light of the Mobilehome Residency Law, did not amount to a taking, because it did not authorize an unwanted physical invasion of the petitioners' property, but rather regulated the use of the property.[466] Singer explains that the takings clause generally requires compensation in the case where the government authorizes a physical invasion that comprises "forced occupation by strangers".[467] However, in this case Justice O'Connor argued that the rent control ordinance did not compel landowners to open their property to the public, because the park owners had already opened the land to strangers by renting out the pads and therefore the restriction placed on their right to exclude certain tenants could not amount to a taking.[468]

In *Seawall Associates v City of New York*,[469] the Court of Appeals of New York had to consider whether a local law resulted in the physical occupation of the plaintiff's property and whether it therefore amounted to an uncompensated taking. In 1985 Local Law 59 was enacted to suspend the demolition (or conversion) of structures containing single-room occupancy (SRO) properties. Local Law 22 extended this suspension and required that all the owners of single-room occupancy properties had to rehabilitate vacant units and place the units on the rental market. Upon failure, landowners were served with severe penalties.[470] Landowners were compelled to make every single-room occupancy unit habitable and lease the unit at

[464] *Yee v City of Escondido* 503 US 519 (1992) 527-528.
[465] *Yee v City of Escondido* 503 US 519 (1992) 528-529.
[466] *Yee v City of Escondido* 503 US 519 (1992) 533. At 538-539, the Court raised the question whether the ordinance constituted a regulatory taking, but decided not to address the issue in the case and referred this question back to the court *a quo*.
[467] Singer JW *Introduction to Property Law* (2nd ed 2005) 699.
[468] Singer JW *Introduction to Property* (2nd ed 2005) 699, citing *Yee v City of Escondido* 503 US 519 (1992) 530-531.
[469] 74 NY 2d 92 (1989).
[470] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 100-101.

controlled rents. If the unit remained unoccupied for thirty days, the owner was presumed to have violated the requirements.[471]

The question was whether the obligations and restrictions imposed by the government forced certain property owners to bear a public burden that should have been borne by the public as a whole.[472] The court found that the regulations violated the takings clause of the Constitution and article 1 (Part 7) of the New York State Constitution, because the laws imposed upon the landowners societal obligations beyond the scope of their just share.[473] The court found that the impact of the laws resulted in a physical taking, because it enabled the City to forcefully control the landowner's possessory interests.[474] Where the owners were compelled to allow occupation of their vacant property by strangers, the deprivation of the landowner's rights was found to be sufficient to result in a physical taking.[475] The court distinguished between previous decisions of the Supreme Court, such as the *Bowles* and *Loab* decisions, which upheld rent control as constitutional, as these decisions did not concern laws that forced landowners to rent their properties to strangers which constituted a physical taking. The other rent control cases concerned the beneficial purpose of the regulation or the extent of the relevant police power. In those cases the courts had to consider restrictions placed upon existing landlord-tenant relationships where the landlord voluntarily placed the property in the rental market.[476] The court acknowledged that the aim of the laws, namely to alleviate homelessness, was socially important, but disapproved of the means sought to address this societal problem.[477] Hancock JR for the majority concluded that:

> "[N]o one disputes the City's power – indeed its duty – to fashion meaningful solutions to address homelessness. No one disputes that the City has the power to prohibit the demolition of SRO properties, or direct restoration of SRO units to habitable conditions to be leased at modest rents for indefinite periods. The City clearly has that power. The question is who is to pay for this and, more particularly, whether the City – in accordance with constitutional mandate – must compensate property owners before it can 'place [them] in a business, force[] them to remain in that business and refuse[] to allow them to ever cease

[471] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 101.
[472] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 102.
[473] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 102-103.
[474] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 103.
[475] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 104.
[476] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 105-106.
[477] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 112.

doing [that] business.' The issue is not one of 'economic due process', but constitutional demand."[478]

6.7 Conclusion

The rental housing market in New York City is both interesting and comparable to the rental housing market in England and Wales. It is necessary to compare the landlord-tenant systems to identify important aspects within the New York City model.

For the majority of the twentieth century, the private rental market in England and Wales provided housing to the majority of tenants, which included low-income tenants. At the end of the century the provision of social housing increased and was aimed at providing housing for low-income households. Numerous low-income tenants in England and Wales currently occupy social housing.

Throughout the twentieth century the private rental market was regulated in order to protect tenants, including low-income tenants.[479] The private rental market became unattractive as an investment opportunity for landlords, which contributed to the decline in private rental housing. As the housing policy changed to increase private rental housing the market was deregulated, but during this period the social housing market increased and started to make housing available for low-income households. Currently the private market can uphold deregulation, because the social housing market is providing a type of "safety net" for vulnerable occupiers. The social housing market is regulated quite extensively in order to protect vulnerable occupiers through the provision of affordable secure rental housing.[480]

The private rental market is therefore not burdened with the indirect duty to provide housing to low-income households, because affordable secure rental housing is made available by local councils and housing associations that collectively form the social housing sector. This sector can accommodate the social

[478] *Seawall Associates v City of New York* 74 NY 2d 92 (1989) 117-118.
[479] See section 4.5 in Chapter 4 for a discussion of previous rent regulation laws in the England and Wales.
[480] See sections 4.5.2 and 4.6.2 in Chapter 4 for a discussion of social housing regulations in England and Wales.

market, because it is governmentally equipped with means to monitor the demand for low-income housing.

The position in New York City is different, but comparable. Currently the majority of the rental housing stock in the United States of America is privately owned by for-profit landowners. The percentage of private homeowners in New York City is low in comparison with the other major US cities. The percentage of private rental housing in New York City is high, especially by comparison to the limited number of public rental housing stock. The private rental market is providing housing to a high number of households, including low-income households. In New York City, the public rental sector is not providing the required number of housing units for low-income households. The private rental market is therefore burdened with the indirect duty to accommodate low-income households. In Chapter 4 it was argued that if the private rental market is functioning efficiently, there would not necessarily be a need to regulate the market if there is some mechanism ensuring affordable and secure housing for the more vulnerable members of society. In New York City the private rental market provides housing to a range of households, including low-income households.

The current position in New York City is very different from the earlier position, when the majority of New Yorkers, and in fact the majority of Americans, were desperately in need of affordable rental housing. During that period the emergency housing shortage affected all income groups and possible tenant exploitation justified rent regulation in the private market. The courts held that rent regulation measures were constitutionally justifiable in light of the housing crisis, because landlords could exploit tenants.[481] Currently a number of private housing dwellings are regulated and the justification for rent regulation subsequently shifted to the provision of affordable rental housing for a small, specified group of low-income individuals. The rent charged in the deregulated private rental sector is higher than the market rent, which indicates a form of tenant exploitation. If the leases of low-income tenants who occupy regulated rental housing in the private market expire, their chances of acquiring public rental housing would be very slim, because public housing stock is limited. Low-income households would also struggle

[481] See the discussion of *Block v Hirsh* 256 US 135 (1921) and *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) in section 6.6.2 above.

to find deregulated accommodation in the private market, because the rent is higher than the market rent and therefore much higher than the rent these households previously had to pay in the regulated market. Currently, the aim of the regulations is to avoid an increase in homelessness, because the immediate effect of deregulation would be an increase in rents. The more recent justification for rent regulation is therefore based on the public interest.

From the case law discussion it is clear that the Supreme Court of Appeal and other courts have found that some regulatory laws are constitutionally justifiable, because it serves a legitimate purpose in protecting tenants while balancing the interests of the parties.

The point of departure in landlord-tenant case law regarding the justifiability of rent regulations is that it is constitutionally valid, because it is in the public interest. However, the extent of the regulation could render it unconstitutional, especially when a small section of society must bear the public burden alone and when the regulations are disproportionate. Where the restrictions force certain property owners to bear this public burden alone the court have found that it amounts to a taking without compensation and is therefore unconstitutional. The courts have found that rent regulations are constitutionally justifiable if the landlord allowed the tenancy. In *Yee* the Supreme Court held that the law did not amount to an unconstitutional taking because it did not authorize an unwanted physical invasion. In *Seawall* the court declared a law unconstitutional because the impact of the law was to force landowners to open their property to the public, which amounted to an unconstitutional physical taking.

In German law[482] the fundamental feature of property is to enable the holder of property to secure a sphere of freedom in which he can develop his own life. A statutory regulation that deprives the owner of this right is held to constitute an invalid and unjustified taking. However, the German Federal Constitutional Court has found that tenure security in residential property is important and it justifies restrictions on landowners' property rights, because it enables tenants to reach a level of personal autonomy. The security of the home is central for the individual (or

[482] See Chapter 7 for a discussion of German landlord-tenant law regarding the protection of tenants' occupation rights.

household) to make decisions and participate in society.[483] German law differs from American law to the extent that it does not have uncodified common law, but rather a Civil Code that protects the tenure rights of tenants.[484] In addition Article 14 of the German Basic Law, which functions as a constitutional property clause, was crafted to protect property rights and to enable the legislature to enact legislation that would give effect to the public interest. The contents and limits of property must be developed by the legislature, while the use of property must serve the public interest. The rights of landowners must always be taken into account, but it is subject to social limitations.

In the American context, Singer explains that landlord-tenant relationships divide property rights between the landlord and the tenant to the extent that the tenant receives a possessory right, while the landlord retains the reversion. According to the case law, regulations that provide tenants with better tenure security by restricting the common law rights of landowners is constitutional, provided that it does not become excessive.[485] The justification for granting the tenant continued occupation rights upon termination of the lease is apparent when balancing the interests of both landlord and tenant. When balancing the interests of the parties the situation could sometimes arise that it would be in the public interest to "privilege the interests of tenants in continued access to their homes over the interests of landlords in recovering possession of the property."[486] However, this form of regulation must be distinguished from forcing landowners to lease their properties. Forcing property owners to let their property is according to the American case law unjustifiable as it amounts to a physical taking.

[483] See section 7.4 in Chapter 7 regarding the fundamental feature of property in German law.
[484] See section 7.3.2 in Chapter 7 for a discussion of the provisions in the German Civil Code regulating landlord-tenant law and specifically the tenure rights of tenants.
[485] See Chapter 7.
[486] Singer JW *Introduction to Property* (2nd ed 2005) 700.

7. German Landlord-Tenant Law

7.1 Introduction

Throughout the twentieth century the private rental housing sector in Germany has represented a large percentage of the housing market and it remains the most common form of housing.[1] The rental housing market was subjected to state intervention since the outbreak of the First and Second World War in order to accommodate households in dire need of affordable housing. The initial introduction of tenant protection measures and rent control had detrimental consequences for landowners and the housing market in general, because it was disproportionate in relation to building costs and inflation.[2] After the Second World War new rental housing measures were introduced that restricted the rights of landowners with the aim to accommodate tenants, but these measures were combined with state assistance in the form of public funds. These funds attracted private investment in the rental housing market, which resulted in an increase in residential property stock, while allowing rent control and tenant protection measures to continue, because landowners became more content with restrictions on rent and other tenure security measures.

Social housing was introduced[3] during a period when a large percentage of low-income households had difficulty entering the private housing market. Social housing made provision for affordable, secure rental housing combined with access control, in order to accommodate the more vulnerable and marginalised group of households. Currently, this form of housing is being phased out, because of the government's financing system.[4]

Landlord-tenant law is presently regulated in the Civil Code.[5] The Civil Code makes provision for tenant protection and restricts rent increases, although rent control as such has been phased out. The market is presently being deregulated, but security of tenure for tenants is still provided for. These provisions apply to all tenants, irrespective of their income. However, where cancellation of the lease could

[1] See text accompanying ffn 16, 71 below.
[2] See text accompanying ffn 26-28.
[3] Social housing was introduced in 1950. See the discussion of the introduction of social housing in 7.2.2 below.
[4] Droste C & Knorr-Siedow T "Social Housing in Germany" in Whitehead C & Scanlon K (eds) *Social Housing in Europe* (2007) 90-140 at 93-95.
[5] *Bürgerliches Gesetzbuch (BGB)*. Landlord-tenant law is regulated in Book 2, Title 5 of the *BGB*.

cause a hardship for the tenant or a member of the tenant's household, the tenant can resist eviction on that basis. This provision[6] indirectly ensures that vulnerable tenants are protected against unjustifiably harsh circumstances that result from eviction. The Civil Code specifically includes the example where a tenant would become homeless after cancellation as a form of hardship.[7]

During the twentieth century the provision of housing, and more specifically the protection of tenants' occupation interests, has developed from being a "public concern" towards becoming an interest that forms part of the general public interest. The public interest is protected in the German Basic Law to such an extent that it has to be weighed against the interests of property owners.[8] In the landlord-tenant context the property rights of landowners are therefore constitutionally balanced with the socially protected interests of residential tenants.[9] In the American courts,[10] including the United States Supreme Court, it has been argued that rent regulations amount to an unconstitutional taking of property, but at least in some cases these regulations have been upheld as constitutionally valid regulatory law because they are in the public interest. The German Federal Constitutional Court has also considered landlord-tenant disputes regarding rent regulations,[11] although the German disputes have always concerned the extent of the regulations rather than the constitutional justifiability of these laws. The courts therefore had to consider whether the legislature correctly weighed up the interests of the parties when it regulates and determines the contents of property rights. Where property serves the public interest (or forms part of the public interest) and society at large has a share in that interest, the legislature's incentive to restrict the rights of the property owner increases. The nature of residential property, and more specifically leased residential property, justifies strict regulation by the legislature because it serves a social function in the provision of housing. The interests of the tenants are socially recognisable interests that justify protection by the legislature. In the case of housing shortages the social importance of residential housing increases to the extent that it becomes a limited resource, which is a vital commodity for society. In these

[6] *BGB* § 574(1).
[7] *BGB* § 574(2).
[8] See text accompanying ffn 159-160 below and the case law discussion in 7.4.2 below.
[9] See the discussion in 7.4.1 - 7.4.3 below.
[10] See section 6.6.2 in Chapter 6 for a discussion of American case law regarding the constitutionality of rent regulations.
[11] See section 7.4.2 below.

circumstances the role of the government in governing this resource changes, as more stringent regulations regarding residential property are justified. The social importance of the property providing housing to society might then outweigh the private property rights of landowners.

However, the restrictions placed on the rights of landowners are not perceived as exceptional or emergency statutory interventions or interferences, as the tenant protection measures are included in the German Civil Code[12] and therefore form part of the private law on a permanent basis. In American law (and pre-1994 South African law)[13] rent regulations are perceived as temporary measures that interfere with the strong common law rights of landowners with the aim to provide strengthened tenure rights for weak, poor, vulnerable, and marginalised occupiers in times of extreme need or hardship. In the current South African housing context the social importance of housing and strengthened tenure security for the previously disadvantaged are also highlighted in sections 25(6) and 26(1) of the Constitution, although the courts (and the legislature) have upheld the strong common law rights of landowners.[14] In American law (and pre-1994 South African law) the justification for limiting private landowners' common law property rights in order to afford better tenure rights for tenants is therefore based on the general public consensus that there is a great disparity between the common law rights of landowners and tenants. When facing housing shortages this disparity increases to such an extent that rent regulations are justified. In German law the justification for rent regulations is based on the importance of substantive tenure rights that enables tenants to participate in society, make their own decisions and achieve personal autonomy, which is a general rather than a temporary, emergency justification. The social importance of residential property is recognised in most jurisdictions, especially when facing housing shortages, but the tension between the rights of landowners and tenants are perceived and analysed from different perspectives, which results in different landlord-tenant regimes.

[12] See section 7.3.2 below.
[13] See section 2.3 in Chapter 2 for a discussion of rent regulations in pre-1994 South Africa.
[14] See sections 3.3, 3.4 and 3.8 in Chapter 3.

7.2 Contextual background

7.2.1 State intervention in rental housing market (World War I – World War II)

In the beginning of the twentieth century housing in Germany[15] was to a large extent unregulated and left to the free market. The nature of private property was generally a private matter and the state did not intervene in the affairs of landowners, especially the relationship between landlord and tenant. During this period ninety percent of the German population lived in rented housing.[16] The housing market remained unregulated and was shaped by market forces instead of housing needs until the First World War, whereafter the free-market approach to housing was replaced by public concern.[17] The economic complications that developed and increased throughout the war forced the state to intervene in the housing market.[18] Initially, tenants who were dependants of soldiers were protected against eviction and shortly thereafter, legislation was enacted to protect fighting men from eviction.[19] In the same year legislation was passed to provide general protection for tenants in rent arrears. At the end of 1914 a decree was issued that made provision for the establishment of "rent settlement offices"[20] (*Mieteinigungsämter*), which manifested

[15] As far as the period between 1945 and 1990 is concerned, this section is based on rental housing development in the former West Germany. Housing in the former German Democratic Republic (East Germany) was different, as three different types of ownership existed, namely state housing, co-operative housing and private housing. During the immediate post-war period the majority of dwellings were privately owned. However, by 1957 state housing stock increased, as 79 percent of all housing construction was for state housing. Rents in older state properties remained very low as a result of a rent freeze in 1936, while the overall cost of rentals was also relatively low. As a result of the low state rents the renting of private property was often seen as a burden on the landowner, because the cost of repair work for the owner often exceeded the rent paid by the tenant. Co-operative housing schemes were operated by non-profit building societies and the co-operative schemes remained owners of all its housing. Co-operative housing construction was financed by local authorities and essentially formed part of government planning. See Staemmler G "East Germany" in Wynn M (ed) *Housing in Europe* (1984) 220-246 at 236-239.

[16] Bessel R *Germany after the First World War* (1993) 166-167. See 167 for a brief discussion on the conditions of rental accommodation.

[17] Bessel R *Germany after the First World War* (1993) 168-169. The role of the state with regard to the housing problem was embedded in Article 155 of the Weimar Constitution (1919), which provided that the state was committed "to secure a healthy dwelling for every German and a place of residence and work for every German family, especially those with many children, appropriate to their needs."

[18] Bessel R *Germany after the First World War* (1993) 170.

[19] The Law for the Protection of Servicemen of 4 August 1914.

[20] Bessel R *Germany after the First World War* (1993) 170.

the beginning of tenant protection through state intervention in the rental housing market.[21]

In 1918 the government introduced new measures to address the housing shortage and to protect tenants. These measures empowered local authorities to prevent privately owned buildings (and parts of buildings) from being demolished; to order that an additional number of persons be accommodated in certain dwellings; to prohibit landowners from using dwellings for purposes other than housing; and to force landowners of vacant land (or buildings) to advertise their availability.[22] The state became the "arbiter of landlord-tenant relations"[23] and it took such an interest in the financing of new building construction that by the end of 1918 it made subsidies available to compensate landowners for increased building costs.[24] Laws and decrees that regulated the relationship between landlord and tenant were enacted in the individual states throughout Germany. When the First World War ended the housing market, and more specifically the rental housing market, was characterized by municipal housing authorities imposing strict control over the availability of housing and the general price of residential property in their area. A number of socio-economic conditions, including a persistent housing shortage, continued inflation, shortage of capital, the return of soldiers and a great number of marriages, led to wide-ranging state intervention, combined with rent controls, during the demobilization period.[25]

The strict enforcement of rent controls had a number of detrimental consequences as a result of the disparity between the rapid inflation and the stagnation of rents. At a period when rents were restricted, Germany experienced drastic inflation which arguably "transferred wealth from landlords to tenants."[26] The costs of owning property, which included insurance, property tax, sewerage, cleaning and repair work continuously increased, while rents were restricted. As a result of the disproportion between landowners' increasing costs and tenants' reduced or stagnant rents, owners of residential property lost the incentive to make their

[21] Bessel R *Germany after the First World War* (1993) 170-171. See 171-174 for a discussion on the condition of housing and the availability of housing during the first stages of the war.
[22] Bessel R *Germany after the First World War* (1993) 174.
[23] Bessel R *Germany after the First World War* (1993) 174.
[24] Bessel R *Germany after the First World War* (1993) 174.
[25] Bessel R *Germany after the First World War* (1993) 174-175. See 175-181 for further detail on the socio-economic circumstances during the demobilization period.
[26] Bessel R *Germany after the First World War* (1993) 181.

property available, which led to the state forcing landowners to put their dwellings on the rental market.[27] Some landowners also allowed their properties to dilapidate instead of paying high costs for repairs.[28] Apart from the adverse effect that rent control had on landowners, rent control generally discouraged the private building of new rental housing.[29]

A number of post-war statutes were introduced that set the legal framework for state involvement in housing. These statutes restricted the rights of landowners to demolish their buildings, to convert residential property to commercial use and to discount vacant buildings by empowering local authorities to seize the vacant buildings and force landowners to let these dwellings to homeless families.[30] Rent control was imposed on all residential property built prior to July 1918, which led to extremely high rent rates for new dwellings, as a result of increased building costs and high interest rates. Finally, the laws in effect prohibited landlords from evicting tenants.[31]

Overall, the measures introduced by the state contributed towards a significant alteration in the German people's perception of the state's justifiable responsibility in solving the housing crisis. After these measures were introduced, the people of Germany more easily accepted the state's responsibility in addressing social problems, even though the interventions didn't actually solve the acute housing shortage.[32] After the stabilization crisis of 1923-1924 rents increased and later, between 1925 and 1926, rents increased rapidly, even though the state remained in control of rents. It seemed as though, once the state intervened in the price of housing, extracting itself became exceedingly difficult. The anticipation of a return of the free-market economy was to a large extent idealistic, as demobilization and inflation resulted in state intervention in the housing market throughout

[27] See section 6.6.2 in Chapter 6 for a discussion of *Seawall Associates v City of New York* 74 NY 2d 92 (1989) where the Court of Appeals of New York decided that a similar law amounted to an unconstitutional taking.
[28] Bessel R *Germany after the First World War* (1993) 181.
[29] Bessel R *Germany after the First World War* (1993) 182.
[30] See section 6.6.2 in Chapter 6 for a discussion of *Seawall Associates v City of New York* 74 NY 2d 92 (1989).
[31] Bessel R *Germany after the First World War* (1993) 184. See also Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 115.
[32] Bessel R *Germany after the First World War* (1993) 187. See 187-189 for statistics on housing production in Germany between 1919 and 1925 and some discussion on the increased housing shortage.

Germany, which eventually played a central role in housing construction.[33] The underlying goal of the state's continued intervention in the housing market, through tenant protection and attempts to increase housing availability, was arguably "political – attempts by insecure governments to demonstrate to an unruly and embittered population that they were doing something."[34] Between 1924 and 1930 the volume of new housing construction increased, in part as a result of government loans made available to builders at low interest rates, which amounted to roughly sixty percent in new housing investment. Private employers were also encouraged to construct new dwellings by offering them building loans at low interest rates. As a result of the depression, between 1930 and 1931 public funds for housing construction were withdrawn and the amount of credit made available through organized capital markets declined. During 1929-1932 residential construction consequently declined by more than fifty percent.[35]

The Nazi regime came into power in 1933 and imposed strict control over the housing market. The regulations were implemented through two four-year plans.[36] The First Four-Year Plan (1933-1936) initially focused on the rebuilding of housing stock, which was followed by greater emphasis on new housing construction.[37] Despite the increase in housing construction, the housing shortage continued and it even increased when 300 000 dwellings were being built every year.[38] The majority of the new construction was aimed at providing housing for low-income households, although some of these dwellings' rent was too high to accommodate tenants. By the end of 1932 more than one million households did not have a home, while there were 150 000 vacant apartments available for rent.[39] The Second Four-Year Plan began in 1937 and was interrupted by the outbreak of the Second World War.

[33] Bessel R *Germany after the First World War* (1993) 192. At 193 Bessel mentions that state control in the housing market lasted longer in comparison to other forms of economic control, because political pressure and state control in the housing market could be imposed quite easily.
[34] Bessel R *Germany after the First World War* (1993) 194.
[35] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 116.
[36] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 116.
[37] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 117-118.
[38] The housing shortage increased as a result of the population growth: Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 119.
[39] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 119.

According to the plan, the entire rent policy was determined by a federal price controller (*Reichskommissar für die Preisbildung*), who controlled prices for goods, especially goods necessary for human living. All rents were frozen in order to keep rentals at a consistent low level.[40]

During the Second World War 25 percent of residential property was destroyed by war action. Consequently, the housing shortage escalated to such an extent that by 1950 more than five million households were homeless. It was estimated that 425 000 residential units would have had to be built each year for fifteen years to eliminate this urgent housing shortage. Apart from that, a large number of existing dwellings were in a critical condition that necessitated an extensive slum-clearance programme.[41]

7.2.2 State intervention combined with state assistance: Introduction of social housing (post-World War II)[42]

The main housing effort that followed after the war was emergency repair work, because new construction was difficult due to a shortage of new materials.[43] The new West German federal government came into power in 1949 and immediately had to address the housing crisis. The problem that existed in the rental housing market was to control rents at modest levels, while providing financing at low interest rates. This difficulty was solved by making available public funds to subsidize housing construction and providing income tax relief for private funds invested in housing.[44]

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[40] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 119.
[41] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 120.
[42] The following section is based on rental housing in West Germany. See fn 15 above for more detail on landlord-tenant law in East Germany.
[43] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 121.
[44] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 123-124.

In 1950 the government created a social housing programme that was set out in the First Housing Act of 1950.[45] The Act made provision for social housing that received subsidies and loans at low interest rates from public funds; increased housing construction that was assisted by tax exemptions; and private housing that received no government aid. The social housing project was aimed at providing housing for the majority of low-income households. The project was financed through subsidies and public loans, although it was subject to rent control and access control by placing a ceiling on tenants' income.[46] The loans covered nearly fifty percent of the construction costs and were provided by the state to private investors and non-profit associations at zero interest. The government controlled the allocation of housing, enforced a minimum standard of housing size and quality and made provision for tenant protection. However, these conditions were made compulsory for a limited period, because when the loan period terminated the dwelling ceased to form part of the social sector and became part of the private sector, unless the landlord was a municipally controlled association.[47]

In the period 1950-1954 rents were considerably lower than building costs, because of a rise in buildings costs and an increase in the quality of housing. The government realised that rents were being kept at an uneconomic level and therefore enacted legislation that made provision for a ten percent increase in rents for all dwellings constructed prior to the currency reform. The rent of dwellings that had certain amenities and central heating were also increased between fifteen and

[45] Social housing in Germany is similar to "public housing" in the United States of America and "council housing" in England and Wales, as it is aimed at providing low-cost housing to poorer members of society: Kennedy D "West Germany" in Wynn M (ed) *Housing in Europe* (1984) 55-74 at 56. Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 90 mentions that since 1945 the housing policy in Germany was committed to a social market economy, even though housing was not provided as a social service, but rather perceived as a social necessity that government was responsible for to the extent that housing standards had to be complied with and the needs of the poorest households had to be adhered to. At 91 Kleinman also mentions that the term "social housing" in Germany describes "a method of *financing* housing together with a set of *regulations* and *responsibilities* about allocation of tenancies, rent levels and standards". This resulted in less segregation between social and private housing.

[46] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 124. By 1956 1.8 million social-housing dwellings had been built under the provisions of the First Housing Act. See Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 131-132 for more detail on the financing of social housing and access control. See also Kennedy D "West Germany" in Wynn M (ed) *Housing in Europe* (1984) 55-74 at 56.

[47] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 94.

twenty percent.[48] The result was that residential rents for the majority of income groups increased with 120 percent by 1958, although rents in state-assisted housing for low-income households remained fifteen percent below the average rents, which reflected the provision of public funds for social housing.[49] The Second Housing Act 1956 made provision for government-assisted interest subsidies to allow dwellings to be let at below-market rents, instead of direct government loans. The social rent for these dwellings was controlled, as was the income group that gained access to the dwellings.[50]

Between 1950 and 1959 roughly 300 000 social housing units were built annually by private investors who received public grants. This number escalated to between 500 000 and 600 000 in the following years, as a result of the introduction of new incentives for private investors.[51] One might assume that the dwellings were publicly owned, because of the amount of public funds that were being spent on social housing. However, the majority of social-housing dwellings were privately owned, because the "policy revolved around publicly subsidized loans to private investors who, in receiving these benefits, bind themselves to at least a 15 year social rent control".[52]

During the 1960s the role of the state in the provision of housing relaxed as a result of an increase in the supply of housing and increased employment. Rent control was partially phased out, while housing benefits were introduced in 1965. Supply subsidies were also extended to owner-occupation and social housing.[53] Nevertheless, state interference in the housing market resurfaced in the 1970s when the government's aim was to increase owner-occupation, improve housing benefit and expand social housing construction through a long-term programme.[54] In the 1980s the government introduced the "additional rent tax" that enabled states to

[48] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 125-126.
[49] Wendt PF *Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II* (1962) 126-127.
[50] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 94-95. In 1967 a second category of social housing was introduced to middle-income tenants who received public funds: 95.
[51] Kennedy D "West Germany" in Wynn M (ed) *Housing in Europe* (1984) 55-74 at 56.
[52] Kennedy D "West Germany" in Wynn M (ed) *Housing in Europe* (1984) 55-74 at 57.
[53] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 95.
[54] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 95.

charge an additional amount on social tenants whose incomes exceeded the maximum income for social housing by at least twenty percent. These funds were used by local authorities to increase the construction of social housing.[55] Conversely, between 1983 and 1989 the German housing policy changed towards deregulation, coupled with new emphasis on housing allowance, instead of housing subsidies. The new housing policy's goal was to relax rent controls, afford assistance to owner-occupiers, reduce subsidies and cease the provision of tax exemptions for social housing. By 1986 federal subsidies for social rental housing was abolished.[56]

7.2.3 Deregulation, a domestic housing shortage and amendments in social housing

At the end of the 1980s and in the early 1990s the housing market experienced extreme pressure as a result of excess demand that led to housing shortages.[57] The number of households increased, while individuals' real disposable income also increased. This resulted in a demand for improved and bigger living space per person in urban areas. As inner-city dwellings were renewed, redeveloped and converted into larger units, the supply of low-income housing decreased, even though a large number of poorer households, including students, young people and

[55] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 95-96.
[56] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 96.
[57] Flockton C "Housing Situation and Housing Policy in East Germany" in Flockton C & Kolinsky E (eds) *Recasting East Germany: Social Transformation after the GDR* (1999) 69-82 at 75 explains that the housing experience in East Germany was to a certain extent similar during this period, as housing investment also increased in the East, although amounting to only forty percent of the increase in construction in West Germany. In East Germany the focus was on repair and renovation and this was accomplished by means of state assistance, special housing programmes and state subsidies aimed at increasing the private housing market. During this period the East German rental system changed from being strictly regulated to adapting to the West German "comparable rents system". This transformation attracted investment in the housing market in the East, even though the rent adjustments were controlled. For the poorer households housing allowances were made available. In 1995 legislation was introduced to discard rent control and initiate the comparable rent system. Special housing allowances were still made available to the poorer households. These amendments did not result in excessive rent increases, because the rental housing market was not experiencing a general supply shortage: Flockton C "Housing Situation and Housing Policy in East Germany" in Flockton C & Kolinsky E (eds) *Recasting East Germany: Social Transformation after the GDR* (1999) 69-82 at 76-77.

smaller households required these dwellings.[58] Therefore, the housing shortage developed as a result of domestic reasons.[59] The government responded by encouraging private investment in the housing market through tax benefits. Federal subsidies were reintroduced for social housing, although this "third subsidy system" was less generous than previous federal subsidies.[60] The housing policy in the 1990s responded to the housing market by addressing the majority of housing needs, although "using state activity to support and supplement, not replace, the market."[61]

Social housing was made available by both private landlords and non-profit housing enterprises (*gemeinnützige Wohnungsunternehmen*), of which the majority received state subsidies throughout the 1990s. The subsidies were sponsored by the federal government, although the states and local authorities could supplement these funds with their own subsidies. The states also controlled the form of the subsidies. The subsidy was equal to an investor's cost minus a predetermined social rent.[62] The rent for social housing was determined on a scheme-by-scheme basis, which led to different rents for social housing, depending on the time of construction. The rent for social housing and private housing is presently quite similar.[63] The applicants for social housing, including owners and tenants, must have had an income below the determined income ceiling. Once vacancies arose, local authorities could allocate social tenants to non-profit social landlords whom they sponsored.[64]

Kleinman notes that the income group who accessed social housing changed during the 1980s and 1990s from skilled workers to the poorest households. This

[58] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 96.
[59] The housing shortage, combined with high rents, affected a number of households, including some of the wealthier families. Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 112 argues that this wide-ranging housing shortage encouraged the government to target housing construction for the skilled working class, arguably the politically most important group, rather than the poorest households.
[60] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 97.
[61] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 97.
[62] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 100-101.
[63] Kurz K & Blossfeld H *Home Ownership and Social Inequality in Comparative Perspective* (2004) 26.
[64] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 101. See Kleinman 101 for more detail on access to social housing.

occurred as a result of the government's policy towards increasing owner-occupation, which led to wealthier households exiting the social housing sector and becoming owner-occupiers. The relatively poor and fairly diverse households continued to rely on social housing.[65] Furthermore, the private rented stock was continuously upgraded and renovated, which contributed to the poorest and most disadvantaged households having to occupy social housing that was controlled by local authorities.[66] By the beginning of the 1990s the social housing sector consisted of four forms of rental housing, namely dwellings owned by private landlords, non-profit housing owned by the local authorities, co-operatively owned social housing and the remaining non-profit dwellings owned by private landlords.[67]

Social housing is currently to a large extent being phased out as a result of the government's financing system. In 2001, the government introduced a new approach to social housing and replaced the previous social housing legislation and programmes. The new laws provide support for private investors and municipal housing companies to accommodate households with access problems on the open market through affordable rental housing and owner-occupation. The federal government provides financial assistance to the states,[68] while the states are responsible for their own housing policies and administration.[69] Social housing has developed over time and currently one can identify three forms of social housing. The first form of social housing is where developers receive subsidies to construct the housing stock, although households prefer to purchase the stock rather than to rent it. Social housing that is federally regulated usually contains strict restrictions on rent increases and access control in relation to the tenant's income. Finally, social

[65] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 102.
[66] The social housing stock decreased as a result of transfers to private renting. Combined with urban renewal, modernisation of private rented stock and increased owner-occupation, more affordable rental properties decreased: Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 111.
[67] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 104.
[68] See Droste C & Knorr-Siedow T "Social Housing in Germany" in Whitehead C & Scanlon K (eds) *Social Housing in Europe* (2007) 90-140 at 94 for more detail on the financing of social housing.
[69] Droste C & Knorr-Siedow T "Social Housing in Germany" in Whitehead C & Scanlon K (eds) *Social Housing in Europe* (2007) 90-140 at 93-94.

housing could also be made available by a specific state, of which the state-owned dwellings are generally of better quality and with less strict rules.[70]

Germany's private rented sector continues to represent a significant percentage of the housing market as a result of favourable tax benefits for private investors, aimed at increasing private rented housing.[71] These investors are mostly commercial companies and wealthy private individuals. The rents for new tenancies are currently unregulated, although tenants enjoy substantive tenure security, as landlords can only evict tenants by relying on specified grounds. Even though rents are unregulated, landlords can only increase the rents by reference to rents of other leases in the vicinity during the preceding three years. An existing rent cannot be increased by more than thirty percent within three years.[72] The private rental sector provides housing to a diverse group of households, including homeowners, and is still perceived as the most common form of tenure in Germany. Kleinman argues that this sector represents a social market economy, as it consists of reasonably strict state regulation, combined with enough space for entrepreneurial activity that provides for social needs. Kleinman argues that "[t]he price for consumers is moderated by a combination of state controls and competitive market pressures."[73]

The percentage of owner-occupation is relatively low in Germany when using a Western European standard, even though it has increased since the 1970s.[74] The government's housing policies are aimed at increasing homeownership, although owner-occupation is not regarded as a right in Germany, but rather as a major responsibility that could only be pursued once one is firmly established in both the labour and housing markets.[75] The social welfare policies and specifically the housing policies that developed during the twentieth century were accommodated in modern German private law. Currently, the statutory interventions in the rental

[70] Droste C & Knorr-Siedow T "Social Housing in Germany" in Whitehead C & Scanlon K (eds) *Social Housing in Europe* (2007) 90-140 at 95.
[71] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 105. Before 1990 investors were not required to pay annual land tax for the first ten years after construction and all losses that occurred from rental housing could be offset against the investor's income from other sources: at 105.
[72] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 105.
[73] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 106.
[74] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 95. Housing prices in Germany is almost double than in Britain.
[75] Kleinman M *Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany* (1996) 120.

housing market that regulate the landlord-tenant relationship are to a large extent included in the Civil Code.[76]

7.3 Private law

7.3.1 Introduction

Property law in Germany is known as *Sachenrecht* ("the law of things"),[77] which is concerned with the rights that an individual can establish with regard to a corporeal thing, while the law of obligations (*Schuldrecht*) is concerned with the personal relationship between individuals.[78]

Ownership is defined as the "all-embracing" right *in rem*,[79] which is described in the German Civil Code (*BGB*)[80] as the right to deal with the thing at the owner's discretion.[81] Where the owner's property is in the possession of another person the owner is entitled to claim his property,[82] except in the case where the possessor has a right to possession.[83] The right of the possessor is usually either a contractual right or a limited right *in rem*.[84] Limited rights *in rem* derive from property law and provide the holder with limited legal powers in relation to the thing. The right attaches to the thing and therefore, where the thing is transferred to a third person the holder would retain his right. This distinguishes rights *in rem* from contractual rights, such as leases.[85] *Sachenrecht* includes a broad range of rights, including possession

[76] Van der Walt AJ *Property in the Margins* (2009) 85.
[77] §§ 90–103, §§ 854-1296 (provided for in the third book) of the German Civil Code (*Bürgerliches Gesetzbuch* or *BGB*) deals with *Sachenrecht*, although these provisions are only concerned with substantive law and not procedural law.
[78] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 227.
[79] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 237.
[80] All translations for provisions in the *BGB* were found at http://www.gesetze-im-internet.de/englisch_bgb/ (accessed 5 May 2010).
[81] *BGB* § 903.
[82] *BGB* § 985. See also See also Ring G, Grziwotz H & Keukenschrijver A (eds) *Nomos Kommentar BGB* Band 3 *Sachenrecht* (2nd ed 2008) 671-693.
[83] *BGB* § 986(1). See also See also Ring G, Grziwotz H & Keukenschrijver A (eds) *Nomos Kommentar BGB* Band 3 *Sachenrecht* (2nd ed 2008) 693-699.
[84] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 238.
[85] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 239. See also 239-244 for more detail on limited rights *in rem*.

