

The illegal eviction of undocumented foreigners from South Africa

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Summary

In Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew & Another and Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality the courts failed to provide guidance regarding the relationship between the Prevention of Illegal Eviction from and Unlawful Occupation of Land, the Refugees Act and the Immigration Act. This article sets out to provide such guidance by contextualising South Africa as a constitutional democracy with a supreme Constitution (the principle of a single system of law) that delineates a point of departure for establishing which source of law should regulate litigation about the illegal eviction from one's home (the subsidiarity principles). The authors then overlay the principle of a single system of law and the subsidiarity principles with the systemic characteristics of a property system that promotes section 39(2) of the Constitution. Taken together, these principles and characteristics are used to evaluate PIE, the Refugees Act and the Immigration Act with a view to establishing which is the most appropriate source of law to evict undocumented foreigners from South Africa and to determine the appropriate relationship between the statutes. The article further aims to evaluate the failure to consider the procedural protection and substantive safeguards outlined in PIE, which ultimately perpetuates, or even exacerbates, the vulnerable position of undocumented foreigners who are forced from their homes.

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1 Introduction

Since the fall of apartheid there has been an increase in immigrants seeking entry into South Africa from all over the African continent.¹ With the influx of immigrants seeking entry into South Africa the government has had to enact legislation and formulate policies that regulate, enforce and control the admission of foreigners into the country as well their departure from the country. Limitations that these statutes and policies place on the individual rights of people, particularly undocumented foreigners, are justified by the public interest. In the immigration context the public interest includes living in an environment where immigration control is performed within the highest applicable standards of human rights protection in compliance with international law²; preventing xenophobic attacks;³ grappling with security considerations;⁴ and retaining control of the immigration of foreigners. The government's use of its police powers to ensure the health, safety and well-being of all the people of South

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- 1 A Hiropoulos 'Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals' November 2017, <http://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf> (accessed 12 May 2018). Realistic estimates of immigration indicate that between two and three million foreign nationals currently reside in South Africa. This number includes both documented and undocumented foreigners, refugees and asylum seekers that are predominantly from Zimbabwe, Mozambique, the Democratic Republic of the Congo, Angola, Somalia, Rwanda and Malawi.
 - 2 Due regard must be had to South Africa's compliance with international law, which is applicable to the human rights protection of refugees, asylum seekers and undocumented foreigners. The Convention Relating to the Status of Refugees was concluded on 28 July 1951 and entered into force on 22 April 1954. As of 1 May 2018 the Convention had 145 ratifications. South Africa ratified the Convention on 12 January 1996. The International Convention on the Elimination of All Forms of Racial Discrimination was concluded on 7 March 1966 and entered into force on 12 March 1969. As of 1 May 2018 the Convention had 179 ratifications. South Africa ratified the Convention on 10 December 1998. The Protocol Relating to the Status of Refugees was concluded on 31 January 1967 and entered into force on 4 October 1967. As of 1 May 2018, the Protocol had 146 ratifications. South Africa ratified the Protocol on 12 January 1996. See https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en (accessed 1 May 2018). However, an extensive analysis of international law is beyond the scope of this article.
 - 3 AE Okem & LE Asuelime 'An insight into South Africa's xenophobia: Impacting on Africa's integration' (2015) 45 *Journal of African Union Studies* 48. In South Africa xenophobia is perpetuated by violence against both documented and undocumented foreigners and the looting of foreign-owned businesses, which creates hostility, fear and distrust among foreigners in South Africa.
 - 4 The South African government may exercise police power to ensure the health, safety and welfare of South African citizens. In ensuring the health of South African citizens the government may impose restrictions on non-citizens from entering the Republic if there has been an outbreak of an infectious disease in their country of origin. See *News24* 'SA issues Ebola travel ban' 21 August 2014,

Africa include the detection and deployment of undocumented foreigners, the monitoring of immigrants and the enforcement of immigration policies. However, in South Africa the use of police powers has an unwholesome history.⁵

Prior to 2002⁶ the applicable legislation that regulated the status of immigrants was the Aliens Control Act 96 of 1991 (Aliens Control Act). The Aliens Control Act was used by state bureaucrats under apartheid as a tool to dictate and control the rights of movement and residence. This aided in establishing and maintaining an unjust and unequal land use system based on racial and status segregation.⁷ Therefore, during apartheid the *rei vindicatio* was legislatively enhanced by the police powers of the state to evict people for the purposes of immigration control.⁸ Local authorities were provided with a platform to evict undocumented foreigners, which allowed them to dictate the scope of immigrant rights in terms of wide and, seemingly unfettered,⁹ powers to those enforcing immigration control and detection.

<https://www.news24.com/SouthAfrica/News/SA-issues-Ebola-travel-ban-20140821> (accessed 18 May 2017). In ensuring the safety of South African citizens, the government may implement measures restricting the number of persons entering the Republic or may remove foreigners from the Republic. This may prevent public disorder, over-crowding or threats to national security (sec 28(1) of the Refugees Act 130 of 1998). To ensure the welfare of South African citizens, the government may prohibit any person from employing an illegal foreigner. This may ensure that employment opportunities are available to citizens only (sec 38(1) of the Immigration Act 13 of 2002).

- 5 AJ van der Walt *Constitutional property law* (2005) 410-411.
- 6 TF Hicks 'The Constitution, Aliens Control Act, and xenophobia: The struggle to protect South Africa's pariah: The undocumented immigrant' (1999) 7 *Indiana Journal of Global Legal Studies* 339.
- 7 G Muller 'The legal-historical context of urban forced evictions in South Africa' (2013) 19 *Fundamina* 369.
- 8 During apartheid, the South African government attempted to divide South Africa into a number of separate states, called 'independent homelands'. Under the homeland system, each state was supposed to develop into a separate nation-state for a different ethnic group. This was regulated by the Black States Citizenship Act 26 of 1970 and the National States Citizenship Act of 1970. These Acts declared black people as foreigners in urban areas and changed their status so that they no longer were citizens of South Africa, but rather citizens of one of the ten autonomous territories. A Boddy-Evans 'Apartheid era laws: Bantu Homelands Citizenship Act No 26 of 1970', <https://www.sahistory.org.za/article/black-homeland-citizenship-act-1970> (accessed 4 September 2019). It is important to qualify that immigrants referred to in the context of this article were South Africans, although they had been consigned to independent homelands. Therefore, a distinction must be made between persons deemed foreigners by the apartheid state and foreigners that were born in countries outside of South African territory. See also C Plasket 'Homeland incorporation: The new forced removals' in C Murray & C O'Regan (eds) *No place to rest: Forced removals and the law in South Africa* (1990).
- 9 Sec 54(1) of the Aliens Control Act 96 of 1991 states that '[a]ny immigration officer may for the purpose of this Act (a) enter upon any premises; and (b) interrogate any person found in or on such premise'. The interpretation of 'any' provided immigration officers with broad power.

South Africa's current constitutional framework affords 'everyone'¹⁰ – including documented and undocumented foreigners – a variety of fundamental rights, benefits and protections. The Aliens Control Act was repealed by the Immigration Act 13 of 2002 (Immigration Act) and the Refugees Act 130 of 1998 (Refugees Act). However, the rights afforded to persons in terms of this new regulatory framework remain a matter of bureaucratic practice as opposed to a matter of judicial interpretation and are largely a remnant of apartheid practices.

