

# **The *Salva Rei Substantia* Requirement in Personal Servitudes**



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## **DECLARATION**

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

Lizette Grobler

August 2015, Stellenbosch

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## SUMMARY

The research question addressed in this dissertation is whether sufficient reasons exist for embracing a flexible approach to the *salva rei substantia* requirement in usufruct law. In South African law the requirement is generally approached in a rigid way, although there seems to be indications that an equitable outcome would be favoured where a usufructuary is vulnerable and subject to unreasonable treatment. A shift towards a flexible approach finds some support from comparative, policy, theoretical and constitutional considerations. Comparative law indicates that the nature of and conceptions regarding family wealth have changed to promote support of the surviving spouse. Additionally, pragmatic considerations require empowering the usufructuary to allow for the development of usufructuary property to maintain or increase its value. Theoretical arguments also support a shift to flexible rules for the sake of efficiency and sharing. As an example of governance property, usufructuary property requires flexible governance norms and coordination devices. Finally, non-property constitutional provisions require a mandatory shift to a flexible approach in certain circumstances. This shift would entail enlarging exceptions to the obligations of the usufructuary or not enforcing those obligations strictly, especially when it would result in termination of a usufruct. A shift towards greater flexibility would result in a deprivation of the bare owner's property right, but this deprivation would not be arbitrary. Courts have the common law power to develop the law of usufruct to bring about the required shift.

## OPSOMMING

Die navorsingsvraag in hierdie proefskrif is of daar voldoende redes bestaan om 'n buigsame benadering tot die *salva rei substantia*-vereiste ten aansien van vruggebruik te volg. In die Suid-Afrikaanse reg word die vereiste meestal op 'n rigiede wyse benader. Daar is egter aanduidings dat howe voorkeur sal verleen aan 'n billike uitkoms waar 'n vruggebruiker weerloos is en onderwerp word aan onredelike behandeling. 'n Skuif na 'n billike benadering word ook ondersteun deur regsvergeljkende, beleids-, teoretiese en grondwetlike oorwegings. Regsvergeljking toon dat die aard van opvattinge rakende familiewelvaart sodanig verander het dat die onderhoud van die langsliewende toenemend bevorder word. Vir pragmatiese redes is dit ook nodig om die vruggebruiker te bemagtig om vruggebruikseiendom te ontwikkel sodat die waarde daarvan in stand gehou kan word of kan toeneem. Teoretiese argumente ondersteun ook 'n skuif na 'n buigsame benadering om doeltreffendheid en gedeelde gebruik van eiendom te bevorder. As 'n voorbeeld van bestuurseiendom vereis vruggebruik buigsame bestuurs- en koördineringsmeganismes. Ten slotte skryf nie-sakeregtelike grondwetlike bepalinge 'n verpligte skuif na 'n buigsame benadering voor in bepaalde omstandighede. Hierdie skuif behels die uitbreiding van uitsonderings op vruggebruikersverpligtinge of dat die verpligtinge nie streng afgedwing word nie, veral as dit beëindiging van 'n vruggebruik beteken. 'n Verskuiwing na groter buigsamheid sal tot gevolg hê dat die blooteienaar van 'n saaklike reg ontnem word, maar die ontneming sal nie arbitrêr wees nie. Die howe beskik oor die gemeenregtelike bevoegdheid om die vruggebruiksreg te ontwikkel en die vereiste verskuiwing teweeg te bring.

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# CHAPTER 1:

## INTRODUCTION

### 1 1 Introduction

The subject of usufruct has been a topic of interest to scholars originating from the southernmost part of Africa since the first period of Dutch colonisation. In fact, Jan van Riebeeck's son Abraham, the second recorded child born to a colonist in the Cape of Good Hope, received his doctorate on the subject of usufruct<sup>1</sup> at Leiden University on 25 March 1673.<sup>2</sup> In terms of content,<sup>3</sup> as was typical of dissertations on usufruct in the Netherlands dating from the seventeenth and eighteenth century, his dissertation was not original and relatively terse.<sup>4</sup> Dissertations of the time usually followed the same pattern, discussing the definition, establishment, object, rights, obligations and extinction of usufruct.<sup>5</sup> The discussion typically concentrated on controversies and debates derived from contradictory or unclear texts in the *Corpus Juris*.

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<sup>1</sup> A van Riebeeck *Disputatio Juridica Inauguralis de Usufructu* (1673).

<sup>2</sup> AV van Stekelenburg and JM Claassen (comp & ed) "The Cape in Latin and Latin in the Cape in the 17<sup>th</sup> and 18<sup>th</sup> Centuries" (2003) 48 *Akroterion* 89-109.