(*Besitz*)[86] and limited rights *in rem*.[87] The right to use the thing and the right to defend possession against the landowner arise from either a right *in rem* or a contractual obligation. It is therefore necessary to distinguish between the factual possession of the possessor and her underlying right to possess the thing.[88] The common law concept of a contract is defined in German law as a contractual relationship of obligation (*vertragliches Schuldverhältnis*).[89] A contract therefore forms part of the law of obligations (*Schuldrecht*), which is regulated in *BGB* §§ 241-853.[90] Paragraph 535 of the *BGB* applies to both a contract of rent, which usually refers to the use of movable things in return for the payment of rent, and tenancy, which refers to the use of immovables for remuneration.

The relationship between landlord and tenant with regard to immovable property is regulated in terms of the law of things (*Sachenrecht*), as the tenant becomes possessor once she acquires control over the property, as well as the law of obligations (*Schuldrecht*), as the parties enter into a contract. However, the distinction between rights *in rem* and contractual rights, as defined earlier, is unclear in the case of the legal rights arising from a tenancy that pertains to immovable property, because these rights "have the nature of a quasi right *in rem*."[91] Rights *in rem*, as previously mentioned, are enforceable against third parties and therefore attach to the thing, while contractual rights derive from contracts and are usually only enforceable against the other party. The rights of residential tenants originate from contract, but on the basis of certain provisions in the Civil Code these rights are enforceable against third parties.[92] The provisions in the Civil Code that pertain to residential leases therefore override the general rules with regard to contractual rights. As mentioned earlier, contractual rights are generally only enforceable against

[86] *BGB* §§ 854 – 872. See also See also Ring G, Grziwotz H & Keukenschrijver A (eds) *Nomos Kommentar BGB* Band 3 *Sachenrecht* (2nd ed 2008) 1-49.
[87] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 228.
[88] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 233-234.
[89] Markesinis SB, Unberath H & Johnston A *The German Law of Contract: A Comparative Treatise* (2nd ed 2006) 25.
[90] Markesinis SB, Unberath H & Johnston A *The German Law of Contract: A Comparative Treatise* (2nd ed 2006) 25. Obligations arising from the law include delict and unjustified enrichment.
[91] Kohler J "Property Law (*Sachenrecht*)" in Reimann M & Zekoll J (eds) *Introduction to German Law* (2005) 227-250 at 247.
[92] See section 2.2 in Chapter 2 for the South African position regarding the common law rights of tenants that are enforceable against third parties. See also the discussion of the nature of the statutory tenancy, which resembles a *quasi contract*: Kerr AJ *The Law of Lease* (2nd ed 1976) 198.

the other contracting party and cannot be enforced against third parties. The contract also usually regulates the relationship between the parties as well as the rights of the parties. The Civil Code overrides these contract-based rules in order to provide tenants with reasonable rents and substantive tenure protection. Rents are kept at reasonable levels by placing restrictions on rent increases and security of tenure is given effect to by prohibiting (or temporarily preventing) eviction.

7.3.2 Provisions regulating lease

7.3.2.1 General provisions

The primary obligation of the lessor is to enable the lessee to use the leased property for the lease period, while the lessee is obliged to pay the agreed rent.[93] Where the lease period is indefinite, either the lessor or the lessee may give notice of termination to the other party in order to terminate the lease. A lease for a definite period generally terminates at the end of that period, unless the lease is extended or has already been legally terminated for cause.[94] The lessor or the lessee may terminate the lease for cause without giving notice of termination to the other party, provided that there is a compelling reason.[95] A compelling reason is deemed to exist if either party cannot reasonably be expected to continue with the lease until the lease expires or until the end of the notice period. A compelling reason also includes cases where the lessee is not permitted to use the leased property in accordance with the contract; where the lessee substantially violates the rights of the lessor by

[93] *BGB* § 535. The lessor is also obliged to offer the leased property in a suitable condition and maintain it in such a condition for the period of the lease.

[94] *BGB* § 542. The landlord-tenant relationship in the Netherlands is regulated in Book 7 of the Dutch Civil Code (*Burgerlijk Wetboek* or *BW*). See Oldenhuis FT, Rossel HJ, Kloosterman AM, Hellegers DPCM & Van Stempvoort JP *Hoofdlijnen in het Huurrecht* (5th ed 2005) 7-8 for a brief introduction to the provisions that regulate residential landlord-tenant law in the Netherlands and the intervention of the Dutch Civil Code in this area of law. Article 7:271 of the *BW* requires a formal notice and a certain period before the lease could be terminated. This provision therefore provides tenants with procedural safeguards. It follows from both articles 7:271 and 7:277 that neither the landlord nor the tenant could terminate the lease prior to the expiration date, although unforeseen circumstances could validate termination before the end of the lease. See Abas P *Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Bijzondere Overeenkomsten* (2007) s v "Huur" at §§188-189 for some discussion on these articles. See also Oldenhuis FT, Rossel HJ, Kloosterman AM, Hellegers DPCM & Van Stempvoort JP *Hoofdlijnen in het Huurrecht* (5th ed 2005) 191-208; Van der Walt AJ *Property in the Margins* (2009) 87.

[95] Van der Walt refers to these grounds as "abnormal cases" for cancelling the lease: Van der Walt AJ *Property in the Margins* (2009) 88. Even though the lessee is not entitled to receive a notice of cancellation, the eviction procedure is still subject to prescribed procedural controls: 88.

endangering the property through acts of negligence; or where the lessee is in default on two consecutive dates of payment of rent or of a significant portion of rent.[96] Upon termination of the lease, the lessee is obliged to restore the leased property to the lessor.[97] The lessor is entitled to demand compensation equal to the agreed rent, or the rent customarily paid for similar items in the vicinity, for the duration of the period during which the lessee failed to return the property upon termination of the lease.[98] If the lessee continues to use the property after termination of the lease, the lease is extended for an indefinite period, unless either one of the parties objects to such an extension within two weeks.[99]

7.3.2.2 Provisions specific to rental housing

The previous section applies to all leases, including residential leases to the extent not otherwise regulated by §§ 549 to 577a of the *BGB*. The provisions discussed below apply specifically to residential leases, although some of the provisions[100] that regulate the rent and lessee protection do not apply to all residential leases;

[96] *BGB* § 543. The list of compelling reasons in *BGB* § 543 is not exclusive. In the case of residential property, a significant portion of the rent would exceed one month's rent. If the lessee of residential property was ordered to pay an increased rent in terms of *BGB* §§ 558-560, the lessor may generally not terminate the lease for default in payment by the lessee before the end of two months after the order: *BGB* § 569. The Dutch position is regulated by article 7:274 of the *BW* and it provides a list of grounds that the landlord could rely on to terminate the lease. This list is exclusive and the landlord could therefore not terminate the lease and evict the tenant on any other grounds. According to article 7:274 the landlord could terminate the lease and start eviction proceedings if the tenant acts inappropriately in which case his behaviour is unacceptable; if the landlord and tenant initially agreed that the tenant would vacate the premises at a certain period and the landlord still has a definite interest in terminating the lease at that period; if the landlord urgently requires the premises for his own use; if the tenant did not accept a reasonable offer made by the landlord for a new lease; if the landlord acquired valid building and planning permission and wishes to undertake certain construction works in the leased premises; or if the leased premises forms part of the landlord's residential property where he resides and the landlord's interest in terminating the lease weighs heavier than the tenant's interest in remaining in the premises. See Abas P *Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Bijzondere Overeenkomsten* (2007) s v "Huur" at §§ 200-236 for detailed commentaries on these grounds. See also Oldenhuis FT, Rossel HJ, Kloosterman AM, Hellegers DPCM & Van Stempvoort JP *Hoofdlijnen in het Huurrecht* (5th ed 2005) 214-233 for some discussion on article 7:274.

[97] *BGB* § 546(1).

[98] *BGB* § 546a(1). The lessor of residential property may only claim further damages where the lessee failed to return the property upon termination of the lease if lessee was responsible for the late return: *BGB* § 571(1).

[99] *BGB* § 545.

[100] These provisions include *BGB* §§ 557-561, 568(2), 573, 573a, 573d(1), 574-575, 575a(1), 577 and 575a. However, § 568(2) does apply to residential space that is let as a student hostel or a hostel for young persons.

excluded are residential space that is leased for a temporary period; residential space that is also inhabited by the landowner; residential space that is leased by a legal person or a welfare organisation to permit use by persons in urgent need of housing; and residential space in a student hostel or a hostel for young persons.[101]

The Civil Code makes a clear distinction between general leases and residential leases, because the provisions that regulate residential leases include restrictions on rent increases and the termination of leases. However, the provisions in the Civil Code that restrict rent increases do not amount to rent control. The main obligation of the lessee is to pay the rent agreed upon at the commencement of the period of the lease,[102] although the parties may agree to increase the rent during the period of the lease.[103] The rent may be agreed upon in writing for varying amounts, applicable to specified periods in time, although the rent amount or the increase in rent must be indicated as a monetary amount. This form of rent increase is referred to as a stepped rent.[104] The parties may also agree in writing that the rent must be determined through the price index for the cost of living of all private households in Germany, which is computed by the Federal Statistics Office. This is known as indexed rent.[105]

Apart from the agreed rent increases, such as stepped rent or indexed rent, the lessor may demand approval for a rent increase "up to the reference rent customary in the locality".[106] The demand for a rent increase must be declared and justified to the lessee in a written format. In order to justify the rent increase, the lessor may specifically refer to a list of representative rents;[107] information from a

[101] *BGB* § 549.
[102] *BGB* § 556b(1).
[103] *BGB* § 557(1). Future changes in the amount of the rent may be agreed upon in the contract as stepped rent (§ 557a) or indexed rent (§ 557b): § 557(2). The lessor may also demand rent increases in terms of *BGB* §§ 558-560: *BGB* § 557(3).
[104] *BGB* § 557a(1). The rent must remain unchanged for at least one year and the lessee is prohibited from terminating the lease through a notice of termination for at least four years after the stepped rent agreement is entered into: *BGB* §§ 557a(2)-(3).
[105] *BGB* § 557b(1). The rent must remain unchanged for at least one year, except for increases under §§ 559-560: *BGB* § 557b(2).
[106] *BGB* § 558. The lessor may only demand such a rent increase if the rent has remained unchanged for the period of fifteen months: *BGB* § 558(1). *BGB* § 558(2) states that the "reference rent customary in the locality is formed from the usual payments that have been agreed or … that have been changed in the last four years in the municipality … for residential space that is comparable in type, size, furnishings, quality and location." The translation for this provision was found at: http://www.gesetze-im-internet.de/englisch_bgb/ (accessed 5 May 2010).
[107] "A list of representative rents is a table showing the reference rent customary in the locality": *BGB* 558c(1).

rent database;[108] an opinion by an expert; and examples of similar rent payments for comparable residential properties.[109] Once the lessee approves the rent increase he becomes liable to pay the increased rent from the beginning of the third calendar month after receipt of the demand for an increase. If the lessee does not approve the demand for a rent increase, the lessor may sue for grant of approval.[110]

Where the lessor carried out construction work that permanently increased the efficacy value of the leased premises, improved the general living conditions of the premises or changed certain conditions that led to savings in water or electricity, the lessor may increase the rent.[111] Where the lessor demands a rent increase up to the reference rent in the locality[112] or where the lessor carried out construction work that led to a rent increase,[113] the lessee may terminate the lease for cause by serving a special notice on the lessor.[114]

The rent of residential leases can therefore be increased during the term of the lease if the parties agreed on such an increase. If the parties did not agree on an increase the landlord can demand an increase, based on the mentioned circumstances. The lessee can agree or refuse such an increase, whereafter the landlord can sue grant of approval. Rent increases are therefore controlled to the extent that it must be proportionate to rents in the vicinity and therefore reflect market rent.

The Civil Code provides protection for lessees and their families against termination of the lease in a number of cases, including where the lessor sells the property to a third party during the term of the lease; where the property is sold in execution or in case of liquidation or insolvency; upon the death of the lessee; when

[108] The rent database is used to determine the reference rent in the locality. It comprises a collection of rents and is updated continuously: *BGB* 558e.
[109] *BGB* § 558a.
[110] *BGB* § 558b.
[111] *BGB* § 559(1). The lessor is also allowed to increase the rent where he has to undertake certain construction works as a result of circumstances for which he is not responsible. The increased rent must be equal to eleven percent of the total costs spent on the property: *BGB* § 559(1).
[112] In terms of *BGB* § 558.
[113] Carried out in terms of *BGB* § 559.
[114] *BGB* § 561(1). Where the lessor aims to increase the rent in terms of *BGB* §§ 558 or 559, he is obliged to declare his intention to the lessee. The lessee may terminate the lease until the end of the second month after receipt of the lessor's intention.

the lessor cancels a lease for a indefinite period; and upon expiration of a lease for a definite period.[115]

If the lessor alienates the leased property during the period of the lease, the new owner replaces the original lessor and takes over all the rights and obligations under the lease for as long as he remains the owner.[116] Similar to most civil-law systems, German law therefore protects the lessee in the case where the property changes hands during the term of the lease. The lease automatically continues, provided that the lessee continues to pay the rent and to comply with the other terms of the lease.[117] Where the leased property is sold in execution or in case of insolvency or liquidation, similar provisions in legislation protect lessees.[118] However, where the property is sold in execution the purchaser may acquire a limited right to cancel the lease.[119]

The death of the lessee[120] does not necessarily end the lease either. If the lessee dies during the term of the lease, the lessee's spouse who maintained a joint household with the lessee succeeds to the lease.[121] If the spouse does not succeed to the lease, the children of the lessee who lived in the joint household would succeed to the lease. If neither the spouse nor the children succeed to the lease, other family members who maintained a joint household with the lessee succeed to

[115] Van der Walt AJ *Property in the Margins* (2009) 86.
[116] *BGB* § 566(1). See also *BGB* § 566(2) for the position where the new owner does not perform his duties. The Dutch position is regulated in article 7:226 of the *BW*. According to this article the lease continues in the event of sale. The new owner obtains all the rights and obligations of the initial landlord. Abas P *Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Bijzondere Overeenkomsten* (2007) s v "Huur" at §§ 67 mentions that this article is a codification of the common law rule "*koop breekt geen huur*". See also Oldenhuis FT, Rossel HJ, Kloosterman AM, Hellegers DPCM & Van Stempvoort JP *Hoofdlijnen in het Huurrecht* (5th ed 2005) 100-103. This rule is still applied in South Africa through the application of the *huur gaat voor koop* rule (see section 2.2.2 in Chapter 2 for a discussion of the rule).
[117] Van der Walt AJ *Property in the Margins* (2009) 87.
[118] § 57 of the Sale in Execution Act and §§ 108 and 111of the Insolvency Act 2004. Van der Walt AJ *Property in the Margins* (2009) mentions that these provisions are similar to *BGB* § 566 that applies to sale of the property.
[119] The right to cancel the lease is granted by § 57a of the Sale in Execution Act, although this right is limited by *BGB* §§ 573 and 574.
[120] The Dutch position is similar to the German position and is regulated in *BW* 7:229, 7:266, 7:268. Article 7:229 states that the death of the tenant would not terminate the lease, while article 7:266 regulates joint tenancies and provides that the lease would continue with the joint tenant despite the fact that the lease ended between the landlord and the head-tenant. Where one of the joint tenants dies article 7:268 states that the lease would continue with the remaining tenant as sole tenant. See Abas P *Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Bijzondere Overeenkomsten* (2007) s v "Huur" at §§ 77, 117 and 151 for commentaries on these provisions. See also Oldenhuis FT, Rossel HJ, Kloosterman AM, Hellegers DPCM & Van Stempvoort JP *Hoofdlijnen in het Huurrecht* (5th ed 2005) 173-176 for discussion on article 7:268.
[121] *BGB* § 563(1). The same applies to a civil partner.

the lease.[122] The successor is not obliged to accept the lease and can end the lease by notifying the lessor within one month of obtaining knowledge of the lessee's death. In such a case the succession is deemed not to have occurred.[123] The lessor may only refuse to accept the succession and end the lease for cause, within the statutory notice period, if there is a compelling reason related to the person of the successor.[124] In the case of joint lessees, the lease continues upon death of one of the lessees, as the surviving lessees become the new lessees.[125] The surviving lessees may terminate the lease for cause within the statutory notice period of one month after obtaining knowledge of the death of one of the lessees.[126]

The above-mentioned persons who succeed to the lease, together with the lessee's heir, are liable as joint and several debtors for the lessee's obligations.[127] However, if the lessee made rent payments in advance then the persons who succeed to the lease in terms of *BGB* §§ 563-563a are obliged to surrender any savings they gained as a result of such payments to the lessee's heir.[128] If the deceased lessee did not provide any security, the lessor may demand under *BGB* § 551 that the lessee's successors give security.[129] If the lease does not succeed to any of the above-mentioned persons, the lease continues with the lessee's heir. The lessor or the heir may terminate the lease for cause within the statutory notice period of one month after obtaining knowledge of the death of the lessee and of the fact that there has been no succession.[130]

The Civil Code therefore makes provision for the continuation of the lease in the event of sale of the premises, insolvency of the landlord and death of the lessee. As a result of the mentioned provisions the lease is protected to such an extent that it continues for the agreed period despite the occurrence of these events that could possibly end the tenancy. The provisions in the Civil Code ensure that the lease continues for the remainder of the lease period, even if it requires substituting the

[122] *BGB* § 563(2). Persons who maintained a joint household with the lessee could also succeed to the lease even though they were not family members of the lessee.
[123] *BGB* § 563(3). Where there is more than one successor, each one can separately declare his intention not to continue with the lease.
[124] *BGB* § 563(4). The lessor may terminate the lease within one month after attaining knowledge of the succession.
[125] *BGB* § 563a(1).
[126] *BGB* § 563a(2).
[127] *BGB* § 563b(1).
[128] *BGB* § 563b(2). See also Van der Walt AJ *Property in the Margins* (2009) 87.
[129] *BGB* § 563b(3).
[130] *BGB* § 564.

original lessee with his successor or heir.[131] However, these provisions merely ensure that the agreed lease period is given effect to and does not provide tenants (or successors in title) with continued occupation rights upon termination of the lease.[132]

With regard to termination of residential leases the Civil Code distinguishes between leases for indefinite periods of time (periodic leases) and leases for definite periods of time (fixed-term leases). In addition to the list of compelling reasons, as listed in § 543 of the *BGB*,[133] the lessee of residential property, irrespective of whether the property is leased for a definite or for an indefinite period, would generally be able to terminate the lease where the property is in such a condition that it endangers her health. Either the lessor or the lessee would also be able to argue that there is a compelling reason to terminate the lease where the other party continuously disturbs the domestic peace.[134]

The Civil Code protects lessees who rent residential property for an indefinite period by providing that the lease may only be cancelled in accordance with the Civil Code or subordinate legislation. The cancellation must also comply with the requirements in the legislation.[135] A lease for an indefinite period of time may only be terminated by the lessor by giving notice[136] if the lessor has a justified interest in terminating the lease.[137] Such a justified interest exists where the lessee has culpably and significantly breached his contractual duties; where the lessor requires the leased premises for his own use, or the use of his family (or household)

[131] The South African common law provides similar protection for tenants to the extent that the lease is given effect to. See section 2.2. in Chapter 2 in this regard.
[132] In South Africa the common law provides similar protection for tenants, as the common law reinforces the agreed lease and ensures that the term of the lease is given effect to. See Chapter 2 for a discussion of the South African common law regarding tenure security in urban landlord-tenant law.
[133] See text accompanying fn 95 for the list of compelling reasons.
[134] *BGB* § 569. This provision applies to leases for definite periods (fixed-term tenancies) and indefinite periods (periodic tenancies). These grounds form part of what Van der Walt refers to as "abnormal cases" for cancellation: Van der Walt AJ *Property in the Margins* (2009) 88.
[135] Van der Walt AJ *Property in the Margins* (2009) 87.
[136] The notice of termination must be served on the third working day of the month in order to terminate the lease at the end of the second month, although the notice period for the lessor is extended by three months: *BGB* § 573c(1).
[137] *BGB* § 573(1). Increasing the rent is not a justified reason to terminate the lease. If the lessor inhabits a building with less than three dwellings and wishes to terminate the lease of a dwelling in that building, a justified interest in terminating the lease is not required: *BGB* § 573a(1). See *BW* 7:271 for the similar Dutch position and the discussion in fn 94 above. Van der Walt AJ *Property in the Margins* (2009) 88 refers to these grounds for cancellation as the "normal cases", because the lease is cancelled in accordance with the agreed prescribed procedures and requirements. The Dutch position is regulated in *BW* 7:274, see fn 96 above for the listed grounds for cancellation.

members; or where the lessor would be denied from making sufficient economic use of the premises if the lease was sustained, which would result in an excessive loss for the lessor.[138] If the lessor terminates the lease for cause, a statutory notice period is prescribed.[139]

If the lessor serves a notice of termination on the lessee, the lessee may object to the notice and require continuation of the lease if termination of the lease would cause a hardship to the lessee, a member of his family or a member of the household that is not justifiable, even when taking into account the justified interest[140] of the lessor.[141] Hardship suffered by the lessee includes where the lessee is unable to find suitable alternative accommodation on reasonable terms.[142] If the lessee's objection is successful the lease continues for an appropriate period, taking into account all relevant circumstances. The terms of the original contract would remain intact, except where the lessor cannot be reasonably expected to continue with the lease under the previous terms. In such a case the lessee may still demand continuation of the lease, although the terms may have to be amended.[143] If the parties are unable to reach agreement with regard to the continuation of the lease, the duration or the terms of the continued lease are determined by judicial decision.[144] Once it has been decided, either by the parties or judicially, that the lease should continue for a definite period of time, then the lessee may only demand an additional continuation if it is justified by a substantial change in circumstances.[145]

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[138] *BGB* § 573(2). The lessor is required to state the reasons for a justified interest in the notice of termination: *BGB* § 573(3). The list is not exclusive.

[139] *BGB* § 573d. §§ 573-573a applies with certain modifications. The notice of termination must be served on the third day of the month in order to terminate the lease by the end of the next month, except for residential space listed in *BGB* § 549(2). In such a case the lessor would be able to serve notice on the fifteenth day of the month in order to terminate the lease at the end of that month (also referred to as the statutory period): *BGB* § 573d. See text accompanying fn 101 for the list of residential properties under *BGB* § 549.

[140] The reasons stated in the notice of termination are the only reasons taken into account when considering the lessor's justified interest: *BGB* § 574(3).

[141] *BGB* § 574(1). The lessee must declare his objection in writing and provide reasons for his objection if the lessor requires such reasons: *BGB* § 574b(1). The lessor may refuse continuation of the lease if the lessee fails to declare his objection less than two months before termination of the lease. However, if the lessor failed to refer the lessee to the possibility of objection before the end of the period for filing an objection, the lessee may raise his objection during the eviction proceedings: *BGB* § 574b(2). Van der Walt AJ *Property in the Margins* (2009) 89 mentions that through this provision the interests of the tenant are balanced against those of the lessor.

[142] *BGB* § 574(2).

[143] *BGB* § 574a(1).

[144] *BGB* § 574a(2). If it is uncertain when the circumstances that constitute a hardship for the lessee would cease to exist, the lease would usually continue for an indefinite period.

[145] *BGB* § 574c(1).

In the case where the court granted continuation of the lease for an indefinite period and the lessor subsequently terminates the lease, the lessee may object to the termination and demand continuation for an indefinite period.[146]

The Civil Code therefore provides protection for lessees of residential property who lease premises for an indefinite period by requiring that the landlord serve a notice of termination stating the landlord's justified interest in cancelling the lease. The landlord must have a legitimate justified interest in termination in order to cancel the lease, which the lessee can resist by arguing that the landlord's justified interest in cancelling the lease is disproportionate to the hardship the lessee would suffer as a result of cancellation.

When considering fixed-term tenancies the point of departure is that the lessor must state a valid reason for entering such a tenancy and the reason must be in accordance with the Civil Code. The lessor must prove that he would wish to end a lease after a fixed period with the aim to either acquire the dwelling for his own use, a member of his family or a member of his household; or to repair the dwelling and continuation of the lease would substantially obstruct this aim; or that he wants to lease the dwelling to a person rendering services to him. Only if the landlord can prove one of these grounds may a fixed-term lease be entered into; the lessor must notify the lessee in writing of the reason for the fixed term.[147] Four months prior to termination of the fixed-term lease, the lessee may demand that the lessor should notify him whether the initial grounds for a fixed-term lease still exist. The lessee is not allowed to demand such a notification before this period. Once the lessor receives the demand, he has to respond and give reasons within one month. If the notification is late, the lessee may demand continuation of the lease for the period of the delay.[148] If the initial reason for the fixed-term lease still exists, the lessee may demand an extension of the lease for an equal period of time. However, if the initial justification for a fixed-term lease no longer exists, the lessee may demand an

[146] *BGB* § 574c(2).
[147] *BGB* § 575(1). The lessor must notify the lessee of the reason when the agreement is entered into. If the lessor does not meet these requirements, the lease is deemed to be entered into for an indefinite period: *BGB* § 575(1).
[148] *BGB* § 575(2).

extension for an indefinite period.[149] A lease for a fixed-term period may be terminated for cause within the statutory notice period.[150]

The Civil Code therefore also protects lessees who rent residential property for a definite period by firstly requiring that the landlord provide a reason for entering into a fixed-term tenancy. At a later stage the landlord's reason for entering into a fixed-term tenancy is re-evaluated. The lease would therefore not necessarily terminate upon expiration of the fixed term. The lease can be extended according to the statutory requirements.[151]

One can conclude that the Civil Code ensures substantive tenure rights for residential tenants in the private rental market by placing restrictions on the usual right of landowners to terminate leases. The right of the private landowner to cancel the lease is restricted to such an extent that the landlord must generally prove that he has a justifiable interest in cancelling the lease, whereafter the tenant can object to cancellation, based on the hardship that he would suffer as a result of cancellation. Apart from this general rule, the landowner can also cancel the lease in cases where the tenant breached the contract or acted in an inappropriate manner that constituted a compelling reason for cancellation. The point of departure is that the parties are assumed to enter into a lease for an indefinite period of time, because the landlord must give good reasons for entering into a lease for a definite period. The Civil Code makes provision for rent increases during the lease, which also supports this incentive of the Civil Code to initiate perpetual leases. Rent control is being phased out, especially when considering the codification of landlord-tenant law, although restrictions on rent increases and security of tenure are still imposed through the Civil Code. A lease is therefore not merely a contractual relationship between landlord and tenant; neither does it simply provide the tenant with a possessory right. Landlord-tenant law in Germany has developed as part of social law.

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[149] *BGB* § 575(3). The lessor must prove the duration of the delay and that the reason for a fixed-term lease does exist.

[150] *BGB* § 575a(1). *BGB* §§ 573-573a and §§ 574-574c apply in such an instance with the necessary modifications, although one of the parties may demand continuation of the lease until the original date of termination. Notice of termination for cause must be served on the third day of the month in order to terminate the lease at the end of the second month. Where the leased property is listed under *BGB* § 549(2) the notice of termination must be served on the fifteenth day of the month in order to terminate the lease by the end of that month: *BGB* § 575a(3). This is also referred to as the statutory period.

[151] Van der Walt AJ *Property in the Margins* (2009) 88.

7.3.3 Conclusion

Landlord-tenant law in Germany is currently regulated in the Civil Code, which affords tenure protection and restricts rent increases. The entire common law has been codified in the Civil Code. German landlord-tenant law is therefore different from England, Wales and the United States of America, as the common law is codified. It is different in the sense that regulation is not accomplished by way of *ad hoc* statutory intervention in the relationship between landlord and tenant. The provisions in the Civil Code that regulate the relationship and ensure substantive tenure protection for tenants is not perceived as temporary restrictions on the private law rights of landowners or exceptional to the "common law", but rather as permanent determinations that are incidental to the private landlord-tenant relationship as tenure security is central to the tenant's interests.

The landlord-tenant market in Germany is also different from England, Wales and the United States of America (or more specifically New York State),[152] because it is not divided into different sectors. As mentioned at 7.2.3 above, the social rental market is basically phased out and the government does not provide state housing as a form of social housing for low-income households. Rental housing in Germany is made available by private landlords and the entire private rental market is subject to the residential housing provisions in the Civil Code. The tenant protection measures and the rent restrictions therefore apply to all households, irrespective of their income or specific needs. However, the fundamental nature of tenancies in Germany is that it is perpetual and that it provides homes to tenants. The most common tenancy is one for an indefinite period, because landlords must prove grounds for entering into a fixed-term tenancy. If the landlord wishes to end a lease for an indefinite period and states his justified interest in cancellation, the lessee can object to cancellation, based on the hardship that he might suffer as a result of termination. Section 574(1) of the *BGB* therefore makes provision for tenant protection based on the personal circumstances of the tenant. This provision

[152] See section 4.4 in Chapter 4 for a discussion of the different rental housing sectors in England. See sections 6.4 and 6.5 in Chapter 6 for a discussion of private and public rental housing in New York City.

incorporates some measure of context-sensitivity as the courts can consider the impact of eviction on the specific tenant or his family and judge on grounds of personal circumstances whether the eviction order would be justified.