The Department of Home Affairs (Home Affairs), law enforcement officials and others involved in immigration enforcement have abused and promoted an environment where xenophobic attacks thrive.¹¹ Human rights violations are perpetuated and the deprivation of constitutional protections and entitlements, including the right of access to adequate housing, has increased.¹² The influx of immigrants and the continuous surge of people into urban areas have increased the pressure on the South African government to utilise its resources for its citizens and, recently, non-citizens including undocumented foreigners.¹³ This pressure, coupled with the risk of indigent citizens being unable to secure temporary emergency housing, has led to a culture of xenophobia that has 'consumed South Africa's consciousness'.¹⁴

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- 10 Although section 26 of the Constitution of the Republic of South Africa, 1996 is of particular importance for this research essay, the Constitution provides a variety of other fundamental rights affording protection to 'everyone'. Sec 24(1)(a) states that '[e]veryone has the right to an environment that is not harmful to their health or wellbeing'. Sec 27(1) states that '[e]veryone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'. Sec 29(1) states that '[e]veryone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible' and so forth.
- 11 T Masuku 'Targeting foreigners: Xenophobia among Johannesburg's police' (2006) *SA Crime Quarterly* 19. Members of the South African People Service (SAPS) frequently target black legal and illegal immigrants. Through various studies, Masuku states that xenophobia not only is embedded in the attitude of the SAPS, but that it manifests itself in violence, abuse and the ill-treatment of foreigners.
- 12 Hiropoulos (n 1) 1. Since 1994, the South African government's primary response to the increase in immigration has been to arrest and deport undocumented foreigners. R Suttona & D Vigneswaran 'A Kafkaesque state: Deportation and detention in South Africa' (2011) 15 *Citizenship Studies* 627. The arrests and deportations are regularly made outside the legal framework, and involve human rights abuses and procedural irregularities.
- 13 *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew & Another* 2010 (1) SA 403 (GJ). In this case the central legal question was whether undocumented foreigners were entitled to temporary emergency accommodation. We expand on this in part 3 below.
- 14 Bloomberg 'Johannesburg mayor insists on 'shock and awe' plan for City' 15 August 2017 <https://www.bloomberg.com/news/articles/2017-08-14/johannesburg-mayor-insists-on-shock-and-awe-plan-for-city> (accessed 20 March 2018). Johannesburg Mayor, Herman Mashaba, discussed his plans to evict undocumented foreigners from the inner city buildings in a bid to attract private investment to rebuild South Africa's economic hub. Mashaba stated that he was going to use 'shock and awe tactics', 'overwhelming power' and a 'spectacular

In the past decade the courts have handed down judgments in cases where local authorities have used police power legislation, in the form of the Immigration Act and the Refugees Act, to evict undocumented foreigners. This has led to the circumvention of the procedural protections and substantive safeguards of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE). In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality (Tswelopele)*¹⁵ officials from three governmental agencies in a joint operation evicted 100 people,¹⁶ respectively, from the rudimentary shelters that they had erected on a vacant piece of land.¹⁷ A total of 16 immigrants without South African documentation were arrested and subsequently deported. The eviction was found to have been unlawful despite the plea of Home Affairs stating that their participation was focused solely on identifying 'non-documented illegal immigrants'.¹⁸

In *Chapelgate Properties 1022 CC v Unlawful Occupiers of Erf 644 Kew and Another (Chapelgate)*¹⁹ the City of Johannesburg sought the eviction of approximately 300 occupiers. When the matter was placed before the High Court, the number of occupiers totalled 161 of whom the majority were not South African citizens.²⁰ Although it was conceded that occupation was unlawful and an eviction order was granted, the issue turned on whether the City was obliged to provide temporary emergency accommodation for undocumented foreigners under PIE.²¹

The question that arises is how the rights of a foreigner, or any category of foreigner, to be in the country may be affected by their status and, if they have no such right, whether the Constitution or other laws requires them to be assisted with emergency temporary shelter if indigent or allows them to participate in housing projects.

display of force to paralyze the enemy's perception of the battlefield and destroy its will to fight', the 'enemy' and 'it' referring to undocumented foreigners.

15 2007 (6) SA 511 (SCA).

16 *Tswelopele* (n 15) para 2. The officials who carried out the operation were from the nature conservation division of the Tshwane Metropolitan Municipality, the Immigration Control Office of the Department of Home Affairs, SAPS and members of the Garsfontein community policing forum.

17 *Tswelopele* (n 15) para 1. See *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) para 3 and *Rikhotso v Northcliff Ceramics (Pty) Ltd & Others* [1996] 4 All SA 524 (W) paras 6 and 7 for a similar history.

18 *Tswelopele* (n 15) para 5.

19 2010 (1) SA 403 (GJ).

20 *Chapelgate* (n 19) paras 10-13. There were only 64 South African citizens out of the total of 161 occupiers (39,75%). In addition, there were two Mozambicans and 22 Zimbabweans who claimed to have rights to remain in South Africa. Therefore, 73 foreign occupiers (amounting to 45%) were unable to produce documentation proving that their stay had been regularised. Out of the total foreigners, only one or two were able to produce documents indicating that they were lawfully entitled to reside in the Republic. Out of 161 occupiers, over half of the 21 occupiers were minors who were born in South Africa to non-citizen occupiers. In addition, one non-citizen occupier was disabled and was being cared for by a relative who is a Zimbabwean national.

21 *Chapelgate* (n 19) para 5.

In both *Tswelopele* and *Chapelgate* the courts failed to provide guidance as to the precise nature of the relationship between police power legislation authorising the eviction of undocumented foreigners in terms of PIE, the Immigration Act and the Refugees Act.

Consequently, the evictions of undocumented foreigners under the guise of 'solely to identify non-documented immigrants' in terms of the Immigration Act and the Refugees Act are frequently executed.²² Evictions are carried out by government officials and local authorities without complying with the procedural protection and substantive safeguards of PIE. They claim that their intention is not to evict undocumented foreigners,²³ but to fulfil the objectives of the Immigration Act and the Refugees Act. The unscrupulous use of police power during these constructive evictions in evading the procedural protections and substantive safeguards outlined in PIE unfavourably resembles the harsh turmoil of immigration control and racial segregation during apartheid.²⁴ Evictions during apartheid were conducted without prior notice, usually involved the demolition of buildings or structures, and occurred without a court order considering the personal circumstances of the unlawful occupiers.²⁵

22 *Tswelopele* (n 15) para 5.

23 *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) (*Pheko*). A similar argument was contended by the Ekurhuleni Metropolitan Municipality where the Municipality instituted eviction proceedings in terms of sec 55(2)(d) of the Disaster Management Act 57 of 2002 (DMA). The case turned on whether 'evacuations' amounted to an 'eviction' and whether the unlawful occupiers faced imminent danger due to unstable dolomite formations. Nkabinde J concluded that the local authority had acted outside the authority conferred by the DMA and contrary to sec 26(3) of the Constitution. Nkabinde J found that the local authorities acted unconstitutionally when evicting the unlawful occupiers in terms of the DMA. However, the Constitutional Court failed to provide the local authorities with guidance as to the precise nature of the relationship between the DMA and PIE.

24 Muller (n 7) 382-384. In 1951 Parliament enacted the Prevention of Illegal Squatting Act 52 of 1951 (PISA). The purpose of PISA was to prevent and control illegal squatting on public or private land. PISA provided courts with the authority to order the eviction of squatters and authorise the demolition of any buildings or structures erected on the land without the permission of the owner or lawful occupier. The peremptory nature of PISA obliged owners to evict unlawful occupiers. Therefore 'the scope of evictions based on the stronger right to possession' under apartheid land law was significantly extended. In 1952 parliament supplemented PISA with a package of laws aimed at implementing its influx control policy. The package included the Black Laws Amendment Act 54 of 1952 which amended sec 10 of the Black (Urban Areas) Consolidation Act, the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 and the Black Service Levy Act 64 of 1952. In 1976 an amendment to PISA followed on the judgment in *S v Peter* 1976 (2) SA 513 (C). The amendment inserted sec 3B into the Act which enabled landowners and local authorities to demolish squatter shacks after the lapse of a seven-day notice period. The provision further deterred landowners from allowing squatters to live on their land by making this a punishable criminal offence.