<sup>3</sup> AMM Canoy-Olthoff "Een Onderzoek naar de Inhoud van een Aantal Zeventiende en Achttiende Eeuwse Dissertaties over Vruchtgebruik" in G van Dievoet & G Macours (eds) *Justicie ende Gerechtigheyt. Colloquium Gehouden op 17 en 18 Mei 1982 aan de Faculteit der Rechtsgeleerdheid van de KU Leuven, Afdeling Kortrijk* (1983) 23.

<sup>4</sup> In the addendum to her article AMM Canoy-Olthoff "Een Onderzoek naar de Inhoud van een Aantal Zeventiende en Achttiende Eeuwse Dissertaties over Vruchtgebruik" in G van Dievoet & G Macours (eds) *Justicie ende Gerechtigheyt. Colloquium Gehouden op 17 en 18 Mei 1982 aan de Faculteit der Rechtsgeleerdheid van de KU Leuven, Afdeling Kortrijk* (1983) 30 states that his dissertation was 5,5 pages long, consisted of 15 propositions, ca 140 lines with 65 references to the *Corpus Juris* but no references to legal literature.

<sup>5</sup> 19.

Almost three and a half centuries later, the South African legal literature on usufruct and related personal servitudes such as the right of habitation still deals with many of the same questions. Certainly, it is not a very popular topic and relevant literature is scant.<sup>6</sup> What seems to be a peripheral but certainly relevant and inevitable issue that has to date received far less academic attention, is the impact of the Constitution on the South African law of personal servitudes in the current legal landscape. Although some recent publications acknowledge the Constitution as a consideration, real engagement with and consideration of a constitutionally inspired approach has seldom emerged in the discourse on personal servitudes. To my mind, the interesting legal questions which should be addressed in a transformative context are not only the traditional doctrinal questions but also their constitutional implications. Against this background I attempt to address a conceptual question that has to a limited extent been acknowledged in literature on South African personal servitudes<sup>7</sup> but has not been examined from a constitutional perspective.

The obligation on the usufructuary to preserve the substance of the object of the usufruct forms part of the heritage of Roman law still present in modern civilian jurisdictions. In Roman law the *salva rei substantia* requirement was an element of

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<sup>6</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University wrote the most extensive dissertation on usufruct dealing with the institution from a property perspective. For examples of recent literature dealing with questions corresponding to doctrinal topics investigated in the seventeenth and eighteenth century see JC Sonnekus "Bewoningsreg (*Habitatio*) – Aard van die Regsobjek en die Effek Dáárvan op die Registrasie van die Reg" (2015) 26 *Stell LR* 63-85; J Scott "Effect of the Destruction of a Dwelling on the Personal Servitude of *Habitatio*" (2011) 74 *THRHR* 155-169; CG van der Merwe "Extinction of Personal Servitude of *Habitatio*" (2010) 73 *THRHR* 657-665; JC Sonnekus "Bewoningsreg (*Habitatio*)—Verval dit Weens Versteuring (Vernietiging) van die Bouwerk?" 2009 *TSAR* 450-469.

<sup>7</sup> R Zimmermann *Das Römisch-Holländische Recht in Südafrika. Einführung in die Grundlagen und Usus Hodiernus* (1983) 175; CG van der Merwe "Regsbegrippe en Regspolities" (1979) 42 *THRHR* 9-20.

certain definitions of usufruct.<sup>8</sup> Pugliese notes that the obligation was “witnessed or implied by many texts or solutions”, adding that he views it as an established duty of the usufructuary.<sup>9</sup> The *salva rei substantia* requirement subsequently formed part of the heritage of Roman law, as is evident from the legal history of various European countries and certain jurisdictions retaining aspects of the civilian tradition. During the nineteenth and twentieth century some modern civil codes incorporated provisions that reproduce the *salva rei substantia* requirement, for example in the definition of usufruct.<sup>10</sup>

The basic sources of South African law include the uncodified common law, which was influenced by English and Roman Dutch law. In turn, Roman Dutch law has its roots in Roman law and Germanic customary law.<sup>11</sup> Writers on South African property law argue that property law in general retains a strong influence from Roman

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<sup>8</sup> CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20 10 n 1 notes that the requirement appears in the definitions of usufruct in *D 7 1 1* and *I 2 4 pr.*

<sup>9</sup> G Pugliese “On Roman Usufruct” (1966) 40 *Tul L Rev* 523-554 548.

<sup>10</sup> G Pugliese “On Roman Usufruct” (1966) 40 *Tul L Rev* 523-554 548 n 77 mentions the French Civil Code art 578 (1804), the Louisiana Civil Code art 533 (1870), the Italian Civil Code art 477 (1865). The requirement is paraphrased in § 1037 of the German Civil Code (1870). The concept “economic destination” is used in § 1036 of the German Civil Code, art 769 of the Swiss Civil Code (1907) and art 981 of the Italian Civil Code (1942). The French and English translations of the current Swiss Civil Code might create the impression that a stricter stance on the *salva rei substantia* requirement has been taken. The English translation refers to “intended use” and the French translation to “*destination*” whilst the German, Italian and Romanian translations refer specifically to the economic destination. See Schweizerische Eidgenossenschaft “Schweizerisches Zivilgesetzbuch von 10 Dezember 1907” (01-07-2014) *Der Bundesrat: Das Portal der Schweizer Regierung* <<http://www.admin.ch/opc/de/classified-compilation/19070042/index.html>> (accessed 28-08-2015).