The interests of tenants in the continued occupation of the leased property, as protected in the Civil Code, have been enforced by the Federal Constitutional Court by balancing them against landowners' constitutional property rights, as stated in article 14 of the Basic Law. In a number of cases the Federal Constitutional Court has found that the limitations placed upon the property interests of the landlord are constitutionally justifiable, provided that the interests of the landlord are duly recognised. Through this process the Federal Constitutional Court has developed a jurisprudence that clarifies how the interests of both landlord and tenant should be balanced "to give effect to the constitutional protection of property within a social obligations framework."[153]

7.4 Constitutional law

7.4.1 Introduction

The *Grundgesetz* (GG) for the Federal Republic of Germany 1949 is generally known as the *Basic Law* and it serves as a constitution. The bill of rights (*Grundrechtskatalog*) forms the first part of the Basic Law and the property clause in article 14 is included in the bill of rights.[154] Article 14.1 states that "[p]roperty and the right of inheritance shall be [are] guaranteed. Their substance [content] and limits shall be [are] determined by law."[155] Article 14.2 states that "[p]roperty entails obligations [imposes duties]. Its use should serve the public interest."[156] Considered as a whole, article 14 is characterised by the liberal view of private property, which

[153] Van der Walt AJ *Property in the Margins* (2009) 90.
[154] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 122.
[155] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 121. See also Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed 1997) 250 where the author mentions that American law does not impose obligations on private property owners.
[156] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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: Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 121.

entails that the right to property is justified by natural law and by the social function of private property, which means that the scope and limitations of property rights are determined by the social context.[157]

Article 14.1 includes a property guarantee that is positively formulated,[158] although this guarantee is not absolute and has to be read with the qualifications in the rest of the clause. In terms of the case law the right to property, as defined in article 14, is a fundamental human right. The purpose of this right is to secure an "area of personal liberty" for the holder of the right within the "patrimonial sphere".[159] This should enable the holder to take responsibility for the development of his life within the social (and legal) context.[160] However, this fundamental property guarantee must be perceived within the constitutional sphere as a public right and not as a private right. Property as defined in article 14 is therefore a constitutional right, and must be distinguished from private-law property rights that are controlled by the German Civil Code (*BGB*).[161] Even though the same term is used to define property in the German Civil Code and article 14 of the Basic Law, namely *Eigentum*, the Federal Constitutional Court has found[162] that the scope and meaning of this term is not identical in the two areas of law. The Civil Code restricts property to tangible, corporeal things, while article 14 does not define property. The meaning and the scope of property in article 14 have to be determined from the constitutional property clause, while taking into account the purpose of the property guarantee in

[157] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 122. See also Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 123 where the author states that article 14(1) has to be read with article 14(2).
[158] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 128 states that the property guarantee comprises of two guarantees, a substantive guarantee and a institutional guarantee. This distinction relates to the positive property guarantee and the qualifications in the rest of article 14.
[159] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 124. See also Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 112-113; Sontheimer K "Principles of Human Dignity in the Federal Republic" in Kirchhof P & Kommers DP (eds) *Germany and its Basic Law: Past, Present and Future – A German-American Symposium* (1993) 213-220 at 215-216.
[160] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 124. See also Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed 1997) 251.
[161] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 126; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124-125.
[162] See *BVerfGE 51, 193* (*Warenzeichen*) [1979] 218.

light of the whole constitution, and not with reference to the Civil Code. The constitutional property concept is much wider than the civil-law concept.[163]

Apart from the unambiguous and positive property guarantee in article 14.1.1, the rest of article 14, and especially article 14.1.2 that states that the content and limits of property must be determined by law, qualifies this right and makes provision for its restriction through statutory regulation. When read as a whole, section 14.1 could be perceived as a mandate for the legislature[164] to develop a property system that represents a fair balance between the social interest and the interests of the property holder.[165] The purpose for limiting constitutional property rights is expanded and defined in article 14.2, as it states that property entails obligations and its use must serve the public interest. Article 14.2, read with article 14.1.2, confirms that constitutional property is limited, and more specifically subject to social limitations.[166]

The legislature is required to ascertain and maintain a fair balance between the public interest and the interests of the property holder. When a regulatory measure is disproportionate to such an extent that it disturbs this balance, the regulation should be declared invalid. This usually occurs when the regulation disregards either the public interest or the property holder's interests.[167] However, the nature of the property right in relation to the personal sphere of the holder of the right determines the extent to which the legislature can interfere with the right. Where the property right is directly concerned with providing security for the personal liberty of the property holder, the legislature's ability to interfere with that right is more rigorously restricted. Conversely, where the property right is less directly connected to the sphere within which the holder experiences personal liberty, the legislature can more easily regulate the restrictions on that right. The relationship between the nature of the right; the importance of the right in relation to the personal liberty of the holder; and the extent to which the legislature can interfere with the right, therefore

[163] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 127.
[164] This duty of the legislature is not unlimited, as article 14 also prohibits excessive regulation: Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 132.
[165] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 132. See also Sontheimer K "Principles of Human Dignity in the Federal Republic" in Kirchhof P & Kommers DP (eds) *Germany and its Basic Law: Past, Present and Future – A German-American Symposium* (1993) 213-220 at 219; Karpen U "The Constitution in the Face of Economic and Social Progress" in Starck C (ed) *New Challenges to the German Basic Law: The German Contributions to the Third World Congress of the International Association of Constitutional Law* (1991) 87- 110 at 98-99.
[166] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 133.
[167] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135.

operates on a continuum to determine whether the interference was fair and proportionate.[168] Certain properties are strictly regulated, because the social interest in regulating the property is greater than the interests of the individual owner in not regulating the property. Land, and more specifically housing, is subject to stricter social regulation, because it is a limited resource as well as socially important. The Federal Constitutional Court has confirmed in a number of decisions that the strict regulation of tenant protection and rent levels is constitutionally valid.[169]

7.4.2 Case law

In the 1974 *Wohnraumkündigungsschutzgesetz* case[170] the Federal Constitutional Court had to consider a federal law[171] that was introduced for a limited period of time, with the aim to provide tenant protection during a housing shortage. According to the law the landlord was prohibited from raising the rent and cancelling the lease, but the landlord could raise the rent to that of similar properties in the vicinity if the tenant gave permission. If the tenant refused to give permission, the landlord could seek permission in a responsible court. The landlord was required to submit a written request to the tenant, including information about rents in the vicinity.[172] The two cases concerned the strict interpretation of this requirement. The court *a quo* found in favour of the tenants due to the fact that the requested information was insufficient to allow rent increases.[173] The landowners claimed that their property rights have been violated through this process, that the act was unconstitutional and that it granted unlimited protection for tenants.[174]

The Federal Constitutional Court had to review the decision of the court *a quo* in light of certain considerations. The Court considered the application of article 14.1.2 of the Basic Law to the extent that the federal law restricted the landlord's right to raise the rent and cancel the lease, while determining the content and limits

[168] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135.
[169] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 136.
[170] *BVerfGE* 37, 132 [1974]. See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582.
[171] Eviction Protection Law (*Wohnraumkündigungsschutzgesetz*) 1971.
[172] *BVerfGE* 37, 132 [1974] at 133.
[173] *BVerfGE* 37, 132 [1974] at 135-136. The detail of the court *a quo* decision is discussed at 137.
[174] *BVerfGE* 37, 132 [1974] at 138.

of the claimants' property rights.[175] Subsequently, the Court considered the limits of the legislature's power to establish the scope of property rights and found that the legislature's ability to determine the content of property rights is limited by its obligation to uphold the property guarantee, as stated in article 14.1.1 and its duty to create regulatory laws that abide by all other constitutional principles.[176] In order to determine the content of property rights, the legislature is obliged to balance the constitutional recognition of private property as guaranteed in article 14.1.1 with its social duty in terms of article 14.2.[177] Apart from the legislature's duty to consider the interests of both parties equally, the Court also acknowledged that the interests of the parties must be scrutinized within the context of laws that aim to protect tenants at that specific period in time.[178]

Generally, a restriction on a landowner's right to raise the rent or cancel the lease is not invalid and in conflict with the above-mentioned considerations that the Court took into account. When considering the importance of the tenant's home and the housing shortage, the restrictions that were placed on the landowner seemed to be justified, provided that it did not amount to an unbalanced burden on the landowner.[179] In light of the aforesaid considerations the Court found that the provisions of the law of 1971 protected the tenant's interest in the family home, while providing the landlord with an opportunity to raise the rent when necessary; and it therefore established a fair balance between the interests of the parties.[180] Nonetheless, the Court found that the court *a quo*'s interpretation of the information requirement, which required that the landlord had to obtain detailed information which was not necessarily available, conflicted with the interests of the landlord, because it was interpreted too strictly and imposed an unwarranted burden on the landlord.[181] The law of 1971 was found to be valid, although the strict interpretation

[175] *BVerfGE* 37, 132 [1974] at 140.
[176] *BVerfGE* 37, 132 [1974] at 140.
[177] *BVerfGE* 37, 132 [1974] at 140.
[178] *BVerfGE* 37, 132 [1974] at 141.
[179] *BVerfGE* 37, 132 [1974] at 141. The Court also discusses the importance of housing for individuals and families. This point was confirmed in *BVerfGE* 68, 361 *(Wohnungskündigungsgesetz)* [1985]; *BVerfGE* 38, 348 *(Zweckentfremdung von Wohnraum)* [1975]; *BVerfGE* 91, 294 *(Fortgeltung der Mietepreisbindung)* [1994]. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 137-138 for a discussion of the above-mentioned considerations.
[180] *BVerfGE* 37, 132 [1974] at 141.
[181] *BVerfGE* 37, 132 [1974] at 145.

of the lower courts was in conflict with the constitutional property guarantee and consequently invalid.[182]

In the 1975 *Zweckentfremdung von Wohnraum* case[183] the Federal Constitutional Court had to consider whether a 1971 Act that strengthened tenants' rights in order to address housing shortages in the residential housing market was unconstitutional. In terms of the Act, the local authority promulgated certain bylaws with the effect that any change in the landowner's property first had to be approved by the local authority. The question was whether this bylaw was in conflict with article 14 of the Basic Law.[184] In both cases the owners changed the use of the property to such an extent that it could no longer provide housing. This was done without prior consent from the local authority.[185] The Court found that the legislation was not in conflict with article 14, because article 14 mandates the legislature to determine the content and boundaries of property through enacting laws that give effect to the general social framework of the constitution. The legislature has to acknowledge and protect private property, while protecting the public interest. The state intervened in the rental housing market in order to make available private rental housing, especially in urban areas. This intervention was in the public interest, because a large percentage of the population was unable to acquire residential housing on the free market.[186]

The Court found that the legislature was allowed to restrict the rights of landowners to unilaterally change the use of their property, because it was in the public interest, due to the urban housing shortage. However, throughout this process the landowner's rights should still be protected and therefore balanced with the strengthened tenure rights of the tenant. The Court found that in these circumstances the only protected interest guaranteed to the owner was the right to receive rent payments.[187]

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[182] *BVerfGE* 37, 132 [1974] at 145. At 146 the Court found that the interpretation of the court *a quo* resulted in placing a too heavy burden on the shoulders of the lessor. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 138. At 138 Van der Walt mentions that this case provides a good example of the way in which the Federal Constitutional Court applies the property clause in relation to a social property interest, in this case the family home.

[183] *BVerfGE* 38, 348 [1975]. See also See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582.

[184] *BVerfGE* 38, 348 [1975] at 348-349.

[185] *BVerfGE* 38, 348 [1975] at 350.

[186] *BVerfGE* 38, 348 [1975] at 370.

[187] *BVerfGE* 38, 348 [1975] at 371.

In the *Wohnungskündigungsgesetz* case[188] the question was whether the legislature was allowed in terms of article 14 to restrict the right of the landowner to cancel the lease to such an extent that the landowner had to become dependent on the property for her own use in order to cancel the lease, because this was the only justifiable interest that the landowner could rely on to cancel the lease. The landlord was the owner of an apartment with seven rooms that was leased to a family. The landlord wanted to cancel the lease and claim the property for her own use and the use of her son, but the tenants refused based on the fact that one of the members of the household was old and disabled. The court *a quo* turned down the application to cancel the lease, whereafter the case went on appeal. The appeals court also dismissed the application based on the fact that the apartment with seven rooms was too big for the landlord and her son. The court found that the landowner's interest in cancelling the lease was an excessive need in relation to that of the tenants and the landowner could therefore not require the tenants to give up the lease.[189] The landowner appealed to the Federal Constitutional Court, but was once again turned down. This case was heard together with another case in which an 89 year old landowner, who was the owner of a number of apartments, wanted to cancel the lease of an apartment on the ground floor, because she wanted to take occupation of the apartment herself. She argued that she wanted to occupy the ground floor apartment because she had difficulty in climbing the stairs to her current apartment and the ground floor apartment was big enough to accommodate her nurse as well.[190] The second case succeeded, even though the two cases were decided on the same grounds.[191]

The Federal Constitutional Court decided the two cases on the basis of § 564 of the Civil Code,[192] which provides that the lessor must have a justifiable interest in cancelling the lease. The Court considered the social responsibility of the legislator in protecting the private property rights of landowners, while protecting the public interest. This forms part of the overall responsibility of the legislator to create a social

[188] *BVerfGE* 68, 361 [1985]. See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582, 620.
[189] *BVerfGE* 68, 361 [1985] at 364-365.
[190] *BVerfGE* 68, 361 [1985] at 365-366.
[191] *BVerfGE* 68, 361 [1985] at 374.
[192] See § 573 of the amended Civil Code for the current position.

framework in light of the constitution.[193] The Court also drew attention to the nature of the property and its relation to the power of the legislature. The Court found that where the property is of such a nature that it serves an important social function, the legislature's ability to restrict the owner's property rights is strengthened. Where the property serves the public interest and other parties share an interest in the use of the property, the legislature's incentive to restrict the rights of the owner is increased. The rights of the property owner could therefore be strictly regulated, but the substance of the property may not be ruined. The duty of the legislature is therefore to identify the different interests, attach an appropriate weight to each of the interests and fairly balance them.[194] The Court considered the tenants' interest in the home as a justifiable interest that could be balanced with property interests of the owner. The purpose of the Civil Code was to protect tenants from unreasonable cancellations, as tenants still had to function within an independent rental housing market.[195]

The Court held that the aim of the Civil Code to protect tenure rights of residential tenants was constitutionally valid, as was the requirement that the landowner could cancel the lease if she had a personal interest in the cancellation. Restricting the landowner's right to cancel the lease was constitutionally legitimate, because residential property was socially important and relevant for tenants as well as for landlords.[196] The Court also found that the prohibition against arbitrary cancellation is constitutionally valid, provided that the interests of the landowner that are worthy of protection should be considered by the legislature in order to fairly balance the interests of both parties.[197]

The 1989 *Eigenbedarfskündigung* decision[198] concerned a number of cases in which landowners sought cancellation of residential leases and their applications were denied. Provisions pertaining to rent control and tenant protection were included in the German Civil Code and it provided that a residential lease could be cancelled if the landlord required the property for his own use. The Federal Court of Justice in Civil Matters handed down a number of decisions and generally followed a

[193] *BVerfGE* 68, 361 [1985] at 367.
[194] *BVerfGE* 68, 361 [1985] at 368.
[195] *BVerfGE* 68, 361 [1985] at 369.
[196] *BVerfGE* 68, 361 [1985] at 370.
[197] *BVerfGE* 68, 361 [1985] at 371.
[198] *BVerfGE* 79, 292 [1989]. See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582, 588, 614, 620.

strict approach when adjudicating the tenant protection measures. It found that the landlord could only end the lease and require the premises for his own use, if there were reasonable grounds for reclaiming the property.[199] The Federal Constitutional Court had to consider three claims on appeal.

The first complainant owned a building with three apartments, while she lived with her parents in what was described as difficult circumstances. Two of the owner's apartments were rented out, the apartment on the ground floor to a family and the apartment on the first floor to a single woman. The apartment on the second floor was unoccupied, but its roof was only 2.2 meters high. The complainant wanted to cancel the lease of the apartment on the first floor in order to occupy the property herself. The trial court refused to allow cancellation of the lease on the ground that the complainant could either remain in her current home or could occupy the vacant apartment on the second floor. Cancellation of the lease was found to be unreasonable.[200]

The second complainant was the owner of a building with twelve apartments, which were all subject to leases. The complainant's son lived with his mother, but the complainant wanted to cancel the lease of one of the apartments in order to establish a guest room for his son. The court denied the application on the grounds that the complainant had recently renovated and let a number of apartments that had become available in the building and that the son was already housed satisfactorily with his mother.[201]

The third complainant was the owner of a building with four apartments. The complainant and her family, including her three sons, lived in the ground floor apartment while using the basement for additional living space, although it was only 1.9 meters high and therefore unsuitable for living quarters. The complainant let the apartment on the first floor and one of the apartments on the second floor, while a small second apartment on the second floor was unoccupied. The complainant's three sons required more living space and she therefore wanted to cancel the lease of the apartment on the second floor in order to accommodate her sons. The court denied her application, based on the argument that the apartment on the ground

[199] *BVerfGE* 79, 292 [1989] at 293.
[200] *BVerfGE* 79, 292 [1989] at 294.
[201] *BVerfGE* 79, 292 [1989] at 296. See also 297 for more detail on the complainant's argument raised in the court *a quo*.

floor with the basement and the smaller vacant apartment on the second floor could adequately accommodate the complainant's three sons.[202]

The three complainants argued that the strict application of the tenant protection measures infringed upon their property rights. The Federal Constitutional Court found that the first two complainants should have been allowed to cancel the leases, while the third complainant's action should have been denied on the basis that the landlord's current need to cancel the lease existed at the time when she had let the property. It would therefore be unreasonable to cancel the lease in such circumstances.[203] The decision provides a number of important principles on rent control and tenant protection, especially in light of its effect on private property. As a result of the housing shortage, the regulation of rental housing had become socially important. Therefore, it had been accepted that rent control and measures protecting the tenure rights of tenants by restricting the right of landlords to cancel the lease, were constitutionally valid.[204] This was based on the principle that the legislature could regulate and determine the content of property rights to such an extent that the regulation must be proportionate to the social utility of the property.[205] However, housing remained an essential requirement for both parties and the Court noted that the landlord should be able to cancel the lease for her own needs. Cancellation of the lease is restricted in the case where the landlord is unable to give good reasons for the cancellation.[206] The regulation of private property is limited in terms of article 14.1.1 and both the courts and the legislature are obliged to respect this limitation. This requires the courts to respect the fundamental property guarantee, namely that the owner of private property must be able, through the protection of her property right, to responsibly develop and control her life according to her views.[207] In light of the housing context, a landowner is entitled to use her residential property for her own living requirements. The fact that the landowner let the property does not mean that she has lost this fundamental right. Any interpretation of regulatory laws that ignores the views of the landowner is in conflict with the property guarantee.[208]

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[202] *BVerfGE* 79, 292 [1989] at 298.
[203] *BVerfGE* 79, 292 [1989] at 302. See also 306-308 for an in depth discussion of the first two complainant's cases and 309-310 for more detailed reasons why the third claim did not succeed.
[204] *BVerfGE* 79, 292 [1989] at 302-303.
[205] *BVerfGE* 79, 292 [1989] at 303.
[206] *BVerfGE* 79, 292 [1989] at 304.
[207] *BVerfGE* 79, 292 [1989] at 304.
[208] *BVerfGE* 79, 292 [1989] at 304.

Based on the above-mentioned principles, the Court found that the courts are not allowed to institute unrestricted investigations into the landlord's reasons for cancelling the lease and reoccupying the property herself, as this would be unconstitutional.[209] The courts must accept the landlord's reasons for reoccupying the property, because she should be able to take control of her own life and this includes making her own decisions. The role of the courts is to verify the alleged need of the landlord and the courts have a limited discretion to decide whether the landlord's needs are unreasonably high.[210] In order to fairly balance the interests of both landlord and tenant, the tenant protection and rent control laws are placed within a more restricted framework, which is similar to restrictions that generally result from social considerations.

In the *Besitzrecht des Mieters* case[211] 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.[212] 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. In the Federal Constitutional Court, the tenant instituted a constitutional complaint and argued that the eviction order was unconstitutional, because it infringed his property right in terms of article 14 of the Basic Law.[213]

An important issue raised in the decision was whether the tenant had a separate property interest in the rental property and to what extent that interest was protected against the property interest of the landowner. More specifically, the Court

[209] *BVerfGE* 79, 292 [1989] at 305. See also Van der Walt AJ *Property in the Margins* (2009) 90 for a discussion on the constitutionality of tenant protection laws, the social obligation of the Basic Law and the guarantee of ownership.
[210] *BVerfGE* 79, 292 [1989] at 305. See also Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 at 33 in this regard.
[211] *BVerfGE* 89, 1 [1993]. See also Kommers DP *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd ed 1997) 255; Youngs R *English, French & German Comparative Law* (2nd ed 2007) 309-310; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 125-126; See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582, 591, 592, 621.
[212] *BVerfGE* 89, 1 [1993] at 1-2. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 138.
[213] *BVerfGE* 89, 1 [1993] at 3-4. Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 at 33.

had to determine whether the tenant had a property right in the lease which was protected under article 14.[214] The Court found that the tenant could not base his claim on article 14.2, because it does not provide the tenant with a substantive right, apart from the fact that it provides the legislature with a measure to determine the contents and limits of property. The Court confirmed that the property clause places an obligation on the legislature to promulgate laws that give effect to social obligations and promotes the public interest.[215] Consequently, the Court did not find that the tenant acquired a right under article 14.2 that could be infringed upon.[216]

Nevertheless, the Court found that the tenant had a constitutional property right that was protected under article 14.1.[217] The Court considered the fundamental feature of property in terms of the property guarantee, as property enables the holder of the right to secure a sphere of freedom where she can take control and responsibility for her own life.[218] The nature of the property in this case, being the family home, is important in light of this fundamental guarantee, as it can be defined as the core of human existence.[219] The tenant's rights in terms of the lease, and the regulatory framework that affords substantive tenure protection for tenants, are similar to the rights that others obtain from tangible property to such an extent that the tenant has private use and the right of disposal. The right of disposal is restricted to a certain extent, although most real rights are similarly restricted. Rent control laws provide tenants with substantive tenure protection and security.[220] The rights that tenants acquire under the legal framework can be enforced against all third parties, including the landowner. The tenant's rights could still be terminated upon expiration of the lease, although her rights are protected under article 14 as property rights, until cancellation of the lease.[221] The Court therefore found that "the tenant's right fulfils the same purpose that all property serves for its owners".[222] The second

[214] *BVerfGE* 89, 1 [1993] at 6-8.
[215] Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 at 34.
[216] *BVerfGE* 89, 1 [1993] at 5-6. See also Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 at 34.
[217] Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 139; Van der Walt AJ *Property in the Margins* (2009) 92-93.
[218] *BVerfGE* 89, 1 [1993] at 7-8.
[219] *BVerfGE* 89, 1 [1993] at 7.
[220] *BVerfGE* 89, 1 [1993] at 7.
[221] *BVerfGE* 89, 1 [1993] at 7. See also Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 139 for a discussion of the factors the Court considered.
[222] Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 at 35.

part of the Court's argument was that the tenant enjoyed the right of disposal, similar to that of the owner, and therefore qualified as an owner under article 14.[223] The tenant's interest in continued possession was classified as *private law* property, because the tenant enjoyed the right of disposal.[224]

Another important question in the case was how heavy the landlord's own needs should weigh in determining whether it would be justified to cancel the lease if the landlord wanted to occupy the premises. The Court found that the tenant and the landlord had a similar property right. In light of the constitutional property clause, the legislature is obliged to regulate the parties' positions and the relation between them in terms of the proportionality principle in order to establish a fair balance between their rights.[225] In this regard the tenant's property protection derives from statutory measures, which is vertically rather than horizontally applied by the courts.[226] Van der Walt states that the term *Eigentum* (property), which is used in the Civil Code and in article 14 of the Basic Law, has a wider meaning in constitutional law than in private law. In civil law the term refers to ownership of tangibles, while in constitutional law it refers to non-ownership interests and intangibles as well. In constitutional law *Eigentum* includes ownership and lesser rights. The tenant's interest in property could therefore be defined as property in the constitutional setting without necessarily being recognised as such in the civil law setting.[227]

The Court found that the decision of the court *a quo* was correct. In terms of the existing tenant protection measures, the mere will of the landlord to cancel the lease for his own use could only justify cancellation if the landlord's purpose was reasonable and feasible.[228] The Court confirmed the 1989 *Eigenbedarfskündigung* decision to the extent that the landlord's wishes must be respected by the courts;

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[223] *BVerfGE* 89, 1 [1993] at 8. Van der Walt AJ "Ownership and Eviction: Constitutional Rights in Private Law" (2005) 9 *Edinburgh LR* 32-64 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: 35-36.

[224] *BVerfGE* 89, 1 [1993] at 7. Van der Walt AJ *Property in the Margins* (2009) 93. See 93-94 for a discussion on the criticism raised against this argument. One should note that the criticism was not raised against the statutory protection of tenants, but rather against the Court's interpretation of the legislation in finding that the tenant had a private law ownership interest on the same level as the owner. Van der Walt mentions that a more acceptable argument would have been to construe the statutory protection of tenants as restrictions that are placed upon the landowner's ownership: Van der Walt AJ *Property in the Margins* (2009) 94-95.

[225] *BVerfGE* 89, 1 [1993] at 8. Van der Walt AJ *Property in the Margins* (2009) 93.

[226] *BVerfGE* 89, 1 [1993] at 8.

[227] Van der Walt AJ *Property in the Margins* (2009) 93.

[228] *BVerfGE* 89, 1 [1993] 9-10. Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 139.

although the landlord's bare declaration to use the property herself was insufficient to cancel the lease.[229] The courts have some scope to launch an inquiry into the landlord's alleged reasons for cancelling the lease in order to determine whether the intention to use the property is reasonable and feasible. If the landlord's intention to use the property is reasonable, the owner's interest can trump the interests of the tenant, even when considering the public interest in protecting vulnerable occupiers in a social context where the provision of housing is a national priority and the fact that the tenant will suffer a hardship if eviction prevails.[230]

In the 1993 *Eigenbedarfskündigung* case[231] the Federal Constitutional Court had to consider two cases. The first case concerned the question whether a landowner of seventeen rented apartments could cancel the lease of five apartments with the aim to occupy the property himself. The landowner argued that he wanted to live closer to his work, because he was getting older and travelling to work, from where he then lived, was burdensome. His property that was subject to rental housing was closer to his work and he therefore wanted to cancel the lease and take possession of the apartments. The application was turned down by the court *a quo*.[232] In the second case the landowner combined two adjacent properties and let the two premises as a single unit. The case concerned the question whether the landowner could at a later stage separate the single unit, while the lease continued, and take possession of the smaller section for personal use.[233]

The Federal Constitutional Court decided that both complaints were invalid and failed to justify a legitimate reason for cancellation. The Court based its decision on a balancing test by weighing up the parties' respective interests in light of the social framework.[234] With regard to the second case, the Court found that the landowner's right to cancel the lease where he required the premises for his own use does not include the right to divide the leased property and claim a section of the

[229] *BVerfGE* 89, 1 [1993] at 10.
[230] Van der Walt AJ *Property in the Margins* (2009) 91.
[231] *BVerfGE* 89, 237 [1993]. See also See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582, 620.
[232] *BVerfGE* 89, 237 [1993] at 237-238.
[233] *BVerfGE* 89, 237 [1993] at 239.
[234] *BVerfGE* 89, 237 [1993] at 241.

property for personal use. If the landowner had a valid reason for cancelling the lease, then he would have required the whole of the premises.[235]

In 1994 the Federal Constitutional Court[236] had to consider whether a treaty that allowed the continued validation of rent control in East Germany after unification in 1991 was in conflict with article 14 of the Basic Law. The Act that made provision for rent control applied to the whole of East Germany and was therefore not only applicable to certain regions. The Court found that neither the treaty nor the Act was in conflict with article 14, because the social circumstances that initially justified the imposition of rent control in East Germany still existed.[237]

7.4.3 Conclusion

It is clear that article 14 of the Basic Law was crafted to protect property rights and to enable the legislature to enact legislation that would give effect to the public interest. The contents and limits of property must be developed by the legislature, while the use of property must serve the public interest. The rights of landowners must always be taken into account, but it is subject to social limitations. The nature of residential property is noteworthy when considering the power of the legislature, because it serves a social function and could therefore be regulated more strictly. Tenure security in residential property is important, because it enables tenants to reach a level of personal autonomy. The security of the home is central for the individual (or household) to make decisions and participate in society. Throughout the case law the fundamental feature of property is highlighted as enabling the holder of property to secure a sphere of freedom in which he can develop his own life. Within this framework the legislature must balance the constitutional rights of landowners with the property interests of tenants. However, the strengthened protection of residential tenants' tenure rights, as part of the public interest, has developed since the beginning of the twentieth century and has become socially protected to such an

[235] *BVerfGE* 89, 237 [1993] at 242.
[236] *BVerfGE* 91, 294 (*Fortgeltung der Mietepreisbindung*) [1994]. See also See also Wendt R "Eigentum, Erbrecht und Enteignung" in Sachs M (ed) *Grundgesetz Kommentar* (4th ed 2007) 582-639 at 582, 591, 604, 605, 609, 620, 621.
[237] *BVerfGE* 91, 294 [1994] at 307.

extent that it has been recognised as constitutional property by the Federal Constitutional Court.

The property rights of landowners, specifically owners of residential property that is subject to leases, and the rights of residential tenants are therefore shaped and determined according to various factors, but especially in relation to each other. The social importance in strengthening the rights of tenants has a detrimental effect on the restricted rights of landowners, but it is constitutionally valid as a result of the phraseology of article 14 and the social purpose of rental housing. Article 14 must be read as a whole, which means that the property rights of landowners are inherently subject to social limitations. The legislature must balance the interests of the property holder with the public interest and thereby determine both the contents of constitutional property, which is analogous to the rights of private landowners, and the rights of tenants.[238] The rights of the parties are amended by the legislature in order to reflect the social context at that specific period in time,[239] but the restrictions on landowners' rights must be justified and may not amount to an unbalanced burden on the landowner. The legislature can therefore regulate and determine the contents of property rights, provided that the regulations and restrictions are proportionate to the social utility of the property.

7.5 Conclusion

Landlord-tenant law has developed in Germany from affording extreme tenant protection during the post-war period that resulted in housing shortages to providing moderate security of tenure combined with rent restrictions. Property, and more specifically private rental housing stock, serves the public interest as third parties have a share in that interest. The social purpose of property justifies increased statutory restrictions on the rights of private landowners. The legislature can therefore regulate and determine the contents of property rights, provided that it is proportionate to the social utility of the property. Apart from the extent of tenant protection and the development of state intervention in the rental housing market

[238] See also Youngs R *English, French & German Comparative Law* (2nd ed 2007) 311.
[239] The Constitutional Case of *BVerfGE* 91, 294 (*Fortgeltung der Mietepreisbindung*) [1994] clearly reflects this point, as rent control was found to be justified in light of the social context.

through legislation, one can confirm that landlord-tenant law in Germany currently forms part of the social law, what Van der Walt would refer to as the "social obligations framework."[240]

In the United States of America the question whether state intervention in the rental housing market is constitutionally justifiable has been raised in the Supreme Court of Appeal and various other courts. The justifiability of rent regulation has been challenged on the basis that it amounts to an unconstitutional taking of private property. The US courts have held that rent regulation does not amount to an unjustifiable restriction on private landowners' rights, provided that it is in response to a housing emergency or in the public interest.[241] In Germany the point of departure is that property serves the public interest and that the legislature must regulate and determine the contents of property rights. The justifiability of rent regulation in Germany is not a contested issue in the courts, as it has been accepted as part of German private law and codified in the Civil Code. Article 14 of the Basic Law is also phrased to allow, and oblige, the legislature to restrict private property in order to give effect to social obligations. In German law property must serve the public interest and rent regulations form part of the public interest. However, the question in German law is whether the application of tenant protection measures and the courts' interpretation of the provisions are not excessive in light of the constitutionally guaranteed rights of landowners. The extent of protection must therefore be just in terms of the German Basic Law and the socio-economic circumstances. It has also been accepted that stricter regulation is justified with regard to property that is further removed from the owner's personal sphere.[242] As a result, protection in favour of tenants that resembles interests closer to the personal sphere is more easily justified.

Presently, residential tenant protection measures are codified in the Civil Code and therefore form part of private law. From the case law discussion one can conclude that the legislature must balance the interests of landowners and tenants in order to determine the content and limits of constitutional property. The tension between the tenant protection measures in the Civil Code and the protection of private property in article 14 provides a unique definition for the property rights of

[240] Van der Walt AJ *Property in the Margins* (2009) 90.
[241] See section 6.6 in Chapter 6.
[242] See Van der Walt AJ *Constitutional Property Clauses* (1999) 136-137 for more detail in this regard.

landowners who subject their residential property to leases. The extent to which residential housing is regulated is also sensitive to the socio-economic circumstances, as the regulations are more strictly applied in the event of housing shortages. Rent regulations and the restrictions imposed on private landowners are therefore context-sensitive to the changing socio-economic circumstances, because the entire landlord-tenant system in flexible. The landlord-tenant framework is not diversified as the systems in the United States, England and Wales to provide different levels of tenure security to diverse occupiers with different needs, although the hardship provision[243] in the German Civil Code makes provision for tenants to acquire continued occupation rights based on personal circumstances.

The nature of the property justifies stringent regulation, because it serves a social function. The social function of residential property is highlighted in the case law when considering the fundamental feature of property, which is to enable individuals to take responsibility for their own lives and function within a secure sphere where they can obtain personal autonomy. This fundamental feature of property in German law is comparable to section 10 of the South African Constitution, which states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." It is important to highlight that in German law the core function of property is to enable individuals to participate in society. The question in the South African context, and in light of section 26(1) of the Constitution,[244] is to what extent the home (as property) should be protected in order to enable individuals to participate in society where they can foster human dignity.

When considering the historical development of German landlord-tenant law, the enforcement of tenant protection measures in the Civil Code and the line of case law from the Federal Constitutional Court, one can conclude that substantive tenure security for residential tenants has been entrenched on a permanent basis as part of the essence of property in light of its moral and social function. The result of rent regulation, and specifically increased tenant protection, is more stringent restrictions on the rights of private landowners. These restrictions are generally justified, although the legislature must develop a fair balance between the interests of landowners and tenants in order to prevent an unbalanced burden on the landlord. In

[243] *BGB* § 574(1).
[244] See section 3.4 in Chapter 3.

the cases where the courts found that the restriction was unjustified the landowner's personal autonomy was too seriously interfered with, considering the reciprocal benefit for the tenant and for society. The restrictions imposed on the rights of landowners must be proportionate to the social utility of the property. Housing is an important necessity for private landowners and tenants, as it enables both parties to develop and control their lives. The fundamental feature of property (the rented premises) that enables a person to secure an area of personal liberty within the patrimonial sphere where he can take decisions and participate in society therefore applies to both landlord and tenant. In order to determine whether rent regulations restrict the rights of landowners unjustifiably, the courts measure the impact of the restriction by considering the extent of the interference on the personal autonomy of the landowner, although the justification for rent regulation is to allow the tenant to achieve personal autonomy. The measure used to balance the rights of the parties is therefore the same. In American law the justification for rent regulation is different as the protection of vulnerable poor households is in the public interest and the restriction of landowners' rights is justifiable, provided that it is in the public interest.

8. Conclusion

8.1 Constitutional failure of landlord-tenant laws

8.1.1 The current tenure rights of urban tenants

8.1.1.1 Background

The First and Second World War influenced socio-economic circumstances, and specifically the housing market, in South Africa to the extent that the white minority experienced a housing shortage during and after the war period. The initial housing shortage did not directly affect the black[245] majority, because the apartheid laws excluded these households from participating in the 'normal' urban housing market. The occupation rights of black persons were regulated in terms of a different statutory regime, namely the racially discriminatory apartheid laws. A major feature of this regime was that these black occupiers of urban residential property were subjected to very insecure tenure. The legislature responded to the initial housing shortage experienced by the white minority group by enacting (and continually amending) the Rents Acts, which afforded white urban residential tenants better tenure security. The Rents Acts restricted private landlords' common law grounds for terminating the tenancy, in some cases forcing landlords to adhere to the lease even when the contract had already expired, while placing restrictions on rent increases.[246] The initial rent control measures therefore provided white tenants with substantive tenure security and placed restrictions on rent increases. The laws did not promote access to rental housing in the private market. The essence of substantive tenure security is generally to allow the tenant (or any occupier) to continue occupying the leased premises as a lawful occupier, while procedural protection is aimed at providing tenants with due process during eviction proceedings.[247] The racially discriminatory laws did not afford black occupiers any substantive tenure protection, because their rights were limited to insecure forms of tenure, generally consisting of personal rights.

