

**BETWEEN CONCEPTUALISM AND CONSTITUTIONALISM:  
PRIVATE-LAW AND CONSTITUTIONAL  
PERSPECTIVES ON PROPERTY**

by

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All that remains is to quote Gloria Steinem as I contemplate what comes after:

Women in business  
dress in man-style suits  
and treat their secretaries in a man-style way.

Women on campus  
wear "masculine" thoughts  
and look to daddy for  
good grades.

Married women  
give their bodies away  
and wear their husbands'  
wishes.

Religious women  
cover sinful bodies  
and ask redemption from god  
not knowing  
she is within them.

That's why I'll always love  
the fat woman who dares to wear  
a red miniskirt  
because she loves her woman's body.  
The smart woman who doesn't go to college  
and keeps possession of her mind.  
The lover who remains a mistress  
because she knows the price of marrying.  
The witch who walks naked  
and demands to be safe.  
The crazy woman who dyes her hair purple  
because anyone who doesn't love purple  
is crazy.

Dear Goddess: I pray for the courage  
to walk naked  
at any age.  
To wear red and purple,  
to be unladylike,  
inappropriate,  
scandalous and  
incorrect  
to the very end.

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## ABSTRACT

The conceptualist view of property is based on the conceptual system or hierarchy of rights conceived by Grotius and developed by the pandectists. It rests on the assumptions that ownership is neutral and timeless. As such it has a number of abstract, timeless and universal characteristics, namely absoluteness, uniformity and exclusivity. Combined with liberalism, this concept of property becomes the guarantee of liberty and equality.

The first part of this study shows that not only are the assumptions historically unfounded, but this conceptualist view of property made liberty and equality for women, in particular, impossible. The liberal, conceptualist property concept is a modernist construct that cannot guarantee either liberty or equality. The question then becomes whether constitutionalism can do what conceptualism cannot – can the constitutional protection of property guarantee liberty and equality.

The second part of this study suggests that the answer to this is an "it depends" kind of answer. It depends on the structure of a constitution, underlying philosophical, political and, above all, hermeneutics theories employed by courts. In the South African context courts need to reject the private-law conceptualist view of ownership in favour of a constitutional property concept. This last-mentioned concept should be based on the values and normative context of the 1996 constitution. As such it involves value choices and making a political stand. Courts need to abandon conceptualist frameworks and decide on the proportionality of limitations on property.

The conclusion to this study suggests that a feminist understanding of human beings as socially constructed and constrained, so that democracy alone cannot provide an answer to the counter-majoritarian dilemma, is necessary for an understanding of property. The creative tension provided by the feminist conflict between a political agenda and a respect for contexts may provide a framework for adjudicating on property issues.

**Key terms:**

Property; conceptualism; constitutionalism; feminism; Grotius; Kant; contextualism; constitutional hermeneutics; post-modernist; ownership.

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## INTRODUCTION

### CHAPTER 1: MOTIVATION AND HYPOTHESES

"(B)y political laws we acquire liberty and by civil law property, and ... we must not apply the principles of one to the other"<sup>1</sup>

"(T)he last word on law comes from judges, who, like lawyers, are for the most part trained in private rather than in public law..."<sup>2</sup>

"Our understanding is often muddled, however, by the patriarchal propensity to erect artificial boundaries ... and then to 'violate' these as 'enemy' territory. ... Our sane surviving requires seeing through male-made, maddening artificial boundaries, as well as deriding male 'violation' of these false boundaries."<sup>3</sup>

#### 1.1 Motivation and hypotheses

The seminal article by Morris Cohen, quoted above, starts with the familiar statement that "... as every student knows..." property and sovereignty/liberty belong to completely different branches of law. Whereas private law regulates the acquisition, protection and transfer of property, public law is concerned with the liberty and equality of citizens. Although property, as a concept, is found in both branches of law, it is assumed that property has fundamentally different functions in each of these branches of law. It is this common assumption that provided the impetus for this study. In broad terms it is an analysis of the classical liberalist private/public dichotomy from the perspective provided by the private-law concept of property and the constitutional protection of private property.

To a large extent, it is the constitutional protection of private property that makes the private/public dichotomy problematic. On the one hand

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1 Cohen M "Property and sovereignty" in Macpherson CB *Property: mainstream and critical positions* (Toronto 1978) 155-175 155. (Cohen is here quoting Montesquieu.)

2 Cohen "Property and sovereignty" 168.

3 Daly M *Gyn/Ecology - the metaethics of radical feminism* (London 1991) 71.

constitutional protection of private property is viewed as an "invasion" of private-law territory by public law and it is resisted as such by civilists. The private-property regime is regarded as inherently just (and therefore not in need of "correction") and as basically a-political (and it should therefore remain uncontaminated by the "political" considerations of public law).<sup>4</sup> This explains why "... traditional conceptions of property prevail over obvious national interests such as the freedom of labourers to organise."<sup>5</sup>

On the other hand the constitutional protection of private property also exacerbates the liberal dilemma in public law. Liberalism is committed to both equality and liberty, and property is seen as the means to attain liberty. However, unequal distribution of property results in inequality both in the political and the economic sense,<sup>6</sup> and the constitutional protection of private property, at least superficially, seems to confirm and "freeze" the existing unequal distribution of property.

The constitutional protection of property thus raises three primary questions. In the first place it strains the traditional understanding of the limits of state interference in "private" matters. In this respect traditional boundaries between private and public, state and citizen, owners and non-owners need to be explored. This mostly deals with the traditional property concept and the way in which these relations are traditionally understood. The second question goes to the heart of the equality/liberty dichotomy. If property is seen as the guarantee for liberty, then a state-enforced equality might threaten that liberty especially if this liberty is understood absolutely. An

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4 Van der Walt AJ "Tradition on trial: a critical analysis of the civil-law tradition in South African property law" 1995 SAJHR 169-206 180: "... some supporters think that the problem with apartheid was that politics was allowed to enter into what should be 'pure' private-law relations, and that the solution is to keep not only apartheid but all politics out of private law."

5 Cohen "Property and sovereignty" 168.

6 Cohen "Property and sovereignty" 159: "But we must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings." On the classical liberalist dilemma see Levy MB "Illiberal liberalism: the new property as strategy" 1983 Rev of Pol 576-594; Gill ER "Property and liberal goals" 1983 J of Pol 675-695; Waldron J *The right to private property* (Oxford 1988) 412ff.

absolute protection of liberty, on the other hand, might result in substantial inequality, at least economically. Constitutional protection of property thus seems to make the simultaneous protection of both equality and liberty impossible. The third question is, however, the crucial one. If it is assumed that the private-law property concept raises many problems and anomalies (and the first part of this study suggests that it does), the question then arises whether constitutional protection can solve these problems. This question then raises the further question regarding the differences, if any, between the private-law and constitutional property concepts.

One key to the solution of these problems lies in the property concept. In the case of the private law/public law controversy, the question then becomes whether the property concept is determined by private law or by public law. Within private law, the question is whether the "private-law character" of the property concept is affected by the public-law nature of the constitutional framework within which fundamental rights are guaranteed. Within public law, the question is whether constitutional law can recognise and utilise the "private-law character" of the property concept.<sup>7</sup> To explore this key to the solution, this study will focus on the property concept and the effect, if any, of constitutional entrenchment on this concept.

However, the concept can never be neutral or objective and is subject to interpretation. Consequently, the study of the concept also implies a study of the interpretation of that concept. This depends on the context and it is, in turn, dependent on some very basic points of departure. Robert Cover stated that "(l)egal interpretation takes place on a field of pain and death"<sup>8</sup> which means that law and legal rules can only be understood within the context of its narratives. Legal rules and concepts do not exist in the abstract, but are

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7 See Van der Walt AJ "Reflections on the teaching of property law in future" 1993 Stell LR 88-99 97, 99 on the public law/private law dichotomy in South African property law.

8 Cover RM "Violence and the word" in Minow M, Ryan M and Sarat A (Eds) *Narrative, violence and the law - the essays of Robert Cover* (Ann Arbor 1992) 203-238 203.

affected by and affect peoples' lives. In a footnote Cover states: "I would be prepared to argue that all law which concerns property, its use and its protection, has a ... violent base."<sup>9</sup> The first, general point of departure of this study is, therefore, that property, in particular, is determined not by abstract conceptual schemes alone but also by the underlying narratives and that these narratives always contain an element of violence and power. For this reason the study is not a "purely legal" one and, even more so, not a "purely private-law" one. It attempts to place legal rules pertaining to property and the property concept within the narratives that give it meaning. It would deprive the property concept of all meaning if it were studied as if the political, philosophical, social, moral and religious narratives did not exist.

The first, general point of departure must be specified further. One of the narratives within which property needs to be placed is the radical feminist one. This narrative denies the privilege accorded to the male pattern of thinking and knowing; it seeks to subvert male and female stereotyping that is seen as the basis for autonomous individualism; and it argues against the use of men as the primary reference point.<sup>10</sup> This second point of departure implies a different methodology that de-privileges traditional modes of analysis in favour of what Mary Daly calls *spinning*.<sup>11</sup> In short, the claims that link property, liberty and equality (which underlie the conceptualism and constitutionalism that is studied here) need to be re-examined against the background of the patriarchal State of Possession:

"The courage to be logical - the courage to name - would require that we admit to ourselves that males and males only are the originators, planners, controllers, and legitimators of patriarchy. ... The fact is that we live in a

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9 Cover "Violence and the word" 210.

10 Minow M *Making all the difference - inclusion, exclusion and American law* (Ithaca 1990) 56, 230, 238.

11 This aspect will be dealt with below at 1.2.

profoundly anti-female society, ... (therefore) this book is an act of Dis-possession; and hence, in a sense beyond the limitations of the label *anti-male*, it is absolutely Anti-andocrat, A-mazingly Anti-male, Furiously and Finally Female."<sup>12</sup>

The property concept exists on a field of pain and death and it is "... part of the **same** system of patriarchal possession, whose primary property is female life."<sup>13</sup>

## 1.2 Methodology

In order to study the problem set out above on the basis of the stated hypotheses, the study is divided into two main parts. In the first part the historical roots and development of the traditional private-law property concept is studied. In particular, the assumptions about this concept are tested against the historical data and narratives. This part concentrates not only on the history of positive law, but also on the philosophical development of the private-law property concept in a comparative context. The historical development is then offset against the background of the social realities of the various periods.

In the second part the property concept is studied from a constitutional perspective. This is mainly a comparative study that attempts to bring into focus both the socio-political backgrounds and the impact of the various constitutions on both society and the property concept itself within a variety of legal systems.

In this regard the comparative study compares dissimilar legal systems. It is argued that this approach will indicate similarities and/or anomalies that do

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<sup>12</sup> Daly *Gyn/Ecology* 28, 29.

<sup>13</sup> Daly *Gyn/Ecology* 33.



not usually surface from a comparative study of legal systems within the same legal "family".

The methodological approach of this study is determined by both the traditional method of analysis<sup>14</sup> and the points of departure stated above. To a large extent analysis of the traditional private-law property concept necessitates the use of the traditional methodology. At the same time a radical feminist analysis implies a different method, one which Mary Daly calls *spinning*.<sup>15</sup> This amounts to a focusing on the female background to male-dominated legal rules and the analytical methodologies that sustain them. This implies both knowledge of the rules and an aware-ness of its inherent violence and gynocidal character.

In this study the question of the vertical and horizontal application of constitutional provisions will not be addressed, except incidentally. Since constitutional protection (and provisions relating to expropriation and regulation) directly affects the relationship between state and citizen, that will be the main issue. For much the same reason this study does not deal with public or state property, but the focus is on private property and, in many cases, on landownership in particular. Consequently, when the term *property* is used, this will refer to private property unless the context indicates otherwise. Because of the focus on the property concept the question of the difference, if any, between real and personal rights will not be addressed, except where relevant in the historical context.

Finally, this study will be limited to an analysis of national constitutions. Although the jurisprudence of international and, especially, regional courts are interesting, they deal with the problem of property on a different basis. The problems confronting regional courts (such as the European commission

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14 See, on the traditional method, Van der Walt 1995 SAJHR 169ff.

15 Daly *Gyn/ecology* 320.

on human rights and the European court of human rights) are unique in that they involve questions of inter-state relations as well as conflicts between states and citizens. For this reason, these decisions will not be studied here.

### 1.3 Terminology

Some of the terminology used in this study will, at first, probably be strange to civil lawyers in particular. The difficulty stems from the fact that different languages use different terms and that different systems of law employ different concepts. In Afrikaans, for instance, a real right to a corporeal object is termed *eiendomsreg* (which is usually translated as *ownership*), while the object itself is termed *eiendom* or *saak* (usually translated as *property*). These terms are found in most civil law systems, albeit in different languages. In Anglo-American law, on the other hand, *property* is used to indicate both the right and the object of that right. Apart from this the term *property rights* is also sometimes used. Furthermore, the use of the term *rights in property* (*regte in eiendom*) in the *Constitution of the Republic of South Africa*<sup>16</sup> made it necessary to distinguish between *property* and *rights in property*.<sup>17</sup>

To avoid confusion the term *property* will be used throughout where appropriate. Although this term is not the one usually employed in civil law, it is the one most commonly used in constitutional property clauses. For this reason it seems the most appropriate, especially in the discussion on constitutional law. In all cases, however, the meaning of the term needs to be deduced from the context. As was the case with concepts, it is assumed for purposes of this study that this term (like most others) has no absolute/abstract/eternal meaning, but its meaning is determined in each case by the socio-political context. In discussions on Roman and Roman-

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16 *Constitution of the Republic of South Africa* 200 of 1993 (hereinafter referred to as the 1993-constitution).

17 See 12.4 below.

Dutch law, the Latin term *dominium* will mostly be used. In all other cases, terms will be defined where they are first used.

## PART I: A PRIVATE-LAW PERSPECTIVE

### CHAPTER 2: INTRODUCTION

"Property ... has varied infinitely in character and content from century to century and from place to place. ... (E)ven as regards things recognised for seven centuries as property, the rights in them recognised by law have been forever changing."<sup>1</sup>

The private-law discourse regarding property is usually conducted on the basis of a number of shared assumptions. These assumptions determine the content and structure of this discourse. In that respect they both make this discourse possible and limit it rhetorically. The first, and most basic, of these assumptions are that property is supposed to be a *neutral* concept.<sup>2</sup> This assumption is based, in turn, on the view that property, and private property in particular, is somehow regarded as a "natural" attribute of humans. Because it is supposed to be natural for people to lay claim to things for their own use, private property should also be regarded as natural and therefore neutral and not defined or justified by political, philosophical or social considerations.<sup>3</sup> Consequently, property is regarded as a technical or a-philosophical concept and term and therefore its content and structure are neutral.

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- 1 Philbrick FS "Changing conceptions of property in law" 1938 U Penn LR 691-732 691-692.
  - 2 "Neutral" here means that it is a concept that neither justifies nor necessitates a particular social, political or legal system. Zwalfve WJ *Hoofdstukken uit de geschiedenis van het Europese privaatrecht Deel 1: Inleiding en zakenrecht* (Groningen 1993) 53: "Het begrip eigendom is zo voor de jurist een filosofisch neutraal begrip ..." For criticism of this assumption, see Van der Wait AJ "Marginal notes on powerful(i) legends: critical perspectives on property theory" 1995 JCRDL 396-420 396; Alexander GS "The concept of property in private and constitutional law: the ideology of the scientific turn in legal analysis" 1982 Col LR 1545-1589 1647ff.
  - 3 Underkuffler L "On property" 1990 Yale LJ 127-148 128: "... they are based on the same unarticulated assumptions: that property is objectively definable or identifiable, apart from social context ..."

Based on this first assumption, a second assumption is made. Because property is neutral (or natural), it is assumed that the contemporary civil-law concept of property is essentially the same as the roman concept of *dominium*.<sup>4</sup> This means that it is assumed that property has and has always had a number of abstract, timeless and universal characteristics. In particular, it is assumed that property is characterised by (and always has been characterised by) absoluteness, uniformity and exclusivity and that its scope and structure are not determined by the objects thereof.<sup>5</sup> In the same way it is assumed that the definition of, justification for and objects of property have always been the same.

Based on these assumptions, it is assumed, in the third place, that property has (and always has had) a profound influence on political, economic, social and legal systems, but without in turn being basically changed or influenced by these systems.<sup>6</sup> Because property is neutral and therefore always the same, it is not susceptible to influences of a social, economic, political or even legal nature. Its abstract nature, however, is supposed to allow property to influence these systems in a fundamental way. In this way, for instance, it is often argued that an absolute property concept implies an individualist, capitalist economic and political system. It is seldom argued that this political system implies an absolute property concept.

This triad of assumptions has had two major consequences. In the first place it has tended to distort historical facts to fit the assumptions. For instance,

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4 Van der Merwe GC *Sakereg* 2nd ed (Durban 1989) 171; Van Zyl DH *Geskiedenis en beginsels van die Romeinse privaatreë* (Durban 1977) 127; Donahue C "The future of the concept of property predicted from its past" in Pennock JR and Chapman JW (eds) *Property NOMOS XXII* (New York 1980) 28-68 36; Zwälwe *Geskiedenis* 86. But compare Van der Walt AJ "Ownership and personal freedom: subjectivism in Bernard Windscheid's theory of ownership" 1993 JCRDL 569-589 570; Tuck R *Natural rights theories - their origin and development* (Cambridge 1979) 13.

5 See discussion below for definitions of these terms.

6 This is what is meant by the abstract concept of ownership - see Underkuffler 1990 *Yale LJ* 127 128; Van der Walt AJ "Developments that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa" 1990 *Stell LR* 26-48 43: "... ownership is autonomous or independent from societal processes ..."

commentators have attempted to describe the roman view of ownership as if it differed only slightly and superficially from contemporary views. The absurdity of this view becomes clear when the socio-political context is kept in mind. In the second place it has tended to block all attempts at change. The argument here is that, since property is a neutral and unchanging concept, there can be no compelling reason or justification for change. Recently, however, the second and third assumptions in particular, have been challenged on historical grounds.<sup>7</sup> This represents an attempt to destabilise the triad of assumptions.

It should be kept in mind that these three basic assumptions about property rest on a certain approach to history in general. This approach focuses on abstract and universal "truths" and concepts, including property. These eternal truths are then read back into the historical data. The newer, more critical approach focuses on context and discontinuity and is the one that will be followed here.<sup>8</sup> The intention is not to provide a complete history of property,<sup>9</sup> but to examine the property concept from very specific historical perspectives. These perspectives deal with the origin and development of property and the presence or absence of specific characteristics usually ascribed to property in a particular period. For this purpose the study will not

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- 7 See, in general, Derine R *Grenzen van het eigendomsrecht in de negentiende eeuw* (Antwerp 1955) IX-XIV; Van Maanen GE *Eigendomschijnbewegingen - juridische, historische en politiek-filosofische opmerkingen over eigendom in huidige en komend recht* (Nijmegen 1987) 16-22; Van den Bergh GCJJ *Eigendom - grepen uit de geschiedenis van een omstreden begrip* (Deventer 1988) 31-47; Van den Bergh GCJJ "Schijnbewegingen" 1987 R & K 327-341 328-340. The same argument has been made regarding Anglo-American law by Kennedy D "The structure of Blackstone's Commentaries" 1979 *Buffalo LR* 205-382 205; Horwitz MJ "The transformation of the conception of property in American law, 1780-1860" 1973 U *Chicago LR* 248-290; Mensch EV "The colonial origins of liberal property rights" 1982 *Buffalo LR* 635-735; Nedelsky J *Private property and the limits of American constitutionalism* (Chicago 1990).
- 8 See Van der Walt 1995 *JCRDL* 396; Van der Walt AJ 1995 *SAJHR* 169-206 for examples of this method.
- 9 This has been done very thoroughly in a number of works, see for example Coing H *Europäisches Privatrecht 1500 bis 1800. Band 1 Älteres Gemeines Recht* (Munich 1985) 291-309; Feenstra R "Historische aspecten van de private eigendom als rechtsinstituut" 1976 *RMT* 248-275.

be conducted with reference to historical periods, but with reference to certain themes. These themes are the following:

- (a) **The definition of property.** The question here is whether property or a specific property right such as ownership was defined in a certain period and, if so, how it was defined. The answer to this question depends, first of all, on the basic approach to and view of law in a certain period. It also depends on philosophical ideas in general and the philosophical basis of law in a particular system.
- (b) **Systematic position/importance of property.** The way in which property is defined, is based on and determines how property, and particularly ownership, is distinguished from other rights and entitlements. That is why not only the distinction between property and other rights will be important, but also the relationship between various property and non-property rights. In particular, the importance of property is determined by whether there is a hierarchy of rights in a particular system and what the position of each specific property right is within that hierarchy.
- (c) **Origin of/justification for property.** The question of where property (and private property in particular) comes from and how it can therefore be justified has always intrigued philosophers and, sometimes, jurists as well. In fact, the assumption about the "naturalness" of property refers to its supposed origin. To a large extent the definition (dealt with above) necessitates a certain justification while the justification might lead to a certain definition.
- (d) **Characteristics/elements of property.** As was pointed out above, it is often assumed that property has (and has always had) a number of elements or characteristics. These characteristics will each be studied in turn. They are the following:

- (i) **Absoluteness of property.** The idea of the absoluteness of property involves the assumption that property is conceptually unlimited and illimitable.<sup>10</sup> Although limitations can and do occur they are regarded as temporary and unusual. In principle, therefore, property is unlimited.
- (ii) **Uniformity of property.** The term *uniformity* refers to the idea that only one kind of property exists and can exist and that this right is typically a private right.<sup>11</sup>
- (iii) **Exclusivity of property.** This refers, in the first place, to the idea that only one person can be the owner of an object at a certain time. This is sometimes referred to as the *individuality* of property. In the second place, and based on the first, it refers to the idea that this right to exclude others (*excludability*) is somehow typical of property.<sup>12</sup>
- (iv) **Objects of property.** In some legal systems only corporeal property can be owned. In others, property of incorporeals is also possible.<sup>13</sup> This aspect therefore involves the

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10 See Birks P "The Roman concept of *dominium* and the idea of absolute ownership" 1985 *AJ* 1-37 1; Visser DP "The 'absoluteness' of ownership: the South African common law in perspective" 1986 *AJ* 39-52; Van der Walt 1993 *JCRDL* 569-589.

11 Imminck PAW "'Eigendom' en 'Heerlijkheid' exponenten van tweeërlei maatschappelijk structuur" 1959 *TR* 36-74 44.

12 Gray K "Property in thin air" 1991 *Cambridge LJ* 252-307 269: "The notion of excludability thus imports a hidden structure of rules which critically define the legal phenomenon of private property." See also Underkuffler 1990 *Yale LJ* 127 135. In South Africa this idea is supported by Lewis C "The right to private property in a new political dispensation in South Africa" 1992 *SAJHR* 389-430.

13 See, for SA law, *Cooper v Boyes NO and Another* 1994 4 SA 521 (C). See also, Olivier NJJ, Pienaar GJ and Van der Walt AJ *Law of property students' handbook* 2nd ed (Cape Town 1992) 29-31; Kleyn DG and Boraine A *Silberberg and Schoeman's the law of property* 3rd ed (Durban 1992) 9-15. On American law, see Underkuffler 1990 *Yale LJ* 127 137 " ... property includes not only material objects but also rights and privileges, particularly those of office."



question whether property is restricted to corporeals or whether incorporeals can also be regarded as property.

Once again it must be stressed that the characteristics might influence the definition and justification and *vice versa*. In much the same way, the characteristics influence each other and are dependent on one another. These sub-divisions must therefore not be seen as absolute but as divisions for the sake of simplification.

It should be clear that this is not a study of "purely" legal developments. In order to determine if other developments influenced the property concept (and if so, how), it is necessary to place these developments within their social, political and philosophical contexts. Consequently, this is not a study of the history of property in "pure" private law, but a contextual approach to the history of property as a social, political, economic and legal phenomenon. This has implications for the way in which the legal "families" will be studied. It must also be kept in mind that not all the themes, problems and characteristics are equally important or comparable in civil and common law or in the various periods. The study will therefore focus on those issues that are important in the particular period under discussion. Moreover, some problems will be basically the same in both the common and the civil-law systems, while others will differ substantially. These similarities and differences will be clear from the context.

In this historical study a broad classification of periods is used. In the first place the *roman and medieval roots* of the themes are studied. This covers roman thinking on and law pertaining to the various subjects, as well as medieval (primarily scholastic) thinking and legal development - a period extending roughly from 400 BC to 1400 AD. The second period is the *early modern era*, that is the sixteenth and seventeenth centuries. This period covers the renaissance, reformation and some of the great political

revolutions. The third period is the *late modern era*, extending from the eighteenth century to the nineteenth century. This is the period of the so-called enlightenment that includes the French and American revolutions.<sup>14</sup> However, the influence of modernist thinking continued into the twentieth century. The historical section will be concluded with a chapter that seeks to subvert the apparent certainties represented by traditional analyses.

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14 This section will not deal with developments in the second half of the twentieth century. These will be discussed in the comparative chapter. The early twentieth century is regarded as a continuation of the nineteenth century and is therefore discussed in the sections on the nineteenth century.



## CHAPTER 3: A QUESTION OF DEFINITION (A HISTORY OF CONCEPTUALISM)

"In short, the concept of property never has been, is not, and never can be of definite content."<sup>1</sup>

### 3.1 Introduction

The questions of whether and how property is defined are important for a number of reasons. Most obviously, the fact that a definition existed in a particular period of history or within a certain legal system provides the simplest point of entry into that legal system. It is also a potentially dangerous way of dealing with a concept, because the definition is always theory-dependent and can, consequently, not be abstracted from that theory.<sup>2</sup> Keeping this in mind, however, the history of the definition of (private) property can supply important clues to the general approach to law, the approach to property and the view of the nature of property in a specific period. More importantly, the traditional view of property is typically definition related, so that a history of definitions is, at the same time, a history of the development of the traditional, conceptualist view.

Consequently, this section will focus on some of the critical moments in the establishment of the private-law property concept. The definitions provide an insight into both the development of this concept and its underlying assumptions. These definitions have, in the course of history, taken on a variety of forms.

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1 Philbrick 1938 U Penn LR 691 696.

2 See Tuck *Natural rights* 2.

In the first place property can be defined as either *natural* or *conventional*. A definition of property as *natural* implies, as a bare minimum, the acceptance of the existence of a system of natural law or at least an objective, eternal and identifiable moral order underpinning society and the law. A *conventional* definition assumes, as point of departure that human convention or agreement creates property and thus that property is subject to change. However, this does not necessarily imply a denial of either natural law or of the state of nature.<sup>3</sup>

In the second place a definition can be either *active* or *passive*. A definition of property as an *active* (or *positive*) right implies that the owner can do something with the property himself and this is closely aligned with the idea of sovereignty.<sup>4</sup> A definition of property as a *passive* right implies that the owner has less control over the object and that the emphasis is on the duties others owe to the holder of the right. In this way, of course, a passive definition can also imply sovereignty. These duties are usually, but not necessarily, abstracted from higher moral principles.<sup>5</sup> The passive definition is usually also *negative*, in that it emphasises the right to exclude.

In the third place definitions of property can be either *objective* or *subjective*.<sup>6</sup> The term "objective" can be used in two different ways. An *objective* definition can imply the existence of an objective legal and moral order.

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3 Property can be seen as conventional even if it is assumed that the state of nature and natural law (or an objective moral order) exists or existed. Natural law and the state of nature then provide the justification for the way in which property is conventionally defined and justified. See eg Haakonssen K "Hugo Grotius and the history of political thought" 1985 *Pol T* 239-265 242.

4 Property is thus a delegation of sovereign power - a power that gives owners the right to make others do what the owner wants them to do - see Singer JW "Sovereignty and property" 1991 *Legal T* 1-56 51.

5 If that is the case, the passive definition implies the assumption of an objective moral order. See Tuck *Natural rights* 6. Haakonssen K "From natural law to the rights of man: a European perspective on American debates" in Lacey MJ and Haakonssen K (eds) *A culture of rights* (Cambridge 1991) 19-61 20 shows that an emphasis on duties owed by others tend to assume that an independent moral order exist which determine these duties.

6 Haakonssen "From natural law" 19ff shows that the difference between the American and British approaches to rights in general, can be traced to this distinction between an objective and subjective view of law.

But an *objective* definition can also mean a definition in which the objects of property determine the definition. A *subjective* definition implies a definition in terms of the rights of the owner (subject) and his powers.<sup>7</sup> This is closely aligned with an active definition and the idea of sovereignty.

### 3.2 Roman and medieval roots

The traditional civil-law discourse regards the roman and medieval periods as the intellectual basis for South African law in general and property law in particular. The views of writers of these periods and of legal rules in these periods are seen as providing the background and point of departure for later discussions. This assumption will be examined here. When the term *medieval law* is used, it stands to reason that no single system of law is envisaged. Roman law in the middle ages developed over four centuries and is characterised by consecutive schools that differed regarding methodology and approach.<sup>8</sup> Apart from that, the different germanic systems also remained in force and influenced roman law and were influenced in turn.

In roman law the distinction between the procedures of *interdictum* and *actio* led to a distinction between *possessio* and *dominium*.<sup>9</sup> This was a very basic distinction in the whole of roman law and is still found today in most civil-law systems. It also formed the basis for the first definition of *dominium* in the middle ages and for the rights-approach thereafter. However, a definition in the technical sense was never developed in roman law.<sup>10</sup> In the first place

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7 For this reason subjective definitions are sometimes referred to a *voluntarist* definitions. The term *voluntarism* is used to indicate an approach that takes as point of departure the power and/or will (in Latin *voluntas*) of the individual person. The definition is therefore determined by the primary role of the human will and this is, in turn, closely aligned with the idea of property as *Herrschaft*.

8 See Van den Bergh *Eigendom* 28; Van Zyl DH *Geskiedenis van die Romeins-Hollandse reg* (Durban 1983) 81-184.

9 Feenstra 1976 RMT 248 259.

10 Ankum H and Pool E "Traces of the development of Roman double property" in Birks P (ed) *New perspectives in the Roman law of property - essays for Barry Nicholas* (Oxford 1989) 5-41 37 have shown conclusively that the terms *dominium* and *dominus* were never technical terms in the *ius civile*.

this was the result of the roman law system of actions.<sup>11</sup> Roman law did not operate with the concept of the "law in subjective sense" and consequently a system of rights was foreign to roman thinking.<sup>12</sup> Within the system of actions, however, the *actio* known as *meum esse* (or the *rei vindicatio*) provided the greatest protection imaginable to roman minds and further elaboration was regarded as unnecessary.<sup>13</sup> In the second place it was the result of the practical approach of the roman jurists.<sup>14</sup> Because they dealt with practical situations, they had no need for philosophical distinctions and abstractions.

The emphasis on actions and remedies did, however, lead to an approach in which the remedies that could be used depended on the objects involved. For instance, the way in which objects were classified as *res corporales/res incorporales* or *res mancipilres nec mancipi* determined which rules were applicable. Similarly, rules pertaining to *dominium* of land depended on and were determined by the nature and location of that land.<sup>15</sup> Furthermore, the emphasis on the *rei vindicatio* tended to make this a negative approach. It seems to have focused on the right of owners to exclude. This object-determined approach, the exclusionary effect of the *rei vindicatio* and the distinction between *dominium* and *possessio* are the crucial elements in the roman approach.

The basic characteristic of feudal property law was the inseparable connection between land tenure and personal service. In a nutshell "(o)wnership of the land and local political sovereignty were inseparable."<sup>16</sup>

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11 Van der Walt AJ and Kleyn DG "Duplex dominium: the history and significance of the concept of divided property" in Visser DP (ed) *Essays on the history of law* (Cape Town 1989) 213-260 218-219; Van den Bergh *Eigendom* 22; Jolowicz HF *Roman foundations of modern law* (Oxford 1957) 77; Birks 1985 *AJ* 1 3.

12 See Schrage EJ *Actio en subjectief recht* (1977 Public lecture delivered at the *Vrije Universiteit* in Amsterdam on 1977-03-31).

13 Watson A *The law of property in the late Roman republic* (Oxford 1968) 92.

14 Kelly JM *A short history of Western legal theory* (Oxford 1992) 49-51.

15 See 6.3.1 and 6.5.1 below and sources cited there.

16 Cohen "Property and sovereignty" 156.

This was the result of the fact that feudal law was both a political and an agrarian system.<sup>17</sup> It was an integrated social system and this makes the study of a definition of *dominium* abstracted from the social context impossible. This indicates that the medieval approach was also objective, since it was determined by the context.

In the romanist tradition the glossators did not attempt a definition, but instead commented on the roman distinction between *dominium* and *possessio* and on the *rei vindicatio*. Bartolus' definition of *dominium* is often regarded as typical of medieval thought on the subject. He used the term *dominium* in several different meanings.

- (a) In the first place he distinguished between a wider and narrower meaning of *dominium*. In a wider sense it referred to *dominium* of corporeal and incorporeal objects.<sup>18</sup> In the narrower sense it referred to *dominium* of corporeals only.<sup>19</sup> This is the basic romanist distinction that was later used by other commentators.
- (b) In the second place he distinguished between *dominium plenum* and *dominium as nuda proprietas*. This distinction will be discussed later.<sup>20</sup>

Bartolus defined *dominium* as: *ius de re corporali perfecte disponendi nisi lege prohibeatur*.<sup>21</sup> It is important to understand that the right to control the object (*disponendi*) played a central role in this definition. This indicates an active approach.

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17 Philbrick 1938 U Penn LR 691 707.

18 This, in particular, included *usufructus*.

19 Bartolus on D.41.1; Coing H "Zur Eigentumslehre des Bartolus" 1953 ZSS (Rom Abst) 348-371 349.

20 See 6.2.2 below.

21 Bartolus on D.41.2 1.7.1 nr 4.



Bartolus' exposition provided the first technical concept or definition of *dominium*. It became the basis for the early modern concept of ownership and determined the debates and definitions that followed.<sup>22</sup> Therefore, the important point is that Bartolus provided the first formal or technical definition of *dominium*. The definition remained within the romanist tradition since it was based on and attempted to explain the roman distinction between *dominium* and *possessio*. It was also new in that it incorporated feudal relations and thus was made relevant to medieval law. Bartolus' definition would later be interpreted to provide a justification for regarding the absolute right of disposal as the essential characteristic of *dominium*. This was never his intention, as is clear from his wider concept and the inclusion in his definition of the phrase *nisi lege prohibeatur*.

In the theological and scholastic thought of the high middle ages the problem of *dominium* also attracted attention, albeit in a different context. Within this tradition the influences of both natural law and of the poverty-doctrine can be seen.<sup>23</sup> However, the emphasis in scholastic thinking was on the conflict between the justification of the church's wealth and the Franciscan insistence on a life of poverty for Christ's followers. This conflict was due, in no small part, to the power struggles between the franciscans and dominicans.<sup>24</sup> Almost accidentally, it also influenced the concept of ownership.

Aquinas (1225-1274) discussed *dominium* (in typical scholastic style) within the context of an answer to the question whether possession of "exterior"

22 Kroeschell K "Zur lehre vom 'Germanischen' Eigentumsbegriff" in *Rechtshistorische studien* (Cologne 1977) 34-71; Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasie daarvan sedert die vyftiende eeu" 1986 JCRDL 305-321 318; Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" 1988 DJ 16-35, 306-325 316.

23 See 4.2.5.2 and 6.2.3 below.

24 See Kriechbaum M *Actio, ius und dominium in den Rechtslehren des 13. Und 14. Jahrhunderts* (Ebelsbach 1996) and Van der Walt JWJG *The twilight of legal subjectivity: towards a deconstructive republican theory of law* (Unpublished doctoral thesis Rand Afrikaans University, Johannesburg 1995) 67-85. For an entertaining, fictional, but remarkably accurate description of these medieval power struggles see Eco U *The name of the rose* (London 1983 Tr W Weaver).

things constituted natural *dominium* or not. In answer to the question, *naturale dominium* was described as *per rationem et voluntatem potest uti rebus exterioribus ad suam utilitatem, quasi propter se factis*.<sup>25</sup> Although this was not a technical or legal definition, it was important in that *dominium* was not defined as natural but in terms of human *potestas*.<sup>26</sup> Aquinas saw the power to procure and dispose of property as the central element. This power was based on the human will and intellect. Therefore he emphasised the rational and subjective nature of *dominium*.<sup>27</sup> He emphasised disposition as the central idea (much like Bartolus), but he linked this with the voluntarist and rationalist view of natural law so prevalent in the medieval period. However, Aquinas never used *dominium* in the technical, legal sense and, for instance, never distinguished *dominium* from *possessio*.

William Occam (1290-1349) also defined *dominium* as *potestas humana* and, in this way, continued the subjective approach to property.<sup>28</sup> This subjectivism was a result of Occam's nominalism<sup>29</sup> and his emphasis on individual *potestas* regarding *dominium*.<sup>30</sup> This was echoed by Jean Quiddort of Paris (c1302). He distinguished between private *dominium* and ecclesiastical *dominium* (that is, property held by the church). Private *dominium* was defined as *ius et potestatem et verum dominium*.<sup>31</sup>

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- 25 Aquinas *Summa Theologica* (Die deutsche Thomas-Ausgabe Graz 1934-) q 66 a1.  
 26 Aquinas *Summa Theologica* q 66 a2: "... *potestas procurandi et dispensandi*". See also Feenstra 1976 RMT 248 268-269; Feenstra R "Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelaltlicher und spätscholastischer Quellen" in Behrends O ea (eds) *Festschrift Franz Wieacker* (Göttingen 1978) 209-234 215.  
 27 Van der Walt AJ *Die ontwikkeling van houerskap* (Unpublished doctoral thesis, Potchefstroom University for CHE, Potchefstroom 1985) 265-267.  
 28 Van der Walt 1986 JCRDL 305 311-312.  
 29 Nominalism, in this context, can be defined as: "(T)he belief that concepts at only a very low level of generality and abstractness are operative. Thus general concepts, such as 'law' or 'property' or 'rights', are seen merely as convenient categorisations of experience." Singer JW "The legal rights debate in analytical jurisprudence from Bentham to Hohfeld" 1982 *Wis LR* 975-1059 1016.  
 30 Coleman J "D<sup>o</sup>minium in thirteenth and fourteenth-century political thought and its seventeenth century heirs: John of Paris and Locke" 1985 *Pol S* 73-100 93-94.  
 31 Coleman 1985 *Pol S* 73 82.

To a certain extent the poverty debate reinforced the idea that the definition of *dominium* is dependent on the objects thereof. The different kinds of property required different justifications for use and ownership. On the other hand the eventual emphasis on *usus iuris* and *usus facti* and on *voluntas/animus* did tend to reinforce later voluntarist (and thus subjective) views. However, these writers were involved in a very specific moral-theological discourse and their definitions were never meant to be applied in a legal or technical sense. Their contribution was, therefore, incidental and indirect.

The theological ideas of the scholastics were developed further by the late scholastics (also known as the Spanish moral philosophers). These philosophers tried to reconcile the thinking of Aquinas with that of the secular jurists of their time.<sup>32</sup> They provided the link between medieval views and those of the sixteenth and seventeenth centuries. In particular they influenced Grotius and through him roman-dutch law and legal thinking.<sup>33</sup>

It should, however, not be assumed that the late scholastics agreed on a definition of *dominium*. De Soto (1494-1560) retained the definition of *dominium* as *facultas humana*.<sup>34</sup> In much the same vein De Molina (1536-1600) used Bartolus' definition as point of departure. However, he took it one step further. In his hands the definition was changed so that the unlimited capacity of the owner to use his property as he saw fit became the essential characteristic of *dominium*.<sup>35</sup> Vasquez de Menchaca (1512-1566) also used Bartolus' definition, but defined *dominium* in terms of the owner's absolute right to dispose of his property.<sup>36</sup> At the opposite end of the scale De Vitoria (1492-1546) denied that *dominium* could be defined in terms of human will and, instead, defined it as the result of an agreement between members of a

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32 Van der Walt *Houerskap* 269.

33 Feenstra "Eigentumsbegriff" 211, 226 ff; Feenstra 1976 RMT 248 268-270; Van der Walt *Houerskap* 271.

34 Feenstra "Eigentumsbegriff" 220; Feenstra 1976 RMT 248 270.

35 Van der Walt 1986 JCRDL 305 313; Van der Walt *Houerskap* 279.

36 See Van der Walt 1986 JCRDL 305 314; Van der Walt *Houerskap* 279.

community.<sup>37</sup> This is one of the earliest definitions indicating a view of property as conventional, and might indicate a continuation of Aristotelian ideas.<sup>38</sup>

The medieval debate on *dominium* took place on three levels. In the first place the romanists, and Bartolus in particular, were interested in explaining and solving the apparent contradictions in the *glossae* regarding the differences between *dominium* and *possessio*. It therefore revolved around the interpretation of texts and concepts within the romanist tradition. In the second place developments in feudal law made it necessary for post-glossators to attempt to reconcile roman law with the feudal system, especially in order to explain the relationship between lord and vassal.<sup>39</sup> In the third place the theological power struggles referred to above almost incidentally influenced the broader issue. These three developments took place side-by-side and only later converged. What they do illustrate is the fact that *dominium* could not and did not develop in a vacuum. Societal influences, such as feudalism, catholicism and power struggles played a definite role in its development. The reference to an objective order is also characteristic of this period. The late scholastics did, however, start the trend towards a more subjective and voluntarist approach.

### 3.3 Grotius and the early modern period

This period was characterised by a moral scepticism, which eventually led to the replacement of scholasticism with juridical humanism.<sup>40</sup> The first theme of this period was the humanist (and consequently conceptual/scientific)

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37 Feenstra 1976 RMT 248 269.

38 See Tuck *Natural law theories* 44-45 for an explanation of the influence of Aristotle on medieval and, especially late scholastic, thinking.

39 See Van der Walt 1986 JCRDL 305 308.

40 Tuck *Natural rights theories* 33: "(H)umanist lawyers found it virtually impossible to talk about natural rights, and extremely difficult to talk about rights *tout court*. What was important to them was not natural law but humanly constructed law, not natural rights, but civil remedies."

definition of ownership. The second theme was provided by the glorious revolution in the form of the social contract theory. Although the themes have a number of characteristics in common, they also diverge at certain points.

### 3.3.1 The humanist definition

The early humanists defined *dominium* and in this respect did the groundwork for later writers such as Grotius. Leonard Leys (1554-1625), for example, defined *dominium* in terms strongly reminiscent of Bartolus with emphasis on the right to disposition.<sup>41</sup> In the same vein Hotman (1524-1590) defined *dominium* in terms of the *potestas* of the owner to use the property.<sup>42</sup> The innovation of these writers lay in the way in which they defined *dominium* in terms of human *facultas/potestas*. This was a further development of ideas that originated with Aquinas and which paved the way for the later subjectivism,<sup>43</sup> and for the views of Hugo Grotius (1584-1645).

Grotius' view on ownership is of particular importance as it has been enormously influential.<sup>44</sup> His view represented a synthesis between roman law, scholasticism, canon law and humanism.<sup>45</sup> Much like Bartolus before him, Grotius determined the direction of the debate on ownership in the following centuries, especially within the roman-dutch tradition. The most important and innovative aspect of his work is the fact that ownership became

41 Leys L *De iustitia et iure actionum humanarum* (Venice 1608) 2.3.1 (21): "Dominatorum proprietatis est ius disponendi de re aliqua tanquam sua in suum commodatum".

42 Hotman F *Commentarius de verbis iuris antiquitatum romanarum elementis amplificatus* (Lyons 1569) 86: "... jus ac potestas, re quapiam tum utendi, tum abutendi, quatenus iure civile permittitur".

43 Feenstra 1976 RMT 268-275; Van der Walt AJ "Der Eigentumsbegriff" in Feenstra R and Zimmermann R (eds) *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (Berlin 1992) 485-520 485.

44 Feenstra "Eigentumsbegriff" 234; Feenstra 1976 RMT 248 248-256, 270-275; Van der Walt *Houerskap* 393; Van der Walt "Eigentumsbegriff" 485 486-487. Grotius' thought also influenced the German Pandectists - see Van der Walt 1993 JCRDL 569 583-585; Tuck *Natural rights* 58; Haakonssen 1985 *Pol T* 239 239; Van der Walt *Legal subjectivity* 93.

45 Feenstra "Eigentumsbegriff" 229; Feenstra 1976 RMT 248 268-270; Van der Walt *Houerskap* 271.

part of a conceptual system that was presented as being abstract and universal.

Grotius did not define *dominium* in either *De iure praedae* or *De iure belli ac pacis*. In both these works the influence of scholasticism can be seen and Grotius concerned himself primarily with the justification of ownership.<sup>46</sup> In his *Inleidinge tot de Hollandsche Rechtsgeleerdheid* Grotius' system of property rights can be found most clearly. The idea of a system of rights is crucial in Grotius' work. Ownership became part of a conceptual system that had pretensions of abstractness and universality.<sup>47</sup> New (Dutch) terms were used.<sup>48</sup> Grotius used *beheering* instead of *dominium*<sup>49</sup> and *inschuld* instead of *creditum*.<sup>50</sup> *Beheering* was sub-divided into *bezit-recht* (possession) and *eigendom* (ownership).<sup>51</sup> *Eigendom* was defined as:

"(H)et toebehooren van een zaeck waer door iemand, schoon het bezit niet hebben, 'tzelve vermag rechtelick te bekomen."<sup>52</sup>

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46 Feenstra "Eigentumsbegriff" 226-228.

47 See Van der Walt 1993 JCRDL 569 584; Van der Walt 1995 SAJHR 169 175-177; Van der Walt AJ "Towards a theory of rights in property: exploratory observations on the paradigm of post-apartheid property law" 1995 SAPL 298-345 335.

48 The fact that a system of rights was developed and that Dutch terms were used, is significant. The idea of a system of law is typical of modernist thinking and in this respect Grotius was ahead of his time. The fact that Latin was no longer used points to the employment of national languages as a result of the rise of national states and nationalism in this period - see Kelly History 159, 160 n 7; Van den Bergh Eigendom 19. Van der Merwe D "Ramus, mental habits and legal science" in Visser DP (ed) Essays on the history of law (Cape Town 1989) 32-59 52 n103 states that this "vernacular movement" in Europe is attributable to the work of Petrus Ramus.

49 *Beheering* means more or less the same as *dominium* *in re*.

50 *Creditum* is the term used in earlier works for all rights that are not property rights (or real rights in modern terms). See Grotius H *De iure belli ac pacis* (Leiden 1939 Ed BJA de Kanter-van Heltinga Tromp) I.1.5 p 32; Van der Walt *Houerskap* 399.

51 Grotius H *Inleidinge tot de Hollandsche rechtsgeleerdheid* (Leiden 1952 Ed F Doring, HFWD Fischer, EM Meijers) II.1.60. See also Feenstra "Eigentumsbegriff" 230; Van der Walt *Houerskap* 402.

52 Grotius *Inleidinge* II.3.4. This can be translated as: "The belonging of a thing whereby someone, who doesn't have the possession thereof, can legally acquire it".

The implication of this definition is that Grotius saw the right to restore lost possession as the essential, defining element of ownership.<sup>53</sup> The effect of making the right to reclaim property the central feature of the definition was to stress the exclusivity of ownership. This was closely related to the idea of *dominium* as *facultas humana* in scholasticism,<sup>54</sup> but the way Grotius used it relates to the *proprium*-aspect of ownership.<sup>55</sup> Another important, and innovative, aspect of Grotius' definition is that he used the definition of the moral theologians and early humanists, but this definition was now only applicable to full ownership as opposed to what is now known as "limited" real rights. This is the origin of the modern view of a hierarchy of rights.<sup>56</sup> This meant that ownership was regarded as the highest right in a hierarchy of rights and that it was regarded as an absolute and individual right. This idea only became possible with the demise of the feudal system and is therefore linked to feudal remnants in *dominium directum* and *dominium utile*. Moreover, the idea of a hierarchy was reinforced by the scientific system of concepts and methods which, in turn, led to a new kind of emphasis on exclusivity.

The result of Grotius' definition is that ownership was regarded as an expression of individual power. The next logical step in an individualist system was to make that power as exclusive as possible. This was, in fact, the logical result of the importance that sixteenth and seventeenth century modernism and humanism attached to individuality, rationality and moral freedom.<sup>57</sup> Thus it represents a shift from objectivism (defining ownership in terms of its object) to subjectivism (defining ownership in terms of its subject,

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53 Grotius *Inleidinge* II.33.1. See also Feenstra 1976 RMT 248 271; Van der Walt *Houerskap* 404.

54 Van der Walt "Eigentumsbegriff" 489.

55 Grotius *H De iure praedae* (The Hague 1868 Ed HG Hamaker) 214. See also Van der Walt "Eigentumsbegriff" 485 488.

56 Van der Walt 1995 SAPL 298 340; Van der Walt 1995 JCRDL 396 405

57 Van der Walt AJ "The South African law of ownership: a historical and philosophical perspective" 1992 DJ 446-457 452; Van den Bergh GCJJ *Geleerd recht - een geschiedenis van de Europese rechtswetenschap in vogelvlucht* (Deventer 1980) 44.

that is, the owner). But it would also contribute to the roman-dutch perspective of ownership as exclusive, although this remained close to the romanist tradition as it was based on the idea and practice of the *rei vindicatio*.<sup>58</sup> What was different, was that exclusivity now had a moral and political content. Therefore the first theme of this period, namely juridical humanism, resulted in a definition that was subjectivist rather than objectivist - a trend which would be continued by the pandectists. The divine natural law of the medieval period was rejected, but the embryonic subjectivism was retained and expanded. This was the direct result of the scientification of law that began with the hierarchy of concepts advocated by Ramus.

### 3.3.2 The social contract

If the first important theme of this period can be described as the conceptualisation/scientification of property, the second theme of the early modern period was the social contract, which primarily dealt with the justification of ownership. The ideas of natural law and feudalism combined to lay the groundwork for this theory.<sup>59</sup> It was, however, the "glorious revolution" that provided the stimulus for the full development of the theory. In fact, Locke probably developed his social contract theory in order to justify this revolution. Within the broad characterisation of the theory, however, widely divergent views were held regarding both the nature of the state and the nature of property. Only the last-mentioned will be studied here.

Thomas Hobbes (1588-1679), because of his views on the state, defined property as something created by the state.<sup>60</sup> Property was, therefore, conventional. Because it was created by the state, it could also be limited or abrogated by the state. Samuel Pufendorf (1632-1694) thought that

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58 Van der Walt 1992 DJ 446 453; Van der Walt "Eigentumsbegriff" 508-509, 515; Van der Walt AJ "Roman-Dutch land and environmental land-use control" 1992 SAPL 1-11 4-5.

59 The social contract theory and its origins will be discussed at 5.3 below.

60 Hobbes T *Elementa philosophica de cive* (Amsterdam 1669) 90/198: "Dominium ergo et proprietatis tua tanta est, et tamdiu durat, quanta et quamdiu ipsa vult".



ownership was the result of natural law.<sup>61</sup> However, he did not necessarily understand natural law in the same way as his predecessors had. For him natural law was the equivalent of our rational convictions regarding what is right for humanity, based on certain universal conditions in human society.<sup>62</sup> In this way ownership was regarded as basically conventional, although it was protected by natural law and the Decalogue.<sup>63</sup> Montesquieu (1689-1755) too defined ownership as created by statute and explicitly linked ownership and freedom to the civil state.<sup>64</sup>

On the other hand, John Locke (1632-1704) defined private property in the civil state as a natural right. Property was a natural right in the state of nature and, therefore, this right continued to exist in the civil state. In fact, the civil state came into being, through a social contract,<sup>65</sup> for the express purpose of protecting property on the basis of natural law.<sup>66</sup> Therefore Locke defined property as a natural right, created by labour and regarded it as the basis for the civil state.

### 3.3.3 Conclusion

It is interesting how views and definitions began to diverge from the seventeenth century. This is probably a result of the renaissance and reformation that led to a more critical attitude towards roman-catholic doctrine in particular and the authority of texts in general. As a result of these

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61 Pufendorf S *De jure naturae et gentium* (Amsterdam 1704) IV.4.14: "... proprietatem et dominium esse juris naturalis proprie dicti, quodque mentibus hominum est inscriptum".

62 Pufendorf *De jure naturae et gentium* IV.4.14: "... sanam rationem suadere id inter homines constitui et recipi ..." In this respect Pufendorf followed the views of Grotius - see Tuck *Natural rights* 156ff.

63 Pufendorf *De jure naturae et gentium* V.3.9 and V.5.7.

64 Montesquieu *L'Esprit des lois in Oeuvres complètes* (Paris 1949) D1.II.767 ff: "Comme les hommes ont renoncé à leur indépendance naturelle pour vivre sous des lois politiques, ils ont renoncé à la communauté naturelle de biens pour vivre sous des lois civiles. Ces premières lois leur acquièrent la liberté; les secondes la propriété."

65 Locke J *Two treatises on civil government* (London 1947) 2.99, 2.129-130, 2.222.

66 Locke *Two treatises* 2.221; Mitchell NJ "John Locke and the rise of capitalism" 1986 *Hist Pol Ec* 291-305 297; Van Maanen *Eigendomschijnbewegingen* 101.

developments the trends started in the sixteenth and seventeenth centuries would continue for some time. These trends include the following:

- (a) The most important trend involved what Alexander calls (in another context) the scientific turn in legal analysis.<sup>67</sup> This conceptualisation was Grotius' most important contribution and it contributed to the abstract, universal and timeless pretensions inherent in the property concept.
- (b) The pretension of abstractness meant that property rules could no longer be justified by appeals to an objective moral order. Therefore it represents the beginning of a movement away from objectivism to the subjectivism of Grotius and Locke.
- (c) This subjectivism, along with individualism, tended to present property as an absolute right that could not be limited. The justification of limitations on property therefore becomes important. Exclusivity was provided with a new content that had important social and moral underpinnings.

What is already clear is that the definition of property was amended to accommodate both the social contract theory,<sup>68</sup> and the demands of early capitalism.<sup>69</sup> This seems to indicate that property is not a neutral concept but is, instead, a concept made possible by existing political and moral ideas and constructs. The differences between natural and conventional definitions would continue to influence the justificatory debate. At the same time the

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67 Alexander 1982 Col LR 1545 1545.

68 Locke *Two treatises* 2.4, 2.36, 2.37. See also Mitchell 1986 *Hist Pol Ec* 291 293. One of the great weaknesses of Locke's theory is that he thought in terms of a real, existing contract - see Ryan *A Property and political theory* (Oxford 1984) 26.

69 It has been argued that Locke "discovered" the primary institutions of capitalism in the state of nature and so legitimised them. Private property was seen as an institution of natural law and therefore imbued with moral authority - see Macpherson CB "Natural rights in Hobbes and Locke" in Raphael DD (ed) *Political theory and the rights of man* (London 1967) 1-15 11; Mitchell 1986 *Hist Pol Ec* 291 296; Gill ER "Property and liberal goals" 1983 *J of Pol* 675-695 677.

introduction of a scientific system of terms and concepts would serve to strengthen the abstract concept of property.

### 3.4 Late modern developments

#### 3.4.1 Introduction

Developments and trends that began in the sixteenth and seventeenth centuries were continued and accelerated from the eighteenth century till the early part of the twentieth century. One of these was the development of various strands of national law and legal theory. This was the result of a complex set of factors, which included the influence of idealism and the move to codification.<sup>70</sup> This section will therefore deal with developments within national contexts. For this purpose, two national systems in the common-law tradition (namely the United Kingdom and the United States of America) and two in the civil-law tradition (namely the Netherlands and Germany) will be studied. This should also indicate the difference, if any, between codified and uncoded systems.

#### 3.4.2 German property law

##### 3.4.2.1 Introduction

The roman law received in the german areas in this period was the learned law (*geleerd recht*) as taught by the post-glossators and which resulted in the school of the *usus modernus pandectarum*.<sup>71</sup> This school used the Bartolist method in study and adjudication. Consequently the *usus modernus pandectarum* can be characterised as basically *mos italicus*<sup>72</sup> tempered by

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70 Zwolve Geschiedenis 50.

71 Van Caenegem RC *An historical introduction to private law* (Cambridge 1988) 69; Zwolve Geschiedenis 20-21; Cohn EJ *Manual of German law vol I* (London 1968) 23.

72 Zwolve Geschiedenis 21.

German morals and other ideas.<sup>73</sup> Because various systems of law prevailed in different areas and as a result of the influence of humanism and natural law, a desire for and a debate about the need for codification characterised the nineteenth century.<sup>74</sup> In this regard Grotius' conceptualisation of ownership and of law in general was enormously influential.

The historical school eventually achieved a systematisation of roman law, which eventually resulted in the *Begriffsjurisprudenz* and pandectism. This school, based on rule formalism and the view of law as a system, precipitated a number of developments. Private law was seen as the sum of rules, which governed the co-existence of free persons, and a subjective right was regarded as that which guaranteed an area of freedom.<sup>75</sup> As a result a comprehensive system of law was developed that could be used as the basis for codification.<sup>76</sup>

#### 3.4.2.2 The pandectists

Much of German thought pertaining to ownership was influenced by the philosophy of Immanuel Kant (1724-1804). Kant saw laws as the rules, which determined how the free wills of individuals could co-exist.<sup>77</sup> Ownership is acquired by the transcendental directing of an individual will upon a given object.<sup>78</sup> In this way personality is associated with having a legal *persona* and

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73 Cohn Manual 23.

74 Zwaive *Geschiedenis* 22; Van Caenegem Introduction 156; Cohn Manual 23.

75 Coing H "German 'Pandektistik' in its relationship to the former 'ius commune'" 1989 *Am J Comp L* 9 13; Van Caenegem Introduction 140; Zwaive *Geschiedenis* 22. This idea is basically derived from Kant.

76 Zwaive *Geschiedenis* 22; Van Caenegem Introduction 157; Coing 1989 *Am J Comp L* 9 10.

77 Kant I *The philosophy of law* (Edinburgh 1887 Tr W Hastie) 45: "Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonized in reality with the voluntary actions of every other person, according to a universal Law of Freedom." See also Smith AA "Kant's political philosophy: *Rechtsstaat* or council democracy" 1985 *Rev of Pol* 253-280 255-256; Scheltens DF "Eigendom en staat bij I Kant" 1980 *R & R* 67-77 67.

78 Kant *Philosophy of law* 63. This is the result of the dualism in Kant's thought between the *Ding an Sich* (reality) and the *denkenden Ich* (rational subject) - see Negro F *Das Eigentum: Geschichte und Zukunft* (Munich 1963) 137.

for this, ownership is required.<sup>79</sup> Through the union of wills this acquisition is recognised as a right so that others will respect it.<sup>80</sup> Kant's definition was therefore essentially a continuation of the subjectivist trend started in the medieval period.

It is furthermore important to place Kant's definition in the context of his philosophy and, in particular, his epistemology. Kant postulated the existence of a rational, scientific and moral system of which ownership was one element (or atom). This system was based on a "simple, all-purpose moral precept" innate in human nature and known as the "categorical imperative".<sup>81</sup> This meant that the elements of the system could be reduced to abstract concepts that were timeless and universal precisely because they were rational and scientific. Apart from this, these concepts were also justified by a rational and scientific morality that ensured their universal and timeless character. In this way Kant contributed to the conceptualism of the pandectists.<sup>82</sup>

This was also the starting point of Georg Wilhelm Friedrich Hegel (1770-1830). Ownership was defined as the directing of one's will on an object.<sup>83</sup> However, there are two basic and important differences between Hegel and Kant. In the first place Hegel saw no basic dualism between subject and object. He thought that man created his own world and this led to the idea of ownership as *Herrschaft*.<sup>84</sup> Therefore ownership is one of the most important ways in which the individual will objectifies and realises itself. For this reason ownership is necessary for liberty.<sup>85</sup> In the second place man is always part

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79 Ryan Property 74.

80 This idea requires a view of society in which individual freedom and individual property is linked and both are regarded as desirable: see Van der Walt 1993 JCRDL 569 588-589; Grey TC "The disintegration of property" in Pennock JR and Chapman JW Property NOMOS XXII (New York 1980) 69-85 73.

81 See Kelly History 261.

82 On Kant's philosophy, see Russell B History of Western philosophy (London 1961) 677-684.

83 Hegel GWF Philosophy of right (Oxford 1952 Tr TM Knox) par 41-44.

84 Negro Eigentum 140.

85 Hegel Philosophy of right 42 par 45: "... from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end."

of a community that recognises him as a person, and for this reason Hegel's view of ownership is more communal and less individualist than Kant's.<sup>86</sup>

One of the most important contributions of Hegel was his denial of the existence of an independent, rational moral order that could provide the basis for evaluating ownership. He denied that people could step outside their own contexts to be able to see this objective order for their own lives. Human beings can only see "... our lives faithfully depicted ..." and then "... we shall simply go on living them, perhaps more at peace with ourselves, but not as a result of any moral conversation."<sup>87</sup>

These writers, and Kant in particular, had a far-reaching effect on German thinking. The historical school adopted Kant's critique of reason to begin the transformation of law into a science. They in turn influenced the pandectists and Windscheid in particular, which changed German thinking in two ways. In the first place their insistence on a scientific approach to law which would later result in a rule formalism in which certain rules were part of institutions and determined by them. In the second place they echoed the humanist call for return to the sources - in this case Justinian's code.<sup>88</sup> This resulted in the view of private law as the sum of rules that govern the co-existence of free persons and of subjective rights (including ownership) as the area in which freedom is guaranteed.<sup>89</sup>

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86 Ryan *Property* 121, 133.