<sup>11</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 6.

Dutch principles.<sup>12</sup> Servitude law, and specifically the law of usufruct, still illustrates the prevalence of Roman Dutch<sup>13</sup> and by extension Roman influence.<sup>14</sup> South African law thus shares the heritage of Roman law with civilian European countries via the Roman-Germanic tradition and in particular, recognizes usufruct as a limited real right to use and enjoy the property of another, to take its fruits without impairing the substance and to return it *salva rei substantia* on termination of the usufruct.<sup>15</sup>

Recent South African legal discourse and case law on personal servitudes or referring to relevant doctrine indicate that the law with regard to the *salva rei substantia* requirement is still relevant, but approached inadequately by the courts. The most recent study that refers to the *salva rei substantia* requirement in some detail is an article by Leos, dating from 2006.<sup>16</sup> The *Cooper v Boyes NO* decision<sup>17</sup> he refers to deals with the requirement in terms of legal historical analysis and sets out the old authorities regarding usufruct. However, this laudable approach has not been

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<sup>12</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 6; CG van der Merwe "Things" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 27 (1 reissue 2001) para 196.

<sup>13</sup> E Leos "Quasi-usufruct and Shares: Some Possible Approaches" (2006) 123 *SALJ* 126-146 131.

<sup>14</sup> MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das Römisch-Holländische Recht: Fortschritte des Zivilrechts im 17 und 18 Jahrhundert* (1992) 567-595 594 remarks that the law of servitude as an area of Roman Dutch law is firmly rooted in Roman law. See also CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 85.

<sup>15</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 86-88, 89-90 highlights these attributes of the personal servitude after comparing definitions by Innes JA in the first decision of the Court of Appeal on usufruct (*Willoughby's Consolidated Co Ltd v Cophall Stores Ltd* 1913 AD 281), Hall and Kellaway, Steyn, Lee and Honoré, Van der Merwe and Corbett.

<sup>16</sup> E Leos "Quasi-usufruct and Shares: Some Possible Approaches" (2006) 123 *SALJ* 126-146.

<sup>17</sup> 1994 4 SA 521 (C).

sustained. A 2007 decision on *usus*, *Vairetti v Zardo*,<sup>18</sup> contains references to case law but strongly leans on general reference work and textbooks. The 2013 decision, *Lola v Rimon*,<sup>19</sup> disconcertingly does not even refer to established law concerning the common law maintenance duty, of which the applicant in this case was contractually absolved.<sup>20</sup> Instead, Molahlehi AJ defines the duty to maintain purely with reference to the *Merriam-Webster* dictionary and *Blacks Dictionary*.<sup>21</sup> Furthermore, in *Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Service*<sup>22</sup> Rogers J (Traverso DJP and Allie J concurring), while noting the duty of a usufructuary to maintain the property subject to the usufruct and to restore it to the owner on termination of the usufruct *salva rei substantia*,<sup>23</sup> does not refer to suitable authority for this statement as convention would require.<sup>24</sup> These decisions indicate a worrying trend: courts no longer approach legal questions regarding usufruct, and for that matter the *salva rei substantia* requirement, with reference to established and accepted practice.<sup>25</sup> This tendency could be a motivating factor for reconsidering doctrinal questions regarding usufruct based on credible and accepted sources.<sup>26</sup> Furthermore, doctrinal questions regarding the *salva rei substantia* requirement and

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<sup>18</sup> [2010] ZAWCHC 146.

<sup>19</sup> 2013 JDR 0783 (GSJ).

<sup>20</sup> 3 paras 2 and 5.

<sup>21</sup> 7-8 para 17.

<sup>22</sup> 2015 1 SA 60 (WCC).

<sup>23</sup> *Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Service* 2015 1 SA 60 (WCC) 78.

<sup>24</sup> Para 74 only cites LAWSA as a source confirming this obligation.

<sup>25</sup> These decisions do not seem to be exceptional judgments in this regard. See in general J Scott "A Growing Trend in Source Application by Our Courts Illustrated by a Recent Judgment on Right of Way" (2013) 76 *THRHR* 239-251.