[245] The term "black" is used generically throughout the dissertation and refers to all racial groups other than white persons.
[246] See section 2.3 in Chapter 2. It is important to note that the Rents Acts did not promote access to housing, but merely provided better tenure rights for tenants who already occupied rental housing.
[247] The difference between substantive and procedural protection is discussed in section 8.1.2 later in this chapter.

The Rents Acts did not apply to black tenants because the occupation rights of these households were strictly regulated under the racially discriminatory apartheid statutes. The majority of apartheid statutes made provision for public sector tenancies. The occupation rights of black tenants were weak and insecure, because it was part of government policy to control the occupation rights of these households in order to regulate urbanisation and to entrench racial segregation, especially in urban areas. A significant number of urban black households were tenants renting accommodation in the public sector, although regulated in terms of the apartheid laws that provided weak tenure.[248]

8.1.1.2 The common law

The government started to phase out the Rents Acts at the beginning of the 1980s and the private rental market was completely deregulated in 2003,[249] while the most important apartheid legislation was abolished during the 1980s.[250] When the Rents Acts were abolished, the common law position with regard to the termination of urban tenancies resurfaced. Currently the common law position applies to all urban tenants, irrespective of race.[251] In terms of the common law the landlord can evict the tenant upon termination of the lease, provided he obtained an eviction order. The lease therefore terminates according to the common law principles, which entails that the lease should terminate in terms of the contract. The common law is aimed at giving effect to the lease to the extent that it is agreed to between the original parties and does therefore not grant substantive tenure protection in the form of continued occupation rights for tenants.[252] The personal circumstances of the tenant and the effect that eviction will have on her and her family play no role in the granting of the eviction order, since the common law does not grant the courts any discretion in deciding whether to allow eviction once the landowner has proved the formal requirements for an eviction order. The occupation rights of tenants are limited to the agreed lease and the common law is aimed at giving effect to this agreement.

[248] See section 2.3, and specifically section 2.3.3.2, in Chapter 2.
[249] Mohamed SI *Tenant and Landlord in South Africa* (2003) 7. See also section 3.6 in Chapter 3.
[250] See section 2.4 in Chapter 2.
[251] See sections 2.4 and 2.5 in Chapter 2.
[252] See sections 2.2 and 2.5 in Chapter 2.

The common law affords substantive tenure security in just three cases, namely the *huur gaat voor koop* principle, upon death of either party or where the landlord becomes insolvent. In all these cases the common law ensures continuation of the lease in order to give effect to the contractual agreement, even if this requires substituting one of the parties. In terms of the *huur gaat voor koop* rule the lease continues upon sale of the premises, because the new owner replaces the original owner as the new landlord. Where the landlord dies during the term of the lease the common law provides tenure security for tenants (and tenants' families) as the lease vests in the estate of the deceased landlord. Insolvency of the landlord can generally not bring the lease to an end either, but where a prior real right, such as a mortgage, vested in the property the amount of the bid could affect the occupation rights of tenants.[253]

To the extent that the common law does not provide strong substantive protection to lessees, it is associated with weak tenure.[254] Strengthened substantive tenure security is associated with measures that would allow tenants to continue occupying rental property for consecutive periods. This form of tenure protection is generally enacted in landlord-tenant legislation and is aimed at affording tenants with strong occupation rights. Substantive tenure rights can also be granted by the courts during eviction proceedings in light of the tenant's socio-economic circumstances, although this form of protection is based on the court's interpretation of anti-eviction legislation that give effect to section 26(3) of the Constitution. The courts are unable to afford substantive tenure protection for tenants in terms of the common law. Procedural safeguards are different from substantive tenure protection, because procedural safeguards are aimed at providing due process for tenants during eviction proceedings in order to ensure fair and just evictions. Procedural safeguards mandate the courts to fulfil certain requirements as part of the eviction proceedings, while substantive tenure rights can prevent the courts from granting the eviction order.

The common law does not grant substantive tenure rights for tenants. The substantive tenure rights of urban tenants are based on the common law, which provides them with weak tenure security. In terms of the common law the landowner

[253] See section 2.5 in Chapter 2.
[254] See sections 3.6.2 and 3.8.6 in Chapter 3.

is entitled to unilaterally terminate a periodic tenancy at any period for any reason and the effect is that the tenant would have to vacate the leased premises within months. A fixed-term tenancy also terminates upon expiration of the lease, whereafter the landowner can claim eviction in court. The common law is therefore associated with weak tenure rights, which is problematic considering the transformative purpose of the 1996 Constitution, especially with regard to the new values introduced in land law. The most important land reform provisions that relate to the tenure rights of urban tenants are discussed later in this chapter in order to explain the insufficiency of the common law tenure rights of these tenants.

8.1.1.3 Landlord-tenant laws

The Rental Housing Act 50 of 1999 and the Social Housing Act 16 of 2008 regulate rental housing in urban areas, but they fail to afford secure occupation rights for all urban residential tenants, because they merely uphold the common law, which is associated with weak substantive tenure security.[255] The Rental Housing Act and the Social Housing Act are the only laws that regulate the relationship between landlord and tenant in the urban rental housing market prior to eviction proceedings. The laws entrench common law tenure rights for urban tenants, which is problematic in light of the land reform provisions of the Constitution. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) is also relevant in the landlord-tenant framework, as it ensures that all evictions take place in a fair and just manner. PIE is therefore aimed at ensuring due process during eviction proceedings, although recently the courts have refused to grant eviction orders, on the basis of PIE, if the order would render the household homeless, which is a form of substantive tenure protection.[256] The insufficiency of the current landlord-tenant laws, more specifically the Rental Housing Act and the Social Housing Act, is explained in the following sections.

[255] See sections 3.4.2 and 3.6.2 in Chapter 3.
[256] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA). See section 1.1.1 in Chapter 1 for a discussion of the case.

8.1.2 The Constitution: Substantive tenure protection and procedural safeguards

The current tenure rights of urban residential tenants are problematic in light of sections 25(6) (read with section 25(9)) and 26(3) of the Constitution.

Section 25(6) of the Constitution mandates tenure reform as it states that any person whose tenure is legally insecure as a result of past racially discriminatory laws is entitled to tenure that is legally secure. Section 25(9) states that parliament must enact legislation in order to give effect to the constitutional commitment in section 25(6). Section 25(6) is not aimed at promoting access to housing, but rather concerns the tenure rights of previously disadvantaged occupiers. The aim of section 25(6) is to provide substantive tenure rights for black occupiers, which is a race-related form of protection. All black urban occupiers, including tenants, are therefore entitled to secure occupation rights. The majority of urban black persons were public sector tenants during the apartheid era and occupied public rental housing with insecure tenure. The legislature has failed to introduce substantive tenure security for these black urban tenants in terms of section 25(6) of the Constitution. Urban black tenants therefore continue to occupy property with insecure tenure, despite the fact that they are entitled to legally secure tenure in terms of section 25(6) of the Constitution.[257]

Urban black tenants occupy residential property in terms of the common law, which is associated with weak tenure rights, because it does not provide substantive tenure security. The landlord-tenant laws, including the Rental Housing Act and the Social Housing Act, merely entrench common law tenure security, which is problematic in light of section 25(6) if the tenant is part of the previously disadvantaged group. There is therefore a gap in the legislative scheme, because the insecure tenure rights of black urban residential tenants have not been addressed sufficiently in legislation. These households are therefore still entitled to redress in terms of section 25(6).[258] The government has therefore so far failed to transform the current landlord-tenant regime in line with the constitutional mandate in section 25(6), because urban black tenants continue to occupy residential property with insecure tenure.

[257] See section 3.3 in Chapter 3.
[258] See section 3.9 in Chapter 3.

The current tenure reform process consists of two strategies, namely the transformation of weak tenure forms by implementing individual structural reforms (section 25(6)); and general anti-eviction provisions that prevent forced removals (section 26(3)).[259] Section 25(6) is aimed at strengthening the occupation rights of black persons, which is a race-related form of tenure protection, while section 26(3) is aimed at providing a more general form of tenure protection. As was indicated above, urban residential tenants have not so far benefited from statutory tenure reform in terms of section 25(6).

Section 26(3) of the Constitution ensures procedural safeguards for all persons facing eviction as it states that no person may be evicted from his home without an order of court made after considering all the relevant circumstances. Section 26(3) ensures that all persons, including the previously disadvantaged who are entitled to secure tenure in terms of section 25(6) and all other occupiers, irrespective of their race or socio-economic background, are afforded procedural safeguards when facing eviction. Section 26(3) is not concerned with access to housing, nor does it transform existing tenure into something more secure; it merely ensures that all evictions take place in a certain fashion, which could be described as a context-sensitive approach that the courts should follow. However, the courts can interpret section 26(3) to authorise a change in the common law to the extent that the courts should be allowed to refuse eviction orders on the basis of the tenant's personal circumstances. Such a discretion is currently not available at common law as a result of the Supreme Court of Appeal's narrow interpretation of section 26(3) in *Brisley v Drotsky*.[260] From the case law[261] it appears that the courts are unwilling to give substantive tenure protection in terms of PIE, which was promulgated to give effect to section 26(3), unless the socio-economic circumstances of the occupier are weak and therefore justifies substantive tenure protection. The socio-economic

[259] Van der Walt AJ *Constitutional Property Law* (2005) 309-310.
[260] See *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras 35-46 where the Court held that section 26(3) did not change the common law to the extent that the courts can refuse eviction orders on the basis of tenants' personal circumstances. See also Van der Walt AJ *Constitutional Property Law* (2005) 422-423 for a discussion of the case.
[261] See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC).

weakness of the household facing eviction has motivated the courts to refuse eviction orders despite private landowners' right to an eviction order. In terms of section 26(3) the courts must consider all the relevant circumstances before granting an eviction order and the socio-economic circumstances of marginalised households have been found to justify an indirect kind of substantive tenure protection, without formally changing the tenure status. Section 26(3) is generally aimed at ensuring due process during eviction proceedings, which entails that the courts must fulfil certain requirements before granting the eviction order, but section 26(3) can also be interpreted by the courts to provide substantive tenure protection for occupiers in need thereof.

In comparison to section 25(6), which mandates the legislature to grant legally secure occupation rights for black persons, which is a race-based form of tenure protection, section 26(3) is aimed at providing a more general form of tenure protection by means of a context-sensitive approach. The courts have recently relied on the weak socio-economic circumstances of the household to justify some form of indirect tenure protection and one can therefore assume that the courts will interpret the anti-eviction measures in section 26(3) so as to accommodate vulnerable occupiers. The anti-eviction measures in terms of section 26(3) differ from the tenure reform measures in section 25(6) in the sense that the former are class-related, while the latter are race-related.

In terms of section 39(2) of the Constitution the courts must promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. The courts therefore have the power to read the aim of section 26(3) into the landlord-tenant laws.

The courts must interpret the landlord-tenant laws, including the Rental Housing Act and the Social Housing Act, in light of the transformative purpose of the Constitution to give effect to section 26(3) and provide tenants with strengthened tenure rights. Section 26(3) is apparently aimed at merely ensuring procedural anti-eviction protection, although it can also have an indirect effect in strengthening tenure security, albeit on a class-related basis. The courts have a discretion to give effect to this broader tenure reform purpose of section 26(3). The initial focus of the urban landlord-tenant disputes has been on ensuring due process in the event of eviction proceedings instead of transforming the substantive rights of weak

tenants.[262] The Constitution mandates the transformation of tenure rights as part of the land reform process, although it is clear that the interpretation of the courts and the extent to which the landlord-tenant laws initially provided tenant protection was not in line with section 26(3) and therefore problematic.[263]

Recently the courts have started to refuse to grant eviction orders if the order would render the household homeless,[264] relying on the Prevention of Illegal Eviction form Unlawful Occupation of Land Act 19 of 1998 (PIE) as the basis for their decisions.[265] PIE is aimed at ensuring fair evictions and does give effect to the procedural safeguards enshrined in section 26(3) of the Constitution. However, PIE was not promulgated with the aim to provide substantive tenure rights for tenants. The courts are currently interpreting PIE in order to protect vulnerable unlawful tenants who are facing eviction that might result in the household becoming homeless. This development should be supported because it tends towards substantive tenure protection, as opposed to merely procedural protection for vulnerable tenants. This interpretation of PIE is currently giving effect to the potential of section 26(3) as a mechanism that provides substantive tenure protection for marginalised occupiers, which is intrinsically class related tenure protection.

8.1.3 The Constitution: Access to rental housing and tenure security

Sections 25(6) and 26(3) are concerned with the occupation rights and eviction of occupiers and are not aimed at providing increased access to housing.

Sections 26(1) and 26(2) of the Constitution ensures a right to housing as it states that everyone has the right to have access to adequate housing and that the state must take measures to achieve the realisation of this right. The government is constitutionally obliged to introduce measures that would give effect to the right to have access to adequate housing. This constitutional mandate is twofold, because it

[262] See section 3.8 in Chapter 3.
[263] See section 3.8.6 in Chapter 3.
[264] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA).
[265] *Ndlovu v Ngcobo / Bekker v Jika* 2003 (1) SA 113 (SCA) was the first case where the Court applied PIE in a landlord-tenant dispute and found that PIE applies to tenants holding over. From the recent case law it appears that the courts still apply PIE in landlord-tenant eviction proceedings.

concerns individuals' right to access housing and it ensures that the housing must be of a certain standard, namely *adequate*. The right to access housing should not be interpreted to be analogous to homeownership. Housing includes a broad range of tenure forms, including rental housing, and homeownership is only one of the forms of housing that could be made available by the state. In order to adhere to the constitutional obligation in sections 26(1) and 26(2) the government apparently decided to grant homeownership to all homeless persons in South Africa. By December 2008 the government had built 2.8 million houses, but the housing backlog nevertheless continues to grow.[266] The state has not been successful in delivering housing to the urban poor and research has shown that ownership is not necessarily the form of tenure occupiers prefer. The primary focus of providing all homeless persons with ownership does not necessarily suit the needs of the urban poor.[267] There is a preference amongst at least some of the urban poor to rent accommodation instead of acquiring ownership, because by renting accommodation individuals do not have to take on all the responsibilities of ownership. The government's involvement in the provision of housing has been ineffective partly because once a household acquires homeownership the government's role is satisfied. This is problematic as the government cannot ensure long-lasting tenure security for the new owners, because the new owners can dispose of their property at will or can lose the house because of circumstances beyond their control. Marginalised occupiers who hold land under private tenure could easily be surprised by hidden costs, which could lead to distress sales.[268]

The government is currently placing more emphasis on rental housing as a form of tenure that could provide wider access to adequate housing and so fulfil the constitutional obligation in sections 26(1) and 26(2). The first question is whether the current landlord-tenant laws sufficiently promote access to rental housing. The Social Housing Act aims to give effect to the right of access to housing, because it states that government must fund the social housing programme to promote the supply of housing. The Rental Housing Act does not promote an increase in rental housing

[266] See section 3.4 in Chapter 3.
[267] Watson V & McCarthy M "Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa" (1997) 22 *Habitat International* 49-56 at 51-52. The authors state that globally, homeownership is not necessarily the best tenure option amongst poor urban dwellers.
[268] Cross C "Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure" in Durand-Lasserve A & Royston A (eds) *Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries* (2002) 195-208 at 207.

that would contribute to the alleviation of housing shortages. The current landlord-tenant regime therefore does not promote access to rental housing sufficiently.

The second question is how rental housing would equate "adequate housing" as defined in section 26(1). As mentioned previously, individuals are entitled to access housing, but the housing must be adequate. The Constitution does not define "adequate housing", nor have the courts construed a fixed meaning for this term. According to General Comment 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[269] security of tenure is a key component of the right to adequate housing. The current rental housing legislation, including the Rental Housing Act and the Social Housing Act, entrenches common law tenure security, which merely gives effect to the contractual agreement between the parties and does therefore not provide tenants with substantive tenure rights that override the landowner- and contractual freedom-orientation of the common law. The rental housing laws do not give effect to the constitutional obligation as stated in section 26(2), because the laws fail to provide tenants with security of tenure and therefore fail to provide *adequate* housing. One can confirm that the current landlord-tenant regime is not in line with the transformative purpose of the Constitution.

The rental housing laws are insufficient in light of sections 26(1) and 26(2) on both grounds, because they do not promote access to rental housing and, even to the extent that they do make available housing, the current tenure rights of urban tenants are insecure and therefore inadequate.[270] The legislature has not sufficiently considered rental housing as a form of tenure that could assist the alleviation of housing shortages and give effect to the right to have access to adequate housing.

[269] United Nations *International Covenant on Economic, Social and Cultural Rights* (1966). In *S v Makwanyane and Another* 1995 (3) SA 391 (CC), and later confirmed in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), the Constitutional Court found that the court must consider international law that has been ratified by the government, although the court can also consider international law that has not been ratified by the government.
[270] See sections 3.4.3 and 3.5 in Chapter 3.

8.1.4 Concluding remarks

The current urban landlord-tenant laws, including the Rental Housing Act and the Social Housing Act, fail to provide substantive tenure rights for urban tenants, because these laws entrench common law tenure security, which is associated with weak tenure rights. These laws therefore also fail to comply with the constitutional obligation in section 25(6), because black urban tenants continue to occupy residential property with insecure tenure. The Rental Housing Act and the Social Housing Act have not transformed urban rental tenure in line with section 26(3) of the Constitution in order to grant substantive tenure rights for vulnerable occupiers. The race related transformation of black urban tenants' occupation rights in terms of section 25(6) has not yet occurred in the current landlord-tenant regime. However, the indirect class related transformation of weak urban tenants' occupation rights in terms of PIE, which gives effect to section 26(3), have surfaced in recent case law, although the extent of this transformation is still limited and uncertain.

There is a general need to strengthen the tenure rights of urban tenants, but the required extent of tenant protection is not the same for all occupiers. Section 25(6) (and section 25(9)) of the Constitution mandates the legislature to enact legislation that would afford secure occupation rights for persons whose tenure is legally insecure as a result of past racially discriminatory laws. Urban black tenants are therefore entitled to strengthened occupation rights and the Constitution mandates the legislature to enact laws that would provide these households with substantive tenure security. The courts can provide indirect substantive tenure protection for all tenants, irrespective of their race, in terms of section 26(3) if the socio-economic circumstances of the tenant justify more stringent protection, but this protection is limited and does not formally transform the nature of urban rental tenure. If marginalised households could occupy rental housing with sufficient tenure security, the right to have access to adequate housing (section 26(1)) would be given effect to. The meaning of *adequate* housing should generally depend on the specific context and therefore be in line with the needs of the occupier. The extent of tenure security should correspond with the tenant's needs in order to be *adequate* rental housing.

Urban residential tenants are therefore constitutionally entitled to different levels of tenure security, because black tenants who were previously denied secure tenure are entitled to substantive tenure security (race related substantive tenure security in terms of section 25(6)), while all marginalised tenants are constitutionally entitled to strengthened substantive protection if it is justifiable in light of their socio-economic circumstances (class related substantive tenure security in terms of section 26(3)). In order to give effect to section 26(1) in the landlord-tenant framework, the level of tenure security afforded to urban tenants should also be context-sensitive. The diversity of urban residential tenants in South Africa justifies different levels of tenure security, because these tenants' tenure needs are diverse and their constitutional rights are different.

To give effect to the transformative goal of the Constitution and comply with the constitutional mandate as stated in sections 25(6), 26(1) and 26(3) it is essential to formulate new strengthened tenure rights for urban residential tenants, while promoting access to rental housing. If the tenure rights of urban residential tenants could be strengthened to such an extent that the occupiers are enabled to continue living in the premises for consecutive periods, the right to have access to adequate housing would be given effect to. The potential role of landlord-tenant law should be analysed in terms of sections 25(6), 26(3) and 26(1) as a form of tenure that could simultaneously give effect to the constitutional obligations of tenure reform and access to housing.

A number of conclusions and summarising results from earlier detailed chapters that consider foreign landlord-tenant regimes and the previous South African rent control laws are analysed in the following section with the aim to identify statutory mechanisms that promoted rental housing delivery while providing substantive tenure security for diverse tenants during different economic, political and social periods in time. The pre-1994 rent control laws of South Africa form part of the comparative analysis, because they imposed statutory measures that provided tenure security similar to some of the foreign landlord-tenant legislative measures.

8.2 Comparative analysis

8.2.1 The common law and the initial justification for rent control

As a result of the First and Second World War the white minority of South Africa experienced a housing shortage during and after the war period. The Rents Acts were enacted and amended throughout the twentieth century with the aim to protect these tenants against exploitation by private landlords. In order to provide tenants with secure occupation rights the landlord-tenant statutes drastically interfered with the common law rights of landowners by providing continued occupation rights for tenants upon termination of the lease.[271] The Rents Acts restricted private landlords' common law grounds for terminating the tenancy, in some cases forcing landlords to adhere to the lease even when the contract had already expired, while placing restrictions on rent increases.[272] The initial rent control measures provided white tenants with substantive tenure security and placed restrictions on rent increases. The laws did not promote access to rental housing in the private market but focused on the protection of tenants who already had access to rental housing. The impact of the Rents Acts on the common law rights of landowners was regarded as justified, because it was in the public interest to protect tenants against the potential exploitation by private landlords. Because of racially discriminatory policies and legislation the fact that this protection was limited to the white minority was not seen as a fact that detracted from the justification for the Rents Acts.

The housing shortages that developed in England as a result of the First and Second World War also motivated the English legislature to enact legislation with the aim to introduce better tenure rights for residential tenants in the private market. This statutory intervention was initially justified by dire socio-economic circumstances, although the security principles underlying the private landlord-tenant statutes remained on the statute book for most of the twentieth century. In due course Britain experienced greater economic prosperity, but the English legislature never abolished security of tenure or rent control in the private market in its entirety. The extent of tenure security was rather amended by the legislature according to the changing

[271] See section 2.3 in Chapter 2.
[272] See section 2.3 in Chapter 2. It is important to note that the Rents Acts did not promote access to housing, but merely provided better tenure rights for tenants who already occupied rental housing.

needs of society.[273] The aim (and justification) of the pre-1994 Rents Acts in South Africa was also to protect tenants against potential exploitation by private landowners during housing shortages, but the South African legislature deregulated the private rental market when the housing market stabilised and the white minority group protected by it could acquire rental housing in the private market.

The English landlord-tenant laws are complex and are discussed in more detail later in the chapter, although it is important to briefly mention the impact of the English landlord-tenant statutes on the common law. In some cases, depending on the context, the legislation is so overpowering that it completely extinguishes the operation of the common law. In these cases the effect of the legislation is to replace the common law, and specifically its relevance in termination of the tenancy, completely, while in other cases the common law remains relevant to the extent that the legislation did not alter its operation. The common law would not have been able to respond to the different housing needs of all tenants as successfully as the legislation has and the complexity of the landlord-tenant statutes confirms the extent to which the legislature had to intervene in the common law relationship of landlord and tenant. However, since 1998 the English domestic law (common law and legislation) must be in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). To argue that the weak tenure rights that some tenants still have under the legislation are in need of rectification is unconvincing because of the complexity and extent of the legislative framework. Tenant protection is a central aspect of English housing policy and landlord-tenant law, which has received extensive consideration by parliament and by the legislature. It is therefore unlikely that the English landlord-tenant statutes would be in contravention of the Convention simply because some tenants still do not enjoy strong tenure. Instead, one has to assume that the relative strength and weakness of different tenure forms in terms of the legislation are based on considered housing policy choices made by parliament. However, the common law does not reflect housing policies and decisions made by parliament. The common law, and more specifically common law termination of the tenancy, is therefore more likely to be in contravention of the Convention. In the English landlord-tenant framework one could more easily argue that a common law eviction is in

[273] See section 4.5.1 in Chapter 4.

contravention of the Convention, but it would be harder to argue that the legislature failed to provide sufficient protection to the tenant (household) in question.

The South African position is comparable to the extent that the South African common law and legislation must also comply with the Constitution, although it must furthermore give effect to the Constitution, which entails certain positive obligations. However, in contrast with English law the tenure security of urban residential tenants in South Africa has not been addressed extensively in legislation and one can conclude that the provision of a diversified spectrum of tenure forms has not been taken into consideration by the South African government to the extent that it should have, especially in light of its constitutional obligation to do so. The substantive tenure rights of South African urban tenants are currently still weak and therefore not in line with the Constitution.

In both the English and South African landlord-tenant schemes there could be areas of law that are in need of reform. However, the mere fact that a certain tenant is not provided with security of tenure does not mean that such a tenant is entitled to strengthened occupation rights. In the South African context the generally weak tenure rights of all urban residential tenants is a direct result of the inadequacy of the legislation, because the legislation does not override the common law sufficiently to provide substantive occupation rights for specifically marginalised tenants, nor does it amend the substantive occupation rights of tenants as developed in terms of the common law in order to give effect to the constitutional obligations. The landlord-tenant legislation should be able to grant substantive tenure protection for marginalised tenants and therefore be context-sensitive to the needs of tenants in general.

The initial justification for regulating the private landlord-tenant relationship in the United States of America, and more specifically New York City, was based on extreme housing shortages that led to landlords exploiting the dire socio-economic circumstances by increasing rents. The majority of states abolished rent regulation during periods of economic prosperity, whereafter the common law resurfaced. According to the common law the landlord could rely on summary eviction proceedings to evict the tenant once the lease had terminated.[274] New York State

[274] See sections 6.2 and 6.3 in Chapter 6.

was one of a few states that did not abolish statutory intervention in the private landlord-tenant market. The continued imposition of rent control in New York State, and more specifically New York City, is noteworthy and discussed later in this chapter.

The initial justification for regulating the private landlord-tenant market in New York City was similar to the pre-1994 South African (and early English) position. In all these jurisdictions the legislature intervened in private landlord-tenant relationship in order to protect urban tenants during housing shortages. This imposition was justified in light of the socio-economic circumstances. The private rental housing market in South Africa was deregulated during a period of economic prosperity, whereafter the common law resurfaced, similar to situation in the majority of American states. The South African common law currently provides just as weak tenure security for tenants as the American common law does. The English legislature chose not to abolish rent control completely, although the private rental market is currently being deregulated. This development in the English landlord-tenant regime is justified and explained later in the chapter.

German landlord-tenant law is different from England, Wales and the United States of America, as the common law is completely codified in the German Civil Code,[275] which includes the statutory interventions in the rental housing market. This regulatory regime is different from the others in the sense that regulation is not accomplished by way of *ad hoc* statutory intervention in the relationship between landlord and tenant. The provisions in the Civil Code that regulate the relationship and afford tenure security for tenants are not perceived as temporary restrictions on the private law rights of landowners or exceptional to the "common law", but rather as permanent determinations that are incidental to the private landlord-tenant relationship, as tenure security is central to the tenant's interests. Tenure security in residential property is important, because it enables tenants to reach a level of personal autonomy. The security of the home is central for the individual (or household) to make decisions and participate in society.

[275] See section 7.3.2 in Chapter 7 regarding the provisions in the Civil Code that regulate tenure security and rent control for residential tenants.

8.2.2 Rent control: Substantive tenure protection versus procedural safeguards

The essence of the pre-1994 South African Rents Acts was to create a statutory lease at the end of the contractual lease. The landowner could not eject the tenant, based on the lease having expired either by effluxion of time (in the case of a fixed-term tenancy), or in consequence of notice duly given (in the case of a periodic tenancy), as long as the tenant complied with the requirements set out in the different acts. The tenant could continue to occupy the premises if she chose to do so, without the landlord's approval. Urban residential tenants therefore enjoyed substantive tenure security, as termination of the lease was averted through the operation of the legislation. The landlord could only claim eviction of the tenant on grounds specifically provided for in the legislation. The legislature continually amended the grounds for possession, although the general aim of these grounds was to allow the landlord to evict the tenant in certain circumstances and thereby prevent an unjustifiably harsh impact on the landowner. The grounds for possession included conduct of the lessee (for instance where the lessee damaged the leased property or caused nuisance to the neighbouring occupiers); needs of the landlord (for instance where the lessor required the property for his own use); or where the landlord for instance required the property for reconstruction work. In due course the legislature included rent control and excluded certain dwellings.[276] The Rents Acts were aimed at providing substantive tenure security for the white minority group, while placing restrictions on rent increases. These laws were not concerned with providing procedural safeguards during eviction proceedings. The Rents Acts were not aimed at promoting access to rental housing either.

Where the tenant breached the contractual agreement the landowner could cancel the lease and claim an eviction order. The contractual lease only converted into a statutory lease where the tenant complied with the original lease and with the requirements as stated in the relevant statute. The legislation therefore protected a certain class of tenants who abided by the contract and the legislation.

Through the statutory landlord-tenant measures the legislature provided a limited number of white households with substantive security of tenure in private

[276] The Rents Act 13 of 1920 was the first act to exclude new buildings.

rental housing during periods of housing shortages, even though the government did not directly provide the housing. The correlation between continued housing shortages and government involvement through the creation of policy and enactment of legislation to improve security of tenure for tenants did exist in the white private landlord-tenant framework. However, the extent of the laws was limited, because it primarily afforded tenure security for tenants who already had lease agreements and were in occupation of private rental housing. The laws failed to promote access to housing during the housing shortage and the government was not actively involved in the process of housing delivery. The laws merely regulated the relationship between landlords and existing white tenants in the private rental market.

As mentioned previously, the landlord-tenant system in England and Wales is complex and consists of a number of laws that generally regulate the rental housing market. At this stage one should note that the English landlord-tenant system is differentiated in terms of different rental housing sectors, namely the private sector and the social sector. The operation of these sectors is discussed in more detail later in this chapter.

Currently the English private rental market is largely deregulated, but the Rent Act 1977 still regulates private sector tenancies granted before 15 January 1989. Even though the application of the Act is limited, certain provisions of the Act are worth highlighting. The Rent Act 1977 (and the Housing Act 1988) excludes certain dwellings, based on the rateable value of the property. This provision is noteworthy, because even though the policy was to regulate private landlord-tenant relationships in general, the Act excludes high value properties.[277] The Act therefore excludes protection to high income tenants, while providing secure tenure rights for all other tenants. This exclusion is unique when considering the other landlord-tenant statutes.

The essence of the Rent Act 1977 is similar to the pre-1994 South African Rents Acts, as it provides that if the protected tenant (the contracted tenant) remains in the property upon expiration of the protected tenancy, he becomes a statutory tenant. Once the contract ends according to the common law, the statutory code affords the tenant continued occupation rights. The aim of the Act is therefore to

[277] See section 4.6.1 in Chapter 4.

provide tenants with substantive tenure security. The private landowner is unable to evict the statutory tenant until the tenancy can be terminated. The only way in which a landlord can terminate the statutory tenancy is to claim possession in court, based on one of the grounds for possession as stated in the Act.[278]

The grounds for possession differ from the pre-1994 South African legislation to the extent that it makes a distinction between "discretionary grounds" and "mandatory grounds". Where the court is faced with an eviction claim and the landlord is relying on one of the discretionary grounds, the court can only grant a possession order if the court considers it reasonable. This requirement grants additional substantive tenure protection for tenants. The English courts have held that, in order to establish whether a possession order is reasonable, the court has to consider "all relevant circumstances as they exist at the date of the hearing", which gives the court a wide discretion in determining reasonableness. The court is at liberty to consider any factor, "in a broad-common sense way", that might affect either the landlord or the tenant and it may attach the appropriate weight to the given factor. The court has to consider the unique circumstances of each case on a fact based approach. The courts consider various circumstances, including the personal circumstances of both parties.[279] The factors taken into consideration by the English courts in order to determine whether an eviction order would be reasonable are expressed as "all relevant circumstances". These factors are therefore comparable to the factors taken into account by the post-1994 South African courts when deciding eviction orders, because section 26(3) of the Constitution requires that the courts must consider all relevant circumstances before granting an eviction order. The post-1994 South African courts initially ignored the personal circumstances of tenants (and urban occupiers in general) when deciding eviction cases. In 2002 the South African Supreme Court of Appeal held that only those circumstances that are legally relevant should come under consideration in terms of section 26(3).[280] The Court considered section 26(3) and not PIE. In 2010 the Supreme Court of Appeal interpreted PIE, which was enacted to give effect to section 26(3), and refused to

[278] See section 4.6.1 in Chapter 4.
[279] Personal circumstances would include the health of the parties (*Briddon v George* [1946] 1 All ER 609 at 610), the age of the parties (*Battlespring Ltd v Gates* (1984) 11 HLR 6 (CA) 11), the financial consequences of a possession order (*Williamson v Pallant* [1924] 2 KB 173 at 176-177), the loss of amenities for the tenant (*Siddiqui v Rashid* [1980] 1 WLR 1018 (CA) 1022) and the landlord's reasons for wanting possession (*Minchburn Ltd v Fernandez* (1987) 19 HLR 29 (CA) 33).
[280] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 42.

grant an eviction order based on the personal circumstances of the tenants and the fact that the order might render the households homeless.[281] The Court's interpretation of PIE in the more recent South African jurisprudence is in line with the spirit, purport and objects of a transformative Constitution, because it allows the courts to consider the personal needs and circumstances of vulnerable tenants in a broad context-sensitive manner. The result of such an approach is more reasonable decision-making. However, the Court still interpreted PIE, and not section 26(3) of the Constitution, to provide the unlawful occupiers with substantive tenure protection.

The aim of the grounds (for eviction) listed in the English Rent Act 1977 is similar to the pre-1994 South African statutes as it provides the landlord with a method to evict the tenant in specific circumstances. The grounds for eviction therefore prevent an unjustifiably harsh impact on the landlord. However, the English Rent Act made a distinction between the different grounds for eviction to oblige the courts to consider the reasonableness of the eviction as a deciding factor when faced with certain grounds. The assured tenancy, regulated by the Housing Act 1988 (the Housing Act 1988 regulates private sector tenancies granted on and after 15 January 1989), makes a similar distinction and also affords substantive tenure security for urban tenants. However, the Housing Act 1988 also introduced the assured shorthold tenancy as an option for private landowners, which has to a large extent deregulated the private landlord-tenant sector, because it does not provide substantive security of tenure.[282] Private landlords can therefore choose to grant either an assured tenancy (associated with substantive tenure security) or an assured shorthold tenancy (associated with weak tenure security).

In English landlord-tenant law local authority lettings and housing association lettings form the social sector. The local authority makes available council housing for low income tenants (regulated in terms of the Housing Act 1985), while housing associations also provide rental housing for lower income households, but housing association lettings are regulated in terms of the Housing Act 1988. Housing associations form part of the private sector. Basically all housing association tenants are assured tenants in terms of the Housing Act 1988 and therefore enjoy substantive tenure security. Local authority lettings are regulated in terms of the

[281] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA).
[282] See section 4.6.2 in Chapter 4.

