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Hanri Mostert, The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany

Summary

This dissertation is an attempt at reconciling the existing (and until recently predominant) private law concept of ownership and the property rights espoused by the new constitutional order. The endeavours at land reform in South Africa and Germany are used as specific examples of the manner in which the whole property law order in both these legal systems is developed through legislative and judicial initiative, on the basis of the constitutional provisions concerning property protection and regulation. The purpose of the investigation is to determine to what extent constitutional development of the private law of property will result in a property law order serving the socio-economic and political goals of economic growth and self-fulfilment and empowerment of the individual. Focus is placed on the influence of the constitutional protection and regulation of property as a mechanism for developing the private law of ownership in Germany and South Africa.

In the first part of the exposition, the choice of legal comparison as course of inquiry is substantiated, and the terminological difficulties connected with an investigation into the development of the private law of property by the constitutional protection and regulation of property are discussed. Attention is given to the use of the terms "ownership" and "property" in the private law and in the constitutional context. The term "tenure" is also discussed in the context of land reform in South Africa. Further, the use of terms such as "public interest", "common weal" and "public purposes" is discussed. The use of these terms are particularly complicated by the fact that each of them are often used in more than one sense, and that the use of these different terms overlap to varying extents.

The second part of the exposition contains information on the background of the constitutional property orders as they are found in Germany and South Africa. The drafting histories of the South African and German constitutional property clauses indicate that in both these legal

systems, the constitutional property clauses have hybrid ideological foundations. Both contain a compromise between, on the one hand, classical liberalism (which affords the holders of rights a high degree of individual freedom and autonomy) and, on the other hand, social democracy (which allow stronger regulatory measures, also upon private property). Further, some of the structural aspects connected to constitutional protection and regulation of property in Germany and South Africa are discussed. The positively phrased property guarantee in art 14 GG is compared with the negatively phrased "guarantee" of section 25 FC, whereby the transitional property guarantee in section 28 IC is also considered. Further, the basic structure and stages of an inquiry into the constitutional property clause are discussed, with reference to differences between the German and South African methods. These differences do not exclude further comparison. However, it is necessary to keep the differences in the judicial system in mind when conducting a comparison of the present nature. Therefore, a brief overview of the judicial systems of Germany and South Africa is provided, with specific reference to the manner in which the courts resolved certain property questions. The principles underlying the constitutional orders of Germany and South Africa are also discussed with specific reference to their significance for the treatment of property issues. In particular, the meaning of the constitutional state *(Rechtsstaat)* and the social welfare state *(Sozialstaat)* for the solution of problems connected to property is discussed. It is indicated that the legitimacy of the legal order in general and property law in particular, depends on the degree of success in the implementation of these values. Further, it is indicated that the implementation of these values also determines the importance of private property and/or regulation thereof in a specific legal system.

In the third part of the exposition, the relevance of the constitutional protection and regulation for the private law of ownership is discussed. The expansion of the concept of property by the application of a "purely" constitutional definition thereof raises the question as to the continued relevance of the private law concept of ownership. This issue is discussed with reference to the protection of property in terms of the constitution in comparison with the scope of property in private law. It is indicated that the "exclusively constitutional" concept of property is by no means based only on Constitutional law. The role of the private law concept of ownership in a constitutional order is then elucidated. The discussion then turns to an analysis of the limitations on property endorsed by the constitutional order. Two main kinds of limitation are possible: (i) limitation of property through vertical operation of the

constitution (ie a broad category of legislative and administrative deprivation (regulation), and a more specialised category, namely expropriations), and (ii) limitation through horizontal operation of the constitution (ie through the inroads allowed on property rights by the protection of other rights in the Bill of Rights). It is indicated that the application of the public interest / public purposes requirements are sometimes intended to protect individual interests rather than those of society in general. In other cases, the public interest / public purposes requirements are aimed at securing the interests of the society at large. Further, it is indicated that the purpose of constitutional "interference" in the area of private property law is to correct imbalances in the relations among private persons which are regarded by the law as "equals," even if they are not equal for all practical purposes.

The fourth part of the exposition concentrates on the land reform programmes in Germany (after the reunification of 1990) and South Africa (since 1991) in order to analyse the endeavours by the legislature and judiciary to give effect to the improved property order as anticipated by constitutional development of property. In both Germany and South Africa political changes made land reform programmes essential: In South Africa the land reform programme was introduced to reverse the injustices created by colonialism and apartheid. A tripartite programme is employed for this purpose. The new kinds of land rights created through this system of land reform are indicated. The manner in which this body of law is treated by the courts is also analysed with reference to its relevance for the development of Property Law in general. In Germany a property and land reform programme became necessary with the reunification. On the one hand, the socialist property order in the former GDR had to be replaced by the property order already existing in the FGR, and on the other hand the individual claims for restitution of the land and enterprises taken by the GDR state or its Soviet predecessor had to be balanced against the claims that present occupiers of such land have to it. The influence of legislation and litigation connected to these issues on the development of Property Law is discussed.

The final part of the exposition is a summary of the conclusions drawn during the course of the analysis.