<sup>26</sup> See for an article motivated by the same impulse regarding praedial servitudes J Scott "A Growing Trend in Source Application by Our Courts Illustrated by a Recent Judgment on Right of Way" (2013) 76 *THRHR* 239-251.

related issues also surfaced in recent foreign scholarship. Two of these foreign sources consider the flexibility of usufruct,<sup>27</sup> while the third examines the standard of behaviour required of the usufructuary.<sup>28</sup>

Perhaps the most urgent issue justifying a study in this regard is the constitutional implications of the *salva rei substantia* requirement. Van der Walt has pointed out the lack of engagement with constitutional questions in servitude case law<sup>29</sup> and developed a methodology of constitutional analysis that can be applied to servitude cases. This study provides an opportunity to apply this methodology to the *salva rei substantia* requirement as it is currently interpreted in case law and literature, and furthermore, allows an exploration of the constitutional implications of a flexible approach to the requirement.

## 1 2 Research question

The question I consider in this dissertation is whether there are sufficient reasons for embracing a flexible approach to the *salva rei substantia* requirement. Conceptually, this inquiry is approached by firstly determining the substantive content of the *salva*

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<sup>27</sup> A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129; A Verbeke, B Verdickt & D Maasland “The Many Faces of Usufruct” in C van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56.

<sup>28</sup> E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19. Giannozzi recently defended her dissertation *Le Bonus Vir en Droit Romain* on the 28th of March 2015. This dissertation on the *arbitratus boni viri* standard as a measure of flexibility will be published too late to be included in this dissertation. See for the abstract : Anonymous “Madame Elena Giannozzi – Le Bonus Vir en Droit Romain” (19-03-2015) *Université Pantéon-Assas Paris II Recherche*

<[http://www.u-paris2.fr/1426761645189/0/fiche\\_\\_\\_actualite/&RH=EDOCT](http://www.u-paris2.fr/1426761645189/0/fiche___actualite/&RH=EDOCT)> (accessed 28-08-2015)

<sup>29</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756; AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Prop L Rev* 3-35.

*rei substantia* requirement as it is currently applied. Since the overarching question assumes that different interpretations of and approaches to the *salva rei substantia* requirement can be identified, I subsequently set out legislation, case law and literature to determine what different interpretations of and approaches to the requirement might entail. A rigid approach would strictly prohibit the deterioration or impairment of the object of the usufruct, without considering contextually relevant factors. It implies that the usufructuary would not be able to change the economic destination of the object of the usufruct, even if its value would be increased by the alteration.<sup>30</sup> A flexible approach normally allows for some physical interference, provided that the economic destination of the object of the usufruct is not altered. Secondly, it might also entail replacing the *salva rei substantia* requirement with the more flexible *salva rei aestimatione* standard<sup>31</sup> and finally, a flexible approach might also entail accepting economic gain (in the sense that it increases the value of the object of the usufruct) as a valid and sufficient reason for changing the economic destination of the object of the usufruct.<sup>32</sup>

Following from this initial overview, I aim to establish whether a shift has taken place from a rigid to a flexible approach or whether these approaches coexist in the South African legal context. Should such a shift be identified, the reasons for it need to be identified. If, on the other hand, such a shift is not evident, the next question is whether it should be promoted in South African law and if so, for what reasons.

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<sup>30</sup> CG van der Merwe *Sakereg* (2 ed 1989) 14.

<sup>31</sup> CG van der Merwe "Regsbegrippe en Regspolitiek" (1979) 42 *THRHR* 9-20 15 explains the term as preserving the value of the usufructuary object.

<sup>32</sup> R Zimmermann *Das Römisch-Holländische Recht in Südafrika: Einführung in die Grundlagen und Usus Hodiernus* (1983) 175.

Finally, the issue is whether either rigid application of the *salva rei substantia* requirement or a shift from a rigid to a flexible approach to the requirement has constitutional implications. Constitutional implications may arise where either the *salva rei substantia* requirement as it is currently employed or as it might be applied in case of a shift from a rigid to a flexible approach breaches or will breach constitutional provisions. Particularly, where any of the provisions allocating rights in the Bill of Rights is prejudiced, such as the right to equality and non-discrimination, human dignity, property or access to housing provisions, the development of the *salva rei substantia* requirement is either necessary or prohibited.<sup>33</sup> I ask what the constitutional implications of a shift to a flexible approach are and how South African law should deal with them.

### **1 3 Chapter outline**

In chapter two I examine the position regarding the *salva rei substantia* requirement in terms of current South African law. To determine the content of the *salva rei substantia* requirement in personal servitudes, I firstly distinguish praedial from personal servitudes to indicate how, flowing from the nature of these servitudes and their differing impact on the servient owner and bare owner respectively, they need similar as well as different types of regulation to protect the relevant parties. In terms of similar regulation, I discuss the *civiliter* requirement. However, since personal servitudes substantially differ from praedial servitudes, they must also be regulated in a specialised manner. To explain this particular type of regulation, it is necessary to expound on the nature of personal servitudes and particularly usufruct as the most

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<sup>33</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 745.

comprehensive personal servitude. Accordingly, I give a cursory overview of the nature, rights and obligations of the usufructuary. This synopsis underpins the conceptual discussion of the *salva rei substantia* requirement as a specialised mechanism regulating personal servitudes. Apart from providing a conceptual interpretation of the construct, I also articulate how a rigid approach to the requirement would differ from a flexible one. On these grounds I subsequently consider how the *civilliter* requirement, which applies to both types of servitudes, differs from the *salva rei substantia* requirement and why both are necessary according to traditional doctrinal considerations. This provides the scaffolding for considering the research question.