Housing Act 1985, which affords substantive tenure security for local council tenants, as the landlord can only terminate the secure tenancy by proving a ground for possession in court. The court can only make a possession order if the landlord can prove one of the grounds listed in the Act. However, the landlord must first stipulate sufficient particulars of the ground he intends to rely on in the notice seeking possession before claiming an eviction order in court, which provides the tenant with an opportunity to rectify any breaches under the tenancy and thereby avoid possession proceedings.[283] This is an additional substantive protection mechanism for local authority tenants.

The grounds for possession are divided into categories, which is similar to the Rent Act 1977 and the Housing Act 1988 assured tenancy provisions. When the court considers one of the discretionary grounds the court may only grant the possession order if it considers it reasonable to do so, while in some cases the court may only grant the eviction order if it would be reasonable, if the landlord proved one of the grounds for possession and if there is suitable alternative accommodation for the tenant when the order takes effect. In terms of the Rent Act 1977 (and the Housing Act 1988 when considering assured tenancies), the landlord can also claim eviction in court upon termination of the lease if there is suitable alternative accommodation and the court considers the eviction order reasonable, but local authority tenants are afforded better tenure security in the cases where the local authority landlord has to prove the ground for eviction and the fact that there is alternative accommodation.[284]

The Rent Act[285] provides that the alternative accommodation will only be suitable if it either offers full Rent Act protection or security of tenure that is reasonably equal to the extent of protection granted by the Act. The accommodation must be "reasonably suitable to the needs of the tenant and his family as regards proximity to place of work".[286] The accommodation must be reasonably suitable to the "housing needs" of the tenant and his family. The definition of suitable alternative accommodation is similar in the Housing Act 1985, but the personal needs of the

[283] See section 4.6.3 in Chapter 4.
[284] See section 4.6.3 in Chapter 4.
[285] The Housing Act 1988 affords similar protection to assured tenants when facing eviction proceedings based on the ground of alternative accommodation. This is a discretionary ground and the court must consider the eviction order reasonable.
[286] Schedule 15, Part IV, para 5(1).

tenant and his family form part of the criteria used to determine whether the alternative accommodation would be suitable. Where the court is required to consider suitable alternative accommodation as a ground for eviction in both the private and social sector (local authority lettings and housing association lettings) it is apparent that the tenure security of the new tenancy and the personal needs of the tenants are the fundamental considerations. The result is that the majority of "good" tenants will enjoy a life-long secure tenancy that suits their personal housing needs, except where an estate management reason for eviction exists.[287] One can conclude that the English landlord-tenant laws provide substantive tenure rights for local authority tenants (generally the lowest income group of tenants) and housing association tenants (also low income tenants), while the private sector is being deregulated and the majority of private sector tenants currently occupy rental housing with weak tenure rights (assured shorthold tenancy). The justification for this development is explained later in this chapter.

The landlord-tenant regime in New York City is also differentiated in terms of different sectors, namely the private sector (private rental housing), the social sector and the public sector. Where the government provides funds for not-for-profit corporations with the aim to increase low cost housing, such a form of housing is known as social housing. Public rental housing in New York is federally regulated in instances where the government is involved in the provision of housing for low to moderate income households, through the provision of either government housing or rental subsidies. The combined operation of these sectors is discussed later in this chapter.

In New York City the Rent Stabilization Law and the Rent Control Law regulates the private rental market. Generally, all rent-regulated tenants who occupy units that are governed by the Rent Stabilization Law or the Rent Control Law, and who continue to pay their rent upon termination of the lease, may only be evicted if the landlord is able to establish a clear basis for eviction as stated in the relevant laws and regulations. These laws are aimed at providing substantive tenure security for existing private sector tenants and do not primarily promote access to housing. The various grounds for eviction are similar to those listed in the pre-1994 South African and English landlord-tenant laws. In some cases, depending on the ground

[287] Bright S *Landlord and Tenant Law in Context* (2007) 218.

for eviction, the landlord of a rent-controlled or rent-stabilized unit may institute eviction proceedings directly in court, although for other grounds the landlord is required to obtain the approval of the New York State Division of Housing and Community Renewal (DHCR).[288] The responsibility of the DHCR reflects the central role of the government in eviction proceedings and one can confirm that the local authority is progressively involved in the private rental market. This direct involvement of the local government in the private rental market is unique to the New York rent regulation laws. The DHCR is proactively involved in the process of evicting tenants to such an extent that the government can refuse to grant approval, whereafter the landlord would be unable to evict the tenant. The government is therefore not only involved in developing private rental housing policies, programmes or even legislation with regard to housing delivery and tenure security, but on a basic everyday basis, having to deal with the context-sensitive circumstances of each case individually.

In the public sector where the government provides the rental housing the rents are low and the public sector tenancy may not be terminated, nor may the tenant be evicted, without adequate procedural safeguards. The essence of public sector tenants' tenure rights is therefore due process during eviction proceedings and not substantive tenure security. This form of tenure protection for public sector tenants is unique in comparison to the other jurisdictions, because public sector tenants usually enjoy strengthened substantive tenure security. Where the tenant breached one of the housing authority's rules or regulations, the housing authority may rely on this breach as a ground for eviction, although the tenant must be given an opportunity to meet with one of the housing authority's members to discuss the problem and cure the breach. This opportunity for public sector tenants to cure the breach is a form of substantive tenure protection; it is also available for English local authority tenants. Public sector tenants in New York City are therefore afforded tenure security to the extent regulated in the housing authority's rules and regulations, although the essence of these tenants' tenure security rests in the procedural safeguards when facing eviction,[289] which is different from the substantive tenure protection provided for English local authority tenants.

[288] See section 6.4 in Chapter 6.
[289] See section 6.5.2 in Chapter 6.

New York State also subsidizes and regulates the provision of housing under a number of other regulatory systems that afford some tenure security. The Section 8 Program enables low-income tenants to rent private housing through federally funded subsidies, although tenure security is limited, as the landowner may institute eviction proceedings once the Section 8 tenancy expires.[290] In New York City funds are also made available to not-for-profit companies to construct and in due course provide rental housing for low-income households. The provision of low-income rental housing is a form of social housing, which represents a type of social sector. One of these subsidized systems of housing is the Mitchell-Lama housing programme in which the tenant selection; rent charged; occupancy; and eviction are all government-supervised.[291]

In Germany landlord-tenant law is codified in the German Civil Code,[292] which includes the statutory interventions in the rental housing market. Even though rents are largely unregulated, landlords can only increase the rents by reference to rent levels of other leases in the vicinity during the preceding three years. The Civil Code provides substantive security of tenure for tenants by placing restrictions on the usual right of landowners to terminate leases. The right of the private landowner to cancel the lease is restricted to such an extent that the landlord must generally prove that he has a justifiable interest in cancelling the lease, whereafter the tenant can object to cancellation, based on the hardship that he would suffer as a result of cancellation. This provision provides protection for vulnerable households as the court must consider the impact that an eviction order would have on the tenant and his family. If the eviction order might render the household homeless the court would find it difficult to grant the eviction.[293] The landowner can also cancel the lease in cases where the tenant breached the contract or acted in an inappropriate manner that constituted a compelling reason for cancellation. The point of departure is that the parties are assumed to enter into a lease for an indefinite period of time, because the landlord must give good reasons for entering into a lease for a definite period.[294]

[290] See section 6.5.3 in Chapter 6.
[291] See section 6.5.4 in Chapter 6.
[292] See section 7.3.2 in Chapter 7 regarding the provisions in the Civil Code that regulate tenure security and rent control for residential tenants.
[293] The South African courts have recently held that private landowners are not allowed to evict tenants holding over if eviction would result in the household being homeless: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA).
[294] See section 7.3.2.2 in Chapter 7.

Tenants in the private sector therefore enjoy substantive tenure security, while the provision of rental housing is also encouraged by the government through favourable tax incentives.

8.2.3 Increased access to rental housing: The role of public assistance and tenure security

The aim to provide tenants with substantive tenure security during housing shortages is worthy of support, but increased tenure security is only efficient to the extent that it can protect tenants who already occupy rental housing. Where there is insufficient rental housing stock the government should either introduce measures that would encourage private actors to become involved in the provision of rental housing or the government itself should provide public rental housing. In a number of jurisdictions the government had to introduce certain measures to increase the development of rental housing stock, while providing tenants with substantive tenure security.

In New York City the aim of the government in the public rental sector is to promote access to public rental housing, although it is also aimed at providing secure occupation rights for low income households. In the private sector the aim of the legislation is different, as it does not promote access to housing. New York State also subsidizes and regulates the provision of housing under a number of other regulatory systems, including the Section 8 Program, that promote access to housing, while providing some tenure security. In New York City funds are also made available to not-for-profit companies to construct and in due course make available rental housing for low-income households. One of these subsidized systems of housing is the Mitchell-Lama housing programme.

In New York State the cooperation between the government and private landowners, or private associations, in the provision of housing is necessary as a result of the fact that the public sector is currently unable to make housing available for all low-income households in need thereof. The social housing sector is therefore extended through this cooperation between the government and private actors with the aim to accommodate lower income households through the provision of affordable housing. This incentive is similar to the housing associations that were

developed in English landlord-tenant law. Housing associations started off as non-profit organisations, providing a limited amount of housing, but recently these associations have doubled in size and are functioning like a business.

Throughout the twentieth century the German state has intervened in the private rental housing market with the aim to address housing shortages and protect tenants. Initially the laws imposed rent control and provided security of tenure for tenants, but it also empowered local authorities to prevent privately owned buildings from being demolished; to prohibit landowners from using dwellings for purposes other than housing; and to force landowners to put their dwellings on the rental market.[295] The aim of these laws was therefore to increase access to housing, while providing tenants with substantive tenure security. The aim and justification for regulating the market was similar to the pre-1994 South African, initial English and initial American positions, but the measures introduced by the German government placed more emphasis on making housing stock available, which had a drastic effect on private landowners' right of use and disposal. This was justified in light of the dire housing shortage, whereas the Court of Appeals of New York held that a law forcing private landowners to place their property on the rental market was unconstitutional, because it amounted to a physical taking without compensation. The court found that it was unconstitutional, even during a period of housing shortages, as it imposed societal obligations upon certain landowners beyond the scope of their just share.[296] In South Africa neither the legislature nor the courts has forced private landowners to make their property available for rent during housing shortages.

However, in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*[297] the Constitutional Court confirmed the decision in the Supreme Court of Appeal[298] where the Court held that unlawful occupiers could remain on private land, even though the owner never agreed to their occupation in the first place, until the state made alternative accommodation available, provided that the state pay compensation to the landowner for the period during which he was denied use of his land. In *Blue*

[295] See section 7.2.1 in Chapter 7.
[296] *Seawall Associates v City of New York* 74 NY 2d 92 (1989).
[297] 2005 (5) SA 3 (CC).
[298] See *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).

Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another[299] the high court decided that tenants holding over could remain on private land for a period of two months, whereafter they were evicted. During this period the state had to pay the private landowner "an amount equivalent to the fair and reasonable monthly rental of the said premises".[300] In both cases the courts effectively forced a private landowner to temporarily accommodate unlawful occupiers on his land, but the state had to pay some form of compensation. The effect of these decisions is therefore similar to a law forcing private landowners to rent their property.

In due course the German government placed more emphasis on the development of new housing stock that would contribute to the alleviation of housing shortages. To encourage the building of new rental housing the government granted loans to builders at low interest rates. The government also made available public funds to subsidize housing construction and provided income tax relief for private funds invested in housing, while keeping rents at modest levels.[301] The measures introduced by the German government during periods of extreme housing shortages consisted of rent regulations (mostly in the form of rent control and tenure security) in the private rental market with the aim to protect existing private tenants, combined with incentives for private actors to invest in the provision of housing. The building of new housing stock was just as important as providing tenure security for occupying tenants in order to alleviate housing shortages.

The German government's social housing project was aimed at providing housing for the majority of low-income households. The project was financed through subsidies and public loans, but it was subject to rent control and access control. The loans covered nearly fifty percent of the construction costs and were provided by the state to private investors and non-profit associations at zero interest. The government controlled the allocation of housing and made provision for tenant protection. The majority of social-housing dwellings were privately owned, because the policy was to use state activity to support and supplement, not replace the

[299] [2010] JOL 25031 (GSJ).
[300] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 196. See section 1.1.2 in Chapter 1 for a discussion of the case.
[301] See sections 7.2.2 and 7.2.3 in Chapter 7.

market. The role of the German state in the provision of housing was subsequently relaxed as a result of an increase in the supply of housing.[302]

The German state therefore addressed housing shortages by integrating private development in the housing market and not by providing housing to all homeless persons directly. In due course, when the housing shortages were largely addressed, the government became less involved in the provision of housing. The German state's involvement in the provision of housing is very different from the English government's direct role as local authority landlord. The focus of the German government was rather to enable private actors to enter the rental housing market and address housing shortages through the provision of public funds than to make housing available directly.

The South African legislature has not introduced sufficient incentives for private actors to become involved in the provision of housing, which is problematic in light of the current housing backlog. The cooperation between the government and private actors is essential in order to alleviate housing shortages. Social housing is a form of housing that should be encouraged by the government during housing shortages, because it provides access to housing, which usually consists of secure occupation rights. The combination of incentives that aim to increase access to rental housing and regulatory measures that grant substantive tenure security for tenants is crucial during housing shortages if the government is aimed at alleviating housing shortages through the use of landlord-tenant laws.

8.2.4 Differentiated rental housing sectors and a context-sensitive approach

For the majority of the twentieth century, the private rental market in England and Wales provided housing to the majority of tenants, which included low-income tenants. The market was regulated in order to ensure protection for all tenants. The housing policy changed to increase private rental housing, whereafter the market was deregulated, but during this period the social housing market increased and started to make housing available for low-income households. Currently the majority of low-income tenants in England and Wales occupy social housing. The private

[302] See section 7.2.2 in Chapter 7.

market can uphold deregulation, because the social housing market is providing a type of "safety net" for vulnerable occupiers. The social housing market is regulated quite extensively in order to protect vulnerable occupiers through the provision of affordable secure rental housing.[303]

The English legislative framework regulating landlord-tenant law is complex because the rental market is divided into various sectors, each providing different levels of tenure security to different categories of tenants in society. The substance of the security provided for constantly changes in these various sectors, according to changing social needs and housing policy.[304] Local authority tenants enjoy the strongest form of tenant protection, because these tenants are usually the most vulnerable households. Housing association tenants also enjoy strong tenant protection, as these households are also marginalised members of society and unable to acquire private rental housing.

Social housing can usually be associated with supply-side subsidies from the state; below-market rents imposed by legislation; provision of housing for low income candidates and enhanced tenure security when facing eviction.[305] The function of the government is central in social housing because this sector of housing provision is a form of "governance".[306] Social housing serves a fundamental role in society in which the provision of affordable, decent housing is central.[307] Social rental housing is therefore a key form of housing for marginalised occupiers, because the state is proactively involved in the provision of housing. The state is at liberty to assess the market, amend the legislation where it is not functioning efficiently and afford secure homes to low-income households. The general role of social housing and its potential in alleviating housing shortages, while providing tenure security for marginalised occupiers, is evident from the preceding sections. It follows that the post-1994 South African government should place more focus on social housing, especially in the urban landlord-tenant framework. The efficiency of social housing is

[303] See sections 4.5.2, 4.6.2 and 4.6.3 in Chapter 4 for a discussion of social housing regulations in England and Wales.
[304] See Chapter 4.
[305] United Nations Economic Commission for Europe *Guidelines on Social Housing: Principles and Examples* (April 2006) ch II.
[306] Cowan D & McDermont M *Regulating Social Housing, Governing Decline* (2006) 21.
[307] Hills J "Ends and Means: The Future Roles of Social Housing in England" (Case Report 34, February 2007) 1.

twofold, namely that it provides access to housing for marginalised occupiers and it usually ensures substantive tenure security for such households.

The residential landlord-tenant system in New York City could also be categorized into different sectors with different levels of tenure security. The laws that regulate the private and public rental market form a body of tenant protection that collectively protects different households with diverse income levels. The entire landlord-tenant framework is therefore similar to the English landlord-tenant system to the extent that it is differentiated in terms of different sectors, but the income categories in relation to these sectors are not the same, nor is the level of tenure security in correlation with the sectors the same. The private rental market in New York City makes housing available to a high number of households, including low-income households, while the extent of tenure security in the public sector is not as high as in the private sector. In English law the higher income group occupies private rental housing, which is generally associated with weaker tenure rights. The lower income group occupies social housing, which is aimed at affording substantive tenure security. In English law the income group, extent of tenure security, imposition of rent control and involvement of the state are therefore closely connected to the applicable rental housing sector.

The landlord-tenant market in Germany is different from England, Wales and the United States of America (or more specifically New York State),[308] because it is not formally divided into different sectors, although it is possible to distinguish purely private from social rental housing. After the Second World War Germany experienced severe housing shortages. Germany introduced a social housing project that made housing available for the majority of low-income households. Social housing has developed over time and currently one can identify three forms of social housing, namely where developers receive subsidies to construct the housing stock; where social housing is federally regulated (usually associated with strict restrictions on rent increases and access control in relation to the tenant's income); and where the state provides social housing.[309] However, Germany's private rented sector continues to represent a significant percentage of the housing market as a result of

[308] See section 4.4 in Chapter 4 for a discussion of the different rental housing sectors in England. See sections 6.4 and 6.5 in Chapter 6 for a discussion of private and public rental housing in New York City.
[309] Droste C & Knorr-Siedow T "Social Housing in Germany" in Whitehead C & Scanlon K (eds) *Social Housing in Europe* (2007) 90-140 at 95.

favourable tax benefits for private investors, aimed at increasing private rented housing.

The differentiated landlord-tenant systems of England, Wales and New York City differs substantially from the current, and pre-1994, South African landlord-tenant system, because the rental market in South Africa is not clearly differentiated in terms of different sectors. During the apartheid era the government made public sector tenancies available to black households. However, when the apartheid laws were abolished these tenancies generally ceased to exist and either converted to private ownership or left the remaining occupiers with uncertainty regarding their rights in the land. The remaining "public sector" tenants' tenure rights are still uncertain, because the sector is not regulated. The government failed to introduce some form of social housing for the majority of black marginalised South African tenants who were left with uncertainty regarding their rights in the land.

Currently the South African private rental housing market is regulated in terms of the Rental Housing Act, while the Social Housing Act regulates social rental housing. The social rental market was introduced only in 2008 and is not functioning optimally yet. The private rental market in urban areas is not accessible to the majority of poor households, because it is exclusive to the minority of households who can afford high rents. The post-1994 government has not introduced a housing option, such as a public rental housing sector where the government acts as landlord, for the most vulnerable households who are in dire need of secure urban housing. The Social Housing Act aims to provide social rental housing for low to medium income households, which is a development that should be encouraged. However, the Act does not afford sufficient tenure security, because it merely upholds the common law, which is associated with weak substantive tenure security.[310] Tenure security is fundamental to any form of social housing, which is evident from the English social sector. The urban rental market in South Africa is diverse. Black urban tenants are entitled to legally secure tenure (section 25(6) of the Constitution), while the courts can interpret section 26(3) of the Constitution to ensure substantive tenure security for marginalised tenants based on their socio-economic weakness. The landlord-tenant regime in South Africa should aim to accommodate all urban tenants and provide each household with the necessary

[310] See section 3.4.2 in Chapter 3.

level of tenure security. The landlord-tenant laws in South Africa should therefore also be context-sensitive and preferably be divided in terms of different sectors.[311]

8.2.5 The constitutional validity of rent control: Rethinking justification

The social importance of residential property is recognised in most jurisdictions, especially when facing housing shortages, but the tension between the rights of landowners and tenants is perceived and analysed from different perspectives, which results in different landlord-tenant regimes. In order to strengthen the occupation rights of tenants the rights of private landowners have to be restricted in a just and equitable manner.

The property clause (article V) of the Constitution of the United States of America 1787[312] states that "[n]o person shall … be deprived of life, liberty, or property". The South African Constitution has a similar property provision in section 25(1), which states that "[n]o person may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." New York State guarantees that homeless persons have a right to shelter,[313] which is similar to the right to have access to adequate housing as stated in section 26(1) of the South African Constitution.[314] The initial justification for rent regulation in New York was similar to previous rent regulations in pre-1994 South Africa to the extent that the rent control measures protected tenants from exploitation by landlords during housing shortages. However, the progressive justification and continuous imposition of statutory intervention in landlord-tenant law in New York, and New York City as an urban setting, is different from the South African private rental market,

[311] See section 8.4 below for a proposed landlord-tenant regime that is context-sensitive and divided into different rental housing sectors.
[312] Fifth Amendment 1791; Fourteenth Amendment 1868.
[313] In *Callahan v Carey* 831 NYS 2d 352 (1979) the New York Supreme Court granted homeless men a preliminary injunction requiring the City to provide shelter. Based on the New York Constitution, the State Social Services Law and the City's Administrative Code, the Court found that homeless men are entitled to a right to shelter and that this entailed clean bedding, adequate security and the necessary supervision to any homeless man who applied at the New York City Men's Shelter: Stoner MR *The Civil Rights of Homeless People: Law, Social Policy, and Social Work Practice* (1995) 30. In 1982 the right to shelter, as provided for in *Callahan*, was extended to women in *Eldridge v Koch* 98 AD 2d 675 (1983). See also Savas ES *Managing Welfare Reform in New York City* (2005) 289-292.
[314] See Chapter 3 for a discussion of the South African constitutional provisions relating to property and housing.

which was deregulated during a period of economic prosperity. In New York City the private rental sector is currently still regulated quite extensively, with the aim to place restrictions on rent increases while providing security of tenure for a diverse group of tenants who occupy certain buildings.[315]

The private rental market in New York City is currently providing housing to a large number of households, including low-income households, because the public rental sector is not providing the required number of housing units for low-income households. The private rental market is therefore burdened with the indirect duty to accommodate low-income households. If the private rental market is functioning efficiently, there would not necessarily be a need to regulate the market, if there is some mechanism to ensure affordable and secure housing for the more vulnerable members of society. By contrast, in England and Wales the private rental market can uphold deregulation, because the majority of low-income tenants occupy social housing. The social housing market is providing a type of "safety net" for vulnerable occupiers.

Initially the American courts held that rent regulation measures were constitutionally justifiable in light of the housing crisis, because landlords could exploit tenants.[316] Currently a number of private housing dwellings are regulated and the justification for rent regulation subsequently shifted to the provision of affordable rental housing for a small, specified group of low-income individuals. If the leases of low-income tenants who occupy regulated rental housing in the private market expire, their chances of acquiring public rental housing would be very slim, because public housing stock is limited. Low-income households would also struggle to find deregulated accommodation in the private market, because the rent is unaffordable. The aim of the regulations is therefore to avoid an increase in homelessness, because the immediate effect of deregulation would be an increase in rents. The more recent justification for rent regulation in New York City is therefore based on the public interest in preventing an increase in homelessness. In recent South Africa case law the justification for not granting an eviction order against unlawful tenants

[315] See section 6.4 in Chapter 6.
[316] See the discussion of *Block v Hirsh* 256 US 135 (1921) and *Edgar A Levy Leasing Co v Siegel* 258 US 242 (1922) in section 6.6.2 (Chapter 6).

was also to prevent homelessness as the immediate effect of the order would have been to render the vulnerable tenants homeless.[317]

The point of departure in American landlord-tenant case law regarding the constitutional justifiability of rent regulations is that it is valid, because it is in the public interest. However, the extent of the regulation could render it unconstitutional, especially when a small section of society must bear the public burden alone and when the regulations are disproportionate. The courts have found that rent regulations are constitutionally justifiable if the landlord allowed the tenancy in the first place. In *Seawall*[318] the court declared a law unconstitutional because the impact of the law was to force landowners to open their property to the public, which amounted to an unconstitutional physical taking.[319] The law was obviously aimed at providing access to housing, although the extent to which it restricted the rights of private landowners was found to be unconstitutional.

In German landlord-tenant law the justifiability of rent control measures is completely different form the United States of America, because the interests of tenants are perceived as socially recognisable interests that justify protection by the legislature. In the case of housing shortages the social importance of residential housing increases to the extent that it becomes a limited resource, which is a vital commodity for society. The social importance of strengthening the rights of tenants has a detrimental effect on the restricted rights of landowners, but it is constitutionally valid as a result of the phraseology of article 14 of the German Basic Law and the social purpose of rental housing.[320] Article 14 of the Basic Law was crafted to protect property rights and to enable the legislature to enact legislation that would give effect to the public interest. In the landlord-tenant context the property rights of landowners are therefore constitutionally balanced with the socially protected interests of residential tenants.

In order to determine whether rent regulations restrict the rights of landowners unjustifiably, the courts measure the impact of the restriction by considering the extent of the interference on the personal autonomy of the landowner, although the

[317] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA).
[318] *Seawall Associates v City of New York* 74 NY 2d 92 (1989).
[319] See section 6.6 in Chapter 6.
[320] See section 7.4.1 in Chapter 7.

justification for rent regulation is also to allow the tenant to achieve personal autonomy. The measure used to balance the rights of the parties is therefore the same. In the cases where the courts found that the restriction was unjustified the landowner's personal autonomy was too seriously interfered with, considering the reciprocal benefit for the tenant and for society.[321]

The German Federal Constitutional Court has considered landlord-tenant disputes regarding rent regulations,[322] although the disputes have always concerned the extent of the regulations rather than the constitutional justifiability of these laws. The US courts have held that rent regulation does not amount to an unjustifiable restriction on private landowners' rights, provided that it is in response to a housing emergency or in the public interest.[323] In Germany the point of departure is that property serves the public interest and that the legislature must regulate and determine the contents of property rights.

In American law (and pre-1994 South African law)[324] rent regulations are perceived as temporary measures that interfere with the strong common law rights of landowners with the aim to afford strengthened tenure rights for weak, poor, vulnerable, and marginalised occupiers in times of extreme need or hardship. The justification for limiting private landowners' common law property rights in order to provide better tenure rights for tenants is therefore based on the general public consensus that there is a great disparity between the common law rights of landowners and tenants. During housing shortages this disparity increases to such an extent that rent regulations are justified. In German law the justification for rent regulations is based on the importance of tenure security that enables tenants to participate in society, make their own decisions and achieve personal autonomy, which is a general rather than a temporary, emergency justification.

[321] See section 7.4 in Chapter 7.
[322] See section 7.4.2 in Chapter 7.
[323] See section 6.6 in Chapter 6.
[324] See section 2.3 in Chapter 2 for a discussion of rent regulations in pre-1994 South Africa.

8.3 Theoretical inquiry

In order to understand the imposition of and justification for rent control it is important to undertake a theoretical analysis of rent control. However, the imposition of rent control, or the deregulation of the private landlord-tenant market, often results in a transformation of the landlord-tenant regime in question and it is therefore also essential to consider theories regarding changes in legal structures. Landlord-tenant law is closely connected to the broader societal function of property, because it is usually concerned with housing shortages. The role of the community is fundamental in giving effect to societal needs, because individual needs are dependent on social relations that function within communities. Theoretical approaches regarding rent control; changes in a regime (specifically a landlord-tenant regime); the function of property in terms of social relations; and the responsibility of the community at large are discussed in the following section for two reasons. The purpose of this theoretical inquiry is firstly to illustrate the limited efficiency of rent control in the private residential market and secondly to initiate a theoretical basis in support of a new landlord-tenant regime in South Africa.

Radin's theoretical perspective on rent control is imperative. It highlights the importance of rent control from a moral "all-things-considered"[325] viewpoint and places emphasis on the personal connection between residential property, as personal property, and occupiers (more specifically tenants). According to Radin, rent control is usually imposed when there is a shortage of affordable rental housing,[326] although in terms of the classic price theory rent control might lead to even worse housing shortages.[327] Radin argues that the justifiability of rent control is a context-sensitive inquiry and can therefore not be determined by reference to a single all-inclusive principle. Rent control usually includes security of tenure through the provision of continued occupation rights for tenants and the imposition of restrictions on rent increases. The justifiability of these interventions depends on the specific circumstances.[328]

[325] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 353.
[326] From the comparative analyses it is evident that this is correct.
[327] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 350-351.
[328] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 352-353.

The essence of Radin's argument is that in some circumstances the tenant's non-commercial personal use of her apartment as her home carries more weight, on a moral basis, than the landlord's commercial interest in reclaiming the apartment.[329] "Personal" property is "bound up" with a persons' personhood to the extent that self-investment in the specific object takes place,[330] while "fungible" property is held by persons for commercial reasons and is exchangeable.[331] The connection between the personal property and the individual contributes to self-development and enables the person to participate in society as a fulfilled person.[332] Radin argues that the tenant's rented property is her home,[333] which is a justifiable form of personal property, because self-investment has taken place. The preservation of the tenant's interest in the home therefore becomes "a priority claim over curtailment of merely fungible interests of others."[334] The landlord's interest is fungible and therefore weighs less than the tenant's interest in continuing to stay in the rented property. It follows from a personhood perspective that property for personhood necessitates more stringent legal protection than fungible property, because personal property is deemed more important by social consensus.[335]

[329] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 360. The function of property for both private landowners and tenants are similar in German landlord-tenant disputes.

[330] 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 MJ "Property and Personhood" (1981-1982) 34 *Stanford LR* 957-1015. 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.

[331] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 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: Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 363.

[332] 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.

[333] See also Fox L *Conceptualising Home: Theories, Laws and Policies* (2007) 25-27 for a similar argument.

[334] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 365.

[335] Radin MJ "Property and Personhood" (1981-1982) 34 *Stanford LR* 957-1015 at 978-979. Radin refers to her theory as a non-utilitarian moral theory, because certain claims are better protected based on their moral value: at 985.

The personhood argument is most appealing in cases where the occupying tenants are poor and deregulation would render the household homeless,[336] because the household would not be able to afford the market rent.[337] However, from a welfare rights perspective and supposing that the right to housing is a welfare right, the tenant would have a right to an apartment, but not to a particular apartment. The obligation of private landowners to accommodate such households is unclear from Radin's analysis.[338] The personhood argument is unhelpful when analysing homeless persons' right of access to housing, because homeless persons are in need of accommodation and there is no established connection between the individual and the object in question that necessitates statutory protection.[339] It follows that there has been no self-investment in the specific apartment and the tenant has not become bound up with the property, because occupation has not taken place. In such circumstances the government does have an obligation to make adequate housing available,[340] but the personhood argument is unconvincing as basis for justifying landlord-tenant regulations that aim to increase rental housing in the private market in order to accommodate homeless persons. Radin's argument therefore supports rent control to the extent that it provides continued occupation rights for tenants and it restricts rent increases. The personhood argument is not concerned with primary access to housing, because the essence of the argument is to prolong existing occupation rights for a household within a certain dwelling that constitutes the household's home.

Radin also acknowledges that in certain circumstances local rent control might be unjustified if the effect of the measures is to exclude would-be tenants from the regulated rental market.[341]

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[336] Brennan's argument that individuals who prefer stability buy homes or condominiums is unconvincing and irrelevant when dealing with low-income tenants who are unable to afford the luxuries of homeownership: Brennan TJ "Rights, Market Failure and Rent Control: A Comment on Radin" (1988) 17 *Philosophy and Public Affairs* 66-79 at 72. The argument for rent control in the case where deregulation would render low income households homeless is evident in New York City.

[337] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 366.

[338] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 367.

[339] Brennan TJ "Rights, Market Failure and Rent Control: A Comment on Radin" (1988) 17 *Philosophy and Public Affairs* 66-79 at 67. At 67 Brennan also mentions that new (or vacated) rental housing would not justify the imposition of rent control based on Radin's theory, because there is no longstanding personal property relation.

[340] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 366.

[341] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 371.

> "When rent control is imposed, the benefit of the wealth redistribution goes not to tenants generally but rather to the tenants who already live in a given political subdivision … The immediate costs fall not only upon the landlords, but also upon would-be tenants who wish to move into the community".[342]

Radin's argument for rent control is therefore credible for a specific community of occupying tenants who are relatively poor, especially where the landlords have a purely commercial interest in the rented property.[343] The justifiability of rent control depends on the group of tenants (and their personal connection with the property);[344] the commercial interests of the landlords in the rented property (described by Radin as fungible property); and the efficiency of the legislation to distinguish between these issues in order to differentiate between categories of tenants with different levels of tenure security.[345]

A number of authors, including Epstein, have criticised rent control for various reasons, specifically economic reasons. Epstein argues that all rent control statutes are unconstitutional under Article V of the Constitution of the United States of America,[346] also known as the takings clause, because the compulsory renewed lease is an interest in property that is transferred from the landlord to the tenant and therefore deprives the landlord of his interest in the reversion, which equals a "taking of private property".[347] Historically, rent control cases were decided under the "mere regulation" standard, while other regulatory measures were decided under the "physical invasion" test.[348] According to Epstein, all deprivations of property should be adjudicated in terms of the same enquiry.[349] Epstein argues that the result of all rent control statutes is a "forced and complete occupation of the landlord's premises

[342] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 355-356.
[343] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 371.
[344] Fox mentions that policy makers must determine whether the occupier's connection with the property is sufficient justification for legal protection in the case where commercial creditors claim the property: Fox L *Conceptualising Home: Theories, Laws and Policies* (2007) 551. This reasoning also applies in the landlord-tenant framework.
[345] Radin MJ "Residential Rent Control" (1986) 15 *Philosophy and Public Affairs* 350-380 at 378.
[346] Fifth Amendment 1791; Fourteenth Amendment 1868.
[347] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 744-745.
[348] See Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 750-757 for a case law analysis. See also Rose JW "Forced Tenancies as Takings of Property in *Seawall Associates v City of New York*: Expanding on *Loretto* and *Nollan*" (1990) 40 *DePaul LR* 245-280 for more detail on the two measures used by the US courts in adjudicating regulatory takings.
[349] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 758.

by an unwanted tenant,"[350] and therefore amounts to a physical invasion of the landowner's property.