87 See Ryan *Property* 140.

88 Coing 1989 *Am J Comp L* 9 12-13.

89 Both these ideas can be traced to Kant - see Coing 1989 *Am J Comp L* 9 13.

This abstract, systematic view of law was in conflict with German idealism, which insisted on the view of law as the product of an organic, national tradition or custom.<sup>90</sup> Based on voluntarism and idealism, ownership was now also defined as conventional. It was denied that there was only one kind of ownership appropriate for all times and places. The best definition of ownership was therefore the one that evolved within each national system and, consequently, rule formalism would be impossible.<sup>91</sup> It is only at the height of liberalist thinking, during the second half of the nineteenth century, that German pandectists rejected this view and created an ownership concept that was abstract and formal.<sup>92</sup> This then provided the rule certainty that idealism couldn't.

Karl Friedrich von Savigny (1779-1861) used Kant's moral imperative (as applied to law) as his point of departure. The purpose of the law is to harmonise the free will of everyone in terms of a general law.<sup>93</sup> On this basis he defined *Eigentum* as:

"Da nämlich das Eigentum die rechtliche Möglichkeit ist,  
auf eine Sache nach Willkühr einzuwirken ..."<sup>94</sup>

Within the *Begriffsjurisprudenz* (in which the legitimacy of a rule could only be determined by its logical and systematic consistency) this eventually led to the abstract definition of ownership. It was now defined as the totality of

90 Schlatter RB *Private property: the history of an idea* (London 1951) 261. Karl Friedrich von Savigny accepted that law is the product of the *Volksgeist* and therefore has no inherent rationality as natural lawyers thought: Van Zyl *Romeins-Hollandse reg* 251-253; Van der Walt 1993 JCRDL 569; Kiefner H "Der Einfluss Kants auf Theorie und Praxis des Zivilrechts im 19. Jahrhundert" in Blühdorn J and Ritter J (eds) *Philosophie und Rechtswissenschaft: zum Probleme ihrer Bezicherung im 19. Jahrhundert* (Frankfurt-am-Main 1969) 3-27.

91 Schlatter *Private property* 262.

92 See Van den Bergh *Eigendom* 29.

93 Von Savigny FC *System des heutigen römischen Rechts* (Berlin 1840-1849) vol I p 331, 338-339, vol II p 2, vol I p 7, 334, vol III p 103. See also Kiefner "Der Einfluss Kants" 3 7, 10, 21 23; Van der Walt 1993 JCRDL 569 587.

94 Von Savigny FC *Das Recht des Besitzes: eine civilistische Abhandlung* (Darmstadt 1803) 27.

possible rights regarding objects.<sup>95</sup> Bernhard Windscheid (1817-1892) used the same system. Windscheid's definition of ownership represents a critical moment in the development of the civil-law concept of ownership. Windscheid's essential contribution lies in the way in which he combined the romanist idea of exclusivity with the Kantian conceptualism and emphasis on the right to free disposal. The Kantian insistence was translated into a view of ownership as a moral totality. For Windscheid a subjective right was defined in terms of will-power granted by law.<sup>96</sup> Real rights (as sub-category of subjective rights) were rights that allowed the holder to determine the actions of everyone in respect of a specific object.<sup>97</sup> Based on this ownership was defined as an abstract, exclusive and unlimited right.<sup>98</sup>

Ownership is, therefore, an abstract concept that is based on a moral order that acquires universality through its abstractness and rationality. In this way ownership becomes the perfect right in an abstract system of rights.<sup>99</sup>

### 3.4.2.3 Codification

The codification of German private law which commenced on 1 January 1900, the *Bürgerliches Gesetzbuch*,<sup>100</sup> was one of the most successful European codifications. It influenced the codifications of Japan, Switzerland, Austria, Turkey, Brazil, Greece and China (until 1940). It was a basically pandectist, nineteenth century codification.<sup>101</sup> Ownership is dealt with in Book 3 of the

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95 Puchta GF *Cursus der Institutionen* (Leipzig 1851) 579-581; Puchta GF *Pandekten* (Leipzig 1848) 207. See also Van der Walt 1986 JCRDL 305 315; Van der Walt and Kleyn "Duplex dominium" 247.

96 Windscheid B *Lehrbuch des Pandektenrechts* (Düsseldorf 1900) vol I, book 2, par 37, p 131 - the voluntarism and Kantianism is obvious.

97 Windscheid *Lehrbuch* I,2,41,149. This follows Kant's view that a right is a relation between persons and not between persons and things.

98 Windscheid *Lehrbuch* I,3,137,603; I,3,167, 756-757; I,3,158,759.

99 Van der Walt 1993 JCRDL 569 579-580.

100 Hereinafter referred to as the *BGB*.

101 Cohn Manual 25; Coing 1989 *Am J Comp L* 9 10; Zwolpe *Geschiedenis* 22; Van Caenegem *Introduction* 69.



*BGB*, which deals with rights to corporeal things. *Eigentum* is defined in section 903:

"Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und ander von jeder Einwirkung ausschliessen."

If this can be called a definition,<sup>102</sup> it is a typically nineteenth century one. It defines *Eigentum* as *Herrschaftsrecht*.<sup>103</sup> It combines the basic elements of exclusivity, free disposal and abstractness to provide the paradigmatic definition of ownership in the civil-law tradition. Because of the influence of this codification, the definition of ownership was also particularly influential.

However, in much the same way as in other systems of this era, ownership is defined to fit capitalist economy and political liberalism.<sup>104</sup> Apart from this private-law codification, property was also included as a basic right in the German constitution of the post-war period. The content and history of this concept will be discussed elsewhere.<sup>105</sup>

#### 3.4.2.4 Conclusion

The developments in the German law of property followed much the same path as in other systems. Although it started out as a natural law definition, political developments and philosophical ideas resulted in a denial of natural law. Although the definition in the *BGB* seems neutral, it was in fact designed

102 Baur F *Lehrbuch des Sachenrechts* (Munich 1987) par 24 states that this is an explanation of the powers of owners and not a definition.

103 Baur *Lehrbuch* par 24 p 212: "Das Eigentum sollte also ... als 'das umfassendste Herrschaftsrecht, das die Rechtsordnung an einer Sache zulässt', begriffen worden."

104 Van der Walt and Kleyn "Duplex dominium" 248.

105 See 11.1 below for the constitutional perspective.

to fit nineteenth-century German ideas on the state and economy.<sup>106</sup> Consequently the definition was never entirely conventional, but based on an objective moral and political order. This order was regarded as just as natural as the one implied by the old natural law.

### 3.4.3 Dutch property law

In the case of the definition of ownership in Dutch law, the influence of Grotius was both pervasive and long lasting. This influence is not restricted to the definition itself, but the system Grotius devised was equally influential. The Dutch writers also adopted his view of ownership as a scientific and abstract concept within a conceptual system.<sup>107</sup> Although earlier writers had used the definition of Bartolus as point of departure,<sup>108</sup> writers of the seventeenth and eighteenth centuries seemed to be doing little more than echoing Grotius.

In this vein Ulrich Huber (1636-1694) defined ownership as the "entire power" over things. This implied, for him, both the full control of and the right to alienate the property. This was combined with the power to demand the property from whoever held it to characterise ownership.<sup>109</sup> This definition stressed the *facultas* aspect in the medieval tradition.

The underlying individualism that had characterised Grotius' definition was made explicit in the eighteenth century by Van der Linden when he defined *eigendom* as "... dat regt, waar door enige zaak aan iemand, met uitsluiting van alle anderen, toekomt." This kind of property could only be limited by

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106 See Van der Walt 1993 JCRDL 569 585-586.

107 See 3.3 above on Grotius' contribution.

108 See De Smidt J Th ea *Compendium van de geschiedenis van het Nederlands privaatrecht* 2nd ed (Deventer 1972) 69.

109 Huber U *The jurisprudence of my time* (Durban 1939 Tr P Gane) 2.2.7, 2.2.10.

statute and by the (limited real) rights of others.<sup>110</sup> This was also basically the definition used by Van der Keessel.<sup>111</sup>

These natural law definitions were, except for their very natural law basis, ideally suited to the definition of the *Code Civil*. Section 544 of the *Code Civil* formed the basis for section 625 of the Dutch codification, known as the *Burgerlijk Wetboek*.<sup>112</sup> The definition reads as follows:

"(H)et recht om van eene zaak vrij genot te hebben en daarover op de volstrekste wijze te beschikken, mits men er geen gebruik van make, strijdende tegen de wetten of de openbare verordeningen, ... en mits men aan de regten van anderen geen hinder toebrengen."

The interesting point is that this definition is closer to that of Bartolus than the German one. Pothier and Hotman's definitions, which were, in turn, based on the Bartolist tradition, influenced the Dutch definition.<sup>113</sup> There is, however, less emphasis on exclusivity as characteristic. The German definition, on the other hand, was based on the Grotian definition, reinforced by Kantian influences.

### 3.4.4 English property law

#### 3.4.4.1 Introduction

English law has had a distinctly national character since the twelfth century.<sup>114</sup> It developed within the existing feudal framework and this feudalism was, to a

110 Van der Linden J *Rechtsgeleerd, practicaal and koopmans handboek* (Amsterdam 1806) I.7.1. See also Van der Walt "Eigentumsbegriff" 507; Van der Walt *Houerskap* 419-420.

111 Van der Keessel DG *Dictata ad Justiniani - Institutionum libri quattuor* (Amsterdam 1965) ad D1.1.148-149.

112 Hereinafter referred to as the *BW*.

113 Van den Bergh *Eigendom* 43ff.

114 Van Caenegem RC *The birth of the English common law* (Cambridge 1988) 87.

substantial extent, maintained until the nineteenth century. Consequently the feudal idea of relation was central to English law in general,<sup>115</sup> and English property law in particular.<sup>116</sup> Therefore the essence of English property law in this period is the fact that it was not an abstract system, but was embedded in social structures and particularly in practice as a decidedly non-scientific, non-conceptualist enterprise. In order to understand the modern developments in English law, one therefore needs to understand the feudal basis thereof.

#### 3.4.4.2 Definition

It will already be apparent that the basic structure of English law made a definition of property, in the abstract sense, highly unlikely. Where definitions did occur, they were formulated by the few legal theorists active during this period. For instance, Sir William Blackstone (1723-1780) used as his point of departure in defining property the traditional, descending view that the King is the fountain of all property and the owner of all land.<sup>117</sup> On this basis he defined property as that "... which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."<sup>118</sup> These rights have their origin in natural law, although the specific rules are conventional.

This definition was strangely ambiguous. Although the feudal nature of English property law was acknowledged, the definition corresponded to those provided by contemporary continental lawyers. This was probably the result of Blackstone's attempt to make English law more continental, that is more

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115 Van Caenegem *Common law* 89.

116 Megarry R and Wade HWR *The law of real property* (London 1984) 12.

117 Blackstone W *Commentaries on the laws of England* 4th ed (Oxford 1770) Book II, chapter 4, page 51 (II.4.51). See Kennedy 1979 *Buffalo LR* 205 318-320 on Blackstone's confusing use of the term *property*.

118 Blackstone *Commentaries* I.1.138.3. In II.1.2 this is echoed by the definition of property as "... the sole and despotic *dominium* which one man exercises over the external things of the world."

scientific and more conceptual. Although limited in nature, property seems unlimited in practice. Likewise his definition was both natural and conventional, possibly indicating a transition of some kind. In the first book of the **Commentaries** he stated that all rights have their origin in natural law,<sup>119</sup> but in the second book it is qualified, indicating that "... the permanent right of property ... was no *natural* but merely a *civil* right."<sup>120</sup> It should also be noted that Blackstone emphasised the powers of owners, which is reminiscent of the medieval idea of *potestas*. This tends to make his definition seem subjective. It is also a passive definition, since emphasis is placed on the protection of the exercise of powers. This might be the result of English law in general, with its emphasis on the system of writs.

While Blackstone's definition is, on the surface, a subjective one, analysis shows it to be ultimately objectivist. Kennedy has shown that Blackstone's definition was developed to fit and legitimate an objective moral, social and political order.<sup>121</sup> By concentrating on the powers of the individual, Blackstone obscured the underlying social and moral order, so that they seem a natural part of the individual's power. In this way the dichotomy is resolved - the convention, which is the basis for property, is based in turn on a natural moral order which determines the content of the convention.

Jeremy Bentham (1748-1832) specifically rejected natural law as the basis for law in general.<sup>122</sup> He saw property rights as the creation of positive law,<sup>123</sup> based on labour.<sup>124</sup> On this basis he defined property as a right that "... gives

119 Blackstone **Commentaries** I.1.124.

120 Blackstone **Commentaries** II.10.11.

121 Kennedy 1979 **Buffalo LR** 205 328.

122 Bentham J **The limits of jurisprudence defined** (New York 1945) 84: "All this talk about nature, natural rights, natural justice and injustice proves two things and two things only, the heat of the passions, and the darkness of the understanding."

123 Bentham J **A comment on the Commentaries and a fragment on government** (London 1977) I.2.16; Bentham **Limits** 85: "Property and law were born and die together." It is typical of utilitarian views to deny that law has a moral basis. This results in Bentham's assertion that slavery cannot be condemned on moral grounds - "(a)nything in which the law creates a title can be owned, and that is that." See Ryan **Property** 108, 96.

124 Bentham J **Economic writings** (London 1952) Vol II 312: "All wealth is the fruit of labour."

you alone a *power* over the land ... it gives you ... *the property of the land, the estate of the land...*"<sup>125</sup>

This definition is firstly an explicitly conventional one. His emphasis on power and labour also indicates an active definition. However, although it seems subjective, in much the same way as is the case with Blackstone, Bentham's definition implied a certain social and moral order.<sup>126</sup> Bentham was strongly in favour of law reform and codification. He had a very clear idea of what the law should look like. His definition of property was part and parcel of his broader reformist principles and was meant to legitimate that new order.<sup>127</sup>

David Hume, whose scepticism regarding philosophy and knowledge resulted in a new theory of morality, was extremely influential. He influenced not only contemporaries like Adam Smith and Jeremy Bentham, but provided the basis for nineteenth century utilitarianism as well.<sup>128</sup> His point of departure was his denial of morality as the basis for property. Hume thought that law was essentially conventional, by which he meant that the citizens shared a common interest based on public utility.<sup>129</sup> In this sense Hume defined property as a set of conventions which men obey because it is in their own best interest to do so.<sup>130</sup> His definition was therefore conventional, but not in a contractarian sense, rather in the sense of public utility. On this basis property should be upheld, but the particular rules pertaining to property depended on the underlying legal system.<sup>131</sup> For Hume, therefore, property

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125 Bentham *Limits* 61 - my emphasis on power.

126 This is probably part of the what Haakonssen calls the objective approach to rights in English law in general, which he contrasts with the subjective approach in American law - see Haakonssen "From natural law" 20-21.

127 See Manchester AH *A modern legal history of England and Wales 1750-1950* (London 1980) 13 for Bentham's approach to law reform.

128 Hendel CW "The philosophy of Hume" in *Hume selections* (New York 1927) v-xxii xix.

129 Hume D "An inquiry concerning the principles of morals" in Hendel CW (ed) *Hume selections* (New York 1927) 194-252 250: "But if by convention be meant a sense of common interest; ... which tends to public utility; it must be owned, that, in this sense, justice arises from human conventions."

130 Hume "Morals" 208.

131 Hume "Morals" 208: "Thus, the rules of equity or justice depend entirely on the particular state and condition in which men are placed ..."

was always defined in such a way as to fit current legal, moral and political ideas. In this sense then, his definition is objective, depending on the underlying system.

This conventional approach was also adopted by Adam Smith. He recognised that the definition of property depended on the kind of government in force.<sup>132</sup> Nevertheless, he defined *dominium* as the "full right of property" and as "... the sole claim to a subject, exclusive of all others, but can use it as he thinks fit, and if he pleases abuse or destroy it."<sup>133</sup> In this definition, therefore, property is inextricably linked to capitalist economy. In fact, Smith thought that the state of nature (as ideal) required an absolutely free market and a free exchange of goods.<sup>134</sup> This was why Smith criticised estates entail, stating that they were "... disadvantageous to the improvement of the country..."<sup>135</sup>

Smith therefore paid only lip service to Hume's conventionalism. For him, public utility was the same as the efficient production of goods, which, in turn, required the accumulation of wealth and unequal property. In this way Smith constructed an objective theory of property - one that fits the objective moral and political order of capitalism.<sup>136</sup>

### 3.4.4.3 Conclusion

An interesting question arises when a comparison is attempted between English and continental developments. The question is whether, and if so to what extent, the conceptualisation of property (and the view of law as a

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132 Smith *A Lectures on jurisprudence* (Oxford 1978) 401: "Property and civil government very much depend on one another ... and the state of property must always vary with the form of government."

133 Smith *Lectures* 10. The use of the term *subject* is confusing - it should probably read *object*.

134 Smith *A An inquiry into the nature and causes of the wealth of nations* (Oxford 1976) Vol I 57.

135 Smith *Lectures* 469. This *improvement* is meant in an economic sense.

136 Mensch 1982 *Buffalo LR* 635 639.

scientific and abstract system) also occurred in the English system. To what extent did the reforms and the views of Blackstone or Bentham result in an abstract, conceptual system as was the case in Germany or the Netherlands? As Kennedy pointed out, the effect of Blackstone's approach was the creation of such a system.<sup>137</sup> Singer characterises Bentham's approach as a *nominalist* one, to contrast it with the conceptualism of Austin and Mill.<sup>138</sup> However, Bentham's commitment to a particular moral and social order<sup>139</sup> (as evinced in his reformist ideas) and his insistence on empirical knowledge, indicate that his approach eventually strengthened the abstract and conceptualist view. To a large extent, therefore, English property law by the beginning of the modern era exhibited many of the same characteristics as the continental systems. However, Bentham's dream of codification was never realised and the feudal basis of English law prohibited the high level of abstractness that characterises continental systems.

### 3.4.5 American property law

#### 3.4.5.1 Introduction

Mensch has shown that, in the colonial period in New York, there were at least two conflicting views of property, based on conflicting views of society.<sup>140</sup> The first of these conceptions of property was a basically *voluntarist* one, known as *title by occupation*, in contrast with the *hierarchical* one, known as *title by grant*.<sup>141</sup> The *hierarchical* approach was, in essence, a natural rights approach based on a contractarian view of law and society. In this respect it

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137 Kennedy 1979 *Buffalo LR* 205 382.

138 Singer 1982 *Wisconsin LR* 975 1016.

139 See Kroeze IJ "Re-evaluating legal positivism - or positivism and fundamental rights: a comedy of errors" 1993 *SAPL* 230-237 235-237.

140 Mensch 1982 *Buffalo LR* 635 635. This is a particularly interesting choice of venue. New York started out as a Dutch colony and was later taken over by the English. One could, therefore, expect a conflict between continental (or at least Dutch) and English views on property.

141 The views of society that these definitions were based on will be discussed below at 5.4.2, because they deal with theories on the origin/justification of property.



more or less followed the ideas of Hobbes.<sup>142</sup> Therefore the origin of property was natural, but its protection was the result of convention. It was a passive and objective approach, since it depended on an objective moral, political and legal order that conferred rights on owners.<sup>143</sup>

The *voluntarist* approach at first glance seems to indicate a continuation of the medieval idea of property as *potestas humana*.<sup>144</sup> It was a conventional approach, but of a very specific kind. It saw property as a right based on use and occupancy, but this right was conferred and controlled by democratic means within the community.<sup>145</sup> It was not, however, anti-monarchical. It simply identified the king with the will of the community.<sup>146</sup> It thus represented a curious blend of feudal and early democratic ideas. It was also an active approach, since failure by the owner to settle and use the land *himself* led to forfeiture of the land. For the same reason (use and occupancy) unimproved land could not be sold.<sup>147</sup> Therefore, not only was the right to settle and use the land central to the approach, but the owner was also actually compelled to use the land.

These two approaches were in conflict not only in theory, but also in practice, where the possession of large pieces of land based on grants were disputed by those who actually settled and used the land. Mostly, titles based on use and occupancy were upheld against grants, in order to promote settlement.<sup>148</sup> However, neither of the two views could provide the economic growth necessary and their conflicting contexts made them irreconcilable.<sup>149</sup> What was needed, therefore, was a new approach abstracted from these two

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142 See 3.3 above for Hobbes' views. See also Mensch 1982 *Buffalo LR* 635 642. The theory also derived, more indirectly, from Blackstone.

143 Mensch 1982 *Buffalo LR* 635 645.

144 See 3.2 above.

145 Mensch 1982 *Buffalo LR* 635 644.

146 Mensch 1982 *Buffalo LR* 635 662.

147 Mensch 1982 *Buffalo LR* 635 646.

148 Mensch 1982 *Buffalo LR* 635 661.

149 Mensch 1982 *Buffalo LR* 635 660.

extremes. This led to the liberal definition of property that saw property as free from hierarchical controls (an idea taken from the voluntarist approach) but which retained the idea of formally valid titles to land (an idea taken from the hierarchical view).<sup>150</sup>

### 3.4.5.2 The framing of the Constitution<sup>151</sup>

The American Constitution was drafted in an era when there were two general theories on offer about the nature of citizenship, the state and law, namely the liberal tradition and the republican tradition.<sup>152</sup> Both these traditions agreed, among other things, that government should protect private property, but in different ways. The conflict between these two theories shaped the arguments at the Convention.<sup>153</sup>

In the *liberal* tradition property played a central role. The acquisition thereof was regarded as the goal of human activity and, consequently, the reason why liberty was desirable. Private property limited the power of a landlord and gave owners a stake in maintaining the current order.<sup>154</sup> The *republican* view of people as social beings also saw private property as important.<sup>155</sup> Private property provided a secure foundation so that they could be "civic-minded", that is, concerned about the public interest.<sup>156</sup>

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150 Mensch 1982 *Buffalo LR* 635 690-694.

151 In this section only the problem of the definition of property in the framing of the American constitution will be discussed. The various political influences and development will be discussed more fully in 9.2 below.

152 Tushnet *M Red, white and blue - a critical analysis of constitutional law* (Cambridge Mass 1988) 4-5.

153 Tushnet *Red, white, and blue* 7.

154 Tushnet *Red, white, and blue* 9.

155 See Nedelsky *Private property* 16-66 on the view of Madison as representative of the republican view of government in general and property in particular.

156 Tushnet *Red, white, and blue* 10-11; Pickens DK and Seligmann GL "Unworthy motives: property, the historian and the federal constitution - a historiographical speculation" 1987 *Soc Sc Q* 847 849.

Eighteenth-century republicanism aimed at creating better citizens by protecting property that created economic independence.<sup>157</sup> This classical republicanism stressed property's role as a way of anchoring an individual in a community. On the other hand, the agrarian republicanism attempted to realise the ideal through institutions that protected land.<sup>158</sup> This republicanism was inspired by the Scottish moral philosophers Hume and Smith<sup>159</sup> and was a major factor in the settlement of the West.<sup>160</sup> This republicanism emphasised the use of land for "natural", that is agrarian, purposes.<sup>161</sup>

In the end the liberal definition prevailed. Private property was seen as an abstract constitutional right that was based on and perpetuated the distinction between public and private spheres. Its abstract nature could be deduced from its neutrality, since it supposedly severed the ties between an objective moral and religious order (on the one hand) and law (on the other hand).<sup>162</sup> However, this abstract and instrumental definition also emphasised production in terms of economic efficiency.<sup>163</sup> Although the relation between property and moral power had ostensibly been severed, the relation between property and economic power would become ever more apparent.<sup>164</sup>

Although the teachings of Locke were appealed to, very little remained of the Lockean definition. For instance, the Jeffersonians differentiated between inherent or natural rights, (life, liberty and the pursuit of happiness) and

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157 Pickens and Seligmann 1987 *Soc Sc Q* 847 849.

158 Pickens and Seligmann 1987 *Soc Sc Q* 847 850.

159 See 3.4.4.2 above.

160 Pickens and Seligmann 1987 *Soc Sc Q* 847 852.

161 Horwitz 1973 *U Chicago LR* 248-290 249.

162 Mensch 1982 *Buffalo LR* 635 735.

163 Horwitz 1973 *U Chicago LR* 248 250, 278: "... men had come to regard property as an instrumental value in the service of the paramount goal of promoting economic growth."

164 Nedelsky *Private property* 2-3 states that the goal of the framers of the Constitution was to insulate property and inequality from democratic transformation and that this has distorted the application of the Constitution.

conventional rights (such as property).<sup>165</sup> The liberal definition was therefore a conventional one in which the state both created property rights and set limits to its own interference.<sup>166</sup>

Developments in the nineteenth century entrenched this liberal, abstract definition. This is the result of three factors. In the first place the Marshall court's liberal interpretation of the commerce and contract clauses was based on and strengthened the liberal definition.<sup>167</sup> The Supreme Court protected property rights against all state intervention<sup>168</sup> by making use of the dual federalism of commerce clause and the substantive due process guaranteed by the 14th Amendment.<sup>169</sup> In the second place it was the definition best suited to achieve production on the basis of economic efficiency.<sup>170</sup> In this way property became an instrumental right.

Thirdly, the influence of CC Langdell in die nineteenth century led to the conceptualisation of law in general and property in particular.<sup>171</sup> In the Langdellian jurisprudence a new methodology is used to establish law as a science based on the view that law is "a complete, formal and conceptually ordered system that satisfies the legal norms of objectivity and consistency".<sup>172</sup> This view is, of course, reminiscent of that of Grotius and Windscheid and, in this way a conceptualism was established that shared

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165 Post DM "Jeffersonian revisions of Locke: education, property-rights and liberty" in Shuffelton F (ed) *The American Enlightenment* (Rochester 1993) 295-305 300.

166 Nedelsky *Private property* 8: "In property, the state sets its own limits."

167 McCann MW "Resurrection and reform: perspectives on property in the American constitutional tradition" 1987 *Pol & Soc* 143-176 146.

168 Except in the case of Indians - see Singer 1991 *Legal T* 1 3.

169 McCann 1987 *Pol & Soc* 143 146.

170 Horwitz 1973 *U Chicago LR* 248 250, 278.

171 See Schlag P "The problem of the subject" 1991 *Texas LR* 1627-1743 1632-1634 where he quotes Langdell as saying: "Law, considered as a science, consists of certain principles or doctrines ..." See also Schlag P "Le hors de texte, c'est moi" - the politics of form and the domestication of deconstruction" 1990 *Cardozo LR* 1631-1674 1638 where he points out that the Langdellian emphasis on "instrumentally useful" knowledge led to a view of law where the desirability of the instrumentalist paradigm cannot be questioned.

172 Minda G *Postmodern legal movements - law and jurisprudence at century's end* (New York 1995) 13. See also Schlag P "Law and phrenology" 1997 *Harvard LR* 877-921 896-914 on the view of law as science and the role of Langdell in this development.

much of the characteristics of the continental conceptualism discussed above.<sup>173</sup> This conceptual or scientific approach strengthened the idea of property as an abstract right.<sup>174</sup>

By the end of the nineteenth century, property was defined as an abstract and absolute right that had to be protected against all forms of interference.<sup>175</sup> It was still an active definition that stressed the owner's right to make certain choices.<sup>176</sup> Above all it was a subjective definition that emphasised the role of the owner as holder of the right.<sup>177</sup>

### 3.4.5.3 Conclusion

The liberal definition was supposed to be a neutral and subjective one that served to sever the connection between property and an objective moral and political order.<sup>178</sup> In reality, however, it served to promote a very specific worldview. Not only did it accept inequality and class differences as natural and inevitable,<sup>179</sup> but it was also actively intended to protect the propertied from democratic levelling.<sup>180</sup> Economic and political power was therefore

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173 See 3.4.2 and 3.4.3 above. See also Schlag 1990 *Cardozo LR* 1631 1637: "One result of this rhetorical economy is that, at least since the time of Langdell ... traditional legal discourse has systematically rejected any *serious* consideration of the social, the psychological, and the rhetorical context of *its own* productions." This move is also characterised by Schlag as a typically male production.

174 Alexander 1982 *Col LR* 1545 1549ff.

175 Frug GE "Tortious interference with contractual relations in the nineteenth century: the transformation of property, contracts and tort" 1980 *Harvard LR* 1510-1539 1511; Vandevelde KJ "The new property of the nineteenth century: the development of the modern concept of property" 1980 *Buffalo LR* 325-367 350; Horwitz 1973 *U Chicago LR* 248 248.

176 Allen DW "Homesteading and property rights; or, 'how the West was really won'" 1991 *J Law & Econ* 1-23 2: "Property rights are defined as one's ability to exercise one's choice over the use of a good."

177 See Haakonssen "From natural law" 42-61 for the history of the shift from objectivism to subjectivism in American thinking.

178 Mensch 1982 *Buffalo LR* 635 735.

179 Nedelsky *Private property* 2; Underkuffler LS "The perfidy of property" 1991 *Texas LR* 293-316 296-297.

180 Ryder J "Private property and the US Constitution" in Gray CB (ed) *Philosophical reflections on the United States Constitution* (Lewiston 1989) 16-28 21, 24.

closely aligned with property and, consequently, the definition was never neutral.<sup>181</sup>

This is nowhere more apparent than in the treatment of the property rights of Indians. From the eighteenth century many rights of Indians based on treaties were not regarded as property. Consequently, they were not protected by the Constitution and infringement was not regarded as unconstitutional.<sup>182</sup> In this way the rights of tribes were sometimes regarded as sovereignty issues (so that their property could be infringed upon without compensation) and sometimes as property issues (to deny them sovereignty over those whites living on reservations). In this way the neutral pretensions of the liberal definition served to mask its racist and colonialist assumptions.<sup>183</sup>

One of the most interesting aspects of the American development is the similarity with continental, civil-law developments. This is most obvious in the civilist approach followed by the *Lochner* court.<sup>184</sup> Although there are obvious dissimilarities, the similarities are startling. Not only is the definition in both cases premised on the existence of a liberal, capitalist state, but both also define property in terms of absoluteness, exclusivity and abstractness. Especially the last-mentioned indicate a fairly widespread acceptance of the conceptualist assumptions underlying modernist legal thought:

"Legal modernism symbolises the progressive union of scientific objectivity and instrumental rationality in pursuit of the intellectual project of *twentieth-century Enlightenment* - the century-old quest for universal truth

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181 Nedelsky *Private property* 143; Underkuffler 1991 *Texas LR* 293 299.

182 Singer 1991 *Legal T* 1 2.

183 Singer 1991 *Legal T* 1 7: "If property is a form of political power, and political power is a source of property, than responsibility for poverty and inequality rests, to a large extent, with the legal system itself."

184 See Alexander 1982 *Col LR* 1545 1598-1599 on the civilist attitude of American courts as an indication of conceptualism.

based on faith in the 'omnipotence and liberating potential of reason and science ... to penetrate to the essential truth of physical and social conditions, making them amenable to rational control.'<sup>185</sup>

This abstract, neutral and subjective definition would be used by the courts to interpret the property clause in the Constitution.<sup>186</sup>

### 3.5 Conclusion

The history of the development of the definition of property is a curious and convoluted one. At first glance there seems to be no pattern to the kinds of definitions presented. However, closer analysis reveals a number of interesting themes. The first of these themes is the development of a truly conventional view of property. Until the early modern period most definitions of property were based on natural law. Even the conventional definitions were not truly conventional. These conventions were regarded as part of an objective moral and social order that was based, in turn, on a secularised natural law. In this way the scope of the convention was limited.

It was only during the late eighteenth and early nineteenth century that truly conventional definitions began to appear. Rousseau was an early precursor, but the idea was fully developed by Hobbes, Hume and Bentham. In fact, a conventional definition could only come about once the idea of a social contract had taken hold. The idea of fully rational humans contracting to create a state and rights was a prerequisite for the idea of property as the result of convention. By the end of the nineteenth century, a clear distinction had emerged between property in practice and the property concept. Practically speaking property was regarded as contingent and contextual, its

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185 Minda Postmodern legal movements 5.

186 See 9.2 below.

content and structure determined by the underlying social, political and economic order. Conceptually, however, it was seen as universal, abstract and absolute. In this way particularities, concrete differences and limitations could be explained as exceptional and temporary.

In the second place it seems fairly clear that the definition of property was never neutral. It was always determined by the context in which it was defined. Consequently it was defined as active or passive, subjectively or objectively, depending on the context. Although a general trend can be discerned from passive to active and from objective to subjective, this is sometimes misleading and, at any rate, not the important point. What is important is the context. For instance, a truly subjective definition only became possible once the voluntarist idea of medieval thought had been recast in an individualist mould. Such a definition would be unthinkable in a feudal community with its emphasis on status and dependence on the moral order of the community. In this respect therefore, it represents an example of the movement away from feudalism with its accompanying economic development and towards the goal of making property available for business purposes.

It should also be emphasised that the definition of property has always played an important role in the legitimisation of the status quo. This will be discussed more comprehensively when dealing with the justification of property.<sup>187</sup> For now it needs to be stated that the way in which property was defined almost always reflected the political and philosophical "mood" of a certain period. In this way the definition of property was not only determined by the context, but also determined the context in turn.

Finally, developments regarding the definition reflect the rise of scientific method as applied to law. This is probably the most important development in

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<sup>187</sup> See 5.5 below.



this regard. The conceptualisation of law made the conceptualisation of property possible. The definition became abstract and technical and with this went the pretensions of universality and timelessness. Although practical, concrete exceptions could and did exist, the concept itself was abstract. It is this conceptual paradigm that is read back into the history of the property concept. The result of conceptualism is that the property concept is basically abstract (*the right*), while the concrete right (*my right*) is regarded as contextual. As such it is a typically modernist construct, that is found in both common-law and civil-law systems. In both cases it is the result of the scientific and neutral pretensions that led to rights talk. In this way property could be and was represented as an equitable institution, while its abstract pretensions masked individual suffering and abuse.

## CHAPTER 4: THE IMPORTANCE OF PROPERTY (CONSTRUCTING A HIERARCHY OF RIGHTS)

"This distinction has sustained a mythic quality of property as not merely a social construct, but a basic right, linked in powerful ways to cherished values of freedom and autonomy."<sup>1</sup>

### 4.1 Introduction

The way in which property was traditionally defined was based on how property was seen in relation to other rights. In fact, it was only when property was regarded as something different from other rights that it could be defined. Thus the relationship between property and other rights determined or co-determined its definition. This tradition was all but destroyed by the rise of conceptualism discussed above.

In discussing the *importance* of property, it is necessary to remember that the term can be used to indicate different things. In the first place it can refer to the systematic position of property within a scientific and abstract system of rights. This implies that this kind of importance only becomes relevant once such a system is proposed or implemented. Consequently, it would be absurd to speak of the importance of property in this sense before the early modern period (and Grotius and Blackstone in particular).<sup>2</sup> Of course, the importance of ownership in this sense is dealt with by earlier writers, but then not as part of an abstract, scientific system of rights. This aspect will be referred to as the *systematic importance* of property.

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1 Nedelsky *Private property* 9.

2 See 3.4 above on the development of a scientific, abstract concept of property.

In the second place *importance* can also indicate the socio-political and philosophical importance of property as a social institution. As such this refers, to a certain extent, to the justificatory debate, but it also involves basic questions regarding the nature of society and of man. This aspect will be referred to as the *philosophical importance* of property. The interesting question regarding these two aspects is what the connection between them is. Does the philosophical importance determine or influence the systematic importance or *vice versa* and, if so, how is this to be understood?

Part of the question on the *systematic importance* of property deals with the relationship between property and other rights. In this regard two separate issues are sometimes confused. On the one hand the distinction between *dominium* and *possessio* in roman law is only important in terms of the way in which romanist lawyers and Bartolus used it. In fact, it would be anachronistic to speak of a systematic importance, since no conceptual system existed at the time. On the other hand, the distinction between real and personal rights, and the structural importance of the former, has to do with the way in which the system of rights is structured and perceived. In this regard there is a definite connection between the systematic importance and the philosophical basis underlying the system.

The introduction of fundamental (human) rights adds a further dimension to this problem. Once property is protected as a fundamental right, the relationship between (or hierarchy of) fundamental rights come into play. Not only is the hierarchical position of property in this scheme determined by its philosophical importance, but it is also strengthened by the systematic importance of property in other fields of law. On the other hand constitutional protection tends to strengthen the systematic position of property further. In this way the systematic and philosophical importance are inter-dependent. For this reason the two kinds of importance will be studied together.

## 4.2 Roman and medieval roots

Roman law was a practical science and this can be seen in the way in which *dominium* was developed and distinguished.<sup>3</sup> In pre-classical Roman law two kinds of procedures existed, namely the *interdictum* and the *actio*. The *interdictum* was used to protect the user of state land and this claim would later become known as *possessio*.<sup>4</sup> The *actiones* were used to protect "own" land, that is land allocated to the *paterfamilias*. One of these *actiones* was the *actio ex iure Quiritium* and this interest was protected by the *rei vindicatio* and the interest would later be known as *dominium*. The eventual distinction between *dominium* and *possessio* therefore has its roots in procedural differences.<sup>5</sup> *Dominium* was not systematically contrasted with "limited real rights", nor did it have any superior position in law.<sup>6</sup> Furthermore, *dominium* included rights, which would be regarded as limited real rights in later developments. The greatest accomplishment of the classical period of Roman law was the beginning of the later distinction between *dominium* and *possessio*. This would form the basis for Bartolus' distinction. Bartolus defined *dominium* as *ius perfecte disponendi* and based this characteristic on an exposition of the *lex in re mandata*.<sup>7</sup> He used the term *perfecte disponendi* in order to distinguish between *dominium* and *possessio*. In contrast with *dominium*, *possessio* was defined as *ius insistendi rei*.<sup>8</sup>

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3 It should be mentioned at the outset that terms and concepts such as *real* and *personal rights* and indeed *rights* itself (in the technical sense) were unknown to Roman law: Van Warmelo P 'n Inleiding tot die studie van die Romeinse reg (Cape Town 1965) 118 par 339; Schrage *Actio en subjectief recht* 10-11, 17.

4 Buckland WW *A manual of Roman private law* (Cambridge 1939) 115-117; Kaser M *Roman private law* 2nd ed (Durban 1968 Tr R Dannenbring) 89; Van Warmelo *Inleiding* 155 par 450.

5 Feenstra 1976 RMT 248 259.

6 Feenstra R "Dominium and *ius in re aliena*: the origins of a civil law distinction" in Birks P (ed) *New perspectives in the Roman law of property: essays for Barry Nicholas* (Oxford 1989) 111-122.

7 C.4.35.21 - this *lex* dealt with the liability of a mandatory. See also Feenstra 1976 RMT 248 251-252.

8 Bartolus on D.41.2.1 pr nr 6. See also Coing 1953 ZSS 348 352; Feenstra 1976 RMT 248 252.

However, the bulk of the debate regarding *dominium* in the middle ages was devoted to discussions on the definition of and justification for property, while the distinction between *dominium* and other rights was mostly ignored. Within catholic doctrine and as a result of the poverty debate, a distinction was made between ownership (*proprietas*) and the use of things (*usus*),<sup>9</sup> along with a further distinction between *usus iuris* and *usus facti*.<sup>10</sup>

This trend to distinguish *dominium* from *possessio/usus* was still found with the Spanish late scholastics. Vitoria,<sup>11</sup> De Soto<sup>12</sup> and De Molina<sup>13</sup> continued the romanist tradition of distinguishing between *dominium* and *possessio*. However, it is impossible to speak of a "system" of law in the middle ages - that is typical of the modern era. Consequently, it would be ridiculous to discuss the *systematic* position of *dominium* if there was no system.

While keeping in mind what was said above, it should not be forgotten that *dominium* played a central role within the feudal relations of the Middle Ages. It is typical of feudalism that *dominium* and political power went hand-in-hand.<sup>14</sup> *Dominium*, in whatever form, was the basis for participation in political decision-making and the exercise of power. In this respect, therefore, *dominium* played a crucial role.

### 4.3 Early modern developments

This period represents the beginning of the great systems of law in European thought. The rise of rationalism and the successes of the natural sciences in

9 Pope Gregorius IX in the bull *Quo elongati* (1230). See also Schrage *Actio en subjectief recht* 40-43; Van der Walt *Houerskap* 212.

10 Pope Nicholas III in the bull *Exiit qui seminat* (1279). See also Schrage *Actio en subjectief recht* 50-54; Van der Walt *Houerskap* 213.

11 See Tuck *Natural rights* 47.

12 Feenstra "Eigentumsbegriif" 220; Feenstra 1976 RMT 248 270; Tuck *Natural rights* 47.

13 Feenstra "Eigentumsbegriif" 221.

14 See, in this regard, Van den Bergh *Eigendom* 8: "De kern van het Middeleeuwse of 'feodale' maatschappelijk bestel was juist dat eigendomsverhoudingen en politieke structuur ... vrijwel identiek waren"; Van Maanen *Eigendomsschijnbewegingen* 23; Tuck *Natural rights* 17.

the seventeenth and eighteenth centuries contributed to this phenomenon. The period is therefore characterised by the prevalence of systems that purported to explain the law in a coherent and all-encompassing manner.<sup>15</sup> The seventeenth and eighteenth centuries also represent the beginning of capitalism and liberalism, which would result in the French and American revolutions.

Grotius was one of the first and most successful of the system builders of his time and the first to base his explanation of law on rights rather than on laws. Already in the *De iure belli ac pacis* Grotius dealt with the division of rights. The term *dominium* was used for all real rights, whilst *creditum* was used for all other rights.<sup>16</sup> The term *dominium utile* was still used, but this term now referred to limited real rights and not to a kind of *dominium*.<sup>17</sup> In his *Inleidinge tot de Hollandsche Rechtsgeleerdheid*, Grotius' system of rights is set out. He distinguished between *beheering* and *inschuld*. *Beheering* is sub-divided into possession (*bezit-recht*) and ownership (*eigendom*).<sup>18</sup>

Grotius made a first distinction between full ownership (where the owner has both the *dominium* and the use) and limited ownership (where the *dominium* and the use is split up). The innovative aspect of this is that he reserves the term *owner* for the person who has the *dominium*, whilst the term *holder* is reserved for the person who has the use.<sup>19</sup> The traditional romanist definition is then reserved for the former. This explanation is one of Grotius' most important contributions to modern legal thought, although the distinction itself

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15 This was due, in no small part, to the dialectic method of Petrus Ramus. See, in this regard, Van der Merwe "Ramus, mental habits and legal science" 32 49-56; Van der Walt 1995 JCRDL 396 402.

16 Grotius *De iure belli ac pacis* I.1.5 p 32; Van der Walt *Houerskap* 399.

17 Grotius *De iure belli ac pacis* I.2.3.19.2 p 217. This distinction between *dominium directum* and *dominium utile* is not the same as Grotius' distinction between *volle* and *gebreckelicke eigendom* – these distinctions are discussed at 6.3.2 below.

18 Grotius *Inleidinge* 2.1.60. See also Feenstra "Eigentumsbegriff" 230; Van der Walt *Houerskap* 402.

19 Van der Walt 1995 SAJHR 176-177; Van der Walt 1995 JCRDL 404-405. For the other distinctions found in Grotius' thought, see 6.3.2 below.

it based on romanist ideas.<sup>20</sup> What is also innovative is that ownership was made the norm or standard by which all the other real rights was measured, and traditional definition of *dominium* is reserved for one set of rights.<sup>21</sup> In fact, "(o)wnership becomes the original example of a right conceived as a sphere of absolute and exclusive individual autonomy."<sup>22</sup> Grotius therefore created a system in which patrimonial rights were divided into real and personal rights and real rights into ownership and possession.<sup>23</sup> The important point is that both personal and real rights were defined in terms of how they fell short of ownership.<sup>24</sup>

The other writers of the seventeenth and eighteenth centuries did not concentrate so much on the distinctions and systematisation as Grotius did. In fact, it wasn't necessary for them to do so, since they simply accepted the system and the definition and worked from there. However, their work was important because of the philosophical importance they attached to ownership within civil society. These early contractarians, whether they thought ownership was a natural right or not, gave it a position of paramount importance. Locke, for instance, saw property as one of the natural rights which men retained on entering civil society.<sup>25</sup> In fact, Locke argued that civil society (or the state) and positive law exist in order to safeguard property.<sup>26</sup> Therefore the goal of the state is to safeguard property. More importantly, this protection is sanctioned by natural law and therefore imbued with moral authority.<sup>27</sup> This idea of private property as the goal of the state which is

20 Feenstra 1976 RMT 248 273; Van der Walt *Houerskap* 400; Feenstra "Eigentumsbegriff" 273; Feenstra *R lus in re: het begrip zakelijk recht in historisch perspectief* (Thorbecke-colleges no 4 Leiden 1979) 25; Van der Walt en Kleyn "Duplex dominium" 246.

21 Van der Walt 1993 JCRDL 569 579.

22 Van der Walt 1995 SAJHR 178.

23 Van der Walt 1995 JCRDL 404.

24 Van der Walt 1995 SAJHR 177.

25 Locke *Two treatises* 2.99, 2.129-130, 2.222.

26 Locke *Two treatises* 2.221; Mitchell 1986 *Hist Pol Ec* 297; Van Maanen *Eigendomsschijnbewegingen* 101; Ryan *Property* 15.

27 Mitchell 1986 *Hist Pol Ec* 299-304; Gill 1983 *J of Pol* 677; Van Maanen *Eigendomsschijnbewegingen* 104.

furthermore sanctioned by natural law, would have an enormous impact on liberal thinking in most systems and is still one of the fundamental tenets of contemporary liberalism.

One of the more confusing aspects of Locke's work is the way in which he used the term *property*. In a wide sense he used the term to refer to all rights - what he terms "life, liberty and estate" - but in a narrower sense it referred to "estate" only. As Waldron has pointed out, Locke used this same term in two different meanings. It refers to limited real and personal rights when Locke writes about "property *in*" something.<sup>28</sup> This is the wider meaning. The narrower meaning becomes clear from the term "the property *of*" - this refers to ownership only.<sup>29</sup> The difference between the two kinds of property lies in the more exclusive usage ascribed to "property *of*".<sup>30</sup>

#### 4.4 Late modern developments

By the eighteenth century the distinction between ownership and other rights was very much part of most legal systems in the civil and common-law traditions. The tendency, already noticeable from the sixteenth century, to define all rights in terms of the norm or standard of ownership, was well established. The more unique characteristic of this period is the increasingly central role that property began to play in the political and economic spheres. This is the essence of the discussion that follows.

##### 4.4.1 German property law<sup>31</sup>

As is the case in most other systems, the importance of ownership in German law needs to be dealt with in two ways. Regarding the systematic importance

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28 Locke *Two treatises* II.194, I.29, II.46.

29 Locke *Two treatises* II.27 where Locke refers to the "property of the labourer."

30 Locke *Two treatises* II.28. See, in general, Waldron *Private property* 157-159.

31 For a general introduction to German property law, see 3.4.5.1 above.



German thinking followed the trend of other continental systems. Writers of the *usus modernus pandectarum* still used the distinction between ownership and possession, and between ownership and limited real rights that was developed in the early modern period.<sup>32</sup> The change came with the innovations introduced by Von Savigny and Windscheid on the basis of Kant's moral theory.<sup>33</sup>

Von Savigny's application of Kantian philosophy to law meant that rights were now seen not as an entitlement to use things, but as power over other persons. This is represented not as a moral theory (which it really was), but as a logically coherent system of conceptual relations.<sup>34</sup> Windscheid took this conceptual system further. His distinction between real rights and personal rights is based on the question of will. Real rights allow the holder thereof to determine the actions of everyone with regard to the object of the right.<sup>35</sup> These real rights are characterised by their exclusivity and negativity.<sup>36</sup> On this basis ownership is distinguished from limited real rights and the main point of the distinction has to do with the scope of the power afforded each.<sup>37</sup> Ownership is therefore characterised by its totality, abstractness and exclusivity, characteristics which limited real rights do not share.

What is important in this analysis is that ownership dominates the whole paradigm. It determines the categories and distinctions. It is the perfect right and all other rights are defined with reference to the way in which they fall short of this ideal:

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32 Van der Walt *Houerskap* 299, 302.

33 Van der Walt 1995 *SAJHR* 177.

34 Van der Walt AJ "Unity and pluralism in property theory – a review of property theories and debates in recent literature: part I" 1995 *TSAR* 15-42 23-24..

35 Van der Walt 1993 *JCRDL* 569 587.

36 Van der Walt 1993 *JCRDL* 569 588; Van der Walt 1995 *JCRDL* 406.

37 Van der Walt 1993 *JCRDL* 569 584; Van der Walt 1995 *JCRDL* 406.

"Ownership is presented as the ideal and normal perfect example of a real right, while the limited real rights are defined according to the ways in which they appear as limited exceptions to this rule."<sup>38</sup>

The Kantian ideal of absolute individual autonomy in this way became the basis for defining ownership as the perfect vehicle for interpersonal power.<sup>39</sup>

Although not nearly as important conceptually, Windscheid's distinction between real and personal rights tends to strengthen the point made above. Once again real rights can be enforced absolutely and universally, while personal rights can only be enforced relatively and specifically. Once again, however, ownership provides the paradigm for the distinction between real and personal rights<sup>40</sup> and it becomes "... the very model of right generally."<sup>41</sup> It was therefore typical of nineteenth century German thought to see ownership as the real right in terms of which all other rights need to be defined.<sup>42</sup> This distinction was also enshrined in the *BGB*.<sup>43</sup>

In German law the philosophical importance of ownership coincided with its systematic importance. The Kantian theory was used to define rights as the guarantee of a negative moral space in which individuals could develop their autonomy.<sup>44</sup> This continuation of the medieval idea of ownership as *facultas*, together with the Kantian emphasis on individual freedom<sup>45</sup> strengthened the systematic position of ownership as the paradigmatic right.<sup>46</sup> In Germany, as

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38 Van der Walt 1993 JCRDL 569 580. See also Van der Walt 1995 JCRDL 407.

39 Van der Walt 1995 JCRDL 406.

40 Van der Walt 1993 JCRDL 569 580.

41 Unger RM "The critical legal studies movement" 1983 *Harvard LR* 564-675 598.

42 Van der Walt 1993 *THRHR* 16.

43 Cohn *Manual* 171, 207.

44 Van der Walt 1995 *SAJHR* 177.

45 See Ryan *Property* 83.

46 Van der Walt *Houerskap* 323; Kroeschell "Eigentumsbegriff" 39.

in the United States, this led to an association of ownership with freedom. Ownership was seen as important, because it guaranteed freedom.<sup>47</sup>

Another factor that should be borne in mind, is a phenomenon that can be characterised as the privatisation of law. The spirit of *laissez-faire*, which was central to early liberalism, led to a view of the state as a *minimum state*. The night-watchman state should not only not interfere in private affairs, but should also be as small as possible. This resulted in a public/private split in which the private sphere should be protected against state interference. Because the public sphere should be kept as small as possible, this resulted in an emphasis on the private sphere and consequently private law. Private law began to play a much larger role in the legal system as a whole than before. Because ownership was the paradigmatic right within private law, it also became the paradigmatic right for the whole legal system.

#### 4.4.2 Dutch property law

The relative importance of ownership in a legal system depends on the position it occupies within the system of rights and especially on the way it is contrasted with other real rights. Most writers of the seventeenth and eighteenth centuries followed the Grotian model.<sup>48</sup> The roman-dutch authors took Grotius' exposition to its natural conclusion. Although two types of real rights were still recognised, ownership was seen as the most important real right.<sup>49</sup> The introduction of the *BW* took this further. Limited real rights were seen as fragments of ownership. These had to be limited to a bare minimum and this led to a closed system of real rights. In this way the position of ownership as a "... parental right, an original right..." was entrenched.<sup>50</sup>

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47 Van der Walt *Houerskap* 360; Van der Walt 1993 JCRDL 569 585.

48 See Van der Walt "Eigentumsbegriff" 510; Van der Walt *Houerskap* 411.

49 Van der Walt "Eigentumsbegriff" 510-511.

50 Chorus JMJ ea *Introduction to Dutch law for foreign lawyers* 2nd ed (Deventer 1993) 64.

It is interesting to note that the connection between ownership and freedom (which was a feature of the Anglo-American and German systems) was not made nearly as often or as insistently in Dutch law. Opzoomer does link freedom to an absolute view of property,<sup>51</sup> but he is one of very few. This trend in Dutch law is probably the result of, on the one hand, the fact that the Netherlands has never had a rigid, *Grundnorm* constitution. On the other hand, the basic understanding even in the nineteenth century was that ownership was limited by the common good.<sup>52</sup>

#### 4.4.3 English property law

##### 4.4.3.1 Realty and personality

In early English law a distinction was made between realty/real property (which could be recovered specifically) and personality/personal property (for which compensation could be claimed).<sup>53</sup> The distinction was therefore originally based on procedure. Later, however, the distinction referred to the object of the right. All interests in land were regarded as *realty*, except leasehold.<sup>54</sup> This emphasised the pronounced feudal nature of English property law. This distinction between real and personal rights remained basic to English property law, and was sometimes referred to as rights *in rem* and rights *in personam*. Blackstone's treatment of the distinction is typically obscure. In the first place he distinguished between *jura personam*, which were rights and duties closely connected with a person, and *jura rerum*, which

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51 Opzoomer CW *Het Burgerlijk Wetboek, verklaard* 2nd ed vol III (Amsterdam 1876) 310.

52 See Van Maanen *Eigendomsschijnbewegingen* 37-45.

53 Megarry and Wade *Private property* 10; Smith K and Keenan DJ *English law* 5th ed (London 1975) 324.

54 Leasehold was based on contract and not on feudal relations and could, therefore, not be regarded as realty. Later, although it was regarded as an interest in land, it was still regarded only as *real personality*. See Megarry and Wade *Private property* 11; Smith and Keenan *English law* 323; Walker RJ and Walker MG *The English legal system* 2nd ed (London 1970) 50.

were rights to things external to man.<sup>55</sup> These *jura rerum*, however, could exist in respect of certain objects only:

"The objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds; things *real* and things *personal*."<sup>56</sup>

These kinds of objects correspond with the contemporary distinction between immovable and movable property respectively.<sup>57</sup> Although his terminology is, therefore, ambiguous and confusing, he maintained the well-known distinction between real and personal property.

Neither Bentham nor Hume dealt specifically with the distinction between real and personal property, probably because they regarded it as unproblematic. Adam Smith, however, gave an exposition on the difference based on the underlying *causa* of each. For him real rights were those that could be vindicated (*dominium*, *servitus*, *pignus* and *haereditas*), while personal rights were based on contract or loan and could, presumably, not be vindicated.<sup>58</sup> Thus the distinction was, once again, based on procedure.

#### 4.4.3.2 Property and limited real rights

The history of this distinction is neither as simple nor as straightforward as the previous one. The multiple forms of property made this kind of distinction unnecessary - as long as all the relevant parties had property rights and these rights could be explained as such, the distinction need not be made. In this regard two developments played a role.

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55 Blackstone *Commentaries* II.1.1.

56 Blackstone *Commentaries* II.2.16.

57 See 6.3.5 below.

58 Smith *Lectures* 9.

In the first place the idea of *seisin* played a crucial role. *Seisin* indicated whether a tenant was in peaceful and undisturbed possession of the property.<sup>59</sup> In the feudal system both the landlord and the tenant were *seised*. The tenant had *seisin* of the soil and fruit, while the landlord had *seisin* of the service(s).<sup>60</sup> Later, with the introduction of leasehold, both the freeholder and the leaseholder had *seisin*. However, since the fifteenth century only those who had an estate in freehold could be *seised*. The leaseholder had possession.<sup>61</sup> In effect "... it was the person *seised* - and he alone - who could exercise an owner's rights over the land."<sup>62</sup> In this way *seisin* contributed to the distinction between owners (who were *seised*) and holders of other rights (who were not).

In the second place, in the sixteenth and seventeenth centuries, as a result of the activities of the courts of equity, a new division arose between *legal* and *equitable* interests in land.<sup>63</sup> Every *legal* estate could and did have an *equitable* counterpart. The person who had a *legal* interest was protected against all parties, while the *equitable* owner was protected against all except the holder of the *legal* interest. This *equitable* interest was more than a personal right, but fell short of *seisin*.<sup>64</sup> In this way a distinction was created between absolute and relative rights.

Blackstone also distinguished between property and limited real rights. In fact, he stipulated that four types of real rights could occur:

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59 Megarry and Wade *Private property* 45.

60 Kempin FG *Historical introduction to Anglo-American law in a nutshell* (St Paul Minn 1973) 123.

61 Megarry and Wade *Private property* 45; Smith and Keenan *English law* 323; Walker and Walker *Legal system* 87.

62 Megarry and Wade *Private property* 47.

63 James PS *Introduction to English law* 12th ed (London 1989) 427.

64 James *Introduction* 427. There is an interesting parallel here with Quiritary and bonitary property - see 8.2.2 below.

- (a) Naked possession is the actual occupation of land without any apparent right.<sup>65</sup>
- (b) The right of possession consisting of the right to restore lost possession if the property is in the actual possession of another.<sup>66</sup>
- (c) The right of property (*jus proprietatis*) which is property in itself without possession or the right of possession.<sup>67</sup>
- (d) The complete title to lands, tenements and hereditaments, which was the right of possession and the right of property together - also known as *jus duplicatum*.<sup>68</sup>

In this way Blackstone distinguished between complete and incomplete title, which was tied to property and different kinds of possession or limited rights. The important element here is the fact that, due to Blackstone's conceptual system, property can be regarded as systematically important in Blackstone's scheme. This was a result of his philosophical position on property, dealt with below.

Bentham made the same kind of distinction but in a slightly different way. He distinguished between *de jure* possession and *de facto* possession. Of these two only the first resulted in title.<sup>69</sup> Therefore the one was definitely a limited right and the other not.

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65 Blackstone Commentaries II.13.195 saw this as "... the most imperfect degree of title."

66 Blackstone Commentaries II.13.196.

67 Blackstone Commentaries II.13.197-199.

68 Blackstone Commentaries II.13.199.

69 Bentham Limits 321.

Adam Smith was, once again, the writer who attempted the greatest systematisation. He distinguished between *jura perfecta* and *jura imperfecta* - a distinction he claimed came from Pufendorf.<sup>70</sup> The *jura perfecta* referred to title and thus to a right, while the *jura imperfecta* referred to duties that ought to be performed. In this way Smith made all rights *jura perfecta*, while reducing the rest to duties that *ought* to be performed. Furthermore, *dominium* was the "... full right of property..." while the others were, presumably, limited.<sup>71</sup>

As a result of this development, English law since the second half of the nineteenth century has distinguished between ownership and limited real rights. Both were regarded as real titles to property, with ownership as the "... better right to possession."<sup>72</sup> However, the above-mentioned distinctions should not be understood in the same way as the distinctions in civil law. These English distinctions were fairly *ad hoc* until the introduction of a conceptual system to English law. This started with Blackstone, but was only really in place in the nineteenth century. Even then the hierarchy was never as pronounced as in the civil-law systems.

#### **4.4.3.3 Philosophical importance**

From the discussion above it appears that the development in English property law tended to follow the trend of defining all rights (and real rights in particular) in terms of ownership, or rather, in terms of how they differed from ownership. This is most obvious in the work of Adam Smith who almost defines rights in the way they are not *dominium*. From a system that knew multiple interests in property, it developed into a system in which one type was regarded as the perfect right.

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70 Smith Lectures 9.

71 Smith Lectures 10.

72 Megarry and Wade *Private property* 105-106.



This fit in with early capitalist developments that required absolute and exclusive private property for the sake of efficient production. This would, in turn, lead to the enclosing of the commons in England<sup>73</sup> and the Highland clearances in Scotland.<sup>74</sup> Both these destroyed age-old feudal relations. Because of land speculation, many small farmers found themselves without land and the resultant move to the cities provided the cheap labour required by the industrial revolution. The agricultural reform was therefore a precondition for the industrial revolution.<sup>75</sup> While the tenures, which underscored these relations, were increasingly under attack,<sup>76</sup> their eventual removal caused a revolution in social and economic relations. This insistence on the relation between property and liberty in effect marked the end of the feudal arrangement. With the end of feudalism came the beginning of conceptualism and within a conceptual scheme property was the perfect real right and the basis for liberty and justice.<sup>77</sup>

#### 4.4.4 American property law<sup>78</sup>

In the civil-law systems, as well as in English property law, one of the characteristics of this period was the development of the distinction between ownership and other rights (that is personal and/or limited real rights) based on the conceptualisation of law. A similar development can be traced in American law, and, according to Minda, the process of conceptualisation in American law started with the work of CC Langdell.<sup>79</sup>

The creation of a conceptual approach to law is a prerequisite for the creation of a hierarchy of rights. In this way the systematic importance of property and

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73 Schlatter **Private property** 163. See Negro **Eigentum** 51-55 on the history of these enclosures, from the "three fields system" to the commercial exploitation of these fields.

74 Van den Bergh **Eigendom** 23.

75 Negro **Eigentum** 55.

76 See Blackstone **Commentaries** II.5.76; Smith **Lectures** 468-469.

77 See 3.4.4.3 and 5.4.3 on English conceptualism.

78 For a general introduction to American property law, see 3.4.4.1 above.

79 Minda **Postmodern legal movements** 13-23.

the conceptualism is linked. However, in American law an interesting and important development took place regarding the philosophical importance of property. This section will concentrate on the last-mentioned development.

About the systematic distinction between real and personal rights or between real and personal property, little need to be said. The development in American law followed that of English law.<sup>80</sup> It seems, however, that the same cannot be said regarding the distinction between ownership and limited real rights. Indeed, such a distinction would be strange in the light of the nature of American property law.