The foundational question is how the *salva rei substantia* is expressed and interpreted in South African law. I investigate how the requirement is articulated and interpreted in terms of the rights and duties that it generates, as well as its termination and relevant remedies that pertain to the requirement, mainly focusing on case law. In terms of the right of use and enjoyment (*ius utendi*) allocated to the usufructuary, I discuss the entitlements to possession,<sup>34</sup> administration,<sup>35</sup> and control<sup>36</sup> of the object of the usufruct. I consider whether the treatment of these entitlements in case law and literature allows the usufructuary some measure of flexibility where the *salva rei*

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<sup>34</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340 cite Voet 7 1 32.

<sup>35</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 585 n 1 cite *Garmany v Templeton's Executors* 1936 SR 139 159; *Steyn v Registrar of Deeds* 1933 CPD 109 112; *Van der Merwe v Van Wyk* 1921 EDL 298 302 and *Furnivall v Cornwell's Executors* (1895) 12 SC 6.

<sup>36</sup> MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 386 cite *Geldenhuis v CIR* 1947 3 SA 256 (C) 264 and *Steyn v Registrar of Deeds* 1933 CPD 109 112.

*substantia* requirement is concerned. In particular, I consider whether they reveal a flexible measure of disposition and if so, under what conditions. Regarding the duties imposed on the usufructuary, I contemplate whether the duties to frame an inventory of the property subject to the usufruct, to render security for the proper use, enjoyment and return thereof and to take responsibility for the ordinary repairs and expenses necessary for normal maintenance of the property<sup>37</sup> are applied strictly and how the courts deal with noncompliance. The question is whether noncompliance is met by severe sanctions and whether contextual factors are taken into account in these decisions. Finally, I consider remedies and causes of termination in which the *salva rei substantia* requirement plays a role. I briefly consider the *actio negatoria* as a possible remedy available to the bare owner when the requirement is breached. Subsequently I consider methods of extinction that are relevant to the *salva rei substantia* requirement, namely termination by permanent impossibility of exercise or enjoyment and termination by misuse. This chapter should accordingly indicate whether a flexible and rigid approach to the *salva rei substantia* requirement co-exist or whether a shift towards a flexible approach can be identified.

In chapter three I address the reasons why a shift to a flexible approach either has taken place or should be implemented in South African law. To develop this argument I undertake a comparative analysis of the position in five jurisdictions, namely France, Belgium, the state of Louisiana, Germany and the Netherlands. I analyse the definitions or descriptions of usufruct, the rights and obligations of the usufructuary, the instances in which termination is triggered by violation of the *salva rei substantia* requirement and the remedies available to the bare owner in case of

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<sup>37</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 594.

breach of the requirement. This analysis is contextualised with reference to the function and categories of usufruct available in the specific jurisdiction and evidence of developments in the law of usufruct. From this comparative analysis I identify the reasons for amending the law of usufruct and different strategic approaches to the institution of usufruct, prompted by context-specific needs and changes in the comparative jurisdictions and conclude whether these reasons are or could be relevant in the South African context and whether different strategic approaches could be implemented in the South African legal landscape.

In chapter four I proceed with the search for reasons for an existing or future shift to a flexible approach to the *salva rei substantia* requirement. Initially I argue that policy as a concept is not defined in a way that makes it a useful and relevant research tool. The question is whether policy arguments in favour of a flexible approach to the *salva rei substantia* requirement are readily found. I consider whether policy might have an effect and whether material in this regard can be used to identify clear and strong arguments in favour of a flexible approach. However, theory underpins policy and accordingly I devote the larger part of chapter four to theoretical considerations that might bolster an argument for a flexible approach.

Firstly, I consider whether Law and Economics theory, with its focus on efficiency, provides support for a flexible approach to the requirement. After outlining the Coase theorem,<sup>38</sup> I discuss the extension of his work by Calabresi and Melamed.<sup>39</sup> Their property and liability rules model was extended by Bell and Parchomovsky<sup>40</sup> in terms

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<sup>38</sup> RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44.

<sup>39</sup> G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128.