From an economic perspective Epstein argues that rent control is inefficient and bad public policy. Rent regulation disregards the rules of supply and demand with the effect that it creates housing market distortions, which negatively affects both landlords and low income households.[351] The political effect of rent control is to increase social losses and therefore Epstein argues that rent control is socially ineffective in both the long and the short run.[352] With reference to Radin's personhood argument, Epstein mentions that the essence of Radin's analysis is to provide preferential treatment to some individuals, which is in conflict with the idea of an open society based on equal opportunities.[353] Epstein also considers rent control from a welfare perspective and concludes that "[m]y 'intuitions' favor an open society in which persons must purchase what they want from the owner of resources, and not plan and scheme to get the state to operate on their behalf."[354] Epstein finally mentions that "[t]he claim for special communities is simply a disguised appeal for special monopoly privileges that should be rejected across the board. There is simply no standard of *social* welfare that justifies the operation of the rent control statutes in any form."[355]

The American landlord-tenant regime developed during the 1980s and early 1990s from providing tenants with limited tenure security (tenants had no right to continued occupation upon termination of the lease as the landlord could terminate the tenancy without stating any reasons) and placing no restrictions on rent increases (the landlord could set the rent at any level) to affording tenants with

[350] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 757.
[351] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 759-760.
[352] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 768-770.
[353] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 771.
[354] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 772.
[355] Epstein RA "Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 741-774 at 773. See also Salins PD "Reflections on Rent Control and the Theory of Efficient Regulation" (1988) 54 *Brooklyn LR* 775-780 where the author argues that the continued imposition of rent control is a result of inadequate empirical proof that rent control amounts to bad public policy and in order to deregulate the private rental market one would have to make a well-researched pragmatic argument against rent regulation.

strengthened occupation rights and imposing rent control in various urban areas.[356] In response to these developments Radin states that the role of the government is to either maintain a certain regime or to initiate some development in that regime, although the aim of the government depends on its interest, which includes the public interest, in that specific regime.[357] The author mentions that the mere enactment of housing codes is too simplistic to initiate such a radical change and that there was an overall change in the culture of property, specifically with regard to tenants' entitlement to decent housing.[358] The decisions of government are therefore connected with "cultural commitments about property" and certain policies or ordinances can either initiate changes in the legal regime or respond to changes in the regime. Radin argues that government action that changes property regimes is generally made implicitly, and could be perceived by the public as common sense, but these decisions depend on a communal understanding of a specific regime.[359]

A similar argument is raised by Singer, where he questions society's understanding of entitlement and the importance of protecting tenants' interests in their home (the rented property) through regulation. Singer argues that if the aim is to protect tenants' interest in their home, one should reconsider property law (and the very concept of property) in order to deviate from the "romance of ownership". One should rather pay attention to the interests "asserted by those who claim they should be entitled to control various aspects of the property, and determine, on the basis of normative criteria, who should have presumptive control of the entitlement in question".[360] Instead of using rights theory or efficiency theory, Singer argues that one should use a normative framework to determine the function of property. The importance of property in light of its broader societal function, specifically with regard to its role in social relationships, is emphasised throughout Singer's argument.[361] Rights, and more specifically property rights, should be perceived within a social context that consists of relationships and mutual obligations. In terms of societal

[356] Radin MJ *Reinterpreting Property* (1993) 172-173. Radin also mentions a number of other changes in the landlord-tenant regime, including the imposition of habitability provisions.
[357] Radin MJ *Reinterpreting Property* (1993) 166.
[358] Radin MJ *Reinterpreting Property* (1993) 174.
[359] Radin MJ *Reinterpreting Property* (1993) 177.
[360] Singer JW *Entitlement: The Paradoxes of Property* (2000) 80-81.
[361] Singer JW *Entitlement: The Paradoxes of Property* (2000) 106.

obligations owners are in some cases required to "exercise their property rights with due respect for the interests of others, including non-owners."[362]

The societal function of property, and more specifically the importance of property for human flourishing, is also highlighted by Alexander and Peñalver. However, the role of the community and the web of social relations it presents is a fundamental consideration in their theory.[363] This web of social relations is essential for human flourishing, as individuals are socially dependant and unable to acquire resources by themselves.[364] Communities in general, which includes the state, cultivate just relations amongst members of the community and thereby shape certain norms for society at large, although the community also enables individuals to acquire resources essential for human development.[365] Human (and communal) dependence creates a moral obligation to encourage social networks and structures that enable members of the community to flourish,[366] which could lead to redistribution (the state could compel wealthier individuals to share their surplus with the poor). However, where the community itself can distribute resources that are essential for human flourishing the state should refrain from interfering, provided that such distribution is efficient and fair. Where the state is involved in the process of redistribution the law should prohibit arbitrary state action and protect rights holders in order for these individuals to also achieve human flourishing.[367]

As an example of their theory where the state is constitutionally obliged to enable households to flourish, Alexander and Peñalver correctly refer to some provisions in the South African Constitution,[368] and more specifically the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*.[369] The authors argue that the right to have access to adequate housing is the core commitment in the Constitution that would

[362] Singer JW *Entitlement: The Paradoxes of Property* (2000) 131.
[363] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 135.
[364] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 138.
[365] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 139-140.
[366] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 142-143.
[367] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 148-149.
[368] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 154.
[369] 2005 (5) SA 3 (CC).

enable persons to participate in society and attain human development. Successful housing delivery is therefore vital to give effect to human flourishing.[370] In *Modderklip* the Court's unwillingness to remove squatters from privately owned land illustrates the Court's willingness to compel private landowners to accommodate non-owners, which resembles the mutual obligation, and inherent dependence, between members of society.[371] In South Africa the market economy is built on a distribution of resources that currently still resembles past injustices, where a marginalised group were excluded from resources vital for human development. In these circumstances state intervention in the economy is justified, but state action must be non-arbitrary.[372]

Underkuffler's theoretical approach to changes in property structures provides a useful perspective to assess and understand the transformation of occupiers' (and more specifically tenants') rights under the South African Constitution. Underkuffler mentions that the bases upon which previous property regimes were constructed developed according to changes in human needs and conditions, because the composition of property rights in one era could be undesirable in the next. If one agrees that property expresses "an area of individual autonomy and control" then it follows that changes in human needs require the transformation of property, and more specifically the protection of property.[373]

Underkuffler proposes a distinction between the common conception of property and the operative conception of property. According to the common conception of property, individual interests, held by legal rights holders, are protected by property and these rights are presumptively superior to competing public interests. Individual rights can be limited (or overridden) by public interest of a

[370] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 155.
[371] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 157.
[372] Alexander GS & Peñalver EM "Properties of Community" (2009) 10 *Theoretical Inquiries in Law* 127-160 at 158.
[373] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 43. Underkuffler's idea of property and its function is similar to the German idea of property and its societal role in enabling persons to participate in society and achieve human development. This idea of property is also similar to Radin's perception of the role of certain kinds of property, specifically property that is essential for individuals to achieve human development. However, Radin makes a distinction between personal property (important for human development) where self-investment has taken place and fungible property, which is a mere investment backed type of property in which the owner has a commercial interest. Radin's contribution is that one property (for instance rented property) can be both personal property (for the tenant) and fungible property (for the landlord).

compelling nature, but limitations must be justified because property rights have presumptive power.[374] In terms of the operative conception of property, change is imbedded in the concept of property and property rights change according to, and in line with, general social needs.[375] Furthermore, all rights are not protected equally and the tensions that evolve between the individual (and his rights) and society at large form part of the very meaning of property.[376]

Despite her use of the concept of property to define the rights and interests of individuals and society at large, Underkuffler emphasises that property remains a social institution that reflects decisions made by society.[377] Within this societal context the public interest is generally portrayed as "derived aggregative social concerns that provide reasons for coercive legal action," which necessitates the imposition of certain obligations to vindicate these interests, while individual rights are contrasted with the demands of the public interest.[378] Underkuffler argues that if the core values of the claimed property right and the core values of the competing public interest are the same, then there is no basis for concluding that rights have normatively superior value, despite the fact that the protection of property is a core value and an interest to which society grants enhanced protection. It follows that in such circumstances there would be no basis for affording rights presumptive power.[379] "*It is the nature of the interests and the values that they assert – not the identities or numbers of the holders – that should determine normative (and presumptive) power.*"[380]

As a result of the housing shortages in South Africa a number of households are either living in informal settlements or are homeless; in light of the theoretical discussion one can conclude that such households are socially dependent on the state, and to a certain extent on private actors, to enable them to acquire housing, which is a vital resource for human development. This social relationship between marginalised households and the state (or private actors) forms part of a nexus of mutual relationships that are community-based. The role of the community is

[374] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 44-46.
[375] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 48-49.
[376] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 53-54.
[377] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 54.
[378] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 66.
[379] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 74.
[380] Underkuffler LS *The Idea of Property: Its Meaning and Power* (2003) 97.

therefore vital to give effect to the right to have access to adequate housing, because all members of society are socially dependent. During housing shortages the relationship between landlord and tenant is one of the most important social relations, because tenants (especially marginalised tenants) are dependent on both the relationship, which represents the right to occupy the property, and the specific resource involved, namely residential property. During housing shortages this dependence increases, because the tenant might not be able to acquire housing elsewhere. The function of the residential property is to enable the tenant and his family to achieve human development and participate in society, although secure tenure in the form of continued occupation rights is essential to give effect to this ideal. From a normative approach the tenant's interest to continue occupying the premises requires legal protection in the form of rent control, which would result in a restriction on the landowner's right to dispose of his property. During housing shortages this restriction is generally justified, but the question is whether rent control should be imposed temporarily or whether it should form part of a permanent landlord-tenant regime. From a theoretical perspective I argue that the South African government should initiate a change in the landlord-tenant regime that would place more emphasis on the strengthened rights of tenants, because South Africa is already experiencing a change in the culture of property that places more weight on the rights of marginalised occupiers. The current landlord-tenant regime has not transformed in line with the constitutional obligations and therefore requires further change. The new landlord-tenant regime should impose rent control in various rental sectors and the justification for rent control would depend on the specific circumstances in question.

8.4 A new landlord-tenant regime

8.4.1 Introduction

From the discussion in section 8.1 of this chapter one can conclude that the current landlord-tenant scheme in South Africa is constitutionally inadequate on a number of grounds. The problems identified in section 8.1 could be addressed through the enactment of new legislation with the aim, firstly, to promote access to rental housing

as a form of tenure that could help alleviate housing shortages and, secondly, to provide all urban tenants with the necessary level of tenure security. This could take the form of either substantive or procedural protection, or a combination of both. New legislation would be able to address the different areas of landlord-tenant law that are currently not giving effect to the constitutional obligations as stated in sections 25(6), 26(1) and 26(3) of the Constitution. It is doubtful whether amendments to the current landlord-tenant laws would be able to give effect to the constitutional obligations, because it entrenches common law tenure security, which is essentially weak tenure protection.[381] New legislation is a better solution to address the constitutional obligations because it can provide diverse tenants with different tenure rights through the introduction of differentiated rental housing sectors.

In the following section I propose different sectors as part of a new urban landlord-tenant regime. The different sectors consist of three forms of rental housing, namely public rental housing (the public sector), social rental housing (the social sector) and private rental housing (the private sector).[382] The sectors differ in relation to the nature and identity of the landlord; the nature and identity of the tenant; the obligation and need to ensure access to rental housing; the nature and extent of tenure security; and the imposition of rent restrictions. Urban tenants' substantive tenure rights and procedural protection would therefore differ in each of the proposed sectors.

8.4.2 Public sector

In order to address the housing shortages in South Africa and give effect to section 26(1) of the Constitution, the government is currently building houses for homeless persons. The aim is to provide these households with homeownership. It was previously argued that homeownership is not necessarily the form of tenure these households prefer and that more emphasis should be placed on rental housing as an

[381] In section 8.1 it was also mentioned that the common law provides inadequate substantive tenure protection, because it does not afford tenants with continued occupation rights.
[382] See section 8.2 for a discussion of the different landlord-tenant sectors in England, Wales and New York City.

alternative form of tenure that could help alleviate housing shortages.[383] However, in order to promote rental housing as a practical tenure option, the government should first increase the rental housing stock. The government should therefore also build houses (or other forms of formal housing stock) with the aim to increase public rental housing stock. The development of diverse forms of tenure for different income groups (and especially low income groups) is part of the housing policy and the government has recently placed more emphasis on rental housing as a form of tenure that could help alleviate housing shortages. My proposition is that public rental housing (as a form of social housing) is a form of housing that should be made available by the state in order to accommodate low income households. The government should be actively involved in the provision of public rental housing. This would entail that the government should construct the public rental stock, maintain the stock and rent the stock to low income households. When facing housing shortages the government is obliged to respond and introduce measures that would alleviate such shortages. An efficient way to address housing shortages is to provide rental housing, because the state is actively involved in the provision of a basic human need.[384] Where the state is acting as public landlord it is able to assess, evaluate and monitor the provision of housing in order to ensure that this basic right is given effect to. Public rental housing should make housing available to low income households and give effect to the right to have access to adequate housing as stated in section 26(1) of the Constitution.

The public sector should provide rental housing to the lowest income group in dire need of housing. The government, acting as local authority (or local municipality), should fulfil its constitutional duty in section 26(2) of the Constitution as public sector landlord. It is important to note that section 26(2) mandates the state to "take reasonable legislative and other measures" to give effect to the right to have access to adequate housing. Landlord-tenant law is an ideal legal institution in terms of which the government can make affordable housing available to the lowest income group in dire need of housing, because the government can maintain control over the housing stock and be actively involved as landlord. Even though this sector would fulfil a social function in the provision of housing for the most vulnerable

[383] In section 8.1 it was emphasised that homeownership is not the required or most efficient way to alleviate housing shortages.
[384] In section 8.2 it was pointed out that any form of social housing requires state participation.

occupiers, it should be referred to as a public sector because the residential stock would be owned by the state and the local authority would be acting as public landlord. The public sector should be considered as part of public law, because its aim should be to give effect to the constitutional obligations in sections 26(1) and 26(2) of the Constitution (the right to have access to adequate housing), while providing substantive tenure security for marginalised occupiers.

An essential feature of a possible public rental sector is the extent of tenure security provided. It was previously argued that a key aspect of *adequate* housing (section 26(1)) is security of tenure. Public rental housing would not give effect to the right to have access to adequate housing if it does not afford tenure security. The aim of the government should be to provide the lowest income households with the most secure form of tenure.[385] The essence of this form of housing should be to allow marginalised households to establish themselves in their community in order to participate in society and achieve human development.[386]

My proposition is that the local authority landlord should provide public sector tenants with periodic tenancies combined with secure tenure. The local authority and public sector tenants should conclude a common law periodic tenancy rather than a fixed-term tenancy.[387] The point of departure should be that the parties may agree on the terms of the periodic tenancy. The local authority should inform the tenant of his rights and duties in terms of the agreed contract with the aim to assist the household. The basis for this proposition is that a periodic tenancy would allow the tenant to easily serve notice to the local authority and terminate the lease. Low income households often require the necessary mobility to move to a different city or different metropolitan area in search for new job opportunities. A public sector tenancy should not restrain such an individual, because she is bound to a fixed term lease.

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[385] In English landlord-tenant law this is also the point of departure, namely to provide substantive tenure protection for the most vulnerable households in local council housing. By providing tenure security for marginalised occupiers the state would also give effect to section 25(6) of the Constitution, see section 8.1 in this regard.

[386] This proposition is in accordance with Radin's personhood theory (see section 8.3) and the German perspective on the function of property (see section 8.2).

[387] The common law principles regarding tenure protection should therefore remain relevant in the public sector. Where the tenant for instance dies during the lease, the tenancy should vest in the tenant's estate. See section 2.5 in Chapter 2 for more detail regarding the common law rights of tenants.

However, the essence of a periodic tenancy should be that the lease is in principle perpetual.[388] If the tenant should wish to continue occupying the premises, then the local authority landlord would only be able to terminate the lease upon the occurrence of either one of two events, namely where the tenant breached the lease or where there is a ground for termination of the tenancy as provided for in the lease. Both these grounds should be strictly regulated in the applicable legislation. The local authority landlord should be able to terminate the lease where the public sector tenant seriously breached the contractual periodic lease.[389] The breach cannot be trivial. Where the tenant failed to pay the rent, the public sector landlord should be able to claim eviction, because the tenant breached the contract. However, in the case where the tenant breached the contract the legislation should enable the tenant to meet with the local authority in order for the tenant to cure the breach.[390] This could be done by compelling the local authority to first issue a notice to the tenant seeking possession, whereafter the tenant would be able to cure the breach. The tenant's opportunity to cure the breach is a form of purely substantive tenure protection, because the local authority landlord would not be able to end the tenancy and claim eviction on the ground that the tenant breached the lease. If the tenant fails to cure the breach, the periodic tenancy would terminate and the local authority landlord would be able to claim eviction in court. The procedural safeguards discussed in the following paragraphs would apply to all public sector tenants facing eviction. The court must therefore first consider the reasonableness of the decision.

In principle, the local authority should also be able to terminate public sector tenancies on specified grounds and the legislation should include detail regarding the grounds that would allow the local authority to end the tenancy. The grounds for eviction should generally relate to certain acts of the tenant, although it should also include other grounds, including circumstances completely unrelated to the parties involved. The proposed grounds for eviction, as discussed in the following paragraph, are part of a broad guideline that requires more detail.

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[388] In German law the point of departure is also that the lease is perpetual and periodic tenancies are therefore the main form of tenancies delivered; see section 8.2 for more detail in this regard.

[389] From the discussion in section 8.2 it is clear that anti-eviction laws in the landlord-tenant framework usually includes grounds for possession that enable the landlord to evict the tenant in certain circumstances. The grounds for possession are usually included in the legislation with detail regarding each ground.

[390] A similar form of protection is included in both the English social sector and the New York social sector. See section 8.2 for more detail in this regard.

The local authority landlord should be able to initiate eviction proceedings where the public sector tenant damaged the property through acts of waste or where the tenant caused a serious nuisance to neighbouring occupiers and disturbed the domestic peace. Where the tenant used the property for other purposes than housing, especially illegal purposes (for instance drug related activities) the local authority should be able to claim eviction.[391] The local authority landlord should also be able to claim eviction where the tenant sublet the property, received a lump sum for exchanging her tenancy or where she failed to use the property as her primary residence.[392] Where the public sector household occupies a family-size dwelling and the one partner (with all her children) leaves the dwelling as a result of domestic violence, the local authority should be able to evict the remaining partner, because the family-size dwelling is no longer used optimally. In such a case the local authority should generally be required to provide the remaining partner with a smaller dwelling. The local authority should usually be allowed to claim eviction in the case where the dwelling is overcrowded, but the court should be hesitant to grant the order, especially during housing shortages. Finally, unrelated to the conduct of the tenant or landlord, the public sector landlord should be required to evict tenants where the dwellings are unsafe and endanger tenants' health. The local authority should also be able to claim eviction where the building requires reconstruction, rebuilding or repair. In these cases the local authority should afford households temporary alternative accommodation until the renovations are completed. The eviction is therefore temporary and the households should generally be able to return to their homes.[393]

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[391] The preceding mentioned grounds are all directly related to conduct of the lessee that could be described as inappropriate and unacceptable in an open society that is based on human dignity. The extent of the tenant's conduct must be determined in each case and the outcome would depend on specific circumstances of each case.

[392] The essence of public sector tenancies is to enable low income individuals to occupy public housing for consecutive periods in order to establish a home. Where the tenant fails to use the property for this purpose the landlord should be able to evict the tenant and make the property available to a household that would use the property for this purpose.

[393] See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para 44 where the Constitutional Court held that the City (the state) has a duty to ensure safe and healthy buildings on the one hand and the responsibility to take measures that would give effect to the right of access to adequate housing. The housing provision and the safety provision must be read together. See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) where the Constitutional Court had to decide whether it was just and equitable to temporarily relocate occupiers in order to upgrade informal settlements where the occupiers were living. Ngcobo J held that where the government seeks to

If there is a ground for reclaiming possession the local authority should be able to initiate eviction proceedings in court and firstly prove the ground for possession. The grounds for possession function as a form of substantive tenure protection, because the local authority landlord would not be able to end the periodic tenancy without successfully proving a ground for possession in court.

However, due to the vulnerability of these households it is essential that the courts must also consider the eviction order reasonable under the circumstances, once the tenancy has been terminated lawfully. The legislation should compel the courts to consider the reasonableness of the decision, with reference to all contextual circumstances, before granting the eviction order.[394] The reasonableness of the decision should depend on the specific circumstances of the household, including the household's personal circumstances. The court must adopt a broad, context-sensitive approach in adjudicating such a decision and attach the appropriate weight to the various factors in order to make a reasonable decision. If the court concludes that the local authority landlord did prove the ground for possession, but an eviction order would be unreasonable under the circumstances, the court should refuse to grant the order and the tenant's periodic tenancy would continue. Even though the reasonableness requirement forms part of a procedural process, as the court must consider the eviction order reasonable, the effect of this requirement should be to grant the tenant substantive tenure security. The reasonableness requirement would apply to all public sector tenants facing eviction.

If the local authority proves a ground for possession and the court considers the eviction order reasonable, the court should grant the eviction order, provided that the court should also consider the availability of suitable alternative accommodation to the tenant and her family.[395] In light of South Africa's housing shortage, especially for the lowest income group, the legislation must compel the local authority to aim and make available suitable alternative housing as soon as the eviction takes place, especially if the household is unable to acquire alternative accommodation by

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relocate people it must consider the needs of each household in order to understand the extent of the disruption: para 241. As part of the relocation inquiry the Court decided that it must consider the location of the residents, their places of employment and access to schools and clinics from the temporary accommodation: paras 254-255.

[394] This form of protection is similar to the discretionary grounds where reasonableness must be considered by the courts in English law; see section 8.2. The meaning of reasonableness is also based on the English definition.

[395] The suitable alternative requirement is also based on English law; see section 8.2.

themselves. In terms of sections 26(1) and 26(2) the state is obliged to develop statutory and other measures to give effect to the right to have access to adequate housing. In *Port Elizabeth Municipality v Various Occupiers*[396] Sachs J held that there is no unqualified principle that local authorities may evict unlawful occupiers only if alternative accommodation is available, although "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available".[397] The public sector should function as a type of safety net for low income households and it therefore follows that the local municipality landlord should only be able to evict a public sector household in exceptional circumstances if there is no alternative accommodation available.

Alternative accommodation would only be suitable if it offers complete statutory protection, similar to that which the household had, and the accommodation must be suitable to the personal needs of the tenant and his family as regards proximity to place of work, schools and so forth. If the household is unable to find alternative accommodation and the local authority is unable to make available suitable alternative accommodation once the eviction order is granted, the tenant should generally be allowed to continue occupying the dwelling until alternative accommodation is made available. In such a case the eviction order should be suspended for the necessary period as determined by the court. The alternative accommodation requirement therefore functions as a form of procedural protection, because the eviction order would generally be suspended in the case where alternative accommodation is not immediately available, although the effect of this requirement is to grant the tenant a substantive right against homelessness. The alternative accommodation requirement would apply to all public sector tenants facing eviction.

The legislation should therefore provide public sector tenants with substantive occupation rights to the extent that the local authority would only be able to end the tenancy if there is a valid and justifiable ground for termination of the lease. If there is a ground for termination of the lease and the local authority claims eviction in court, which is a purely procedural requirement in terms of the common law and section 26(3) of the Constitution, the court is obliged to consider all the relevant

[396] 2005 (1) SA 217 (CC).
[397] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 28.

circumstances (section 26(3)) before an eviction order can be made. In terms of the proposed legislation, additional substantive protection should be included as part of the eviction procedure to the extent that the court may generally only grant the eviction order if it is reasonable and if suitable alternative accommodation is available. These additional protective measures could be regarded as procedural measures, because they form part of the eviction proceedings and require the courts to consider the contextual circumstances, but their effect would be substantive tenure protection, because evictions would only be granted in exceptional circumstances.

The legislation should also restrict rent levels in the public sector to the bare minimum that would cover basic services and housing maintenance. It is doubtful whether the terminology of rent control would be appropriate in the public sector, because rent control is usually imposed in the private rental sector, or even the social rental sector where private actors provide low cost housing, and it would therefore be more accurate to describe the inclusion (rather than the imposition) of strict rent level restrictions in the public sector as a critical form of tenant protection.

8.4.3 Social sector

The social sector I propose is in line with the aim of the current Social Housing Act 16 of 2008 to the extent that social housing institutions (or associations) should be developed to operate as private actors in the provision of social rental housing for low to medium income households, although combined with state assistance and strict regulation.[398]

The state should firstly promote the private development of rental housing stock more actively by granting loans to private investors at low interest rates; by offering state funds to subsidize housing construction; and by introducing tax incentives for private developers. The South African government has not been successful in significantly alleviating housing shortages and the cooperation between

[398] The importance of state participation is founded on the German approach to housing during a period when Germany experienced extreme housing shortages; see section 8.2.

the state and private actors is therefore vital to address the housing crisis.[399] The government should encourage private actors (and private not-for-profit corporations), by making available public funds and state assistance, to develop residential housing stock and thereafter become involved in the provision of rental housing for low- to medium-income households. However, the state should still be involved in the provision of housing for this higher income group, because housing remains a government responsibility, even though the private corporations would become the landowners of the developments. The state should remain involved in the social sector, but its role should not be as direct as in the public sector. My proposition is that the state should be involved in the social sector as regulator rather than owner of rental housing. The social sector should therefore also help alleviate housing shortages by providing increased access to rental housing, although the rental housing stock should be built by private corporations.

The social housing institution, acting as landlord, should be able to let the residential premises to low- and medium-income households on either fixed-term or periodic tenancies. The housing institution and the tenant should be able to freely conclude a lease that would suit their needs and the lease should be concluded and enforced in terms of the common law, until the statutory regulations become applicable (discussed in the following paragraphs).[400] In the case where the tenant breaches one of the terms of the lease the landlord should be able to terminate the lease and claim an eviction order, whereafter the procedural safeguards, as discussed in the following paragraphs, would provide the necessary procedural protection for the tenant and his family. Similar to the public sector, where the tenant breached one of the terms of the lease the social institution should be able to claim eviction, although the breach should not be trivial. Breach of the lease includes failure to pay the rent. The common law should therefore remain applicable in relation to the contractual agreement, including termination of the lease.[401] However, the legislation should provide social tenants with secure occupation rights through

[399] The importance of the cooperation between the state and private actors is also highlighted in the discussion of New York City's landlord-tenant laws.

[400] Similar to the public sector, the common law principles regarding the substantive tenure rights of tenants should remain relevant in the social sector. Where the tenant for instance dies during the lease, the tenancy should vest in the tenant's estate. This should be the case where the tenant occupies the premises in terms of the original contract or as a statutory tenant. See section 2.5 in Chapter 2 for more detail regarding the common law rights of tenants.

[401] Similar to the pre-1994 Rents Acts the common law can remain intact until the lease terminates; see section 8.2.

the creation of a statutory tenancy upon termination of the contractual lease. A statutory tenancy entails that where the tenant continues to pay the agreed rent and fulfils the other terms of the lease upon termination of the contractual lease, the contractual lease would automatically convert into a statutory tenancy. The essence of this statutory tenancy would be to provide social tenants with substantive security of tenure, as the tenant's right to continue occupation would not come to an end and the social landlord would not be able to claim eviction upon termination of the contractual lease.[402] Similar to the public sector, the core of the social sector is to allow the tenant to choose when she would like to end the tenancy. The aim of the proposed legislation is to afford tenants the option to continue occupying the leased premises.

The statutory tenancy would continue on a periodic basis until the tenant serves a notice to terminate the lease or until the landlord can prove one of the grounds for possession (listed in the legislation) in court.

Similar to the public sector, the grounds for eviction should mostly relate to certain acts of the tenant and include a couple of other grounds related to the landlords' conduct (or needs) or circumstances unrelated to the parties. The following grounds for eviction are mere indications of what might be required. Where the tenant damaged the property, caused a serious nuisance to neighbouring occupiers or used the property for illegal purposes the social housing institution should be able to claim eviction.[403] Social sector tenancies should prohibit subletting and social housing institutions should therefore be able to claim eviction where the tenant sublet the property, received a lump sum for exchanging his tenancy or where he failed to use the property as his primary residence.[404] Where the social housing stock is not used efficiently (for instance where the household occupied a family-size dwelling and one of the partners, with all her children, left the dwelling as a result of

[402] The essence of this statutory tenancy is similar to the pre-1994 South African statutory tenancy and the English statutory tenancy; see section 8.2.

[403] The extent of the tenant's conduct must be determined in each case and the outcome would depend on specific circumstances of each case.

[404] The social sector should enable lower income households to occupy social housing with substantive tenure security in order to establish a home and participate in society. Social housing tenants must therefore occupy the premises themselves and use the dwellings as their primary homes. A social sector tenant should not be able to sublet the property (not even to a person sharing the dwelling with him), because the social housing institution, and the government agency responsible for social housing, should be in control of the social housing stock and its tenants at all times. The social housing institution would not be able to control and assess the social housing stock sufficiently if the dwellings were sublet.

domestic violence) the social housing institution should be able to evict the tenants who fail to use the property optimally. On the other hand, the social housing institution should also be allowed to claim eviction in the case where the dwelling is overcrowded.[405] Different from the public sector, where the social housing institution offered a renewed lease upon termination of a fixed-term tenancy and the social tenant declined this offer, the social housing institution should be able to claim eviction, despite the tenant's acceptance at a later stage. The social landlord should also be able to claim eviction in the case where the tenant served a notice to end the periodic tenancy, but later refuse to vacate. Unrelated to the conduct of the parties, the social landlord should be required to evict social tenants where the dwellings are unsafe and dangers to the tenants' health. Where the buildings require reconstruction, rebuilding or repair the housing institution should also be able to claim eviction.[406] In these cases the social housing institution is not obliged to provide alternative accommodation to the households, because social housing institutions are private landowners and therefore not constitutionally obliged to ensure a right to housing. However, the court should consider the possibility of providing the tenants with a right to return to the premises once the renovations are complete.[407] This possibility would depend on the specific circumstances in each case.

Similar to the public sector, the effect of these grounds should be to provide the tenant with substantive tenure protection, as cancellation should be impossible in the absence of one of the listed grounds. If the landlord can prove a ground for possession in court, then the statutory tenancy would come to an end and the social landlord would be able to claim eviction. The level of substantive tenure protection in the social sector is therefore not as extensive as in the public sector. This is

[405] The essence of these grounds is to enable to social housing institution to remain in control of the housing stock. During housing shortages, especially for the lowest income group, the existing housing stock must be used efficiently. This requires that under occupied dwellings should be fully occupied and overcrowded dwellings should also be prevented, because it leads to unsanitary conditions and overuse.

[406] In the public sector the local authority is obliged to provide temporary accommodation to the evicted tenants until the renovations are complete. The evictions are therefore temporary and the households can reoccupy their houses once it is habitable again. This obligation is justifiable in light of the state's duty to provide access to housing.

[407] See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) where the Constitutional Court had to decide whether it was just and equitable to temporarily relocate occupiers in order to upgrade informal settlements where the occupiers were living.

justifiable because social housing institutions are private landowners and their property rights should not be restricted too extensively. The social sector should ensure security of tenure for tenants, but the social housing institutions' property rights should not be burdened in an unjustifiably harsh manner.

Once the landlord has proven a ground for possession in court, which would generally include the case where the tenant breached one of the terms of the lease, the court must consider all the relevant circumstances (section 26(3)) before granting the eviction order, which forms part of the procedural safeguards. Similar to the public sector, the court must consider all the relevant circumstances, including the personal and socio-economic circumstances of the tenant. However, the availability of alternative accommodation forms part of these circumstances. To incorporate governmental oversight in the activities of the social sector, as a form of procedural protection, the proposed legislation should require prior government approval (preferably from the local authority in the jurisdiction) before a social tenant could be evicted.[408] In essence, the only basis upon which the government should disapprove the eviction order is if there is no rental housing available in the public sector. Where the government disapproves the eviction order on the basis that there is no rental housing available in the public sector, the court should consider this fact as part of the relevant circumstances, but the government's disapproval should not be the deciding factor, as there could be alternative accommodation available in the social sector. In terms of section 26(3) of the Constitution the court should consider all relevant circumstances before granting the eviction order, which provides the tenant with procedural safeguards. It is safe to assume that the courts would only refuse an eviction order in exceptional circumstances. The absence of alternative accommodation is an example of where the courts should be reluctant to grant the eviction order. If there is no public rental housing available and the household is unable to acquire housing in either the social or private sector, then the court should be reluctant to grant the eviction order. In such a case the court should generally be able to grant the eviction order but suspend its implementation for a reasonable period until the state can provide the household with alternative accommodation. The court should have the discretion to decide whether to grant the eviction order, and suspend the implementation thereof, or to grant the eviction order and render the

[408] The inclusion of government approval is similar to the function of the DHCR in New York City; see section 8.2 for more detail in this regard.

person homeless. In the first-mentioned case the social housing institution would be burdened with the duty to continue providing housing for the household on a temporary basis, until alternative housing is made available. During this period the tenant should continue to pay the agreed rent. If the tenant is unable to pay the agreed rent (for instance where the landlord is relying on non-payment as a ground for possession) then the tenant should pay whichever amount possible and the state should pay the balance of the rent. If the tenant is unable to pay any rent, then the state should pay the entire amount until the state can make alternative accommodation available in the public sector.[409]

In order to prevent tenant exploitation the legislation should place restrictions on rent increases, although the imposition of strict rent control might be too harsh and a more flexible system of rent restrictions should therefore be imposed. The legislation could for instance allow rent increases every three years with reference to rents of comparable dwellings in the vicinity. The government should be involved in allowing rent increases and a governmental body should appointed to oversee (and regulate) rent increases and the eviction of tenants, as mentioned earlier.

8.4.4 Private sector

In terms of the proposed legislation the private sector should consist of private landowners and tenants with medium to high income. The point of departure is therefore that this sector should accommodate the higher income households who prefer to rent privately and who require the necessary mobility associated with rental housing, without the constraints coupled with homeownership. If the proposed public and social sectors could provide affordable secure rental housing for low to medium income occupiers and function as a type of safety net for vulnerable occupiers, then the private sector would generally make housing available for higher income tenants. The private sector should remain largely unregulated and function mostly according to the dictates of the free-market, because it should generally not be necessary to afford the higher income households increased tenure protection in the form of

[409] The basis for this proposition is *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) and *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ).

substantive occupation rights. In the private sector private landowners should be able to rent their property to tenants in terms of the common law, which includes common law principles regarding termination of the lease and rent setting. Landlords in the private sector should be able to set their own rent levels. Weak tenure rights form part of landlord-tenant regimes and are therefore not necessarily unconstitutional, if the tenants are not particularly vulnerable. It was previously argued that all urban tenants are not entitled to substantive tenure security and the Constitution does also not guarantee substantive tenure security for all occupiers. The aim of rent regulation and the imposition of substantive tenure security are to enable lower income households to continue occupying a certain dwelling that resembles their home. The justification for rent control, namely to accommodate and protect vulnerable occupiers during housing shortages, does not apply to the proposed private sector, because this sector should accommodate higher income households.