Property in American law is mostly defined as a conceptual entity which "... can be carved up in various useful and convenient ways"<sup>81</sup> and which consists of a "... bundle of legal relations."<sup>82</sup> Property can be carved into different estates or interests, and all of these are regarded as *property*. The various estates might confer more absolute or relative claims, but all of these are regarded as property. The result of this is that a category of limited real rights is both unnecessary and unthinkable. Although some kinds of property can be more or less absolute and undivided (such as the *estate fee simple absolute*) it is still only one kind of property of several possibilities. The distinctions, however, only became conceptually important with the development of a scientific system of law along the lines of the civil-law tradition. This started with Langdell and was reinforced in court decisions.<sup>83</sup>

It is in respect of the *philosophical* importance of property as a constitutional right, however, that the interesting development took place. American law, on the basis of its feudal heritage, made a connection between property and

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80 Browder OL, Cunningham RA and Julin JP *Basic property law* (St Paul Minn 1966) 3-5; Cribbet *Principles* 9.

81 Browder, Cunningham and Julin *Basic property law* 8.

82 Moynihan CJ *Introduction to the law of real property* (St Paul Minn 1962) 88.

83 Minda *Postmodern legal movements* 13-23. See 9.2 on the American case law.

sovereignty and, later on, also between property and democracy.<sup>84</sup> Even in the seventeenth century both the hierarchical and the voluntarist models saw property as the basis of and prerequisite for freedom,<sup>85</sup> both in the political and in the economic sense.<sup>86</sup>

The liberal definition of property that was enshrined in the Constitution quickly became the paradigm and conceptual framework for the protection of all individual rights.<sup>87</sup> Property was made a *civil right* that was elevated above the mere *political rights*, rights that were seen as the means to the end of protecting civil rights.<sup>88</sup> In this way, property was seen as the most important right in a hierarchy of rights. This was strengthened by the view of property as a barrier between private and public, which was based on the idea of the minimum or night watchman state.<sup>89</sup> Underkuffler characterises this position of private property in the following way:

"Focus on property as the paradigmatic right to be insulated from the democratic process also created a general notion of rights as natural and uncontested in nature."<sup>90</sup>

Consequently, property acquired a "mythic quality ... as not merely a social construct, but a basic right, linked ... to cherished values of freedom and

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84 Mensch 1982 *Buffalo LR* 635 649-650; Singer 1991 *Legal T* 1 7, 51.

85 McCann 1987 *Pol & Soc* 143 145 quotes John Adams as having said: "Property must be secure or liberty cannot exist."

86 Pickens and Seligmann 1987 *Soc Sc Q* 847 849. See also Allen 1991 *J Law & Econ* 1 22 on the use of homesteading in order that the government might establish "federal property (in an economic sense) ..." and McCann 1987 *Pol & Soc* 143 145.

87 Nedelsky *Private property* 1-3.

88 Nedelsky *Private property* 5; Underkuffler 1991 *Texas LR* 293 299.

89 Nedelsky *Private property* 203 calls it limited government. See also Underkuffler 1991 *Texas LR* 293 306-307.

90 Underkuffler 1991 *Texas LR* 293 300. See also Nedelsky *Private property* 184-185. Of course, it is also possible that the Lockean idea of property as natural caused the view thereof as paradigmatic and not the other way around - see Post "Jeffersonian revisions" 295 297-298.

autonomy.<sup>91</sup> Nedelsky has shown that this preoccupation with private property resulted in an acceptance of inequality and a strong relationship between economic and political power.<sup>92</sup> The primacy given to property and the protection thereof in terms of the Fourteenth Amendment "due process" also hampered the New Deal program and made redistribution of land in America impossible.<sup>93</sup> Moreover, Singer has shown that this position on property could be and was manipulated by the courts in order to deprive Indians of sovereignty.<sup>94</sup> In this regard he agrees with Hamilton:

"It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection."<sup>95</sup>

#### 4.5 Conclusion

The history of the role or importance of property is interesting for a number of reasons. It is, however, often more important in what it doesn't say than in what it does. More interesting too, than the actual history, is that which the history made possible. In one sense this was a fairly straightforward development. First there was an almost universal recognition of the distinction between real and personal rights. In civil law this was followed by a systematic distinction between limited real rights and ownership. Finally ownership became the paradigmatic right. In civil-law systems this was mostly achieved through the systematic position which ownership had in the conceptual scheme. In common-law systems this paradigmatic status was the result of ownership's philosophical importance as a barrier between private

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91 Nedelsky *Private property* 9. McCann 1987 *Pol & Soc* 3 146 quotes Lincoln as saying in 1864: "...property is desirable; is a positive good in the world."

92 Nedelsky *Private property* 1, 79-80; Underkuffler 1991 *Texas LR* 293 297.

93 Schlatter *Private property* 194.

94 Singer 1991 *Legal T* 1 6-7.

95 Hamilton *W Encyclopaedia of the social sciences* (New York 1930-1935).

and public. However, behind this apparently simple development lies a complex set of meanings.

In the medieval period there was no distinction between ownership and limited real rights, because all rights were tied to the feudal structure and *that* determined its relative importance. Similarly, it would be ludicrous to speak of a *systematic* position, since there was no *system* of law. The advent of the early modern period, however, made this possible. Moreover, there was no conceptualism and no scientific ideal. Consequently rights were determined by social relations and not by concepts.

Once law was seen as a scientific system based on concepts, definitions and logical relations, the embryonic idea of a distinction between property and other rights could come to life. In this way the conceptualism contributed to the creation of a hierarchy of rights and thus also to an abstract, universal concept. Once property was contrasted with other rights in this way, a number of factors served to make it the paradigmatic right. Although feudalism had been based on a relationship between property and power and the end of feudalism was supposed to have severed this tie, it was really only continued in another guise. Liberalism, combined with capitalism, maintained the link between property and power.

Liberalism, with its emphasis on individual power and sovereignty, demanded an autonomous sphere that could transcend equality and liberty. Property became the means of guaranteeing liberty and equality and in this way became the supreme right. This idea combined with capitalism to make property the paradigmatic commodity - the standard by which all rights were to be measured and protected in a capitalist state. If one should add to this the movement toward "privatisation" in law (that is, to make private law the paradigmatic discipline in law), the end result is to elevate private property above all criticism. The result of this development was therefore to make private property the standard or norm for all rights. It was regarded as the fundamental basis and highest goal of Western society. It had become the perfect right.

Seen against this background, the conceptualism discussed above both made the construction of a hierarchy of rights possible and maintained it. Not only did conceptualist thinking result in a system of concepts, but those concepts were of a very specific nature in that they were regarded as neutral, objective, a-political and, consequently morally incontestable. As the primary concept within this hierarchy, property was assumed to have all of these characteristics. Consequently the property concept that was regarded as the most important right, was also the perfect example of conceptualist thinking.

One should, however, not be misled by the pretensions of legal science. A number of legal scholars have pointed out that it is neither abstract and neutral nor a-political. Some point to the hidden political agenda or ideology of liberalism underlying conceptualism.<sup>96</sup> Others find in the scientific pretensions an underlying metaphysics or pseudo-science.<sup>97</sup> All agree that the scientific pretension amount to little more than a political choice, a politics of interpretation.<sup>98</sup> As such, these pretensions of scientific abstractness and neutrality should be seen for what they are – pretensions designed to deceive and to mask real injustice.

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96 See Kennedy 1979 *Buffalo LR* 209-382 on the hidden political agenda and Alexander 1982 *Col LR* 1545-1599 on the ideology underlying the "scientific turn in legal analysis".

97 See Peller G "The metaphysics of American law" 1985 *California LR* 1151-1290 and Schlag P "Law and phrenology" 1977 *Harvard LR* 877-921.

98 Van der Walt AJ "Un-doing things with words: the colonization of the public sphere by private-property discourse" (Unpublished paper delivered at a conference on "Doing things with words – meaning in legal interpretation" at RAU 1-4 September 1997) on file with author.



## CHAPTER 5: THE JUSTIFICATION OF PRIVATE PROPERTY (FROM NATURAL LAW TO LIBERALISM)

"There is nothing which so generally strikes the imagination, and engages the affections of mankind as the right of property."<sup>1</sup>

"Pourquoi donc à cette autre demande: *Qu'est-ce la propriété?* ne puis-je répondre de même: *C'est la vol...*"<sup>2</sup>

### 5.1 Introduction

The justification of private property has always fascinated philosophers. Because property is such a basic and important concept in Western liberal society, justifying it seems to some to be equally important and necessary on a basic level. For this reason, philosophers have tried to justify property in a variety of ways since the time of the Greeks. The legal debate about the justification of property did not, however, really pick up steam before the seventeenth century. But, by the end of the eighteenth century, the debate, as far as lawyers were concerned, was over. Although philosophical and political justificatory theories could still be found, lawyers were no longer interested in these kinds of theories. The reasons for this are many and varied, but a historical perspective will explain much.

The history of the debate on justification is a curious one. During the roman and medieval periods, very little was done to try to justify *dominium*. There was, in fact, no need for justification, because it rested on a widely accepted and authoritative moral order. However, once the authority of the church had been challenged, the process of secularisation was started. This undermined

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1 Blackstone Commentaries 1.1.16.

2 Proudhon J Oeuvres complètes (1926 Eds c Bouglé and H Moysset) 131.



the objective moral order that had underpinned the idea of private ownership and of its social limits. Once the certainty had been undermined, the search for a justificatory theory became important.

It should, however, be pointed out that justificatory theories did not attempt merely to justify the existence of private property, but also, and perhaps more importantly, attempted to justify the existing patterns of distribution. Therefore from a very early period, the justificatory debate was really a distributory debate. Once the moral order that justified certain patterns of distribution fell away, modern theories needed to justify those patterns on other grounds. In the twentieth century this took on another form, as the redistribution of property became the focus of justificatory theories.

## 5.2 Roman and medieval roots

Greek thinkers did not concern themselves overmuch with theories on the origin of property, nor did they try to justify it. Since both Plato and Aristotle saw property as conventional (even if the convention seems to have been determined by natural law) and both recognised common and private property, it would in fact have been surprising to find such theories in their work.<sup>3</sup> The most important Roman philosopher, Cicero, based his views on *dominium* on the distinction between the *ius naturale* and the *ius gentium*.<sup>4</sup> Cicero was ambivalent about whether *dominium* originated from natural law, but thought that the state was founded primarily to protect it.<sup>5</sup> This would seem to indicate that property existed before the creation of the state and it was therefore natural. Cicero's statement on natural law is echoed by

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3 Although Plato, in his utopian vision of the state, thought that the ruling class should have common property, this is by no means an attack on private property or a justification for common property.

4 Cicero *MT De republica* (London 1951 Tr CW Keyes) IV.5.

5 Cicero *De republica* II.xxi.73: "In primis autem videndum erit ei, qui rem publicam administrabit, ut suum quisque teneat neque de bonis privatorum publice deminutio fiat. ... Nam, etsi duce natura congegabantur homines, tamen spe custodiae rerum suarum urbium praesidia quaerebant." See also Cicero *MT De officiis* (London 1913 Tr W Miller) II.xvii.79.

Seneca, except that he thought that it was not private property that was natural, but common property.<sup>6</sup> From this it should be clear that the question of the justification of property was not a big issue in roman thinking.

The romanists of the middle ages did not concern themselves with the justification of property either. Bartolus, who provided the first definition of *dominium* in the romanist tradition, did distinguish between natural *dominium* and civil *dominium*. For Bartolus, however, this simply meant that natural *dominium* was that which was common to all people, while civil *dominium* was that which had been unique to Rome.<sup>7</sup>

Unlike the romanists, the canonists (or scholastics) were forced by circumstances to concern themselves with the justification of *dominium*. The first truly justificatory theories are found here. The need for this kind of justification arose from the fact that a number of Biblical texts could be read to indicate a distrust of wealth and of private property.<sup>8</sup> In fact, Augustine, for instance, thought that *dominium* was a creation of the state and the result of sin. Consequently Christians should not be allowed to own things individually.<sup>9</sup>

But the debate really picked up steam as a result of the poverty debate that raged in the church in the thirteenth and fourteenth centuries. Francis of Assisi's insistence on a life of poverty for his followers (which included a prohibition of private property)<sup>10</sup> threatened the Dominicans' extensive ownership of land in particular, and, consequently, their power-base

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6 Seneca LA 17 **Letters** (Warminster 1988 Tr CDN Costa) Letter 90-38: "In commune rerum natura fruebantur; sufficebat illa ut parens in tutelam omnium; haec erat publicarum opum secreta possessio."

7 Bartolus on D.13.6. See also Tuck **Natural rights** 35.

8 See, for instance, the Gospels according to Matthew 19:16-30; Mark 10:17-31 and Luke 18:18-30.

9 Augustine A **Homilies on the Gospel according to St John and his first epistle** (Oxford 1848-1849 Tr unknown) VI.25. Augustine was reacting to the Donatists' labour theory of property - an idea that would later resurface - see Schlatter **Private property** 38; Van den Bergh **Eigendom** 26.

10 Van der Walt **Houerskap** 211; Coleman 1985 **Pol S** 73 77; Tuck **Natural rights** 20.

generally. As a result, the Dominicans needed to justify their ownership and in this way a general justificatory theory was developed.

The Franciscans, on the basis of the apostolic poverty doctrine, wanted to be able to use objects without acquiring *dominium* in them.<sup>11</sup> For them, the *ius naturale* was not neutral regarding ownership but was, in fact, against it.<sup>12</sup> What natural law sanctioned was common use, not common ownership. In reaction to this the Dominicans postulated *dominium* as something sanctioned by natural law. On the basis of continuity between God and man, ownership was justified on the basis of God's *dominium* over the earth.<sup>13</sup> For the Dominicans, therefore, private ownership was natural, good and justified by divine law.<sup>14</sup> It should, however, be remembered that these debates were not only theological, but were the result of the power games between the Dominicans and the Franciscans.

In response to this, William Occam pointed out that *dominium* was tied to human juridical institutions (the *rei vindicatio* in particular) and, therefore, natural man could not have had it, as it was conventional.<sup>15</sup> The *ius naturale* justified only the *ius utendi* and this was not *dominium*. Both groups therefore acknowledged the existence of natural law, but the papists thought it justified ownership, while the Franciscans thought it only justified use.

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11 The problem with this was that, in terms of Roman law, the use of consumable property was a method of acquiring property. Consequently the Franciscans did acquire property if they used the objects, and this was in conflict with the prescriptions of the founder of the order. See, in general, Van der Walt 1995 JCRDL 396 399.

12 Tuck *Natural rights* 21.

13 Pope John XXII *Quia vir reprobus* (1329).

14 Tuck *Natural rights* 22.

15 Occam *Opus Nonaginta Dierum* in Sikes JG (ed) *Guillelmi de Occam opera politica I* (Manchester 1940) 287-374. This was probably the result of Occam's nominalism - see 3.2 above. See also Tuck *Natural rights* 22-23.

For Aquinas, however, natural law was irrelevant in the context of ownership. Following Aristotle, he thought that natural law was, in fact, neutral regarding ownership.<sup>16</sup> However, one of the purposes of the state was to protect private ownership and to regulate it for the common good.<sup>17</sup> Aquinas' justification of ownership in terms of *potestas*,<sup>18</sup> however, tended to justify it on the basis of power. This power was part of the natural order created by God and was therefore both natural and good.<sup>19</sup> Aquinas' justification therefore was based on the continuity between God and man and the existence of an objective moral order that justified property relations and the exercise of power.

The late scholastics (or neo-Thomists), interestingly, were not very concerned with the justification of ownership. They tried to restore Thomism and reconcile it with catholic doctrine. In their work the influence of humanism can be seen. It is probably this humanism that led De Soto to reject the idea of the continuity between God and man that had been fundamental to the Dominicans' view.<sup>20</sup> In this way the late scholastics contributed to the secularisation of the justificatory theories.

This medieval debate on the nature of ownership is a curious precursor of the very intense debate that would follow in the eighteenth century. Ownership had been justified in a number of ways. It was sometimes justified as the result of God's grace and His natural law (in which case it was justified by an appeal to faith). In other cases it was justified as entirely conventional (in which case the justification was not based on faith, although the underpinning religious order in a sense pre-determined the conventions). The process of secularisation that was initiated by the late scholastics would gain momentum in the early modern era and necessitate other theories of justification.

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16 Aquinas *Summa Theologiae* 1a 2ae 94.5. See also Tuck *Natural rights* 19-20; Schlatter *Private property* 48.

17 Aquinas *Summa Theologiae* I-II 105.2.

18 See 3.2 above.

19 Van der Walt 1995 JCRDL 398 399.

20 Tuck *Natural rights* 49.

### 5.3 Early modern developments

This period saw the beginning of the debate regarding the justification of property that would continue until the nineteenth century and was characterised by two important factors that would determine the nature and extent of the debate. In the first place it represents the beginning of the process of secularisation which would change the view of society and of law. The justificatory theories of the Middle Ages had been based on the assumption of continuity between God and man, but the neo-Thomists had begun the process of denying that continuity.<sup>21</sup> The Reformation, too, had as one of its basic points of departure the denial of this continuity between God and man.<sup>22</sup> They stressed the discontinuity and differences between God and man. In their view, therefore, ownership could not be based on the idea that man's *dominium* was essentially the same as God's *dominium*. They saw political life (and therefore also ownership) as a gift from God and not as a natural right.<sup>23</sup>

Once the idea of continuity between God and man had been destroyed, however, a new basis for justification had to be found. This led to the second important factor in this period, namely the rise of the phenomenon of legal science. Because of the successes that had been achieved in the natural sciences, the view in this period was that "the legitimacy of law is built not upon metaphysical and cosmological but upon scientific pretensions...."<sup>24</sup>

The point of departure was that the law should be a system of rules, principles and concepts from which logical deductions could be made by the application of legal reasoning.<sup>25</sup> The idea was to create a scientific system of law that

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21 See 5.2 above.

22 Kelly *History*; Tuck *Natural rights* 42-43.

23 Tuck *Natural rights* 43-45.

24 Van der Walt 1995 JCRDL 396 402.

25 See Van der Walt 1995 JCRDL 396 403 and Van der Merwe "Ramus, mental habits and legal science" 32ff on the influence of Petrus Ramus in this regard.

would make all metaphysical speculation obsolete. In such a system, speculation on the origin and/or justification of ownership would be a waste of time. This kind of system is not only self-referential, but also self-justifying. The conceptual scheme was complete in the sense that it needed no justification from outside the system. In this process Grotius would play a crucial role.<sup>26</sup>

Grotius, a lawyer who was also a Protestant, attempted to justify ownership in a modern way. He was the first writer to try to explain the legal system in terms of rights rather than in terms of laws.<sup>27</sup> His theory was an attempt to give a natural law justification that did not rely on natural law as a result of God's divine grace, but on natural law as part of legal reasoning. However, this does not mean that Grotius denied the divine origin of natural law, but simply that he denied that scientific knowledge of this divine component was possible.<sup>28</sup> Consequently, natural law was divorced from divine law and given a humanist and rationalist foundation.

Grotius' theory on the origin and justification of ownership was mentioned generally in *Mare liberum*,<sup>29</sup> but in *De iure praedae* his theory on the state of nature can be found. In the state of nature, man could make use of the common property by occupying it and expending labour on it.<sup>30</sup> This *dominium* was not yet civil *dominium*, but became *dominium* in the civil state.<sup>31</sup> Thus ownership started out originally as a natural, common right to

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26 Van der Walt 1995 JCRDL 396 402: "Hugo Grotius and his intellectual heirs among the German theorists of the nineteenth century are the original authors of the kind of scientific, non-metaphysical property legend we are used to and comfortable with today."

27 Tuck *Natural rights* 66.

28 Haakonssen 1985 *Political theory* 239 249-251.

29 Feenstra R "Hugo de Groot's eerste beschouwingen over *dominium* en over de oorsprong van private eigendom: *mare liberum* en zijn bronnen" 1986 *AJ* 269-282 275.

30 Grotius *De iure praedae* (Leiden 1934 Tr by O Damsté) 217.

31 Tuck *Natural rights* 61.

use things, but this was extended by agreement to recognise certain other relationships as *dominium*.<sup>32</sup>

The contract theory is developed further in the second book of the *De iure belli ac pacis*. He assumed, first of all, that a nation (*imperium*) could not exist without acquiring a supreme right of ownership (*ius eminens*) in the land it occupied. This was known as the *privatum plenumque dominium* that was then distributed amongst the individual citizens.<sup>33</sup> This meant that the individual's *dominium* was dependent on the nation's *dominium*.<sup>34</sup> It was, however, not the same as the feudal relationship of *emphyteusis*,<sup>35</sup> but originated in the *pactum tacitum* entered into between members of the nation.<sup>36</sup> This whole idea of the origin and justification of ownership was grounded in rational natural law. In this way, Grotius provided a new theory on the origin of ownership<sup>37</sup> and, at the same time, secularised natural law and ownership.<sup>38</sup> Therefore Grotius provided a modern, rationalist explanation of ownership that determined the debate within the context of rights, and of scientific conceptualism.<sup>39</sup>

It is important to note that Grotius' justificatory theory was developed in his earlier works. In his last (and probably most influential) work, the *Inleidinge tot de Hollandsche rechtsgeleerdheid*, no such theory can be found. Instead, this is a systematic and scientific explanation of property rules

32 Grotius *De iure belli ac pacis* II.2.2.5. See also Haakonssen 1985 *Political theory* 239 242.

33 Feenstra "Eigentumsbegriff" 229.

34 Feenstra 1986 *AJ* 269 275.

35 Grotius *De iure belli ac pacis* II.3.19.3.

36 Feenstra 1976 *RMT* 248 271; Van der Walt 1992 *SAPL* 1 2. Admittedly, Grotius had some problems with the contract theory, primarily because, if the contract was part of positive law, it could also be abrogated by positive law - see also Schlatter *Private property* 130; Tuck *Natural rights* 77.

37 Tuck *Natural rights* 77.

38 This is in fact a logical result of the importance that sixteenth and seventeenth century modernism and humanism had attached to individuality, rationality and moral freedom - see Van der Walt 1992 *DJ* 446 452; Van den Bergh *Geleerd recht* 44.

39 Tuck *Natural rights* 80.

actually in force in the Netherlands.<sup>40</sup> However, the justificatory theory served as the basis for the explanation of law as a system of concepts and relations based on convention.

Grotius' social contract theory was just the first of many such theories in this period. The modern view of natural law (based on human rationality and subjectivity) combined with certain feudal ideas (such as the contractual nature of the feudal relationship) would provide fertile ground for the concept of a social contract.<sup>41</sup> Within this theory ownership would become increasingly important due to the rise of early capitalism. In fact, the works of Locke and Hobbes are often seen to be providing the justification and basis for capitalism.<sup>42</sup>

Like Grotius, Hobbes<sup>43</sup> distinguished between a state of nature and a civil state. In this state of nature, everyone had a right to everything.<sup>44</sup> This, inevitably, led to war.<sup>45</sup> In order to achieve security, men transferred their rights to a sovereign who distributed them.<sup>46</sup> Natural rights (if they existed) were therefore irrelevant, since the sovereign created these rights in a civil state.<sup>47</sup> Unlike Grotius, who had based the social contract on man's innate sociability, Hobbes saw man as driven to creating this contract against his will. For Hobbes natural law and the state of nature were not desirable, but were seen as measures of subjection because it tended to place certain

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40 Van der Walt 1995 JCRDL 396 404.

41 Barker E "Introduction" in *Social contract - essays by Locke, Hume and Rousseau* (London 1947) v-bi viii-ix; Coleman 1985 Pol S 73 90.

42 Macpherson "Natural rights" 1-15.

43 See, in general, on Hobbes, Polin R "The rights of man in Hobbes and Locke" in Raphael DD (ed) *Political theory and the rights of man* (London 1967) 16-26.

44 Hobbes *Leviathan* (Oxford 1946 Ed M Oakeshott) Part 1 ch XIV page 85 (I.XIV.85): "... every man has a right to every thing ..." This is the idea of "positive" communality - that is that everything belonged to everyone.

45 Hobbes *Leviathan* I.XIII.81; I.XIV.85.

46 Hobbes *Leviathan* II.XVII.112.

47 Hobbes *Leviathan* II.XVIII.7.



things beyond criticism.<sup>48</sup> Therefore Hobbes took the next logical step, namely to make the secularised natural law of Grotius totally irrelevant.

Pufendorf attempted a rescue of Grotius by distinguishing between positive and negative community. Positive community (such as Hobbes assumed in the state of nature) implied co-ownership. Negative community, on the other hand, implied that nothing belonged to anyone and this was the position in the state of nature.<sup>49</sup> The first men had neither joint rights (as Grotius claimed) nor did each have a right to everything (as Hobbes postulated). Through a tacit agreement, however, most things were eventually transferred to private ownership.<sup>50</sup> Therefore ownership was created by convention, but was protected by natural law and the Decalogue.<sup>51</sup> However, ownership was created first and then government was created to protect antecedent contracts, including contracts dealing with ownership.<sup>52</sup>

The most famous of the seventeenth century contractarians was probably John Locke. He developed his theory as a direct result of the constitutional crisis in England in the seventeenth century.<sup>53</sup> Locke, like Grotius, used a state of nature as point of departure. This state of nature is described as one in which men lived in "peace, goodwill, mutual assistance and preservation".<sup>54</sup> In the state of nature all people were politically equal<sup>55</sup> with an equal claim to life, liberty and property.<sup>56</sup> The right to liberty included not only "freedom to

48 See Melzer AM "Rousseau's moral realism: replacing natural law with the general will" 1983 *Am Pol Sc R* 633-651 635.

49 Pufendorf *De jure naturae et gentium* IV.iv.ii.

50 Tuck *Natural rights* 160-161.

51 Pufendorf *De jure naturae et gentium* V.iii.ix, V.v.vii.

52 Pufendorf *De jure naturae et gentium* Books VII and VIII.

53 Van der Vyver JD *Die beskerming van menseregte in Suid-Afrika* (Cape Town 1975) 1; Levy MB "Illiberal liberalism: the new property as strategy" 1983 *Rev of Pol* 576-594 590; Schlatter *Private property* 151; Russell *History of Western philosophy* 584; Schwarzenbach S "Locke's two conception of property" 1988 *Soc T & P* 141-172 142; Van den Bergh *Eigendom* 21-22.

54 Locke *Two treatises* II.3.19.

55 Locke *Two treatises* II.6.54.

56 Locke *Two treatises* II.5.26; II.2.4. See also Yolton JW *Locke* (Oxford 1985) 67. It must be noted that Locke used the term "property" to include both "life, liberty and equal political jurisdiction" and property: Locke *Two treatises* II.2.57; II.2.28.

order their actions", but also freedom to dispose of possessions.<sup>57</sup> Originally the earth was the common property of all mankind<sup>58</sup> and everyone had the equal right to acquire property through his own labour.<sup>59</sup> These rights were originally subject to limitations, but later these limitations fell away and this led to conflicts.<sup>60</sup> In these disputes everyone was a judge in his own cause due to the natural equality of everyone. The civil state came into being, through a social contract,<sup>61</sup> solely to settle these disputes on the basis of natural law.<sup>62</sup>

It has become trite to say that Locke provided early capitalism with a moral basis<sup>63</sup> by "discovering" the primary institutions of capitalism in the state of nature and so providing them with legitimacy.<sup>64</sup> This implied that the institution of private property was justified as an institution of natural law and therefore imbued with moral authority.<sup>65</sup> Because this fit the rise of capitalism so well, later writers (especially in the Anglo-American tradition) would simply either quote or criticise Locke in order to ground their own justifications of property.

The contractarian theories of justification offered by Locke, Hobbes, Pufendorf and Grotius represent the last of the great natural law theories until the revival of natural law in the twentieth century. However, it should be

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57 See, in general, Mekkes JPA "John Locke" in Zuidema SU (ed) *Baanbrekers van het humanisme* (Franeker undated) 61-121 106-109. See also Polin "Rights of man" 22: "Property is the external manifestation ... of a liberty which has become effective and of a right which is capable of being exercised on things."

58 This must be understood in terms of negative community, in the way Pufendorf used the term - in other words nothing belonged to anyone.

59 Locke *Two treatises* II.2.4; II.2.27.

60 See Locke *Two treatises* II.36, II.37; Mitchell 1986 *Hist Pol Econ* 291-305 293.

61 Locke *Two treatises* II.2.99; II.2.129-130; II.2.222.

62 Locke *Two treatises* II.2.221. See also Mitchell 1986 *Hist Pol Econ* 291 297; Van Maanen *Eigendomsschijnbewegingen* 101.

63 Macpherson "Natural rights" 11; Mitchell 1986 *Hist Pol Econ* 291 291; Van Maanen *Eigendomsschijnbewegingen* 104; Schlatter *Private property* 154.

64 Macpherson "Natural rights" 11; Mitchell 1986 *Hist Pol Econ* 291 296.

65 Mitchell 1986 *Hist Pol Econ* 291 299-304; Gill 1983 *J of Pol* 675 677.

remembered that all these theories did not justify private property in the abstract, but also justified existing distributory patterns.

#### 5.4 Late modern developments

By the middle of the eighteenth century, the debate on justification had lost much of its impetus. The few theories still on offer were vague restatements of earlier theories and were not that important. The groundwork laid by Grotius, coupled with the influence of Immanuel Kant and the criticism of the utilitarians, resulted in a view of law as a scientific discipline in which metaphysical speculation on the origin or justification of property had no place. Emphasis was placed on a description of legal rules actually in force and property relations that actually existed.

Justificatory theories still played a role in one respect and that was in dealing with the question of the limits of state interference in private property. Usually, the theory was offered not so much to justify property (it had been accepted that the role of legal science was simply to describe existing property relations) but to provide a basis for either justifying or criticising state intervention in property relations. This development coincided with the rise of the modern state.

##### 5.4.1 German property law

Because writers of the *usus modernus pandectarum* had based their definitions on that of Bartolus, it is to be expected that they would also take over the Medieval justifications. The natural law thinkers of this period (Wolff, Pufendorf<sup>66</sup> and Thomasius) based their justificatory theories on the secularised natural law proposed by the late scholastics and Grotius.

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66 See 5.3 above.

Therefore property was justified, not by reference to divine law, but on the basis of human rationality.<sup>67</sup>

Once again the theories of Kant and Hegel played an important role. Kant rejected labour as a justification for ownership, because it was too mechanical.<sup>68</sup> Although he used a fictional state of nature, communal ownership of land<sup>69</sup> and a fictional social contract as point of departure, these could not justify ownership.<sup>70</sup> Ownership was justified by the principle of first occupancy,<sup>71</sup> so that the intent to occupy became central to ownership.<sup>72</sup> However, the state was necessary in order to protect the directing of one's will upon an object and therefore necessary to convert the principle of first occupancy into a right. Because the state was necessary for the existence of ownership, it could regulate it.<sup>73</sup> This meant that, for Kant, ownership could not be violated by other citizens, but it could be violated by a legitimate state.<sup>74</sup>

Like other liberals, Kant was concerned about the relationship between ownership and freedom and between ownership and equality.<sup>75</sup> To solve this classic liberal dilemma, he justified ownership on the basis of first occupancy and legitimate transfer.<sup>76</sup> In this way ownership was made more valuable than freedom, and this provided the justification for capitalism.<sup>77</sup> Furthermore, Kant explicitly made a connection between ownership and citizenship (political

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67 Van der Walt *Houerskap* 305; Tuck *Natural rights* 68, 72.

68 Kant *Philosophy of law* 69.

69 Used here in the sense of Pufendorf's negative community.

70 Kant *Philosophy of law* 94. See also Scheltens 1980 *R & R* 67 68.

71 Kant *Philosophy of law* 92, 97.

72 Ryan *Property* 81.

73 Kant *Philosophy of law* 76-77.

74 Ryan *Property* 82-83.

75 Vogel U "When the earth belonged to all: the land question in eighteenth-century justifications of private property" 1988 *Pol S* 102-122 107.

76 Vogel 1988 *Pol S* 102 111.

77 Smith 1985 *Rev of Pol* 253 163, 167. Scheltens 1980 *R&R* 67 70, 74 shows that the protection of property was, for Kant the justification for the existence of the state and only owners were allowed to vote and take part in the state - an idea typical of early capitalism. Consequently the state was both justified by property and existed to promote property.

activity was limited to owners) and, in this way, Kant became the " ... defender of the bourgeoisie and *petit bourgeoisie*."<sup>78</sup> Kant's distributory theory therefore had pretensions of neutrality, because it was based on rationality and logic, but in reality it was another justification of liberalism.

For Hegel the connection between ownership and liberty was less strong. Ownership, to him, was justified because it provided a way for people to anchor themselves and their purposes in a community and in the world.<sup>79</sup> He explicitly rejected the social contract theory,<sup>80</sup> but saw the protection of ownership as one of the primary tasks of any state.<sup>81</sup> While the state was not based on contract, ownership was based on contract and on legal formalities.<sup>82</sup> One should note, however, that for Hegel justice was not concerned with the equal distribution of resources,<sup>83</sup> but he accepted inequality as necessarily entailed in ownership. For Kant, therefore, freedom and moral autonomy justified ownership, but this did not necessarily imply equality. For Hegel ownership was justified because it anchored people in the world. However, this did not guarantee equality either.

This idea of ownership as justified by freedom was also found in the theories of Von Savigny<sup>84</sup> and Windscheid.<sup>85</sup> In both these theories ownership was regarded as the guarantee of personhood and this, in turn, provided the justification for private ownership.<sup>86</sup> Windscheid, in particular, used Kant's view on morality combined with Grotius' scientific conceptualism to justify ownership in the modern civil state. In this way it assumed an aura of objectivity and neutrality. However, closer analysis reveals that these

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78 Ryan *Property* 73, 87.

79 Hegel *Philosophy of right* 35-36. See also Ryan *Property* 124.

80 Hegel *Philosophy of right* 242 par 75.

81 Hegel *Philosophy of right* 126 par 188, 134 par 208.

82 Hegel *Philosophy of right* 139 par 217.

83 Hegel *Philosophy of right* 44 par 49, 130 par 200.

84 Van der Walt *Houerskap* 232; Kroeschell "Eigentumsbegriff" 39.

85 Van der Walt 1993 JCRDL 569 587.

86 Van der Walt 1995 JCRDL 396 407.

assumptions were developed (like those of Locke) to justify the existence of the nineteenth century liberal state.<sup>87</sup>

The almost mechanical repetitions in these writings indicate the end of the justificatory debate in Germany as well. The rise of legal science and the purely formal system of law combined with codification brought the debate to an end. From this time lawyers are concerned with interpreting and applying the code and metaphysical questions, such as those pertaining to the justification of ownership, were no longer regarded as relevant.<sup>88</sup> However, these codifications laid down the existing law and justificatory theories as if they had no context. While the moral justification of Kant and Hegel are presented as neutral and transcendental, they actually justified the status quo. In this way the nineteenth century justifications became part of the codified law.

#### 5.4.2 Dutch property law

As in the case of other systems, the justificatory debate had lost most of its impetus by the eighteenth century. This is even truer in the case of the Netherlands. Because it was one of the systems in which codification took place earliest, the trend was visible earlier. None of the commentators really mention justification of property and it seems to have become a non-question.<sup>89</sup> This was the result of three basic factors. In the first place Grotius ended the debate with his scientific and conceptual model. The justificatory question was no longer an issue since ownership was now defined in a neutral and abstract way. The result of this was that theories no longer justified the existence of ownership *per se*, but justified the existing

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87 Van der Walt 1993 JCRDL 569 587.

88 See Kop PC *Legisme en privaatrechtswetenschap* 2nd ed (Deventer 1992) 12; Cohn *Manual* 26.

89 Van der Walt "Eigentumsbegriff" 506.

distribution of property. These distributive questions were all answered mechanically within the boundaries of the conceptual system.

In the second place, even in those cases where it didn't satisfy, codification tended to end the debate on justification of ownership. Lawyers were interested in explaining and expounding the *BW* and not in what was regarded as metaphysical speculation. This led to the third factor, namely the rise of the view of law as a science like the natural sciences. This legalism/positivism tended to focus attention on the law as a system of terms and rights rather than on the justification thereof.<sup>90</sup>

The debate on the origin/justification of property would re-surface in the twentieth century, but then in a very different guise. Twentieth-century questions revolve around the justification of redistribution of property by the state. In this way the relationship between property and equality would become the focal point.

#### 5.4.3 English property law

Justificatory theories were never as important in English property law as they were on the continent. This is largely due to the fact that, until the second half of the nineteenth century, there were few law faculties in England and those that did exist had little or no influence.<sup>91</sup> This factor, coupled with a view of law as a largely *technical* enterprise, resulted in a legal atmosphere that was hostile to what was seen as metaphysical speculation. Those justificatory theories that were on offer were mostly uncritical restatements or extensions of Locke's theory.

Locke's theory was intended, at least in part, to protect private landholdings from interference by the King. In eighteenth century England, however, the

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90 Kop *Legisme* 58.

91 Van Caenegem *Introduction* 159.

government was in the hands of a parliament with the King's powers substantially reduced. This parliament consisted of landowners elected by and representing the interests of landowners. They did not need protection from themselves<sup>92</sup> and, consequently, justificatory theories in this period tended to justify the status quo. Thus not only the existence of private property, but also the unequal distribution thereof were justified. For this reason too, these theories tended to justify the enclosures and clearances as well.<sup>93</sup>

Blackstone's theory is a point in case. He reiterated Locke's idea that all rights have their origin in natural law, but realised that they required human intervention in order to be maintained. In fact, that is the main purpose of human laws.<sup>94</sup> In the state of nature property was common, but the civil state came into being by means of a social contract to protect all rights.<sup>95</sup> These civil *advantages* (a result of the social contract) include liberty, security and private property. Consequently, the origin of property is natural, but its protection is the result of convention.<sup>96</sup> This theory of Blackstone's is, like most of his *Commentaries*, an uncritical reflection of the law and legal thinking at that time. It is also a curious blend of Lockean and Hobbesian thinking which leaves most of the questions unanswered.

By the eighteenth century the natural law justifications were no longer in vogue. This is due, on the one hand, to the general decline in natural law thinking (at least in its medieval form).<sup>97</sup> On the other hand, unexpected interpretations of Locke's theories had begun to surface.<sup>98</sup> For both these

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92 Schlatter *Private property* 162.

93 Schlatter *Private property* 163. See 4.4.1.3 on the clearances and enclosures.

94 Blackstone *Commentaries* I.1.124.

95 Blackstone *Commentaries* I.1.1; II.1.3ff; II.1.117-118.

96 Blackstone *Commentaries* I.1.16.

97 Van den Bergh *Geleerd recht* 47; Kelly *History* 258-262.

98 See Ellis RJ "Radical Lockeanism in American political culture" 1992 *W Pol Q* 825-849 825 for an explanation of how Locke's "... potentially subversive labour theory ..." could be used and was used to justify both liberal individualism and radical egalitarianism.



reasons, large concentrations of property in a few people's hands (justified by natural law) were increasingly under attack<sup>99</sup> and the existing naturalist justifications were no longer acceptable. In their place utilitarian theories were advanced.<sup>100</sup>

This shift to utilitarianism is of particular importance regarding property. Utilitarianism, in the first place, rejected natural law, the idea of natural rights and, consequently, natural law justifications of property.<sup>101</sup> It insisted on a separation of law and morals, a view of law as being essentially a command of a sovereign and that " ... a purely analytical study of legal concepts ... was as vital to our understanding of the law as historical or sociological studies."<sup>102</sup> With this approach the English version of the *Begriffsjurisprudenz* had finally arrived.

Utilitarianism emphasised that what was important was not the theory and justification of property, but the study of the real and existing property rules within the legal system. If it had to be measured against anything, it should be measured against the standard of utility. Therefore Bentham thought property should be justified by utility and labour.<sup>103</sup> This was also the basis for the theories of the Scottish moral philosophers. Both Hume and Smith knew Grotius' work and their theories represent reactions to his.<sup>104</sup> However, they both rejected his natural law basis for justifying property and emphasised

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99 Schlatter *Private property* 173.

100 Schlatter *Private property* 181.

101 Bentham J "Anarchical fallacies" in Browning J (ed) *Works* (Edinburgh 1938-1943) ii.501: "Natural rights' is simple nonsense; 'natural and imprescriptible rights' rhetorical nonsense - nonsense upon stilts."; Bentham *Limits* 84: "All this talk about nature, natural rights, natural justice and injustice proves two things and two things only, the heat of the passions and the darkness of the understanding."

102 Hart HLA "Positivism and the separation of law and morals" 1958 *Harvard LR* 593-629 601.

103 Bentham *Limits* 85; Bentham *Economic writings* vol II 312.

104 Haakonssen 1985 *Pol T* 239 251.

practical reason and purely formal rules regarding property.<sup>105</sup> Of course, that is exactly what Grotius did too, except that he called it natural law.

Hume rejected the natural law basis of property and saw property as a product of civil society.<sup>106</sup> However, he realised that if property had no moral foundation, there would be no logical foundation for its continued protection.<sup>107</sup> Therefore he created an artificial virtue, called justice, that was in turn based on utility. This justice was property.<sup>108</sup> Property was therefore the ultimate utility and could, on this moral basis, be defended against any threat of egalitarianism.<sup>109</sup> In other words, Hume replaced the natural law justification with one based on utility, which was just as capitalist as its predecessor had been.

Adam Smith did not reject natural law outright. For him the labour theory (derived from Locke) and the limitations on property held true in a state of nature.<sup>110</sup> The introduction of civil society, however, destroyed this relationship so that the accumulation of wealth became possible.<sup>111</sup> Private property was thus necessary for wealth and it was, therefore, the primary goal of government to preserve it.<sup>112</sup> This development from the state of nature to unlimited private property was a healthy historical one, because it led to capitalism. The function of the state is merely one of promoting negative justice that prohibits interference.<sup>113</sup>

It seems clear that all the writers discussed above added little to the justificatory theories of Grotius and Locke. The basis for the protection of

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105 Haakonssen 1985 Pol T 239 253.

106 Hume "Morals" 208.

107 Hume "Morals" 44.

108 Hume "Morals" 420-421.

109 Mensch 1982 Buffalo LR 635 638 n8.

110 Smith *Wealth of nations* vol I 57: "In that original state of things ... the whole produce of labour belongs to the labourer."

111 Smith *Wealth of nations* vol I 58: "As soon as land becomes private property, the landlord demands a share of almost all produce."

112 Smith *Lectures* 1.

113 Haakonssen 1985 Pol T 239 257, 264 n49.

property may have changed, but the goal (protecting private property) remained the same. This strengthens the assumption that the theories of Locke and Grotius were the last of the influential justificatory theories. From the nineteenth century in particular, English legal thinking was concerned with formal rules and practice and not with "metaphysical speculation". Those theories still on offer were political or moral theories.

#### 5.4.4 American property law

As in the case of the other jurisdictions studied, justificatory theories played a role in American legal thinking until the eighteenth century. As was the case in Europe, the aim was to justify private property in contrast with feudal property relations. As long as this remained the aim, these theories continued to be important. In seventeenth century America, there were two justificatory theories on offer, based on conflicting views of society.

The *hierarchical* view sought to justify property on the basis of the sovereign's right to property. Based on a traditional state of nature and contractarian ideas, it attempted an Americanisation of Blackstone. Like Blackstone they thought the use and possession possible in the state of nature could not guarantee security and order. Consequently, a social contract was concluded which vested all rights in the sovereign, who then distributed it.<sup>114</sup> On this semi-feudal basis property was justified as basically unequal.<sup>115</sup> Property could only be based on *title by grant* from the King and this was associated with moral and political order and harmony.<sup>116</sup>

This view in particular fit the property regimes found in the English colonies. Land in these colonies were held in tenure (mostly free and common socage) and some colonists even had the power to sub-infeudate, since they held

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114 Mensch 1982 *Buffalo LR* 635 642. See 5.4.1 above on Blackstone's ideas.

115 Mensch 1982 *Buffalo LR* 635 636.

116 Mensch 1982 *Buffalo LR* 635 645.

tenure directly from the King.<sup>117</sup> After the revolution land was held in tenure from the state in some states, while others abolished it completely.<sup>118</sup>

The *voluntarist* view in the eighteenth century, on the other hand, justified property by reference to the use and occupation of land.<sup>119</sup> Rights to land were based on *title by occupation*, based in turn on a view of the community as the source of morality, authority and property.<sup>120</sup> The modern version of this view, called republicanism, attempted to create better citizens by means of institutions that protected land. In this way it tended to emphasise the private realm.<sup>121</sup> This modern republicanism was based on the ideas of the Scottish moral philosophers (like Hume, Smith and Ferguson) and based property on self-interest which, if expressed in a free market, would benefit public interest and welfare.<sup>122</sup>

By the beginning of the eighteenth century, the debate on the justification of property was losing steam. Both the liberals and republicans at the Constitutional Convention agreed that property should be protected. *Liberals* argued that property was the barrier protecting individuals against state interference.<sup>123</sup> Property was therefore justified by an appeal to liberty. *Republicans* saw property as the way in which an individual could be bound to the community,<sup>124</sup> thus ensuring that individual acts will be in the public interest.<sup>125</sup> Property was thus justified by an appeal to communitarianism and

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117 This was the case with William Penn - see Moynihan Introduction 25.

118 Moynihan Introduction 26.

119 Mensch 1982 *Buffalo LR* 635 636. This is what Michelman refers to as the strong version of republicanism - see Michelman F "Law's republic" 1988 *Yale LJ* 1493-1537 1495.

120 Mensch 1982 *Buffalo LR* 635 645.

121 Pickens and Seligman 1987 *Soc Sc Q* 847 849.

122 Pickens and Seligman 1987 *Soc Sc Q* 847 850-851; Mensch 1982 *Buffalo LR* 635 636 n 1 & 2. See 5.4.1 above on the Scottish moral philosophers.

123 Nedelsky *Private property* 2, 79-80; Underkuffler 1991 *Texas LR* 293 296-297.

124 Pickens and Seligman 1987 *Soc Sc Q* 847 849.

125 Post "Jeffersonian revisions" 295 300, 305.

democracy. In the end, however, " ... the liberal and republican traditions converged in supporting the institution of private property..."<sup>126</sup>

If the differences between the justificatory theories seem more illusory than real, the division in the distributive debate was sharp and real. This debate on the distribution (or redistribution) of property was a heated one. On the one hand Jefferson and his followers argued that property was not a natural right (like life, liberty and the pursuit of happiness), but a civil right. Because societal definitions and conventions justified property, it was also subject to revision and redistribution on the same basis.<sup>127</sup> This is basically the same argument as the one used by Paine. He used Locke's labour theory to distinguish between productive and unproductive labour. Property derived from "real work" (productive labour) should be protected against redistribution, but property based on speculation should not.<sup>128</sup> This was also the argument used by the Jacksonians to argue for a radical, egalitarian social reconstruction by means of a redistribution of property.<sup>129</sup>

The Madisonian view, on the other hand, was based on property as a natural right. Because property was regarded as natural, it could not be subject to revision and government's primary goal was to protect it.<sup>130</sup> However, the Madisonians accepted that conflicts regarding property could and would occur. In the first place there would be a conflict between the propertied and the unpropertied if the majority of unpropertied sought to invade those

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126 Tushnet **Red, white, and blue** 15.

127 Post "Jeffersonian revisions" 295 300, 305. Ryder "Private property" 16 25 quotes Jefferson as having said: "Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right."

128 Ellis 1992 **W Pol Q** 825 828-829.

129 Ellis 1992 **W Pol Q** 825 831-835. This idea was also used in the Reconstruction after the Civil war to give slaves property rights.

130 Ryder "Private property" 16 19. This argument is justified by an appeal to Locke. Since the previous argument was also based on Lockean theory, this is an indication of the ambiguity of this theory.

property rights. In this conflict between democracy and property, property should always win.<sup>131</sup>

This meant that the Madisonian view was based on the acceptance of inequality and unequal property and of the natural inevitability of classes of rich and poor.<sup>132</sup> This basic inequality should also be protected and preserved.<sup>133</sup> In this way the foundation for the strong relation between liberty, property and economic power would be laid.<sup>134</sup>

In the second place there would be conflicts between various property rights, for example between agrarian and mercantile interests in property. This conflict was meant to be resolved by the doctrine of the separation of powers and other constitutional checks and balances.<sup>135</sup> The resultant weighing of interests would apply to property rights only, not to conflicts between property and other rights or interests.

In the end the republican and liberal traditions also converged in this respect by agreeing that the Constitution should encourage rapid economic growth so that property could be distributed widely.<sup>136</sup> Neither the hierarchical nor the voluntarist models could ensure this rapid economic growth.<sup>137</sup> The view enshrined in the Constitution was one that was abstracted from the two views and which contained elements of both.<sup>138</sup> The interesting feature was the

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131 Ryder "Private property" 16 21-23. This was the fear of what Tushnet *Red, white, and blue* 10 calls the "tyranny by the legislators."

132 Nedelsky *Private property* 2; Underkuffler 1991 *Texas LR* 293 296-297; Ryder "Private property" 16 20.

133 Ryder "Private property" 16 20 quotes Hamilton as having said: "... nothing like an equality of property existed: that an inequality would exist as long as liberty existed, and that it would unavoidably result from that very liberty itself."

134 Nedelsky *Private property* 79-80; Underkuffler 1991 *Texas LR* 293 297.

135 Ryder "Private property" 16 24.

136 Tushnet *Red, white, and blue* 15.

137 Mensch 1982 *Buffalo LR* 635 660 indicates that republicanism led to a diffusion of resources and the feudal nature of the hierarchical view destroyed initiative. Horwitz 1973 *U Chicago LR* 248 271, 278: "... men had come to regard property as an instrumental value in the service of the paramount goal of promoting economic growth."

138 Mensch 1982 *Buffalo LR* 635 690, 694.

introduction of the familiar liberal private-public split.<sup>139</sup> Private property was no longer justified by its origin, but by its liberal function of limiting governmental interference and guaranteeing liberty.<sup>140</sup>

On this basis laid in the eighteenth century, nineteenth century developments tended to emphasise the protection of property rights against all forms of interference.<sup>141</sup> The appeal to liberty also resulted in an expansion of the category of property rights to include other rights (such as contractual rights) which could be protected in the same way.<sup>142</sup> The Supreme Court became instrumental in protecting property rights against state intervention by making use of the dual federalism of commerce clause and the substantive due process clause of the Fourteenth Amendment.<sup>143</sup> Note, however, that this is no longer a justificatory debate, but a distributory debate. Parties no longer seek to justify property but to justify certain patterns of distribution.

This last point is illustrated by the advent of radically egalitarian ideas in nineteenth century American thinking. Henry George, in reaction to the papal encyclical *Rerum Novarum*,<sup>144</sup> took Locke's ideas to their logical extreme and saw property as justified only if it applied to the fruit of one's labour.<sup>145</sup> This could then be the basis for a redistribution of property. This idea was not developed further and never became dominant in the nineteenth century. It would, however, become one of the central issues in the twentieth century redistribution debate.

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139 Mensch 1982 *Buffalo LR* 635 733-735; Nedelsky *Private property* 3; Underkuffler 1991 *Texas LR* 293 303.

140 Nedelsky *Private property* 8; Underkuffler 1991 *Texas LR* 293 294; McCann 1987 *Pol & Soc* 143 145 quotes John Adams having said: "Property must be secure or liberty cannot exist."

141 Frug 1980 *Harvard LR* 1510 1511.

142 Frug 1980 *Harvard LR* 1510 1511.

143 McCann 1987 *Pol & Soc* 143 146.

144 Pope Leo XIII *Rerum Novarum* (1891).

145 Benestad JB "Henry George and the Catholic view of morality and the common good, I: George's overall critique of Pope Leo XIII's classical encyclical, 'Rerum Novarum'" 1985 *Am J Econ Soc* 365-378 365.

The basic justification of property in the American tradition therefore developed from one based on an external hierarchy or an external (objective) set of communitarian values to a subjective justification based on the liberty of the individual. This justification would remain central to American property theory in the twentieth century. Increasingly, however, the emphasis is on the question whether and to what extent governmental interference (based on democracy) can be justified without destroying the liberty of the individual. The debate has therefore shifted from one about the justification of property to one dealing with the distribution of property and the powers of owners.

## 5.5 Conclusion

The history of justificatory theories illustrates one point very well and that is that property is inextricably tied to morality. At the start there was no need for justificatory theories because the legal order was underpinned by an external and objective moral order. This moral order was, in turn, tied to some form of authority in the religious sense. Whether the authority was derived from gods (in the Greek sense) or from God (in the roman catholic sense), its authority gave natural law its moral authority. The legal order was seen as a natural consequence of the religious order and therefore needed no justification. Ownership and property relations were part of this "natural" order and, for the same reason, needed no justification. The best example of this is the feudal arrangements of the medieval period.

The process started by the poverty debate was accelerated by the work of the late scholastics and Grotius' theory and ended with the advent of the *Aufklärung*. Once natural law had been divorced from its religious underpinnings, natural law was no longer the only possibility for a moral basis. Moreover, once natural law no longer had a religious basis,<sup>146</sup> its moral

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146 Haakonssen 1985 Pol T 239 247: "What is clear is that natural law theories during the seventeenth and eighteenth centuries lost more and more of their theological appearance, ..."



authority was under attack. Although most of the theorists of this period still worked from an implicit or explicit Christian foundation, the possibility of scientific knowledge of this natural law was increasingly denied and this, together with the humanist influence, tended to secularise natural law.<sup>147</sup> The end result was that property could no longer be justified in an objective manner, that is, with reference to an external moral order abstracted from humanity. For this reason the justificatory theories of the nineteenth century focused attention on the subject of property relations, that is the human individual, or on society (contractarians), or on legal science (Grotius, Langdell) or on transcendental morality (Kant). The collapse of the perceived objective moral order, or, as Winter would have it, the proliferation of moralities, therefore necessitated a different kind of justificatory theory.<sup>148</sup> If the moral order was no longer constant at least the moral subject still was.

This movement from an objective to a subjective justificatory theory had two interesting consequences. In the first place the debate on the origins of property became increasingly irrelevant. This is understandable, since the origin in an external, objective moral order became absurd once the perception no longer existed that such an order could be known rationally. Instead the focus was on real, existing property relations. This led to the second consequence, namely that the justificatory theories from the nineteenth century onwards justified *existing* property relations.<sup>149</sup> It is important to note that new justificatory theories did not lead to new property relations - the patterns of property remained the same, only the theories justifying it changed. In this respect very little had changed - old and new theories have as their purpose the justification of existing property relations

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147 Haakonssen 1985 Pol T 239 250ff.

148 See Winter SL "Human values in a post-modern world" 1994 Yale JLH 233-248 238 on the relativism brought about by the eighteenth century Enlightenment due to the " ... loss of foundations (and) the expansion of moral sources..."

149 See, for instance, Nedelsky *Private property* 205-207; Van den Bergh *Eigendom* 66: "De vermaatschappelijking van de eigendom die rond 1900 zou hebben ingezet, heeft nauwelijks invloed gehad op de voortgaanse concentratie van economische macht."

and of the *status quo*. As was pointed out above,<sup>150</sup> the justificatory theories never postulated a *new* order of distributory patterns, but simply tried to justify why things were the way they were. This rests on the assumption that the status quo is basically just and equitable and this view was incorporated into the conceptualist view of law in general and property law in particular.

The second important shift in this debate was from a focus on justification to a focus on distribution. Once the theories ceased to justify private property *per se* and started justifying existing patterns of property, the emphasis shifted. The emphasis was now on justifying the way in which property was distributed and no theory was offered to transform this basic pattern of distribution. This would provide the impetus for late nineteenth and, especially, twentieth century criticism of private property.<sup>151</sup> The central idea was that, if these theories justified *existing* distributory patterns, property no longer guaranteed equality or equal liberty.

In the end the debate on the justification of property did not have a very long life. It was very important in an era when metaphysical questions were regarded as part of law. Once the view of law as a science (in the sense of natural science) was adopted, however, such questions were either ignored or regarded with suspicion. Lawyers, increasingly, were concerned with the law as a system of rules that could be understood in an abstract and formally logical way. Especially if the law was codified, questions dealing with the justification of property fell outside the lawyer's field and became the study field of philosophers and political theorists. Law (and property) was seen as abstract, neutral and divorced from politics, while enforcing and maintaining a system with real political and moral underpinnings and implications.

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<sup>150</sup> See 3.5 above.

<sup>151</sup> See chapter 8 below.



## CHAPTER 6: THE CHARACTERISTICS OF OWNERSHIP (FROM OBJECTIVISM TO SUBJECTIVISM)

"To the extent that these things are necessary to the life of my neighbour, the law thus confers on me a power, limited but real, to make him do what I want. If Laban has the sole disposal of his daughters and his cattle, (*sic*) Jacob must serve him if he desires to possess them."<sup>1</sup>

### 6.1 Introduction

As was pointed out above,<sup>2</sup> it is often assumed that ownership has (and has always had) certain elements or characteristics. This is closely aligned with the view that ownership is a neutral concept unaffected by historical change. If the concept is neutral, the characteristics implied by that concept must also be "neutral" in the sense that they remain the same. On this basis it is assumed that ownership is, and has always been, absolute, uniform, exclusive and a real right. These terms will be defined briefly.

The *absoluteness* of ownership refers to the idea that ownership is basically unlimited. This view does not deny that ownership can be limited and that limitations actually do occur in law, but these limitations are seen as temporary and abnormal. Two kinds of limitations can occur.

In the first place statutory restrictions (laws as the result of political will) are regarded as unnatural and unacceptable, because it involves public-law interference in private law. In the second place limitations may be

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1 Cohen "Property and sovereignty" 159.

2 See chapter 2 above.

the result of rights (based on freedom of contract) of others. In this case too it is regarded as unusual and temporary. In common-law systems particularly, this type of restriction is seen as a remnant of feudalism and as such is regarded as unacceptable. Once the limitations are removed, ownership reverts to its basic unlimited nature. All limitations are therefore seen as unnatural, while ownership (in its unlimited form) is seen as natural. This is referred to as the elasticity of ownership in civil law - as soon as the restrictions are removed, ownership resumes its previous form.

In much the same way, the *uniformity* of ownership refers to the idea that only one kind of ownership (namely private, individual ownership) exists (and has always existed) and that this is typically a private right. The first part of the assumption is based on the idea that private ownership is natural and that all other kinds of ownership are somehow unnatural and indefensible. This is closely aligned with the second part of the assumption, namely that ownership is typically a private right governed by the rules and conceptual scheme of private law.

The *exclusivity* of ownership refers to the idea that there can be only one owner of the ownership at a specific time and that the right to exclude others is the essence of private ownership. These two assumptions have a lot in common. The first is known as the individuality of ownership and reflects the liberalist emphasis on the individual. In much the same way, once the emphasis is placed on the individual and his private sphere,<sup>3</sup> the right to exclude others from this sphere becomes important. Therefore, the emphasis on the exclusivity of ownership can only be understood in the context of the individuality and uniformity of ownership. This idea is in direct opposition to

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3 The liberalist point of departure is that every individual has an equal right to develop his full potential within a private sphere insulated from government interference. Private ownership is seen as the guarantee for the development of this equality and freedom - see Levy 1983 *Rev of Pol* 578; Underkuffler 1990 *Yale LJ* 128; Barton SE "Ownership rights and human rights: efficiency and democracy as criteria for regulatory reform" 1983 *J Econ* 1 915-930 916; Bethell T "Ownership and justice" 1991 *Am enterprise* 23-26.

the view of ownership as communal/common characterised by the right not to be excluded, which is a very old idea that never quite died out.

The characterisation of ownership as a right to corporeals deals with the question of the *objects* of ownership. The question is whether ownership of various kinds of objects is possible. The traditional assumption in South African (and most civil-law systems) has been that ownership of corporeal objects is possible, but that incorporeals cannot be owned.<sup>4</sup> This assumption has been challenged on various grounds in the past few years and has seen a number of changes. More important, however, is the question whether the objects of ownership determine its definition or not. The answer to this question will indicate whether ownership is defined abstractly or not. As such it is linked to the previous characteristic.

This chapter will examine these assumptions from a historical perspective. It seeks to determine whether and to what extent these characteristics were present during the various periods under discussion and how they were created. It must be emphasised that these characteristics are related. To a very large extent the absoluteness of ownership implies its exclusionary nature (since restrictions limit the right to exclude and are seen as temporary and unusual), and both imply the existence of only one kind of ownership. The role that the objects of ownership play is also related to the abstract nature of the other characteristics.

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4 See Van der Merwe CG Sakereg (Durban 1979) 29.

## 6.2 The absoluteness of ownership

### 6.2.1 Roman and medieval roots

To a large extent it is anachronistic to speak of absoluteness with reference to roman and medieval law. Recent historical studies have indicated that *dominium* in roman law was never absolute.<sup>5</sup> Restrictions and limitations could and did occur. Two kinds of restrictions were mentioned above.<sup>6</sup> Public-law restrictions only became a problem with the rise of the modern state and were therefore never an issue in roman law. Restrictions based on the rights of others only arose as a result of the move away from feudalism. Once again, they were simply not an issue in roman law.

It is clear that medieval law, too, cannot be regarded as absolute. Public-law restrictions only became an issue with the rise of the modern state. Because the idea of an absolute ownership was unknown, restrictions were simply regarded as part of the feudal structure. Medieval thinking on the absoluteness of ownership can be illustrated with reference to Bartolus' definition and, in particular, the phrase *nisi lege prohibeatur*.<sup>7</sup> The phrase *nisi lege prohibeatur* indicated that there were legal limitations on the owner's right of disposition.<sup>8</sup> Therefore, Bartolus never regarded *dominium* as a right that was, in principle, unlimited.<sup>9</sup> Indeed, such a perception would have been impossible in the light of medieval society and thought.<sup>10</sup> However, post-glossators like Jason de Mayno replaced the phrase *perfecte disponendi* in

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5 Visser 1986 AJ 39 48 n7. See also Van der Walt and Kleyn "Duplex dominium" 217 n28 and sources cited there.