<sup>40</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79.

of pliability rules. I argue that especially the latter can provide useful theoretical support for a flexible interpretation of the *salva rei substantia* requirement. On the other hand, I also show that Law and Economics theory only supports a flexible approach up to a certain point. Flexibility might result in fragmentation and opportunism, outcomes not favoured by Law and Economics theorists, as is evident from the work of Parisi<sup>41</sup> and Mackaay.<sup>42</sup> I argue that the *salva rei substantia* requirement traditionally counters both fragmentation and opportunism. Secondly, I reflect on the work of two Progressive Property theorists, namely Alexander<sup>43</sup> and Dyal-Chand,<sup>44</sup> both of whom point out that the traditional dominant paradigm of ownership with its focus on exclusion results in a perception that sharing is a peripheral phenomenon in property law. In fact, however, sharing is more prevalent in property institutions, as their examples show. I argue that usufruct may also be viewed as an instance of sharing and usufructuary property as an example of governance property. Therefore, usufruct necessitates internal governance rules that provide for flexibility and adaptable remedies in case of breach of these rules. To summarise, in lieu of strong policy reasons I rely on both Law and Economics and Progressive Property theory to support a shift to a flexible approach.

In chapter five I investigate the constitutional implications of both a rigid and a flexible approach to the *salva rei substantia* requirement. The constitutional provisions that inform the analysis in this chapter are the equality and non-discrimination,<sup>45</sup>

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<sup>41</sup> F Parisi “Entropy and the Asymmetric Coase Theorem” in D Porri & GB Ramello (eds) *Property Rights Dynamics: A Law and Economics Perspective* (2007) 69-93 71-72.

<sup>42</sup> E Mackaay *Law and Economics for Civil Law Systems* (2013) 260.

<sup>43</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887.

<sup>44</sup> R Dyal-Chand “Sharing the Cathedral” (2013) 46 *Conn L Rev* 647-723.

<sup>45</sup> Constitution of the Republic of South Africa, 1996 s 9.

housing<sup>46</sup> and property<sup>47</sup> clauses. Firstly, in terms of a rigid approach, I focus on the consequences of noncompliance with the requirement. Noncompliance with the requirement, either wilfully or as a result of circumstances, may result in the termination of the usufruct where (a) the obligation to frame inventory and the obligation to provide security are not complied with in response to a court order, (b) the usufructuary property is subjected to disfigurement or serious abuse, (c) the usufructuary property is destroyed and (d) the usufructuary property is substantially changed. In pursuit of this aim I initially refer to the subsidiarity principles in order to determine the applicable sources of law. The subsidiarity principle particularly relevant to servitude disputes states that a party alleging an infringement of a constitutional right should rely on legislation enacted in order to protect the relevant right.<sup>48</sup> He may not in the presence of applicable legislation rely on the common law to bring an action.<sup>49</sup> However, should legislation be absent he may directly rely on either the common law or a relevant constitutional provision. After determining the relevant sources of law, I use the normative and methodological considerations developed by Van der Walt<sup>50</sup> in his recent servitude articles to inform my constitutional analysis.

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<sup>46</sup> S 26.

<sup>47</sup> S 25.

<sup>48</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 739-740.

<sup>49</sup> 739-740.

<sup>50</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756; AJ van der Walt "The Continued Relevance of Servitude" (2013) 3 *Prop L Rev* 3-35.

In terms of the constitutional analysis I rely on the two-stage approach to Bill of Rights litigation<sup>51</sup> and its particular application in the *FNB* decision<sup>52</sup> to determine the constitutional validity of the outcome of the preservation requirement in cases of noncompliance. The “two-stage approach”<sup>53</sup> firstly identifies a limitation of a right in the Bill of Rights and secondly evaluates the justifications for the restriction.<sup>54</sup> To claim protection under a provision of the Bill of Rights, a litigant must firstly prove that he is entitled to that right and that the right is subject to limitation.<sup>55</sup> If he is successful, the opposing party may subsequently prove that the limitation may be justified under section 36 of the Constitution. The *FNB* test was developed in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.<sup>56</sup> It consists of seven questions and is summarised as follows by Van der Walt:

“(a) Is there a protected property interest involved? (b) If there was property, was there a deprivation of that property? (c) If there was a deprivation, was the deprivation arbitrary? (d) If the deprivation was arbitrary, can it be justified in terms of section 36(1)? (If the arbitrary deprivation cannot be justified, it is unconstitutional and that ends the constitutional inquiry.) (e) If the deprivation was not arbitrary or if it could be justified in terms of s 36(1), does it also constitute

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<sup>51</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 301; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 74.

<sup>52</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

<sup>53</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 301; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 74.

<sup>54</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 153.

<sup>55</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 301; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 75.