25 G Muller 'Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa' (2015) 132 *South African Law Journal* 617. The judgment in *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) resulted in the 1977 amendment of PISA.

The transition to democracy and the entry into force of the Constitution of the Republic of South Africa, 1996 (Constitution) changed the legal landscape of evictions.²⁶ Section 26(1) of the Constitution provides that everyone has the right to have access to adequate housing. Section 26(2) places an obligation on the state to adopt reasonable legislative and other measures to achieve the progressive realisation of this right within its available resources.²⁷ Furthermore, section 26(3) of the Constitution provides that no one may be evicted from their home or have their home demolished without a court order which was made after considering all the relevant circumstances. Section 26(3) furthermore states that no legislation may permit arbitrary evictions. PIE was enacted to give effect to section 26(3) of the Constitution.²⁸ It provides specific procedural protections and substantive safeguards to unlawful occupiers who use buildings/structures or land for residential purposes. The jurisprudence developed in terms of PIE has indicated that the courts have adopted an increasingly sensitised approach to the squalid conditions in informal settlements and inner city buildings, highlighting the struggle²⁹ of unlawful occupiers.³⁰ A detailed history of their occupation is also considered.³¹ These conditions are viewed as serious by judges when determining whether it would be just and equitable to grant an eviction order and when, or under what conditions, it would be just and equitable to execute such an order.

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- 26 Muller (n 25) 618. The socio-economic landscape of evictions, however, has not undergone a similarly profound change. The government has a considerable housing backlog, and overcrowded, impoverished black neighbourhoods still exist next to spacious, well-established, affluent, white neighbourhoods in certain parts of South Africa. Informal settlements and abandoned inner city buildings within the large metropolitan municipalities of South Africa are not always suitable for the habitation of unlawful occupiers because of a lack of water, sanitation and electricity.
- 27 *Eagle Valley Properties 250 CC v Unidentified Occupants of Erf 952, Johannesburg* [2011] ZAGPJAC 3 (17 February 2011) para 40. In determining the government's ability to provide temporary emergency accommodation, the Court required the City of Johannesburg to submit information, including statistical projections of the expected number of indigent households requiring shelter and the allocation of the City's budget. *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue & Others* 2009 (1) SA 470 (W) paras 27, 56 & 57. Sec 153(a) of the Constitution provides that a municipality must 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'.
- 28 Muller (n 25) 619.
- 29 See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 7; *City of Johannesburg v Rand Properties (Pty) Ltd & Others* 2007 (6) SA 404 (SCA) para 10.
- 30 In terms of sec 1 of PIE, an 'unlawful occupier' is defined 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'. It is clear that South African citizens, undocumented immigrants and immigrants whose stay has been regularised can be unlawful occupiers.
- 31 Muller (n 25) 619.

The aim of this article is twofold: first, to identify which statute is the most appropriate source of law to evict undocumented foreigners in post-apartheid South Africa; and, second, to determine the appropriate relationship between the suite of statutes.³² We set out to do this by contextualising South Africa as a constitutional democracy with a supreme Constitution (the principle of a single system of law) that delineates a point of departure for establishing which source of law should regulate litigation about the alleged infringement of a right in the Bill of Rights (the subsidiarity principles). We then overlay the principle of a single system of law and the subsidiarity principles with characteristics of a property system that promote the spirit, purport and objects of the Bill of Rights.³³ Taken together, these principles and characteristics are used to evaluate PIE, the Immigration Act and the Refugees Act to establish the appropriate relationship between these three statutes in regulating the effective eviction of foreigners from land and buildings or structures that they occupy unlawfully.

2 Single system of law

2.1 Introduction³⁴

Currently, three parallel sources of law – PIE, the Immigration Act and the Refugees Act – are applied when evicting undocumented foreigners from unlawfully-occupied property. This position is problematic because these statutes not only require different procedural requirements and substantive considerations, but also have different results. Van der Walt states that the existence of a choice between different sources of law might lead to a power struggle between forces that entrench the *status quo* and forces that promote transformation.³⁵

The enquiry into which statute is the most appropriate source of law for evicting undocumented foreigners must begin with the fact that South Africa is a democracy founded on the values of the supremacy of the Constitution and the rule of law.³⁶ The effect of this is that no source of law – which in this case includes a choice between

32 A] van der Walt *Property and Constitution* (2012) 24 states that ‘the job of academic lawyers is to help figure out how legislation could be ... interpreted ... so as to promote the spirit, purport and objects of the Bill of Rights’.

33 Sec 39(2) of the Constitution states: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

34 This part resembles Muller (n 25) 6-8.

35 Van der Walt (n 32) 4 19. Van der Walt refers to the forces that entrench the *status quo* as courts are intent on protecting the common law, for example the landlord’s right to select tenants. Van der Walt refers to the forces that promote transformation as legislatures are intent on introducing statutory reforms required by the Constitution, for example to prevent racial discrimination.

36 Sec 1(c) of the Constitution.

PIE, the Immigration Act and the Refugees Act – exists independently in the South African legal system.³⁷ The Constitutional Court in *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa*³⁸ (*Pharmaceutical Manufacturers*) states that '[t]here is only one system of law ... shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control'.³⁹

The principle of a single system of law was used by the Constitutional Court to develop the 'subsidiarity principles'. In determining which source should regulate litigation regarding an alleged rights infringement, the subsidiarity principles should be applied as a starting point for the eviction of undocumented foreigners. This prevents the submergence of parallel sources of law, particularly in a property dispute, and ensures maximum coherence with the principle of a single system of law⁴⁰. These principles are not meant to restrict the power of the courts to interpret legislation, engage in constitutional review and develop the common law.

The first principle states that a litigant who alleges that a right in the Bill of Rights has been infringed must rely on the legislation that was specifically enacted to protect that right and may not rely directly on the provision in the Bill of Rights when bringing an action to protect the right.⁴¹ However, the proviso allows a litigant to rely directly on the provision in the Bill of Rights if he or she attacks the legislation for being unconstitutional or because it inadequately protects the right.⁴²

The principle results in a shift away from 'binary notions of autonomy, rivalry and conflict' between the relationship of the Constitution and other sources of law.⁴³ This ensures a shift of emphasis between the effect of the Constitution in relation to its transformative goals on vested property rights.⁴⁴ The shift transcends traditional notions of vested property rights away from regulating the conflict between individual property interests and rather manages tensions between reform measures promoting the spirit, purport and object of the Bill of Rights, while simultaneously and optimally protecting vested individual property interests.⁴⁵ It is inevitable that the simultaneous and optimal balancing of implementation of reform goals and the protection of rights may result in conflict. Insofar as this conflict is concerned, the principle of a single legal system requires an

37 Van der Walt (n 32) 20.

38 2000 (2) SA 674 (CC).

39 *Pharmaceutical Manufacturers* (n 38) para 44.

40 Muller (n 25) 622.

41 Van der Walt (n 32) 36.

42 Muller (n 25) 622; Van der Walt (n 32) 35.

43 Van der Walt (n 32) 67-68.

44 Van der Walt 37.

45 Muller (n 25) 622; Van der Walt (n 32) 20.

equalising that 'optimises' both, rather than ranking one higher than the other.⁴⁶ In *Port Elizabeth Municipality v Various Occupiers (PE Municipality)*⁴⁷ the Constitutional Court elucidated this principle. The intricate balancing of property rights and constitutionally-protected housing rights necessary for the purpose of PIE are described below:

The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It 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.

This dictum provides a constitutionally-inspired process of optimal, simultaneous and equal protection of vested rights (section 25 of the Constitution) while promoting the interests of justice by encouraging access to secure land tenure and housing (section 26 of the Constitution).⁴⁸ The impact of this shift away from sources competing for supremacy ensures that an equitable balancing of two interlinked processes forming part of one single legal and constitutional goal simultaneously promotes section 39(2) of the Constitution.⁴⁹ Identifying the most appropriate source of property law – in this case either PIE, the Immigration Act or the Refugees Act – for evicting undocumented foreigners in a single system of law, therefore, must proceed from section 39(2) of the Constitution.