6 See 6.1 above.

7 See Bartolus on D.41.2.1.7.1 nr 4.

8 Coing 1953 ZSS 348 354; Van der Walt 1986 JCRDL 305 310.

9 Van der Walt *Houerskap* 193-194.

10 Van der Walt 1992 DJ 446 451.

Bartolus' definition with the phrase *libere disponendi*, thus emphasising the owner's complete right of disposition regarding the object.<sup>11</sup> This was the start of the move away from the feudal view of ownership and which was continued by the writers of the *mos italicus* and later the *usus modernus pandectarum*.<sup>12</sup>

The works of the scholastics in particular emphasised the voluntarist approach to law in general and ownership in particular.<sup>13</sup> Ownership was defined as the *potestas humana*, which indicated that ownership presupposed the individual's power regarding his ownership.<sup>14</sup> This represented the start of a shift away from the feudal, socially restricted concept of ownership toward a free right of individual disposition within the limits imposed by law. But ownership was still regarded as limited by natural law.<sup>15</sup> Because of the inherent limitation placed on law by the supremacy of natural law, ownership was always limited in principle. This precluded an absolute view of ownership.

Gradually, however, the emphasis on human individuality and control over the external world began to replace the idea of a basically limited ownership.<sup>16</sup> This was the result, on the one hand, of the gradual abandonment of natural law as the supreme law that was already apparent in the works of the late scholastics. On the other hand, the ascendancy of the views of the social contractarians also played a role. De Vitoria saw law as the result of an agreement between members of a community<sup>17</sup> and the degree of absoluteness of ownership would therefore depend on the content of this

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11 Van der Walt 1986 JCRDL 305 312-312.

12 Van den Bergh *Eigendom* 39-50; Van der Walt 1986 JCRDL 305 314-316; Van der Walt 1988 DJ 16 316.

13 Van der Walt *Houerskap* 216-217; Schrage *Subjectief recht* 68; Feenstra "Eigentumsbegriff" 215-216.

14 Coleman 1985 *Pol S* 73 93-94.

15 Van der Walt *Houerskap* 216.

16 Van der Walt and Kleyn "Duplex dominium" 247; Tuck *Natural rights* 28.

17 Feenstra 1976 *RMT*248 269.



agreement. It was however, presumably still limited by the terms of that agreement. De Molina, who denied that the owner had to use the ownership in his own best interest, took this process one step further.<sup>18</sup> Presumably this was a form of limitation that De Molina thought no longer applied. Vasquez de Menchaca explicitly stated that Bartolus' phrase *perfecte disponendi* meant that the owner had an absolute right to dispose of his ownership.<sup>19</sup> This illustrates the influence of humanism, with its revolt against feudalism and the emphasis on individual freedom.

### 6.2.2 Early modern developments

In a very real sense it is ridiculous to speak of absolute ownership in this period. Not only is this the pinnacle of natural law thinking (which saw all law - including ownership - as limited by natural law), but the idea of unlimited personal freedom was not yet conceivable. On the other hand the developments in this period would provide the stimulus for the social revolutions of the modern era. Therefore, it provided the bridge between the medieval and modern period.<sup>20</sup>

The beginning of the break with the idea of ownership as limited by natural law occurred with the Spanish moral philosophers and Grotius.<sup>21</sup> In the *Mare liberum* Grotius still stated that individual ownership was derived from the nation's *dominium eminens* and was therefore limited thereby.<sup>22</sup>

He was, however, careful to state that this was not the same as feudalism, but the result of a *pactum tacitum* between citizens.<sup>23</sup> In contrast with feudalism, this represented a right to contract, which was associated with freedom. In

18 Feenstra 1976 RMT 248 270.

19 Van der Walt 1988 JCRDL 305 314; Van der Walt *Houerskap* 279.

20 Van den Bergh *Geleerd recht* 29.

21 See 6.2.1 above.

22 Feenstra 1986 AJ 269 275.

23 Grotius *De iure belli ac pacis* II.3.19.3. See also Feenstra 1976 RMT 248 271; Van der Walt 1992 SAPL 1 2; Schlatter *Private property* 130.

his later works, however, this was not mentioned. Grotius recognised that ownership could be limited by law in general,<sup>24</sup> by secularised natural law,<sup>25</sup> and by the *ius eminens* of the nation.<sup>26</sup> Because limitations by public law were not yet a problem and because all other restrictions were made part of the conceptual system, Grotius' view was not absolute. However, Grotius' system contributed to the rise of the idea of ownership as exclusive and this made the introduction of an absolute concept possible.

In much the same way as Grotius provided the basis for an absolute concept of ownership in Roman-Dutch law, Locke laid the foundation in Anglo-American law. In English law a further element to be taken into consideration was the feudal nature of its property law. Because all land was held in tenure from the King as ultimate owner,<sup>27</sup> property could never be absolute. This was in fact recognised by Hobbes in his view that property was created by the sovereign<sup>28</sup> and was, consequently, limited in principle by the sovereign's power. In this respect Hobbes' view was much closer to actual English property law than Locke's.<sup>29</sup>

In fact Locke's views on property were developed, at least in part, to deny this power of the sovereign.<sup>30</sup> Locke thought that in the first phase of the state of nature, private property was limited.<sup>31</sup> However, in the second phase, due to the invention of money, these limitations fell away<sup>32</sup> so that *natural* property became absolute.

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24 See Grotius' definition in *Inleidinge* II.3.4.

25 Van der Walt 1992 *SAPL* 1 2; Tuck *Natural rights* 72, 76.

26 Visser 1986 *AJ* 39 43.

27 See Megarry and Wade *Real property* 13.

28 Hobbes *Leviathan* II.18.7: "... the whole power of prescribing the rules, whereby every man may know, what goods he may enjoy, and what actions he may do, without being molested by any of his fellow-subjects; and this is it men call *propriety*."

29 Milsom *SFC The legal framework of English feudalism* (Cambridge 1978) 39: "The *dominium* of this kind of *dominus* was always a relative thing."

30 See Schwarzenbach 1988 *Soc T & P* 141 142; Van den Bergh *Eigendom* 21-22.

31 On these limitations see Locke *Two treatises* 2.4, 2.31, 2.33, 2.27.

32 Locke *Two treatises* 2.36, 2.37, 2.47, 2.28.

Two things are important here. In the first place the limitations were already done away with in the state of nature, so that unlimited property was regarded as *natural*. It is not the result of convention and should, therefore, be protected as a natural and inalienable right. In the second place this denies the sovereign's right to services on the basis of his/her/their ultimate property. This move away from feudalism meant that the very idea and system of tenure was under attack. Therefore Locke, like Grotius, was a pivot around which the movement from feudal to modern took place.

### 6.2.3 Late modern developments

#### 6.2.3.1 German property law

The move away from feudalism occurred in the eighteenth century as a result of the influence of Kant. For Kant ownership consisted of the directing of an individual's will on a certain object.<sup>33</sup> Because ownership was basically voluntarist, it could only be limited through "legislative common will".<sup>34</sup> Although the free will was, therefore, in principle unlimited, it could be limited by the common will. This meant that ownership could be limited by the state, but not by individual citizens.<sup>35</sup> The idea of ownership as the manifestation of the external freedom of morally autonomous entities, was therefore an expression of a basically unlimited right.<sup>36</sup>

On this Kantian basis, coupled with an abstract view of legal science, the Pandectists developed an absolute view of ownership. Von Savigny's view was that an owner could use his ownership " ... nach Willkür ... ", which

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33 Kant *Philosophy of law* 83.

34 Kant *Philosophy of law* 88. See also Vogel 1988 *Pol S* 102 108.

35 Ryan *Property* 82-83.

36 Van der Walt *Houerskap* 323; Kroeshell "Eigentumsbegriff" 34 39.

seems to imply an absolute power.<sup>37</sup> Windscheid too, defined *Eigentum* in terms of the abstract and unlimited nature thereof.<sup>38</sup> Puchta defined *Eigentum* as the " ... volle rechtliche Unterwerfung ... die vollkommene rechtliche Herrschaft..."<sup>39</sup> This means that Windscheid used the moral basis that Kant provided to justify the absolute right of owners to disposition. In this explanation, then, all limitations become exceptional, unacceptable and even immoral, except if they are in accordance with the owner's will as manifested in contract or voting.

This absolute view of ownership was included in the *BGB* as a typically roman idea. In section 903 of the *BGB* ownership is regarded as conferring a right to use the ownership " ... nach Belieben ..." In this way the Pandectists' absolute view of ownership was included in the German codification.<sup>40</sup> However, events in the twentieth century changed this somewhat. With the introduction of section 14 of the Basic Law (*Grundgesetz*<sup>41</sup>), ownership could no longer be regarded as absolute, since this section limited ownership in principle and in respect of the exercise of police powers by the state.<sup>42</sup> This was the result of a complex set of circumstances that will be discussed later.<sup>43</sup>

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37 Von Savigny *Das Recht aus Besitz* 27.

38 Windscheid *Lehrbuch* I.3.137.603, I.3.167.756-757, I.3.168.759.

39 Puchta *Pandecten* 207 - translation: " ... full legal dominion ... the complete legal lordship ... " (my emphasis). See also Van der Walt and Kleyn "Duplex dominium" 247.

40 Baur *Lehrbuch* 24.212: "Das Eigentum sollte also ... als 'das umfassendste Herrschaftsrecht, das die Rechtsordnung an einer Sache zulässt, begriffen worden." (My emphasis.) See also Cohn *Manual* 175; Van Caenegem *Introduction* 157.

41 Hereinafter referred to as GG.

42 Cohn *Manual* 180.260.

43 See 11.1 below.

### 6.2.3.2 Dutch property law

The question whether or not the late modern Dutch view of ownership had been absolute, resulted in quite a debate. On the one hand there are those who regard the definitions in this period and that expressed in section 625 *BW* as an absolute concept of ownership.<sup>44</sup> Others reject this view and indicate that a number of limitations on ownership could and did exist in this period, resulting in a less absolute view of ownership.<sup>45</sup> In this view the eventual absolute concept of ownership was the result, not of the French revolution, but of late nineteenth century capitalism.

However, as Van der Walt has pointed out, the question is not whether limitations could and did occur, but whether ownership was *conceptually* limited.<sup>46</sup> Because most writers accepted Grotius' conceptual scheme, along with the Kantian moral basis and theoretical exposition of Windscheid, they also accepted an ownership concept that was conceptually unlimited. Although most writers mention that ownership can be limited for the common good by statute as well as by the rights of others, this does not affect the basically unlimited nature of ownership. Although it cannot be said that the concept of ownership in this period was completely absolute, the foundation for such a conception was laid on the basis of Grotius' restricted definition of ownership.<sup>47</sup> Similarly the fact that a closed system of real rights existed, indicate an absolute view of ownership. Since all other rights are seen as encroachments, the basic concept must be unlimited,<sup>48</sup> except if the owner consents to them by either contract or ballot.

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44 See Van Maanen *Eigendomsschijnbewegingen* 26.

45 Van Maanen *Eigendomsschijnbewegingen* 43-44; Visser 1985 *AJ* 39 43-46.

46 Van der Walt "Eigentumsbegriff" 508. See chapter 2 above.

47 Van der Walt "Eigentumsbegriff" 509.

48 Chorus ea *Introduction* 63.

### 6.2.3.3 English property law

As was mentioned previously,<sup>49</sup> this was a period of extreme conservatism in England. It was also, however, the period following the Glorious Revolution, the rise of early capitalism and the Industrial Revolution. These developments had a profound influence on law in general and property law in particular.

While the practice of property law in this period still revolved around tenure and estate (albeit to a lesser degree), legal theory tended more and more to emphasise the absoluteness of ownership. Blackstone, for example, explicitly stated that ownership is an absolute right of individuals derived from natural law.<sup>50</sup> This right was to be enjoyed " ... without any control or diminution, save only by the laws of the land."<sup>51</sup> This must be understood against the background of Blackstone's ambition to create a legal science similar to that of the continental lawyers. This ambition was then developed further by the utilitarians.

As Kennedy has pointed out, Blackstone justified this move from limited use-ownership to absolute dominion on the basis of policy or convenience. It was to prevent disorder and to encourage industriousness that ownership needed to be absolute. Thus tenure should make way for modern, absolute ownership.<sup>52</sup> It was only by destroying feudalism (an ambition that Blackstone shared with continental lawyers) that absolute ownership could emerge to be the basis for capitalism. The idea of estates was now a way in which relations between persons and things could be explained and did not constitute limitations on property.<sup>53</sup>

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49 See 3.4.1.1 above.

50 Blackstone *Commentaries* I.1.124.

51 Blackstone *Commentaries* I.1.138.

52 Kennedy 1979 *Buffalo LR* 205 332.

53 Kennedy 1979 *Buffalo LR* 205 336.

Bentham continued this trend in his view of private ownership as " ... the ownership of the land, the estate of the land..."<sup>54</sup> No infringement of this right could take place, and, where such infringements did occur they were " ... such slight exceptions [that they] are not in common speech considered as derogating from the general rule."<sup>55</sup> Ownership could, therefore, be limited, but this was temporary and not considered an essential part of its nature. On the other hand, Bentham thought that the law functions exactly by placing limits on liberty. Even if the law (as in the case of ownership) had freedom as its goal, it would still limit freedom.<sup>56</sup> For this reason Bentham's view was not entirely absolute.

Smith, too, saw ownership as an absolute (or perfect) right. Ownership for him implied complete freedom of choice, including the owner's freedom to abuse his ownership.<sup>57</sup> However, the unproductive use of *land* was not a legitimate exercise of freedom of choice.<sup>58</sup> This development of ownership as absolute was seen by Smith as a healthy one because, historically, it had led to capitalism.

From the above the connection between an absolute concept of ownership and both capitalism and liberalism becomes clear. Capitalism required unlimited ownership in order for the free-market idea to work.<sup>59</sup> Liberalism required an interference-free sphere in order to emphasise individualism.<sup>60</sup> This move away from feudalism toward individualism and absolutism was for the sake of commerce, as was the case in civil law. In this way the ownership

54 Bentham *Limits* 62.

55 Bentham *Limits* 62.

56 Ryan *Property* 97.

57 Smith *Lectures* 10: " ... the sole claim to a subject ... if he pleases [to] abuse or destroy it."

58 Smith *Wealth of nations* Vol I 386 n 16. This applies only to land - see Vogel 1988 *Pol S* 102 120.

59 Macpherson "Natural rights" 11; Van Maanen *Eigendomsschijnbewegingen* 104-105.

60 See Gill 1983 *J of Pol* 675 679; Van der Walt AJ "The fragmentation of land rights" 1992 *SAJHR* 431-450 447; Levy 1983 *Rev of Pol* 576 577: "Ownership as a defined sphere of private right has always been understood in all varieties of liberal thinking as a barrier to state power and as a secure realm for individual human actions and freedom."

concept is changed to accommodate historical, philosophical, economic and social changes.

#### 6.2.3.4 American property law

As was the case with English ownership law, American law was somewhat ambiguous on this point. On the one hand American property law (at least in the English colonies) grew out of the basic feudal arrangement of English property law.<sup>61</sup> As a result all land was held in tenure and, as such, was essentially limited. Even before the Revolution, however, feudal services connected with tenure were exceptional and most land was held free from feudal restrictions.<sup>62</sup> After the Revolution, land was held in tenure from the state. At this stage, however, some states began to abolish tenure and land was held allodially.

The various types of estates still existed, however. An exception was the estate *fee tail*. This was never popular in America because it was associated with primogeniture and the holding of land as a power base. Both were regarded as un-American.<sup>63</sup> It was consequently abolished by all but four states in the nineteenth century. In the late eighteenth and early nineteenth centuries, private property was regarded as an important tool in fighting feudal and monarchical restrictions.<sup>64</sup>

This feudal basis with later capitalist development is the reason for the ambiguity in American property law. On the one hand Anglo-American property was contrasted with the "complete, exclusive, unqualified and absolute" civil-law view of ownership.<sup>65</sup> On this basis of an essentially limited right to private property two types of restrictions were recognised. In the first

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61 Browder, Cunningham and Julin *Basic property law* 7.

62 Moynihan *Introduction* 26.

63 Moynihan *Introduction* 41.

64 Ryder "Private property" 16 20.

65 Browder, Cunningham and Julin *Basic property law* 6.



place restrictions resulting from shared ownership as in the case of (for example) estates, and, in the second place, restrictions resulting from neighbour law, self-imposed restrictions and state intervention were recognised.<sup>66</sup> However, all of these restrictions were based on either contract or the ballot, therefore it could be stated that "(o)wnership ... is not inherently fragmented nor liable to involuntary fragmentation..."<sup>67</sup> This seems to indicate that property (at least in the form of an estate *fee simple absolute*) was conceptually absolute.

In this respect it seems that American property law developed in the same direction as the continental systems. The rise of capitalism encouraged the development of an absolute concept of property, even if the concept had, historically, been limited.

### 6.3 The uniformity of ownership

#### 6.3.1 Roman and medieval roots

One of the most pervasive ideas about ownership is that there is only one kind of ownership possible and that this one kind is private ownership. It is furthermore assumed that this was also the case in roman and medieval law. Recently, however, this assumption has been proven wrong. In pre-classical law, a distinction was made between Quiritary ownership<sup>68</sup> and bonitary ownership.<sup>69</sup>

It is sometimes also argued that *dominium of res Mancipi* and *res nec Mancipi* differed (resulting in two more kinds of ownership), primarily because *res*

66 Browder, Cunningham and Julin **Basic property law** 12.

67 Browder, Cunningham and Julin **Basic property law** 12.

68 G.2.40; G.1.54. See also Van Zyl *Geskiedenis* 79, 128 n25; Kaser *Private law* 333; Jolowicz *Introduction* 366, 384; Buckland *Manual* 113.

69 Ankum and Pool "Double ownership" 5 32, 41; Van Zyl *Geskiedenis* 128 n25; Van Warmelo *Inleiding* 122 par 352.

*mancipi* could only be transferred by *mancipatio* or *in iure cessio*.<sup>70</sup> This shows how different rights were created for different objects, but the distinction had already disappeared in classical law<sup>71</sup> and was explicitly abolished by Justinian.<sup>72</sup>

In classical law the concept of bonitary *dominium* was developed further.<sup>73</sup> Various other kinds of property also existed.<sup>74</sup> In fact, at least five different kinds of ownership could be distinguished.<sup>75</sup> These were all types of ownership and not, for instance, possession and each were governed by unique and typical legal rules. When common Roman citizenship was introduced, the type of ownership unique to *peregrini* and citizens in the provinces disappeared, but the rest remained.<sup>76</sup>

In post-classical law, largely due to the disappearance of the different *actiones*, the distinction between the *dominus* and the quitrent-holder,<sup>77</sup> on the one hand, and between bonitary and Quiritary *dominium*,<sup>78</sup> on the other hand, disappeared. It seems that only one kind of ownership called *dominium* existed.<sup>79</sup> This probably included *possessio* and other rights such as *ususfructus*.<sup>80</sup> Therefore it was still not a really uniform right.

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70 G.2.14a-16; Van Zyl *Geskiedenis* 123; Van Warmelo *Inleiding* 114 par 328-330.

71 Birks 1985 *AJ* 1 9; Van Zyl *Geskiedenis* 124.

72 C.7.31.5.

73 For instance, the case where a *res Mancipi* was not or could not be transferred by *mancipatio* or *in iure cessio* or where the owner lacked the *ius commercii*. See Buckland *Manual* 113, 114; Kaser *Private law* 94; Ankum and Pool "Double ownership" 33, 41; Van Warmelo *Inleiding* 122 par 353-354.

74 Jolowicz *Introduction* 280-281; Feenstra 1976 *RMT* 248 269; Buckland *Manual* 113, 114; Birks 1985 *AJ* 1 9, 22; Lenel *O Das Editum Perpetuum* 3rd ed (Leipzig 1927) 189; Van Warmelo *Inleiding* 115 par 332; Van Zyl *Geskiedenis* 101.

75 These were Quiritary *dominium*, bonitary ownership, ownership by *peregrini*, ownership of provincial land and ownership of the *dos*. See Van der Walt 1988 *JCRDL* 305 307; Van der Walt 1988 *DJ* 16 311.

76 Feenstra 1976 *RMT* 248 260.

77 C.11.62.12. See also Feenstra 1976 *RMT* 248 261.

78 Van Warmelo *Inleiding* 123 par 355.

79 Buckland *Manual* 114, 116; Kaser *Private law* 95.

80 Van der Walt 1988 *JCRDL* 305 308.

In the Justinian codification a resurrection of the classical distinction was attempted. That the effort was not entirely successful is clear from the inconsistent application of the *actiones in rem*.<sup>81</sup> However, Justinian did abolish the distinction between *dominium* of Italic and non-Italic land<sup>82</sup> and probably also the distinction between Quiritary and bonitary *dominium*.<sup>83</sup>

One of the most important characteristics of medieval society was the feudal system.<sup>84</sup> The glossators attempted to explain this feudal system in terms of the existing roman law. In this way the feudal relations were explained as instances of the roman *dominium*.<sup>85</sup> In this tradition the glossators' interpretation of the *praescriptio longi temporis* acquired by *usucapio* was that it could lead to *dominium utile*, but not to *dominium directum*.<sup>86</sup> Therefore they distinguished between at least two kinds of *dominium*.<sup>87</sup> This distinction was also accepted by Jacques de Révigny (1230/1240-1296), although he regarded one (*dominium utile*) as being the true *dominium*.<sup>88</sup> In much the same way Bartolus distinguished between two kinds of *dominium*, namely *dominium directum* and *dominium utile*.<sup>89</sup> In this regard he relied on the glossators' exposition on *emphyteusis* and the *actio utilis*.<sup>90</sup> However, the distinction was rejected by late post-glossators such as Jason de Mayno.<sup>91</sup> In

81 Van der Walt 1986 JCRDL 305 308.

82 C.7.31; I.2.1.40.

83 Kaser Private law 95.

84 See Van den Bergh Geleerd recht 17-21 for a thorough exposition on the feudal system. This system probably developed as a result of the mixture between Roman and Germanic law that occurred during this time - see Van der Walt 1992 DJ 446 450.

85 This was the division between *dominium directum* and *dominium utile* - see Van Maanen Eigendomsschijnbewegingen 21. See also Tuck Natural rights 17: "... the complexity of feudal relationships had reached such a point by the mid-thirteenth century that either all lords had *dominium* of some kind or the notion ceased to have much sense." (Footnote omitted).

86 D.39.3.1.23. The same distinction was made based on the *ius hereditatis* - Coing 1953 ZSS 348 357.

87 Van der Walt Houerskap 152.

88 Van der Walt Houerskap 183-185.

89 The distinction is based on an interpretation of C.11.62.12.1 and is therefore probably a synthesis of classical and Justinian law - Van der Walt and Kleyn "Duplex dominium" 237. See also Coing 1953 ZSS 348 356; Van der Walt Houerskap 201-204.

90 Coing 1953 ZSS 348 358; Van der Walt and Kleyn "Duplex dominium" 237.

91 De Mayno on D.41.2.3.4 n 16: "Dominium utile non est verum et proprium dominium."

this the influence of humanism (a return to roman sources) and the movement away from feudalism can be seen.

In general, therefore, the medieval jurists utilised the roman distinction between full and naked *dominium*, but this distinction acquired a new meaning. Because use was also recognised as *dominium*, it became a way of explaining feudal relationships. This picture began to change in the later middle ages. The emphasis of the late scholastics on *dominium* as *facultas humana* precluded the idea of a functionally divided *dominium*.<sup>92</sup> De Vitoria still distinguished between three forms of *dominium*,<sup>93</sup> while De Molina distinguished between *dominium perfectum* and *dominium imperfectum*, both being regarded as *dominium utilis*.<sup>94</sup> However, because the idea of a *duplex dominium* had been developed to fit the feudal society of the middle ages, the destruction of that system also signified the beginning of the end for the idea of *duplex dominium*. This was achieved by recognising the vassal as the *dominus utilis* or owner, while the landlord (*dominus directum*) was regarded as a political authority. Consequently only one type of *dominium* remained.

This process was accelerated and facilitated by the work of the humanists. Because they wanted to restore classical roman law, they disregarded all legal developments since that time. On the basis of this point of departure, they argued that there could be only one kind of *dominium*, because *dominium utile* was of post-classical origin.<sup>95</sup> The exception to this is Hotman, who accepted the idea of a *duplex dominium*, in the Bartolist tradition, based on the *ius gentium*.<sup>96</sup>

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92 Van der Walt and Kleyn "Duplex dominium" 247.

93 Feenstra "Eigentumsbegriff" 219.

94 Van der Walt Houterskap 276. These themes would resurface, albeit in another guise, in Grotius' work.

95 Tuck *Natural rights* 40.

96 Tuck *Natural rights* 41.

### 6.3.2 Early modern developments

The idea of a *duplex dominium* began to lose its appeal and support near the end of the medieval period, as was indicated above.<sup>97</sup> This process was accelerated in the early modern period. Grotius dealt with the divided concept of ownership in a very specific way. In the *De iure belli ac pacis*<sup>98</sup> and the *Mare liberum* he mentions the distinction, but does not discuss it. In the *Inleidinge*<sup>99</sup> he reiterates the basic Bartolist distinction between two types of direct ownership, namely ownership either with or without use, and he still refers to the medieval terms *dominium directum* and *dominium utile*, but he changes the direction of the debate.

First, being a humanist, he places the main emphasis on the roman distinction between *dominium plenum* and *dominium minus plenum*, both of which refer to *dominium directum* (with or without use). Thereby the importance of the distinction (which is central to medieval law) between *dominium directum* and *dominium utile* (which is roughly the same as use) is reduced. Then he focuses on *dominium minus plenum*/imperfect ownership, and says that that can refer to either empty property without use (that is *dominium directum* in the form of *minus plenum*, *imperfectum*, *nuda proprietas*) or use (*dominium utile*), and point out (in line with medieval law) that either could be called *dominium*.

However, to avoid confusion, he proposes that the former be called ownership and the second a use right (*gerechtigheid*). Both full ownership (*volle eigendom*) and imperfect ownership (*gebreckelicke eigendom*) are regarded as ownership, but use (*dominium utile*) is not. The Grotian revolution therefore inverted the late medieval solution to the problem of *duplex*

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<sup>97</sup> See 6.2.3 above.

<sup>98</sup> Grotius *De iure belli ac pacis* I.2.3.19.2.

<sup>99</sup> Grotius *Inleidinge* II.3.9-II.3.11. See also Feenstra "Eigentumsbegriff" 231; Van der Walt *Houerskap* 402.

*dominium*, by effectively removing *dominium utile* from the category of ownership.

English ownership law in this period knew a wide variety of interests that could be classified as ownership. Different kinds of tenure and estates could lead to different kinds of ownership with different powers, entitlements and duties.<sup>100</sup> Any attempt to establish a uniform concept of ownership was, therefore, going to be very difficult.

Locke never dealt with the uniformity of ownership explicitly, probably because it was not an issue in English law. Because feudal law survived here longer, the timing and structure of the debate differed from the continental one. The upcoming liberalism did, however, necessitate the removal of feudalism, but this did not necessitate the same conceptual moves that had been necessary in continental systems. The end-result of the rise of humanism (on the continent) and liberalism (in England) did, however, have the same result, namely the destruction of feudalism.

### 6.3.3 Late modern developments

#### 6.3.3.1 German property law

After the reception of roman law, German law also operated with at least two types of ownership.<sup>101</sup> The *usus modernus pandectarum* still distinguished between *dominium directum* (*Obereigentum*) and *dominium utile* (*Untereigentum/Nutzbares Eigentum*). This distinction was also included in the Prussian *Allgemeines Landrecht*, but was eventually abandoned in the

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<sup>100</sup> See, in general, 3.4.1.1 above and sources quoted there.

<sup>101</sup> Van den Bergh *Eigendom* 31; Kroeschell "Eigentumsbegriff" 36.

eighteenth century.<sup>102</sup> This was due, in part, because of the influence of Grotius and Thibaut.<sup>103</sup>

The abandonment of the idea of a functionally divided ownership was the result of the emphasis on autonomy in Kantian liberalism, the increasingly abstract nature of legal science and the economic effort of getting rid of feudal relations.

The emphasis on autonomy tended to exclude simultaneous rights to the same object.<sup>104</sup> This led to the view of ownership as the totality of possible rights.<sup>105</sup> The abstract nature of legal science was even more influential. Law was increasingly seen as a system of a-historical and a-political terms and definitions.<sup>106</sup> Because legal science required general or abstract concepts, ownership had to be defined in an abstract way as a general term.<sup>107</sup> This meant that there could be only one term/definition for ownership and, consequently, only one kind of ownership.<sup>108</sup> Because of the emphasis on *individual* autonomy, it became a typically private right.

Because of these factors, the Pandectists accepted the idea of uniform ownership and the concept of double ownership was abandoned.<sup>109</sup> In the *BGB* ownership is dealt with in Book III as part of the section on *Sachenrecht*. There is no distinction between various types of *Eigentum* and only one kind is recognised. There are, however, tentative developments in German law that indicate a possible return to a more pluriform approach, both in private law<sup>110</sup> and in public law. In the last-mentioned case the introduction of section

102 Van der Walt and Kleyn "Duplex dominium" 247.

103 See Van der Walt and Kleyn "Duplex dominium" 247-248.

104 Van der Walt and Kleyn "Duplex dominium" 247.

105 Puchta *Institutionen* 579-581; Puchta *Pandecten* 207; Van der Walt 1986 JCRDL 305 315.

106 Kap *Legisme* 12.

107 Van Caenegem *Introduction* 140.

108 Cohn *Manual* 57.

109 Van der Walt and Kleyn "Duplex dominium" 248.

110 Cohn *Manual* 175: these refer to the "ownership" of a holder on behalf of someone else and the *Sicherungseigentum*.

14GG has prompted writers to distinguish between private-law ownership and public-law property.<sup>111</sup>

### 6.3.3.2 Dutch property law

Some writers still mention the distinction between *dominium directum* and *dominium utile*,<sup>112</sup> but this does not amount to much. This was the result of the fact that they followed Grotius' scheme and accepted his distinctions. This means that, for Dutch property law, the idea of a divided ownership died with Grotius' *Inleidinge*. This was also the position at the time of codification.

### 6.3.3.3 English property law

Developments in English law tended to differ from those in civil-law systems. Much of the discussion centred on the ancient tenures. Blackstone, for instance, criticised them as "(a) slavery so complicated, and so extensive..." and this cried out for "... a remedy in a nation that boasted of her freedom."<sup>113</sup> The same was true for the modern tenures, except for the tenure of socage, which is depicted as "... relics of Saxon liberty..."<sup>114</sup> Tenure is therefore associated with Normans and with servitude.

This indicates that English property law was not concerned with conceptual issues, but with the practical struggle to abolish feudalism. For this reason the abolition of feudal distinctions and pluriformity in favour of a uniform concept was advocated. Pluriformity was associated with feudal servitude and uniformity with progress and commerce.<sup>115</sup> The end result was that "(a) 'thing' (the land) was controlled, for the purposes of occupancy and

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111 Van der Walt AJ "The impact of a bill of rights on property law" 1993 *SAPL* 296-319 303. See also 11.1.3 below.

112 Huber *Jurisprudence* 2.2.11 distinguished between *full* and *bare* ownership and Van Leeuwen *S Commentaries on Roman-Dutch law* (London 1851-1886 Tr JG Kotze) 2.2.1 between *full* and *defective* ownership.

113 Blackstone *Commentaries* II.5.76.

114 Blackstone *Commentaries* II.6.81.

115 Kennedy 1979 *Buffalo LR* 205 328.



production, by a single person, *the private owner*.<sup>116</sup> This single, private owner could now exercise the absolute power as required by capitalism and liberalism.

Bentham too emphasised the role of the sole owner, the proprietor.<sup>117</sup> The strong criticism levelled at the variety of tenure by Bentham and Humphreys, eventually resulted in the formation of a real ownership commission. They retained tenure, but expressed themselves in favour of one kind of ownership.<sup>118</sup> The abolition of tenure would finally come to pass in 1967.<sup>119</sup>

#### 6.3.3.4 American property law

Developments in civil-law systems in the late modern era tended to emphasise that there could be only one kind of ownership and that this was typically a private right. Developments in the common-law systems tended to agree with the last but not with the first. Because of the system of estates, a variety of property rights could exist at the same time in respect of the same object. Property was seen as a "... conceptual entity which can be carved up in various useful and convenient ways."<sup>120</sup> Consequently, Property was not a relation between persons in respect of a thing, but a legal concept, "... a bundle of legal relations ..."<sup>121</sup>

This means that, at least in principle, property in American law was not uniform. Undivided property could, however, exist in the case of an estate *fee*

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116 Kennedy 1979 *Buffalo LR* 205 333.

117 Bentham *Limits* 61: "... it makes you sole owner, the proprietor of the land ..."

118 *Manchester History* 304.

119 *Leasehold Reform Act*, 1967. See decision of the European commission on human rights in *James & others v UK* (application no 8793/79) in *Yearbook of the European convention on human rights* (The Hague 1983) at 65.

120 Browder, Cunningham and Julin *Basic property law* 8.

121 Moynihan *Introduction* 88.

*simple absolute*.<sup>122</sup> In the view of property as a *private* right, however, the American view corresponded with the continental one.<sup>123</sup>

This was also a result of the public/private split that was the basis of the liberal definition of private property.<sup>124</sup> The liberal definition required an emphasis on the *private* sphere of free development and *private* property was the means by which individuals could be insulated from state interference.<sup>125</sup> Therefore, although American law did not operate with a basic distinction between private law and public law as was the case with continental systems, the characterisation of property as a private right was well established.

## 6.4 The exclusivity of ownership

### 6.4.1 Roman and medieval roots

The idea of the exclusivity of ownership is one that is closely aligned with the uniformity and absoluteness of ownership and it comprises two aspects. In the first place exclusivity means that only one person can be owner of an object at a specific time (*individuality*). This is, of course, dependent on the idea that there is only one kind of ownership. As long as it is assumed that more than one kind of ownership exists, it is also possible for two or more persons to be owners of the same object at the same time. In this respect, therefore, the history of this characteristic follows that of the uniformity of ownership. In the second place, exclusivity refers to the idea that the right to exclude others from one's property is somehow central to the concept of ownership (*excludability*). Of course the first and second aspects are connected. It makes no sense to speak of *excludability* if more than one

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122 Browder, Cunningham and Julin *Basic property law* 8.

123 Cribbet JE *Principles of the law of property* (Brooklyn 1962) 5: "... property automatically translates as *private* property."

124 See 5.4.2 above.

125 See Gill 1983 J of Pol 675 679; Levy 1983 Rev of Pol 576 577; Underkuffler 1990 Yale LJ 127 139; Reich CA "The new property" 1964 Yale LJ 733-787 733.

person can be owners at the same time. Consequently the *individuality* of ownership and the *excludability* are different sides of the same coin.

As was stated above, the *individuality* of ownership is impossible in a legal system where ownership could be functionally divided. In effect this meant that, in certain cases, two people could have different entitlements to the same object, both being the result of ownership. This was especially true in the case of the *dos* (where one spouse had the entitlement to use the property and the other the right to alienate it)<sup>126</sup> and in the case of *pignus*.<sup>127</sup> It therefore seems clear that, as long as the idea of *duplex dominium* persisted, ownership was not conceptually individualistic.

Of more importance is the idea of *excludability*. It is sometimes stated that this right to exclude others is somehow typical of ownership<sup>128</sup> and that it is this excludability that characterises ownership as an absolute right.<sup>129</sup> The result of this is that the *rei vindicatio* played a major role in characterising ownership. It is the right to vindicate one's property with the *rei vindicatio* that implies the absolute control that characterises ownership.<sup>130</sup>

However, the right to exclude others was not limited to Quiritary *dominium*, but was also applicable to bonitary *dominium*. While Quiritary *dominium* could be vindicated with the *rei vindicatio*, "... the bonitary owner had the *actio Publiciana* and the *exceptio rei verditae et traditae* or the *exceptio doli* at his disposal."<sup>131</sup> There was no reason to emphasise the *rei vindicatio* rather than

126 G.2.62-63; D.23.3.75; Van Zyl *Geskiedenis* 101; Birks 1985 *AJ* 1 22. See also 6.2.2 above.

127 C.8.33.3. See also Van der Walt and Kleyn "Duplex dominium" 227.

128 Kaser *Private law* 29 sees Roman *dominium* as an absolute right and is of the opinion that this absoluteness is the result of the right to exclude others. See also Birks 1985 *AJ* 1 1; Gray 1991 *Cambridge LJ* 252 269.

129 Kaser *Private law* 255 therefore sees the wife's ownership of the *dos* as the "natural" or "full" ownership, since she had the *rei vindicatio*. See also, regarding the *dos*, Van Warmelo *Inleiding* 80 par 230.

130 Jolowicz *Introduction* 142-144.

131 Van der Walt and Kleyn "Duplex dominium" 352-353. Donahue "Property" 35 claims that Roman law "never developed a remedy whereby an individual could, upon proof of ownership, specifically recover the thing." This statement is clearly not supported by historical facts.

any other remedy, what was important was that the non-owners could be excluded by some proprietary remedy.

The *individuality* of ownership was also unthinkable in the medieval period. Since more than one kind of ownership existed, more than one person could be owner of property at a given time. As a matter of fact, the overlord usually had the *dominium eminens*, the landlord the *dominium directum* and the vassal the *dominium utile*, while any number of people could also have rights of use *at the same time* with regard to the *same property*.<sup>132</sup> It therefore seems that *dominium* was not regarded as individualistic in the medieval period.

Regarding *excludability*, the medieval debate centred on the relative importance of certain entitlements to ownership in the context of the poverty debate.<sup>133</sup> Some writers emphasised the entitlement of disposal/alienation, while others emphasised the entitlement of use. Bartolus, for example, emphasised the owner's right to dispose of his property in order to distinguish *dominium* from possession, which was characterised by factual control.<sup>134</sup> In this respect he was followed by Baldus, while Jason de Mayno chose to emphasise the entitlement to use.<sup>135</sup> The writers of the *mos italicus* and the *usus modernus pandectarum* continued the trend to emphasise the entitlement of use.<sup>136</sup> However, as long as each had a remedy, each form was regarded as exclusive.

It should, however, be noted that, where the entitlement of disposal is emphasised, this is done in respect of both *dominium directum* and *dominium*

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132 Van der Walt and Kleyn "Duplex dominium" 235-243; Van der Walt 1992 DJ 446 451.

133 See 4.2 and 5.2 above.

134 Van der Walt "Medieval legal theory" 31.

135 Van der Walt 1986 JCRDL 305 311-312; Feenstra 1976 RMT 248 251.

136 Van der Walt 1986 JCRDL 305 311-312.

*utile*. In the case of *dominium utile*, however, this right could be limited by the landlord.<sup>137</sup>

The exclusivity of *dominium* was one of the central issues in the poverty debate. The Franciscans tended to emphasise the right of alienation and disposition as the essence of ownership precisely because that would enable them to use things without acquiring ownership. That meant that they could exercise entitlements of use without acquiring ownership, since use was not the essence of ownership.<sup>138</sup> On the other hand, the Dominicans placed emphasis on the entitlements of use in order to be able to argue that use of ownership also established ownership.<sup>139</sup> It is in response to this argument that William Occam once again tied *dominium* to the *rei vindicatio*, thereby to indicate that alienation was the essence of ownership. Since the Franciscans never alienated their belongings, they could not be said to have acquired ownership.<sup>140</sup>

"The end result of this debate was that the conservative theorists had been led to say that men, considered purely as isolated individuals, had a control over their lives which could correctly be described as *dominium* or ownership. .... (This) led pretty directly to a strong individualistic political theory which had to undergo only a few modifications to emerge as something very close to the classic rights theories of the seventeenth century."<sup>141</sup>

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137 Coing 1963 ZSS 348 358.

138 Tuck Natural rights 21-22.

139 In John XXII's Bull *Quia vir reprobus* (1329) - see Tuck Natural rights 22.

140 Tuck Natural rights 23.

141 Tuck Natural rights 24.

The emergence of a voluntarist theory of ownership and the deterioration of feudalism signalled the end of the concept of *duplex dominium*.<sup>142</sup> William Occam, for instance, was concerned with the individual *potestas* over property<sup>143</sup>, which would, eventually, tend to emphasise the individuality of ownership. This line of thinking was continued by the late scholastics in their emphasis on the individual owner's freedom to use the property.<sup>144</sup> In the end De Molina's transformation of Bartolus' definition resulted in individuality and excludability becoming the essence of the concept of ownership which would later lead to the absolute view of ownership.<sup>145</sup>

In effect, the work of the late scholastics provided the basis for the transformation of the ownership concept. They emphasised the individuality and excludability of ownership and this would become the basis for the absolute view of ownership. This phenomenon, combined with the rise of subjectivist theories of ownership, as developed by Grotius in particular, would shape the concept of ownership in the modern era.<sup>146</sup>

#### 6.4.2 Early modern developments

As with the other characteristics, this period saw the beginning of an *exclusionist* view of ownership. The idea that only one person could be the owner at a certain time was the direct result of a more uniform view. The emphasis on the right to exclude, already present in the medieval period, tended to encourage this development.

Grotius' characterisation of *dominium* in the *Mare liberum* as *privatum plenumque dominium*<sup>147</sup> already pointed toward a more exclusive view of

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142 See Tuck *Natural rights* 48. See also 6.2.2 above.

143 Coleman 1985 *Pol S* 73 93-94.

144 Van der Walt 1986 *JCRDL* 305 313; Van der Walt *Houerskap* 274-275.

145 Van der Walt 1986 *JCRDL* 305 313; Van der Walt *Houerskap* 279.

146 Tuck *Natural rights* 50.

147 Feenstra "Eigentumsbegriff" 229.

ownership.<sup>148</sup> In his definitive *Inleidinge*, however, it is mentioned explicitly. Ownership is defined in terms of the right to restore lost possession.<sup>149</sup> In roman law the *rei vindicatio* was available for the protection of *dominium ex iure Quiritium*. Because Grotius reserved the Bartolist definition (and the *rei vindicatio*) for owners, this meant that only owners had the right to vindicate their property. In this way the right to exclude those who were not owners became the essence of ownership.<sup>150</sup> This right to vindicate therefore implied an exclusive view of ownership.

This view of Grotius represented a natural progression from the medieval idea of ownership as *facultas humana*.<sup>151</sup> If ownership was the expression of individual power, the next logical step in an individualist approach was to make that power as exclusive as possible. It was, in fact, the logical result of the importance attached to individuality, rationality and moral freedom.<sup>152</sup> This idea would, however, only reach maturity in the works of the humanists and especially after Kant.

In English law, it should be mentioned once again, the idea that only one owner could and did exist, was foreign. Even in the early law, however, the right to restore lost possession was regarded as typical of real rights.<sup>153</sup> This statement can, however, not be left unqualified. All kinds of tenure presupposed certain persons or classes of persons who could not be excluded in one way or another, for example in the case of estates entail.<sup>154</sup> This was, in fact, exactly what the Benthamites had against the system.<sup>155</sup> In this case, too, the new and typically modern idea of individualism and

148 Van der Walt "Eigentumsbegriff" 488.

149 Grotius *Inleidinge* II.3.4: "(H)et toebehooren van een zaeck ..." (My emphasis).

150 Grotius *Inleidinge* II.33.1. See also Feenstra 1976 RMT 248 271; Van der Walt *Houerskap* 404.

151 Van der Walt "Eigentumsbegriff" 489.

152 Van der Walt 1992 DJ 446 452; Van den Bergh *Geleerd recht* 44.

153 Megarry and Wade *Real property* 10.

154 Megarry and Wade *Real property* 14-30.

155 See 6.4.3.3 below.

exclusivity would result in new problems regarding the relationship between state and individual.

Hobbes reflected this position. Because ownership was granted by the sovereign, it could also be invaded by the sovereign as in the case of taxes, confiscation/expropriation or services.<sup>156</sup> Locke disagreed. Because ownership was based on man's labour, he acquired a title that excluded the common ownership of others or the claims of other persons.<sup>157</sup> Locke's view therefore was that ownership was exclusive, in order to deny the sovereign (or anyone else) any right to it. Moreover, whereas "lives" and "liberties" could never be alienated, "estates" could be alienated. In this way the right to alienation became the criterion for distinguishing between ownership and other rights.<sup>158</sup>

Both Grotius' and Locke's views were enormously influential.<sup>159</sup> Not only would Locke's ideas form the basis for American property law, but it influenced English law as well. This exclusive view would eventually lead to the enclosure of the commons, with the attendant social and economic consequences.<sup>160</sup> The difference between the two influences lie in the areas of law they influenced. Locke's exclusivism had a political nature and this influenced public law in particular. Grotius, on the hand, used the exclusivism in a private-law conceptual scheme and, in this way, influenced private law. In this way the exclusivism became part of both private and public law.

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156 Hobbes *Leviathan* II.18.7.

157 Locke *Two treatises* II.27: "... it hath by this *labour* something annexed to it, that excludes the common right of other Men.", II.32: "He by his Labour does, as it were, inclose it from the Common."

158 Ryan *Property* 29.

159 See Haakonssen 1985 *Pol T* 239 239; Haakonssen "From natural law" 44 n55.

160 On the enclosures and clearances, see 4.4.3.3 above.



### 6.4.3 Late modern developments

#### 6.4.3.1 German property law

One of the most enduring legacies of German jurisprudence (and Kantian liberalism in particular) is the emphasis on individualism in law. German thinking, in general, placed great emphasis on ownership as the external sphere of *individual* autonomy.<sup>161</sup> This is the logical result of the Medieval idea of ownership as *facultas/potestas* that was developed by Kant. Kant emphasised the owner as *individual*, whose will established ownership.<sup>162</sup> The same emphasis is placed by Hegel, although he acknowledged limitations through the common will.<sup>163</sup> This idea is also found in Von Savigny,<sup>164</sup> and Windscheid.<sup>165</sup> The *exclusive* view of ownership meant that it could never be regarded as a "bundle of powers" (as in Anglo-American law), since it represented the completeness of the owner's powers.<sup>166</sup> Moreover, the German view was based on a Kantian morality, whilst the English opted for utilitarianism.

Apart from this, Hegel's important contribution lies in his views on negation. In order to realise freedom (that is the realisation that the world can be what it is not) man must be able to negate certain things. Things can only be property if they can be negated, that is alienated.<sup>167</sup> In this way the ability to negate was translated as the right to alienate and this provided the distinction between what could and what could not be owned.<sup>168</sup> For this reason lives and liberties could not be owned, but material, external things could.<sup>169</sup>

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161 Van der Walt and Kleyn "Duplex dominium" 247.

162 See Smith 1985 *Rev of Pol* 253 255-256; Scheltens 1980 *R & R* 67 67.

163 Hegel *Philosophy of right* 41-44.

164 Van der Walt *Houerskap* 323; Kroeschell "Eigentumsbegriff" 39.

165 Windscheid *Lehrbuch* I.3.137.603, I.3.167.756-757, I.3.168.759.

166 Van der Walt 1993 *JCRDL* 569 582.

167 Hegel *Philosophy of right* 53.

168 See Ryan *Property* 125, 129.

169 This might have provided the philosophical justification for the German idea that incorporeals cannot be owned.

Moreover, the Kantian emphasis on freedom and will implied the exclusion of other wills in order to preserve a sphere of moral autonomy.

This basic exclusive and individualist view of ownership was included in the BGB.<sup>170</sup> Ownership is described in terms of the owner's right to exclude others ("... ander von jeder Einwirkung ausschliessen.") and section 985 emphasised the importance of the *rei vindicatio*. In this way German law developed in the direction of ownership as an individualist and exclusive right. In this process the systematic and abstract thinking of Grotius and Windscheid played a major role.

#### 6.4.3.2 Dutch property law

As in the case of the other characteristics the exclusivity of Roman-Dutch ownership is derived from Grotius. His individualist concept of ownership, expressed as the *proprium*-aspect thereof, was accepted by most writers.<sup>171</sup> This, coupled with the emphasis on human *facultas*, resulted in an exclusive concept of ownership. Huber, for instance, emphasised ownership as a private right belonging to one person.<sup>172</sup> Van Leeuwen also explicitly mentioned exclusivity as a characteristic of ownership.<sup>173</sup> Van der Linden is the most explicit of all in his definition.<sup>174</sup>

Although exclusivity is not mentioned explicitly in section 625 BW, section 647 BW mandated the enclosing of common land. As in the case of Britain, this indicates a move towards exclusivity.<sup>175</sup> It is the characteristic that seems to be the least ambiguous and problematic.

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170 Van Caenegem *Introduction* 157.

171 Van der Walt "Eigentumsbegriff" 509.

172 Huber *Jurisprudence* 2.2.1.

173 Van Leeuwen *Commentaries* 2.2.1.

174 Van der Linden *Koopmans handboek* 1.7.1.

175 Gilissen J *Historische inleiding tot het recht* (Antwerp 1984) 613.

### 6.4.3.3 English property law

The development of English property law regarding *seisin* indicates the development in this system. The gradual development from a variety of persons who had *seisin* to a single person who was *seised*, was accelerated by the theorists and by attempts to side-step the limitations on estates entail.<sup>176</sup> Blackstone throughout emphasised the exclusivity of ownership whether in the guise of the right to restore lost possession or in terms of the right to alienate ownership. Both required that the owner have the right to exclude others. Consequently, modern property law needed to abolish both the restraints on alienation and the whole idea of entailed estates.<sup>177</sup> Restraints of either kind limited the exclusivity necessary for commerce.

Bentham also declared himself in this regard. He stated explicitly that common ownership was not exclusive and private ownership exclusive.<sup>178</sup> Therefore the very thing that characterises ownership as a *private right* is the idea of exclusivity. Smith too stated that "(p)roperty is to be considered an exclusive right."<sup>179</sup> For him the essence of a real right was that it could be *vindicare potest a quocunque possessore*.<sup>180</sup> Entails had to be criticised, both because they infringed on exclusivity and because they were a strain on development.<sup>181</sup>

It seems clear that there is a connection between exclusivity and the enclosures and clearances. At this stage the arguments regarding exclusivity serve to justify these actions. This is therefore a continuation of the public-law exclusivism that characterises Locke's thinking.

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176 See Kempin *Introduction* 123ff.

177 Kennedy 1979 *Buffalo LR* 205 330-331.

178 Bentham *Limits* 61-62.

179 Smith *Lectures* 10.

180 Smith *Lectures* 9.

181 Smith *Lectures* 469.

#### 6.4.3.4 American property law

Closely aligned with the idea of uniformity is the idea of exclusivity. In American law, in particular, this is associated with the protection of liberty. Once the connection had been made between property and liberty, it was necessary to make that individual liberty (and consequently ownership) as exclusive as possible. The rise of individualism therefore strengthened the connection between ownership and liberty.<sup>182</sup>

For this reason ownership was characterised as a relation *in rem*, which meant that " ... his right is against anyone or everyone..." and as a *negative* right.<sup>183</sup> Consequently the right to exclude others became a primary characteristic of ownership. This idea was strengthened by the constitutional protection afforded property in the American system. Property was conceived as a barrier between state and individual. Already in the metaphor used the exclusivity is clear - it is meant as an instrument to exclude others in order to establish a sphere of moral autonomy.

### 6.5 The objects of ownership

#### 6.5.1 Roman and medieval roots

One of the characteristics of roman law was that it defined *dominium* in terms of the objects thereof.<sup>184</sup> Basically a distinction was made, on the basis of the nature of the object, between *res extra commercium* (things which could not

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182 Cribbet *Principles* 7: "Only as the individual has specific, and to a limited extent exclusive, rights over a thing, does he have that liberty of action which is vitally necessary to the preservation of a free society."

183 Browder, Cunningham and Julin *Basic property law* 5-6.

184 See 3.2 above. See also Birks 1985 *AJ* 1 27: "... Roman law distinguishes between different objects of *meum esse* rather than between different relationships to or interests in the material world."

be owned) and *res in commercio* (things which could be owned).<sup>185</sup> A further distinction was made between *res corporales* and *res incorporales*.<sup>186</sup> This objective approach characterised the roman approach to *dominium* as a real right. Where the objects of *dominium* were mentioned, they were discussed as if the question was settled and required little or no explanation. However, the nature of the right was often determined by the object, as in the case of *res mancipi* and *res nec mancipi* for example.

This was also, basically, the approach in medieval law, although the development of the distinction between corporeal and incorporeal ownership was interesting. This development took place as a result of the poverty debate referred to earlier. In the fourteenth century Aegidius Romanus argued, in the context of the conflict between church and state, that there were two powers in the state - one spiritual and general (which he labelled *incorporale*) and one particular (*corporale*).<sup>187</sup> The *corporale* power referred to material things and was based on contract. In this way incorporeal ownership came to be identified with power (or *potestas*) and corporeal ownership with *dominium*. Towards the end of the medieval period, the feudal relations typical of that period began to disappear. Because of the rise of early capitalism, new property relations arose. Through the work of John of Paris the distinction between incorporeals/power and corporeals/ownership took on a new meaning. The power of the overlord was transformed into jurisdiction, which included the right to tax, while corporeal *dominium* came to mean individual *dominium*.<sup>188</sup>

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185 G.2.1; I.2.1pr. See also Kleyn DG and Boraine A Silberberg and Schoeman's *The law of ownership* 2nd ed (Durban 1983) 22; Van Zyl *Geskiedenis* 122; Van Warmelo *Introduction* 63 par152.

186 G.2.12-14; D.1.8.1.1; I.2.2pr. See also Birks 1985 *AJ* 18.

187 Coleman J "Medieval discussions of ownership: *ratio* and *dominium* according to John of Paris and Marsilius of Padua" 1983 *Hist Pol T* 209-228 215.

188 Coleman 1983 *Hist Pol T* 209 224-225.

Bartolus, in typical romanist fashion on the other hand, used the term *dominium* in two different meanings. He distinguished between a wider concept of *dominium*, which included *dominium* of both corporeal and incorporeal objects (for instance *usufructus*), and a narrower concept that referred to *dominium* of corporeal objects only.<sup>189</sup> It is in this narrower sense that he defines *dominium* by using, amongst others, the phrase *de re corporali*. This meant that *dominium* in the narrower sense was only possible with reference to corporeal objects<sup>190</sup> and that *dominium* was defined in terms of its object.<sup>191</sup>

The distinction between movable and immovable objects became very important in the medieval period due to the importance of land in the feudal system and the influence of germanic law.<sup>192</sup> The importance given to land resulted in a stricter distinction between the two classes and, of the two, *dominium* of immovable objects was the more important.<sup>193</sup> During the thirteenth and fourteenth centuries writers were more concerned with this distinction. It was complicated further by other, feudal divisions.<sup>194</sup>

Roman and medieval approaches to *dominium* was, therefore, basically objective. Although distinctions were made and these sometimes acted as precursors to later developments, the basic approach remained the same.

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189 Bartolus on D.41.1; Coing 1953 ZSS 348 349.

190 Coing 1953 ZSS 348 349; Van der Walt Houerskap 193.

191 Coing 1953 ZSS 348 352.

192 Van der Merwe CG "Things" in Joubert WA, Scott TJ and Van Coosten FFW (eds) *The law of South Africa* vol 27 (Durban 1987) 1-195 24; Van der Merwe *Sakereg* 30; *Negro Eigentum* 18-21.

193 Gilissen *Historische inleiding* 590 quotes a saying of the glossators (*mobiliu reru vilis est possessio*) to illustrate the undervaluation of movable ownership.

194 Gilissen *Historische inleiding* 591.

### 6.5.2 Early modern developments

The early modern law in Europe continued the development of learned Roman law. Categories of objects of legal rights were maintained and explained further.<sup>195</sup> Grotius stated that *things* were everything external to man which were of use to him. Things could be classified according to their nature or according to their relation with persons. In terms of their nature they could be classified as collections of things or particular things. Particular things could be either corporeal or incorporeal (such as a right of way).<sup>196</sup> In terms of their relation to persons, the well-known distinction between *divini juris* and *humani juris* was maintained. However, the divine things were really owned by man, but they had a different purpose from human things.<sup>197</sup> Grotius also distinguished between alienable and inalienable objects. For instance a man's life, body, freedom and reputation were inalienable things.<sup>198</sup>

It seems clear that the various objects of ownership to a large extent still played an important role for Grotius. The various kinds of ownership had different powers and duties attached to them. However, in Grotius' system of rights, ownership was not classified in terms of the objects thereof, but in terms of its place in the conceptual system. The objects played a role in determining the rights and duties of property holders, but not in determining its nature because that nature was by definition abstract.

English property law has always distinguished between movables and immovables and between real and personal property. Real property could be divided further into *corporeal realty/hereditaments* and *incorporeal*

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195 See Van Caenegem Introduction 45-85 and Van den Bergh Geleerd recht 37 on the reception of Roman law in this period.

196 Grotius Inleidinge II.1.5-14.

197 Grotius Inleidinge II.1.15.

198 Grotius Inleidinge II.1.42.

*realty/hereditaments*, such as easements, profits and rentcharges.<sup>199</sup> The main distinction had, however, always been based on types of tenure, rather than on the objects of the right. Therefore the objects of property played a smaller role in determining the scope of rights and duties.

With Locke, however, this began to change. The shift to a subjective definition of ownership<sup>200</sup> would, necessarily, tend to shift the emphasis from the objects of the rights to the subject of the owner.<sup>201</sup> These subjective approaches were, however, not necessarily egalitarian. Tuck states that " ... most strong rights theories have in fact been explicitly authoritarian rather than liberal."<sup>202</sup> This was probably the case because it still relied on a moral order that tended to maintain the status quo.

### 6.5.3 Late modern developments

#### 6.5.3.1 German property law

In the feudal period, certain distinctions were made, for instance between inherited and bought objects.<sup>203</sup> However, this last distinction was abandoned once feudalism ceased to play a role. What was established early was the distinction between **ownership** of corporeals and **rights** to incorporeals.<sup>204</sup> Since the eighteenth century ownership of *Sachen* only was possible and this included only those things that could be regarded as corporeals.<sup>205</sup>

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199 Megarry and Wade *Real property* 11; James *Introduction* 421.

200 See 3.3 above.

201 See Haakonssen "From natural law" 47-52 for an illustration of how this process worked in America.

202 Tuck *Natural rights* 3.

203 Van Maanen *Eigendomsschijnbewegingen* 22; Feenstra 1976 RMT 263.

204 Van der Walt 1993 SAPL 296 303.

205 See, eg, Puchta *Pandecten* 207: " ... Herrschaft über eigenen körperlichen Gegenstand." (My emphasis).



In Book III of the *BGB* ownership is dealt with as part of *Sachenrecht*, but what is known as *intellectual ownership* in other systems, is excluded. This is because ownership of corporeal things only is possible in terms of section 903.<sup>206</sup> The German constitutional court has, however, interpreted section 14 of the constitution wider, so that ownership of incorporeals is also protected constitutionally. This difference between private-law ownership and public-law property in German law is dealt with elsewhere.<sup>207</sup>

### 6.5.3.2 Dutch property law

The distinction between corporeals and incorporeals and between movables and immovables seem to have been well established by the eighteenth century.<sup>208</sup> Apart from this the usual distinction between kinds of objects is found. *Eigendom* is sometimes restricted to corporeal things, although Huber recognised that this is only true in the narrow sense of the word.<sup>209</sup> In the *BW* the same distinction can be found.<sup>210</sup> Ownership of incorporeals is recognised, although some writers insist that ownership in the strict, technical sense of the word is limited to corporeals only.<sup>211</sup>

### 6.5.3.3 English property law

In this respect a very interesting development occurred. English property law had always known objects called *incorporeal hereditaments*. These were real rights to rights in respect of land, such as easements.<sup>212</sup> The late modern period saw a process that Kennedy calls the "reification of incorporeal

206 Cohn *Manual* 170, 174.

207 See 11.1 below.

208 Van Leeuwen *Commentaries* 2.1.4-2.1.15; Huber *Jurisprudence* 2.1.1-2.1.28.

209 Huber *Jurisprudence* 2.2.5.

210 Chorus *ea Introduction* 66.

211 See Beekhuis and Mijnsen *Mr C Asser's Handleiding tot de beoefening van het Nederlandse burgerlijk recht. Zakenrecht Algemeen deel 1* (Zwolle 1980) 48; Van Maanen *Eigendomsschijnbewegingen* 13.

212 Megarry and Wade *Real property* 12; James *Introduction* 421.

hereditaments".<sup>213</sup> Blackstone basically organised property law according to the objects of ownership and the categories they belong to.<sup>214</sup> For Blackstone the distinction between things *real*<sup>215</sup> and things *personae*<sup>216</sup> corresponded to the distinction between immovables and movables.<sup>217</sup> However, Blackstone was at pains to show that these incorporeal hereditaments were all closely connected with land or other real property in order to deny their unphysical nature.<sup>218</sup>

In this way Blackstone reduced the intricate social relations underlying the incorporeal hereditaments to real relations so that they became simply rights to things.<sup>219</sup> This reification is probably the result of two factors. In the first place, since incorporeal hereditaments had a feudal origin, its demise was probably the result of Blackstone's antipathy toward feudalism.<sup>220</sup> In the second place it is probably the result of the rising legal formalism, which attempted to represent law as an abstract, neutral set of determinate, consistent rules. In this scheme ownership of things was seen as "a domain of abstract individual freedom" unconnected to the hierarchy of relations between persons.<sup>221</sup>

These two factors combined to ensure the continuation of the view of property law as a more-or-less technical field of abstract rules that had little or nothing

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213 Kennedy 1979 *Buffalo LR* 205 432.

214 Kennedy 1979 *Buffalo LR* 205 327.

215 Things real could be either *corporeal* hereditaments (real, existing, physical objects) or *incorporeal* hereditaments (advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents). See Blackstone *Commentaries* II.2.21.

216 Personal things were subdivided into things in *possession* (a right plus actual possession) and *choses in action* or things in *action* (bare right without any possession). See Blackstone *Commentaries* II.2.383.