However, in terms of section 26(3) of the Constitution no person may be evicted without a court order made after considering all the relevant circumstances. In the private sector the court must consider all the relevant circumstances before granting the eviction order and private sector tenants therefore enjoy the procedural safeguards in section 26(3) when facing eviction proceedings. The court's interpretation of this requirement could indirectly provide tenants with substantive tenure security, although it would depend on the specific circumstances. Section 26(3) can imply some substantive protection, even for higher income private tenants in a free-market environment. Private sector tenants, like social sector tenants, should be able to resist eviction, even upon termination of the lease, by arguing in court that an eviction order would have an unjustifiably harsh impact on the tenant or his family that outweighs the commercial interest of the landlord in reclaiming the property.[410] It is safe to assume that the courts would only refuse an eviction order in exceptional circumstances. An example of where the court should be able to refuse eviction is where the eviction order would render the household homeless. If the household is unable to find alternative accommodation in the private sector or the social sector, then the public sector should function as a last resort where the

[410] This proposition is based on provisions in the German Civil Code and Radin's theoretical analysis regarding the importance of personal property in relation to fungible property; see sections 8.2 and 8.3.

household would be able to acquire alternative accommodation. The duty to make available access to adequate housing, which includes the duty to prevent households from becoming homeless, is a state duty and the state should be joined in eviction proceedings where the eviction order might render the household homeless. In such a case the occupiers should apply for a joinder and the state should aim to provide suitable alternative accommodation to the occupiers in the form of public rental housing. If the state is unable to immediately provide public rental housing when the eviction order is granted, then the court should generally suspend the eviction order until the state can make housing available. Similar to the social sector, the court should have the discretion to decide whether to grant the eviction order, combined with the suspension of the order, or just the eviction order that would have immediate effect. If the court decides to suspend the eviction order, the private landowner would be burdened with the duty to temporarily accommodate the vulnerable household until the state can fulfil its constitutional duty and provide alternative accommodation. Similar to the social sector, the tenant should continue to pay the agreed rent, unless she is unable to. In such a case the state should assist the tenant and make the rental payments on her behalf. The state should either pay a percentage of the agreed rent or the whole amount, depending on the financial circumstances of the tenant.[411]

The courts have also recently held that the state should be joined in proceedings where private landowners claim eviction of unlawful occupiers (who previously rented the property) and where the eviction order would result in the occupiers being homeless.[412] The court held that the interests of the occupiers, private landowner and state (municipality) would be protected if the state was joined, because the state has a duty to provide the evicted tenants with adequate housing.[413]

[411] The basis for this proposition is *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) and *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ). See section 1.1.2 in Chapter 1 for a discussion of the *Blue Moonlight* case.
[412] *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W).
[413] *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W) para 18.

8.5 Constitutional compliance

The following paragraphs firstly provide a brief introduction of the recent case law where the courts had to decide whether to grant an eviction order if the result would have been to render the unlawful occupiers homeless. The effect of the decisions is important in light of the proposed legislation, because the proposed legislation would entrench the essence of these decisions, which is an overall effort to combat homelessness. In order to give effect to the constitutional obligations in sections 25(6), 26(1) and 26(3) of the Constitution, and to combat homelessness, the rights of private landowners have to be restricted. The second part of this section assesses the proposed legislation, which brings about a deprivation in terms of section 25(1) of the Constitution, to determine whether it would be in compliance with the Constitution.

The South African private rental market is currently providing housing to a range of households with various income levels, including the poorest of the poor. The courts have recently suspended the right of private landowners to evict tenants holding over if eviction would result in the household being homeless, although the courts applied the Prevention of Illegal Eviction form Unlawful Occupation of Land Act 19 of 1998 (PIE) as basis for its decision.[414] My proposition in terms of the proposed legislation, which was highlighted in the discussion of the social and private sectors above, is that the courts should only be able to evict tenants in exceptional circumstances if it would result in the tenant and his family becoming homeless, although the private sector should not be burdened with the duty to make housing available for the poorest households. The state is obliged to provide housing and the public sector should function as a type of safety net where persons facing eviction in both the social and private sectors should be able to acquire secure rental housing.

The more problematic question is what the role of the private sector should be in the case where the state is unable to make suitable alternative accommodation available in the form of public rental housing once the eviction order is granted.

[414] *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (SCA).

In *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)*[415] the Constitutional Court confirmed the decision in the Supreme Court of Appeal,[416] where the Court held that unlawful occupiers could remain on private land until the state made alternative accommodation available, but the state had to pay compensation to the landowner for the period during which he was denied use of his land. In *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another*[417] the high court decided that unlawful occupiers could remain on private land for a period of two months, whereafter they were evicted. During this period the state had to pay the private landowner "an amount equivalent to the fair and reasonable monthly rental of the said premises".[418]

One should note that the courts have a discretion to refuse eviction orders in terms of PIE (promulgated in terms of section 26(3)), which mandates the courts to consider all relevant circumstances. The courts can therefore still grant the eviction order even if no alternative accommodation is available.[419] From the case law it appears that the courts have recently interpreted PIE to refuse eviction orders in the case where such an order would render the occupiers, including urban tenants, homeless. The state has also been joined in these proceedings, because the state has a duty to provide measures that would enable all persons to gain access to adequate housing. However, the courts allow the continued occupation of unlawful occupiers on private land until the state can make alternative accommodation available, provided that some form of compensation is paid to the private landowner. The effect of these decisions is to force private landowners to make their property available to unlawful occupiers in desperate need of housing, while this burden is accompanied by compensation.

The aim of the proposed legislation is to strengthen the occupation rights of tenants. In terms of the proposed legislation private landowners could be burdened with the duty to afford continued occupation rights for tenants, although the private

[415] 2005 (5) SA 3 (CC).
[416] See *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA).
[417] [2010] JOL 25031 (GSJ).
[418] *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another* [2010] JOL 25031 (GSJ) para 196.
[419] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

landowner is entitled to the agreed rent. Social housing institutions should allow social sector tenants to remain in the premises upon termination of the contractual lease as statutory tenants. Statutory tenants are still obliged to continue paying rent, but the right of the social housing institution to terminate the lease and claim eviction is restricted. In both the social and private sectors the courts should generally allow the tenant to remain in the premises if the eviction order would render the household homeless, provided that the tenant's right to continue occupying the premises is provisional until the state can make alternative accommodation available. In this case the private landowner remains entitled to the agreed rent. If the tenant is unable to pay the rent, then the state should assist the tenant and either pay the whole amount or a portion of the rent, depending on the financial circumstances of the tenant.

The result of the proposed legislation would be to restrict the property rights of private landowners, which would amount to a deprivation[420] in terms of section 25(1) of the Constitution. Section 25(1) deals with limitations on property and it states that "[n]o person may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." The proposed legislation must comply with the Constitution and if it contravenes section 25(1) it would be invalid, while section 39(2) of the Constitution states that the courts must promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. The anti-eviction measures in the proposed social and private sectors must comply with section 25(1) of the Constitution, because the effect of the measures is to limit the private landowners' property rights.

In order to determine whether the proposed legislation would comply with section 25(1) one should first establish that the affected interest is property, as section 25(1) states that no one may be deprived of *property*. According to Van der Walt one could assume that private landowners' property, and more specifically residential property that is rented out in terms of the proposed legislation, would be included as property in terms of section 25(1), because it is a real right in land (immovable tangible property) and therefore one of the categories of property that is

[420] See Van der Walt AJ *Constitutional Property Law* (2005) 121-178 for a detailed discussion regarding the definition, requirements and application of a deprivation. At 131 Van der Walt defines a deprivation as "properly authorized and fairly imposed limitation on the use, enjoyment, exploitation or disposal of property for the sake of protecting and promoting public health and safety, normally without compensation."

undoubtedly constitutional property.[421] The proposed legislation would only affect one of the private landowner's property entitlements, namely the right to dispose of the property, which includes the right of use.[422]

In the proposed social sector the tenant would be allowed to remain in the leased premises upon termination of the lease as a statutory tenant. The social housing institution's right to evict the tenant upon termination of the lease is suspended, because the lease continues through the operation of the proposed legislation. The tenant would generally also be able to temporarily remain in the premises upon termination of the statutory lease in exceptional circumstances. The example used in following paragraphs is where an eviction order would render the household homeless. In such a case the court should be able to suspend eviction until the state can find alternative accommodation. In the proposed private sector the private landowner's right to evict the tenant could be suspended in certain circumstances, depending on the socio-economic circumstances of the tenant. An example of where the courts are inclined to suspend eviction orders is where the order would render the household homeless. This ground for suspension is used in the following paragraphs to illustrate the constitutional validity of such a suspension, but it is important to note that in terms of the proposed private sector the courts should be able to suspend eviction orders on the basis of other grounds as well. If the eviction order would render the household homeless the tenant should generally be able to remain in the leased premises, although on a temporary basis until the state can provide alternative accommodation. In both sectors the private landowner's right to dispose of the property is limited as a result of the proposed legislation. The right to dispose of the property forms part of private landowners' range of property entitlements, including the right to use and exclude.

The next question is whether the proposed legislation and more specifically the tenant's statutory right to continue occupation upon expiration of the lease, amounts to a deprivation. In terms of the proposed social sector the tenant would be able to continue occupying the leased premises upon expiration of the contractual lease as a statutory tenant without the landowner's consent. The court would also be

[421] Van der Walt AJ *Constitutional Property Law* (2005) 118.

[422] A deprivation of just one entitlement affects the assessment of whether the deprivation was arbitrary, but not the property or deprivation issues: *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

able to suspend the eviction order upon termination of the statutory lease in exceptional circumstances, including where the eviction order would render the household homeless. In the proposed private sector the private landowner's right to evict the tenant could also be limited on a temporary basis if the eviction order would render the household homeless. The unlawful tenant would therefore be able to continue occupying the property until the state can make alternative accommodation available.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[423] the Constitutional Court defined a deprivation as "any interference with the use, enjoyment or exploitation of private property".[424] Van der Walt makes a distinction between deprivations and expropriations,[425] whereafter he concludes that a "deprivation could be defined as properly authorized and fairly imposed limitation on the use, enjoyment, exploitation or disposal of property for the sake of protecting and promoting public health and safety, normally without compensation."[426] The effect of the anti-eviction measures in both the social and private sectors is to limit private landowners' right to evict tenants and one can conclude that it interferes with landowners' right to use and dispose of their property, even if only on a temporary basis. The anti-eviction measures in both sectors are therefore clearly deprivations of property. In both the social and private sectors private landowners' right to dispose of their property is restricted in order to provide some tenure protection for tenants. In the case where the private landowner is unable to evict the tenant as a result of the possibility of rendering the household homeless, the aim of the temporary restriction is clearly to avoid an unjustifiable result.

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[423] 2002 (4) SA 768 (CC).

[424] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

[425] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 58 Ackermann J held that all expropriations are a subspecies of deprivations.

[426] Van der Walt AJ *Constitutional Property Law* (2005) 131. In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 53-64 the Court moved away from the substantive deprivation test, as developed in *FNB*, and applied a thinner rationality test. The result was to restrict the scope of deprivations to only significant deprivations. See Van der Walt AJ *Constitutional Property Law* (2005) 158-160 for some criticism on this limited approach.

A valid deprivation in terms of section 25(1) must be imposed by law of general application, which exemplifies the general rule of law that the limitation must form part of properly authorized and valid law.[427] It is unlikely that statutory deprivation of property would fall foul of this requirement unless it burdens a small group of individuals in an unfair manner, although most deprivations only affect some persons.[428] Van der Walt mentions that "the fact that a law affects one class of people or one class of property to the exclusion of others will generally not mean that this requirement is not met."[429] The proposed legislation would affect all private landowners who choose to lease their residential premises to tenants, either as a social institution (regulated in terms of the social sector) or a private landowner (regulated in terms of the private sector). The automatic creation of a statutory lease upon termination of the contractual lease in the proposed social sector would be available to all social sector tenants as a form of substantive tenure security. This imposition would therefore be generally applied in all social sector tenancies. The restriction on the institution's right to evict the tenant upon termination of the statutory lease where eviction could result in the household becoming homeless should be interpreted as an exceptional form of protection. The application of this form of exceptional protection is however still general, because it should be generally applied in all eviction cases where the eviction order might render the household homeless. In the proposed private sector private landowners' right to evict tenants is generally also restricted in exceptional circumstances, including where the eviction order might render the household homeless, and this rule is applicable to all private landlords. The rule is therefore generally applicable and all private landlords in the private sector are subject to this rule, although it would only be applied in a number of cases. This does not mean that the law is not generally applicable.

The limitations in the proposed legislation must be non-arbitrary in order to comply with section 25(1) of the Constitution. In terms of the general application requirement it is already established that the law cannot burden a small group of individuals, although such a deprivation would also be arbitrary. A regulatory deprivation would be arbitrary if it is disproportionate in relation to the public benefit it

[427] Van der Walt AJ *Constitutional Property Law* (2005) 143.
[428] Van der Walt AJ *Constitutional Property Law* (2005) 143-144.
[429] Van der Walt AJ *Constitutional Property Law* (2005) 240.

serves and the private harm it causes.[430] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[431] the Constitutional Court opted for a thick, proportionality-type approach when interpreting the non-arbitrariness requirement.[432] In *FNB* Ackermann J adopted a substantive interpretation of the non-arbitrariness requirement and the point of departure is that a deprivation is arbitrary if there is insufficient reason for it or if it is procedurally unfair.[433]

In order to determine whether there is sufficient reason for the deprivation Ackermann J lists a number of relations that have to be considered by the court. The list includes the relationship between means employed (the deprivation) and ends sought to be achieved (the aim of the deprivation); the relationship between the purpose of the deprivation and the person affected; and the relationship between the purpose of the deprivation and the nature of the property (including the extent of the deprivation in relation to the property).[434] Ackermann J also mentions that where the deprivation affects ownership of land (or a corporeal moveable) or where the deprivation "embraces all the incidents of ownership" a more compelling reason would have to be established in order for the deprivation to constitute sufficient reason.[435] The arbitrariness test, as developed by Ackermann J, has to be applied to the specific facts of each case and is therefore a contextual inquiry.[436]

One should first establish whether there is a relationship between the deprivation and the aim of the deprivation. In terms of the proposed legislation the deprivation is the anti-eviction measures that impose a limitation on the private landowners' right to dispose. As mentioned previously, two anti-eviction measures

[430] Van der Walt AJ *Constitutional Property Law* (2005) 145.
[431] 2002 (4) SA 768 (CC).
[432] See Van der Walt AJ *Constitutional Property Law* (2005) 145-148 for more detail on the different approaches the courts use when considering the arbitrariness of a deprivation. After the *FNB* decision the thick proportionality test was followed by the courts.
[433] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[434] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[435] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.
[436] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. The contextual approach developed by Ackerman J is in accordance with Radin's proposition (see section 8.3) that the justifiability of rent control, which is always a form of regulation, depends on the specific circumstances.

are included in the proposed social sector, where the legislation creates a statutory tenancy upon termination of the lease and in the exceptional cases where the eviction order would for instance render the household homeless. The aim of the statutory tenancy is to provide continued occupation rights for low to medium income households, while the aim of prohibiting eviction in the case where the eviction order would render the household homeless is to combat homelessness. Limiting the landowner's right to evict the tenant (the deprivation) is directly related to the tenant's right to continue occupying the property (the aim of the deprivation). Stated differently, the tenant's statutory right to continue occupying the property cannot be realised without limiting the landowner's right to evict the tenant (the right to dispose). In the proposed private sector the deprivation occurs in exceptional cases, one being where eviction would render the household homeless. The essence of the deprivation is to limit the landowner's right to evict the tenant upon termination of the lease where eviction would result in homelessness. The aim of the deprivation is to prevent homelessness, because in the absence of the deprivation the household would have become homeless. There is therefore a sufficient relationship between the deprivation and the aim of the deprivation.

According to the arbitrariness test there must also be a sufficient relationship between the purpose of the deprivation and the person affected. In the proposed social sector one can easily recognize the relationship between strengthened occupation rights for low to medium income households and social housing institutions, because the essence of the proposed social sector is to provide secure occupation rights for these households. There is also a clear link between the prevention of homelessness (where the eviction order would render the household homeless) and the nature of social housing institutions. The social sector should be strictly regulated and the social housing institutions should preferably come into being with state assistance. In the context of the aim and function of the entire social sector it is evident that there is a relationship between strengthened occupation rights for social tenants, measures that prevent homelessness, and the nature of social housing institutions.

The more difficult relationship to identify in the private sector is the relationship between the aim to prevent homelessness, in the case where the eviction order would render the household homeless, and the private landlord.

Private landowners should generally not be burdened with the duty to make housing available for persons in desperate need of housing, this is a state duty. However, in the exceptional case where the eviction of a tenant (and her family) would render the household homeless, because the lease expired and the state is unable to provide immediate alternative accommodation, one could argue that there is a relationship between the private landowner and the aim to prevent homelessness.[437] In such a case the private landowner already made his property available on the rental market and is voluntarily in the business of providing housing. In the context of housing shortages one could argue that there is a relationship between a private landowner who voluntarily makes his property available for rental housing and the general aim to prevent homelessness, especially in the case where the specific landlord already made his property available to a household facing homelessness. In the exceptional case where the eviction order would render the private sector tenant homeless one could argue that there is a relationship between aim of the deprivation and the private landowner, although this relationship could be more difficult to establish in different circumstances. The example of the possibility of homelessness succeeds as a non-arbitrary deprivation on this point, because it is related to the nature of the landlord, but a different example might not be that easy to prove.

In terms of the arbitrariness test one should also consider the relationship between the purpose of the deprivation and the nature of the property. In both the social and private sectors it is clear that there is a sufficient relationship between the purpose of anti-eviction measures (in the form of statutory continued occupation rights and measures that prevent homelessness) and the nature of the landowners' right to dispose, because the right to dispose enables landowners to make decisions about their property, including the right to evict tenants upon termination of the lease, while the purpose of anti-eviction measures is to provide tenure security and prevent evictions where it would cause homelessness.

According to Radin's personhood theory the private landowner's interest in the property is fungible, because the landowner has a mere commercial interest in the property, which is evident due to the fact that it is placed on the rental market as an investment. The tenant's interest in the rented property is personal, because self-

[437] In terms of Alexander & Peñalver's community based theory (see section 8.3) one could argue that there is always a relationship between vulnerable occupiers and landowners, because all relationships in a community depend on each other for resources.

investment has taken place. The effect of the proposed anti-eviction measures is to place more weight on the interest of the tenant. The tenant's home interest, as a form of personal property, is deemed more important by social consensus than the landlord's fungible property and therefore requires more stringent protection.[438] In German law tenure security in residential property is important, because it enables tenants to reach a level of personal autonomy. The security of the home is central for the individual (or household) to make decisions and participate in society. German constitutional law distinguish between the personal autonomy interest of the tenant and the commercial interest of the landlord. The further the interest is from the person, the stricter the regulation may be, while the social purpose of property justifies increased statutory restrictions on the rights of private landowners. In terms of Radin's personhood argument and the German perception of tenants' tenure security, the interest of the tenant is deemed more important than the right of the landowner to dispose of the property. In the South African context I argue that this is the case where an eviction order would render the household homeless.

In terms of the arbitrariness test, as developed by Ackermann J in *FNB*, one can conclude that the proposed legislation would be constitutionally valid if it complies with the section 25(1) requirements (the proposed legislation must be generally applicable and non-arbitrary), because the reasons for the deprivation would be sufficient in light of the contextual factors. Even though private landowners' ownership rights would be affected by the proposed legislation, the right to dispose of property is the only property entitlement affected by the legislation. The right to dispose of the property would also be restricted temporarily, while the landowner would remain entitled to monthly payments. The nature of the right affected is the entitlement to dispose of the property and the extent of the deprivation is limited, because it is temporary.[439] In light of the preceding paragraphs one can conclude that the proposed anti-eviction measures would be non-arbitrary, as long as there would be a sufficient relationship between the affected landowners, the affected

[438] Radin MJ "Property and Personhood" (1981-1982) 34 *Stanford LR* 957-1015 at 978-979. Radin refers to her theory as a non-utilitarian moral theory, because certain claims are better protected based on their moral value: at 985.

[439] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100 where the Court found that one has to consider relationship between the nature of the right and the extent of the deprivation as part of the arbitrariness test.

property and the purpose of the deprivation.[440] The example used in both the social and private sector, namely where the eviction order would render the household homeless, is a valid deprivation, although in terms of the proposed social and private sectors the courts should be able to suspend evictions orders in other exceptional circumstances as well. The circumstances of each case should be considered by the courts to determine whether the deprivation is non-arbitrary and therefore constitutionally valid.

If one of the deprivations in terms of the proposed legislation is found to be inconsistent with section 25(1), then the court should first determine whether the deprivation could not be justified under section 36 of the Constitution.[441] Section 36 is the general limitations clause in the Constitution and all rights in the Bill of Rights can be restricted in terms of this provision. An arbitrary deprivation can therefore be justified in terms of section 36, although it is unlikely.[442] If the deprivation is valid under section 25(1), or justified in terms of section 36, then the court must determine whether the deprivation amounts to an expropriation,[443] because expropriations are a subset of deprivations.[444] If the deprivation is invalid under section 25(1) and unjustifiable in terms of section 36, the deprivation would be unconstitutional.[445] The deprivations in terms of the proposed legislation would not amount to expropriations, because the proposed law is not aimed at authorizing expropriations. All expropriations must be authorized in terms of law of general application and the proposed legislation does not authorize expropriations.[446]

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[440] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108; Van der Walt AJ *Constitutional Property Law* (2005) 154.

[441] This view was suggested in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 110 and followed in *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 34.

[442] See Van der Walt AJ *Constitutional Property Law* (2005) 150-151 in this regard and *Nhlabati and Others v Fick* 2003 (7) BCLR 806 (LCC) para 32 where the court argued that in some circumstances an unjustified expropriation could be justified.

[443] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

[444] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 57-58.

[445] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 58.

[446] See sections 25(2)-(4) of the Constitution and Van der Walt AJ *Constitutional Property Law* (2005) 179-283 for more detail regarding expropriations.

8.6 Concluding remarks

The current landlord-tenant laws have not transformed urban residential tenancy in line with the Constitution. The Rental Housing Act and the Social Housing Act entrench common law tenure rights for urban tenants, which is associated with weak substantive tenure protection. The Prevention of Illegal Eviction from Unlawful Occupation of Land Act (PIE) has recently been interpreted by the courts to provide urban unlawful tenants with substantive tenure protection in order to prevent the occupiers from becoming homeless. However, this form of protection remains temporary until the state can accommodate the occupiers with alternative accommodation and is therefore limited in its application and effect. The continued weak substantive tenure rights of urban tenants fail to give effect to sections 25(6) and 26 of the Constitution. Section 25(6) mandates race related tenure reform, while section 26(3) could be interpreted by the courts as a general class related reform measure. The socio-economic weakness of urban tenants could justify better substantive tenure rights in terms of section 26(3). The government has also not sufficiently considered rental housing as a form of tenure that could assist the alleviation of housing shortages and the current landlord-tenant laws have therefore not transformed the institution of residential tenancy in line with sections 26(1) and 26(2) of the Constitution.

In order to develop the South African landlord-tenant law in line with the constitutional obligations the legislature should enact new legislation. The legislation should ensure strengthened substantive tenure rights for urban tenants, but the legislation must be able to afford different levels of tenure security for different tenants. The legislature should therefore introduce regulatory measures with a context-sensitive approach that would provide the required level of tenure security in each individual case. The state should be involved in the provision of rental housing in order to alleviate housing shortages, while ensuring that marginalised occupiers enjoy the required level of tenure security. Private landowners should also be involved in the provision of rental housing, albeit on a limited scale. The legislation must ensure that the strengthened rights of tenants and the rights of private landowners are balanced in a just and equitable manner.

South Africa is currently experiencing a change in the culture of property to the extent that the common law right of private landowners to evict marginalised occupiers who unlawfully occupy land is no longer absolute. This is evident from the recent case law, including *Modderklip* and *Blue Moonlight*. The culture of property, and the function of immovable property as a limited housing resource, is transforming to enable the majority of vulnerable South Africans to obtain housing, which is an essential resource for human development. The current landlord-tenant regime has not transformed in line with this constitutional mandate, neither has the perception of regulatory law changed to emphasise the importance of tenure security, which enables marginalised households to participate in society, make their own decisions and achieve personal autonomy. Regulatory laws should be perceived as a mechanism that empowers low income households to achieve human flourishing rather than an intrusion on private landowners' rights that constantly requires justification. The relationship between landlord and tenant forms part of a social obligations framework that functions within a community based sphere of relationships, where individuals are dependent on each other for limited resources that are essential for human development. The landlord-tenant regime in South Africa should transform to reflect the broader change in the culture of property, but this change requires a new conception of ownership and the entitlements it consists of.

Abbreviations

Brooklyn LR - Brooklyn Law Review

CCR - Constitutional Court Review

CLJ - Cambridge Law Journal

DePaul LR - DePaul Law Review

Edinburgh LR - Edinburgh Law Review

ESR Review - Economic and Social Rights of South Africa Review

Fordham LR - Fordham Law Review

Fundamina - Fundamina: A Journal of Legal History

JAL - Journal of African Law

LQR - Law Quarterly Review

McGill LJ - McGill Law Journal

SAJHR - South African Journal on Human Rights

SALJ - South African Law Journal

SAPL - South African Public Law

Stanford LR - Stanford Law Review

Stell LR - Stellenbosch Law Review

THRHR - Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

TSAR - Tydskrif vir die Suid-Afrikaanse Reg

Yale LR - Yale Law Review

Bibliography

A

Abas P Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Bijzondere Overeenkomsten (2007) Deventer: Kluwer

African National Congress Reconstruction and Development Programme (1994) Johannesburg: African National Congress by Umanyano Publications

http://www.anc.org.za/rdp/rdp.html (27 November 2008)

Alexander GS The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence (2006) Chicago: University of Chicago Press

Alexander GS & Peñalver EM "Properties of Community" (2009) 10 Theoretical Inquiries in Law 127-160

Allen T Property and the Human Rights Act 1998 (2005) Oxford: Hart

B

Badenhorst PJ, Pienaar JM & Mostert H Silberberg & Schoeman's The Law of Property (5th ed 2006) Durban: Butterworths

Balchin P & Rhoden M Housing Policy: An Introduction (4th ed 2002) London: Routledge

Barker K "Review of Housing Supply – Delivering Stability: Securing our Future Housing Needs" (HM Treasury and ODPM, March 2004)

http://image.guardian.co.uk/sys-files/Guardian/documents/2004/03/17/Barker.pdf (accessed 7 April 2009)

Bernstein A Land Reform in South Africa: A 21st Century Perspective (2005) Johannesburg: Centre for Development and Enterprise

Bessel R Germany after the First World War (1993) Oxford: Oxford University Press

Birks P "Before we Begin: Five Keys to Land Law" in Bright S & Dewar J (eds) Land Law. Themes and Perspectives (1998) 458-486 Oxford: Oxford University Press

Blandy S "Housing Standards in the Private Rented Sector and the Three Rs: Regulation, Responsibility and Rights" in Cowan D & Marsh A (eds) Two Steps Forward: Housing Policy in the New Millennium (2001) 73-92 Bristol: Policy Press

Brennan TJ "Rights, Market Failure and Rent Control: A Comment on Radin" (1988) 17 Philosophy and Public Affairs 66-79

Bridge SB Residential Leases (1994) London: Blackstone Press

Bright S "Ending Tenancies by Notice to Quit: The Human Rights Challenge" (2004) 120 LQR 398-403

Bright S “Article 8 again in the House of Lords: Kay v Lambeth LBC; Leeds CC v Price” [2006] Conveyancer and Property Lawyer 294-308

Bright S Landlord and Tenant Law in Context (2007) Oxford: Hart

Budlender G “The Constitutional Protection of Property Rights” in Budlender G, Latsky J & Roux T (eds) Juta’s New Land Law (1998) 1-70 Cape Town: Juta

Budlender G “Justiciability of the Right to Housing – The South African Experience” in Leckie S (ed) National Perspectives on Housing Rights (2003) 207-219 New York: Martinus Nijhoff Publishers

Burchell EM “Statutory Tenant’s Rights” (1950) 67 SALJ 211-213

C

Calderwood DM Native Housing in South Africa (1953) LLD thesis University of Johannesburg

Carey Miller DL (with Pope A) Land Title in South Africa (2000) Cape Town: Juta

Carey Miller DL & Pope A “South African Land Reform” (2000) 44 JAL 167-194

Cave M “Every Tenant Matters: A Review of Social Housing Regulation” (June 2007) http://www.communities.gov.uk/documents/housing/pdf/320365.pdf (accessed 7 April 2009)

CBN Archive “Plan to Re-implement Rent Controls” Cape Business News November 1998

http://www.cbn.co.za/archive/98-nov/rent.htm (accessed 10 July 2008)

Chewi L “Recommendations of the United Nations Special Rapporteur on Adequate Housing Following his Mission to South Africa” (2008) 21 ESR Review 24-25

Clarke D “Long Residential Leases: Future Directions” in Bright S (ed) Landlord and Tenant Law. Past, Present and Future (2006) 171-190 Oxford: Hart

Coombe RJ “‘Same as it ever was’: Rethinking the Politics of Legal Interpretation” (1989) 34 McGill LJ 603-652

Cooper WE The Rent Control Act (A Supplement to the South African Law of Landlord and Tenant) (1977) Cape Town: Juta

Cooper WE Landlord and Tenant (2nd ed 1994) Cape Town: Juta

Costa A “Landlords and Les Miserables” (2003) March De Rebus 22-24

Cowan D & McDermont M Regulating Social Housing, Governing Decline (2006) Abingdon: Routledge-Cavendish

Coyle DJ Property Rights and the Constitution: Shaping Society through Land Use Regulation (1993) Albany: State University of New York Press

Craven MCR The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (1995) Oxford: Oxford University Press

Cross C “Why the Urban Poor Cannot Secure Tenure: South African Tenure Policy under Pressure” in Durand-Lasserve A & Royston A (eds) Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries (2002) 195-208 London: Earthscan Publications

Cullingworth JB Problems of an Urban Society Volume II: The Social Content of Planning (1973) London: Allen and Unwin

D

DETR “Quality and Choice: A Decent Home for All, The Housing Green Paper” (April 2000)

http://www.communities.gov.uk/documents/housing/pdf/138028.pdf (accessed 28 April 2009)

De Vos P “Pious Wishes or Directly Enforceable Rights?: Social and Economic Rights in South Africa’s 1996 Constitution” (1997) 13 SAJHR 67-101

De Vos P “The Essential Components of the Human Right to Adequate Housing – A South African Perspective” in Brand D & Russell S (eds) Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives (2002) 23-33 Pretoria: Protea Book House

De Wet JC “Huur Gaat voor Koop” (1944) 8 THRHR 74-87, 166-194, 226-251

Donaldson R & Marais L “Preface: Transforming Rural and Urban Spaces” in Donaldson R & Marais L (eds) Transforming Rural and Urban Spaces in South Africa during the 1990s – Reform, Restitution, Restructuring (2002) 1-10 Pretoria: Africa Institute of South Africa

Donaldson R, Marais L, Rambali K, Maharaj B, Bob U & Kwaw I “Land Restitution and Land Tenure: An Introduction” in Donaldson R & Marais L (eds) Transforming Rural and Urban Spaces in South Africa during the 1900`s – Reform, Restitution, Restructuring (2002) 11-24 Pretoria: Africa Institute of South Africa

Donnison DV The Government of Housing (1967) Harmondsworth: Penguin

Droste C & Knorr-Siedow T “Social Housing in Germany” in Whitehead C & Scanlon K (eds) Social Housing in Europe (2007) 90-140 London: London School of Economics and Political Science

Dukeminier J, Krier JE, Alexander GS & Schill MH Property (6th ed 2006) New York: Aspen Publishers

Du Plessis L “‘Subsidiarity’: What’s in the Name for Constitutional Interpretation and Adjudication?” (2006) 17 Stell LR 207-231

Durand-Lasserve A & Royston L “International Trends and Country Contexts – From Tenure Regularization to Tenure Security” in Durand-Lasserve A & Royston A (eds) Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries (2002) 1-36 London: Earthscan Publications

E

Epstein RA “Rent Control and the Theory of Efficient Regulation” (1988) 54 Brooklyn LR 741-774

Evans DL & Smith PF Evans: The Law of Landlord and Tenant (2nd ed 1985) London: Butterworths

F

Fischer WW “The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights” in Lacey MJ & Haakonssen K (eds) A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991 (1991) 266-365 New York: Cambridge University Press

Flockton C “Housing Situation and Housing Policy in East Germany” in Flockton C & Kolinsky E (eds) Recasting East Germany: Social Transformation after the GDR (1999) 69-82 London: Frank Cass

Fourie JSA “Saaklike Regte by Huur en Onderhuur” (1978) 41 THRHR 299-306

Fox L Conceptualising Home: Theories, Laws and Policies (2007) Oxford: Hart

Friedman MR Friedman on Leases Volume 1 (5th ed 2009) New York: Practising Law Institute

Friedman MR Friedman on Leases Volume 2 (5th ed 2009) New York: Practising Law Institute

G

Garner S A Practical Approach to Landlord and Tenant (2nd ed 1998) London: Blackstone

Gilbert A, Mabin A, McCarthy M & Watson V “Low-income Rental Housing: Are South African Cities Different” (1997) 9 Environment and Urbanisation 133-147

Gilderbloom JI & Appelbaum RP Rethinking Rental Housing (1988) Philadelphia: Temple University Press

Goymour A “Proprietary Claims and Human Rights – A Reservoir of Entitlement” (2006) 65 CLJ 696-719

Granelli R Urban Black Housing: A Review of Existing Conditions in the Cape Peninsula with some Guidelines for Change (1977) Cape Town: Urban Problems Research Unit of the University of Cape Town

Gray K & Gray SF Elements of Land Law (5th ed 2009) Oxford: Oxford University Press

Griffiths GLH "Article 8 and Possession Proceedings – The Saga Continues" [2008] Conveyancer and Property Lawyer 437-441

Guthrie C "Defaulting Tenants" (2000) January De Rebus 24-25

H

Harloe M The People's Home? Social Rented Housing in Europe & America (1995) Oxford: Blackwell

Hawthorne L "The Right to Access to Adequate Housing - Curtailment of Eviction?" (2001) 34 De Jure 584-592

Hayek FAVerdict on Rent Control: Essays on the Economic Consequences of Political Action to Restrict Rents in Five Countries (1972) London: Institute of Economic Affairs

Hill DS Landlord and Tenant Law in a Nutshell (4th ed 2004) St Paul, MN: Thomson/West

Hills J "Ends and Means: The Future Roles of Social Housing in England" (Case Report 34, February 2007)

http://sticerd.lse.ac.uk/dps/case/cr/CASEreport34.pdf (accessed 30 April 2009)

Hirsch WZ Law and Economics: An Introductory Analysis (1979) New York: Academic Press

HM Treasury and ODPM "Housing Policy: An Overview" (July 2005)

http://www.hm-treasury.gov.uk/d/housing_policy190705.pdf (accessed 7 April 2009)