2.2 Characteristics of a property system promoting section 39(2) of the Constitution⁵⁰

Whether the Immigration Act, the Refugees Act or PIE is the most appropriate source of law for evicting undocumented foreigners depends on the ability and likelihood of each of these Acts to promote the spirit, purport and object of the Constitution. In determining this ability and likelihood, attention should be drawn to the 'general, systemic features and characteristics' that underpin the property system holistically.⁵¹

46 Muller (n 25) 623.

47 2005 (1) SA 217 (CC).

48 Muller (n 25) 623.

49 Van der Walt (n 32) 22.

50 This part resembles Muller (n 25) 9-10.

51 As above. Van der Walt states that the focus should not be on upholding individual rights, reforming specific property institutions or introducing particular reforms, but rather on the general, systemic features and characteristics of the property system.

Van der Walt argues that all sources of law should display the following characteristics: They should be formally valid and of general application in that they must be adopted and promulgated publicly;⁵² be expressed in understandable terms; be prospective in effect; not require conduct beyond the powers of the people; not be changed so frequently that people cannot arrange their own actions and affairs; be consistent with one another; and must be administered consistently with their wording.⁵³ All sources of law should also promote the following general characteristics:⁵⁴ equality;⁵⁵ the inherent human dignity of every person;⁵⁶ access to courts;⁵⁷ and access to administrative justice.⁵⁸ In addition to these general characteristics, a property system should further recognise the following specific characteristics: state regulation of property that is 'legitimate, natural and inevitable' if the regulation serves a legitimate public purpose,⁵⁹ and state interference with property must establish an equitable balance between the private interests that will be affected by the regulation and public interest that is served by the regulation.⁶⁰ In addition to the aforementioned positively-framed characteristics,⁶¹ a property system should not authorise the arbitrary eviction from one's home⁶² or arbitrary deprivation of property.⁶³ Lastly, a property system should ensure that new legislation is enacted to give effect to the following reformative goals in the Constitution:⁶⁴ providing access to secure tenure;⁶⁵ access to land on an equitable basis;⁶⁶ the progressive realisation of the right of access to adequate housing;⁶⁷ and protection against eviction without a court order and only after all relevant circumstances have been considered.⁶⁸

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- 52 F Michelman 'The rule of law, legality and the supremacy of the Constitution' in S Woolman, M Bishop & J Brickhill (eds) *Constitutional law of South Africa* (Original Service, June 2008) ch 11.
- 53 Van der Walt (n 32) 27 28.
- 54 Van der Walt 28.
- 55 C Albertyn & B Goldblatt 'Equality' in Woolman, Bishop & Brickhill (n 52) ch 35.
- 56 S Woolman 'Dignity' in Woolman, Bishop & Brickhill (n 52) ch 36.
- 57 J Brickhill & A Friedman 'Access to courts' in Woolman, Bishop & Brickhill (n 52) ch 59.
- 58 J Klaaren & G Penfold 'Just administrative action' in Woolman, Bishop & Brickhill (n 52) ch 63; C Hoexter *Administrative law in South Africa* (2012) ch 63.
- 59 Van der Walt (n 32) 29.
- 60 AJ van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77.
- 61 As above.
- 62 Sec 26(3) Constitution.
- 63 Sec 25(1) Constitution.
- 64 Van der Walt (n 32) 31 40-43 on the notion of legislation that gives effect to a right.
- 65 Sec 25(6) Constitution.
- 66 Sec 25(5) Constitution. See also J Pienaar & J Brickhill 'Land' in Woolman, Bishop & Brickhill (n 52) ch 48; AJ van der Walt *Constitutional property law* (2005) 354-368.
- 67 Sec 26(2) Constitution. See S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 187-191.
- 68 Sec 26(3) Constitution.

Therefore, these characteristics indicate that a property system should not have the unwanted outcomes of causing or exacerbating homelessness or landlessness.⁶⁹

Van der Walt argues that these characteristics and the unwanted outcomes can be linked to the general constitutional aims and transformative goals stated in the various provisions of the Bill of Rights.⁷⁰ Therefore, in promoting the spirit, purport and objects of the Bill of Rights a property system must display these characteristics and avoid unwanted outcomes. When determining which is the most appropriate source of law – PIE, the Immigration Act or the Refugees Act – to regulate the eviction of undocumented foreigners in post-apartheid South Africa, it must be established whether and to what extent PIE, the Immigration Act or Refugees Act promotes the principle of a single legal system of law which demonstrates these characteristics while avoiding unwanted outcomes.

2.3 Evicting undocumented foreigners from South Africa

2.3.1 *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*

The purpose of PIE is to prohibit illegal evictions and to establish a framework for evicting unlawful occupiers. PIE provides three distinct application procedures for the eviction of unlawful occupiers, namely, where a private owner or the person in charge of the land institutes normal eviction proceedings;⁷¹ where a private owner or person in charge of the land institutes urgent eviction proceedings;⁷² and where an organ of state institutes eviction proceedings.⁷³ Section 6(1) of PIE states that an organ of state may institute eviction proceedings against unlawful occupiers from the land and that the court may grant an order of eviction if it is 'just and equitable' to do so and if 'it is in the public interest'. For the purposes of section 6(2) of PIE 'public interest' includes 'the interest of health and safety of those occupying the land and the public in general'.

PIE was enacted after 1994 and reliance on it recognises its enactment by the democratically-elected legislature so that it demonstrates the desired features and attempts to steer clear of unwanted outcomes. Furthermore, PIE is partial legislation,⁷⁴ but does

69 Van der Walt (n 32) 32.

70 As above.

71 Sec 4 PIE.

72 Sec 5 PIE.

73 Sec 6 PIE.

74 Muller (n 25) 633. PIE applies to all instances of unlawful occupation (squatting, land invasions, former mortgagors and holding over), in both urban and rural areas, where the property is used for residential purposes. However, PIE is not applicable if the property is used for business or for commercial purposes. See *Manguang Local Municipality v Mashale & Another* 2006 (1) SA 269 (O) paras 6 and 7; *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) para 14.

give direct effect to a right in the Constitution that directly impacts evictions in general.⁷⁵ PIE requires circumspect application of the subsidiarity principles because it neither exhausts the constitutional obligation in terms of section 26(3), nor does it wholly replace the common law eviction of unlawful occupiers wholly. Relying on the subsidiarity principles in the context of partial legislation such as PIE still serves the general purpose of ensuring that the identification of the applicable source of law promotes constitutional goals despite the reduction in their directive force.⁷⁶

PIE seems to satisfy all the characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights. PIE is formally valid and of general application to all unlawful occupiers who use land or buildings/structures for residential purposes in both urban and rural areas. PIE also promotes the inherent human dignity of people; applies to everyone equally and does not discriminate against people based on any of the listed grounds in section 9(3) of the Constitution read with section 29(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and Item 4(a) of the Schedule to PEPUDA;⁷⁷ promotes access to administrative justice;⁷⁸ and promotes access to courts.⁷⁹ PIE limits the right of owners to the use and enjoyment of their property for a legitimate purpose, but also ensures that an appropriate balance is struck between the property interests of landowners and the housing interests of the unlawful occupiers in that PIE explicitly states that a court should make an order that is just and equitable to landowners and the unlawful occupiers.

PIE fits with one of the land reform programmes provided for in the Constitution.⁸⁰ Land tenure reform has been described as the reform

75 Van der Walt (n 32) 61-63. Although it is clear from the Preamble of PIE that it intends to give effect to sec 26(3) of the Constitution, this section does not specifically provide that legislation should be enacted to give effect to it.