217 Blackstone *Commentaries* II.2.16.

218 Blackstone *Commentaries* II.2.201.

219 Kennedy 1979 *Buffalo LR* 205 346-347.

220 Kennedy 1979 *Buffalo LR* 205 348: "... reification allowed him to assimilate *both* the remnants of the feudal mode of organisation and the emerging elements of the liberal mode to the model of the landowner controlling his land. This in turn allowed him to maintain the illusion that the long process of abolishing the feudal "servitudes" had been, in essence, one of social decontrol, of the growth and institutionalisation of freedom."

221 Kennedy 1979 *Buffalo LR* 205 349-350. On legalism/formalism see Kop *Legisme* 58.

to do with power. In fact it legitimated the status quo.<sup>222</sup> This would be continued by other writers. Bentham, for instance, saw the objects of ownership as being either corporeal or incorporeal. Incorporeals were, however, simply corporeals considered from a specific point of view because " ... ownership must always relate to some really existent objects..."<sup>223</sup> In this way the reification was continued. Corporeal things could be either rational (a person) or irrational (a thing) and irrational things could be either animate (animals) or inanimate. Inanimate objects were either movable or immovable.<sup>224</sup> Bentham's definition therefore continued the tradition of basing the rules relating to ownership on the types of objects. The tradition was also continued by Smith, especially since he never even mentioned incorporeals.<sup>225</sup> To a large extent this was the result of the negative attitude towards everything that had to do with feudalism, in this case the services associated with that system.

#### 6.5.3.4 American property law

It is in respect of the objects of property that American law developed in a unique way. During the eighteenth century Blackstone's reified view of ownership<sup>226</sup> was prevalent in positive law. Property was seen as an absolute right that could only exist in respect of corporeal or tangible objects.<sup>227</sup> Because private property was protected so absolutely, it quickly became the paradigm for the way in which all rights should be protected. In order, therefore, to protect other rights in the same absolute way and, based on Hohfeld's theory of rights, more things were classified specifically as property.

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222 Kennedy 1979 *Buffalo LR* 205 350: "His structure suggested that the human universe could be divided into two parts: a world of hierarchically ordered relations of people to one another, and an egalitarian world in which people dominated objects. The function of this odd procedure was to legitimate the status quo."

223 Bentham *Limits* 326.

224 Bentham *Limits* 326.

225 For his classification see Smith *Lectures* 459.

226 See 6.4.1.5 above.

227 Vandeveldt 1980 *Buffalo LR* 325 330.

Business goodwill, accession, trademarks and trade names were all regarded as property and protected in the same absolute way.<sup>228</sup> What was already implicit outside constitutional law was now made explicit in the realm of public law. In this process the realists played a major role because of their insistence on a focus away from objects and towards social function and relations.

This process of dephysicalization resulted in the view that every contract created a property right and that these had to be protected in the same way as private property of corporeal things.<sup>229</sup> Consequently, even the breach of a contractual obligation was seen as a violation of property rights and intangible property was protected like private property of tangibles.<sup>230</sup>

The problem with this view of property surfaced near the end of the nineteenth and the beginning of the twentieth century. It became apparent that the absolute protection of contracts was detrimental to the competition required by a free-market, capitalist economy.<sup>231</sup> The courts were faced with the dilemma of reconciling " ... their desire to protect contractual property from interference with their reluctance to immunise individuals from the rigors of competition."<sup>232</sup> By the beginning of the twentieth century the real question was whether courts should encourage competition or protect property rights in the form of contracts.

Early twentieth-century American law distinguished between real property/real estate (immovables/land) and personal property. Personal property (or chattels) could be either tangible or intangible (for example shares).<sup>233</sup> This did not, however, mean that property was to be identified with the object.

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228 Vandeveldt 1980 *Buffalo LR* 325 335-340.

229 Frug 1980 *Harvard LR* 1510 1511.

230 Frug 1980 *Harvard LR* 1510 1524.

231 Frug 1980 *Harvard LR* 1510 1529.

232 Frug 1980 *Harvard LR* 1510 1532.

233 Browder, Cunningham and Julin *Basic property law* 3; Cribbet *Principles* 9.

"(Y)ou must distinguish between the thing (*res*) and the estates, interests or claims which people may own in a thing. ... property is a concept, separate and apart from the thing. Property consists, in fact, of the legal relations among people in regard to a thing."<sup>234</sup> In this respect, then, developments in American ownership law turned Blackstone on his head. The reification of incorporeal property attempted by Blackstone became the dephysicalization of property instead.

## 6.6 Conclusion

It now seems very clear that the view that ownership has certain characteristics and has always had them, is extremely far-fetched. In fact, given the societal basis of ownership, it would be difficult to imagine that it could be the same in legal and political cultures as diverse as that of the roman republic, medieval feudal society and nineteenth century capitalism. What is undeniable is that the concept of ownership at the beginning of the twentieth century in most legal systems was an absolute, individual, exclusive and abstract one. The reasons why this should be the case is the interesting aspect of this development. Three factors played a role in this.

In the first place the rise of liberalism, with its emphasis on individualism and autonomy, played an important role. As was the case in the justificatory debate, the increasing emphasis on the liberal subject tended to make ownership more and more absolute. While medieval society and law tended to see the individual as part of a community, liberalism tended to abstract the individual from that communal context. The rights that this individual had could only be limited by the individual himself, either through contract or through voting. Either way, the individual will is crucial for the justification of

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234 Cribbet Principles 2.

limitations. In this scheme, ownership became the boundary between private and public.

In the second place liberalism worked with a basic public/private split. The private relationships between people were seen as the most important and as a sphere outside government control. This had the effect of emphasising private legal relations and private law. In this way private law became paradigmatic for all law so that even the relationship between state and citizen was privatised. (Think of the social *contract*.) If ownership was the perfect private right and private law the paradigm, ownership was to become the perfect right. To this end all fundamental rights were measured against ownership.

In the third place the "scientification" of law, *modo geometrico*, also influenced this process. The idea, which originated from Grotius and Kant and was continued by the utilitarians, Blackstone and the Pandectists, of an abstract system of law (divorced from morality and religion) resulted in an abstract view of ownership. Ownership could no longer be defined in terms of its objects or the specific relation between persons, it had to be abstracted from this context. In this way uniformity and abstractness became characteristic of ownership.



## CHAPTER 7: ALTERNATIVE HISTORIES (HOW TO DO THINGS WITH FACTS)

"The fact is that we live in a profoundly anti-female society, ... Within this society it is men who rape, who sap women's energy, who deny women economic and political power. To allow oneself to know and name these facts is to commit anti-gynocidal acts."<sup>1</sup>

"Truth is the daughter of Time, not of Authority"<sup>2</sup>

### 7.1 Summary: the story thus far

Two things have become clear from the historical study. In the first place it is obvious that the assumptions referred to in chapter 2 are typically modern ones that could only have been created after the rejection of feudalism and the rise of the modern state. In all cases it appears that it would be absurd to expect to find these assumptions in previous periods, due to the nature of law and of society in these periods. Once again this illustrates the contextual nature of property.

For instance, in the creation of the *conceptualist* model and the scientific ideal for law (which implied a rational method on a moral base) the work of Kant, Grotius and Windscheid played a pivotal role. However, the pretension of an abstract concept only became possible within the context of the modern period once the idea of law as a system of rights was postulated. This would have been unthinkable in an earlier period. Furthermore, because the idea of a hierarchy of rights only became possible within the conceptual framework, it was also only in the modern period that the *importance* of property became an issue. In this way it becomes clear that the central role that property plays within liberalism is inextricably tied to conceptualism.

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1 Daly *Gyn/Ecology* 29.

2 Francis Bacon, as quoted by Miles R *The women's history of the world* (New York 1988) 225.



Because the justificatory theories of property had been based on natural law, the demise of natural law also meant the end of the debate on *justification*. Once property is based on the rights of the autonomous subject, it needs no further justification. The rise of *individualism* thus gave rise to *subjectivism* in property law. This development was only possible once natural law had been rejected and this only became possible in the modern era. Thus the rejection of natural law and feudalism made individualism possible and this could only occur in the modern world.

In the second place it has become clear that, although there are obvious differences, there are also striking similarities between the civil-law and common-law approaches to property. Of these the most obvious is the strong aversion to feudalism that marks these legal systems. Underlying this obvious similarity, is the fact that the developments in the legal systems that were studied were naturally the result of the same philosophical *Zeitgeist*. Because these systems were influenced by the same philosophical, political and economic ideas, it comes as no surprise that they have a lot in common. An example of this is the scientification of law. Based on the successes of the natural sciences and under the influence of early positivism, this effort to make law (as with all humanities) more like the natural sciences led to the rise of conceptualism in law. This development can be found in the work of such diverse figures as Grotius, Windscheid, Langdell, Hohfeld, and, to a lesser extent, Blackstone and Bentham. This conceptualism is the single most important factor in the view of property as the paradigm right in the hierarchy of rights.

## 7.2 The alternative storylines

It has become clear that, in Western, liberal thinking, property is mostly portrayed as a neutral or abstract concept that has remained essentially the same throughout history and which is not influenced by political, social, economic or ideological ideas and practices. This concept is *the* concept of property that, when applied formally, will have equitable results. Thus

property is property is property, and has always been that. To strengthen this view, the history of property is represented as either a struggle of an essentially unchanging concept to free itself from exterior constraints (such as feudalism) or as the unfolding of essentially the same concept that just revealed its liberal nature progressively in the course of history. Either way, the result is the abstract, neutral view of property as the perfect sphere of freedom, non-interference and privacy. In this way property is linked to liberty as a necessary prerequisite. Property therefore embodies cherished human values. But, it is only the scientific, technocratic, private-law view of private property that embodies these values, and, in this way, the public/private split so vital to liberalism is also maintained.

"Property is, in this vision, something 'apart' from social forces and collective power. It is self-evident, self-executing, and self-justifying."<sup>3</sup>

Of course this view did not fall from the sky. In particular the renaissance, reformation and (political and scientific) revolutions of the sixteenth to eighteenth century paved the way for the conceptualism, individualism and exclusivity that eventually shaped the property concept. The picture presented by the traditional history paints a rosy picture. This period of history is represented as the emergence from the "dark" middle ages, the attainment of freedom in every way, the movement from status to contract, from feudalism to capitalism, from stagnation to progression. And in this movement property played a central role as both medium and goal. Closure is achieved through the codification and constitutional protection of this property concept.<sup>4</sup>

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3 Underkuffler-Freund LS "Takings and the nature of property" 1996 Can J LJ 161-205 201.

4 This will be dealt with in the next section.

Of course this way of looking at property is only half the picture. What it represents is basically a male, bourgeois story and as such it is also basically incomplete. The purpose of this chapter is to attempt to make this picture more complete. It will, therefore, concentrate on the alternative storylines that indicate the consequences of conceptualism.

### 7.2.1 History and herstory

"The key to understanding women's history is in accepting - painful though it may be - that it is the history of the majority of the human race."<sup>5</sup>

Apart from the fact that the history presented in the previous chapters indicates that the property concept is a fundamentally modern one, this history is also a fundamentally masculinist one. In a very literal way, it is his-story. The masculinist story is one in which nature is increasingly subjected to the will and control of men by rational methodology. This is made possible by the increasing freedom provided by private property.<sup>6</sup> The property concept is represented as neutral, abstract and inherently just and this tends to blind one to the patriarchal foreground. A history that concentrates on women's experience, however, paints a picture that is in stark contrast to the one set out previously.

The alternative storyline set out below will concentrate on two aspects. In the first place it will provide her-stories that indicate the different background narratives against which property needs to be understood. In the second place a more theoretical question needs to be raised. This deals not with the history, but with the feminist reaction to and modification of the property concept itself.

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<sup>5</sup> Lerner G, as quoted by Miles *Women's history* 1.

<sup>6</sup> Of course, this story starts much earlier than the modern period. The voluntarist definitions, scientific method and natural law assumptions about man and nature underpin this story.

### 7.2.1.1 Her-stories

When providing alternatives for male history, feminist historians are at pains to indicate that her-story can never be just one story. There are different stories to be told, simply because there is no "generic woman", nor any monolithic "woman's point of view".<sup>7</sup> Therefore this story needs to be read in conjunction with the other equality stories told below. What follows is then an alternative to the rosy picture of the liberal Enlightenment era presented above.

The reformation that is presented as the achievement of freedom from roman catholicism in the case of women only meant a re-formation of patriarchy. For instance, the witch-hunts of the medieval period continued unabated. Zealous catholic torturers were replaced by equally zealous protestant torturers. Even the textbook (the *Malleus Maleficarum*) remained the same.<sup>8</sup> Conservative estimates are that about 9 million women died in these witch-hunts. That this was not a mere chance happening is illustrated by the militarism and hatred of women that was part and parcel of protestant language and metaphor.

This period is also represented as a renaissance of learning and culture, but, in the case of women, it was a re-birth of an even more oppressive patriarchy. The nunneries that had provided the only opportunity for learning to women were closed due to the rise of protestantism. At the same time universities and professions remained reserved for men. Moreover, medical knowledge that had been passed from mother to daughter since time immemorial was lost because these women were accused of witchcraft and inevitably killed.

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7 Elam D *Feminism and deconstruction - Ms en Abyme* (London 1994) 37ff; Rhode DL "The politics of paradigms: gender difference and gender disadvantage" in Bock G and James S (ed) *Beyond equality and difference* (London 1992) 149-163 158.

8 *Daily Gyn/ecology* 185: "Thus also protestants, though bitterly opposed to catholicism, vied with and even may have surpassed their catholic counterparts in their fanaticism and cruelty during the witchcraze. Typically, each used the orthodoxy of the other to entrap women under the witch label."

The political revolutions, too, turned out to be fraud on women. Women had been active in all these revolutions, only to discover that *liberté* and *égalité* were inextricably and literally tied to *fraternité* in a literal sense. The political discourses of Grotius, Kant, Locke and Windscheid " ... were not meant to include women, and their coherence depend(ed) partially on (women's) continuing exclusion".<sup>9</sup> It was, therefore, a re-volution of a male view of public life.

On a larger scale the subjection of women seemed to be a logical part of the project of the Enlightenment, precisely because women were associated with nature.<sup>10</sup> If nature was to be subjected to man's control, that subjection had to apply to women as well. Consequently, while for men this is a narrative of freedom, for women it is a narrative of subjection. Men had property and could acquire freedom. Women were denied property and thus had no freedom. That is why the male pronoun has been used throughout this study so far, for when writers speak of owners as *he* it is not meant generically. It is meant to indicate men as owners and women as property. Therefore it should also come as no surprise that the end of female control over resources and the beginning of the idea of *man the owner* coincided with the rise of patriarchy and monotheistic religions.<sup>11</sup>

The net result of this was the birth of the idea of *man the owner/master*. Men became owners and holders of everything, including women and children, so that, by the eighteenth century women could but rarely be owners.<sup>12</sup> The industrial revolution only confirmed this state of affairs, and Blackstone was able to proclaim: "By marriage, the husband and wife are one person in law:

9 Flax J "Beyond equality: gender justice and difference" in Bock G and James S (ed) **Beyond equality and difference** (London 1992) 193-210 195.

10 See Miles **Women's history** 192 on the manipulation of this perception in the early sciences of craniology and psychology.

11 See Miles **Women's history** 48.

12 Consequently, property was held by either the father or the husband - see Miles **Women's history** 88, 122. See also Watkins SA, Rueda M and Rodriguez M **Feminism for beginners** (Cambridge 1992) 41, 56.

that is, the very being or legal existence of the woman is suspended during the marriage."<sup>13</sup> This meant that when women got married (the only "profession" open to them apart from prostitution) their property was transferred to their husbands who had complete control over its disposition. In the so-called "new world" too the granting of land to single women was prohibited and women who became owners of land through inheritance, had to marry within seven years or forfeit the land.<sup>14</sup> Philosophically speaking the idea of women as owners did not make sense. A prerequisite for ownership was ownership of the self, and, since women did not own their own bodies, they could not become owners through labour.<sup>15</sup>

Since women could also not vote, it is not farfetched to say that they were not only civilly dead, but also publicly dead. As far as the law was concerned, women simply did not exist. Because they rarely owned property, they also had no access to power, freedom and economic wealth. Privately and publicly she had no rights, no freedom, no power. This is the reality of women's lives that is masked by the law and property concept with its pretensions of neutrality and equality.

### 7.2.1.2 The theoretical question

The economic effect of this history of subjection is that, by the end of the twentieth century, women perform 75% of all work, receive 10% of the world's wages and own 1% of all property.<sup>16</sup> The question arises whether this state of affairs is an unfortunate legacy of historical oddities or an implicit part of the property concept.

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13 Blackstone Commentaries I.XV.iii.

14 Miles Women's history 167, 241; Watkins ea Feminism 163.

15 Davidoff "Public and private" 236, 237.

16 See Leghorn L and Parker K Woman's worth: sexual economics and the world of women (Boston Mass 1981). See also Miles Women's history 241; Watkins ea Feminism 163.

In the first place it must be emphasised that, as the historical study has shown, there are no neutral theories or concept. In the same way as the property concept is not economically or politically neutral, it can be shown that it is not sexually neutral either.<sup>17</sup> In fact, some of the most central tenets of the property concept are masculinist and therefore imply discrimination. A few examples will be discussed here.

In the first place the rise of individualism led to the appearance of dichotomies in the new legal science. The construction of the morally autonomous individual subject required the simultaneous construction of "the other". This basic dichotomy (self/other) served as the basis for others, such as subject/object, man/woman, and public/private. These all have an element of power, since the first element is always privileged over the second. This kind of hierarchical thinking is also apparent in the property concept that operates with dichotomies like real right/personal right, ownership/limited real right, private ownership/public property. Once again the first is privileged over the second. Seen from this perspective, the property concept is a reflection of the power structures in society.

In the second place the property concept serves to keep the power imbalances in place through its emphasis on exclusivity. Minow has proven that exclusion nearly always indicates discrimination.<sup>18</sup> The notion that a right to exclude is central raises, for Radin too, a " ... disquieting inference about discrimination ... "<sup>19</sup> This hostility toward exclusion may also have a psychological basis in the female development of attachment.<sup>20</sup> In the third place property as a right within rights talk (or a rights-based language) is

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17 Gilligan C *In a different voice: psychological theory and women's development* (Cambridge Mass 1982) 6: " ... theories formerly considered to be sexually neutral in their scientific objectivity are found instead to reflect a consistent observational and evaluative bias."

18 See Minow *Making all the difference* 146ff.

19 Radin MJ "The consequences of conceptualism" 1986 U Miami LR 239-244 241.

20 Gilligan *In a different voice* 8: "Since masculinity is defined through separation while femininity is defined through attachment, male gender identity is threatened by intimacy while female gender identity is threatened by separation."

often seen as a male-created idiolect that is " ... inimical to feminist ambitions."<sup>21</sup> Psychologically speaking, rights talk seems to be typical of male responses to ethical dilemmas in that these dilemmas are recast as a morality of rights based on separation and individuation.<sup>22</sup> Moreover, such rights talk also serves to isolate and disempower the disadvantaged.<sup>23</sup>

There is a temptation at this point to advocate a "feminist" property concept that is, in all respects, the exact opposite of the concept discussed above. If the patriarchal property concept is abstract, individualist and exclusionary, it is assumed that the feminist concept must be concrete, communitarian and inclusive. Many new theories in fact depart from exactly this perspective. However, such an approach is merely a continuation of the accepted dichotomies. There is no rule that states that property must be either inclusive or exclusive - it can be both or neither. One should not, therefore, get caught in a P/~P scheme which limits the imagination. Moreover, just as there is no "generic woman", there is also no single conceptual feminist framework to solve these problems.<sup>24</sup> A feminist approach therefore needs to be open to various theories.

Property is, therefore, a social construct that seeks to reward "men's work" but which, consistently, undervalues "women's work". It is a basically pro-male view of the relationship between individuals and exterior things. It has been consistently changed to accommodate men's notions of what is to be called "property". Hence, slavery was criticised as the unacceptable "property" of people, while very few male jurists had trouble in accepting women as the property of men. It has been shaped by very basic ideas on the nature of male-female relationships.

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21 Hutchinson AC "Part of an essay on power and interpretation (with suggestions on how to make bouillabaisse)" 1985 NYULR 850-886 876ff.

22 Gilligan *In a different voice* 17-19. See 13.4 below for a detailed discussion of this difference.

23 Rose CM "Property as the keystone right?" 1996 Notre Dame LR 329-365 350.

24 Rhode "Politics of paradigms" 149 158.



In essence then, the liberal concept of property could be linked to cherished values of liberty and equality, but only in the case of men. Liberty and equality (like property) were the prerogative of males, and a very specific class of males at that. Even with the removal of barriers to women's participation, very little has changed in respect of property. The liberal concept, with its ideological baggage and abstract pretensions, cannot meet the challenge of this kind of equality.

### 7.2.2 And liberty for all?

One of the oldest dilemmas in the theory of property has been how to justify a free and unlimited property based on control and an absolute right of disposition, without at the same time justifying slavery. This problem of slavery has plagued the debate for many centuries and is still, today, at the heart of many debates.<sup>25</sup>

The idea of slavery has always been slightly distasteful to philosophers. It was sometimes justified as natural (if the man is born into slavery) and sometimes as conventional (as in the case of captives of war).<sup>26</sup> Christianity justified it on the basis of man's sinfulness, so that liberty was only applicable to men before sin.<sup>27</sup> This justification, coupled with Aquinas' Aristotelianism, justified the church's own extensive slaveholding.<sup>28</sup> The Medieval emphasis on the right of disposition, as the characteristic of property, and the view of liberty as a kind of property, resulted in the view that liberty must also be alienable. If property was a natural right (based on alienability)<sup>29</sup> and one had

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25 It must be noted here that these philosophers were worried about the property rights of men and not about the property rights of women in marriage.

26 See Aristotle *Politica* (New York 1943 Tr by B Jowett) 2.3, 5; 1.4-6.

27 See Kelly *History* 106.

28 Kelly *History* 148-149.

29 See 5.2 above on the poverty debate.

property of one's liberty (as a kind of *dominium*), then slavery could also be natural.<sup>30</sup> Liberty could be alienated and this made slavery justifiable.

Of course, this view was not held universally. Several writers denied the naturalness of slavery,<sup>31</sup> while others denied that liberty was a kind of *dominium* and so denied that liberty could be alienated.<sup>32</sup> By the end of the renaissance, slavery had been abolished in most parts of Europe, only to become a problem anew with the colonisation of the Americas and Africa. It was only with the advent of the idea of inalienable rights that the institution of slavery was finally abolished.<sup>33</sup> Still, it could be pointed out that, in a truly conventional definition of property, the objects of property are also determined by the convention. Consequently, there is nothing "natural" that prohibits slavery - it is conventionally determined.

The debate about slavery and property in a paradoxical way illustrates that property is not neutral. If property were truly an abstract concept that was characterised by autonomy, the question of human beings as objects would simply never have arisen. As it was, the rejection of slavery points toward a much more limited view of property. Property was essentially determined by the views on the nature of humanity and of rights in a particular period. It is, and has always been, part and parcel of the political, social, philosophical and economic structure of a society. It must be understood, and will only make sense, as part of that context. This implies that there have always been limitations that were not based on either contract or ballot, but which existed outside the owner's will. It implies that property has always been an inherently limited concept, it was just represented as essentially unlimited.

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30 Tuck *Natural rights* 29.

31 Kelly *History* 194.

32 Notable among these was De Vitoria - see Tuck *Natural rights* 49.

33 Tuck *Natural rights* 53-54, 147.

### 7.2.3 Property and equality

The conflict between property and liberty is not the only one worrying liberalism. The liberal concept of property also has to deal with the conflict between property and equality. This has already been indicated in the discussion on property and feminism. But there is an even more fundamental, conceptual difficulty. There are many views as to what would constitute a liberal concept of property,<sup>34</sup> but such a concept should, as a minimum, include the basic ideals of liberalism. The basic goal of liberalism is the development of individual capabilities on the basis of equality. To achieve this the individual needs a sphere that is guaranteed to be free from state intervention. Private property is the institution that guarantees this state-free zone.<sup>35</sup> Therefore, private property provides the freedom for individuals to develop on a basis of equality without state intervention.<sup>36</sup>

The problem with the link between property and equality is that, if property is not equally distributed, some will lack this prerequisite for freedom either completely or in part.<sup>37</sup> The dilemma for liberals is therefore to either justify the unequal distribution of property or accept government intervention to distribute property equally. Both alternatives are equally in conflict with the fundamental ideas of liberalism.<sup>38</sup> In this regard then the liberal concept of property, as enshrined in the constitutions of most liberal democracies, is a conceptually contradictory view. It is only comprehensible within the value structure of contemporary liberalism that elevates property above both liberty and equality.

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34 See, for instance, Nozick R *Anarchy, state and utopia* (Oxford 1974) 172 and Nock CJ "Equal freedom and unequal property: a critique of Nozick's libertarian case" 1992 *Can J Pol S* 677-695 677-680.

35 See Gill 1983 *J of Pol* 675 678; Van der Walt 1992 *SAJHR* 431 447.

36 See Levy 1983 *Rev of Pol* 576 577; Underkuffler 1990 *Yale LJ* 127 139; Reich 1964 *Yale LJ* 733 733.

37 Waldron *Private property* 412 states: "Freedom requires private property, and freedom for all requires private property for all. Nothing less will do."

38 See Gill 1983 *J of Pol* 675 676-678.

Moreover, as Flax has pointed out, "(e)quality seems to require some uniform way to answer the question, equal in regard to what?"<sup>39</sup> If all were to be placed in a position equal to that of a white male, that would reinforce this position as the "normal" one. In a word, it would ensure that this be the standard for property and would stabilise the conceptual dichotomies.<sup>40</sup>

### 7.3 A conclusion midway

The purpose of this section was to attempt to destabilise a number of assumptions about the history of property. In the course of this investigation it has become apparent that property has always meant exactly what a certain group at a certain point in time decided it should mean - nothing more and nothing less. Consequently, property is not always property. There is nothing eternal about private property and certainly not about the liberal idea of property so prevalent in the late twentieth century. While it is true that human beings have always appropriated things for their own or their group's use, this should not be taken to mean that private property is a natural attribute or characteristic of humanity. That would be, as Simone de Beauvoir said, "... to equate significance with necessity."<sup>41</sup> Private property is a human, societal construct. It has been used and abused to order human society on the basis of widely divergent views on its origin, justification and importance.

It has, moreover, also been shown that the formalist application of the private-law property concept does not necessarily guarantee either equality or liberty. In fact, the very concept itself may make equality and liberty unattainable goals. This inevitably leads to the question whether the constitutional protection of property can make these goals attainable. That will be the focus of the next section of this study.

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39 Flax "Beyond equality" 193 194.

40 Rhode "Politics of paradigms" 149 155.

41 De Beauvoir S *The second sex* (London 1953 Tr HM Parshley) 38. This was her reaction to Hegel's view on the relationship between male and female.



## PART II: CONSTITUTIONAL PERSPECTIVE

### CHAPTER 8: INTRODUCTION

"Relying on early nineteenth century ideas to tackle and resolve late twentieth century problems, is like trying to repair a computer with a hammer and chisel: it will do much more harm than good."<sup>1</sup>

#### 8.1 The problem restated

In part I of this study, the historical development of the private-law property concept was examined. Although property is often represented as an unchanging, abstract and, above all, private right, the study proved that this was a typically modern idea. The modern idea was that property was an abstract concept, which could not therefore be influenced by social factors.

The historical study also showed that property is not, nor has it ever been, a static, neutral or abstract concept. In fact, it has always been profoundly influenced by social, philosophical and political factors.<sup>2</sup> The history of the property concept is one of a constantly shifting concept determined by its context. However, this notion never found acceptance in private law, because it is dominated by the modernist idea of abstract and absolute property rights.

Whatever its historic roots, however, it was the modern private-law concept of property (as neutral, abstract and private) that was incorporated into the French *Déclaration des droits de l'homme et du citoyen* (1789) and American constitution of 1787. These constitutions became the paradigm, at least conceptually, for most twentieth century constitutions.

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1 Hutchinson AC and Petter A "Private rights/public wrongs: the liberal lie of the Charter" 1988 U Toronto LJ 278-296 289.

2 Philbrick 1938 U Penn LR 691 696.

The result of this was that the private-law concept of property became part of twentieth-century constitutional theory and practice. In the constitutional context the private-law property concept is accepted as a necessary part of and precondition for liberalism. Therefore the private-law property concept is transformed into a liberal property concept.

The liberal property concept is based on three theses. The first is the justificatory thesis, that states that the concept is justified by and based on the essential nature and needs of the individual. Thus property is an individual (or private) right. This is the constitutional restatement of the idea of individuality in the private-law property concept. The second is the systematic thesis, namely that property is a right, and more specifically an abstract right. Once again this is a restatement of the idea of abstractness in the private-law concept. The third is the political thesis, namely that the state creates and enforces individual property rights.<sup>3</sup> Especially in the case of the third thesis, the underlying assumption is that a pre-political boundary exists between the collective (the state) and the individual, which boundary needs to be defended and patrolled by means of the law. In constitutional terms, this translates into the idea that a constitution polices the boundary between state and individual.<sup>4</sup> To a large extent, the property concept determines where that boundary should be drawn.

This liberal property concept also implies a liberal political theory, namely that of the minimum state.<sup>5</sup> Because the individual needs a protected, pre-political sphere to attain true liberty,<sup>6</sup> the state should interfere as little as possible in this sphere. In this night-watchman state, any intervention by the state is regarded as temporary and exceptional. Property serves to maintain this

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3 See Longo JP "The concept of property and the concept of compensation on compulsory acquisition of land" 1983 U *Tasmania* LR 279-294 289.

4 Hutchinson and Petter 1988 U *Toronto* LJ 278 284.

5 Most recently defended by Nozick *Anarchy, state and utopia*, but already present in the theories of Locke, Blackstone, Bentham, Hume and Langdell.

6 See Gill 1983 *J of Pol* 675 679; Van der Walt 1992 *SAJHR* 431 447.

state-free sphere.<sup>7</sup> Thus the liberal concept of property and liberal political theory are inter-dependent.

This liberal concept, both of the state and of property, was incorporated into some constitutions. Others used the liberal property concept but within the context of a socialist political theory. Whatever the case the subsequent conflict over property provides insight into how the conflict between state and individual in general is viewed and resolved. Moreover, in the second half of the twentieth century, many of the liberalist ideas and values are no longer appropriate. State intervention into what used to be regarded as "private" matters, is no longer merely tolerated as exceptional, but is regarded as a necessary precondition for justice and equality. It is against this background that the constitutional property concept needs to be evaluated.

When confronted by a constitutional property clause, judges seem to have two alternatives. On the one hand they can regard the property concept in the constitution as basically the same as the one found in private law. In other words, what the constitution protects as property is exactly the same as that protected by private law. This approach means that the private-law paradigm is used for constitutional analysis. Apart from the fact that this enhances the position of the private-law paradigm in law generally, it, more importantly, disguises the political assumptions imbedded in that paradigm. On the other hand, courts can acknowledge that something called constitutional property exists side-by-side with private property. The problem with this approach is that, if a constitutional property concept is acknowledged, the traditional elements/characteristics of private property cannot necessarily be attributed to it. If this constitutional property concept is not the same as the abstract, seemingly a-political private property concept,

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7 Levy 1983 *Rev of Pol* 576 577: "Property as a defined sphere of private right has been understood in all varieties of liberal thinking as a barrier to state power and as a secure realm for individual human actions and freedom." See also Underkuffler 1990 *Yale LJ* 127 139; Reich 1964 *Yale LJ* 733 733.



what then is its content? How is constitutional property to be defined? What kinds of rights will be included therein? And, above all, can the court maintain its stance of being a-political if the private-property paradigm is abandoned? Of course, this kind of differentiation, on another level, also exacerbates the private/public split.

The courts are therefore confronted with something that has a very settled and unquestioned meaning and force in private law, but which they have to deal with/interpret/apply in a different, constitutional context. This not only confronts them with the two choices outlined above, but also goes to the heart of liberal political theory. Thus, for instance, the American court in *Lochner v New York*<sup>8</sup> opted for the traditional private-law concept in settling a labour dispute, based on a political choice in favour of the minimum state. On the other hand, the German court, in the *Warenzeichen* case,<sup>9</sup> decided that the constitutional property concept needed to be determined by the constitution itself, based on a political choice that moved away from *laissez-faire* liberalism. In a post-modern setting, judges need to make these kinds of decisions in the context of the post-modern state in their judgements about the property clause. The irony is that the liberal property clause is based on nineteenth-century liberalism and judges need to deal with that clause within a constitutional context quite different from the nineteenth-century one.

Some analyses of the constitutional property concept tend to focus on the relevant section of the constitution in terms of certain categories. Attention is given to the various clauses making up the property clause and the case law dealing with this.<sup>10</sup> In this way the type of problems that all or most systems need to deal with, are highlighted. Typically, the focus has been on the difference between expropriation/takings and regulation/police powers and on

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8 *Lochner v New York* 198 US 45 (1905).

9 *BVerfGE* 51, 193 [1979].

10 See, for example, Van der Walt AJ "Comparative notes on the constitutional protection of property rights" 1993 R & K 263-297.

the question of compensation. This study will not deal with these questions, at least not directly or exhaustively. The focus will be on the property concept, and the impact, if any, of a constitution on this concept. This particular focus does not, however, mean that the other questions can be ignored. In particular, the question of how "public purpose" is to be understood and how compensation is to be calculated may provide important clues to the content of the concept.<sup>11</sup> It might, for instance, indicate whether property is regarded as absolute or as essentially limited. What would constitute "public purpose" would normally indicate the accepted level of interference by the state in private property. In this way all the various issues are inter-connected.

The focus of this study furthermore assumes that the debate on property and the property clause takes place against the background of, and is determined by, a much larger debate. This larger debate is about the issues that every constitution needs to address and tries to resolve, namely the conflicts between democracy and judicial review; between interference and protection; between individual and state; and, ultimately, between freedom and equality.

To a very large degree the property concept accepted in a particular system is indicative of the resolution that system accepts for these conflicts. In this regard the property concept may be both example and paradigm/model. For this reason the political and constitutional backgrounds against which the property concept functions, need to be studied.

## 8.2 Comparing notes

There is a tendency among interpreters of constitutions, especially in the case of fairly young constitutions, to be reluctant to use and even to be wary of foreign case law. This is also true in the case of the interpretation of a

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11 It is exactly this connection indicated by Longo 1983 U Tasmania LR 279-294.

property clause and perhaps even more so.<sup>12</sup> This reluctance is justified as an attempt to develop the law within the unique, organic system of law of that particular community. Of course this justification may well signify nothing more than a genuine need to be responsive to the needs of a specific people. It might, however, also indicate methodological and structural underpinnings that pre-determine answers.

In particular, remnants of eighteenth century idealism might account for a preoccupation with what is perceived as national, "organic" and unique issues. The belief in the structural integrity and self-sufficiency of a legal system (derived from nineteenth-century rationalism and pandectism) tends to strengthen this. Combined, they tend to make comparative analysis not only unnecessary, but also almost sacrilegious. If, therefore, the pandectist view of law is maintained, comparative case law will be regarded as (possibly) interesting, but rarely convincing. This problem is aggravated by an insistence on the fundamental difference between common-law and civil-law systems. There are three reasons for not following this approach.

In the first place, as was the case with the private/public split so typical of liberalism, this type of approach tends to make one think in terms of us/them (or P/~P). In this way the inter-connectedness and inter-dependence of not only people,<sup>13</sup> but also legal systems, are denied.<sup>14</sup> The recognition of fundamental rights as more or less universal seems to indicate a need for a less particularised approach. This is not meant to indicate that fundamental rights are natural or derived from natural law, but to indicate the impossibility of a legal system existing in "splendid isolation". Thus, neglecting comparative analysis seems like trying to reinvent the wheel with plenty of

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12 In particular, there seems to be almost a knee-jerk reaction to anything American, while most acknowledge the American Bill of Rights as foundational to their own.

13 Hutchinson and Petter 1988 U Toronto LJ 278 296.

14 See, for instance, chapter 7 on the surprising similarities between disparate systems of law.

very nice wheels lying around. On the other hand it could also indicate a number of square wheels that don't work and therefore shouldn't be copied.

In the second place comparative analysis has, traditionally, been limited to comparable legal systems. This would mean that a civil-law system can only be compared to other civil-law systems and the same would be true (*mutatis mutandis*) for common-law systems. In this case, however, such an approach will be impoverishing for two reasons. In the first place, courts seem to find connections between different legal families almost despite their reluctance to do so. For example, in both the *Davies-case*<sup>15</sup> and the *Kameshwar Singh-case*,<sup>16</sup> the Zimbabwean and Indian courts respectively held that the doctrine of *eminent domain* is derived from Grotius. In this way the doctrine, which is characterised in the *Davies-case* as American,<sup>17</sup> becomes acceptable to roman-dutch law. These kinds of correspondences should not be regarded as unusual given the communality of the medieval *ius commune*. In the second place the problems that countries face in the twentieth century, and especially developing countries, seem remarkably similar. Problems like land reform, environmental conservation and development are global problems. It would be shortsighted to ignore the experiences of other systems, even if they appear to differ fundamentally from the own.

In the third place, a reluctance to use comparative analysis or an emphasis on comparable systems might hide the universality/pervasiveness of certain problems. When Virginia Woolf wrote: "As a woman, I have no country", this was what she meant. Discrimination (or unequal distribution of resources) on whatever grounds, might be described as simply a national problem due to particular, national circumstances or cultures.

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15 *Davies and others v The Minister of Land, Agriculture and Water Development* 1995 1 BCLR 83 (Z) 87H-J, 88A.

16 *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 271.

17 *Davies and others v The Minister of Land, Agriculture and Water Development* 1995 1 BCLR 83 (Z) 85G-J.

It assumes a different meaning when it is revealed as a global problem. It confronts courts with the pervasive nature of inequality and discrimination. It is for that reason that property also needs to be studied in the context of colonialism, capitalism and chauvinism. For these reasons then, comparative constitutional analysis should have a broader base than would ordinarily be the case.<sup>18</sup>

### 8.3 A question of method

There are various ways in which the relevant case law may be studied and analysed. Traditional analyses of the property concept do so within a private-law paradigm.<sup>19</sup> This means that the property concept is described in terms of the (traditional) entitlements of the owner, whether in roman-dutch or anglo-american terminology. While this approach has its obvious advantages (not the least of which is accessibility and clarity), it also has certain drawbacks. In the first place it tends to perpetuate the private/public dichotomy with the emphasis on the protection of private, individual rights and the entitlements of the private, individual owner. This tends to ignore or obscure the social context and political considerations. In the second place it tends to categorise case law in terms of pre-conceived categories. The very real role that the particular facts and the circumstances play tend to be left unaccounted for. Moreover, certain considerations are never taken into account, simply because they do not make it to court, or, if they do, they are judged against the background of the courts' private-law preference for the conceptualist method.

For these reasons, this study will be contextual. It is envisaged that case law should be seen as multi-coloured, many-faceted and probably flawed pieces

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18 Longo 1983 U Tasmania LR 279 292.

19 See, for instance, Allen T "Commonwealth constitutions and the right not to be deprived of property" 1993 ICLQ 523-552, where the property concept is analysed in terms of traditional private law entitlements.

in the patchwork of law. Because interpretation, whether constitutional or otherwise, is always contextual, the context of the decision can never be ignored.<sup>20</sup> The approach will therefore be to analyse the case law against the background of both the particular legal system within which the judgement is delivered and the specific political theory and socio-economic context that gave rise to the case in the first place. The broader approach alluded to earlier therefore does not mean that the specific context can be ignored. For this reason a brief introduction to each set of case law will be given.

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20 See Cardozo BN *The nature of the judicial process* (New Haven 1949) 171: " ... the chief lawmakers ... may be, and often are, the judges .... Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy."



## CHAPTER 9: AN AMERICAN TALE (OR TWO)

"Our concept of property has shifted; incorporeal rights have become property.

And, finally, 'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations - rights, powers, privileges, immunities."<sup>1</sup>

"Indeed, in the final analysis the Bill of Rights depends upon the existence of property. ... Civil liberties must have a basis in property or bills of rights will not preserve them."<sup>2</sup>

### 9.1 Introduction

In most comparative analyses of property clauses, a definite distinction is made between the situation in the United States of America (the 'classic property clause') and in Canada ('no property clause').<sup>3</sup> It is the purpose of this section to determine whether this perceived difference is not more apparent than real. To be able to achieve this goal, a specific approach becomes necessary. A basic historical background to the developments in American property law has already been provided.<sup>4</sup> In this section the emphasis will be on the property concept used by the various Supreme Courts in America. However, the part on the Canadian situation requires that some historical background be given. For this reason a brief introduction to the Canadian constitutional context is provided.

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1 Horwitz MJ *The transformation of American law 1870-1960: the crisis of legal orthodoxy* (New York 1992) 156, quoting Arthur L Corbin.

2 Reich 1964 *Yale LJ* 733 771.

3 Van der Walt 1993 *R&K* 263 267, 275; Bauman RW "Property rights in the Canadian constitutional context" 1992 *SAJHR* 344-361 355-359.

4 See Part II of this study, in particular 3.4.4; 4.4.2; 5.4.2; 6.



## 9.2 The classic property clause: the United States of America

### 9.2.1 Introduction

The American constitutional property clause is regarded as the "classic" clause for three reasons. In the first place it indicates the popular acceptance of the American property clause as one of the oldest and most effective of its kind. In the second place it refers to the idea that it is the foundation or origin of property clauses in various national and international documents.<sup>5</sup> In the third place it indicates that the American provision is regarded as the exemplary embodiment of the liberal view of private property in a constitution.<sup>6</sup>

The American "property clause" is actually contained in the Fifth<sup>7</sup> and Fourteenth Amendments<sup>8</sup> to the Constitution. These provisions, coupled with the "dual federalism" of commerce clause, provided the basis for the Supreme Court's protection of private property.<sup>9</sup> In this section the history of this protection will be described in terms of a number of phases of historical development. The nineteenth-century development, as the first phase, provided the basis for later developments.<sup>10</sup>

The next phase, popularly known as the *Lochner* period, began in 1897 with the decision in *Allgeyer v Louisiana*,<sup>11</sup> reached its apogee in the famous case of *Lochner v New York*<sup>12</sup> and was finally ended by the *Parrish* case.<sup>13</sup> This

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5 See 10.3; 10.4 below on India, for example.

6 Van der Walt 1993 R&K 267.

7 "No 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."

8 "{N}or shall any State deprive any person of life, liberty, or property, without due process of law, ..."

9 McCann 1987 Pol & Soc 143 146.

10 Tribe LH *American constitutional law* (New York 1978) 434 characterizes this period as the "model of implied limitations".

11 *Allgeyer v Louisiana* 165 US 578 (1897).

12 *Lochner v New York* 198 US 45 (1905).

13 *West Coast Hotel v Parrish* 300 US 397 (1937).

period was characterised by the development of the doctrine of substantive due process. Partly as a result of the critique of the so-called progressives, the *New Deal* era, which was precipitated by the constitutional crisis following President Roosevelt's re-election,<sup>14</sup> was characterised by the court's retreat from its previous position. The next phase was largely a result of the partial acceptance by the courts of the influential article by Charles Reich,<sup>15</sup> and the *new property* era was launched, which was characterised by the recognition by the courts of new kinds of property for the purposes of due process. There are some indications that the present court favours a more conservative approach, but this trend is not yet completely clear.

It has become almost fashionable for commentators to decry the "high level of arbitrariness" in the Supreme Court's decisions on property, especially in the case of so-called takings law.<sup>16</sup> However, it would be a mistake to concentrate on the questions surrounding takings law, since these do not answer the threshold question of what *property* is. As Underkuffler states: "Whatever one's theory of compensation might be, it is apparent that the threshold question - what 'property' is, for constitutional purposes - is most crucial."<sup>17</sup> Therefore the focus of this study will be on the property concept employed by the Court and a deeper analysis of this concept reveals a surprising coherence and lack of ambiguity.

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14 After the Supreme Court had, in the *Lochner* era, invalidated much of the *New Deal* legislation as unconstitutional, the President threatened to "pack" the court. This had the desired effect and resulted in a retreat by the Court from its previous position. See Ely JW *The guardian of every other right - a constitutional history of property rights* (Oxford 1992) 120-127; Beckton CF "The impact on women of entrenchment of property rights in the Canadian Charter of Rights and Freedoms" 1985 *Dalhousie LJ* 288-312.

15 Reich 1964 *Yale LJ* 733-767.

16 See Chaskalson M "The problem with property: thoughts on the constitutional protection of property in the United States and the Commonwealth" 1993 *SAJHR* 388-411 395; Ackerman B *Private property and the constitution* (New Haven Conn 1977) 168: "(T)akings law is incoherent, its principles altogether mysterious."

17 Underkuffler-Freund LS "Takings and the nature of property" 1996 *Can JLJ* 161-205 165.

## 9.2.2 The history of constitutional property

### 9.2.2.1 Nineteenth century: implied limitations

The common-law tradition never knew the strict distinction between tangibles and intangibles so familiar to civil-law systems. This was also the case in the United States. In the seventeenth and eighteenth centuries land had been the primary source of wealth and the English system of tenure had been "largely drained of any substance".<sup>18</sup> This led to a basically physicalist definition of property with an emphasis on real property.<sup>19</sup> Even so, and in conformity with the common-law tradition, other forms of wealth were also recognised as property. The most obvious of these were slaves, who were classified as *chattels personal*.<sup>20</sup> Apart from this very thorny issue, however, American courts also protected a wide variety of intangible interests as property. Almost from the start, for instance, intellectual property was protected and even included in the Constitution.<sup>21</sup> Business goodwill was also recognised as property and monopolies were regarded as an infringement on "the property rights of others to engage in business".<sup>22</sup>

A number of decisions of the Supreme Court delivered near the end of the nineteenth century precipitated twentieth-century developments. In the *Slaughterhouse* cases the Court rejected the argument that the creation of a monopoly amounted to a deprivation of a property right to pursue a trade, since limitations were accepted as in the public interest.<sup>23</sup> In the important dissenting judgement of Justice Field, however, the statute was seen as an

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18 Ely *Constitutional history* 12.

19 Horwitz *Transformation* 145. See also Ely *Constitutional history* 25: "The widespread ownership of land made the colonists especially sensitive to any interference with their property. ... Significantly, the cry 'Liberty and Property' became the motto of the revolutionary movement."

20 Ely *Constitutional history* 15.

21 Article II, section 8 of the US Constitution. See also Ely *Constitutional history* 32; Epstein RA "No new property" 1990 *Brooklyn LR* 747-775 753.

22 Ely *Constitutional history* 53-55; Horwitz *Transformation* 154.

23 *Slaughterhouse* cases, 83 US 36 (1873).

invasion of the right to acquire property as this " ... does deprive them of liberty as well as property without due process of law."<sup>24</sup> This was echoed in *Munn v Illinois* where the court refused to regard price regulation as an invasion of property. Since it was " ... devoted to a public use, (it) is subject to public regulation."<sup>25</sup> Once again the court accepted the implied limitations and once again Justice Field dissented and on the same grounds. In *Mugler v Kansas*,<sup>26</sup> the legislation was upheld but the court warned that the purpose behind legislation could be scrutinised. In *Holden v Hardy*<sup>27</sup> the legislation was also upheld and freedom of contract was rejected because the parties had been unequal.

These cases illustrate two points. In the first place the majority judgements accepted that regulation of property for "public use" could and did occur. The minority judgements indicate the beginning of a move toward a more absolute property concept. In the second place the *laissez-faire* attitude was gradually being replaced by a more activist view of the role of the judiciary.

The property concept in this period indicated the changes to come. In the first place indications were already present of the due process requirement that characterised the next period.<sup>28</sup> In the second place a wide variety of intangible, symbolic forms of wealth were increasingly recognised as property. Examples include contracts, credit and money.<sup>29</sup> In fact, property in the late

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24 *Slaughterhouse cases*, 83 US 36, 122 (1873).

25 *Munn v Illinois* 94 US 113 130 (1877).

26 *Mugler v Kansas* 123 US 623 (1887) - brewers challenged prohibition laws as deprivations of property without due process. See also Andersen JL "Takings and expectations: toward a 'broader vision' of property rights" 1989 U Kansas LR 529-562 537.

27 *Holden v Hardy* 169 US 366 (1898) - act stating minimum hours for minors challenged.

28 *Philbrick* 1938 U Penn LR 691 719 states that this was the result of the extreme individualism of Justices Field and Harlan.

29 See *Georgia v Brailsford* 2 Dall 403 (1794); *Calder v Bull* 3 Dall 394 (1798); *Dartmouth College v Woodward* 4 Wheat 518 (1819).

nineteenth century was increasingly defined as everything with exchange value or an investment-backed expectation.<sup>30</sup>

In the third place the dephysicalization also contributed to the conceptualism that characterised the approach of the courts in the nineteenth century. In this regard the influence of Hohfeld cannot be ignored. His conceptualism accelerated the dephysicalization of property, since property was no longer a thing, but a relation between people.<sup>31</sup>

### 9.2.2.2 *Lochner* and the rise of due process

The so-called *Lochner* era actually began in the late nineteenth century. The court adopted the attitude of the dissenting judges in the *Slaughterhouse* cases and in *Munn v Illinois* to "restrain progressive and redistributive social and economic legislation."<sup>32</sup> To achieve this the court required not only procedural due process but also scrutinised the substance of legislation to determine its purpose.<sup>33</sup> In protecting property through the development of the "substantive due process" test, the court provided the paradigm for the protection of all rights concerning the private sphere.<sup>34</sup>

*Lochner v New York*<sup>35</sup> dealt with a statute that prescribed minimum working hours for bakers. This was challenged on the ground that it violated freedom of contract. The court invalidated the act on the basis that the real object had

30 *Powell v Pennsylvania* 127 US 678 (1889). Horwitz *Transformation* 145-146, 151 ascribes this to the decisions in the *Slaughterhouse* and *Minnesota rate* cases: "(T)he very conception of property became infinitely expandable. The result was that during the 1880s and 1890s a variety of new property interests for the first time received recognition by American courts. These property interests were endowed with what, by traditional standards, can only be called extravagantly expanded prerogatives. During this period, American courts came as close as they ever had to saying that one had a property right to an unchanging world."

31 Horwitz *Transformation* 152-156. See also Singer 1982 *Wis LR* 975 986-989 on Hohfeld's system in the context of analytical jurisprudence.

32 Tribe *Constitutional law* 435. See 9.2.2.1 above on these cases.

33 Ely *Constitutional history* 87; Horwitz *Transformation* 147.

34 See Michelman FI "Possession vs distribution in the constitutional idea of property" 1987 *Iowa LR* 1319-1350 on the reasons for this. See also Chaskalson 1993 *SAJHR* 388 402; Philbrick 1938 *U Penn LR* 691 721.

35 *Lochner v New York* 198 US 45 (1905).

been the regulation of labour relations and not safeguarding health.<sup>36</sup> Consequently the statute had exceeded the police powers of the state. The results of this judgement were many and varied. It established the substantive due process test, which meant that courts could and did scrutinise the reasonableness of statutes.<sup>37</sup> In this way it became symbolic of the court's commitment to private rights.<sup>38</sup> However, Sunstein has pointed out that the court's activism was of a very specific kind. It imposed a constitutional requirement of neutrality, that is, preserving the existing distribution of wealth and entitlements "under the baseline of the common law."<sup>39</sup> This meant that constitutional protection was based on what was regarded as property in common law.

"The *Lochner* Court required government neutrality and was sceptical of government 'intervention', it defined both notions in terms of whether the state had threatened to alter the common law distribution of entitlements and wealth, which was taken to be part of nature rather than a legal construct. ... If the *Lochner* era is thought to embody less an active judicial role and more particular conceptions of baseline, neutrality and action, it has not been entirely overruled."<sup>40</sup>

The effect of *Lochner* was that property was increasingly seen as a bundle of more or less absolute common-law rights that was to be accorded the highest protection. Courts used a strict means-ends analysis to invalidate laws that they found " ... violate(d) *natural* rights of property and contract, rights lying at

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36 *Lochner v New York* 198 US 45, 61 (1905).

37 Ely *Constitutional history* 103; Horwitz *Transformation* 161.

38 This was sustained by academic writings on property, such as CG Tieman's work *A treatise on the limitations of police power in the United States* which was published in 1886 and J Lewis' *Treatise on the law of eminent domain in the United States* which appeared in 1888. Both were enormously influential - see Ely *Constitutional history* 87; Horwitz *Transformation* 147.

39 Sunstein CR "Lochner's legacy" 1987 *Col LR* 873-919 875.

40 Sunstein 1987 *Col LR* 873 917-918.

the very core of the *private* domain."<sup>41</sup> Consequently property was increasingly protected against state interference.

A second development occurred with the decision in *Pennsylvania Coal Co v Mahon*.<sup>42</sup> In this case a mining company sold land while contractually reserving the right to undermine the land and placing the risk on the purchaser. Thereafter the state passed an act that prohibited undermining in such a way as to cause collapse of the surface. The mining company alleged that this was a taking without compensation, and the court agreed.<sup>43</sup> This was the start of the court's *takings doctrine*<sup>44</sup> which represented a move towards a multifactor balancing test.<sup>45</sup>

The activist attitude of the court was also developed further. For instance, the court upheld a statute setting maximum work hours for miners on the ground that their contracts were "unilaterally imposed by their employers"<sup>46</sup> and held protective legislation for female employees to be valid because it dealt with the special health needs of women and their dependent status.<sup>47</sup> The trend to recognise "dephysicalized" property also continued. In *Adams v Tanner*<sup>48</sup> the right to engage in a useful business was held to be property and this was confirmed in *New State Ice Co v Leibmann*.<sup>49</sup> This trend toward dephysicalization was encouraged by the view of property as a bundle of rights that, based on market value, tended to regard all vested interests as property. Interestingly, licences were not regarded as property, because they

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41 Tribe **Constitutional law** 439. Emphasis added.

42 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

43 See Ely **Constitutional history** 112.

44 Micheiman 1987 **Iowa LR** 1319 1338.

45 Radin MJ "The liberal conception of property: cross currents in the jurisprudence of takings" 1988 **Col LR** 1667-1696 1672.

46 *Holden v Hardy* 166 US 366, 393, 397 (1897).

47 *Muller v Oregon* 208 US 412 (1908). See also Tribe **Constitutional law** 440. Needless to say, this kind of paternalistic protection also made the employment of women more expensive and consequently limited their options. This increased their dependency and would later spill over from employment to welfare - see Ely **Constitutional history** 105; Rhode "Politics of paradigms" 149 151.

48 *Adams v Tanner* 244 US 590, 37 SCT 662 (1917).

49 *New State Ice Co v Leibmann* 285 US 262, 52 SCT 371 (1932).

were susceptible to unilateral revocation,<sup>50</sup> but war risk insurance policies were contracts (and therefore property) because of the payment of premiums, which meant that they could not be revoked unilaterally.<sup>51</sup>

### 9.2.2.3 The new deal: procedural due process

The *Lochner* period came to an end after the constitutional crisis with the *Parrish* decision in which legislation regarding minimum wages was upheld.<sup>52</sup> The court abandoned the substantive scrutiny of legislation and henceforth required only that a procedural due process test be met. Since legislation was no longer scrutinised in the same way, the question of whether an interest was property or not became the threshold issue.<sup>53</sup> What was regarded as property was increasingly determined by the abstract, dephysicalized concept that was a result of the influence of Hohfeld. Hohfeld's analysis of traditional concepts in law was aimed at destabilising the traditional position of "rights" in the legal system. His abstract view had the effect of radically dephysicalizing the system of property so that property consisted of legal relations, not of physical things.<sup>54</sup>

However, the court refused to regard social-security expectations and the expectation of a leasehold renewal as property.<sup>55</sup> In *Flemming v Nestor*<sup>56</sup> the court refused to hold that the termination of old-age benefits was a taking of

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50 *Taff v Bridgeton Worsted Co* 246 Mass 444, 141 NE 119 (1923).

51 *Lynch v United States* 292 US 571 (1934).

52 *West Coast Hotel Co v Parrish* 300 US 379 399 (1937). This was a challenge to a statute that prescribed minimum wages in which the liberty of contract doctrine was repudiated. This meant the end of economic due process - since 1937 not one statute has been overturned on the basis of due process. See *Ely Constitutional history* 127.

53 *Alexander* 1982 Col LR 1545 1549.

54 *Horwitz Transformation* 156: "Our concept of property has shifted; incorporeal rights have become property. And finally, 'property' has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations - rights, powers, privileges, immunities."

55 *Flemming v Nestor* 363 US 603 (1960); *United States v Petty Motor Co* 327 US 372 (1946).

56 *Flemming v Nestor* 363 US 603 (1960).



property, on the basis that it was not an "accrued property right", because of its "noncontractual" nature.<sup>57</sup> The court did recognise goodwill as property.<sup>58</sup>

In the second place the property concept was influenced by the progressives, who criticised the exclusionary model used by the court. Their contention was that property is power and that to protect it substantially is to deny the unpropertied their democratic rights.<sup>59</sup> The effect of this criticism and the constitutional crisis was a move away from substantive due process that resulted in a situation where personal (or civil) rights and property rights were no longer treated the same by the courts. While interference with civil rights received "searching judicial scrutiny" based on substantive due process, interference with property rights was subject only to a "rationality" test.<sup>60</sup> Consequently, the new constitutional direction was based on a dichotomy between property rights and personal liberties.<sup>61</sup> For instance, in *US v Carolene Products Co*<sup>62</sup> the court upheld a statute prohibiting so-called "filled milk". This was not the important point. What was important was the famous footnote 4 in Justice Stone's decision stating that the presumption of constitutionality had a narrower application if legislation impinged on specific rights in the bill of rights. The result was that a distinction was made between personal rights and economic rights, with economic rights receiving secondary constitutional status. This gave the state latitude to fashion economic policy.

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57 *Fleming v Nestor* 363 US 603 608-609 (1960).

58 *Kimball Laundry Co v United States* 338 US 1 (1948).

59 Michelman 1987 *Iowa LR* 1319 1335, 1336: "The critique's progressivism lies in its insistent focus on the wide distribution of the prime constitutional goods of materially based political competence or independence."

60 McCann 1987 *Pol & Soc* 143 148-149; Ely *Constitutional history* 127.

61 Ely *Constitutional history* 132.

62 *US v Carolene Products Co* 304 US 144 (1938).

#### 9.2.2.4 The new property

Charles Reich's influential article starts out from the basic liberalist contention that property is the guardian of the "troubled boundary" between individual and state.<sup>63</sup> This basic liberalist assumption is maintained throughout the article.<sup>64</sup> However, Reich contends that the rise of the "public interest state" has led to a situation where government acts as a major source of wealth, which takes the place of traditional forms of wealth.<sup>65</sup> These new forms of wealth include income and benefits (derived from, for example, social security, unemployment benefits and veterans benefits), government jobs, occupational licences, franchises, contracts, subsidies, use of public resources and services.<sup>66</sup> The result is that the new forms of wealth create dependence,<sup>67</sup> because they are based on "government largess" and is seen as being subject to the public interest.<sup>68</sup> Consequently, they can be revoked at will.

This results in what Reich called the *new feudalism*:

"Wealth is not 'owned', or 'vested' in the holder. Instead, it is held conditionally, the conditions being ones which seek to ensure the fulfilment of obligations imposed by the state."<sup>69</sup>

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63 Reich 1964 Yale LJ 733 733.

64 Reich 1964 Yale LJ 733 773: "... the basic importance of individual private property" for liberty is recognised.

65 Reich 1964 Yale LJ 733 733. See also Van Alstyne W "Cracks in the 'new property': adjudicative due process in the administrative state" 1977 Cornell LR 445-498 453.

66 Reich 1964 Yale LJ 733 734-736.

67 Reich 1964 Yale LJ 733 738: "... today more and more of our wealth takes the form of rights or status rather than of tangible goods."

68 Reich 1964 Yale LJ 733 745.

69 Reich 1964 Yale LJ 733 768-768.

Thus the *new feudalism* represents the triumph of society over private property and puts pressure on the protection of constitutional rights. Largess is doing the work of private property, but it is not as well protected as property. Consequently, Reich thinks that the problem will only be solved if a *new property* is created.<sup>70</sup> If these new forms of wealth could be protected as well as traditional property, that would create independence and thus liberty. This represents a move away from the old liberal private-property concept based on personality toward a new concept based on status.

Reich's contention that state benefits are the new form of wealth and therefore ought to be protected as property was widely influential. Due to this influence, the courts, in the course of the 70's and 80's, continued the trend to recognise more and more intangible interests as property.<sup>71</sup>

"In sum, the 'new property' doctrine extends due process protections to intangible property; however, it must be established that a property interest exists in order for such protection to be applied."<sup>72</sup>

The courts therefore needed, first of all, to address the threshold question of whether an interest should be classified as property or nonproperty.<sup>73</sup> In this process a wide variety of interests were recognised as property. As early as 1969 wages were held to be property,<sup>74</sup> and in 1970 the decision in *Goldberg v Kelly* held that welfare benefits were property, and that a termination of such

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70 Reich 1964 *Yale LJ* 733 787: "We must create a new property." This new property can be briefly described as *status*. See Van Alstyne 1977 *Cornell LR* 445 454.

71 The influence of Reich is apparent in the court's extensive quotation from his article in *Goldberg v Kelly* 397 US 254 (1970). See also Alexander 1982 *Col LR* 1545 1545.

72 Davis S "Federalism and property rights: an examination of Justice Rehnquist's legal positivism" 1986 *W Pol Q* 250-264 256.