Hopkins K "Insurance Policies and the Bill of Rights: Rethinking the Sanctity of Contract Paradigm" (2002) 119 SALJ 155-173

Hopkins K "The Influence of the Bill of Rights on the Enforcement of Contracts" (2003) August De Rebus 22-25

Hopkins K & Hofmeyr K "The Constitutional Anomaly Created by Extending PIE" (2003) March De Rebus 14-17

Hughes D & Davis M "Human Rights and the Triumph of Property: The Marginalisation of the European Convention on Human Rights in Housing Law" [2006] Conveyancer and Property Lawyer 526-552

K

Kahn E, Havenga M, Havenga P & Lotz J Principles of the Law of Sale and Lease (1998) Cape Town: Juta

Karpen U "The Constitution in the Face of Economic and Social Progress" in Starck C (ed) New Challenges to the German Basic Law: The German Contributions to the Third World Congress of the International Association of Constitutional Law (1991) 87- 110 Baden-Baden: Nomos

Keating WD "Rent Control: Its Origins, Histories and Controversies" in Keating WD, Michael BT & Skaburskis A (eds) Rent Control: Regulation and the Rental Housing Market (1998) 1-15 New Brunswick, NJ: Center for Urban Policy Research

Keightley R "The Impact of the Extension of Security of Tenure Act on an Owner's Right to Vindicate Immovable Property" (1999) 15 SAJHR 277-307

Keightley R "When a Home becomes a Castle: A Constitutional Defence against Common-law Eviction Proceedings: Ross v South Peninsula Municipality" (2000) 117 SALJ 26-31

Kennedy D "West Germany" in Wynn M (ed) Housing in Europe (1984) 55-74 London: Croom Helm

Kerr AJ The Law of Lease (2nd ed 1976) Durban: Butterworths

Kerr AJ The Law of Sale and Lease (1984) Durban: Butterworths

Kerr AJ The Law of Sale and Lease (2nd ed 1996) Durban: Butterworths

Kerr AJ The Law of Sale and Lease (3rd ed 2004) Durban: Butterworths

Kerr AJ & Harker JR "Damages for Holding Over. The Rule on Mitigation of Loss" (1986) 103 SALJ 176-184

Klare K "Legal Subsidiarity & Constitutional Rights: A Reply to AJ Van der Walt" (2008) 1 CCR 129-154

Kleinman M Housing, Welfare and the State in Europe: A Comparative Analysis of Britain, France and Germany (1996) Cheltenham: Elgar

Kohler J "Property Law (Sachenrecht)" in Reimann M & Zekoll J (eds) Introduction to German Law (2005) 227-250 The Hague: Kluwer Law International

Kommers DP The Constitutional Jurisprudence of the Federal Republic of Germany (2nd ed 1997) Durham: Duke University Press

Kritzinger KM "May a Lessee Discontinue the Lease on the Sale of the Leased Property? Is Genna-Wae here to Stay?" (1994) 111 SALJ 221-232

Kritzinger KM "Forced Sale of Let Property Subject to a Prior Mortgage" (1996) 113 SALJ 209-214

Kurz K & Blossfeld H Home Ownership and Social Inequality in Comparative Perspective (2004) Stanford: Stanford University Press

L

Lansley S Housing and Public Policy (1979) London: Croom Helm

Legwaila T “An Introduction to the Rental Housing Act 50 of 1999” (2001) 12 Stell LR 277-282

Lewis C “Real Rights in Land: A New Look at an Old Subject” (1987) 104 SALJ 599-615

Liebenberg S “The Application of Socio-economic Rights to Private Law” 2008 TSAR 464-480

Liebenberg S Socio-Economic Rights: Adjudication under a Transformative Constitution (2010) Cape Town: Juta

Luba J “Residential Possession Proceedings and Article 8 (Part 2): The Impact on the Private Sector” (2002) 6(2) Law and Tenant Review 9-12

M

Malpass P & Murie A Housing Policy and Practice (5th ed 1999) Basingstoke: Palgrave MacMillan

Markesinis SB, Unberath H & Johnston A The German Law of Contract: A Comparative Treatise (2nd ed 2006) Oxfrod: Hart

McLennan JS “Formalities for Long Leases – A Fresh Start?” (1969) 86 SALJ 345-348

Milton JRL “Ownership” in Zimmermann R & Visser DP (eds) Southern Cross: Civil Law and Common Law in South Africa (1996) 657-699 Oxford: Oxford University Press

Mohamed SI Tenant and Landlord in South Africa (2003) Durban: Organisation of Civic Rights

Mukheibir A “The Effect of the Rental Housing Act 50 of 1999 on the Common Law of Landlord and Tenant” (2000) 21 Obiter 325-350

Mullins D & Murie A Housing Policy in the UK (2006) Basingstoke: Palgrave Macmillan

N

Nedelsky J “Should Property be Constitutionalized? A Relational and Comparative Approach” in Van Maanen GE & Van der Walt AJ (eds) Property on the Threshold of the 21st Century (1996) 417-432 Antwerpen: Maklu

Ntsebeza L Land Tenure Reform, Traditional Authorities and Rural Local Government in Post- Apartheid South Africa: Case Studies from the Eastern Cape (1999) Bellville: Programme for Land and Agrarian Studies

O

Oldenhuis FT, Rossel HJ, Kloosterman AM, Hellegers DPCM & Van Stempvoort JP Hoofdlijnen in het Huurrecht (5th ed 2005) Deventer: Kluwer

Olivier N "Property Rights in Urban Areas" (1988) 3 SAPL 23-33

Olivier N "Urbanisation: Policy/Strategy with Particular Reference to Urbanisation and the Law" (1988) 53 Koers 580-599

P

Partington M Landlord and Tenant. Text and Materials on Housing and Law (2nd ed 1980) London: Weidenfeld and Nicolson

Penny P "Rent Control" (1966) 83 SALJ 493-502

Pienaar JM "The Housing Crisis in South Africa: Will the Plethora of Policies and Legislation Have a Positive Impact?" (2002) 17 SAPL 336-370

Pienaar JM "Die Beskerming van Onroerende Eiendom: Nuwe Ontwikkelings" in Smits J & Lubbe G (eds) Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland, België (2003) 141-159 Antwerpen: Intersentia

Pienaar JM & Mostert H "Uitsetting onder die Suid-Afrikaanse Grondwet: Die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)" 2006 TSAR 277-299

Pienaar JM & Muller A "The Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework" (1999) 10 Stell LR 370-396

Pope A "Eviction and the Protection of Property Rights: A Case Study of Ellis v Viljoen" (2002) 119 SALJ 709-720

Purshotam R "Equity for Tenants" (1999) June De Rebus 27-30

Q

Quinn TM & Phillips E "The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future" (1969) 38 Fordham LR 225-258

R

Radin MJ “Property and Personhood” (1981-1982) 34 Stanford LR 957-1015

Radin MJ “Residential Rent Control” (1986) 15 Philosophy and Public Affairs 350-380

Radin MJ Reinterpreting Property (1993) Chicago: University of Chicago Press

Reich C “The New Property” (1964) 73 Yale LJ 733-786

Republic of South Africa Official Yearbook of the Republic of South Africa (1976) Pretoria: Bureau for Information

Republic of South Africa Debates of Parliament (Hansard) (3 February 1981) Pretoria: Government Printer

Republic of South Africa First Report of the Select Committee on Rent Control (January 1983) GC 9A- `83 iv

Republic of South Africa Debates of Parliament (Hansard) (30 May 1983) Pretoria: Government Printer

Republic of South Africa Official Yearbook of the Republic of South Africa (1987/1988) Pretoria: Bureau for Information

Republic of South Africa White Paper on Land Reform (1991) Pretoria: Government Printer

Republic of South Africa White Paper on Reconstruction and Development (1994) Cape Town: Ministry in the Office of the President

(Government Gazette 16085 23 November 1994; http://www.info.gov.za/gazette/whitepaper/1994/16085.pdf (accessed 27 November 2008))

Republic of South Africa Urban Development Strategy of the Government of National Unity (1995) Pretoria: Ministry in the Office of the President

(General Notice 1111; http://www.anc.org.za/rdp/urbanrdp.html (accessed 3 December 2008))

Republic of South Africa A Social Housing Policy for South Africa (July 2003) http://www.housing.gov.za/content/legislation_policies/Social%20Housing%20Policy.pdf (accessed 5 August 2009)

Republic of South Africa, Department of Housing White Paper: A New Housing Policy and Strategy for South Africa (1994) Pretoria: Government Printer

http://www.info.gov.za/whitepapers/1994/housing.htm#4.6 (accessed 11 March 2010))

Republic of South Africa, Department of Housing Breaking New Ground Policy (2004)

http://www.capegateway.gov.za/Text/2007/10/bng.pdf (accessed 6 August 2009)

Republic of South Africa, Department of Land Affairs White Paper on South African Land Policy (1997) Pretoria: Department of Land Affairs

Republic of South Africa, Department of Statistics General Household Survey (2007) http://www.statssa.gov.za/publications/P0318/P0318July2007.pdf (accessed 8 September 2009)

Ring G, Grziwotz H & Keukenschrijver A (eds) Nomos Kommentar BGB Band 3 Sachenrecht (2nd ed 2008) Baden-Baden: Nomos

Rose JW "Forced Tenancies as Takings of Property in Seawall Associates v City of New York: Expanding on Loretto and Nollan" (1990) 40 DePaul LR 245-280

Rosenow REG & Diemont MA The Rents Act in South Africa (1945) Cape Town: Juta

Rosenow REG & Diemont MA The Rents Act in South Africa (2nd ed 1950) Cape Town: Juta

Rosenow REG & Diemont MA The Rents Act in South Africa (3rd ed 1965) Cape Town: Juta

Roux T "Continuity and Change in a Transforming Legal Order: The Impact of Section 26(3) on South African Law" (2004) 121 SALJ 466-492

Royston L "Security of Urban Tenure in South Africa: Overview of Policy and Practice" in Durand-Lasserve A & Royston A (eds) Holding their Ground, Secure Land Tenure for the Urban Poor in Developing Countries (2002) 165-181 London: Earthscan Publications

Russell S "Introduction – Minimum State Obligations: International Dimensions" in Brand D & Russell S (eds) Exploring the Core Content of Socio-economic Rights: South Africa and International Perspectives (2002) 11-21 Pretoria: Protea Book House

S

Salins PD "Reflections on Rent Control and the Theory of Efficient Regulation" (1988) 54 Brooklyn LR 775-780

Savas ES Managing Welfare Reform in New York City (2005) Lanham, MD: Rowman & Littlefield Publishers

Scherer A Residential Landlord-Tenant Law in New York (2008) Eagen, Minnesota: Thomson West Publishing

Schoombee JT "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 Acta Juridica 77-118

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

Singer JW Property Law: Rules, Policies and Practices (3rd ed 2002) New York: Aspen Law & Business

Singer JW Introduction to Property (2nd ed 2005) New York: Aspen Publishers

Sonnekus JC “Herklassifisering van die Aard van die Huurder se Reg” 1987 TSAR 223-236

Sontheimer K “Principles of Human Dignity in the Federal Republic” in Kirchhof P & Kommers DP (eds) Germany and its Basic Law: Past, Present and Future – A German-American Symposium (1993) 213-220 Baden-Baden: Nomos

Staemmler G “East Germany” in Wynn M (ed) Housing in Europe (1984) 220-246 London: Croom Helm

Stassen K & Stassen P “New Legislation: Rental Housing Act 50 of 1999” (2000) March De Rebus 55-59

Stegman MA “The Model: Rent Control in New York City” in Niebanck PL (ed) The Rent Control Debate (1985) 29-56 Chapel Hill: University of North Carolina Press

Stoner MR The Civil Rights of Homeless People: Law, Social Policy, and Social Work Practice (1995) New York: Aldine de Gruyter

T

Thomas PhJ “The Rental Housing Act” (2000) 33 De Jure 235-247

Thomas PJ “Rental Housing” in Joubert WA, Faris JA & Harms LTC (eds) The Law of South Africa vol 23 (2nd ed 2009) 101-120 Durban: Butterworths

Tucker W Zoning, Rent Control and Affordable Housing (1991) Washington, DC: Cato Institute

U

Underkuffler LS The Idea of Property: Its Meaning and Power (2003) Oxford: Oxford University Press

United Kingdom Law Commission Landlord and Tenant: Reform of the Law (1987) Law Com No 162

United Kingdom Law Commission Termination of Tenancies for Tenant Default (2006) Law Com No 303

V

Van der Merwe CG Sakereg (2nd ed1989) Durban: Butterworths

Van der Merwe CG & De Waal MJ The Law of Things & Servitudes (1993) Durban: Butterworths

Van der Walt AJ “Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip” (1988) 21 De Jure 16-35, 306-325

Van der Walt AJ “Towards the Development of Post-apartheid Land Law” (1990) 23 De Jure 1-45

Van der Walt AJ “Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid’s Theory of Ownership” (1993) 56 THRHR 569-589

Van der Walt AJ “Towards a Theory of Rights in Property: Exploratory Observations on the Paradigm of Post-apartheid Property Law” (1995) 10 SAPL 298-345

Van der Walt AJ The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996 (1997) Cape Town: Juta

Van der Walt AJ Constitutional Property Clauses: A Comparative Analysis (1999) Cape Town: Juta

Van der Walt AJ “Dancing with Codes -- Protecting, Developing and Deconstructing Property Rights in the Constitutional State” (2001) 118 SALJ 258-311

Van der Walt AJ “Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law” (2002) 18 SAJHR 372-420

Van der Walt AJ “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation” 2002 TSAR 254-289

Van der Walt AJ Constitutional Property Law (2005) Cape Town: Juta

Van der Walt AJ “Ownership and Eviction: Constitutional Rights in Private Law” (2005) 9 Edinburgh LR 32-64

Van der Walt AJ “Legal History, Legal Culture and Transformation in a Constitutional Democracy” (2006) 12 Fundamina 1-47

Van der Walt AJ “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 CCR 77-128

Van der Walt AJ Property in the Margins (2009) Oxford: Hart Publishing

Van der Walt AJ & Pienaar GJ Introduction to the Law of Property (6th ed 2009) Cape Town: Juta

Van Heerden CM & Boraine A “Reading Procedure and Substance into the Basic Right to Security of Tenure” (2006) 39 De Jure 319-353

Van Wyk J “The Relationship (or not) between Rights of Access to Land and Housing: De-linking Land from its Components” (2005) 16 Stell LR 466-487

Visser C “Rent Control” 1985 Acta Juridica 349-368

Visser DP “The Absoluteness of Ownership: The South African Common Law in Perspective” 1985 Acta Juridica 39-52

W

Watson V & McCarthy M “Rental Housing Policy and the Role of the Household Rental Sector: Evidence from South Africa” (1997) 22 Habitat International 49-56

Wendt PF Housing Policy – The Search for Solutions: A Comparison of the United Kingdom, Sweden, West Germany, and the United States since World War II (1962) Berkeley: University of California Press

Wendt R “Eigentum, Erbrecht und Enteignung” in Sachs M (ed) Grundgesetz Kommentar (4th ed 2007) 582-639 München: Beck

Western Cape Rental Housing Tribunal Annual Report (April 2002 to March 2003)

http://www.capegateway.gov.za/Text/2003/tribunal_annual_report2.pdf (accessed 27 November 2008)

Wilkie M, Luxton P, Morgan J & Cole G Landlord and Tenant Law (5th ed 2006) Basingstoke: Palgrave MacMillan

Wille G Landlord and Tenant in South Africa: A Treatise on the Law of Lease, or Letting and Hiring of Immovable Property in the Cape Colony, the Transvaal, Natal and Orange Free State (1910) Grahamstown: African Book Co

Wille G Landlord and Tenant in South Africa (2nd ed 1927) Cape Town: Juta

Wille G Landlord and Tenant in South Africa (4th ed 1948) Cape Town: Juta

Wilson S “Breaking the Tie: Eviction from Private Land, Homelessness and a New Morality” (2009) 126 SALJ 270-290

Y

Youngs R English, French & German Comparative Law (2nd ed 2007) London: Routledge-Cavendish

Index of Cases

Germany

BVerfGE 37, 132 (*Wohnraumkündigungsschutzgesetz*) [1974]

BVerfGE 38, 348 *(Zweckentfremdung von Wohnraum)* [1975]

BVerfGE 51, 193 (*Warenzeichen*) [1979]

BVerfGE 68, 361 *(Wohnungskündigungsgesetz)* [1985]

BVerfGE 79, 292 (*Eigenbedarfskündigung*) [1989]

BVerfGE 89, 1 (*Besitzrecht des Mieters*) [1993]

BVerfGE 89, 237 (*Eigenbedarfskündigung*) [1993]

BVerfGE 91, 294 *(Fortgeltung der Mietepreisbindung)* [1994]

South Africa

Absa Bank Ltd v Amod [1999] 2 All SA 423 (W)

Absa Bank v Murray 2004 (2) SA 15 (C)

Aggouras v Macfarlane 1943 CPD 103

Barkhuizen v Napier 2007 (5) SA 323 (CC)

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC)

Betta Eiendomme (Pty) Ltd v Ekple-Epoh 2000 (4) SA 468 (W)

Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Another [2010] JOL 25031 (GSJ)

Brisley v Drotsky 2002 (4) SA 1 (SCA)

Chetty v Law Society, Transvaal 1985 (2) SA 756 (A)

Chetty v Naidoo 1974 (3) SA 13 (A)

Chirwa v Transnet Ltd 2008 (2) SA 24 (CC)

Clark v Findlay 1946 AD 224

Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA)

Dundas v Seeligsohn 1960 (1) SA 249 (C)

Ellis v Viljoen 2001 (4) SA 795 (C)

Engelbrecht v Road Accident Fund 2007 (6) SA 96 (CC)

Fernandes v Dawood 1943 CPD 414

FHP Management v Theron 2004 (3) SA 392 (C)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC)

Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd 1994 (1) SA 106 (D)

Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd 1995 (2) SA 926 (A)

Gien v Gien 1979 (2) SA 1113 (T)

Godongwana v Mpisana 1982 (4) SA 814 (TkS)

Gordon v Kamaludin TPD 15.9.27 (unreported)

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC)

Graham v Ridley 1931 TPD 476

Green v Griffiths (1885-1886) 4 SC 346

Herison v South African Mutual Life Assurance Society 1942 AD 259

Hitzeroth v Brooks 1964 (4) SA 443 (E)

Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A)

Ismail v Ismail 2007 (4) SA 557 (EC)

Jackpersad v Mitha 2008 (4) SA 522 (D)

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

Johannesburg Board of Executors & Trust Co Ltd v Gordon 1947 (1) SA 92 (W)

Johannesburg Municipal Council v Rand Townships Registrar and Others 1910 TS 1314

John Orr & Company v Eagar 1929 TPD 985

Josuub Ltd v Ismail 1953 (2) SA 461 (A)

Joubert v Van Rensburg 2001 (1) SA 753 (W)

Kendall Property Investment v Rutgers [2005] 4 All SA 61 (C)

Kessoopersadh v Essop 1970 (1) SA 265 (A)

Klerksdorp Town Council v Jassat 1961 (3) SA 20 (T)

Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands 2008 (3) BCLR 325 (W)

Lorentz v Melle 1978 (3) SA 1044 (T)

Mignoel Properties v (Pty) Ltd v Kneebone 1989 (4) SA 1042 (A)

Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae) 2006 (2) SA 311 (CC)

Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others 2005 (1) SA 530 (CC)

Ndlovu v Ngcobo / Bekker v Jika 2003 (1) SA 113 (SCA)

Nduna v Absa Bank 2004 (4) SA 453 (C)

Nhlabathi and Others v Fick 2003 (7) BCLR 806 (LCC)

Nino Bonino v De Lange 1906 TS 120

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

The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] ZASCA 28 (SCA)

Paul v Youley (1920) 41 NPD 191

Pharmaceutical Manufacturers Association of SA: In re: ex parte President of the RSA 2000 (2) SA 674 (CC)

Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter 2000 (2) SA 1074 (SE)

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

President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA)

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC)

Pretoria Stadsraad v Ebrahim 1979 (4) SA 193 (T)

Randfontein Estates Gold Mining Co (Witwatersrand) Ltd v Forbes 1992 (1) SA 649 (W)

Regal v African Superslate (Pty) Ltd 1963 (1) SA 102 (A)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing rights and Evictions and Another, Amici Curiae) 2010 (3) SA 454 (CC)

Rose's Car Hire Co Pty Ltd v Harris & Co 1944 WLD 159

Ross v South Peninsula Municipality 2000 (1) SA 589 (C)

S v Makwanyane and Another 1995 (3) SA 391 (CC)

S v Thebus and Another 2003 (6) SA 505 (CC)

SAB Ltd v Van Zyl 2006 (1) SA 197 (SCA)

Sailing Queen Investments v The Occupants La Colleen Court 2008 (6) BCLR 666 (W)

Sandown Park (Pty) Ltd v Hunter Your Wine & Spirit Merchant (Pty) Ltd 1985 (1) SA 248 (W)

Sasfin Bank Ltd v SOHO Unit 14 CC t/a Aventura Eiland 2006 (4) SA 513 (T)

Secco v Johannesburg City Council 1943 TPD 199

Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)

Smith v Coulon 1956 (1) SA 163 (N)

South African National Defence Union v Minister of Defence 2007 (5) SA 400 (CC)

Tiopaizi v Bulawayo Municipality 1923 AD 317

Tongoane and Others v Minister of Agriculture and Land Affairs and Others [2010] ZACC 10 (CC)

Total South Africa (Pty) Ltd v Xypteras 1970 (1) SA 592 (T)

Varalla v Jayandee Properties (Pty) Ltd 1969 (3) SA 203 (T)

Velcich v Land and Agricultural Bank of South Africa 1996 (1) SA 17 (A)

Wellworths Bazaars Ltd v Chandler's Ltd 1947 (2) SA 37 (A)

Wylie v Singer 1923 EDL 368

Yeko v Qana 1973 (4) SA 735 (A)

United Kingdom

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and Another [2004] 1 AC 546 (HL)

Backhouse v Lambeth BC (1972) 116 SJ 802

Barnes v Barratt [1970] 2 QB 657

Battlespring Ltd v Gates (1984) 11 HLR 6 (CA)

Briddon v George [1946] 1 All ER 609

Britannia Building Society v Earl [1990] 1 WLR 422 (CA)

British Anzani (Felixstowe) v International Marine Management (UK) Ltd [1980] QB 137

Bruton v London and Quadrant Housing Trust [2000] 1 AC 406 (HL)

BTE Ltd v Merseyside and Cheshire Rent Assessment Committee and Jones [1992] 24 HLR 514

Burrows v Brent LBC (1996) 1 WLR 1448 (HL)

Butcher v Poole Corporation [1943] KB 48

Cobstone Investments Ltd v Maxim [1985] QB 140

Connors v United Kingdom [2005] 40 EHRR 189

Cresswell v Hodgson [1951] 1 All ER 710

Cumming v Danson [1942] 2 All ER 653

Darnell v Millwood [1951] 1 All ER 88

Doherty (FC) and Others v Birmingham City Council [2008] UKHL 57 (HL)

Doran v Liverpool City Council [2009] EWCA Civ 146

Greenwich LBC v McGrady (1983) 6 HLR 36

Hammersmith and Fulham LBC v Monk [1992] 1 AC 478 (HL)

Hanson v Church Commissioners [1977] 2 WLR 848

Harrison v Hammersmith and Fulman London Borough Council [1981] 1 WLR 650 (CA)

Harrow LBC v Qazi [2004] 1 AC 983 (HL)

Hill v Rochard [1983] WLR 478

Hussey v Camden London Borough Council (1995) 27 HLR 5 (CA)

Kay and Others v Lambeth LBC; Leeds City Council v Price and Others [2006] 2 AC 465 (HL)

Keeves v Dean [1924] 1 KB 685

Lambeth LBC v Howard [2001] 33 HLR 58

Landlords Association for Northern Ireland's Application for Leave to Apply for Judicial Review; Re Boyle, Greer, Jackson and Laird's Application for Judicial Review, Re [2005] NIQB 22

Leek & Moorlands Building Society v Clark [1952] 2 QB 788

London Housing Properties v Cowan [1977] QB 148

Luby v Newcastle-under-Lyme Corpn [1964] 2 QB 64

Manchester City Council v Pinnock [2009] EWCA Civ 852

Marsden v Edward Heyes Ltd [1927] 2 KB 1 (CA)

Mason v Skilling [1974] 1 WLR 1437 (HL)

McCann v United Kingdom (2008) 47 EHRR 40

Metropolitan Housing Trust v Hadjazi [2010] EWCA Civ 750

Metropolitan Property Holdings v Finegold [1975] 1 WLR 349

Milmo v Carreras [1946] KB 306 (CA)

Minchburn Ltd v Fernandez (1987) 19 HLR 29 (CA)

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48

Redspring Ltd v Francis [1973] 1 WLR 134

Roe v Russel [1928] 2 KB 117 (CA)

Rye v Rye [1962] 2 WLR 361 (HL)

Schneiders & Sons Ltd v Abrahams [1925] 1 KB 301

Sheffield City Council v Jepson (1993) 25 HLR 299

Sheffield City Council v Smart [2002] LGR 467

Shelley v London County Council [1948] 1 KB 274 (CA)

Siddiqui v Rashid [1980] 1 WLR 1018 (CA)

Stokes v Mayor and Burgesses of London Borough of Brent [2009] EWHC 1426 (QB)

Street v Mountford [1985] AC 809

Tod-Heatly v Benham (1889) LR 40 Ch D 80

Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd [1972] 1 QB 318 (CA)

Wandsworth LBC v Dixon [2009] EWHC 27 (Admin)

Weaver v London & Quadrant Housing Trust [2008] EWHC 1377 (Admin)

Westminster City Council v Clarke [1992] 2 AC 288 (HL)

Whitbread v Ward (1952) 159 EG 494

Williamson v Pallant [1924] 2 KB 173

Wilson v London Borough of Harrow [2010] EWHC 1574 (QB)

YL v Birmingham City Council and Others [2007] 3 WLR 112 (HL)

United States of America

Armstrong v United States 364 US 40 (1960)

Block v Hirsh 256 US 135 (1921)

Bowles Price Administrator v Willingham 321 US 503 (1944)

Callahan v Carey 831 NYS 2d 352 (1979)

Department of Housing and Urban Development v Rucker 534 US 1111 (2002)

Edgar A Levy Leasing Co v Siegel 258 US 242 (1922)

Eldridge v Koch 98 AD 2d 675 (1983)

Fishel v New York City Conciliation and Appeal Bd 123 Misc 2d 841, 474 NYS 2d 908 (1984)

Loab Estates Inc v Druhe 300 NY 176 (1949)

Maia v Castro 139 Misc 2d 312, 527 NYS 2d 154 (Dist Ct 1988)

Malafis v Rosario 18 Misc 3d 1106(A), 856 NYS 2d 24 (NY City Civ Ct 2007)

Old Town Development Company v Langford 349 N E 2d 744 (1976) (Court of Appeals Indiana)

Pennell v San Jose 481 US 1 (1988)

Seawall Associates v City of New York 74 NY 2d 92 (1989)

Yee v City of Escondido 503 US 519 (1992)

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Germany

The Netherlands

South Africa

Constitution of the Republic of South Africa 1996

Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988

Co-operatives Act 14 of 2005

Deeds Registries Act 4 of 1937

Development Act (House of Representatives) 3 of 1987

Development and Housing Act 103 of 1985

Development Facilitation Act 67 of 1995

Development Trust Land Act 18 of 1936

Extension of Security of Tenure Act 62 of 1997

Formalities in Respect of Leases of Land Act 18 of 1969

General Law Amendment Act 50 of 1956

General Law Amendment Act 98 of 1965

General Law Amendment Act 102 of 1967

General Law Amendment Act 70 of 1968

General Law Amendment Act 101 of 1969

Group Areas Act 41 of 1950

Group Areas Act 77 of 1957

Group Areas Act 36 of 1966

Housing Act 35 of 1920

Housing Act 4 of 1966

Housing Act 107 of 1997

Housing Act (House of Representatives) 2 of 1987

Housing Development Act (House of Delegates) 4 of 1987

Housing Development Agency Act 23 of 2008

Interim Protection of Informal Land Rights Act 31 of 1996

Land Reform (Labour Tenants) Act 3 of 1996

National Housing Act 107 of 1997

National Housing Code (Chapter 12)

Natives (Urban Areas) Act 21 of 1923 (also referred to as the Blacks (Urban Areas) Act 21 of 1923)

Natives (Urban Areas) Amendment Act 25 of 1923

Natives (Urban Areas) Consolidation Act 25 of 1945 (also referred to as the Blacks (Urban Areas) Consolidation Act 25 of 1945)

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

Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment

Draft Bills published on 16 November 2007 (*GG* 30459) and 22 December 2006

(General Notice 1851, *GG* 29501)

Prevention of Illegal Squatting Act 52 of 1951

Proclamation 317 of 1966 (*Government Gazette* 1586 p177 4 November 1966)

Proclamation 83 of 1978 (*Government Gazette* 5970 p1 6 April 1978)

Proclamation 87 of 1979 (*Government Gazette* 6421 p1 26 April 1979)

Proclamation 91 of 1980 (*Government Gazette* 7040 p1 23 May 1980)

Proclamation 32 of 1983 (*Government Gazette* 8616 p9 25 March 1983)

Proclamation 99 of 1983 (*Government Gazette* 8782 p1-2 1 July 1983)

Proclamation 24 of 1987 (*Government Gazette* 10614 p5 20 February 1987)

Proclamation 51 of 1991 (*Government Gazette* 13285 p1-2 30 May 1991)

Provision of Land and Assistance Act 126 of 1993

Regulations Concerning the Administration and Control of Land in Black Urban Areas of 14 June 1968 (Government Notice R1036 of 1968 (*Government Gazette* 2096 p1 14 June 1968))

Rental Housing Act 50 of 1999

Rental Housing Amendment Act 43 of 2007

Rent Control Act 80 of 1976

Rents Act 13 of 1920

Rents Act 33 of 1942

Rents Act 43 of 1950

Rents Act Extension Act 29 of 1924

Rents Act Extension and Amendment Act 30 of 1921

Rents Act Extension and Further Amendment Act 10 of 1922

Rents Amendment Act 26 of 1940

Rents Amendment Act 53 of 1947

Rents Amendment Act 7 of 1948

Rents Amendment Act 53 of 1951

Rents Amendment Act 47 of 1964

Rents Amendment Act 54 of 1966

Rents Amendment Act 64 of 1969

Rents Amendment Act 56 of 1970

Rents Amendment Act 20 of 1971

Rents Amendment Act 51 of 1972

Rents Amendment Act 30 of 1975

Rents Extension Act 20 of 1923

Restitution of Land Rights Act 22 of 1994

Sectional Titles Act 66 of 1971

Slums Act 53 of 1934

Social Housing Act 16 of 2008

Tenants Protection (Temporary) Act 7 of 1920

Transformation of Certain Rural Areas Act 94 of 1998

Upgrading of Land Tenure Rights Act 112 of 1991

War Measure 42 of 1941 (Proc 195 of 1941 (*Government Gazette* 2952 p127 13 October 1941))

War Measure 37 of 1943 (Proc 103 of 1943 (*Government Gazette* 3203 4 June 1943))

War Measure 97 of 1944 (Proc 244 of 1944 (*Government Gazette* 3422 1 December 1944))

War Measure 59 of 1946 (Proc 219 of 1946 (*Extraordinary Government Gazette* 3723 p1 1 November 1946))

United Kingdom

Assured Tenancies (Amendment)(England) Order 2010 (25 March 2010)

Caravan Sites Act 1968

Cross Act (Artisans' and Labourers' Dwellings Improvement Act 1875)

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Europe)

Finance Act 1988

Housing Act 1980

Housing Act 1985

Housing Act 1988

Housing Act 1996

Housing Act 2004

Housing and Regeneration Act 2008

Human Rights Act 1998

Landlord and Tenant Act 1954

Law of Property Act 1925

Mobile Homes Act 1983

Protection from Eviction Act 1964

Rents Act 1915

Rent Act 1977

United States of America

Administrative Code of the City of New York: § 26

California Mobilehome Residency Law

Code of Federal Regulations: 24 CFR: § 5, 888, 912-999

Constitution of the United States of America 1787

Constitution of the State of New York 1894

District of Columbia Rents Act of 1919

Emergency Price Control Act of 1942

Housing and Rent Act 1947

Housing New York Program Act 1986

Local Emergency Housing Rent Control Act 1960 (New York)

Local Emergency Rent Control Act 1960 (New York)

New York City Local Law 30 of 1970

New York City Rent and Eviction Regulations: Parts 2201, 2204, 2206

New York City Rent Control Law 1962

New York City Rent Stabilization Law 1969

New York Code Rules and Regulations: 9 NYCRR 1727

New York Emergency Housing Rent Control Law 1950

New York Emergency Tenant Protection Act 1974

New York Emergency Tenant Protection Regulations: Part 2503

New York Private Housing Finance Law: § 35

New York Public Housing Law: § 156, 401

New York Real Property Law: § 231-232

New York Social Services Law

New York City Housing Authority Management Manual: Chapters IV, 7

Real Property Actions and Proceedings Law (New York): § 711, 715

Rent Regulation Reform Act of 1997 (New York)

Rules of the City of New York: Title 28, § 3

Sound Housing Act 1974

United States Code Annotated: Title 42, § 1437; Title 50, § 1892

United States Department of Housing and Urban Development (HUD) Appropriations Bill 1996 (Federal)

United States Housing Act of 1937 (Federal)

International Papers and Websites

International papers

United Nations *International Covenant on Economic, Social and Cultural Rights* (1966) 993 UNTS 3
http://www2.ohchr.org/english/law/cescr.htm (accessed 6 August 2009)

United Nations Commission on Human Settlements *Global Strategy for Shelter to the Year 2000* (1988) UN Doc A/43/8/Add 1
http://ww2.unhabitat.org/programmes/housingpolicy/documents/A.43.8.Add.1.pdf (accessed 6 August 2009)

United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* (1991) UN Doc E/1992/23
http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument (accessed 6 August 2009)

United Nations Economic Commission for Europe *Guidelines on Social Housing: Principles and Examples* (April 2006) UN Doc ECE/HBP/137 http://www.unece.org/hlm/prgm/hmm/social%20housing/ECE_HBP_137%20Social%20Housing%20final.pdf (accessed 7 April 2009)

United Nations *Universal Declaration of Human Rights* (1948) UN: Department of Public Information

Websites

http://www2.ohchr.org/english/bodies/cescr/ (accessed 6 August 2009)

http://www.communities.gov.uk/housing/ (accessed 21 July 2009)

http://www.gesetze-im-internet.de/englisch_bgb/ (accessed 5 May 2010)

http://www.info.gov.za/aboutsa/housing.htm (accessed 3 August 2009)