76 Van der Walt (n 32) 50.

77 G Muller 'On considering alternative accommodation and the rights and needs of vulnerable people' (2014) 30 *South African Journal on Human Rights* 47. Muller argues that PIE gives effect to substantive equality. PIE requires a context-specific consideration of the rights and needs of the elderly, children, persons with disabilities and female-headed households.

78 Sec 4(2) PIE. The unlawful occupiers and local authority within whose jurisdiction the land falls must be given written and effective notice of eviction proceedings at least 14 days before the hearing of the application. The purpose of the notice is to provide the occupiers with protection by notifying them of the threat to their occupation, informing them of the provisions of PIE, and informing them of their rights. The unlawful occupiers must receive information regarding the nature of the proceedings; the date and time of the hearing; the grounds for the proposed eviction; their right to appear and defend the case; their right to request legal aid; and the fact that they will have an opportunity to place their personal circumstances before the court.

79 Secs 4(6), 4(7), 5(1) & 6(1) of PIE expressly state that evictions may occur only in terms of a court order that was issued after consideration of all the relevant circumstances.

80 Muller (n 25) 635.

of the legal basis of land holding that is usually directed towards the implementation of social change.⁸¹ In the context of eviction of undocumented foreigners, calls are made for social change through a land use system that is not segregated along the lines of ethnic or social origin. The abolition of discriminatory apartheid land law legislation was insufficient and merely symbolised the start of a process that required the enactment of further legislation to strengthen and stabilise weak rights and interests in land.⁸² Lastly, the availability of alternative accommodation is regarded as the most important factor that a court should consider in determining whether it is just and equitable to grant an eviction order.⁸³ The reality of an eviction is that the evictees are unable to take the physical site and its intangible elements as a home⁸⁴ with them to the alternative accommodation. Therefore, an eviction order often breaks the strong emotional ties and support structures within a community.⁸⁵ An eviction destroys and disrupts the livelihoods of individuals and their families as relocation entails various uncertainties.⁸⁶ An additional layer of uncertainty is attached when undocumented foreigners are evicted, including further marginalisation and the imminent threat of

81 D Carey Miller *Land title in South Africa* (2000) 456.

82 Muller (n 25) 635.

83 *Tswelopele* (n 15) para 18. The evictees had constructed their shelters using scraps of building and waste material. Although the actual structure had a minimal market value, the pain and humiliation of being left homeless could not be quantified. Regardless of the minimal market value of the shelter, it provided them with a home which they would have otherwise not have had. Therefore, the availability of alternative accommodation is imperative in regaining an evictee's sense of dignity and safety.

84 See L Fox 'The meaning of home: A chimerical concept or a legal challenge?' (2002) 9 *Journal of Law and Society* 580; L Fox 'The idea of home in law' (2005) 2 *Home Cultures* 1; L Fox *Conceptualising home: Theories, laws and policies* (2007). Fox developed the concept of 'home' in the context of the United Kingdom to show how courts could weigh the tangible, monetary interests of creditors against the intangible, affective interests of occupiers that face eviction claims from the creditors. These intangible, affective interests of occupiers include the home as (a) a physical structure because it provides occupiers with the requisite shelter from the elements and the facilities that sustain and support them; (b) a territory because it affords the occupiers of the home the opportunity to exercise control over the space in the home and the activities within it; (c) identity because it embraces the adage 'home is where the heart is' and reveals the fact that occupiers forge strong emotional connotations with their homes through the experience of living in a particular place over a period of time; and (d) as a social and cultural unit because it creates an intimate link between the family and their place of residence that is sustained through a complex process of social interaction between members of the household. See also the submissions of the *amici curiae* in *Residents of Joe Slovo Community Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 27-49. These submissions are available online at <http://www.constitutionalcourt.org.za/Archimages/12720.PDF> (accessed 1 August 2011).

85 Muller (n 25) 636.

86 As above. These uncertainties range from the ability of individuals to earn an income as informal traders or usurping other unskilled employment; the prevalence of gang-related violence and the safety of the new area; the closeness of recreational facilities, health care facilities, religious institutions and schools; and service delivery and infrastructure.

xenophobic attacks. The failure to consider whether it is just and equitable to grant an eviction order may perpetuate or even exacerbate the vulnerable position of undocumented foreigners who are forced from their homes.

Therefore, PIE satisfies the characteristics of a property system that optimally promotes the spirit, purport and objects of the Bill of Rights.

2.3.2 *Immigration Act*

The Immigration Act was enacted to provide a uniform framework containing guidelines for the regulation of admission⁸⁷ of foreigners to,⁸⁸ their residence in, and their departure from the Republic.⁸⁹ All other relevant matters connected thereto are outlined in the Immigration Act, including the enforcement and detection policy relating to the monitoring of foreigners. It further aims to create a new system of immigration control in which immigration laws are efficiently and effectively enforced by deploying the administrative capacity of Home Affairs.

As is the case with PIE, the Immigration Act was enacted after 1994, and reliance on it must be approached similarly to that of PIE. However, the Immigration Act is partial legislation,⁹⁰ is of a technical nature⁹¹ and does not give direct effect to a right in the Constitution but may give indirect effect to section 21 of Constitution. The extent of the protection afforded in terms of the Bill of Rights may be

87 Sec 1(1)(a) of the Immigration Act defines 'admission' as 'entering the Republic at a port of entry on the basis of the authority to do so validly granted by this Act or by an immigration officer in terms of this Act'.

88 Sec 1(1)(xvii) of the Immigration Act defines 'foreigner' as 'an individual who is neither a citizen nor a resident but is not an illegal foreigner', while in terms of sec 1(1)(xviii) an 'illegal foreigner' is defined as 'a foreigner who is in the Republic in contravention of this Act and includes a prohibited person'.

89 Sec 1(1)(xi) of the Immigration Act defines 'departure' as 'exiting the Republic from a port of entry'.

90 Van der Walt (n 32) 20. The Immigration Act regulates and identifies persons who are lawfully entitled to enter the Republic. However, the Immigration Act does not regulate admission into and departure from the Republic of persons who are specifically regulated by the Refugees Act. Sec 2(b) of the Citizenship Act 88 of 1995 states that a person who is exempted from visa requirements in terms of sec 10A or sec 31(1) of the Immigration Act, who entered the Republic or is in the Republic for purposes of permanent residence, shall be deemed to be or have been lawfully admitted to the Republic for permanent residence therein, or permanently and lawfully residing in the Republic. The above is indicative that large portions of migration, citizenship and status regularisation are regulated by the Immigration Act, Refugees Act and Citizenship Act.

91 The *Oxford advanced learner's dictionary* (2005) defines 'technical' as 'connected with a particular subject and therefore difficult to understand if you do not know that subject'. The Immigration Act contains a web of procedural processes and substantive aspects. This includes internal monitoring and control, which requires a certain level of understanding, knowledge and skill to manoeuvre. Eg, the Immigration Act outlines 12 categories of visas in sec 10(2) all of which have their own specific requirements.

affected by the legal status of persons residing within South Africa.⁹² Section 21(1) provides that everyone has the right to freedom of movement, and section 21(2) states that ‘everyone’ – including non-citizens⁹³ – has the right to leave the Republic. The Immigration Act regulates the admission of foreigners to, their residence in, and their departure from the Republic and, therefore, may give indirect effect to sections 21(1) and 21(2) of the Constitution.

The scope and application of section 21 determine the extent of the protection of the right, which is linked to the interpretation of the right to freedom of movement and residence. This protection is of importance for persons who are neither South African citizens nor have regularised their stay. The position of section 21 in light of the Lawyers for Human Rights judgment is confirmed by Klaaren who states that it would seem that sections 21(1) and 21(2) of the Constitution similarly would be applicable to all persons within the South African territory,⁹⁴ including persons who are illegally in the Republic.