73 The term 'nonproperty' is derived from Alexander 1982 *Col LR* 1545 1570.

74 *Sniedach v Family Finance Corp* 395 US 337 342 (1969): "The 'property' of which petitioner has been deprived is the use of the garnished portion of her wages ..."

benefits without a prior hearing violated due process.<sup>75</sup> However, it did not amount to a taking.<sup>76</sup> Thereafter a wide variety of interests were recognised as property,<sup>77</sup> but only for the purpose of due process.<sup>78</sup> In cases dealing with *new property*, it was seldom, if ever, a question of whether there had been a taking.<sup>79</sup> If *new property* was taken, the only question was whether due process had been complied with.

By the early 1980's the court could on the one hand declare that property included "the whole domain of social and economic fact."<sup>80</sup> On the other hand, there were also indications that not all economic interests were regarded as property. In three cases the court refused to regard employment (both private employment and employment as civil servants) as a form of *new property* for the purpose of both due process and takings.<sup>81</sup> Some writers attribute this to a conservative backlash, and it does tend to substantiate the claim that the Supreme Court decisions were arbitrary.

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75 *Goldberg v Kelly* 397 US 254 (1970).

76 See Ely *Constitutional history* 150.

77 *Bell v Burson* 402 US 535 (1970) - driver's license; *Morrissey v Brewer* 408 US 471 (1972) - conditional freedom following parole; *Perry v Sinderman* 408 US 593 (1972) - teacher's continued employment; *Wolff v McDonnell* 418 US 539 (1974) - "good time" credits of prisoner; *Goss v Lopez* 419 US 565 (1975) - high school education; *Mathews v Eldridge* 424 US 319 (1976) - medical benefits; *Memphis Light, Gas and Water v Craft* 436 US 1 (1977) - continued service by a public utility; *Barry v Barchi* 443 US 55 (1979) - horse trainer's license.

78 See Van Alstyne 1977 *Cornell LR* 445 457.

79 Andersen 1989 *U Kansas LR* 529 549.

80 *Logan v Zimmerman Brush Co* 455 US 422 (1981).

81 In *Board of Regents v Roth* 408 US 564 (1972) the non-renewal of the defendant's contract to teach was held not to be a taking based on a distinction between status and property. In *Arnett v Kennedy* 416 US 134 (1974) the employment of a nonprobationary civil servant was terminated, based on the fact that if property was vested in him, it was contingent and extremely limited. In *Bishop v Wood* 426 US 341 (1976) the termination of the employment of a police officer was also not regarded as property because he held it at the pleasure of the city manager. See Van Alstyne 1977 *Cornell LR* 445 457-469 for an analysis of these cases.

### 9.2.2.5 The rise of *takings*

The "cracks in the *new property*"<sup>82</sup> began to appear in the early seventies. Whereas the previous era had focused on due process, this period saw the emergence of the importance of the takings doctrine. Already in *Lynch v Household Finance Corp* the court had re-established the fundamental connection between liberty and property,<sup>83</sup> and the election of Reagan saw the re-emergence of the emphasis on traditional, exclusive property rights.<sup>84</sup> The exclusionary view of property resulted in court decisions that focused on the question whether there had been a *taking* (as a denial of exclusivity) in which case compensation had to be paid. A number of judgements illustrate this.

In *Loretto v Teleprompter Manhattan CATV Corp* a New York law requiring the installation of cable-TV facilities on property was challenged.<sup>85</sup> The court stated that property consisted of possession, use and disposition, but that the power to exclude was central.<sup>86</sup> Although the actual physical intrusion would be minimal, the court held that any "permanent physical occupation" effectively destroys each of the strands in the bundle of rights. Consequently, this constituted a taking for which compensation had to be paid. In *Nollan v California Coastal Commission* the court agreed that the precondition of the Commission, that the owner should grant an easement across his property in exchange for a permit, constituted a taking.<sup>87</sup> The court found that there was no legitimate public interest involved and that the "permanent physical

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82 A term borrowed from Van Alstyne 1977 *Cornell LR* 445.

83 *Lynch v Household Finance Corp* 405 US 538 552 (1972): "... fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

84 Ely *Constitutional history* 143.

85 *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982).

86 *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 435 (1982).

87 *Nollan v California Coastal Commission* 107 US 3141 (1987). However, the minority judgement, delivered by Justice Brennan, found for the defendant on the ground that state law defines property rights and that the right to exclude others from the beach is not a strand in the bundle of rights. See p 3159 of the report.

invasion" made this a taking.<sup>88</sup> In *Kaiser Aetna v US* a private marina was connected to the Pacific Ocean through the dredging of a pond and the removal of a barrier beach. The government regarded this private marina as now subject to public access based on the navigational servitude of the United States. The court regarded this as a taking.<sup>89</sup> Once again the destruction of the right to exclude was emphasised.<sup>90</sup>

On the other hand the court in *Keystone Bituminous Coal Association v DeBenedictis*, in dealing with legislation similar to the one in *Pennsylvania Coal* held that this was a regulation and not a taking.<sup>91</sup> The basis for the decision was that it was a denial of economically viable use and not permanent physical occupation.<sup>92</sup> The restriction placed in building in the case of *Penn Central Transportation Co v New York City* was, similarly, not regarded as a taking, since it only affected economic use and not physical invasion.<sup>93</sup>

The difficult, and interesting, question in this regard is what made the difference in these cases? In general, property is seen as a bundle of rights, but the question is whether the destruction of one of the strands of the bundle constitutes a taking. In none of these cases was the property as a whole taken. There are some cases where the emphasis is placed on the bundle as a totality.<sup>94</sup> In other cases the right to use is regarded as property.<sup>95</sup> In most

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88 The court, in this instance, explicitly followed *Loretto* - see *Nolan v California Coastal Commission* 107 US 3141 3148-3150 (1987). See also Michelman F "Takings" 1988 Col LR 1600-1629 1607.

89 *Kaiser Aetna v US* 444 US 164 (1979).

90 Judgement of Justice Rehnquist - *Kaiser Aetna v US* 444 US 164 179-180 (1979).

91 *Keystone Bituminous Coal Association v DeBenedictis* 107 US 1232 (1987).

92 *Keystone Bituminous Coal Association v DeBenedictis* 107 US 1232 1247 (1987).

93 *Penn Central Transportation Co v New York City* 438 US 104 (1978).

94 *Andrus v Allard* 444 US 51 (1979); *Penn Central Transportation Co v New York City* 438 US 104 (1978).

95 *Dolan v City of Tigard* 114 US 2309 2316-2317 (1994).

cases, however, deprivation of the right to exclude is regarded as the central or core strand in the bundle.<sup>96</sup>

This emphasis on the right to exclude has resulted in "physical invasion" becoming the determining factor in takings law.<sup>97</sup> It is almost always in cases of physical intrusion or occupation, no matter how minuscule, that a taking is said to have occurred.<sup>98</sup> This conceptual severance of exclusion from the bundle of rights<sup>99</sup> indicates a return to the idea of negative liberty and classical liberalism.<sup>100</sup> It also indicates a move away from the prevailing multifactor balancing test in takings law<sup>101</sup> toward takings based on *per se* categories.<sup>102</sup>

A secondary debate in this period concerns the nature and definition of property. Some definitions tend to define property in terms of "standing law". This means that property is that which is created by statute and its limits and destruction are also determined by that same law.<sup>103</sup> Therefore, if the standing law (state or federal legislation or common law) has not been breached, neither is there a constitutional breach. On the other hand, some justices insist that property is not dependent on statute, but must have an

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96 *Hodel v Irving* 107 S Ct 2076 (1987); *Lechmere Inc v NLRB* 112 S Ct 841 (1992). See, in general, Michelman 1988 Col LR 1600-1629; Underkuffler-Freund 1996 Can J LJ 161 165.

97 *Kaiser Aetna v United States* 444 US 164 (1979); *Nollan v California Coastal Commission* 107 S Ct 3141 (1987); *Pruneyard Shopping Centre v Robins* 447 US 74 (1980); *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982).

98 Michelman 1988 Col LR 1600 1604: "Permanent physical occupation by strangers, or by the property of strangers is a taking *per se* ..." See also *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 434-435 (1982); *Keystone Bituminous Coal Association v DeBenedictis* 107 US 1232 1244 n 18 (1987).

99 Radin 1989 Col LR 1667 1677.

100 See Radin 1988 Col LR 1667 1679 on the connection between a liberal view of humanity, a liberal conception of property and the rule of law. See also Singer JW "Re-reading property" 1992 *New England LR* 711-729.

101 *Penn Central Transportation Co v New York City* 438 US 104 (1978). See also Radin 1988 Col LR 1667 1672.

102 Michelman 1988 Col LR 1600 1625; Radin 1988 Col LR 1667 1682.

103 McCann 1987 Pol & Soc 143 167; Van Alstyne 1977 *Cornell LR* 445 463ff; Davis 1986 *W Pol Q* 250 257-258; Michelman FI "Property as a constitutional right" 1981 *Washington and Lee LR* 1097-1114 1099.

essential "nature".<sup>104</sup> This essentialist approach is strengthened by the conceptual severance.

Apart from the rise in takings law, this period has also seen the demise of *new property*. *New property* had been introduced into law in that some welfare benefits were recognised as property for the purpose of due process. However, it should be kept in mind that the due process required was minimal and that any substantive judgement was excluded.<sup>105</sup> Moreover, *new property* was not recognised for the purpose of takings. The new emphasis on takings thus precluded the survival of *new property*.

### 9.2.3 The property concept

There can be little doubt that property is, above all else, a *paradigmatic* right in American law.<sup>106</sup> However, that in itself says very little. It is property of a very specific kind that is regarded as paradigmatic. This kind of property is perceived as a "bundle of rights" but, once again, of a very specific kind. The property concept revolves around questions concerning the nature and origin of property.

Property, in American law, can be regarded as defined by either the constitution itself or with reference to "standing law". The latter approach means that the meaning of property in the constitution is to be determined by either common law or statute. If property is defined by standing law, its

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104 See judgement of Justice Scalia in *Nollan v California Coastal Commission* 107 S Ct 3141 (1987)

105 McCann 1987 Pol & Soc 143 151. Tribe *Constitutional law* 524: "The practical impact of the Court's adoption of a positivist approach to the definition of 'property' in *Bishop v Wood* is that a public employee can count on procedural due process protection only if the law or contract defining the employee's job expressly provides that the employee can be discharged only for cause."

106 Michelman 1987 Iowa LR 1327.



contents and limitations will also be defined in the same way. This is the approach mostly used by the courts,<sup>107</sup> and it has had two consequences.

In the first place the private-law concept of property has been used by constitutional law so that property is viewed as basically private and exclusionary.<sup>108</sup> This emphasis on the exclusive nature of property resulted in the conceptual severance that sees deprivation of exclusive control as a taking. As such the conceptual severance is only concerned with *exclusion*.<sup>109</sup> This is regarded as a continuation of the idea in common law that, if an interest is recognised as property, no one else has the power to intrude on that interest. Thus it is the "total vulnerability to another person's unrestricted discretion to terminate" that prevents certain interests from being recognised as property.<sup>110</sup> The continuation of this idea explains why some kinds of interests were regarded as property and some not.<sup>111</sup> In this view the level of outside control therefore determines whether an interest is property or not.

In the second place the acceptance of the standing-law definition has resulted in what Underkuffler calls the difference between the *apparent model* and the *operative model* in the property concept. The apparent model sees property as a barrier to state power guarding an individual, autonomous sphere. In this model property is primary.<sup>112</sup> Moreover, according to this model, there is a need to *define* individual rights in order for property to have meaning. This concept-based approach has pretensions of abstractness and, in effect,

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107 *Lochner v New York* 198 US 45 (1905); *Arnett v Kennedy* 416 US 134 (1974). See also Sunstein 1987 Col LR 873 875 n 40; Van Alstyne 1977 Cornell LR 464; Michelman 1981 Washington and Lee LR 1097 1099

108 Alexander 1982 Col LR 1545 1585.

109 Radin 1988 Col LR 1678.

110 Alexander 1982 Col LR 1545 1582.

111 For example, in the *Sinderman* case the court found that a contract had existed between employer and employee and that this limited the employer's power to terminate the employment - see *Perry v Sinderman* 408 US 593 (1972). On the other hand, if there is no contract, the employer has an unrestricted power and, consequently, there is no property - see *Board of Regents v Roth* 408 US 564 (1972); *Bishop v Wood* 426 US 341 (1976).

112 Underkuffler-Freund 1996 Can JLL 161 167. This corresponds to what Andersen 1989 U Kansas LR 529 533 calls the *federalist view*.

"freezes" property, so that any change is regarded as a taking.<sup>113</sup> In reality, Underkuffler says, the courts work with an operative model that assumes that all property is " ... not held with the same intensity and are not protected equally."<sup>114</sup> The difference lies in the degree of excludability.

The upshot of this is that claims regarding the arbitrariness of the court's treatment of property is, at least, overstated. Such claims usually find a high level of arbitrariness in the decisions<sup>115</sup> and attribute the *discontinuity* to either the recognition of the *new property*<sup>116</sup> with its attendant dephysicalization of property<sup>117</sup> or the various political influences that motivated various courts.<sup>118</sup> However, the analysis of the property concept shows a remarkable *continuity* in the property concept.<sup>119</sup> Ely<sup>120</sup> and Epstein<sup>121</sup> both indicate the historical continuity between older forms of intangible property and the *new property*. But the deeper continuity has to do with the underlying liberalist property concept with its emphasis on exclusion and individualism. In this way the *new property* represents a way in which liberalism could be perpetuated in a modern welfare or regulatory state.<sup>122</sup> Of course, that was precisely what Reich had intended.<sup>123</sup>

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113 Underkuffler-Freund 1996 *Can JLJ* 161 180.

114 Underkuffler-Freund 1996 *Can JLJ* 161 185.

115 Chaskalson 1993 *SAJHR* 388 395.

116 Davis 1988 *W Pol Q* 250 256.

117 Michelman 1988 *Col LR* 1600 1627; Horwitz *Transformation* 158; Van der Walt 1993 *R&K* 283 267.

118 See eg Davis 1986 *W Pol Q* 250ff on the neo-conservative Rehnquist-court. See also Ely *Constitutional history* 152: "Yet, as throughout its history, the Court was simply moving in conformity with the changing political climate."

119 McCann 1987 *Pol & Soc* 143 147: "(T)his history of judicial action on behalf of private rights reflects a complex doctrinal development less arbitrary, irrational, and inconsistent than sometimes is portrayed ..."

120 Ely *Constitutional history* 141.

121 Epstein 1990 *Brooklyn LR* 747 753-754.

122 Michelman 1987 *Iowa LR* 1319 1331; Radin 1988 *Col LR* 1667 1682-1683; Van Alstyne 1977 *Cornell LR* 445-493; Alexander 1982 *Col LR* 1545 1591, 1598. Of course, that was precisely what Reich intended - see 9.2.2.4 above.

123 See 9.2.2.4 above.

#### 9.2.4 Conclusion

The American tale about the constitutional protection of property is a complex and multi-layered one. The most diverse interpretations have been attached to it. Some see it as a patchwork of mismatched decisions that betray arbitrary and *ad hoc* attitudes. Others see a continuous golden thread (usually called liberalism) that shows a way into and out of the maze. Still others speak in metaphors that indicate growth (or the lack thereof) from substantive to procedural due process, from direct to derivative right, from *thing*-ownership to a bundle of property rights.

However one interprets this history, its influence on other systems is not to be denied. Most constitutions in the world today to some degree derive their inspiration from the American model. This is not without its problems. Along with the ideological baggage of liberalism, importation of the bundle of rights idea means importation of the problems that idea implies, specifically regarding conceptual severance in terms of exclusion. Like American authors and courts, lawyers and courts in other systems will have to struggle with the questions raised here. In particular the questions on the difference, or lack thereof, between private and constitutional property, the problem of conceptual severance regarding exclusion and the liberalist substructure of the constitutional protection of property will have to be addressed.

The two most important aspects of the American development are the shift away from the substantive due process test towards a definitional test and the emphasis on standing law to provide the definition. Because the American constitution does not contain a general limitations clause, a way had to be devised to make it possible to limit rights, and property in particular. The shift away from *Lochner* was an attempt (probably as a result of the influence of the realists) to make limitations on property both possible and justifiable. The substantive due process test had, however, failed and a new test was required. The solution was to use the definition of property as a screening

device. In other words, limitations are justified by excluding the particular entitlement from the definition of property provided by standing law.

### 9.3 No property clause: Canada

#### 9.3.1 Introduction

Canada, before confederation, consisted of a number of territories and colonies mostly under the authority of either the French or the English. The last-mentioned eventually managed to acquire the French areas as well. The basic rule was that civil law remained in force in those provinces ceded by or won from other imperial powers until amended by the new authority. In the rest of the colonies common law prevailed.<sup>124</sup> In most cases, therefore, the English property law formed the basis for Canadian law.<sup>125</sup>

This meant that, before confederation, in both the French and English colonies, the legislative authority regulated the body of legal rules governing relationships between individuals. For this reason the *Constitution Act, 1867* in section 92(13) declared "property and civil rights" to be within the legislative authority of the provinces.<sup>126</sup> The term "property and civil rights" does not, in this context, have the meaning usually associated with it. "Civil rights" refer to what is usually known as private law, that is property, contract and tort and not to civil liberties.<sup>127</sup> Consequently, all legislative authority pertaining to real and personal property fell within the provincial power.<sup>128</sup>

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124 Ziff B *Principles of property law* (Toronto 1993) 43.

125 Alvaro A "Why property rights were excluded from the Canadian Charter of Rights and Freedoms" 1991 *Can J Pol Sc* 309-329 311.

126 Hogg PW *Constitutional law of Canada* (Toronto 1992) 537; Augustine PW "Protection of the right to property under the Canadian Charter of Rights and Freedoms" 1986 *Ottawa LR* 55-81 56; Alvaro 1991 *Can J Pol Sc* 309 313.

127 Hogg *Constitutional law* 540.

128 Hogg *Constitutional law* 561.

Although some exceptions to the rule stated above can be found in section 91,<sup>129</sup> this meant not only that property fell within the legislative prerogative of the provinces, but also that there was no constitutional guarantee of private property.<sup>130</sup>

Both federal and provincial authorities had the power to interfere with these rights, on the basis of the British model of parliamentary sovereignty without a written guarantee of individual rights.<sup>131</sup> The result of this is stated succinctly by Alvaro:

"The only major restriction on legislative activity regarding property was the division of powers. Legislation by one level of government which, in 'pith and substance', encroached upon the jurisdiction of another level of government was ultra vires."<sup>132</sup>

This meant that provinces could and did introduce sweeping and aggressive economic programmes that infringed on property rights, such as social-welfare programmes, the establishment of monopolies through crown corporations and limitations on how much land non-residents could own.<sup>133</sup> Against this background prime minister Diefenbaker introduced a bill of rights for Canada in 1960. Although the bill of rights contained a property clause in section 1(a),<sup>134</sup> this did not have much of an effect. The bill of rights was an ordinary statute of federal parliament that therefore applied only to the federal field. Since property was a provincial matter, it could not be effective. Coupled with a poorly drafted enforcement section, extremely conservative

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129 Hogg *Constitutional law* 539.

130 Augustine 1986 *Ottawa LR* 55 56.

131 Augustine 1986 *Ottawa LR* 55 56.

132 Alvaro 1991 *Can J Pol Sc* 309 315. See also Bauman 1992 *SAJHR* 344 348; Augustine 1986 *Ottawa LR* 55 57.

133 Alvaro 1991 *Can J Pol Sc* 309 316, 319.

134 Section 1(a) "... the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law."

judicial interpretation and the fact that it only applied to individuals, this resulted in an almost completely ineffective clause.<sup>135</sup> Despite its defects, the bill of rights remains in force.

### 9.3.2 The 1982 Constitution

In the late 1970's talks were held in preparation of the drafting of a new constitution for Canada.<sup>136</sup> One of the most controversial questions was whether a right to property should be included in the *Charter of Rights and Freedoms* that would form part of the new constitution.

Since this *Charter* would not be an ordinary statute like the Bill of Rights but, instead, would be part of the supreme law of the land in terms of section 52(1) of the constitution, this placed the whole issue in a different light. There were a number of reasons why the inclusion of a right to property was resisted.<sup>137</sup>

In the first place it was felt that property was sufficiently protected by provincial and federal legislation and the common law. In addition to this there was some controversy over whether property is such a fundamental right as to require constitutional protection.<sup>138</sup> In the second place there was some concern over the range of rights that might be included in the protection afforded property. In the light of the American experience, especially of the development of the substantive due process requirement, it was felt that inclusion of property might result in " ... an excessively wide definition of the term 'property' ... " and that this might result in judicial interventionism.<sup>139</sup>

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135 See Hogg *Constitutional law* 779; Bauman 1992 *SAJHR* 344 349-350; Augustine 1986 *Ottawa LR* 55 62, 65: "The right to property, like the *Canadian Bill of Rights* generally, has been given a conservative, non-interventionist interpretation."

136 For an illuminating history of these talks, and especially Prime Minister Trudeau's role in them, see Alvaro 1991 *Can J Pol Sc* 309 319ff.

137 For some very good examples of this, see Nedelsky *Private property and Nedelsky J* "Should property be constitutionalized? A relational and comparative approach" in Van Maanen GE and Van der Walt AJ (eds) *Property law on the threshold of the 21<sup>st</sup> century* (Antwerp 1997) 417-432.

138 Bauman 1992 *SAJHR* 344 345.

139 Augustine 1986 *Ottawa LR* 55 67. See also Bauman 1992 *SAJHR* 344 345.

However, the resistance of the provinces proved to be the major stumbling block in the inclusion of the property clause. It would mean, in their view, that provincial powers (granted by the previous constitution) would be abridged.<sup>140</sup>

The result of this was that property was not included in the *Charter of Rights and Freedoms*, there was no protection against expropriation and no right to compensation.<sup>141</sup> This was not, however, the end of the controversy. There were several attempts to read a protection of property into other sections of the *Charter*. There was, first of all, an attempt to make the right to property an implicit part of the right to security of the person protected by section 7.<sup>142</sup> In two cases this approach was followed,<sup>143</sup> but this was widely criticised by academics<sup>144</sup> and specifically rejected by the Court of Appeal.<sup>145</sup>

In the second place an attempt was made to find a right to property implicit in the *right to liberty* guaranteed by section 7.<sup>146</sup> No support for this is to be found in the case law, however, and it was later specifically rejected.<sup>147</sup> A third attempt, to use the term "fundamental justice" in section 7 to construct a property clause, has also met with failure. This term was read rather narrowly and it is " ... unlikely that the Canadian judiciary will utilise their expanded right of judicial intervention to provide constitutional protection for ... the right to property ... "<sup>148</sup> A fourth attempt to read a right to property into the *search and seizure* provision in section 8 was not successful either.<sup>149</sup> Because this

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140 Bauman 1992 *SAJHR* 344 345; Alvaro 1991 *Can J Pol Sc* 309 309.

141 Hogg *Constitutional law* 1030.

142 Section 7 reads as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." (My emphasis).

143 See *The Queen v Fisherman's Wharf Limited* [1982] 135 DLR (3d) 307; *Re Estabrooks Pontiac Buick Ltd* 7 CRR 46 (QB).

144 See, eg Brandt GJ "Notes of cases" 1983 *Can BR* 398-406.

145 Augustine 1986 *Ottawa LR* 55 69; Bauman 1992 *SAJHR* 344 353.

146 For full text of section 7, see note 141 above. See also Augustine 1986 *Ottawa LR* 55 69.

147 The court in *Irwin Toy v Quebec* [1989] 1 SCR 927 1003 found that that would be to allow in the back door that which had been denied the front door. See also Augustine 1986 *Ottawa LR* 55 69; Hogg *Constitutional law* 1031.

148 Augustine 1986 *Ottawa LR* 55 76.

149 Section 8 reads: "Everyone has a right to be secure against unreasonable search or seizure." See *Becker v Alberta* 45 AR 37, 7 CRR 232 (QB 1983) in which this was rejected.

section was interpreted as dealing with search and seizure for evidentiary purposes, it does not give rise to a right to property.<sup>150</sup>

Two further attempts to accord property constitutional protection need to be mentioned. Section 26 of the *Charter* provides that rights predating the *Charter* are not abolished or abridged.<sup>151</sup> This does not, however, mean that these rights are "constitutionalized" but simply that they continue to be in force insofar as they are not inconsistent with the *Charter*.<sup>152</sup> This means that the right to property guaranteed by the Bill of Rights continue to be operative, but subject to the limitations imposed by the nature of that document.<sup>153</sup>

In the second place the presumptions of statutory interpretation have been used in property cases. In particular the presumption against interference with property rights and the presumption in favour of compensation have been employed.<sup>154</sup> Of course, these presumptions do not necessarily apply in constitutional interpretation and, in any event, cannot be elevated to the status of constitutional right. Consequently this attempt must also fail.

It is interesting to note the lengths to which the courts were prepared to go to read a right to property into the *Charter*. This attitude is indicative of a certain theoretical basis that will be discussed later. For now, however, the conclusion seems to be that property is not protected either explicitly or implicitly by the constitution.

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150 See Hogg *Constitutional law* 1031; Augustine 1986 *Ottawa LR* 55 76.

151 Section 26 reads: "The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."

152 Augustine 1986 *Ottawa LR* 55 77; Brandt 1983 *Can BR* 398 405.

153 Hogg *Constitutional law* 1031.

154 In *The Queen in Right of British Columbia v Tener et al* [1985] 17 *DLR* (4th) 1 these presumptions, as enunciated in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] *AC* 508 at 542, was relied on. See also Augustine 1986 *Ottawa LR* 55 58; Cohen D and Hutchinson *AC* "Of persons and property: the politics of legal taxonomy" 1990 *Dalhousie LJ* 20-54 32-36.



### 9.3.3 The property concept

Despite the fact that property is not constitutionally protected in Canada, or perhaps because of it, it is still necessary to examine the Canadian property concept. There are two reasons for doing so. In the first place the traditional division between private and public law seems to have become increasingly unstable.<sup>155</sup> This raises important questions as to what rights are to be regarded as property for the purpose of public law. In the second place this will indicate whether or not the *constitutional* protection of property has any effect on the property concept.

The basic point of departure seems to be the traditional view of property as a bundle of rights. This means that property is not a thing, but a right or collection of rights over things enforceable against others.<sup>156</sup> This view is usually based on the analyses of Macpherson,<sup>157</sup> Honoré<sup>158</sup> and Hohfeld.<sup>159</sup> This approach means that not all forms of property share the same characteristics and, for this reason, a right may be property for some purposes but not for others. For example, confidential information is property in private law but not in criminal law.<sup>160</sup>

The question therefore becomes whether there is one stick or strand in the bundle that is essential to ownership. If a test were devised, that would indicate whether a certain issue involves property or not. Although various

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155 Hogg *Constitutional law* 539: "Moreover, the original distinction between private and public law has tended to break down for constitutional purposes, as governments have increasingly intervened to regulate the economic life of the nation."

156 Ziff *Property law* 1; Bauman 1992 *SAJHR* 344 346; Beckett 1985 *Dalhousie LJ* 288 289.

157 Macpherson *CB Property: mainstream and critical positions* (Toronto 1978) 3.

158 Honoré *AM "Ownership"* in Guest AG (ed) *Oxford essays in jurisprudence: first series* (Oxford 1961) 107-147.

159 Hohfeld *WN* "Some fundamental legal conceptions as applied in legal reasoning" 1913 *Yale LJ* 16-59.

160 *R v Stewart* [1988] 50 *DLR* (4th) 1. See also Ziff *Property law* 3 for further examples.

tests have been suggested,<sup>161</sup> none seem to be universally accepted.<sup>162</sup> In general, however, the property concept has expanded.

In the most prominent case on the property concept, the Supreme Court found that goodwill was also property and, consequently, ordered the state to pay compensation for its taking.<sup>163</sup> Interestingly, the right to compensation was based on the presumptions of statutory interpretation mentioned above.<sup>164</sup> This set the trend for more and more abstract rights to be recognised as property.<sup>165</sup> In this way, for instance, university degrees have been recognised as property, at least for the purpose of matrimonial property law,<sup>166</sup> as have pension rights.<sup>167</sup>

The basic assumption has been stated as follows:

"There is no catalogue of what courts regard as property and no indisputably settled core of what must be contained within the bundle to make a right one of property. .... (It) is not a static concept and is in a constant state of flux and realignment."<sup>168</sup>

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161 For example if the right is identifiable, permanent or stable; or if it is binding and transferrable or if it is exclusive.

162 *Ziff Property law* 4-5.

163 *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101, 88 DLR (3d) 462 (1978) at 465-467.

164 See also Augustine 1986 *Ottawa LR* 55 59-60.

165 *Ziff Property law* 29.

166 See *Caratum v Caratum* [1978] 43 DLR (4th) 398 (HC).

167 See *Rutherford v Rutherford* [1981] 23 RFL 337 (BCCA) and *Re Fischer and Fischer* [1983] 31 RFL (2d) 274 (SaskQB).

168 *Ziff Property law* 27.

#### 9.3.4 Alternative tales

There are three alternative storylines that tend to make this part of the American tale less obvious. The first of these storylines is the liberalist/propertarian one, the second is the aboriginal one and the third is the constitutional one.

There can be very little doubt that the *Charter* is, basically, a liberalist document based on the " ... ideal that individuals should be autonomous moral creatures."<sup>169</sup> In this vision the main enemy of freedom is the state and the purpose of the *Charter* is to " ... police the boundary that separates the political and the collective from the pre-political and the individual ... "<sup>170</sup> The basis on which this boundary is drawn is property:

"The implication is obvious: property is the foundation upon which Charter rights are conferred, protected, and enhanced. The less property one has, the less one can exercise and enjoy one's rights."<sup>171</sup>

On this basis picketing was regarded as being outside the scope of *Charter* scrutiny, as it involved common law issues.<sup>172</sup> The court did not regard common law protection of private property and contract as in itself a form of state activity, but preferred to delegate the freedom of expression and of peaceful assembly guaranteed in the *Charter* to a concern secondary to common law rights. In the same way the right to equality was regarded as secondary to a club's common law property rights.<sup>173</sup> These common law rights were also allowed to override legislation in order to provide

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169 Bauman 1992 SAJHR 344 353. See also Alvaro 1991 Can J Pol Sc 309 310.

170 Hutchinson and Petter 1988 U Toronto LJ 278 283-284.

171 Hutchinson and Petter 1988 U Toronto LJ 278 293.

172 *Retail, Wholesale and Department Store Union, Local 580 et al v Dolphin Delivery Ltd* [1986] 2 SCR 573, dealing with the locking out of workers who picketed the company.

173 *Re Blainey and Ontario Hockey Association* [1986] 26 DLR (4th) 728 (OntCA) dealing with the refusal of the OHA to allow a woman to play hockey.

compensation where none had been provided for in the case of real property,<sup>174</sup> but to deny compensation in the case of a tort.<sup>175</sup>

The second alternative tale is a highly ironic and anomalous one involving aboriginal title. Section 35(3) of the *Constitution Act, 1982* provides that land claims agreements with aboriginal people concluded after 1982 is to be treated as "treaty rights" within the meaning of section 35(1). The effect of this is to constitutionalize such an agreement and in this way the rights contained in the agreement becomes constitutional rights.<sup>176</sup> Rights extinguished before 17 April 1982 are not revived by section 35,<sup>177</sup> but new rights created by agreement " ... receive constitutional status ... (and) they are accorded more legal weight than simply legislative or contractual provisions."<sup>178</sup>

Even more surprising, these aboriginal and treaty rights supersede *Charter* rights, because they are not subject to the limitations imposed by section 1 of the *Charter*.<sup>179</sup> This has the unusual result that aboriginal title to land (as contained in the agreement) is constitutionally protected and other private property isn't. Moreover, these rights cannot be limited in terms of the usual grounds, because they are not subject to section 1. However this is to be interpreted, it shows at least that some property rights are constitutionally protected in Canada.

The third alternative tale is one that proves both the inventiveness of the judiciary and the proprietarian bias of the *Charter*. At least one writer is at

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174 *The Queen in Right of British Columbia v Tener et al* [1985] 17 DLR (4th) 1 (SCC) dealing with zoning and mining rights.

175 *Lapierre v Attorney-General of Quebec* [1985] 16 DLR (4th) 554 (SCC) dealing with personal injury as a result of a government inoculation program. See also Hutchinson and Petter 1988 U Toronto LJ 278 32-38.

176 Isaac T "The Nunavut Agreement-in-principle and section 35 of the *Constitution Act, 1982*" 1992 Manitoba LJ 380-405 393-394.

177 *R v Sparrow* 70 DLR (4th) 385.

178 Isaac 1992 Manitoba LJ 390 396.

179 Isaac 1992 Manitoba LJ 390 401.

pains to indicate that, although property is not protected, several of the strands that go to make up the bundle of rights are protected.<sup>180</sup> This allows the right to freedom of expression to be interpreted as the right to use property as one sees fit.<sup>181</sup> This indicates both that property can get in the back door while being denied the front and that the absolute concept of property is still very much part of the Canadian context.

Moreover, the development of the fairness doctrine in Canadian administrative law seems to have strengthened this trend. The courts have stated that a right to property can only be removed by clear statutory language or following a fair hearing.<sup>182</sup> These natural justice and fairness cases often involve government grants or other forms of *new property* and require fairness before a benefit is terminated.<sup>183</sup> In this way the procedural due process required by the *Charter* serves to protect *as property* rights not usually recognised as such.<sup>184</sup>

There is an important difference between the Canadian and American law. While the American constitution contains a property clause, it does not contain a general limitations clause. The Canadian constitution, on the other hand, does have a limitations clause, but no property clause. The Canadian approach to limitations on property would therefore be different from the American one.

Canadian courts have developed a proportionality test regarding limitations. In order for a limitation on a fundamental right to be justifiable, it must

- (a) be designed to achieve the objective in question;

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180 Bauman 1992 SAJHR 344 360.

181 *Big M Drug Mart* [1985] 2 SCR 295.

182 *Cooper v Board of Works for the Wandsworth District* [1863] 14 CB(NS) 180; *Knapman v Board of Health for Saltfleet Township* [1954] 3 DLR 760 (OntHC).

183 *Re Webb and Ontario Housing Corporation* [1978] 93 DLR (3d) 187 (OntCA).

184 *Beckton* 1985 *Dalhousie* LJ 288 302.

- (b) impair the fundamental right as little as possible; and
- (c) lead to a proportionality between the effect and the objectives sought to be achieved.<sup>185</sup>

This approach has been immensely influential in South African constitutional jurisprudence.<sup>186</sup> However, since it differs substantially from the American approach in that it involves issues of fairness and equity, it will also have a different effect if applied to property.

### 9.3.5 Conclusion

The foregoing invites at least two conclusions. In the first place the unqualified statement that property is not protected constitutionally in Canada is, at best, lacking in nuance. Not only are some kinds of property protected constitutionally (as in the case of aboriginal title), but different strands of the bundle of rights that make up property are protected indirectly by the *Charter*. Apart from this the role that the rules of statutory interpretation play and the liberalist basis of the *Charter* make it impossible to ignore property in the constitutional context. Even if the *Charter* does not explicitly protect most property, it constitutes an important and irreducible part of the implicit *Charter*.

More important, however, is the fact that Canadian lawyers' worst fears have been realised even without a property clause. Bauman states:

"A simply worded 'right to property' in a bill of rights would amount to an apparently unqualified constitutional protection of an indefinite number of rights to the

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185 See *R v Oakes* (1986) 26 DLR (4th) 200 at 227.

186 See chapter 12 below.

ownership and use of an indeterminate number of tangible and intangible things."<sup>187</sup>

This fear of an expanding property concept along American lines as a result of constitutional entrenchment has been realised through other means. Not only real property, but goodwill, confidential information, government grants and benefits, pensions and even university degrees have been recognised as property. This expansion was not the result of private-law developments, but usually inspired by state action, political change and pressure from business.<sup>188</sup> This means that, at least in the case of Canada, the expansion of the property concept is not directly attributable to constitutional entrenchment. It suggests that such an expansion may have more to do with liberalism, the *new property* and judicial interpretation than with the constitution as such.

#### 9.4 Preliminary conclusions

The purpose of this chapter has been to indicate the differences, if any, between the American and the Canadian property concepts. It is often argued, as it was during the Canadian constitutional debate on property, that constitutional protection of property inevitably results in an expanded property concept. This expansion into *new property* is directly attributed to constitutional protection. In fact, this was one of the reasons why a property clause was not included in the Canadian constitution. Closer examination of this North American story reveals, however, that this view is, at best, without nuance. Not only did the Canadian property concept expand almost despite its lack of constitutional protection, but commentators also agree that the property concept (and its underlying philosophy) invites expansion.

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187 Bauman 1992 SAJHR 344 347.

188 Ziff *Property law* 33: "Generally, these changes have not been based on private law responses ..., but instead have taken the form of regulatory regimes involving licensing and criminal ... sanctions."

The liberal philosophy (which underlies both systems), with its link between property and power, makes an ever-increasing exclusive control over resources (in whatever form) almost inevitable. If exclusive control over resources is necessary for the development of morally autonomous people, that control will be expanded to more and more things in search of the elusive goal of moral autonomy. In this way the liberal concept and *new property* are necessarily connected. Both serve to uphold the liberal dream.

The main difference between the American and Canadian approaches lies in the way in which limitations on property is viewed. While the American constitution has a property clause but no limitations clause, the Canadian constitution has a limitations clause but no property clause. The Americans have therefore had to revert to a definitional test in order to justify limitations on property. This means that rather than balance the individual and public interest, they tend to exclude certain kinds of property from the definition. In this way the issue is avoided. The Canadian approach does give a guideline for the way in which individual and public interests can be balanced, but this has not been applied to property.





## CHAPTER 10: A TALE OF TWO (FORMER) COLONIES

"The history of Indian constitutional change can be epitomised as largely a story of successive attempts on the part of Parliament to overrule judicial interpretation of the Constitution - a story in which the constitutional guarantees as to property rights played a dominant role."<sup>1</sup>

One of the privileges of a democracy of free men is the right to mismanage one's own affairs within the confines of the law."<sup>2</sup>

### 10.1 Introduction

A comparison between India and Malaysia regarding the property concept in constitutional law offers interesting possibilities. There are a number of fairly obvious similarities between the two systems. Both have a very old customary-law basis. Both underwent religious influences from Hinduism and Islam and influences due to colonisation (wholly or in part) by the Dutch, French, Portuguese and English. In both systems independence was achieved in the first half of this century and both have an entrenched constitution with a chapter on fundamental rights. In fact, Malaysia's property clause was modelled on the Indian one as it then stood and both property clauses are contained in typical English colonial constitutions with all the

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- 1 Narain J "Constitutional changes in India - an inquiry into the working of the constitution" 1968 ICLQ 878-907 882.
  - 2 Bose J in *Dwarkanadas Shrivinas v Sholepur Spinning and Weaving Co Ltd and Others* AIR 1954 SC 119 138.

irony this implies. In both cases too, at least up to a point, appeals had to be lodged with the Privy Council in England.<sup>3</sup>

There are a number of fairly superficial differences between the two systems that can be mentioned briefly. In the first place Malaysia is a constitutional monarchy consisting of thirteen states,<sup>4</sup> while India has no monarch, but is also made up of a number of states and a number of union territories.<sup>5</sup> In the second place a drafting commission drafted the Malayan constitution, while the Indian constitution was drafted by a constituent assembly.<sup>6</sup> In the third place both states went through a period when a state of emergency was declared. However, the Indian state of emergency was revoked in 1977,<sup>7</sup> but the Malayan one has never been revoked.<sup>8</sup>

There are, interestingly, both similarities and dissimilarities between the Indian and Malayan approaches to the property concept. The differences are due, in no small part, to differences of opinion regarding the interpretation of the constitution and the role of the judiciary. In fact, many of the differences are directly attributable to differences in political theory, both on the part of the government and on the part of the judiciary.

- 3 In Malaysia the Privy Council acted as final court of appeal until 1985 (1978 in constitutional cases); Harding AJ "The 1988 constitutional crisis in Malaysia" 1990 ICLQ 57-81 72. In India appeals to the Privy Council were abolished in 1949 - see 31.
- 4 Section 1(1) and 1(2) of the *Federal Constitution*. Malaysia originally consisted of tribal organisations that were united under British rule, some ruled directly, others as protectorates. A constitution was originally drafted and modern Malaysia was formed. See, in general, Minattur J "Malaysia" in David R ea (eds) *International encyclopedia of comparative law* vol 1 L-M (Tübingen 1972) M-17 - M-29 M-17; Abraham DA "The legal system of Malaysia" in Redden KR (ed) *Modern legal systems cyclopedia* vol IX (Buffalo NY 1990) 9.200.1-9.200.143 9.200.7-9.200.8; Ibrahim A and Jain MP "The constitution of Malaysia and the American constitutional influence" in Beer LW (ed) *Constitutional systems in late twentieth century Asia* (Seattle 1992) 507-570.
- 5 India was consecutively ruled by ancient kings, the Rajput, the Moguls and the British. Independence was achieved in 1950. See, in general, Irani PK "India" in Knapp V (ed) *International encyclopedia of comparative law* Vol I: National reports (Tübingen undated) I-7 - I-25 I-7; Young CC "The legal system of the Republic of India" in Redden KR and Schleuther LL (eds) *Modern legal systems cyclopedia* vol 9 (Buffalo 1990) 9.80-9.110.21 9.80.7.
- 6 Seervai HM *Constitutional law of India* vol I (2nd ed Bombay 1975) 1ff; Young "India" 9.80.21.
- 7 Polyviou PG "Constitutional law" in Wade HWR and Cryer HL (eds) *Annual survey of Commonwealth law 1977* (London 1979) 1-72 43-44.
- 8 Abraham "Malaysia" 9.200.9.

There are, however, also a number of similarities, which, to some extent, are the result of the various religious influences. These similarities are most apparent in customary land law and a few will be mentioned here. Both Malaysia and India knew a wide variety of types of property. Common to both was the communal types of ownership where the tribe/community/village held and cultivated the land.<sup>9</sup> However, in Malaysia land held from the community could be used as security for loans.<sup>10</sup> Unique to India was the feudal structures known as *zamindar*, *talukdar* and *malguzar*. These were originally peasant-farmers, but they eventually became intermediaries between the farmers (not owners) of the land and the state for the purpose of revenue collection.<sup>11</sup> Apart from these, land could also be held in *janman*-right,<sup>12</sup> in *shtanam*,<sup>13</sup> and in *ryotwari pattadar*.<sup>14</sup>

In Malaysia British rulers characterised the traditional *adat* rights as *proprietary usufructs*, with ownership of the land vested in the chief.<sup>15</sup> The only other change was the introduction of the *Torrens* system of land registration.<sup>16</sup> This meant that only those rights created and defined by

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- 9 This is the *adat*-system in Malaysia (see Hiscock ME and Allan DE "Law modernisation in South-East Asia: colonial and post-colonial land tenures in Indonesia and Malaysia" 1982 *Rebels Z Privatrecht* 509-529 511-512; Abraham "Malaysia" 9.200.10) and the *farwad* (family property - see *Kochuni v States of Madras and Kerala* AIR 1960 SC 1080 1099, 1100-1102) and village property (see Majumdar RC (ed) *The history and culture of the Indian people* Vol IX: British paramountcy and Indian renaissance (Bombay 1963) 1133) in India. In these cases individual or private property was not recognized. Interestingly, both the *adat* and *farwad* systems were matrilineal but not matriarchal.
- 10 This is called the *jual janji* - land was transferred, but ownership did not pass - see Abraham "Malaysia" 9.200.31-34.
- 11 Majumdar *History and culture* 360; *Kameshwar Singh v Province of Bihar* AIR 1950 Patna 392 395; *Atma Ram v State of Punjab* AIR 1959 SC 519 524; *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 297.
- 12 "Freehold interest" or "absolute proprietorship" - see *Kochuni v States of Madras and Kerala* AIR 1960 SC 1080 1087, 1108.
- 13 Head of a *farwad*, but with separate property - see *Kochuni v States of Madras and Kerala* AIR 1960 SC 1080 1100-1102.
- 14 Tenancy from the state - see *Karimbil Kunhikoman and another v State of Kerala* AIR 1962 SC 723 731-732.
- 15 This meant, among other things, that the British could succeed the chiefs as absolute owners and natives could be given rights of use and occupation by grant - see Hiscock and Allan 1982 *Rebels Z Privatrecht* 509 517.
- 16 Minattur "Malaysia" M-25. This system, based on the Australian model, was introduced by the British, but maintained in Malaysia by the *National Land Code* 56 of 1965 - see Sinnadurai V *The sale and purchase of real property in Malaysia* (Singapore 1984) 4.

statute were recognised and new rights could not be created by contract.<sup>17</sup> In India the semi-feudal system of *zamindari* was maintained by the British as this facilitated revenue collection.<sup>18</sup> The very high revenue charged and the absolute power of the *zamindari* over their *raiyyats*<sup>19</sup> changed a system that had been fairly popular<sup>20</sup> into a target for revolution. By the end of the British era 43% of all land was held in terms of *zamindar* schemes.<sup>21</sup>

## 10.2 The property clauses

The Indian constitution that was adopted in 1950 was based, to a large extent, on the *Government of India Act 1935*,<sup>22</sup> and was influenced by various constitutions and constitutional ideas.<sup>23</sup> At the time of drafting it was clear that the constitution was aimed at social and economic reform. Part of this goal was the reform of the system of land tenure, revenue and rent, the relief of agricultural debt and nationalisation of key industries.<sup>24</sup>

- 17 Hiscock and Allan 1982 *Rables Z Privatrecht* 509 518, 525; *Haji Abdul Rahman v Mohamed Hasan* [1917] AC 209. On the recognized types of title to land, see Sinnadurai *Real property* 168-172. When this system was combined with the *jual janji*, the result was that many "owners" lost their land to moneylenders. This also meant that equitable ownership could not be recognised in Malaysia law, although this decision was recently overturned by the Malayan Federal Court - see *Chin Choy v Collector of Stamp Duties* [1981] 4 MLJ 47; *Mosbert Bhd v Chatib bin Kani* [1985] 1 MLJ 162.
- 18 *Majumdar History and culture* 361, 497; Murphy J "Insulating land reform from constitutional impugment: an Indian case study" 1992 *SAJHR* 362-388 378; Sarojini Reddy P *Judicial review of fundamental rights* (New Delhi 1976) 219.
- 19 *Majumdar History and culture* 938, 1133.
- 20 *Kameshwar Singh v Province of Bihar* AIR 1950 Patna 392 395: "... the raiyyats in Chota Nagpur were much attached to their zamindars and (that) in several instances serious disorders had occurred when the estate of a zamindar was sold for arrears of revenue and a purchaser, who was not known and esteemed in the locality, sought to take possession of it."
- 21 Murphy 1992 *SAJHR* 362 378.
- 22 In fact 250 of the 395 sections of the new constitution was based on the *G/ Act* - see Seervai *Constitutional law* 1, 2; Young "India" 9.80.21. For this reason the *G/ Act* became important for interpreting the new Constitution.
- 23 The idea of parliamentary government, that is the cabinet system in which the executive is responsible to the legislature, was adopted from the British system. The ideas of fundamental rights and a Supreme Court were taken from the American system, while the Irish model of directive principles was also incorporated. The Canadian and Australian federal model was preferred over the American one. See Young "India" 9.80.21; Seervai *Constitutional law* 4; Narain 1968 *ICLQ* 878 879.
- 24 Sarojini Reddy *Judicial review* 210.

Almost from the start, there were problems in the Constituent Assembly regarding the property clause.<sup>25</sup> It was felt that in the new constitution other rights, beside ownership, needed protection.<sup>26</sup> There was also a conflict between two basic ideas or approaches in the Constituent Assembly. On the one hand there was a group who felt that expropriation should be limited to public purpose and subject to just and equitable compensation. On the other hand, the second group advocated that there should be no private property of certain industries and natural wealth and that acquisition of these should be on the government's own terms.<sup>27</sup> As a compromise sections 19(1)(f), 19(5) and 31 were included in the Constitution.

Section 19(1)(f) protected the right of citizens to acquire, hold and dispose of property, subject to restrictions in the interests of the general public as set out in section 19(5). Section 31 stated that expropriation could take place by authority of law that provided for compensation.<sup>28</sup> Section 31A provided that certain acts pertaining to expropriation were excluded from the protection offered by section 31(2). Acts listed under section 31A thus did not have to meet the requirements of public purpose and compensation.

In the debates on the Constitution, Nehru made it clear that the government thought that these sections would provide very limited protection of property. He distinguished between petty acquisitions (for which compensation had to be paid) and large-scale acquisitions for the purpose of social reform (for which no compensation should be paid). There could be no judicial review of

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25 The *GI Act*, in sections 299 and 300, had contained provisions regarding property.

26 These included "vested interests" such as grants or tenure of land held free from revenue or held subject to partial revenue, individual rights (known as *taluk, inam, watan, jagi, musafi* and *sanad*) and also *zamindari* rights. See Seervai *Constitutional law* 636-637.

27 Sarojini Reddy *Judicial review* 211; Dhavan R "The constitution as the situs of struggle: India's Constitution forty years on" in Beer LW (ed) *Constitutional systems in late twentieth century Asia* (Seattle 1992) 373-461 379.

28 See Sarojini Reddy *Judicial review* 218 on the differences between the new constitutional provisions and section 299 of the *GI Act*.

these acquisitions and the legislative will would be supreme.<sup>29</sup> Subsequent events proved that the view that the judiciary would not be a problem was a serious miscalculation. The next twenty-five years of Indian constitutional history was dominated by the conflict between parliament and the courts over property.<sup>30</sup>

The government attempted agrarian reform by means of legislation and, often, these were overturned as unconstitutional or their scope was limited by the courts.<sup>31</sup> The upshot of this conflict was that in the late seventies the right to property was removed from the chapter on fundamental rights in the Indian Constitution. Today, the only protection for the right of property is to be found in Section 300-A, which states that '(n)o person shall be deprived of his property save by authority of law'.<sup>32</sup>

Unlike in India, there was very little debate on the constitution in general and the property clause in particular in Malaysia. Malaysia retained the English idea of parliamentary sovereignty,<sup>33</sup> although the Constitution shows a lot of American and Indian influences.<sup>34</sup> Section 13 of the *Federal Constitution* reads as follows:

- (1) No person shall be deprived of property save in accordance with law.

29 Chaskalson 1993 SAJHR 388 390; Murphy 1992 SAJHR 362 363; Seervai *Constitutional law* 639-640.

30 Chaskalson 1993 SAJHR 388 390; Dhavan "The constitution" 379. See also Narain 1968 ICLQ 878 882.

31 It turned out that the *zamindari* had enormous political and economic clout and the abolition of that system eventually cost the government Rs 6700 million. On the other hand the re-allocation of land resulted in a 3,1% increase in agricultural output. See Murphy 1992 SAJHR 362 377, 379.

32 Sorabjee SJ "Equality in the United States and India" in Henkin L and Rosenthal AJ (eds) *Constitutionalism and rights - the influence of the United States constitution abroad* (New York 1990) 94-124 98.

33 Hickling "Constitutional changes" 4.

34 Ibrahim and Jain "Constitution of Malaysia" 510. It should, however, be pointed out that the Malayan constitution was not the result of a democratic process or approved by referendum. It was drafted by a committee and simply promulgated - see Hickling "Constitutional changes" 3: "At each step the emphasis was more on the authoritarian and the utilitarian, than upon the democratic and the cosmetic."

- (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

Although the constitution provided for judicial review,<sup>35</sup> the first very modest attempts at judicial activism precipitated a constitutional crisis.<sup>36</sup> The power of judicial review was scaled down even more at the insistence of the executive.<sup>37</sup> This was exacerbated by the continuing state of emergency.<sup>38</sup> Although the Malayan courts have shown a reluctance to use foreign case law, a number of Indian cases were quoted, at least until the early sixties.<sup>39</sup>

### 10.3 The property concept

#### 10.3.1 Malaysia

In *Selangor Pilots Association v Government of Malaysia*<sup>40</sup> the government, acting through the Port Authority, took over the function of piloting in the harbour in accordance with the law. The physical assets of the pilot association were also taken over and compensation was paid for this. The plaintiffs then claimed compensation for the loss of goodwill and future profits. The court *a quo* regarded goodwill as property and read the term *property* in section 13 broadly to include both corporeal and incorporeal property. Property was, therefore, regarded as a bundle of rights and goodwill was a strand of this bundle. Deprivation of goodwill therefore was a deprivation of

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35 Section 4 seemingly provides very clearly for judicial review, but this interpretation was not generally accepted - see Hickling "Constitutional changes" 15.

36 The dispute revolved around the illegal procedures followed by the ruling party in its election of officials. It resulted in the dismissal of Suffian CJ, ostensibly because he had written a letter to the King.

37 That this power of the executive over the judiciary was very effective is proved by the fact that not a single act was declared unconstitutional in the first thirty years after promulgation of the constitution. See Harding 1990 ICLQ 57 80-81; Ibrahim and Jain "Constitution of Malaysia" 528.

38 Hickling "Constitutional changes" 7.

39 See *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355; Hickling "Constitutional changes" 18. The attitude eventually changed because of India's perceived move toward socialism.

40 *Selangor Pilots Association v Government of Malaysia* [1975] 2 MLJ 66.



property. The court also stated that a person could be deprived of property even if the property was not acquired by the state. Consequently the court followed the approach of the Indian courts before 1957 and ordered the government to pay compensation.

On appeal to the Privy Council, however, the decision was overturned.<sup>41</sup> The majority judgement, delivered by Viscount Dilhorne, stated that goodwill might have been a part of the business built up by the respondents, but that this was not the decisive point:

"(The respondents) ... had acquired a goodwill, ... of which it was deprived by the amending Act. But ... it does not follow that the goodwill was *acquired* by the Port Authority ... and in the opinion of the majority ... it was not."<sup>42</sup>

The majority held that, what the respondents had lost and what the state had acquired, was the right to act as and employ pilots, "neither being property."<sup>43</sup>

Lord Salmon, who delivered the dissenting judgement, agreed that a license was not property and neither was the right to employ pilots.<sup>44</sup> On the basis of several Northern Irish decisions, however, he held that goodwill was property and, since it is "impossible to disentangle a business such as the respondents' from its goodwill, they acquired its goodwill with it."<sup>45</sup> It is

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41 *Government of Malaysia v Selangor Pilots Association* [1978] AC 337 (PC); [1977] 2 WLR 901 (PC); [1977] 1 MLJ 133.

42 Per Dilhorne J *Government of Malaysia v Selangor Pilots Association* [1977] 1 MLJ 133 136 - emphasis added. See also Lee KTY, Min YT and Seng LK *Constitutional law of Malaysia and Singapore* (Singapore 1991) 685.

43 *Government of Malaysia v Selangor Pilots Association* [1977] 1 MLJ 133 135.

44 *Government of Malaysia v Selangor Pilots Association* [1977] 1 MLJ 133 138.

45 *Government of Malaysia v Selangor Pilots Association* [1977] 1 MLJ 133 140. The metaphor of entangling is one typical of this view of property and is understandable in the light of the metaphor of property as a *bundle* of rights.

interesting to note that Salmon based his decision, at least in part, on a political theory that opposed nationalisation without compensation.<sup>46</sup>

Thus, both the Malayan court and the Privy Council held that goodwill is property or, at least, an important strand in the bundle of rights. They differed on the question whether the goodwill had been acquired. At the same time the right to a licence was held not to be property.

In *Station Hotels Berhad v Malayan Railway Administration*<sup>47</sup> the Malayan High Court had to deal with the question of the nature of property. In this case, too, it was held that, while the term was generally wide enough to include rights in terms of a lease or mortgage, section 13 only referred to " ... 'proprietary rights *in rem*.'" A case such as this one, where contractual rights were disputed, did not fall within the ambit of section 13, but had to be resolved with reference to the ordinary law of contract. "His contractual right under the lease is not 'property' within the meaning of Article 13."<sup>48</sup> The case went on appeal to the Federal Court, but the appeal was dismissed. As in the *Selangor Pilots Association* case, this is an indication of a refusal to read the constitution widely and an acceptance of the private-law paradigm, in which ownership plays a decisive role.

In the case of *Pengarah Tanah Dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*<sup>49</sup> section 13 was not mentioned explicitly. This was a case in which an application was lodged with the Land Executive Committee (LEC) for sub-division and re-zoning of agricultural land.

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46 *Government of Malaysia v Selangor Pilots Association* [1977] 1 MLJ 133 139: "In my opinion, this appeal raises constitutional issues of vital importance. I fear it will encourage and facilitate nationalisation without compensation throughout the Commonwealth."

47 *Station Hotels Berhad v Malayan Railway Administration* [1977] 1 MLJ 112.

48 *Station Hotels Berhad v Malayan Railway Administration* [1977] 1 MLJ 115.

49 *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135. The respondent in the High Court case and the appellant in the Federal Court case was actually the Land Executive Committee (LEC).

A part of the land was surrendered to the government, apparently in exchange for this approval. The Committee approved the application, subject to the exchange by the applicant of his "title in perpetuity" for a 99-year lease. Applicant objected to this and applied to the court for an order that the LEC approve the application on the usual terms and conditions. The application was granted on the basis that a 99-year lease is not property<sup>50</sup> and that deprivation of property required a legislative and not merely an executive act.<sup>51</sup>

In general, the approach of the Malayan courts can be described as conservative. Although the courts have not allowed governmental organs, such as the Land Executive Committee, to exceed its powers, no expansion of the property concept took place. The protection offered by the Constitution was limited to rights *in rem* thus restricting the property concept.

### 10.3.2 India

At first glance, the conflict between the Indian legislature and the courts seem to have been, and has been represented as, a clash over land reform and compensation.

At another level, however, this was a conflict about the property concept, specifically about what was or was not protected as "property" by the constitution. In its resistance against the legislature (for whatever reason) the property concept was one of the courts' most effective weapons, and it was all the more effective for being virtually unnoticed.

The way in which this history unfolded, is illuminating. The court had, very early on, declared expropriation *for the purpose of agrarian reform*

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50 *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 140.

51 *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 141.

constitutional.<sup>52</sup> This principle was reiterated time and again by the courts.<sup>53</sup> What was, ostensibly, in dispute was the compensation. While maintaining this position the court could simultaneously hold that expropriation for other purposes (such as slum clearance or nationalisation) was not saved by section 31A and was therefore subject to the twin tests of public purpose and compensation.

While the legislature struggled to force the courts to give estates covered by section 31A as wide a meaning as possible, this enabled the courts to read *property* widely in other areas as well and thus expand the property concept. In this process, more and more rights were regarded as *property* and protected as such. Once the goal of land reform seemed secure, the government turned its attention to nationalisation and other forms of economic reform. These industries and services were, however, by this time well protected as a result of the expansion of the property concept. The upshot was that economic reform was severely hampered.

As in most other systems with an English background, *property* in Indian law can mean either the objects of the right or the right itself.<sup>54</sup> It is this second meaning that is at stake here. *Property* is, in general, defined as "a bundle of rights".<sup>55</sup> This means that *property* is not an abstract concept that can be defined out of context. In each case the strands making up the bundle differ, so that the content of the "bundle of rights" comprising property differ depending on the type of property under discussion. Thus, for example, the

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52 See *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 295, 264.

53 See eg *Kochuni v States of Madras and Kerala* AIR 1960 SC 1080 1087-1089; *State of Kerala v Gwaior Rayon Silk Manufacturing (Weaving) Co* AIR 1973 SC 2734. See also Yardley DCM "Fundamental rights and civil liberties" in Wade HWR and Cryer HL (eds) *Annual survey of Commonwealth law 1974* (London 1975) 62-102 87.

54 *State of West Bengal v Subodh Gopal Bose and Others* AIR 1954 SC 92 101.

55 *Kameshwar Singh v Province of Bihar* AIR 1950 Patna 392 420, 427; *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 313; *State of West Bengal v Subodh Gopal Bose and Others* AIR 1954 SC 92 101, 118; *Charanjit Lal Chowdry v Union of India and Others* AIR 1951 SC 41 54, 61; *RC Cooper v Union of India* AIR 1970 SC 564.

property rights that shareholders have, will be different from those of landowners.

This raises the question whether there is a single strand of this bundle that can be regarded as essential or typical of property. This question is usually asked in a different form, because it is assumed that certain strands of the bundle can be acquired without acquiring the property as such. The question then is when such an acquisition of a strand/s (even if the entire property is not appropriated) effectively amounts to an expropriation. Therefore, the recognition of a typical or essential strand in the bundle will determine whether acquisition of that strand amounts to expropriation. This, in turn, implies that such an individual strand is then regarded as property in itself. The Indian courts have answered this question in various ways, depending on the kind of property right concerned. What is important, though, is the various tests developed to answer this question.

In *Kameshwar Singh v Province of Bihar*<sup>56</sup> the property of *zamindari* was not expropriated, but the management was taken over by government agents and the owner was only entitled to a part of the profits. The question was whether this in fact constituted expropriation or not. The right to possession was regarded as "the most characteristic and essential of these rights" in the case of landownership.

This was confirmed in the appeal case. Therefore, the right to manage the property and to benefit from the arrears of rent due to a landlord before passage of the act was also regarded as property. The court, however, excluded this kind of legislation from the protection of section 31A because it "... does not seem to have even a remote connection with ... land reform."<sup>57</sup> Therefore the principle is acknowledged that strands of the bundle of rights

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56 *Kameshwar Singh v Province of Bihar* AIR 1950 Patna 392 427.

57 *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 295.

can be acquired without it amounting to expropriation,<sup>58</sup> but if the strand is recognised as property in itself, the acquisition of that strand will be expropriation. Only if that right has anything to do with agrarian reform, will it be saved by section 31A.