<sup>56</sup> 2002 4 SA 768 (CC).

expropriation? (f) If the deprivation does constitute expropriation, does it comply with the requirements in s 25(2)? (f) If the expropriation does not comply with the s 25(2) requirements, can it be justified in terms of s 36(1)? If the expropriation does not comply and cannot be justified, it is unconstitutional.”<sup>57</sup>

The first constitutional provisions I explore are the obvious ones that guarantee democratic liberty in a democratic society.<sup>58</sup> Van der Walt reasons that in the early stage of a constitutional argument “non-utilitarian rights that serve a democratic or liberty-enhancing purpose, such as equality and human dignity”, should be considered.<sup>59</sup> Given the gender-qualified exceptions to compliance with specifically the duty to provide security, I consider whether the equality and non-discrimination clause<sup>60</sup> is compromised by the exemption awarded to a father nominated as usufructuary in cases where his children are bare owners.<sup>61</sup> Subsequently, I ask whether the “less obvious but nevertheless relevant”<sup>62</sup> right of access to housing<sup>63</sup> is contravened where usufruct is terminated due to one of the reasons connected to the *salva rei substantia* requirement mentioned above. The housing clause<sup>64</sup> grants everyone the right of access to adequate housing, places an obligation on the state to progressively realise this right with its available resources and prevents the eviction from or destruction of a home without a court order given after consideration of all the

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<sup>57</sup> J van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 749-750.

<sup>58</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Prop L Rev* 3-35 32.

<sup>59</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 742 n 80.

<sup>60</sup> *Constitution of the Republic of South Africa*, 1996 s 9.

<sup>61</sup> Voet 7 9 7; Van der Keessel *Praelectiones ad Grotius* 2 39 3; Carpzovius *Definitiones Forenses* 2 10 9; Huber *HR* 2 39 23; *Holl Cons* 1 57 2; Schorer *ad Grotius* 2 39 3; CG van der Merwe (2 ed 1989) *Sakereg* 517.

<sup>62</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Prop L Rev* 3-35 32.

<sup>63</sup> *Constitution of the Republic of South Africa*, 1996 s 26.

<sup>64</sup> S 26.

relevant circumstances. Furthermore, legislation may not permit arbitrary evictions. Finally, the question is whether the right not to be arbitrarily deprived of property<sup>65</sup> is affected by a flexible approach to the *salva rei substantia* requirement.<sup>66</sup> I make use of the *FNB* analysis<sup>67</sup> to consider the effect of developing the law towards a flexible approach to the termination of usufruct, specifically on the bare owner. In particular I test whether a shift to a flexible approach amounts to an arbitrary deprivation of the bare owner's right to property.

## 1 4 Methodology and qualifications

The title of this dissertation refers to personal servitudes and not to usufruct *per se*. However, I focus predominately on usufruct and define the *salva rei substantia* requirement within this context. As the most “comprehensive” (“*omvattendste*”) personal servitude,<sup>68</sup> observations and conclusions reached regarding usufruct can generally be applied to the other personal servitudes of *usus* and *habitatio* as well. This is also consistent with the treatment of personal servitudes in South African literature. The choice to focus on usufruct is also motivated by developments in comparative jurisdictions. In the current *Burgerlijke Wetboek (BW)* of 1992 the rights of habitation and use were doctrinally subsumed under the right of usufruct. Likewise, the German Civil Code (*BGB*) does not recognise use as a personal servitude in its

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<sup>65</sup> S 25.

<sup>66</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Prop L Rev* 3-35 33 distinguishes the right not to be arbitrarily deprived of property from the s 9 and s 26 rights in the sense that it is an economic rather than a democratic right.

<sup>67</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

<sup>68</sup> See CG van der Merwe *Sakereg* (2 ed 1989) 506.

own right but should the need arise, it may be constituted as a limited usufruct or an innominate limited personal servitude.<sup>69</sup> Furthermore, in Louisiana the servitude of use and its detailed provisions were abolished in 1976 and replaced by rights of use.<sup>70</sup> This revision indicated that the servitude of use “had little, if any, practical significance”. The fact that use has been subsumed under the category of usufruct in foreign jurisdictions justifies a comparison that concentrates on usufruct. In chapter two I consequently analyse South African case law and doctrine on usufruct to determine the current position in South African common law regarding the *salva rei substantia* requirement. Nevertheless, given the lack of current literature on the South African law of usufruct, compared to the availability of relatively recent case law and articles on *habitatio*, it is useful to refer to examples and literature on habitation, particularly where examples from the latter usefully supplement the discussions of usufruct.

In terms of the scope of this dissertation, I have chosen not to investigate quasi-usufruct as this legal construction differs significantly from usufruct. Whereas a usufructuary has limited entitlements to possess, use and enjoy the usufructuary property throughout the existence of the usufruct, he does not have the *ius abutendi*.<sup>71</sup> The quasi-usufructuary, on the other hand, has ownership<sup>72</sup> of the consumable or fungible property that is the object of the quasi-usufruct and “which, when used for the first time in the normal way, changes in substance, is extinguished or is readily

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<sup>69</sup> AN Yiannopoulos *Louisiana Civil Law Treatise Vol 3 Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 520 n 3.