Although the Immigration Act may give effect indirectly to sections 21(1) and 21(2) of the Constitution, it is contextually problematic to construct a direct and clear line between the objectives of the Immigration Act and a right or rights in the Constitution. An extension of the subsidiarity principles may be justified in the context of post-1994 technical legislation because the Immigration Act was enacted in an era characterised by the efforts of a democratic legislator. Therefore, the normal subsidiarity principles should be consulted as a point of departure to prevent the development of parallel systems of law that regulate the eviction of undocumented foreigners under the guise of the Immigration Act. This will ensure maximum coherence with the principle of a single system of law. Although the subsidiarity principles should be used as a point of departure, they should be applied less strictly while allowing the provisos to feature more prominently.

In pursuance of the Immigration Act, section 32 regulates the deportation and monitoring of illegal foreigners and provides as follows:

92 J Klaaren ‘The right to freedom of movement and residence’ in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (Original Service, January 2013) ch 66-65.

93 Sec 21(3) of the Constitution provides that ‘[e]very citizen has the right to enter, to remain in and to reside anywhere in, the Republic’. Sec 21(4) provides that ‘[e]very citizen has the right to a passport’. Therefore, protection in terms of sec 21 in some instances is afforded to ‘everyone’ and in other cases only to ‘citizens’. However, the restriction of the protection is only to the extent that persons enter into and remain in the Republic and reside anywhere in the Republic.

94 Klaaren (n 92) 66-63. ‘Everyone’ should be given its ordinary meaning. The term, therefore, provides coverage to all natural persons, whether or not they are of South African nationality. Sec 26(1) of the Constitution states that everyone has the right to access adequate housing. It is suggested that the meaning of ‘everyone’ in terms of sec 26(1) be given the same interpretation as ‘everyone’ in terms of sec 21.

- (1) Any illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending his or her application for a status.
- (2) Any illegal foreigner shall be deported.

Furthermore, section 34(1) provides for the deportation and detention of illegal foreigners and states:⁹⁵

Without a need for a warrant,⁹⁶ an immigration officer may arrest an illegal foreigner, or cause him or her to be arrested, and shall irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General.

Both sections 32 and 34 require mandatory departure from the Republic in the form of the permanent deportation of illegal foreigners.⁹⁷ Where illegal foreigners are unlawfully occupying property and are deported they are required to permanently vacate the property in which they were residing with limited possibility to return once they have regularised their status due to having a criminal record.⁹⁸

95 Sec 34(1)(a) provides that the foreigner concerned shall be given written notice of the decision to deport him or her and that he or she has the right to appeal such decision in terms of this Act. The foreigner may at any time request any officer attending to him or her that his or her detention be confirmed by a court warrant and will be immediately released if the warrant is not issued within 48 hours of said request (sec 34(1)(b)). Additionally, the foreigner shall be notified of his or her rights in a language that he or she understands if practical, possible and available (sec 34(1)(c)). Sec 34(1)(d) provides that the foreigner concerned may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days. Lastly, sec 34(1)(e) provides that the foreigner concerned shall be held in detention complying with the minimum prescribed standards affording protection to his or her dignity and human rights.

96 In terms of sec 33(5)(b) of the Immigration Act, an immigration officer may also obtain a warrant to apprehend an illegal foreigner.

97 Sec 34(5) of the Immigration Act. Failure to depart will result in the foreigner being guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months.

98 In *Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) the constitutionality of sec 12(4)(b) of the National Building Regulations and Building Standards Act 103 of 1977 was challenged. The Constitutional Court held that sec 26(3) of the Constitution deserved 'a generous construction' and that sec 12(6) of the Act would render sec 26(3) of the Constitution 'virtually nugatory and [that it] would amount to little protection if people who were in occupation of their homes could be constitutionally compelled to leave by the exertion of the pressure of a criminal sanction without a court order' (para 49). In *Pheko* (n 23) the Constitutional Court interpreted sec 55(2)(d) of the DMA to refer to a 'temporary removal from a disaster-stricken area to a temporary shelter' which suggests that, if possible, people would be able to return to their homes once the disaster has abated. In the context of evicting unlawful occupiers from informal settlements or dilapidated inner city buildings, it would be contrary to the purpose of the Act if

The characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights, as applied above in respect of PIE, should be applied in the same manner to the Immigration Act. The Immigration Act is formally valid; is of general application to foreigners regarding their admission to, residence in and departure from the Republic; applies to all foreigners equally and does not discriminate against foreigners based on any of the listed grounds in section 9(3) of the Constitution read with section 29(1) and Item 4(a) of the Schedule to PEPUDA; promotes administrative justice,⁹⁹ and promotes access to courts.¹⁰⁰ The Immigration Act serves a public purpose of ensuring that immigration control is maintained. However, it may be argued that the Immigration Act falls short in terms of promoting the inherent dignity of human beings. Removing illegal foreigners in order to deport them deprives them of a home under the auspices of immigration control. This deprivation or loss has been referred to as a 'painful and often degrading experience' which perpetuates the marginalisation of illegal foreigners and their standing in society.¹⁰¹ The Immigration Act does not attempt to strike a balance between the public interests of local authorities to monitor and control immigration and the individual interests of illegal foreigners who are deeply affected in vacating their homes following arrest and deportation.

The Immigration Act does not contain a specific provision that requires immigration officials to consider the rights, needs and relevant circumstances of illegal foreigners before deportation is effected – let alone eviction. The purpose of the Immigration Act is not to regulate evictions but to ensure the efficient and effective administration of immigration control. The Immigration Act minimally promotes the adjudication and review of decisions that adversely affect an illegal immigrant.¹⁰² Therefore, the Immigration Act falls

unlawful occupiers could return to the settlement or building had measures not been taken to ensure the recurrence of the living conditions that necessitated the evacuation in the first place. In *Pheko* the Constitutional Court stated: 'An evacuation does not entail the demolition of people's homes or an indefinite removal. The DMA does not seek to achieve this. If the purpose of the DMA were to authorise demolition and eviction without an order of court, it would have said so. It does not. The forcible removal of the applicants amounts to an eviction, an indefinite removal from Bapsfontein. The deprivation is, in the circumstances, inimical to the right in s 26(3)' (para 40).

- 99 Sec 5(d) of the Immigration Act empowers the Immigration Advisory Board to review any decision of the Department of Home Affairs taken in terms of sec 8(1) of the Immigration Act when requested to do so by the Minister of Home Affairs.
- 100 Sec 8(2) of the Immigration Act affords a person who is aggrieved by the decision of the Department of Home Affairs generous avenues of appeal to the Director-General, the Minister and the courts. See further sec 37(1) of the Immigration Act.
- 101 *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others* 2012 (6) SA 294 (SCA) para 33.
- 102 Sec 8(1) of the Immigration Act states that prior to making a decision that adversely affects a person, Home Affairs must notify the affected persons and give them at least 10 calendar days to make representations. Thereafter, Home Affairs

short with regard to promoting access to the courts and administrative action.

The Immigration Act does not promote the spirit, purport and objects of the Bill of Rights to the extent that deportation is used to disguise a constructive eviction. It falls short on the characteristics of promoting the inherent human dignity of illegal foreigners, promoting access to administrative justice and promoting access to courts.

2.3.3 *Refugees Act*

The Refugees Act was enacted to give effect to the relevant international legal instruments, principles and standards relating to refugees in South Africa,¹⁰³ to provide for the reception of asylum seekers into South Africa,¹⁰⁴ to regulate applications for and recognition of refugee status; and to provide for rights and obligations flowing from such status.¹⁰⁵

The Refugees Act was also enacted after 1994 and reliance on it must be approached similarly to that of PIE and the Immigration Act. The Refugees Act is partial legislation and is of a technical nature.¹⁰⁶ The Refugees Act does not give direct effect to a right in the Constitution but may give indirect effect to section 21 of the Constitution, as in the case of the Immigration Act. It remains contextually problematic to construct a direct line between the Refugees Act and a right in the Constitution. Therefore, the subsidiarity principles demand that the focus must be on a purposive interpretation of the Refugees Act.

The characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights, as applied above in respect of PIE, should be applied in the same manner to the Refugees Act. The Act is formally valid; is of general application and applies equally to all

must give notice to the affected persons if the decision has been withdrawn, modified, or if it will become effective. Sec 8(4) further provides that any person who is adversely affected by a decision of Home Affairs shall be notified in writing of his or her rights and may not be deported before the relevant decision is final. However, when an illegal immigrant is evicted under the veil of immigration control in terms of the Immigration Act, he or she is neither notified of the impending eviction in terms of the Immigration Act nor in terms of PIE. It would appear that local authorities use the provisions of the Immigration Act to circumvent the procedural requirements in PIE. Therefore, deportation may often lead to an unlawful eviction.

103 Sec 1(xv) defines 'refugee' as 'any person who has been granted asylum in terms of [the Refugees] Act'.

104 Sec 1(v) defines 'asylum seeker' as 'a person who is seeking recognition as a refugee in the Republic'.

105 Preamble of the Refugees Act.

106 In interpreting, applying and administering the Refugees Act, a certain level of skill, knowledge and understanding is required. Sec 2(b) provides that each Refugee Status Determination Officer and Refugee Reception Officer must have such qualifications, experience and knowledge of refugee matters to ensure that they are capable of performing their functions.

asylum seekers regarding their application for refugee status; does not discriminate against asylum seekers based on any of the listed grounds in section 9(3) of the Constitution read with section 29(1) and Item 4(a) of the Schedule to PEPUDA; promotes access to administrative justice;¹⁰⁷ and promotes access to courts.¹⁰⁸

The Refugees Act pursues a public purpose of ensuring that relevant international legal instruments, principles and standards relating to refugees are adhered to. Therefore, the Refugees Act upholds both public interest and individual interest by extending protection to those who are unable or unwilling to return to their country of nationality out of fear.¹⁰⁹ The Refugees Act contains specific provisions for when the rights, needs and circumstances of refugees and asylum seekers are considered.¹¹⁰

Section 23 of the Refugees Act provides for the detention of an asylum seeker whose status has been withdrawn:

If the Director General has withdrawn an asylum seeker visa in terms of section 22(5), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.

Removal and detention in this instance entails that the asylum seeker referred to above must permanently vacate the building or structure in which he or she is residing. The asylum seeker therefore is evicted from their home.

The Refugees Act appears to meet many of the characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights. However, it provides no protection in circumstances where its provisions, particularly section 23 above, are used to execute an eviction.

107 Secs 11(e) and 25(1) of the Refugees Act empowers the Standing Committee for Refugee Affairs to review the decision of a Refugee Status Determination Officer.

108 Secs 14(1)(b) and 26 of the Refugees Act empower the Refugee Appeal Board to hear and determine any appeal lodged in terms of this Act.

109 Sec 3 of the Refugees Act provides that 'a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere'.

110 See secs 2 and 3 of the Refugees Act read with sec 32 which makes special provision for unaccompanied children and mentally-disabled persons who must be assisted in applying for asylum.

3 Eviction of undocumented foreigners

In evicting undocumented foreigners, the procedural protections and substantive safeguards contained in PIE should be applied as a point of departure. Therefore, it is necessary to first consider the protection generally afforded to unlawful occupiers in terms of PIE before ascertaining whether these protective measures are limited in respect of unlawful occupiers who are undocumented foreigners. When an owner or person in charge of land institutes proceedings for the eviction of an unlawful occupier,¹¹¹ the court must serve written and effective notice of the proceedings on the unlawful occupier and the municipality having jurisdiction. This must be done at least 14 days prior to the hearing of the proceedings.¹¹² If the court is satisfied that service cannot conveniently or expeditiously be effected in the manner provided by the rules of the court, then service must be effected in the manner directed by the court provided that the court considers the rights of the unlawful occupier to receive adequate notice and to defend the matter.¹¹³ In determining whether it would be just and equitable to evict the undocumented foreigners, the court must consider the rights and needs of vulnerable people,¹¹⁴ the availability of alternative accommodation,¹¹⁵ imposing reasonable conditions on the eviction and/or demolition order.¹¹⁶

In *Chapelgate* the Court examined the extent of benefits, protections and rights afforded to undocumented foreigners. An undocumented foreigner who resides in South Africa and to whom the Refugees Act does not apply has diminished status. He or she may not be lawfully employed¹¹⁷ and no learning institution may knowingly provide him or her with training.¹¹⁸ Additionally, it is an offence to let or make available to an illegal foreigner accommodation unless for the purposes of humanitarian assistance.¹¹⁹ The Court referred to *Khosa v Minister of Social Development*.¹²⁰ In this judgment Mokgoro J stated that the case of an illegal foreigner was 'quite different' to that of a person who has regularised his or her stay. However, the failure of a foreigner to enter the country legally at a designated port of entry or one who did not seek asylum but gained entry using another category of visa which has since expired does not

111 Sec 4(1) PIE. The procedure for the serving of notices and filing of papers is prescribed by the rules of the court.

112 As above.

113 Secs 4(4) & 5 PIE.

114 Sec 4(6) PIE.

115 Sec 4(7) PIE.

116 Sec 4(12) PIE.

117 Sec 38(1)(a) of the Immigration Act provides that no person shall employ an illegal foreigner.

118 Sec 39(1)(a) of the Immigration Act further provides that no learning institution shall knowingly provide instruction or training to an illegal foreigner.

119 Secs 42(1)(b)(viii)-(ix) read with sec 49 of the Immigration Act.

120 2004 (6) SA 505 (CC) paras 59 & 69.

render that person subject to the consequences of the Immigration Act provided that an intention to seek asylum exists.¹²¹ South African precedent has proved hesitant in affording an undocumented foreigner the same rights as asylum seekers and refugees. However, the courts have confirmed that the right to dignity is determinative of the issue if it is conflicted by any other law, including another provision in the Constitution.¹²² In *Chapelgate* Spilg J concluded that undocumented foreigners are equally entitled to the socio-economic rights contained in the Bill of Rights as a citizen would ordinarily be entitled to insofar as the provision does not specifically provide enjoyment and protection for citizens only.¹²³

In *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others (Changing Tides)*¹²⁴ the interior of a building had been divided into apartments that were let to citizens and undocumented foreigners. The Supreme Court of Appeal considered whether the City was obliged to provide temporary emergency accommodation for undocumented foreigners. The judgment turned on whether the determination of status should precede the provision of emergency shelter. Without the luxury of time, the Court identified that the matter required prompt alleviation of the plight of individuals who had been trapped in an emergency situation.¹²⁵ The living conditions in the building posed a risk to life and health.¹²⁶ Therefore, the Court did not concern itself with the niceties of any qualifier other than the desperate need to accommodate the individuals concerned.¹²⁷ In establishing when the appropriate time was to determine the status of the undocumented foreigner, the Court held:¹²⁸

The relevant question, in cases of eviction creating an emergency, is whether the appropriate time to [determine the status of the occupier] is before that person obtains such accommodation or afterwards. Where the facts point to the desirability of the eviction being effected as rapidly as

121 *Chapelgate* (n 19 above) para 40.

122 *Chapelgate* (n 19 above) para 51. See further *Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others* 2007 (4) SA 395 (CC) para 99–110 (*Union of Refugee Women*); *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA) para 26–31.

123 *Chapelgate* (n 19) para 67–70. Only a few sections in the Bill of Rights apply expressly to citizens only. The laws of general application may also be applicable to reasonably and justifiably limit the enjoyment of other constitutionally-protected rights to citizens only. However, where questions of life, bodily integrity and dignity are involved, it becomes more problematic to justify the limitation of the right.