In *State of West Bengal v Subodh Gopal Bose and Others*<sup>59</sup> the state took away owners' rights to annul under-tenures and to evict under-tenants. The question was whether the destruction of this strand of the bundle of rights amounted to expropriation. There was some difference of opinion amongst the various judges on this issue. Sastri CJ held that this was not merely a strand, but constituted property in itself. Das J did not agree. Jagannadhadas J thought that section 31(2) applied to every strand separately, but section 31(1) did not. Two tests were suggested.

On the one hand it was suggested that, if acquisition of a strand/s resulted in withholding of possession and enjoyment, or seriously impaired this or reduced the property's value, it would amount to expropriation.<sup>60</sup> On the other hand it was suggested that, if a strand can be acquired (in the technical sense) *by itself*, such a strand would be regarded as property in itself.<sup>61</sup> On the first test, in this case, the deprivation was found not to be substantial enough. On the second test, too, it was found that the right to annul could not be acquired separately and, consequently, it was not in itself property.

In the case of shareholders, and other holders of intangible property, other tests were devised. In *Charanjit Lal Chowdry v Union of India and Others*<sup>62</sup> a share was defined as movable property implying the right to income, the right to alienate and the right to vote or take part in management as the strands in the bundle of rights. Once again two tests were proposed. Mukherjea J

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58 *State of Bihar v Kameshwar Singh* AIR 1952 SC 252 313.

59 *State of West Bengal v Subodh Gopal Bose and Others* AIR 1954 SC 92 94.

60 *State of West Bengal v Subodh Gopal Bose and Others* AIR 1954 SC 92 101.

61 *State of West Bengal v Subodh Gopal Bose and Others* AIR 1954 SC 92 118.

62 *Charanjit Lal Chowdry v Union of India and Others* AIR 1951 SC 41 55.

suggested that the test be whether the whole property is taken or only "some minor ingredient".<sup>63</sup> Based on this test the right to vote could not, in itself, be regarded as property. Das J, however, repeated the test laid down in the previous case. Property was that " ... which can by itself be acquired, disposed of or taken possession of".<sup>64</sup> However, he reached the same conclusion as Mukherjea J.

Das J once again relied on this test in *Dwarkadas Shrivinas v Sholapur Spinning and Weaving Co Ltd and Others*<sup>65</sup> to hold that only strands that can be acquired separately can be regarded as property in itself. Mahajan J and Bose J attempted a more flexible approach in asking whether the acquisition had resulted in loss or injury and whether the acquisition had resulted in "paper ownership" or the "mere husk of title".<sup>66</sup> The result would then depend on the bundle of rights and what was acquired in each case.

In *Tilkayat Shri Govindlalji Maharaj etc v State of Rajasthan and Others*<sup>67</sup> the state took over the management of a temple, without expropriating the property. The question was whether this amounted to expropriation. Based on the religious order (*Firman*) that had been issued to found the temple and on the *Tilkayat's* limited right to manage the property, the court found that the right to hold this particular office in this temple was not property.<sup>68</sup> The question whether the right to supply electricity could be regarded as property was raised in *Western Uttar Pradesh Electric Power and Supply Co Ltd v State of Uttar Pradesh and Others*<sup>69</sup> but not answered. The court did,

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63 *Charanjit Lal Chowdry v Union of India and Others* AIR 1951 SC 41 55 - relying on *Minister of State for the Army v Dalziel* 68 CLR 261.

64 *Charanjit Lal Chowdry v Union of India and Others* AIR 1951 SC 41 62.

65 *Dwarkadas Shrivinas v Sholapur Spinning and Weaving Co Ltd and Others* AIR 1954 SC 119 136.

66 *Dwarkadas Shrivinas v Sholapur Spinning and Weaving Co Ltd and Others* AIR 1954 SC 119 125, 138.

67 *Tilkayat Shri Govindlalji Maharaj etc v State of Rajasthan and Others* AIR 1963 SC 1638.

68 *Tilkayat Shri Govindlalji Maharaj etc v State of Rajasthan and Others* AIR 1963 SC 1638 1656, 1658.

69 *Western Uttar Pradesh Electric Power and Supply Co Ltd v State of Uttar Pradesh and Others* AIR 1970 SC 21.

however, in an *obiter dictum* indicate that since this was not an exclusive right, it was probably not property.<sup>70</sup>

In the important *Bank Nationalisation* case<sup>71</sup> the banks were not expropriated, but their assets were transferred to other banks. Compensation was paid, but the question was whether goodwill and unexpired leases were also property that needed to be taken into consideration in calculating compensation. Based on the definition of property in Entry 42, List III of the Constitution,<sup>72</sup> Shah J found that both had substantial value and should, therefore, be taken into consideration.<sup>73</sup> The term "undertaking" included all property, that is, assets, rights, privileges, obligations and liabilities.<sup>74</sup> In this case, therefore, the strands of the bundle of rights could not be separated and had to be acquired *in toto* as an undertaking.<sup>75</sup> In a number of other cases, various rights were regarded as property or not on the basis of either the extent of the holder's right or the value of such a right. Because the position of a hereditary trustee was regarded as basically the same as that of a manager or custodian, the office was not regarded as property.<sup>76</sup> In other cases the value of the right apparently convinced the court to see it as property. In this way the pension of a civil servant was regarded as property, because the court considered it a "valuable right". It is, consequently, not to be treated as " ... a

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70 *Western Uttar Pradesh Electric Power and Supply Co Ltd v State of Uttar Pradesh and Others* AIR 1970 SC 21 26.

71 *RC Cooper v Union of India* AIR 1970 SC 564.

72 Entry 42, List III defines property as "the highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy; it includes ownership, estates and interests in corporeal things, and also rights such as trade-marks, copy-rights, patents and even rights in personam capable of transfer or transmission, such as debts; and signifies a beneficial right to a thing considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured."

73 *RC Cooper v Union of India* AIR 1970 SC 564 611. See also Finnis JM "Constitutional law" in Wade HWR and Cryer HL (eds) *Annual Survey of Commonwealth Law 1971* (London 1972) 1-65 36.

74 *RC Cooper v Union of India* AIR 1970 SC 564 610.

75 *RC Cooper v Union of India* AIR 1970 SC 564 630.

76 *Kakinada Annadana Samajan v Commissioner of Hindu Religious and Charitable Endowments, Hyderabad and Others* AIR 171 SC 891. Interestingly, the court states on 895 that "even females" can be hereditary trustees, indicating a certain attitude towards both property and women.



bounty payable on the sweet-will and pleasure of the Government..."<sup>77</sup> In the same way the payment of a cash bonus to employees was regarded as property.<sup>78</sup>

Property, in constitutional sense, then must be understood widely:

"[It] comprises every form of property, tangible or intangible, including debts and choses in action, such as unpaid accumulation of wages, pension, cash grant and constitutionally protected Privy Purse."<sup>79</sup>

However, the right to life membership of the senate of a university, the right under a lease to work a mine on government property, the "passage benefits" of civil servants, the rights of members of the management committee of a private school and the right to obtain a mining lease were not regarded as property.<sup>80</sup>

In general the Indian courts have applied a wide range of tests to determine whether a certain right is property or not. These tests seem to revolve around the value of the right, whether it can be acquired in the technical sense and the level of control exercised by the holder of the right. All seem to emphasise the role of property as a valuable right that confers a certain amount of power on the proprietor. In this way the connection between property and power was stressed. To make that power as absolute as possible, a wide range of property rights were recognised.

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77 *Deokinan Prasad v State of Bihar and Others* AIR 1971 SC 1409 1419.

78 *Madan Mohan Pathak and others v Union of India and Others* AIR 1978 SC 803 819.

79 *Madan Mohan Pathak and others v Union of India and Others* AIR 1978 SC 803 821.

80 *Seervai Constitutional law* 718.

#### 10.4 Preliminary conclusions

It seems strange that two legal systems with so much in common, could come to such diverging conclusions regarding property. In Malaysia, the introduction of a constitution had little or no effect on the property concept. Property was defined in terms of private law conceptions and ideas to limit it to "proprietary rights *in rem*." This was the result of a complex set of factors. One of these was the influence of the Privy Council on constitutional interpretation. The Privy Council opted for a literal, legalistic interpretation that confined concepts to their traditional ambit. This effect was reinforced by the various courts' reluctance to use foreign (especially American) case law.<sup>81</sup> In the case of India, on the other hand, the Privy Council never had any jurisdiction in constitutional matters and courts were, especially in the beginning, willing to use American constitutional theory. This is another one of the reasons for the differences.

In the second place the narrow definition of property was the result of the role that the doctrine of parliamentary sovereignty played. It is difficult to see how a supreme constitution and parliamentary sovereignty can ever co-exist.<sup>82</sup> In fact, the constitutional crisis of 1988 in Malaysia and the repeated amendments to the Indian constitution suggest that they cannot. More important, however, is the difference in the way the judiciary viewed its role. The Malayan courts never sought to challenge the legislature,<sup>83</sup> while the Indian courts did.<sup>84</sup> The result in India might not always have been positive, but it had a definite impact on the property concept. In the third place it

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81 See Hickling "Constitutional changes" 10 and cases cited there.

82 There is some dispute over whether section 4 actually guarantees a supreme constitution, indicating the extent of the problem.

83 *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165 166: "As to this there can be, *prima facie*, no doubt that the legislation was duly passed by Parliament in the exercise of its sovereign function ... and that there can be no resort to natural justice."

84 Sarojini Reddy *Judicial review* 247 states that this activism was based on a constructionist (ie literal) interpretation of the constitution, at least in property cases. This view is supported by Narain 1968 ICLQ 878 882, 892

should be remembered that Malaysia apparently never had to deal with land reform on the scale that India did or at least it did not result in such direct confrontations with the property clause. Therefore there had not been the kind of pressure on the Malayan courts that had been brought to bear on the Indian courts.

The impact of section 13 of the Malayan constitution on property law has been minimal. Property is mostly regarded as more or less absolute,<sup>85</sup> except in the case of land within the Malay reservations.<sup>86</sup> There is very little indication of social control of or influence over the use of property. Where the term "public purpose" is used in legislation dealing with expropriation, it is simply equated with legislative will.<sup>87</sup> In other words, the requirement of public purpose is met because the legislature says that it has been met.

Compared to the Malayan courts, the Indian courts were activist, especially in the field of property law. This resulted in what has been termed the "unedifying squabble" between the courts and parliament. In this process the property concept was broadened so that, by the time the 25th Amendment was enacted, Indians enjoyed the same protection of property that Americans did.<sup>88</sup> The result was an emphasis on individual rights that hampered social reform.

In the main the land reform policy of the government worked. Millions were freed from the revenue burden. Unfortunately, recent years have seen the emergence of a new set of revenue farmers and corruption remains a

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85 See *Sajan Singh v Sadara Ali* [1960] 26 MLJ 52; [1960] 1 All ER 269: "And the transferee, having got the property, can assert his title against all the world ..."

86 In these cases land may not be alienated to non-Malays. The land is held under a matrilineal system and the occupier has a life interest that cannot be attached or sold - see Minattur "Malaysia" M-28.

87 *S Kulasingham and Another v Commissioner of Lands Federal Territories and Others* [1982] 1 MLJ 204 208: "... the declaration issued under the section shall be conclusive evidence that all the scheduled land is needed for the purpose specified therein."

88 This was due, in part, to the reliance of Indian courts on American constitutional theory - see Murphy 1992 SAJHR 362 365, 373.

problem. Moreover, emphasis on agrarian reform has meant that other types of reform (such as upgrading of slums) received less attention.<sup>89</sup>

The battle with parliament over property rights eventually cost the court the war over the constitution. The emphasis on property tended to strengthen the assumption that this battle had more to do with wealth and privilege, than with democracy.<sup>90</sup> The emerging constitutionalism was basically appropriated by the advantaged classes. This did much to discredit the constitution.<sup>91</sup>

The problem in both India and Malaysia was basically one of constitutional theory. The idea of a supreme constitution with entrenched rights is, at a very basic level, incompatible with the idea of legislative supremacy. In Malaysia the adherence to legislative supremacy resulted in a property concept that remained static. In India the very real conflict over resources was disguised by the clashes over land reform:

"The land reform struggle made explicit the heresy already implanted in the Fundamental rights chapter that, by and large, fundamental rights flowed from legislative and government action and were not really antecedent to it."<sup>92</sup>

In the final analysis, this battle was about the contradiction inherent in liberalism. The Indian courts apparently accepted the basic liberalist doctrine,<sup>93</sup> but the dichotomies inherent in that theory, such as private/public and state/individual became anomalous in a system committed to a form of socialism. This problem was aggravated by the definitional approach to property issues taken from the American example. The definition in terms of

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89 Murphy 1992 SAJHR 362 382-385.

90 Chaskalson 1993 SAJHR 388 392-393.

91 Dhavan "The constitution" 381.

92 Dhavan "The constitution" 403.

93 *Kameshwar Singh v Province of Bihar* AIR 1950 Patna 392 397, 399.

private law (or standing law) resulted in a failure to develop die property concept constitutionally.

## CHAPTER 11: THE GERMAN ALTERNATIVE

"Eine Gegenüberstellung von 'liberalem' und 'sozialistischen' Eigentum ist bereits historisch in solcher Allgemeinheit problematisch, rechtstheoretisch kaum zu begründen. Doch wenn schon derart pointiert werden soll, so bedeutet 'Eigentum als Menschenrecht' den Sieg des liberalen Eigentums."<sup>1</sup>

### 11.1 Introduction

The history of German property law until the twentieth century is dealt with elsewhere.<sup>2</sup> The basic conclusion is, however, summarised here for the sake of continuity. German thinking about private ownership was strongly influenced by modernist philosophers like Kant and Hegel and jurists like Von Savigny and Windscheid. By the beginning of the twentieth century, German private law had been codified in the *BGB*. Ownership was incorporated into the *BGB* on the basis that it was an institution of private law that guaranteed freedom for morally autonomous individuals.<sup>3</sup> Property was defined as absolute, uniform, exclusive and pertaining to corporeal objects only.<sup>4</sup> This basically pandectist definition and its modernist philosophical basis also fit the requirements of capitalism and political liberalism prevalent at that stage.<sup>5</sup>

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1 Leisner W "Eigentum" in Isensee J and Kirchhof P (eds) *Handbuch des Staatsrechts* Vol VI: *Freiheitsrechte* (Heidelberg 1989) 1023-1098 1034.

2 See 3.4.5; 4.4.3; 5.4.3 and 6.4.3 above.

3 In this way the liberalist private/public split was incorporated into German law, whereby private law in general, and ownership in particular, served to guarantee a sphere of individual freedom or autonomy. This resulted in ownership being viewed as a typically private right closely associated with liberty. See Coing 1989 *Am J Comp L* 9 13; Van Caenegem *Introduction* 140; Zwalve *Geschiedenis* 22.

4 See 6.4.3 above.

5 Van der Walt and Kleyn "Duplex dominium" 248.

However, the introduction of the German Basic Law (GG) in 1949 as the supreme law meant that the strong distinction between private and public law could not be retained. Not only was private ownership no longer governed by rules of private law only, but the constitution also contained provisions that applied to what was formerly the domain of private law. The constitutional protection of ownership meant that ownership's dual function (both private and public) had to be acknowledged.

The introduction of the GG in the early post-World War II period was the result of Allied (and particularly American) influences.<sup>6</sup> However, there was also a strong German liberalist tradition to draw upon and, to a large extent, the GG reflected both the foreign influences and this liberal heritage,<sup>7</sup> in particular a combination of German neoliberal thinking and Catholic social theory.<sup>8</sup> The GG reflects all these influences. Its theoretical basis is the combination of the principles of the *Rechtsstaat* (with its liberal emphasis on the individual) and of the *Sozialstaat* (with the emphasis on establishing a just social order).<sup>9</sup> Most of the fundamental rights contained in sections 1-19 of the GG are therefore associated with liberal democracy<sup>10</sup> and its emphasis on "negative rather than positive liberties".<sup>11</sup> However, these liberal rights were always supposed to be balanced by the social state principle that served to balance individual rights with social needs.<sup>12</sup>

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6 See Van der Walt 1993 SAPL 296 300.

7 Wendt R "Art 14" in Sachs M (ed) *Grundgesetz Kommentar* (Munich 1996) 482-528 485: "Der Eigentumsschutz des GG steht in der Tradition der Philosophie der Aufklärung sowie der vorangegangenen rechtsstaatlichen deutschen Verfassungen, die die Garantie des Privateigentums als Menschenrecht begriffen und vom engen Zusammenhang zwischen Eigentum und Freiheit ausgingen."

8 Kommers DP *The constitutional jurisprudence of the Federal Republic of Germany* (Durham 1989) 247.

9 Kommers *Jurisprudence* 248.

10 Leisner "Eigentum" 1023 1037 states that the period after 1945 represented an "Erneuerung liberal-grundrechtlicher Traditionen".

11 See Currie DP *The constitution of the Federal Republic of Germany* (Chicago 1994) 14; Kommers *Jurisprudence* 248.

12 Currie *Constitution* 16; Kommers *Jurisprudence* 248. However Leisner "Eigentum" 1038 states that this was only achieved, to a greater or lesser degree, since the 1970's.

Section 14 of the GG deals with property, inheritance and expropriation. It reads as follows:

- (1) Property and the right of inheritance are guaranteed. Their content and limits shall be determined by the laws.
- (2) Property imposes duties. Its use should also serve the public weal.
- (3) Expropriation shall be permitted only in the public weal. It may be affected only by or pursuant to a law which shall provide for the nature and extent of the compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts.<sup>13</sup>

The first thing that should be kept in mind is that various German courts have jurisdiction regarding various aspects of the property clause.<sup>14</sup> The interpretative and philosophical differences in approach of these courts have resulted in differences regarding the property clause and property concept.

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13 This translation of the GG is the official one provided by the Press and Information Office of the Government of the Federal Republic of Germany and was published c1974.

14 The federal constitutional court (*Bundesverfassungsgericht* - hereinafter referred to as *BVerfG*) has jurisdiction regarding the constitutionality of legislation, administrative acts and judgements of lower courts regarding property. The federal administrative court (*Bundesverwaltungsgericht* - hereinafter referred to as *BVerwG*) deals with the validity (but not constitutionality) of administrative acts and decisions and the federal court of justice in civil matters (*Bundesgerichtshof* - hereinafter referred to as *BGH*) has jurisdiction to decide on the amount of compensation to be paid for expropriations, but not on the constitutionality of such expropriations. See *BVerfGE* 58, 300 [1981]; Davis D, Chaskalson M and De Waal M "Democracy and constitutionalism: the role of constitutional interpretation" in Van Wyk DH ea (eds) *Rights and constitutionalism: the new South African legal order* (Cape Town 1994) 1-130 73-85.



In the second place the property clause is generally understood to include two guarantees, namely a substantive or individual guarantee,<sup>15</sup> which protects the individual against state interference<sup>16</sup> and an institutional guarantee<sup>17</sup> which protects the institution of private property as such against abolition.<sup>18</sup>

## 11.2 Case law

Section 14 GG has been the subject of a number of judgements by various German courts. These will not be canvassed in full, but the landmark decisions regarding the property concept will be discussed briefly.

In one of the most important constitutional court cases, the so-called *Deichordnung* case,<sup>19</sup> the city of Hamburg, in reaction to extensive flooding, reclassified dyke land as public property. This measure was aimed at better management of the dyke system, but was attacked as unconstitutional by dispossessed landowners.

The court explained the philosophical basis of section 14 with reference to the link between property and personal freedom.<sup>20</sup> The property clause is intended to guarantee a personal sphere of autonomy in patrimonial matters in order to ensure the freedom for individuals to take charge of their own

15 *Bestandsgarantie, Individualgarantie* or *Rechtstellungsgarantie*.

16 *BVerfGE* 24, 367 [1968] at 388 (the so-called *Deichordnung* case); *BVerfGE* 58, 300 [1981]; See also Wendt "Art 14" 486-487; Currie *Constitution* 291; Van der Walt 1993 R&K 263 271; Kleyn D "The constitutional protection of property: a comparison between the German and the South African approach" 1996 *SAPL* 402-445 410; Herzog R "Eigentum" in *Evangelisches Staatslexikon* Vol I 3rd ed (1987) 674. This is sometimes referred to as the subjective aspect, that is from the perspective of the subject - see Badura P *Staatsrecht* (Munich 1986) 139.

17 *Wesensgehalt-, Instituts- or Einrichtungsgarantie*.

18 For this purpose section 14 must be read with section 19(2). See Leisner "Eigentum" 1029: "Diese Garantie sichert einen Grundbestand von Normen, die das Eigentum im Sinne dieser Grundrechtsbestimmung umschreiben." See also Van der Walt 1993 R&K 263 271; Herzog "Eigentum" 674. This then represents the objective working of the clause which prevents the state from removing whole categories of property from the sphere of private property - see Badura *Staatsrecht* 139; *BVerfGE* 4, 7 [1954]; *BVerfGE* 21, 73 [1963]; *BVerfGE* 24, 367 [1968]; *BVerfGE* 42, 263 [1979]; *BVerfGE* 52, 1 [1979]; *BVerfGE* 58, 300 [1981]; *BVerfGE* 79, 292 [1988].

19 *BVerfGE* 24, 367 [1968].

20 *BVerfGE* 24, 367 [1968] at 389: "Das Eigentum ist ein elementares Grundrecht, das im einer inneren Zusammenhang mit der Garantie der persönlichen Freiheit steht."

lives.<sup>21</sup> However, property which serves the public interest, can be removed from this private sphere without falling foul of section 14.<sup>22</sup>

This philosophical basis was reiterated in the *Contergan case*.<sup>23</sup> In this case the private fund that had been set up to compensate Thalidomide victims was transformed into a public fund. Beneficiaries alleged that this constituted an infringement on section 14. The court stated that the meaning of *property* had to be determined by the constitution itself,<sup>24</sup> but that the purpose of the property clause had been to create and protect an individual sphere of personal freedom in the patrimonial field.<sup>25</sup> The claims against the fund were recognised as property,<sup>26</sup> but its social function made the change from private to public legitimate.<sup>27</sup>

In the *Naßauskiesung* case<sup>28</sup> certain uses of water was made subject to the granting of a permit. The applicant's permit for continued excavation of a gravel pit beneath the groundwater level was not renewed and he averred that the act in question was therefore an expropriation and, since it did not provide for compensation, also unconstitutional. The court stated as point of departure that the meaning of *property* is to be determined within the context

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21 BVerfGE 24, 367 [1968] at 389: "... einen Freiheitsraum im vermögensrechtlichen Bereich sicherzustellen und ihm damit eine eigenverantwortliche Gestaltung des Lebens zu ermöglichen."

22 BVerfGE 24, 367 [1968] at 396: "Gegenstand und Umfang der Eigentumsgarantie werden durch Art 14 Abs 1 Satz 2 und Abs 3 GG bestimmt. Zunächst ist es Aufgabe des Gesetzgebers, Inhalt und Schranken des Eigentums unter Beachtung der Grundsatzentscheidung des Verfassungsorgans festzulegen. ... Art 14 Abs 3 GG lässt die Entziehung des konkreten Eigentumsgegenstandes zu, wenn das Wohl der Allgemeinheit dies erfordert."

23 BVerfGE 42, 263 [1976].

24 BVerfGE 42, 263 [1976] at 292: "Bei der Beantwortung der Frage, welche vermögenswerten Güter als Eigentum im Sinne des Art 14 GG anzusehen sind, muss daher auf den Zweck und die Funktion der Eigentumsgarantie unter Berücksichtigung ihrer Bedeutung im Gesamtgefüge der Verfassung zurückgegriffen werden."

25 BVerfGE 42, 263 [1976] at 293: "... muss in besonderem Masse für schuldrechtliche Ansprüche gelten, die den Charakter eines Äquivalents für Einbussen an Lebensstüchtigkeit besitzen."

26 BVerfGE 42, 263 [1976] at 293: "Von dieser grundlegenden Auffassung aus sind privatrechtliche Ansprüche der vorliegenden Art als Eigentum im Sinne des Grundgesetzes anzusehen."

27 BVerfGE 42, 263 [1976] at 294: "Soweit das Eigentumsobjekt in einem 'sozialen Bezug und einer sozialen Funktion' steht, hat der Gesetzgeber ... einen relativ weiten Gestaltungsbereich; ..." and at 195: "Die Ersetzung der autonomen Regelungsbefugnis muss der unaufgebbaren Spannungslage zwischen dem Freiheitsraum des Einzelnen und den Anforderungen der sozialstaatlichen Ordnung gerecht werden."

28 BVerfGE 58, 300 [1981].

of the constitution.<sup>29</sup> The court stated explicitly that this property concept is different from the private-law concept.<sup>30</sup> When considering section 14, the private-law concept is not primary, but the content of the property is to be determined by all law in force at the time.<sup>31</sup> In this context the social needs (or public interest) need to be taken into consideration.<sup>32</sup> In this case the public interest in the case of water justifies the public control.<sup>33</sup>

In the *Mitbestimmung* case<sup>34</sup> the question was whether laws, which provided for participation of employees in management, were constitutional. The court reiterated the philosophical basis of section 14,<sup>35</sup> but also reiterated its social function.<sup>36</sup> Because of the strong connection between individual freedom and property, the own effort (*Eigenleistung*) of the owner is emphasised,<sup>37</sup> but in cases of property with a definite social function, the regulatory power of government is expanded.<sup>38</sup> The rights of shareholders are protected in terms

29 *BVerfGE* 58, 300 [1981] at 335: "Der Begriff des von der Verfassung gewährleisteten Eigentums muss aus der Verfassung selbst gewonnen werden."

30 *BVerfGE* 58, 300 [1981] at 335: "... noch kann aus der privatrechtlichen Rechtsstellung der Umfang der Gewährleistung des konkreten Eigentums bestimmt werden." and at 336: "Den privatrechtlichen Eigentumsvorschriften kommt im Rahmen des Art 14 GG auch kein Vorrang vor den öffentlich-rechtlichen Vorschriften zu, die eigentumsrechtliche Regelungen treffen."

31 *BVerfGE* 58, 300 [1981] at 336: "Den privatrechtlichen Eigentumsvorschriften kommt im Rahmen des Art. 14 GG auch kein Vorrang vor den öffentlich-rechtlichen Vorschriften zu, die eigentumsrechtliche Regelungen treffen."

32 *BVerfGE* 58, 300 [1981] at 338: "Der Gesetzgeber muss bei der Wahrnehmung des ihm in Art 14 Abs. 1 Satz 2 GG erteilten Auftrages, Inhalt und Schranken des Eigentums zu bestimmen, sowohl die grundgesetzliche Anerkennung des Privateigentums ... als auch das Sozialgebot ... beachten."

33 *BVerfGE* 58, 300 [1981] at 339: "Die Gewährleistung des Rechtsinstituts wird nicht angetastet, wenn für die Allgemeinheit lebensnotwendige Güter zur Sicherung überragender Gemeinwohlbelange und zur Abwehr von Gefahren nicht der Privatrechtsordnung, sondern einer öffentlich-rechtlichen Ordnung unterstellt werden."

34 *BVerfGE* 50, 290 [1979].

35 *BVerfGE* 50, 290 [1979] at 339: "Geschichtlich und in ihrer heutigen Bedeutung ist diese ein elementares Grundrecht, das im engen inneren Zusammenhang mit der persönlichen Freiheit steht. Ihr kommt im Gesamtgefüge der Grundrechte die Aufgabe zu, dem Träger des Grundrechts einen Freiheitsraum im vermögensrechtlichen Bereich zu sichern und ihm dadurch eine eigenverantwortliche Gestaltung seines Lebens zu ermöglichen."

36 *BVerfGE* 50, 290 [1979] at 340: "Die Bestandsgarantie ..., der Regelungsauftrag ... und die Sozialpflichtigkeit des Eigentums ... stehen in einem unlöslichen Zusammenhang."

37 *BVerfGE* 50, 290 [1979] at 340: "Soweit es um die Funktion des Eigentums als Element der Sicherung der persönlichen Freiheit des Einzelnen geht, genießt dieses einen besonders ausgeprägten Schutz."

38 *BVerfGE* 50, 290 [1979] at 340: "Dagegen ist die Befugnis des Gesetzgebers zur Inhalts- und Schrankenbestimmung um so weiter, je mehr das Eigentumsobjekt in einem sozialen Bezug und einer sozialen Funktion steht ..."

of section 14, but, since it is not closely associated with personal freedom, it is subject to extensive statutory regulation.<sup>39</sup>

The German courts have also had to deal with the question of what is known in American law as *new property*. In the *Eigenleistung* case<sup>40</sup> the question was raised whether benefits in terms of a medical aid scheme could be regarded as property for the purposes of section 14. The benefits in terms of the scheme had been altered so that the complainants could no longer acquire these benefits. The courts summed up the position regarding social security claims. In the first place claims to payments from statutory pension schemes (*Rentenanwartschaften*) that can mature to full pension rights are protected in terms of section 14,<sup>41</sup> but discretionary payments are not.<sup>42</sup> Once again, the function of section 14 is repeated.<sup>43</sup> Social security interests fall under section 14 if they establish a legally protected interest in the patrimonial sphere (*vermögenswerte Rechtspositionen*), if they serve the individual interests of the claimant, if they are based on the claimant's considerable own effort and if they secure the claimant's patrimonial existence.<sup>44</sup>

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39 *BVerfGE* 50, 290 [1979] at 342: "Neben dem Sozialordnungsrecht ... bestimmt und begrenzt das Gesellschaftsrecht die Rechte des Anteilseigners; nach diesem wird das Vermögensrecht durch das Mitgliedschaftsrecht vermittelt; ..."

40 *BVerfGE* 69, 272 [1985].

41 *BVerfGE* 53, 257 [1980].

42 *BVerfGE* 42, 263 [1976].

43 *BVerfGE* 69, 272 [1985] at 300: "Ihr kommt die Aufgabe zu, dem Träger des Grundrechts einen Freiheitsraum im vermögensrechtlichen Bereich zu sichern und ihm damit eine eigenverantwortliche Gestaltung des Lebens zu ermöglichen ..."

44 *BVerfGE* 69, 272 [1985] at 301: "Der sozialversicherungsrechtlichen Position muss weiterhin eine nicht unerhebliche Eigenleistung des Versicherten zugrunde liegen. Der Eigentumsschutz beruht dabei wesentlich darauf, dass die in Betracht kommende Rechtsposition durch die persönliche Arbeitsleistung des Versicherten, wie diese vor allem in den einkommensbezogenen Eigenleistung Ausdruck findet, mitbestimmt ist. Dieser Zusammenhang mit der eigenen Leistung ist als besonderer Schutzgrund für die Eigentümerposition anerkannt ..." and at 303: "Konstituierendes Merkmal für den Eigentumsschutz einer sozialversicherungsrechtlichen Position ist schliesslich

### 11.3 The property concept

One of the most outstanding characteristics of the German property case law, is the almost repetitive reiteration of the philosophical basis of section 14. Emphasis is placed on the basic nature of property as a guarantee of a sphere of individual liberty regarding patrimonial interests (*vermögenswerte Rechte*).<sup>45</sup> This is a political right, which protects the individual,<sup>46</sup> and it is therefore not a goal in itself, but an instrument that allows the individual to take part in society. Therefore, if a right or interest is closely associated with personal, patrimonial freedom, that right will be protected more widely than a right associated with investment purposes.<sup>47</sup>

It should be kept in mind that German law does not recognise what is known in American law as regulatory takings. Any regulatory measure that goes too far is invalid. In terms of German law, to satisfy the requirements of the proportionality principle, a regulation, in order to be in the public interest, must be strictly necessary (*erforderlich*), be suitable for the purpose it purports to serve (*geeignet*), must not impose disproportionate burdens (*verhältnismässig*) and must be constitutional in a wide sense.<sup>48</sup> In this regard, however, there ensued a difference of opinion between the constitutional court and the civil courts.

The civil courts seem to have followed the American example and allowed compensation for regulatory takings on the basis of the extraordinary sacrifice

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45 BGHZ 6, 270 [1952] at 278; BVerfGE 83, 201 [1991] at 209; BVerfGE 89, 1 [1993] at 6; BVerfGE 24, 367 [1968], at 389: "Das Eigentum ist ein elementares Grundrecht, das in einem inneren Zusammenhang mit der Garantie der persönlichen Freiheit steht. ... einen Freiheitsraum im vermögensrechtlichen Bereich sicherzustellen und ihm damit eine eigenverantwortliche Gestaltung des Lebens zu ermöglichen."

46 BVerfGE 24, 367 [1968] at 400: "Die Eigentumsgarantie ist nicht zunächst Sach-, sondern Rechtsträgergarantie." See also Herzog "Eigentum" 673.

47 This means that, for instance, a family home is protected more fully against regulation than property held for investment purposes. See BVerfGE 89, 1 [1993]; BVerfGE 50, 290 [1979] and the *Kleingärten* cases - BVerfGE 52, 1 [1979]; BVerfGE 87, 114 [1992]. See also Wendt "Art 14" 509.

48 See Wendt "Art 14" 501, 503; Currie *Constitution* 309-310.

required of individual owners.<sup>49</sup> The constitutional court, on the other hand, has consistently held such regulations that go too far as simply unconstitutional, based on the *Junktim-Klausel*<sup>50</sup> in section 14(3). This has resulted in a situation where the civil courts now award compensation, not on the basis of the constitution, but on the basis of private-law equalisation or compensation payments.

Section 14(1) allows the legislature to determine the content and limits of property. At the same time section 14(2) provides that property is subject to social limitations. This means that the *Sozialgebundenheit* of property determines how its contents and limits are to be determined.<sup>51</sup> This is, in turn, limited by the individual function or basis of property.<sup>52</sup> The balance is achieved by reference to the proportionality principle (*Übermaßverbot*).<sup>53</sup>

In essence this means that the extent of the legislature's power to regulate property for social purposes is determined by the function of the property in question. Some kinds of property have a clear social function, others don't. Thus, the more distinct the social function, the greater the freedom to legislate and to regulate.<sup>54</sup> Therefore, in certain cases, the nature of property makes social control thereof important and individual control is regarded as

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49 See Wendt "Art 14" 521-524. This approach seems to be the result of the traditional private-law approach of the civil courts.

50 The *Junktim-Klausel* (or linking clause) in sec 14(3) which states that an expropriation can only be valid if it is authorized by law, and (and this is the important part) if it provides for the nature and extent of compensation. Since laws that seek to regulate property obviously do not provide for compensation, they can never meet this requirement. See Van der Walt AJ "Federal Republic of Germany" 9 (Unpublished manuscript on file with author).

51 Van der Walt 1993 SAPL 296 301; Badura *Staatsrecht* 140; Leisner "Eigentum" 1039-1041, 1075-1085; Herzog "Eigentum" 678; Kleyn 1996 SAPL 402 411, 414.

52 Leisner "Eigentum" 1031 states that the institutional guarantee functions as the boundary for state interference and formulates the basic rule as: "Eigentum muß Eigentum bleiben." See also Van der Walt 1993 SAPL 296 302.

53 *BVerfGE* 58, 300 [1981] 334ff. See also Wendt "Art 14" 497.

54 Schuppert GF "The right to property" in Karpen U (ed) *The constitution of the Federal Republic of Germany* (Baden-Baden 1988) 107-119 110; Badura P "Eigentum" in Benda, Mithofer and Vogel (eds) *Handbuch des Verfassungsrechts* (Berlin 1984) 653ff; Leisner "Eigentum" 1087; Van der Walt 1993 SAPL 296 303.

potentially dangerous.<sup>55</sup> For this reason the law of landlord and tenant, agriculture, planning, development, building and social security are subject to wider regulation because of their social importance.<sup>56</sup>

One of the unique aspects of German property law is the existence of two property concepts or at least a distinction between private-law ownership and public-law property. The civil court has interpreted *Eigentum* in section 14 to mean the same as *Eigentum* in section 903 of the *BGB*. This basically pandectist codification restricts ownership to tangible, corporeal things.<sup>57</sup> This concept of ownership was reinforced by an interpretative theory based on the pandectist theory of civil law. For this purpose a distinction was drawn between the essence of ownership (as essentially unlimited) and the practical substance or content (which could be restricted). That meant that ownership was conceptually unlimited but could be temporarily limited.<sup>58</sup>

Originally, the constitutional court followed the approach of the civil court.<sup>59</sup> However, this meant that the social dimension of property was frustrated by a conservative, nineteenth-century interpretative theory.<sup>60</sup> It was eventually decided that the civil definition could not be equally authoritative for constitutional purposes<sup>61</sup> and that the scope of the constitutional protection of property should be determined by the constitution itself.<sup>62</sup>

In fact, at least one commentator stresses that section 14 protects *Rechts-Eigentum* and not *Sacheigentum*.<sup>63</sup> Thus the civil-law understanding of

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55 See, for instance, the *Naßauskiesung* case - *BVerfGE* 58, 300 [1981] at 339; the *Deichordnung* case - *BVerfGE* 24, 367 [1968] and the *Contergan* case - *BVerfGE* 42, 263 [1976]. See also Wendt "Art 14" 498-500.

56 See Wendt "Art 14" 507-508, 510-516 for further examples.

57 See Cohn Manual 170, 174; Van der Walt 1993 R&K 263 271. See also, in general, 6.4.3.4 above.

58 Van der Walt 1993 SAPL 296 302.

59 Van der Walt 1993 R&K 263 271.

60 Van der Walt 1993 SAPL 296 303.

61 Schuppert "Property" 107 108.

62 *BVerfGE* 51, 193 [1979] at 218; *BVerfGE* 58, 300 [1981] at 388. See also Schuppert "Property" 107 108; Leisner "Eigentum" 1050.

63 See Leisner "Eigentum" 1023-1098 1027.

*Eigentum* was restricted to a basically pandectist thing-ownership, while the constitutional understanding was, conceptually, much wider. This meant that, in order to determine whether an interest could be regarded as property (in the constitutional sense) the court had to take the fundamental, constitutional purpose of the property clause into consideration. The basic question therefore is whether a particular interest serves to create an area of personal liberty in the patrimonial sphere to ensure self-determination.<sup>64</sup> Therefore "Eigentum ist Freiheit ..."<sup>65</sup>

The wider constitutional-law property concept means that the scope of the protection of section 14 necessarily comes into play. The basis on which courts determine whether a right should be protected as property or not, is the philosophical one referred to above. Thus the scope of property is determined by its personal, patrimonial nature. This means that the property concept is also necessarily limited. In the first place only concrete, individual rights are included, not the individual's whole estate.<sup>66</sup> Future possibilities are not regarded as property,<sup>67</sup> and the idea of property as a "bundle of rights" is wholly foreign to German thinking.<sup>68</sup> This indicates that conceptual severance is impossible in German law.<sup>69</sup>

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64 This is referred to as the *Nutzung* requirement. See Leisner "Eigentum" 1054; Schuppert "Property" 107 109; Badura *Staatsrecht* 139; Herzog "Eigentum" 673;

65 Leisner "Eigentum" 1033.

66 *BVerfGE* 4, 7 [1954] at 17. See also Wendt "Art 14" 493. However, Leisner "Eigentum" 1071-1075 states that the last few years have seen a new development in theoretical thinking which aims at recognising the whole estate as part of the property concept.

67 *BVerfGE* 28, 119 [1970]; *BVerfGE* 45, 142 [1977]; *BGHZ* 83, 1 [1982]. See also Wendt "Art 14" 494; Van der Walt 1993 *R&K* 263 271.

68 Leisner "Eigentum" 1042, 1043: "Das Grundgesetz schützt nicht ein mehr oder weniger systematisch zusammengefasstes Bündel von Property Rights ... Das Grundgesetz verbietet schliesslich eine Aufspaltung des einheitlichen Eigentumsrechts an einem bestimmten Gut in mehrere selbständige Berechtigungen."

69 See 9.2.4 above on conceptual severance.



Another interesting expansion of the constitutional property concept occurred in the sphere of so-called public-law rights.<sup>70</sup> Section 14 also protects what is known as *öffentlich-rechtliche Rechtspositionen*, (or what Leisner calls *Leistungseigentum*<sup>71</sup>) that is, claims to rights arising from social security.<sup>72</sup> This corresponds to what is known in American law as *new property*, although it is more restricted.<sup>73</sup> These rights are protected as property if they serve to safeguard the person's existence,<sup>74</sup> if they have been acquired by or have vested in the person in question,<sup>75</sup> and if the right was acquired through the person's own work, effort or expenditure.<sup>76</sup> Leisner states:

"Alle Werte, welche der Existenzsicherung dienen können, sind eigentumsfähig; sind sie appropriiert, so genießen sie Eigentumsschutz - und dies gilt ja auch für alle Gegenstände des herkömmlichen Eigentums, vom Grundstück über das Patent bis zu jeder Mark im Beutel; sie alle sind geeignet, existenzsichernd zu wirken."<sup>77</sup>

Therefore, social security rights based on "state largesse" are not protected.<sup>78</sup> Consequently, claims in terms of pension schemes and unemployment insurance are protected as *property*, but housing subsidies or family allowances are not.<sup>79</sup> It should, however, be pointed out that some the rights

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70 Leisner "Eigentum" 1069: "Hier hat sich die wohl bedeutendste Veränderung des verfassungsrechtlichen Eigentumsgedankens seit 1949 vollzogen, ..." See also Kleyn 1996 SAPL 402 412-413, 420.

71 Leisner "Eigentum" 1069.

72 See Badura *Staatsrecht* 139; Herzog "Eigentum" 675.

73 Van der Walt 1993 SAPL 296 303.

74 *BVerfGE* 69, 272 [1985] at 300; *BVerfGE* 53, 257 [1988] at 289. See also Schuppert "Property" 107 110; Wendt "Art 14" 491.

75 That is, if it is not a mere expectancy. See Wendt "Art 14" 491.

76 This is known as the *Eigenleistung* requirement. *BVerfGE* 69, 272 [1985]; *BVerfGE* 72, 9 [1986] at 18-21; *BVerfGE* 53, 257 [1980]. See also Currie *Constitution* 297; Wendt "Art 14" 491; Schuppert "Property" 107 101; Van der Walt 1993 R&K 263 271; Leisner "Eigentum" 1070; Kleyn 1996 SAPL 402 424-427.

77 Leisner "Eigentum" 1058.

78 Schuppert "Property" 107 110.

79 *BVerfGE* 53, 275 [1980]; *BVerfGE* 69 272 [1985]; *BVerfGE* 55, 114 [1980]; *BVerfGE* 63, 152 [1983]; *BVerfGE* 92, 9 [1986]; *BVerfGE* 78, 232 [1988].

not recognised as property are specifically protected as separate rights in the GG.<sup>80</sup>

#### 11.4 Evaluation

Academic wisdom has it that, although American and German approaches to property originally did not differ, due to shared interpretative practices, a divergence eventually occurred.<sup>81</sup> This divergence is said to be visible in the existence of a dual property concept in German law and in the role that the *Sozialstaat*-principle plays. In many respects, however, this divergence is more apparent than real. In the first place both courts and commentators recognise the liberal basis of both the private-law property concept and of the constitutional property concept. Both concepts explicitly recognise that property and liberty are linked. Moreover, property is still seen as the " ... wichtigste Rechtsinstitut zur Abgrenzung Privater Vermögensbereiche".<sup>82</sup> This seems to indicate that property is still the paradigm right and the philosophical and theoretical basis of that right has not changed, although its field of application has been expanded.

Furthermore, the requirements for the recognition of constitutional property reveal the capitalist underpinnings of the German approach. Although the GG is based on the harmonisation of *Sozialstaat* and *Rechtsstaat*, it is only in the last twenty years that the social element has received adequate attention.<sup>83</sup> This neglect was partly the result of the conflict between the *BVerfG* and the *BGH*. Like the constitutional court in India, the *BGH* undermined attempts at establishing social reconstruction because its decisions were based on a conceptual, pandectist approach with a strong liberalist basis. But it also indicates, on the one hand, the need for a strong

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80 Van der Walt 1993 *SAPL* 296 303.

81 Van der Walt 1993 *SAPL* 296 302.

82 Leisner "Eigentum" 1049.

83 Leisner "Eigentum" 1038.

economy before social equality can be achieved and, on the other hand, that even then constitutional property is made subject to an own (monetary) contribution. In both cases the capitalist assumptions are clear.

This also seems to indicate that the basic tension between *Sozialstaat* and *Rechtstaat* has not been resolved. Although German law seems to be more sensitive to social needs and goals than most other systems, the basic approach to property remains a liberalist, individualist one - what Leisner calls the *Sieg des liberalen Eigentum*.

One of the most important differences between the German and the American approaches is that the German courts use a proportionality test to determine whether limitations on property are justifiable. Although the German constitution does not contain a general limitations clause, limitations on property are allowed if they meet the requirement of proportionality. Therefore the threshold question of whether an interest is property or not, is not nearly as important in German law as in, say, American or Indian law. Courts accept fairly easily that an interest is property, but then inquire whether the limitation is justifiable if they serve the public or social goods.

## CHAPTER 12: OUT OF (SOUTH) AFRICA

"The very belief that Roman-Dutch private law is politically neutral has allowed property lawyers to tactfully turn their theoretical backs by occupying themselves with the fine distinctions that characterise 'pure' Roman-Dutch property law, while pretending not to notice how politicians shape land rights according to their ideological whims, ..."<sup>1</sup>

### 12.1 Introduction

To a very large extent the history of civil law described in Part II of this study, is also the history of the South African common law regarding ownership. South African property law is based on the rules in force in the province Holland in the seventeenth century and it was only marginally influenced by English law.<sup>2</sup> This law was developed further and acquired a unique character due to the influence of typical South African circumstances and developments.<sup>3</sup> Conceptually and systematically speaking, however, South African property law is basically Roman-Dutch law, insofar as it has not been amended by legislation.

Most property lawyers and courts in South Africa accept that the basic principles of Roman-Dutch law are inherently not only just and equitable, but

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- 1 Van der Walt AJ "The future of common law land ownership" in *Land reform and the future of land ownership in South Africa* (Cape Town 1991) 21-35 24.
  - 2 See Van der Merwe *Sakereg* 6-9; Van der Merwe *Sakereg* (1989) 7-10; Van der Merwe "Things" 6; Schoeman J Silberberg and Schoeman's *The law of property* 2nd ed (Durban 1988) 8-9; Kleyn and Boraine *Law of property* (1982) 8; Olivier, Pienaar and Van der Walt *Law of property* (1992) 10-12 for the sources of South African property law. See also Milton JRL "Ownership" in Zimmerman R and Visser D (eds) *Southern cross: civil law and common law in South Africa* (Cape Town 1996) 657-699 692-699 on the development of the South African property concept.
  - 3 These developments and circumstances usually refer to such things as mineral rights and water rights, where the situation differed markedly from that in Holland. See Milton "Ownership" 657-670-691.

also politically neutral.<sup>4</sup> Although it is, somewhat grudgingly, acknowledged that *apartheid* legislation has had an effect on this perfect system, the assumption is that removal of such laws will "revive" the pure, neutral and just Roman-Dutch property law. As was shown in Part II, however, legal rules and systems are never neutral. The question then arises whether South African property law could have remained unaffected by the effects of *apartheid*.

The introduction of (a) new constitution(s) raises other questions, namely if property law will remain unaffected by constitutional measures. If the rigid separation between public and private law is maintained, the assumption must be that such public-law measures will not affect the neutral private law.<sup>5</sup> However, the inclusion of a property clause in the constitution(s) must at least make the rigid maintenance of this distinction problematic if not downright impossible to maintain.

This chapter therefore addresses three aspects. In the first place the idealised version of the Roman-Dutch property concept in South African law needs to be studied. To this end the views of academic commentators and the courts will be studied to try to extract the much-vaunted principles of this ideal system. In the second place the effect of *apartheid* legislation on this system will be studied. The main question here is whether *apartheid* changed the basic structure of property law in South Africa or if its effect was at best peripheral.

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- 4 This perception is the result of the dichotomy between private and public law that is at the heart of South African law. See Van der Walt 1995 SAJHR 169 180: "... at least some supporters of the civil-law tradition think that the problem with apartheid was that politics was allowed to enter into what should be 'pure' private-law relations, and that the solution is to keep not only apartheid but all politics out of private law. ... Consequently the civil-law method is characterised by a very clear division between private and public spheres." See also Van der Walt "Common law landownership" 23.
- 5 Van der Walt 1995 SAJHR 169 185: "Private law [is] restricted to the 'pure' principles of the civil-law tradition, as they apply between private individuals, and [has] nothing to do with government actions or politics." This is Van der Walt's characterisation of the traditional view and does not represent his own view.

In the third place the effect of the new constitution(s) will have to be studied in some depth. Although this development is still in its infancy, the academic debate in particular provides interesting perspectives. The main question in this respect will be the reach of the public-law protection of private property and, incidentally, whether the rigid distinction between private and public law is still tenable.

## 12.2 The Roman-Dutch ideal

As was mentioned earlier, South African property law is basically Roman-Dutch law. Some of the earliest commentators (at least until the end of the nineteenth century) accepted and used the definitions and descriptions of ownership of, in particular, Van der Linden and, to a lesser extent, those of Grotius and Voet.<sup>6</sup> The point of departure of these early definitions seems to be the idea of ownership as absolute, exclusive and abstract.<sup>7</sup> Some of the earliest case law depended on the definition of Von Savigny<sup>8</sup> and defined *dominium* as follows:

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- 6 Van der Walt *Houerskap* 446; Milton "Ownership" 657 659-664, 670-679. See 3.3, 3.4.3, 4.3, 4.4.2, 5.3, 5.4.2, 6.2.2, 6.2.3.2, 6.3.2, 6.3.3.2, 6.4.2, 6.4.3.2, 6.5.2, 6.5.3.2 above on these Roman-Dutch writers.
- 7 Van der Walt *Houerskap* 446-447. See Milton "Ownership" on the absolute concept of ownership.
- 8 See 3.4.2.2, 4.4.1, 5.4.1, 6.2.3.1 above on Von Savigny.

"Dominium is the unrestricted and exclusive control which a person has over a thing. Inasmuch as the owner has the full control, he also has the power to part with so much of his control as he pleases. Once the owner, however, he remains such until he has parted with all his rights of ownership over the thing."<sup>9</sup>

Courts explicitly rejected the idea of double ownership in the early twentieth century.<sup>10</sup> The conclusion seems inescapable that an abstract and absolute concept of ownership " ... formed the matrix for all real relations in the earliest South African law."<sup>11</sup>

In modern South African law ownership is regarded, for purposes of classification and conceptualisation, as a subjective right and specifically as a real right.<sup>12</sup> A real right can be defined as " ... a *direct* legal connection between a person and a thing, the holder of the right being entitled to control that thing within the limits of his right ... "<sup>13</sup> Ownership is distinguished from other real rights in that it is the only real right *in re sua*. All other real rights are rights *in re aliena*. Consequently ownership is the only complete real right.<sup>14</sup> This indicates the importance of ownership.

9 *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 1319. It should be mentioned that Von Savigny (or any of the other pandectists) can not be regarded as Roman-Dutch authority - see Visser 1986 AJ 39 47. On the other hand, this definition does not differ that much from the ones supplied by Roman-Dutch writers - see Milton "Ownership" 695.

10 *Lucas' Trustee v Ismail and Amod* 1905 TS 239 247ff; *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 1319. This (fairly late) rejection of the fragmented property concept was based on its supposed English origin - see Van der Walt and Kleyn "Duplex dominium" 249.

11 Van der Walt *Houerskap* 462.

12 Van der Walt *Houerskap* 593.

13 Klajn and Boraine *Law of property* 43. The classical South African definition of a real right is provided by Van Zyl FJ and Van der Vyver JD *Inleiding tot die regswetenskap* 2nd ed (Durban 1982) 422: "n Saaklike reg is dus die juridiese aanspraak van 'n regs subjek op 'n saak ten opsigte van ander persone ..."

14 Van der Walt 1988 DJ 16 17; Schoeman *Law of property* 162; Van der Walt *Houerskap* 594; Sonnekus JC and Neels JL *Sakereg Vonnisbundel* 2nd ed (Durban 1994) 250.

Against this classification background, ownership is defined.<sup>15</sup> The definition of Van der Merwe has been influential and can be regarded as representative and authoritative. He defines ownership (*eiendom*) as:

"(D)ie saaklike reg wat die mees volkome en omvangrykste heerskappy oor 'n saak verleen. 'n Eienaar kan binne die grense deur die publiek- en privaatreë gestel na geliewe met die saak handel."<sup>16</sup>

This definition is basically repeated in the later edition of this work,<sup>17</sup> and in other works by the same author.<sup>18</sup> With minor variations this definition is repeated and used by most South African property lawyers.<sup>19</sup> This is also the definition used in most case law.<sup>20</sup>

On this basis commentators recognise that the South African law of ownership has a number of characteristics. In the first place ownership is an *absolute* right. Although it can be and is restricted, these restrictions are regarded as temporary and unusual.<sup>21</sup> In the second place ownership is an *exclusive* right that is held by an individual owner to the exclusion of all

15 To avoid confusion, it should be noted that South African writers use various terms to indicate property. Most use *eiendom* or *eiendomsreg* in Afrikaans. This is translated into English as *ownership*. For the use of terminology in this study, see chapter 1.

16 Van der Merwe *Sakereg* 110. Translation: "(Ownership is) the real right that gives the most complete and extensive sovereignty over a thing. An owner can, within the boundaries set by public and private law, do with the thing as he pleases."

17 See Van der Merwe *Sakereg* (1989) 171.

18 See eg. Van der Merwe "Things" 98.

19 See Schoeman *Law of property* 162: "(O)wnership potentially confers the most complete or comprehensive control over a thing."; Sonnekus and Neels *Vonnisbundel* 249: "... verleen in beginsel aan die reghebbende die wyds moontlike bevoegdhede ten aansien van 'n saak."

20 *Gien v Gien* 1976 2 SA 1113 (T) 1120C: "... die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê."; *Chetty v Naidoo* 1974 3 SA 13 (A) 20A: "... a right of exclusive possession."

21 This is the traditional view on the nature of ownership. See discussion by Van der Walt 1992 DJ 446-457 447; Van der Merwe *Sakereg* 11; Sonnekus and Neels *Vonnisbundel* 249; Van der Walt "Introduction" in *Land reform and the future of landownership in South Africa* (Cape Town 1991) 1-7 1. However, a number of commentators have begun to criticise and reject this characteristic on historical and philosophical grounds.



others.<sup>22</sup> In the third place ownership is an *abstract* right in that it is always more than the sum of its entitlements.<sup>23</sup> This means, among other things, that ownership can never be a *bundle of rights*. Finally, ownership is limited to *things*, that is, objects that are impersonal, corporeal, independent, judicially controllable and of use and value.<sup>24</sup> Regarding the aspect of corporeality, however, some development has taken place and most authors now recognise that *things* can also be incorporeal,<sup>25</sup> but this is still regarded as the exception to the rule. Because of the view of ownership as absolute, restrictions are recognised but mentioned, as it were, in passing. Most textbooks mention *public law restrictions* (which include *apartheid* legislation), but this takes up a very small part of the discussion<sup>26</sup> and much more emphasis is placed on private-law restrictions.

The last few years have seen some innovation. In the first place there has been a move away from conceptualism generally and the pandectist definition in particular. Some writers criticise the traditional definition, mainly on historical grounds, but provide no new definition.<sup>27</sup> Others state that a definition would depend on extra-judicial factors that necessitate a move away from conceptualism.<sup>28</sup> Ownership is then defined as:

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22 Van der Walt 1992 DJ 446 447; Van der Walt *Houerskap* 600; Van der Merwe *Sakereg* 113; Van der Merwe *Sakereg* (1989) 175.

23 Van der Walt 1992 DJ 446 447; Van der Walt *Houerskap* 599; Van der Merwe *Sakereg* 14; Schoeman *Law of property* 162; Olivier NJJ, Pienaar GJ and Van der Walt AJ *Sakereg studentehandboek* (Cape Town 1989) 40; Sonnekus and Neels *Vonnisbundel* 249; Van der Walt "Introduction" 2.

24 Van der Merwe *Sakereg* 19-22; Van der Merwe *Sakereg* (1989) 23-27; Van der Merwe "Things" 5, 12-15; Olivier, Pienaar and Van der Walt *Law of property* (1992) 13-16; Sonnekus and Neels *Vonnisbundel* 23-24.

25 See eg. Schoeman *Law of property* 11-15; Kleyn and Boraine *Law of property* 8-19. However, Van der Walt AJ and Pienaar GJ *Inleiding tot die sakereg* (Cape Town 1996) 20 warns that this must be regarded as exceptions to the general rule that *things* must be corporeal.

26 See eg. Van der Merwe *Sakereg* 115-118; Van der Merwe *Sakereg* (1989) 177-183; Van der Merwe "Things" 100; Schoeman *Law of property* 163-171; Sonnekus and Neels *Vonnisbundel* 250-251.

27 See eg. Kleyn and Boraine *Law of property* 161-164.

28 Van der Walt and Pienaar *Sakereg* (1996) 3, 37; Olivier, Pienaar and Van der Walt *Law of property* (1992) 28, 29.

"(A) legal relationship with an abstract nature which implies that there is a legal relationship between the owner and a thing (legal object) in terms of which the owner obtains certain rights (entitlements) to the thing and that there is a legal relationship between the owner and other legal subjects with regard to the thing."<sup>29</sup>

This definition is, of course, still within the broad tradition. However, it leaves room to change the relationship depending on social circumstances. In the second place it is increasingly recognised that, although it is inconsistent with the theory of subjective rights, real rights to incorporeals can and do exist.<sup>30</sup> In the third place the effect of *apartheid* legislation on property law is more widely discussed and studied.

The effect of this abstract and very neat system has been that property law is seen as politically neutral and, because of that, basically just and equitable. There is very little, if any, discussion on the justification of private ownership and most authors simply state that it is an important social, economic and political institution. The result of this is that there is no South African *tradition* of discussing ownership in terms of freedom, nor is there (with a number of very notable exceptions) a *tradition* of critical thinking about private ownership.<sup>31</sup> As Van der Walt states: "(T)he debate is inhibited by the fact that the traditional liberalist perception of ownership and the theoretical system in which it is embodied are accepted uncritically."<sup>32</sup>

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29 Olivier, Pienaar and Van der Walt *Law of property* (1992) 34.

30 Van der Walt and Pienaar *Sakereg* (1996) 16-17; Olivier, Pienaar and Van der Walt *Law of property* (1992) 14.

31 Van der Walt 1992 DJ 446 457: "... the myth created by Grotius and the Pandectists according to which the traditional Western European system of land rights is a universal, timeless, scientific and superior product which should be accepted for the protection and promotion of human liberty and dignity has been so successful that most of us find it unthinkable to depart from that tradition ..."

32 Van der Walt 1992 DJ 446 456.

### 12.3 The *apartheid* reality

The vision of South African property law as a perfectly just and equitable conceptual system seems slightly ridiculous once the effect of *apartheid* on this system is realised. *Apartheid* legislation regarding property covered a large subject field. Examples of this type of legislation include the *Slums Act*,<sup>33</sup> the *Trespass Act*,<sup>34</sup> the *Health Act*,<sup>35</sup> the *Group Areas Act*,<sup>36</sup> the *Prevention of Illegal Squatting Act*,<sup>37</sup> the *Black Land Act*,<sup>38</sup> the *Development Trust and Land Act*<sup>39</sup> and the *Black Administration Act*.<sup>40</sup> The content, reach and consequences of these acts will not be discussed here, as they have been extensively covered elsewhere.<sup>41</sup> This is not to deny the awful reality of this type of legislation, but the focus of this section will be on the effect of this type of legislation on South African property law.

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- 33 *Slums Act* 76 of 1979 that aimed at preventing the development of slums and that provided for the removal of people from such areas. The act also provided that lack of housing could not be a defence against actions taken in this regard.
- 34 *Trespass Act* 6 of 1959 that prohibited trespass on property without the permission of the owner or legal occupier.
- 35 *Health Act* 63 of 1977 which provided that an owner could be forced to clear up situations which created a health hazard and that, if he refused, that it may be cleared up at his expense.
- 36 *Group Areas Act* 36 of 1966 which aimed at separating all people into segregated urban areas and which provided that people could be removed to implement the act.
- 37 *Prevention of Illegal Squatting Act* 52 of 1951 which gave the administration wide powers to forcibly and without legal intervention remove squatters. This act also purported to oust the jurisdiction of the courts in these cases.
- 38 *Black Land Act* 27 of 1913 which prevented blacks from acquiring land outside the so-called scheduled areas.
- 39 *Development Trust and Land Act* 18 of 1936 which created so-called Trust areas that were envisaged to be the basis for the later creation of homelands.
- 40 *Black Administration Act* 38 of 1927 which created a separate administrative system for people in so-called black areas.
- 41 See eg. Van der Walt 1990 *Stell LR* 26-48; Van der Walt AJ "Land law without the land acts - predicaments and possibilities" 1991 *JCRDL* 738-752 739-742; Gutto SBO *Property and land reform - constitutional and jurisprudential perspectives* (Durban 1995) 25-34; Davenport THR "Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control" in *Land ownership - changing concepts* (Cape Town 1986) 53-76; Schoombee JT "Group areas legislation - the political control of ownership and occupation of land" in *Land ownership - changing concepts* (Cape Town 1986) 77-118. See, in particular, Van der Merwe D "Land tenure in South Africa: a brief history and some reform proposals" 1989 *TSAR* 663-692 678-685 on the far-reaching effects of the legislation dealing with land tenure.

There is little doubt that these types of legislation served as some of the most important cornerstones of apartheid.<sup>42</sup> Moreover, they established " ... the property law context within which the government policy of racial segregation function(ed). In this way the social function of the law of property ... has been politicised fundamentally."<sup>43</sup> What has, however, been even more important is the reaction of South African courts to these acts. On the one hand some judgements<sup>44</sup> have used the abstract definition of ownership along with the intentionalist approach to interpretation to give effect to legislation without regard to their social (and personal) effect.<sup>45</sup>

On the other hand the use of more "liberal" methods of interpretation (such as the *mischief* theory) and the willingness to take social consequences into consideration, have led to rather different judgements.<sup>46</sup> This difference of approach is particularly noticeable in the judgement in the *Diepsloot*-cases.<sup>47</sup>

The inequitable results reached in the majority of cases dealing with *apartheid* legislation can be attributed to the abstract definition of property combined with the intentionalist approach to interpretation (both of which allow courts to apply legislation without regard to its social consequences). It is, furthermore, a result of an acceptance of the public/private split, which create the impression that property is immune to political influences. This has led to an approach where a lack of justice is masked by attention to technicalities,

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42 See Schoombee "Group areas legislation" 77.

43 Van der Walt 1990 Stell LR 26 29.

44 *Minister of the Interior v Lockhat* 1961 2 SA 587 (A); *S v Adams*; *S v Werner* 1981 1 SA 187 (A).

45 Van der Walt 1990 Stell LR 26 43: " ... the abstract definition of ownership has the effect that ideologically inspired legislation ... is applied regardless of its social consequences." On the intentionalist approach see Du Plessis LM *Interpretation of statutes* (Durban 1986) 31-39 and Devenish GE *Interpretation of statutes* (Cape Town 1992) 33-35.

46 See eg *S v Govender* 1986 3 SA 969 (T); *Vereeniging City Council v Rhema Bible Church, Walkerville* 1989 2 SA 142 (T); *Vena v George Municipality* 1987 4 SA 29 (C); *S v Lutu* 1989 2 SA 279 (T) and the unreported cases of *Munisipaliteit van Port Nolloth v Xhalisa*; *Lumalala v The Municipality of Port Nolloth* CPD 1989-01-12, cases no 8580/88 and 10458/88.

47 *Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1993 1 SA 577 (T); *Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1993 2 SA 49 (T); *Diepsloot Residents' and Landowners Association v Administrator, Transvaal* 1994 3 SA 336 (A). See also Van der Walt 1993 SAPL 263-297; Van der Walt 1994 JCRDL 181-203; Van der Walt 1995 SAPL 1 27ff.

based on professed neutrality regarding moral or social issues. Moreover, as an analysis of the approach of textbooks above illustrated, this approach is also taught to students:

"We occupy our students' time with the fine distinction between *commixtio* and *confusio*, and then we would, perhaps, make a brief and rather apologetic reference to the so-called 'black land law' during the last period of the semester, hastening to add that the student need not break their heads over that mysterious topic for exam purposes - after all, it is not really private law, is it?"<sup>48</sup>

However, it should be realised that such legislation is part of the very fibre of property law. It has affected property in a number of very fundamental ways. In the first place it has " ... all but destroyed the essential ... spirit of justice and equality ... "<sup>49</sup> In the second place it has destroyed any hope for a natural set of land relations and the very belief in the neutrality of property law has allowed land rights and relations to be shaped by ideological whim.<sup>50</sup> Moreover, this pretence of neutrality has resulted in blinding current and future generations of property lawyers to the moral and political dimensions of property.<sup>51</sup> Finally the preoccupation with "pure Roman-Dutch law" has resulted in the failure to develop customary land law.<sup>52</sup> A thorough understanding of the customary-law property concept and the customary land-

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48 Van der Walt 1990 *Stell LR* 26 47.

49 Van der Walt "Common law landownership" 23.

50 Van der Walt "Common law landownership" 24.

51 See Barnard E "Blacks, their castles and the law of property: a bid for a new approach in education and practice" 1990 *RM* 450-461.

52 Van der Walt "Common law landownership" 25; Dlamini CRM "Landownership and customary law reform" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (Cape Town 1991) 37-44 37.

use ethic is essential for the development of a truly functional South African property concept.

## 12.4 Enter the constitution(s)

### 12.4.1 The 1993-constitution

Even before the 1993-*constitution* came into force, academics were calling for changes to the existing paradigm of ownership and property rights. These proposals were mostly based on the idea that the theoretical framework no longer reflected the reality and therefore was in need of change.<sup>53</sup> The drafting of a constitution seemed like the perfect opportunity to effect these changes, and, although some writers expressed reservation about the inclusion of a "property clause",<sup>54</sup> it was eventually included.<sup>55</sup>

The 1993-*constitution* in section 28 dealt with property.<sup>56</sup> This section read as follows:

#### "28. Property

- (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

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53 See, for instance, Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (Cape Town 1991); Van der Walt 1992 SAPL 1-11; Van der Walt AJ 1990 Stell LR 26-48; Budlender G "The right to equitable access to land" 1992 SAJHR 295-304; Lewis 1992 SAJHR 389-430; Van der Walt 1992 SAJHR 431-450; Kroeze IJ "Eigendom morgen: nuwe ontwikkelings in die Nederlandse en Suid-Afrikaanse eiendomsreg" 1993 DJ 42-58.

54 See Van der Walt 1993 R & K 263 281-282 for a summary of these reservations.

55 The process by which the property clause was drafted and accepted is described in Chaskalson M "Stumbling towards section 28: negotiations over the protection of property rights in the interim constitution" 1995 SAJHR 222-240. Chaskalson M "The property clause: section 28 of the constitution" 1994 SAJHR 131-139 131 also emphasises the fact that section 28 was a last minute agreement, which might account for some sloppy drafting.

56 It should be remembered that this was an *interim* constitution, since section 73(1) provided that a new constitution had to be adopted within two years from the date of the first sitting of the National Assembly.

- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

The 1993 constitution also provided, (in sections 121-123) for the restitution of land rights. Both the history of section 28<sup>57</sup> and its possible interpretation and application was extensively debated.<sup>58</sup> The debate centred around the meaning of the term "rights in property", the effect of the limitations in section 28 and its relation to section 33, the meaning of and relationship between sections 28(2) and 28(3) and the application of the constitution to private law. These questions will be discussed briefly here.

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57 See Murphy J "A note on the SA Law Commission's interpretation of the property rights in article 11 of the ANC bill of rights" 1992 *SAPL* 12-39; Van der Walt 1993 *R&K* 263 281-287; Chaskalson 1995 *SAJHR* 222-240.

58 See Van der Walt 1993 *R&K* 263 287-297; Van der Walt AJ "The future of private ownership of land" 1994 *Codicillus* 35:2 4-18; Chaskalson M 1994 *SAJHR* 131-139; Murphy J "Property rights in the new constitution: an analytical framework for constitutional review" 1993 *CILSA* 211-233; Van der Walt AJ "Notes on the interpretation of the property clause in the new constitution" 1994 *JCRDL* 181-203; Murphy J "Interpreting the property clause in the Constitution Act of 1993" 1995 *SAPL* 107-130; Van der Walt 1993 *SAPL* 296-319; Kroeze IJ "The impact of the bill of rights on property law" 1994 *SAPL* 322-332; Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk DH ea (eds) *Rights and constitutionalism - the new South African legal order* (Cape Town 1994) 455-501.

*The term "rights in property"*

The most innovative aspect of section 28 was the use of the term "rights in property". Section 28(1) contained a positive guarantee clause that protected the right to acquire, hold and dispose of rights in property.<sup>59</sup> Therefore the constitution did not protect *ownership, property, or even property rights*. It protected *rights in property*. The question was how this term is to be understood. While various solutions were proposed, writers seemed to agree that the term had to be interpreted widely to include not only real rights, but also immaterial property rights, property rights in incorporeals and even personal rights in property.<sup>60</sup> This did not mean that the distinction between real and personal rights would become redundant, but that it would affect the hierarchy of rights. It meant that ownership would lose its privileged position and that the protection of all rights in property was foreseen in section 28.<sup>61</sup> Chaskalson argued that section 28 would also include species of "new property", based on the recognition of state employment as property for the purposes of the *audi alteram partem*-rule.<sup>62</sup>

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59 Van der Walt AJ 1995 SAPL 298-345 302 states that this is comparable to the German institutional guarantee in that it protects a certain kind of property relationship. See also Murphy 1995 SAPL 107 113 who states that: "Private property is accordingly a constituent of the normative legal order."

60 See Kroeze 1994 SAPL 322 328; Murphy 1995 SAPL 107 113; Van der Walt 1994 JCRDL 181 193; Van der Walt 1995 SAJHR 169 189. Chaskalson 1994 SAJHR 131 132 explains this in terms of the idea that property is a bundle of rights which, individually, make up property rights.

61 See Van der Walt 1995 SAPL 298 314.

62 Chaskalson 1994 SAJHR 131 133 quoting Hoexter JA in *Administrator, Natal v Sibiyi* 1992 4 SA 532 (A) 539A-B.



### Limitations

The limitations on the right protected in section 28 were contained in the section itself and in section 33.<sup>63</sup> The main question revolved around the relationship between these two sections. On the one hand was argued that section 28(2) overrode section 33(1) in that 28(2) requires "a law" ("n wet") rather than simply "law" ("reg").<sup>64</sup> In this argument the specific provision was preferred rather than the general one. On the other hand Van der Walt argued that section 33 provided for limitations on the institutional guarantee of rights in property. If it is argued that section 28(1) provides an institutional guarantee of rights in property (that is that the state may not act in such a way as to make the acquisition, use and disposition of rights in property impossible) then section 33 would provide for those cases where it is necessary to limit the right in itself.<sup>65</sup> The wording of section 33 (1)(b) strengthened this view. The limitations provided for in section 28(2) would then refer to those circumstances where individual rights in property needed to be limited, either by deprivation or expropriation.

A third view would be that section 33 provided the broad parameters within which limitations could occur. It stated the fundamental principle that no right was absolute, but that all rights could and would be limited. All these limitations then need to meet the criteria set out in section 33. Any specific limitation, such as the one found in section 28, must then meet these criteria in addition to those found in the specific section.

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63 The relevant part of section 33 reads as follows: "(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

- (a) shall be permissible only to the extent that it is-
  - (i) reasonable; and
  - (ii) justifiable in an open and democratic society based on freedom and equality; and
- (b) shall not negate the essential content of the right in question, ... "

64 See Kleyn 1996 SAPL 402 432.

65 Van der Walt 1995 SAPL 298 304; Murphy 1995 SAPL 107 114.

That would imply that limitations on rights in property (whether in its institutional or individual form) must meet the requirements of both sections 28 and 33. The implication would be that, for instance, an expropriation must not only be for public purposes and subject to payment of compensation, but also reasonable and justifiable in an open and democratic society.

The element that all interpretations have in common, however, is the assumption that rights in property can and will be limited. It represents a fundamental shift away from the absolute view of ownership in the traditional civil-law approach towards an inherently limited right that is placed firmly within the social and political context.

#### *Deprivation and expropriation*

Section 28(2) prohibited the *deprivation* of rights in property except in accordance with a law, while section 28(3) provided for *expropriation* of these rights in certain circumstances. The next question was what the relationship was between these two sections. Subsection (3) was a more or less standard formulation found in most constitutions and was, broadly speaking, in conformity with the provisions of the civil law. The only real difference lay in the fact that more factors needed to be taken into consideration when compensation is determined. This indicated sensitivity for historical injustices.

It was more difficult to determine the meaning of *deprivations*. In terms of the normal rules of interpretation words must be understood in their ordinary meaning unless they have a special or specific meaning (in the sense of a technical-legal meaning). The term has no specific meaning in either private or public law and, in those cases where it is used, it refers to a total withdrawal of rights.<sup>66</sup> This led Murphy to suggest that "deprivation" should

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66 See Van der Merwe GC and De Waal MJ *The law of things and servitudes* (1993) 74, where 'deprivation' is used in the context of the deprivation of possession and the *mandament of spoel*.

be accorded a wide or general meaning, while "expropriation" should be understood in its technical meaning.<sup>67</sup>

The more probable solution is that subsection (2) referred to regulation of rights in property (as in the American due-process clause), while subsection (3) referred to expropriation.<sup>68</sup> It is now generally accepted that this is the correct view. Therefore " ... compensation is not available for deprivations which are not expropriations."<sup>69</sup>

#### *Horizontal application*

It is sometimes argued that the 1993-constitution had little or nothing to say about private law and that it was restricted to public law. This expresses the typically liberal view that fundamental rights only have vertical application, and that the constitution fulfils the function of protecting the private sphere of the individual against state interference.<sup>70</sup> Consequently the constitution has only a marginal influence on private law.<sup>71</sup> However, it must be emphasised that the 1993-constitution provided the normative and conceptual framework for all law, and that included private law.<sup>72</sup> Furthermore, section 28 provided the normative paradigm for all property rights and private-law provisions relating to these would have to be interpreted in the light of section 28.<sup>73</sup> Because the constitutional provision was wider than traditional private-law

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67 Murphy 1995 SAPL 107 115-116.

68 Van der Walt 1995 SAPL 298 308-310; Kleyn 1996 SAPL 402 427; Chaskalson 1994 SAJHR 131 134; Van der Walt 1994 JCRDL 181 198-199; Van der Walt 1995 SAJHR 169 188.

69 Murphy 1995 SAPL 107 117. See also Chaskalson 1994 SAJHR 131 134.

70 Gill 1983 J of Pol 675 679; Van der Walt 1992 SAJHR 431 447; Kroeze 1994 SAPL 322 324.

71 See the judgement of Van Dijkhorst J in *De Klerk and another v Du Plessis and others* 1995 2 SA 40 (T) 501-J in which the influence of the constitution in the "virile" (sic) private law is restricted to " ... the unruly horse of public policy" and 491: "There was no need for institutional invasion of the private law." (My emphasis.)

72 See, for instance, the provisions of sections 7(2), 35(3) and 33(2). See also discussion in Kroeze 1994 SAPL 322 324.

73 Van der Walt 1995 SAPL 298 301.

ownership, Kleyn warned, " ... the notion of property could swallow up the whole of private law."<sup>74</sup>

### *Conclusion*

In general it can be stated that section 28(1) contained a positive institutional guarantee<sup>75</sup> that was limited by the provisions of section 28(2), 28(3) and 33. The right enshrined in section 28 included the right to acquire, hold and dispose of rights in property. These are the traditional liberal entitlements of ownership that are now applied to rights in property.

The negative individual guarantee against unwarranted interference by the state was contained in subsections (2) and (3). Once again these rights could be limited if the conditions stated in subsections (2) and (3) and 33 were met. It should, furthermore, be noted that section 28 distinguished between various kinds of rights in property by the use of the words "to the extent that the nature of the rights permits". This only applied to the entitlement of disposal, which indicates that certain rights could not be alienated.<sup>76</sup>

The important point is, however, that section 28 represented a major paradigm shift from the civil-law preoccupation with ownership within a hierarchy of rights toward a constitutional idea of rights in property that tends to be non-hierarchical.<sup>77</sup> While ownership will not disappear and will remain an important right, doctrinally speaking, it will lose its privileged position.<sup>78</sup>

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74 Kleyn 1996 *SAPL* 402 423.

75 Murphy 1995 *SAPL* 107 112; Van der Walt 1994 *JCRDL* 181 194. However, Chaskalson 1994 *SAJHR* 131 133 states that section 28(1) is of limited scope and simply protects certain entitlements.

76 This was probably intended to refer to tribal land and necessitates a distinction between alienable and inalienable rights in property - see Van der Walt 1995 *SAPL* 298 306.

77 Van der Walt 1995 *SAPL* 298 335 states that this is not a paradigm shift, but a scientific revolution in Kuhnian terms.

78 Van der Walt 1995 *SAPL* 298 314; Van der Walt 1995 *SAJHR* 169 189.

### 12.4.2 The 1996-constitution

The final constitution<sup>79</sup> also included a property clause. Section 25 of the 1996-constitution reads as follows:

**"25. Property**

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application-
  - (a) for public purposes or in the public interest; and
  - (b) subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court.
- (3) The amount, timing, and manner of payment, of compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant factors, including -
  - (a) the current use of the property;
  - (b) the history of the acquisition and use of the property;
  - (c) the market value of the property;
  - (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - (e) the purpose of the expropriation.
- (4) For the purposes of this section -
  - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
  - (b) property is not limited to land.
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

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<sup>79</sup> *Constitution of the Republic of South Africa 108 of 1996* - hereinafter referred to as the 1996-constitution.

- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).
- (9) Parliament must enact the legislation referred to in subsections (6).

### *Structure and content*

On the whole the 1996-constitution, and the Bill of rights in particular, differ from its predecessor in that it is generally worded more simply and clearly. Section 25 is an exception to this general observation. It is a long and fairly detailed section, partly as a result of the fact that it deals not only with property, but also with land and related reform.<sup>80</sup>

Unlike its predecessor, section 25 does not contain a positive, institutional guarantee. Neither ownership, property nor its entitlements are protected, but subsections (1) and (2) are reminiscent of the American property clause.<sup>81</sup> There has been some debate on whether this negative guarantee is sufficient to protect property rights.

This question was also raised in the *First Certification Case*, where it was argued that section 25 does not make explicit provision for the protection of property.<sup>82</sup> The court's reply was that there is "... no universally recognised formulation of the right to property," which seems to indicate that a negative guarantee of property might be as effective in protecting property as a

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80 In the 1993-constitution these measures had not been part of the chapter on fundamental rights, but had been provided for in sections 121-123. These provisions are not directly relevant for present purposes and will only be referred to in passing.

81 Kleyn 1996 SAPL 402 416-418.

82 *In re: Certification of the Constitution of the Republic of South Africa*, 1996 1896 10 BCLR 1253 (CC).

positive one. Therefore the property clause should not be seen as conferring a purely negative right, but should be understood within the normative context of the constitution as a whole.

What is protected is the owner's right not to be deprived of property except in terms of a general law and the right not to have property expropriated except in set circumstances and against compensation. Subsection (1) contains the regulation clause that provides that property may be regulated but only in terms of law of general application. A further departure from the previous section 28(2) is that 25(1) explicitly prohibits arbitrary deprivations. Subsection (2) contains the expropriation clause and provides that expropriation may only take place in terms of law of general application, for public purpose or in the public interest and if compensation is paid. The factors to be taken into consideration when calculating compensation are enumerated in subsection (3).

Subsection (4) provides that "public interest" includes the nation's commitment to land reform and that "property" is not limited to land. Subsections (5) to (9) deal with land reform, redistribution and access to resources. It is sometimes argued that this should not form part of a property clause. However, these subsections provide important clues to the normative context of the property clause in that it makes the programmatic nature of this section clear. It is furthermore interesting to note that subsection (8) empowers the state to take steps to effect land, water and related reform, but it also provides that this must be done in accordance with the provisions of section 36(1). This indicates that these rights are also subject to the general limitations clause.

### *Property*

It can be predicted with a fair amount of certainty that a large part of the debate around section 25 will, once again, revolve around the term *property*. Murphy warns that " ... the primary question ... is not whether the affected resource is 'property' or not.... but whether the government action in relation

to the resource is justified or not."<sup>83</sup> The recognition that property is, in the constitutional sense, concerned with a power relationship, seems to make this question irrelevant. However, the conceptual approach and training of property lawyers make it unlikely that this will not, once again, be regarded as the crucial question. A new conceptual scheme, such as the one proposed by Van der Walt,<sup>84</sup> may be needed. At any rate it will have to be a "... system of a social-relations rather than an abstract right."<sup>85</sup>

Whatever the outcome of the above-mentioned debate, it is fairly certain that *property* will be given a fairly wide meaning in the constitutional sense. In an *obiter* remark the court in *Transkei Public Servants Association v Government of the Republic of South Africa and others*<sup>86</sup> stated:

"It would seem, therefore, on the above somewhat cursory examination of certain of the authorities, that the meaning of 'property' in section 28 of the Constitution may well be sufficiently wide to encompass a State housing subsidy. In the view that I take of the matter, however, it is not necessary for me to decide the issue and therefore to deal with it in any greater depth."

Such an approach would, indeed, be consistent with international trends and with the debate on section 28 discussed above. It is also fairly certain that this view will be extended to discussion on section 25 as well. The real question is, of course, how this is to be squared with the traditional concept of ownership.

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83 Murphy 1995 SAPL 107 114.

84 Van der Walt 1995 SAPL 298 335ff.

85 Van der Walt 1995 SAPL 298 343.

86 *Transkei Public Servants Association v Government of the Republic of South Africa and others* 1995 9 BCLR 1235 (Tk) 1246J.



An interesting development in this regard is the creation of statutory property rights that go far beyond traditional civil-law ownership. For instance, the *Development Facilitation Act*<sup>87</sup> creates a right known as *initial ownership* in section 62 which provides for a secure, registerable right to land that has not been surveyed.<sup>88</sup> When such land is eventually surveyed and becomes registerable in the usual manner, the initial ownership is automatically converted into ownership.<sup>89</sup> Furthermore, the *Housing subsidy scheme* extends subsidies to " ... persons who enjoy functional security of tenure ... " indicating a move away from formal ownership. It also contains special provisions for land held by communities. These rights are now protected by the *Interim Protection of Informal Land Rights Act*.<sup>90</sup> Apart from these statutory developments new property rights, customary property rights, labour rights, informal land rights as well as religious and social rights will probably be recognised as property.<sup>91</sup> All of these developments serve to strengthen the assumption that the constitutional protection of property will extend beyond the limits of traditional civil-law ownership.

#### *Interpretation clause*

A number of other provisions have also been altered in the 1996-constitution and these affect the interpretation of section 25. Section 39, dealing with interpretation, resembles section 35 in the 1993-constitution, but no longer requires reference to comparable foreign case law, but simply allows courts to refer to *foreign law*. As was stated earlier, this makes it possible for courts to move beyond the restriction to civil-law systems.<sup>92</sup>

87 *Development Facilitation Act* 67 of 1995.

88 This is in accordance with the provisions of section 25(6) of the 1996-constitution.

89 Section 62(7) of the *Development Facilitation Act* 67 of 1995.

90 *Interim Protection of Land Rights Act* 31 of 1996.

91 Van der Walt 1995 SAPL 298 317-333.

92 Kleyn 1996 SAPL 402 402 also welcomes this as an opportunity to learn from "non-comparable" systems, especially in the African context.

*Limitations*

One of the problems with the previous property clause dealt with the relationship between the limitations contained in the clause and section 33. It was then suggested that the limitation clause provided a basic set of rules that govern all limitations on rights. Specific limitations in other acts were then to be regarded as additional safeguards in the case of limitation of rights. It is suggested that this approach would also apply to the present section 25. Section 36, which replaces section 33, deals with limitations and is much simplified. In essence, section 39 is a codification of the proportionality principle.<sup>93</sup> Section 25(8) specifically provides for legislative limitations on property, but also explicitly states that these need to conform to the requirements set out in section 36(1). The conclusion is that limitations on property need to be in accordance with the requirements of both sections 25 and 36. More importantly, the limitations contained in section 25 indicate that property is never to be regarded as absolute, but as limited in principle.

*Horizontal application*

The horizontal application of the fundamental rights is taken further and made more explicit in the 1996-constitution. Apart from the fact that the constitution plays a vital role in that it " ... creates public meaning for private law... ",<sup>94</sup> explicit provisions tend to blur the traditional distinction between private and public law even more. Section 2 provides that " ... law or conduct inconsistent with (the constitution) is invalid ... " and section 8(1) makes it clear that chapter 2 applies to "all law".<sup>95</sup> Furthermore, section 39(2) places an obligation on courts, when developing the common law, to promote the "spirit,

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93 Kleyn 1996 SAPL 402 428.

94 Van der Walt 1995 SAPL 298 335.

95 Section 8(1) reads: "The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state." This question will not be discussed further here, because the introduction of section 8(2), read with 8(1), makes it clear that the 1996 constitution will apply horizontally. Therefore it is no longer really an issue.

purport and objects of the Bill of Rights".<sup>96</sup> The conclusion is that section 25 provides a normative framework for property law, whether in the private-law or public-law contexts. It provides the paradigm for the normative discourse on property in South African law.

### 12.4.3 Constitutional property concept

While the traditional South African private-law property concept is a basically conceptualist one with the emphasis on ownership as the paradigm right, the constitutional property concept needs to be developed within the constitutional context. This implies at the very least that ownership can no longer provide the conceptual paradigm. In fact, the very wording of section 25 makes it virtually impossible to maintain a hierarchy of property rights. All property rights are protected and all are subject to limitations in the public interest. Although the courts have not dealt with this issue yet, it is argued that the constitutional property concept will, at least, have a number of characteristics.

In the first place, the constitutional property concept can never be an abstract or neutral concept. It is a profoundly contextual and political concept that must be understood in the normative context of the constitution as a political document. Consequently, it cannot be isolated from societal influences and demands. In the second place, the property concept is also conceptually limited. This becomes clear from the limitations in section 25, but also from the general limitations clause and section 7(3) that states explicitly that all the rights in chapter 2 are subject to limitations.

More importantly, constitutional property will probably be much wider than traditional thing ownership. Indications are that it will include all or most

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96 Section 39(2) reads: "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."

private-law patrimonial rights as well as public-law property. This becomes clear from the interpretation of the constitution as a public-law document. However, if both the wide protection and the inherent limitations are kept in mind, it seems that, paradoxically, the constitutional property concept is, at the same time, both wide and limited. This paradox turns out to be the most interesting part of the property concept.

In this respect, South African law is in a unique position. The American constitution contains a property clause, but no limitations clause, while the situation is reversed in the case of Canada. The German constitution also does not contain a limitations clause, and yet the German courts have developed a jurisprudence of limitations. The South African constitution has both a property clause and a limitations clause. This means that South African courts can avoid the American definitional approach (which is their way of dealing with limitations) with all its shortcomings. Instead the well-developed constitutional jurisprudence regarding limitations used by the Canadian and German courts seem more appropriate. This means that courts might easily accept an interest as property and then focus on the question of whether a limitation is justifiable. Using the established two-stage approach, courts can then focus on the more important issue of proportionality of limitations rather than on the *property vel non* question.

Moreover, the inclusion of sections 25(4)–(9) indicates that a balance needs to be struck between protection of property and land reform. This indicates that not only is property part of a social and political structure, but it is limited by that structure. An emphasis on property as an absolute right, in an attempt to block social reform, therefore seems impossible. This makes it possible to regard property as determined by social relations, rather than social relations determined by property.

## 12.5 Values and interpretation

"We inhabit a *nomos* - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."<sup>97</sup>

These words of Robert Cover are particularly striking in the South African constitutional context. Cover states that the law can never be just a system of rules, but that every rule must be placed within a discourse, a narrative which provide it with meaning, history, beginning, end and purpose. And every discourse, every narrative, require a prescriptive point, a morality.<sup>98</sup> Legal rules cannot escape their narrative and their morality. To establish meaning requires interpretative commitments and actions that can only be understood with reference to morality or values.<sup>99</sup> A legal tradition is more than a system (or hierarchy) of rules, it is also language, mythology and values.

For Cover a constitution represents a moment of undivided understanding that serve as a sort of fleeting legal DNA of common understanding. It remains as a sort of matrix, which is expressed in belief and ritual, and a common understanding of what the values mean.<sup>100</sup> Therefore the constitution serves as a sacred text around which narratives are built up and these narratives create meaning based on shared commitments and shared values.<sup>101</sup>

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97 Cover RM "Foreword: *Nomos* and narrative" 1983 *Harvard LR* 4-68.

98 Cover 1983 *Harvard LR* 4 5: "And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe ..."

99 Cover 1983 *Harvard LR* 4 7: "The normative universe is held together by the force of interpretive commitments ... (which) determine what law means and what law shall be."

100 Cover 1983 *Harvard LR* 4 15: "(T)o their common understanding of creed and ritual is added a common understanding of their relation to the primordial, imaginary, *true* unity ..."

101 Cover 1983 *Harvard LR* 4 25: "Many of our necessarily uncanonical historical narratives treat the Constitution as foundational - a beginning - and generative of all that comes after."

This process of jurisgenesis takes place within communities that create their own meaning and therefore create law.<sup>102</sup> However, the meaning created by communities may differ substantially from that created by courts. In the moment that courts of final instance choose one meaning over another, they destroy meaning and therefore law. Courts, in distinction from communities, are jurispathic.<sup>103</sup> By privileging one meaning over others, they destroy those meanings.

Therefore, external, objective legal rules are created, based on a normative discourse.<sup>104</sup> Making sense of constitutional provisions therefore require not only an understanding of the legal rules, but also of their normative discourse, their prescriptive point, their morals. Even more, it requires a commitment to shared values and understandings. It is no secret that the 1996-*constitution* contains values, some explicit, some implicit. Much of the debate on the new constitution centres on the identification, ordering and application of those values. It takes the form of either debating whether and to what extent the 1993-*constitution* provided for a *Rechtsstaat* (or constitutional state) and to what extent this has been maintained and expanded or not in the 1996-*constitution*,<sup>105</sup> or to what extent a hierarchy of values can be constructed that would guide interpretation in concrete cases.

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102 Cover 1983 *Harvard LR* 4 28: "I am asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning ... the Mennonite community creates law as fully as does the judge."

103 Cover 1983 *Harvard LR* 4 40: "Courts, at least the courts of the state, are characteristically 'jurispathic:'"

104 Cover 1983 *Harvard LR* 4 45: "Creation of legal meaning entails, then, subjective commitment to an objectified understanding of a demand."

105 See Venter F "Aspects of the South African constitution of 1996: an African democratic and social federal *Rechtsstaat*?" 1997 *ZaöRV* 51-82 and sources cited there. See also Erasmus G and De Waal J "Die finale grondwet: legitimiteit en ontstaan" 1997 *Stell LR* 31-44 in which the idea of a constitutional state is equated with the doctrine of *rule of law*. This is, at best, a questionable assumption.

In this respect the preamble<sup>106</sup> along with sections 1,<sup>107</sup> 2<sup>108</sup> and 7(1)<sup>109</sup> are used.

South African courts need to understand that their interpretation and application of section 25 will always take place within the normative discourse created by the constitution. A simple privileging of the civil-law hierarchy of property rights (even if couched in the language of the constitution) will result in jurisprudential decisions. The text of section 25 and the implicit and explicit values in the constitution make another approach possible - that of recognition that communities create property rights and that it is the courts' task to make those rights secure. To this end there is no need to create a hierarchy of values. That would be to perpetuate in the public-law sphere the conceptualism and hierarchical thinking that has plagued private-law thinking on property for so long.

- 106 "We, the people of South Africa,  
 Recognise the injustices of our past;  
 Honour those who suffered for justice and freedom in our land;  
 Respect those who have worked to build and develop our country; and  
 Believe that South Africa belongs to all who live in it, united in our diversity.  
 We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -  
     *Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;*  
     *Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;*  
     *Improve the quality of life of all citizens and free the potential of each person;*  
     *Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.*  
 May God protect our people."
- 107 "The Republic of South Africa is one sovereign democratic state founded on the following values  
 (a) Human dignity, the achievement of equality and advancement of human rights and freedoms.  
 (b) Non-racialism and non-sexism.  
 (c) Supremacy of the constitution and the rule of law.  
 (d) Universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."
- 108 "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the duties imposed by it must be performed."
- 109 "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

## 12.5 Conclusion

South African property law is, without a doubt, experiencing a long-overdue fundamental overhaul. The use of the term *property* in the two constitutions has opened up a number of possibilities but has also, paradoxically, constrained those choices. That the term *property* will, in a constitutional sense, mean protection beyond the traditional thing-ownership seems reasonably certain. The more difficult question, however, is what difference this will make to traditional private-law ownership. If the German example is followed, this could mean that *property* would mean different things in the private- and public-law contexts respectively. That could, in turn, mean that private-law property would, once again, be insulated from political, social and moral scrutiny. If the onus is placed on a public-law property concept to ensure justice, this could have the detrimental effect that nothing will change in the traditional private law. Following the German example could, therefore, mean that private property could remain locked in its conceptual ivory tower. Or to use Mr Justice van Dijkhorst's metaphor - it would maintain the "virile private law" virtually unaffected by the wafting perfume of public law!<sup>110</sup> It would ensure that the dichotomist split of the law into private and public is perpetuated.<sup>111</sup>

On the other hand, if it is assumed that the constitution is the supreme law of the land, also in so-called "pure" private-law areas, this could have a startling but beneficial effect. It cannot be assumed that, when *apartheid* legislation is abolished, private law will somehow, magically resume its just and equitable nature (if that had ever been its nature).

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110 *De Klerk and another v Du Plessis and others* 1995 2 SA 40 (T) 501-J.

111 Van der Walt 1995 SAPL 298 337 has indicated that there is no need for the German dual concept of property to be introduced into South African law, because there is no South African civil code and the interpretive theories differ. While this is true, the very real resistance to what is perceived as the "invasion" of private law by public law should not be discounted.



Using the basic egalitarian nature of the constitution to transform private law could, however, be the method to achieve just that. This would ensure that private property rules be subject to the scrutiny of the constitution and would force the law to confront the injustices toward, for instance, blacks and women inherent in the rules. It would ensure that private law is seen as embedded in the power structures and inequalities of society.

Moreover, the emphasis on *property* instead of *ownership* could lead to what Van der Walt calls the "demythologisation of ownership."<sup>112</sup> The effect of this would be a levelling out of rights in place of the old hierarchy of rights. Conceptually, at least, rights will have to be seen within a new normative discourse in which the privileged position of ownership is exchanged for a concern with values such as dignity and equality. The new constitution implies that everything, including property, be immersed in a normative discourse.<sup>113</sup>

Little attention has, so far, been given to the connection between property and power in the South African context. As in most constitutional systems, attention is focused on property as pre-requisite for liberty. However, to emphasise that only, tends to mask the detrimental effect of property on equality.

Moreover, if there is little in South African textbooks on *apartheid*, there is even less on the impact of discrimination based on gender. The oppression of women (in both customary and civil-law systems) is rarely alluded to in any branch of private law. Consequently, it is treated as if it doesn't exist. For South African law, therefore, to focus on the property concept without placing it squarely within the patriarchal context would be to perpetuate the position of

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112 Van der Walt 1995 SAPL 298 317.

113 Van der Walt 1995 SAPL 298 344.

women. Property is not, nor can it ever be, an abstract concept. It impacts on and is shaped by basic assumptions about power, equality and liberty.



## CHAPTER 13: CONCLUSION

### (DOING THINGS WITH CONSTITUTIONS)

"Law is politics, not because law is subject to political value choice, but rather because law is a form that power sometimes take."<sup>1</sup>

"Property is, and probably always will be, a contested concept."<sup>2</sup>

#### 13.1 Summary

The purpose of this section was to study the property concept from a constitutional perspective regarding specific issues. The first of these issues was what the content of *property* within a constitutional context is and how this is to be determined. Is property in the constitutional sense the same as the private-law concept (ie property is property is property), or is there a difference?

There are three basic approaches to this problem. In the first place, some systems use the private-law paradigm whereby the content of the constitutional property clause is determined by private-law views and definitions of property. In the American system, for instance, it is called the "standing law" approach.<sup>3</sup> This approach, while having the virtue of certainty, tends to enhance and promote the importance of the private-law paradigm in law in general and property law in particular. It also disguises the political assumptions inherent in that paradigm. Moreover, the absolute nature of the private-law property concept tends to disregard the general limitations clause that is so vital to constitutional jurisprudence in South Africa.

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1 Schlag P "Foreword: postmodernism and law" 1991 U Col LR 439-453 448.

2 Radin 1986 U Miami LR 239 241.

3 Michelman 1981 Washington and Lee LR 1097-1114.

In the second place, some systems (such as the German one) opt for a dual property concept. That means that the private- and public-law property concepts differ, yet exist side-by-side. Apart from the fact that this obviously makes for confusion and conflict between courts, it also serves to exacerbate the (artificial) private/public split. Moreover, it serves to immunise private law against constitutional influences. Once again the constitution is not allowed to function as a corrective for the inequalities inherent in the private-law concept. One solution for this problem would be to allow "horizontal seepage" from the constitution to private law, but this depends on courts' willingness to abandon the private-law paradigm. However, the content of sections 2, 7, 8 and 39 of the constitution ensures the horizontal application of the constitution.

A third possibility is raised by writers like Michelman but this has not yet been adopted in law. He suggests that constitutionally protected property should be seen as an original and not as a derivative right. That would supposedly make constitutional/public law the paradigm for property in the private sphere too and ensure greater equality. But this section has shown that, as long as the public-law property concept is based on liberal points of departure, that equality will be more apparent than real. Put another way, the emphasis on liberty would mean that equality is sacrificed. If, however, the constitutional property concept can be relieved of its liberal burden, it can be used as an instrument to reform private law.

The second question dealt with the expansion of the property concept. There is no doubt that the concept has expanded to include certain public-law or *new property* rights. This is sometimes attributed to constitutional entrenchment (as was the case in the Canadian constitutional debate). However, the study has shown that the expansion can also be observed in systems without a property clause and, consequently, constitutional entrenchment cannot be the cause. Instead it is suggested that the expansion is necessarily implied in the liberal property concept itself. When this general statement is applied to constitutional law, it means that maintaining the liberal

basis will almost certainly ensure the expansion of the property concept. Seen in this light, *new property* is just another way of ensuring the survival of liberalism in constitutional law.

The third issue concerned the role of property as a boundary between private and public. It became clear that the question of where that boundary should be drawn was not a purely legal one, but involved a complex set of factors that included political theory, judicial theory and interpretative commitments. What remains clear, however, is that property is regarded, in most systems, as an important tool to mediate between public and private.

The final question dealt with the value, if any, of comparative analysis. This study indicated a remarkable similarity regarding the types of problems legal systems have to face. Of course the specifics differ, but problems of land reform, regulation, expropriation, personal liberty and equality seem universal. As such they indicate that comparative analysis is not without value.

### 13.2 Property and constitutional hermeneutics

As was pointed out above, some of the differences regarding the property concept are attributable, at least in part, to different hermeneutical approaches. An uncritical acceptance of government policy regarding property is usually masked by an intentionalist/literalist approach to the interpretation of a constitution. Courts then rely on the intentions of real or mythical "founding fathers" (*sic*).<sup>4</sup> On the other hand, once courts become critical of government policy, they enter the minefield of what is known in American law as the *counter-majoritarian difficulty*. Interpreting and applying constitutional provisions then seem to become a choice between the tyranny

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4 See Van Dijkhorst J in *De Klerk and another v Du Plessis and others* 1995 2 SA 40 (T) 46G where he refers to the intention of "the Founding Fathers of Kempton Park". Apart from the obvious sexism inherent in that remark, it is possible that quite a few of those "Fathers" might dispute paternity!

of the majority (represented by the elected legislature) and the tyranny of the minority (represented by an unelected judiciary). In a constitutional system that is dedicated to both liberalism and social goals, the problem is compounded. In the case of property the conflict centres on the individual property right (that is supposed to be a pre-political boundary between state and individual) and social justice (that must necessarily imply a crossing of that boundary). The resolution of that conflict will depend, to a large extent, on the interpretative commitment of the judiciary within the normative discourse.

Avoiding the counter-majoritarian dilemma requires at least a basic examination of the hermeneutic approach of courts. The first step would be to recognise that the traditional approaches to interpretation are inappropriate in the case of constitutions. But, at the same time, seemingly abstract and conceptual "recipes" for constitutional interpretation are equally inappropriate. It must be recognised that constitutional interpretation is far more complex and involves narratives, values and conflict.

### 13.3 The South African context

It is not yet clear what the approach of the South African courts will be regarding the property clause. The existence of both a constitutional court (with final jurisdiction in constitutional matters)<sup>5</sup> and a supreme court of appeal (with final jurisdiction in all other matters)<sup>6</sup> could complicate the problem. As this division corresponds to the German model, it could mean that the German approach might be followed. This could result in a dual property concept in South African law as well. This possibility is strengthened by the constitutional court's reluctance to judge on private-law matters in

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5 See section 167 of the 1996-constitution.

6 See section 168 of the 1996-constitution and in particular subsection (3).

terms of the 1993-*constitution*.<sup>7</sup> Such an approach would serve to strengthen the private/public split and to maintain the illusion of a politically neutral private law. Moreover, such a split concept could frustrate redistribution of property and the redressing of past injustices.

However, the 1996-*constitution* would make this approach virtually impossible. Section 2 reads:

"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

This is an extremely wide provision that makes the constitution applicable to all law and all juridically relevant acts.<sup>8</sup> The effect of this is that the entire body of law, legal rules and legal acts in South Africa are now "constitutional matters" within the meaning of section 167. That means that it would be virtually impossible for the constitutional court not to have jurisdiction in any legal dispute. Of course the court could read section 2 more restrictively, but that would require a very creative interpretation indeed. The result is that a dual property concept in South African law is a highly unlikely occurrence.

The supremacy of the constitution also means that the illusion cannot be maintained that private law is beyond the reach of constitutional provisions. If the property clause, as was argued earlier, implies that all property is to be protected, then the privileged position of ownership and the conceptual pyramid on which that position is based, can no longer be maintained.

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7 See eg *Du Plessis and others v De Klerk and another* 1996 4 SA 850 (CC) par [60]: "The fact that Courts are to do no more than have regard to the spirit, purport and objects of the chapter indicates that the requisite development of the common law and customary law is not to be pursued through the exercise of the powers of this Court ..." and *Gardener v Whitaker* 1996 4 SA 337 (CC) par [13] in which the previous decision was confirmed.

8 Note that it does not apply to acts by the state only, but to all acts, irrespective of who performs them.



Retaining a common-law rule that privileges ownership over other property rights would be unconstitutional and, consequently, invalid. The upshot of this is that there is very little doubt that the South African property concept will be expanded. Van der Walt has proposed that the previous hierarchical system of property rights should be "levelled out" so that the *property vel non* question becomes less important.<sup>9</sup> This would imply that rights would be protected constitutionally as property as long as they fit within a broad range of minimum and maximum requirements. Such an approach would also ensure that rights developed within communities would be recognised as property instead of being destroyed by conceptual schemes. As such it would enable courts to be jurisgenerative rather than jurispathic. An added bonus of such an approach could be the avoidance of the *new property* problem in South Africa. If there is no need to fit new rights into a rigid conceptual scheme, the creation of a class of *new property* ceases to be a problem. The question becomes one of simply determining whether the threshold criteria are met. If they are, constitutional protection is afforded. The court can then move on to the real problem of balancing individual and societal interests by using the proportionality test.

The crux of the problem, however, lies with the courts' philosophical and interpretative commitments. A commitment to liberalism and individualism would frustrate the goal of social democracy and/or a more communitarian approach. The expanded (or "levelled out") property then becomes a tool to frustrate reconstruction, because more and more rights are liberally protected against state interference. In this way a clause designed to liberate can be used to perpetuate inequality. On the other hand the very explicit provisions of sections 25(5) to (9) make it impossible to maintain the liberal façade. These sections make it clear that the protection of property must be balanced by the reforms provided for. In this way the property clause becomes an

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9 Van der Walt 1995 SAPL 298 342-343.

instrument for undermining the conceptualist and liberalist private-law approach.

Much the same needs to be said regarding the values in the constitution. If a hierarchy of values is constructed (as commentators seem to be doing) this will once again result in jurisprudential judgements by the courts. The privileging of one value (such as human dignity) over others (such as equality) might mean a perpetuation of inequality. Moreover, even if the mere identification and classification seem harmless, giving it content is not. If these values (like human dignity) are given a typical male, Western meaning it would ensure the continuation of cultural and sexual domination in a much more refined and consequently more dangerous form. In this respect it is not enough to speak of a *purposive* or a *generous* approach - the basic assumptions and consequences of these approaches need to be examined.

#### 13.4 In a different voice

In chapter 7 a number of feminist objections to or problems regarding the conceptualist private-law paradigm were raised. It was pointed out that this paradigm is a fundamentally male one that, in various aspects, tends to allow rather than prohibit discrimination. The question now arises whether the constitutional property concept can do what the private-law concept could not. The best way to answer this question is to contrast the constitutional ideas with feminist views.

Contemporary theories on constitutional interpretation are often based on Cover's view of interpretation as based on narratives and, ultimately, on a moral point.<sup>10</sup> On the face of it, this seems to be in accordance with feminist ideas. But Violi warns that masculine narratives are of a very specific kind:

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<sup>10</sup> See 12.5 above on Cover.

"Narrative is crucial to the establishment of male subjectivity because it enables men to objectivize themselves and their experiences in the stories that represent it."<sup>11</sup>

Male narratives therefore tend to regard the subject as central and autonomous. In this process symbols serve as mediators between private experience and general forms.<sup>12</sup> There can be little doubt that one such (very powerful) symbol is property. Female narratives need to be told in a different voice – one that gives voice to the female experience. What follows is a suggestion of what a feminine theory of constitutional property might look like.<sup>13</sup>

If it is true, as Cover suggests, that legal rules are imbedded in narratives which are, in turn, based on a moral point, then a feminist theory needs to start with the different ways in which men and women approach moral dilemmas, such as the one posed by property and equality. It seems that the male approach relies on instrumental abilities that recast such dilemmas in the language of a morality of rights. Such an approach is based on the ideas of separation and individuation.<sup>14</sup> The female approach, in contrast, relies on expressive capacities that translate dilemmas into a morality of responsibility. As such it is, psychologically, based on connection and relationship.<sup>15</sup> If it is correct that the moral approach differs, that must imply that the narrative and, ultimately, the theory will differ. Therefore feminist theory is quite distinct from the male one:

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11 Violi P "Gender, subjectivity and language" in Bock G and James S (eds) **Beyond equality and difference** (London 1992) 164-176 169.

12 Violi "Gender, subjectivity and language" 164 168.

13 Of course, this is not to suggest that there is only one feminist theory possible. That would be an expression of the ideal that there is a "generic woman" or a monolithic "women's experience".

14 Gilligan **In a different voice** 17.

15 Gilligan **In a different voice** 19.

"Thus it becomes clear why a morality of rights and noninterference may appear frightening to women in its potential justification of indifference and unconcern. At the same time, it becomes clear why, from a male perspective, a morality of responsibility appear inconclusive and diffuse, given its insistent contextual relativism."<sup>16</sup>

When this general statement is applied to constitutional property, a number of interesting possibilities are opened up. In the first place it seems clear that a feminist constitutional property concept can never be based on a political theory of non-intervention or the minimum state. This implies that constitutional property cannot be seen as a negative right, but is, instead, viewed as a positive, allocative right.<sup>17</sup> In the second place its "insistent contextual relativism" means that property is not always property.<sup>18</sup> Property's relational role determines its content, function and protection for every situation. In the third place it means that the idea of a connection between property and personhood needs to be redefined. The *person* in this context is never the morally autonomous individual, but is the fully situated, related human being. The conflict between property and equality can, therefore, not be resolved through logical deduction, as the male pattern would have it. Instead such a conflict indicates " ... a fracture of human relationships that must be mended with its own [ie relational] thread."<sup>19</sup>

Like post-modernists, feminists decenter the concept of a unitary or essentially rational self. In this process they reject the Lockean and Kantian

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16 Gilligan *In a different voice* 22.

17 Underkuffler-Freund LS "Property: a special right" 1996 *Notre Dame LR* 1033-1047 1042.

18 Radin 1986 *U Miami LR* 239 243ff.

19 Gilligan *In a different voice* 31.

"rational man" theory of justice.<sup>20</sup> However, feminists point towards locating the self in "concrete social relations, not only in fictive or purely textual conventions."<sup>21</sup> What this implies is that a feminist theory of constitutional property is not merely the exact opposite of the masculinist one, but requires a completely different way of thinking. It does not require the exchanging of one conceptual scheme for another, or even a paradigm shift. It requires an understanding of law and reality that is based on a specific way of knowing and understanding. This will probably seem "inconclusive and diffuse" to many, but liberating and real to many others.

In real terms this means that a feminist approach needs to focus on the apparent paradoxes in the property clause, because they point towards property's relational nature. The constitutional property clause is both wide and limited, making it impossible to maintain the masculinist characteristics of absoluteness, abstractness and exclusivity. More importantly, the balance that is implied between protection of property and social reform means that property does become a more allocative right rather than a negative, liberal right. The refusal to once again make property part of a conceptual hierarchy also offers interesting possibilities. By protecting all rights, section 25 provides security to owners and non-owners alike, making it possible to emphasise its relational role. In this way the state's responsibility to maintain and protect relations is served. On the other hand, the limitations ensure that property's social function is emphasised which, in turn, undermines the public-private dichotomy.

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20 Flax "Beyond equality" 193 196.

21 Flax "Beyond equality" 193 203.

## CONCLUSION

### CHAPTER 14: CONCLUSION

"My choice is to resist the temptations of theoretical purity."<sup>1</sup>

"I thought that everyone had a theory and my problem was that I didn't."<sup>2</sup>

#### 14.1 Summary

##### 14.1.1 The consequences of conceptualism

This study started out with the familiar statement that property and liberty (or equality) belongs to different branches of law and should not be confused with each other. It is highly ironic that this tongue-in-cheek remark should turn out to be true in an unforeseen way. To discover why this should be so we need to retrace our steps. The primary objective of this study was to examine the property concept from a private-law and constitutional-law perspective. The constitutional protection of private property makes the traditional distinction between private and public law problematic. Consequently the first step was to try to understand what the private law concept entails. Only then can it be compared to the constitutional one.

The authoritative or accepted private-law concept of ownership is that it is a universal, timeless and abstract concept. This accepted view is based on a number of shared assumptions. Ownership is technically and conceptually defined and justified as the paradigmatic right, within a hierarchy of rights, and is characterised as an absolute, exclusive, uniform and real right. Not only is this *the* concept of ownership that, applied formally, will result in liberty, but the background assumption is that this has always been the case and will always be. This formalist and conceptualist view of ownership is the

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1 Rhode "Politics of paradigms" 149.

2 Eco U Foucault's pendulum (San Diego 1989 Tr W Weaver) 34.

operative one in both civil and common law. The exception to this rule is American law, where criticism of conceptualism surfaced early through the work of the realists. Their insistence on a more sociological approach had an impact on constitutional law in particular, but also had a marginal influence on private law.

The first part of the study indicated that, not only is the background assumption without foundation, but this operative view has also had unacceptable consequences. Its conceptualist and formalist pretensions of abstractness, universality and neutrality made it possible to accept and justify slavery, discrimination and inequality. Moreover, the rhetorical assumptions have tended to elevate this property clause above criticism so that these inequities have gone largely unchallenged. In fact, it has become clear that the accepted view of property implies inequality and exclusion. The consequence of conceptualism in the private-law concept therefore has been to create, justify and maintain unequal property. This has not been a result of strange historical factors, but is an essential part of the property concept. Indeed, property and liberty/equality seem to have very little in common. It would not be farfetched to suggest that they might indeed be mutually exclusive.

#### **14.1.2 The consequences of constitutionalism**

The purpose of the second part of this study was to investigate whether, and if so to what extent, constitutional protection of property can rectify or compensate for the consequences of conceptualism. Put another way, the question was whether constitutionalism can guarantee liberty and equality. The answer to this question has been an "it depends" kind of answer. It depends on whether the conceptualist model is utilised in constitutional adjudication; what the courts' views are on their role; what interpretative theory is used and (above all) what the operative political theory is.

For example, if the conceptualist view of property is used in constitutional cases (ie when the courts argue that property is property is property), the

ideological baggage of this concept will also be introduced. This makes it virtually impossible for constitutional courts to avoid the consequences set out above. Moreover, if property (in its private law guise) becomes paradigmatic for public law too, the results will be essentially contradictory. Property, of all the fundamental rights, is the one that is virtually universally recognised as based on and resulting in inequality. Most of the others are concerned with maintaining or creating equality. But if the paradigm right is conceptually unequal, the paradigm will be unequal and inequality might become acceptable in other cases too. Therefore, using the private law paradigm is a mechanism for excluding political considerations and, in that way, of ensuring inequality. Developing a dual (private and public) property concept could be equally problematic. Apart from the fact that this virtually guarantees conflict between courts, it serves to perpetuate the public/private split. On the other hand, this paradoxical split might be utilised to undermine the private-law paradigm in line with the constitutional duty to develop the common law. Similarly, where judges see their role as that of merely applying the law, they will accept that property is whatever the legislature says it is. This will avoid landing them in the counter-majoritarian difficulty, but has little else to recommend it.

On the other hand, if courts should use the idea of equality as a basis for interpreting the property clause, that might result in an approach where the constitutional property concept becomes paradigmatic for all law. Such an approach would be consistent with the 1996 constitution, as indicated above. Moreover, such an approach would satisfy a feminist approach provided that a number of conditions are met. These conditions are set out below.

Of crucial importance is the interpretative theory employed by the courts. Courts that remain in the literalist/intentionalist mould can never play a transforming role, that is of transforming an essentially unequal property concept into a means of achieving equality. One should remember that constitutions, in Cover's words, provide a bridge between *what is*, *what should*



be and *what might be*. It therefore provides the opportunity for transforming distributive patterns and conceptual systems.

Most importantly the success of constitutional property in ensuring equality depends on the underlying political theory. If this underlying theory is a typically liberal one, this will import all the theoretical and conceptual difficulties of liberalism into constitutional analysis. The comparative study has shown that, at the very least, using the liberal theory as point of departure will guarantee conflict between a conservative judiciary and a transforming legislature. It also imports the liberal dichotomies into constitutional law, so that private/public, man/woman, subject/object, rational/emotional, concrete/diffuse, abstract/relative become "natural" categories that force constitutional analysis into a P/~P mode of thinking. Therefore the answer seems to lie outside liberal thinking.

#### 14.2 Work in progress

The public/private dilemma cannot be resolved, it needs to be transcended. The split into public and private is a false dichotomy, an artificial boundary. This becomes clear when *the woman question* is asked: does this make any difference to women? The answer is, of course, negative. Private law, like all forms of conceptualism, ignores women's position in property relations because it pretends to be neutral and abstract. The economic and social condition of women is none of its concern, because it is neutral regarding such "political" questions. The effect of this is the confirmation of the *status quo*. Public law, which is supposed to be about equality, similarly ignores women. Because it is imbedded in a patriarchal structure, it will always put male interests first. That is why both the 1993 constitution and the 1996 constitution are concerned with restoring the property rights of men (or of patriarchal families/tribes) who have been dispossessed. There is no indication of an intention to provide restitution for women who were so discriminated against that they had no property that could be dispossessed.

In much the same way the "conflict" between courts and legislatures is shadowboxing. It changes little for women. Both the courts and legislatures are patriarchal structures based on hierarchical and confrontational principles. The disregard for women is apparent when the official paralysis regarding maintenance orders for women is exposed. The courts, legislatures and state officials, effectively ignore what would be vigorously enforced in cases of debts or fines. For women the choice between a **private** hell of abuse and the **public** lack of concern seems like a choice between directions for circling around the sacred tree of property.

The lesson to be learned from radical feminist thought is that the erection of artificial boundaries is almost always a sign of hidden oppression. The "violation" of these artificial barriers is meant to distract and confuse. A feminist view would mean that one needs to see clearly beyond the patriarchal foreground and to spin out new tapestries and webs of understanding.<sup>3</sup> There is, however, a temptation to construct a feminist theory of property that is, in all respects, the exact opposite of the existing, patriarchal one. Therefore, if the patriarchal concept is abstract, individualist and exclusive, the feminist concept must perforce be concrete, communitarian and inclusive. Although such a turnaround would serve to destabilise the traditional concept, it would also force one to remain caught in the traditional dichotomies. There is no law that states that a concept must be either private law or public law, either abstract or concrete, either individualist or communitarian, either inclusive or exclusive. The only thing that keeps one inside such a P/~P scheme is a lack of imagination.

#### 14.2.1 A feminist constitutionalism

The "interpretive turn" in legal thinking provided the insight that everything in law is interpretation. In order, therefore, to begin the process of establishing

a feminist theory of constitutional property, one needs to think about a feminist approach to constitutional interpretation. In law interpretation is often nothing more than the privileging of one set of truths (or concepts) over others. Feminism, on the other hand, uses the contextuality of understanding as point of departure. In fact, interpretation is not only contextual, but also multi-contextual, since interpretation takes place within multiple, over-lapping and sometimes contradictory contexts.

Feminist constitutional theory is, therefore, not primarily about the counter-majoritarian dilemma, since this dilemma is also to an extent a-contextual. Instead, it is about the conflict between the feminist political agenda and the respect for contextuality. As with the counter-majoritarian dilemma, this conflict too is basically unresolvable. However, the creative tension between the two extremities provides an opening for possibilities.

Feminist constitutional theory must necessarily start with an analysis of power. For feminists, the rule of law often means nothing more than the rule by men. The emphasis on legitimate uses of state power in constitutional law (such as in the case of limitations on rights) takes the emphasis away from private power and the interdependency of power and identity. This analysis of power then gives rise to a dominance analysis, which studies the role of law in reinforcing gender inequality.

From these analyses then comes the insight that feminist constitutional theory can never advocate state neutrality. Such neutrality prevents rights from being allocative to redress imbalances. To attain gender equality state intervention is required. This represents part of the feminist political agenda. However, the respect for contexts means that there has to be a way to determine and constrain this power. The traditional answer, that this is to be achieved through democracy, is not acceptable to feminists. Democracy

implies free choice by individuals, and this is a myth that ignores the interdependency of identity, choice and power.

The answer lies in the utilisation of a critical feminist theory that undermines certainties by indicating the power relations underlying it. This is an open-ended approach that must be constantly revised as the contexts shift and interact. As such it is a political stance rather than a recipe or conceptual scheme for constitutional interpretation. However, it provides indications of how a feminist theory of constitutional property could look like.

#### **14.2.2 A last word about property**

In the light of the above a number of points of departure can be suggested for a feminist theory of constitutional property. In the first place a feminist theory starts from the idea that property is relational. This means that the underlying relations determine the nature and content of property and not the other way around. The question then is not whether an interest is property or not, but what the effect of state interference or limitations is. If such interference will destroy relationships within which women flourish, it must be regarded as in conflict with the constitutional goal of non-sexism. On the other hand limitations which destroy relationships inimical to female flourishing, should be allowed as legitimate state action. This is the anti-subordination principle in action. It implies a functional approach to property and an approach where property is not used to perpetuate inequality.

In the second place a feminist theory must necessarily imply the destruction of the idea of *man the owner/master*. This is achieved by accepting that all holders of property are to be protected equally. If the expanded property concept is determined by masculinist ideas, this will not advance the feminist agenda. Therefore attention needs to be given to types of property that advance female flourishing. An example would be to regard the right to maintenance for children after divorce as property to be protected constitutionally. Neglect by state institutions to implement this effectively would then be unconstitutional.

Finally a feminist theory of constitutional property must address the question of the private/public dichotomy. Countless feminist studies have indicated that this dichotomy is at the heart of the oppression of women. Moreover, property lawyers have shown that property is never "purely" private, but both public and private. In the South African context the options are to either advocate the abolition of the distinction between private law and public law or to allow constitutional ideas to undermine the conceptualism of private law. Both options present problems. The first is probably too radical and would meet with resistance from the traditional South African law community. The second places much faith in the willingness of the judiciary to allow such an undermining. The common thread is, however, the need for the (eventual) destruction of the artificial boundary between private and public.

These suggestions are but signposts on the way to becoming the kind of society we would like to be. They may prove to be too circuitous for some and too radical for others. But if they stimulate the democratic conversation we should all be engaged in, that is enough.

## ABBREVIATIONS

AJ	Acta Juridica
Am Enterprise	American Enterprise
Am J Comp L	American Journal of Comparative Law
Am J Econ Soc	American Journal of Economics and Sociology
Am Pol Sc R	American Political Science Review
Brooklyn LR	Brooklyn Law Review
Buffalo LR	Buffalo Law Review
California LR	California Law Review
Cambridge LJ	Cambridge Law Journal
Can BR	Canadian Bar Review
Can J Pol S	Canadian Journal of Political Science
Can J Pol S	Canadian Journal of Political Science
Can JLJ	Canadian Journal of Law and Jurisprudence
✓CILSA	Comparative and International law of South Africa
Col LR	Columbia Law Review
Cornell LR	Cornell Law Review
Dalhousie LJ	Dalhousie Law Journal
DJ	De Jure
Hist Pol Ec	History of Political Economy
Hist Pol T	History of Political Thought
ICLQ	International and Comparative Law Quarterly
Iowa LR	Iowa Law Review
J Econ Issues	Journal of Economic Issues
J L & Econ	Journal of Law and Economics
J of Pol	Journal of Politics

✓ JCRDL	Journal of Contemporary Roman-Dutch Law (Tydskrif vir Hedendaagse Romeins-Hollandse Reg)
Manitoba LJ	Manitoba Law Journal
New England LR	New England Law Review
NYULR	New York University Law Review
Notre Dame LR	Notre Dame Law Review
Ottawa LR	Ottawa Law Review
Pol & Soc	Politics and Society
Pol S	Political Studies
Pol S	Political Studies
Pol T	Political Theory
R & K	Recht en Kritiek (Law and Criticism)
R & R	Rechtsgeschiedenis en Rechtsfilosofie
Rabels Z Privatrecht	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Rev of Pol	Review of Politics
Rev of Pol	Review of Politics
RM	Responsa Meridiana
RMT	Rechtsgeleerd Magazijn Themis
✓ SAJHR	South African Journal on Human Rights
Soc Sc Q	Social Science Quarterly
Soc T & P	Social Theory and Practice
✓ Stell LR	Stellenbosch Law Review
Texas LR	Texas Law Review
TR	Tijdschrift voor Rechtsgeschiedenis
TSAR	Tydskrif vir Suid-Afrikaanse reg (Journal for South African Law)
U Chicago LR	University of Chicago Law Review
U Kansas LR	University of Kansas Law Review
U Miami LR	University of Miami Law Review

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U Penn LR	University of Pennsylvania Law Review
U Tasmania LR	University of Tasmania Law Review
U Toronto LJ	University of Toronto Law Journal
W Pol Q	Western Political Quarterly
Washington and Lee LR	Washington and Lee Law Review
Wis LR	Wisconsin Law Review
Yale JLH	Yale Journal of Law and Humanities
Yale LJ	Yale Law Journal
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZSS	Zeitschrift der Savigny Stiftung





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