124 2012 (6) SA 294 (SCA).

125 *Changing Tides* (n 124) paras 53–54.

126 *Changing Tides* para 2. The building was in a state of disrepair with no toilets or ablution facilities, illegal electricity connections, no sewerage or water supply, inadequate ventilation and refuse, including human waste, strewn in open spaces. The building was a health and fire hazard and it was claimed by the local police that the building provided a hub for illegal activities.

127 *Chapelgate* (n 19) para 58.

128 *Changing Tides* (n 124) paras 53 & 56. The Court ordered that accommodation be made available to all occupiers.

possible, because the circumstances in which the occupiers are living pose a risk to life and health, the only answer must be that the review process should defer to the need for eviction and accordingly take place after the City has provided the evictees with temporary emergency accommodation.

The Court in both *Chapelgate* and *Changing Tides* held that while evictees that are undocumented foreigners are entitled to temporary emergency accommodation,¹²⁹ their entitlement may be subject to reasonable and conditions set by the courts, such as regularising their stay within a certain period.¹³⁰

Our argument is that in instances such as *Chapelgate* and *Tswelopele*, where undocumented foreigners stand to be unlawfully evicted under the guise of immigration control, PIE is the most appropriate source of law to regulate the effective eviction of any foreigner. The Immigration Act and the Refugees Act do not contain the same, or even similar, procedural protections and substantive safeguards against illegal eviction. However, the provisions of the Refugees Act and the Immigration Act ought to be used to supplement PIE in the unique context of regulating the entry into and egress from South Africa of foreigners. Specifically, this includes the precondition that before an undocumented foreigner is entitled to temporary emergency accommodation their stay must be regularised. In this regard, the relevant sections of Refugees Act and the Immigration Act pertaining to detention, deportation and withdrawal of refugee or asylum seeker status are to be applied.¹³¹

Until such time that the status of a foreigner is determined or their lawful detention or deportation commences, he or she must be entitled to the same benefits that are afforded to any citizen. Pertinently, this includes the procedural protections and substantive safeguards in PIE and access to temporary emergency shelter. This is especially so when the living situation of the undocumented foreigner is one of dire need.¹³² This approach will prevent local authorities from circumventing the procedural protections and substantive safeguards of PIE under the guise of immigration control and 'weeding out' the few unlawful occupiers who may not be entitled to certain benefits, such as temporary emergency accommodation.¹³³

By identifying PIE as the most appropriate source of law – and thus the best starting point – in all eviction matters relating to undocumented foreigners, and supplementing its provisions with the relevant sections of the Immigration Act and Refugees Act, we are able to determine the relationship and coherence of all three Acts within a single system of law that is shaped by the Constitution.

129 Sec 4(7) PIE.

130 Sec 4(12) PIE.

131 Sec 34 of the Immigration Act and secs 23 and 28(1) read with sec 28(4) of the Refugees Act.

132 *Changing Tides* (n 124) para 52.

133 As above.

4 Conclusion

It is likely that the increase in immigrants seeking entry into South Africa will continue to surge.¹³⁴ Therefore, it is necessary to provide local authorities with guidance as to how they should – and, by implication, are not permitted to – evict unlawful occupiers who are undocumented foreigners under the guise of immigration control. The subsidiarity principles demand that the Immigration Act should be interpreted with a generous measure of distrust as it does not optimally demonstrate all the characteristics or avoid the unwanted outcomes. In addition, the Immigration Act should be treated with a fair amount of circumspection given that it is partial legislation and due to its technical nature. The application of the subsidiarity principles demands a purposive interpretation of the Immigration Act. The Immigration Act does not optimally promote the spirit, purport and objects of the Bill of Rights because it does not satisfy all the general, systemic features and characteristics of a property system in post-apartheid South Africa.

The Refugees Act appears to meet many of the characteristics of a property system that promotes the spirit, purport and objects of the Bill of Rights and appears to avoid unwanted outcomes. However, the Refugees Act should also be treated with a fair amount of circumspection given that it is partial legislation and due to its technical nature. The subsidiarity principles demand that the focus must be on a purposive interpretation of the Refugees Act. Although the Refugees Act satisfies many of the general, systemic features and characteristics of a property system in post-apartheid South Africa, it does not provide adequate protection in circumstances where its provisions, particularly section 23 of the Refugees Act, are used to execute an eviction.

PIE, in contrast, deserves a greater degree of respect. It satisfies all the characteristics and avoids the unwanted outcomes of a property system that optimally promotes the spirit, purport and objects of the Bill of Rights.¹³⁵ It is argued that PIE should be the starting point for evicting unlawful occupiers who are undocumented foreigners. The rights and needs of the evictees should be central to the question of whether it is just and equitable to grant an eviction order.¹³⁶ Put differently, the marginalisation of undocumented foreigners will be perpetuated if local authorities are allowed to execute evictions for immigration control in terms of police power legislation. Local authorities are required to fundamentally reconsider their response to eviction under the guise of immigration control. This reconsideration must be animated by a genuine concern for the precarious position in which undocumented foreigners find themselves; the duty to respect

134 Hiropolous (n 1) 1.

135 Muller (n 25) 637.

136 As above.

their right of access to adequate housing;¹³⁷ the political will to find case-specific solutions that will allow progressive realisation of the right of access to adequate housing;¹³⁸ and a profound understanding of the significance of a home.¹³⁹

The Immigration Act and the Refugees Act should be used in conjunction with PIE where the unlawful occupiers are undocumented foreigners. This conjunction would infuse any decision on evicting undocumented foreigners with the procedural protections and substantive safeguards, including the right to be provided with temporary alternative accommodation, of PIE.

This conclusion should be understood against the background of various paradigm shifts in the law of evictions: first, from abstract to context-specific adjudication and, second, from a hierarchical arrangement of rights to a constitutional matrix of relationships.¹⁴⁰ The last paradigm is a move from government establishing a land use system that is based on racial and status segregation to a government that must promote equitable access to land and housing.¹⁴¹

It is arguable that local authorities and the government at various levels feel frustrated that they are unable to satisfy all the context-specific requirements of PIE.¹⁴² In these instances, local authorities have instead decided to invoke their police powers to evict undocumented foreigners for the purposes of immigration control. In some respects it appears that by doing so, local authorities have decided to further marginalise undocumented foreigners and to ignore the precarious conditions in which undocumented foreigners find themselves.

The right to dignity features prominently in the right to have access to adequate housing in terms of sections 26(1) and (2) of the Constitution and underscores the protective rights accorded to an evictee under section 26(3) of the Constitution, which is given substantive context through PIE. In *Maphango & Others v Aengus Lifestyle Properties (Pty) Ltd*¹⁴³ Froneman J stated that '[i]t would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation. This would be so no matter how the case was pleaded.'¹⁴⁴

It is clear that the courts have a constitutional responsibility to consider all legislation that promotes equitable access to land and

137 Muller (n 25) 638.

138 As above.

139 *Residents of Joe Slovo* (n 84) paras 231 & 232. Ngcobo J stated that sec 26(3) 'underscores the importance of a house, no matter how humble ... it acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security.'

140 Muller (n 25) 638.

141 As above.

142 As above.

143 2012 (3) SA531 (CC).

144 *Maphango* (n 143) para 152.

housing and prevents further marginalisation of vulnerable groups, particularly undocumented foreigners, and that all evictions, irrespective of the status of the evictees, are carried out in a manner that respects human dignity, equality and freedom.¹⁴⁵ The time is ripe to declare that PIE should be the starting point in any inquiry regarding the eviction of unlawful occupiers who are undocumented foreigners in post-apartheid South Africa.

145 *Chapelgate* (n 19) para 73. Spilg J shared this sentiment with Ngcobo J in *Joe Slovo* (n 84) paras 231 & 232.