<sup>70</sup> 520.

<sup>71</sup> *Ex parte Eloff* 1953 1 SA 617 (T) 619-620; *Ex parte Pierce* 1950 3 SA 628 (O) 631; CG van der Merwe *Sakereg* (2 ed 1989) 508; MM Corbett “Usufruct, Usus and Habitation” in HR Hahlo (ed), MM Corbett, JR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 387.

<sup>72</sup> CG van der Merwe *Sakereg* (2 ed 1989) 509.

consumed by use”.<sup>73</sup> Therefore, the distinction between the *ius utendi* and *fruendi* that allows a usufructuary to use, enjoy and draw the fruits of the usufructuary property, as opposed to the *ius abutendi* and *disponendi* which are not allocated to a usufructuary but normally permits an owner to abuse or destroy the property, loses its significance.<sup>74</sup> Moreover, since quasi-usufruct already allows maximum flexibility, since the quasi-usufructuary only has the obligation to return the equivalent in quality or quantity or value of the property (*salva rei aestimatione*) as established on the date when the quasi-usufruct commenced,<sup>75</sup> it does not pose the same interesting challenges that the institution of usufruct does in terms of the *salva rei substantia* requirement.<sup>76</sup>

Furthermore, I have chosen to exclude the usufruct of shares from this dissertation. Firstly, the application of property principles to shares seems to be contentious. In this regard Leos has shown that application of the principles of property law to company shares may lead to “anomalous conclusions”.<sup>77</sup> Earlier, other authors<sup>78</sup> have also questioned aspects of such an exercise in relation to *Tigon Ltd v Bestyet Investments (Pty) Ltd*.<sup>79</sup> In particular, Larkin and Cassim did not agree with the labelling of a share as incorporeal movable property where it is accepted that the

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<sup>73</sup> E Leos “Quasi-usufruct and Shares: Some Possible Approaches” (2006) 123 *SALJ* 126-146 132.

<sup>74</sup> 132.

<sup>75</sup> CG van der Merwe *Sakereg* (2 ed 1989) 509.

<sup>76</sup> I am indebted to Professor AJ van der Walt for a helpful discussion in this regard.

<sup>77</sup> E Leos “Quasi-usufruct and Shares: Some Possible Approaches” (2006) 123 *SALJ* 126-146 126.

<sup>78</sup> See for example MP Larkin & FHI Cassim “Company Law (Including Close Corporations)” 2001 *ASSAL* 506-530-533; AJ van der Walt & PJ Sutherland “Dispossession of Incorporeals or Rights – Is the Mandament van Spolie the Appropriate Remedy?” (2003) 15 *SA Merc LJ* 95-102.

<sup>79</sup> 2001 4 *SA* 634 (N).

entitlements originating from the share are designated as personal rights.<sup>80</sup> Van der Walt and Sutherland also caution that the classification of shares should be approached with circumspection.<sup>81</sup> Secondly, since “there is no simple definition of a share”,<sup>82</sup> as Van Zyl J acknowledges, concluding that shares may only be subject to usufruct and not to quasi-usufruct does not take account of the complex characteristics of different kinds of shares. Leos<sup>83</sup> is accordingly troubled with the decision in *Cooper v Boyes NO*.<sup>84</sup> He argues that certain shares may be considered as consumables or fungibles and identifies problems resulting from holding that all types and classes of shares may be subject to usufruct.<sup>85</sup> Accordingly, since quasi-usufruct is not the subject of this dissertation and the complicated problems relating to shares and their application make them susceptible to both quasi-usufruct and usufruct, I choose not to venture into the discussion of shares so as to avoid a fragmented perspective of the topic.

Another question that might have been considered is whether a discussion of the usufruct of shares might not arise during a discussion of a usufruct of universalities,

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<sup>80</sup> MP Larkin & FHI Cassim “Company Law (Including Close Corporations) 2001 ASSAL 506-554 530-533.

<sup>81</sup> AJ van der Walt & PJ Sutherland “Dispossession of Incorporeals or Rights – Is the Mandament van Spolie the Appropriate Remedy?” (2003) 15 SA Merc LJ 95-109 100-102.

<sup>82</sup> *Cooper v Boyes NO* 1994 4 SA 521 (C) 535B.

<sup>83</sup> See E Leos “Quasi-usufruct and Shares: Some Possible Approaches” (2006) 123 SALJ 126-146 127-128 and 138:

“Any conclusion that shares could not be subject to a quasi-usufruct whatever the circumstances, presupposes not only that the legal nature of a share is all-encompassing and immutable, but also that the complex of personal rights comprising a share is, and remains, homogenous at all times.”

<sup>84</sup> 1994 (4) SA 521 (C).

<sup>85</sup> See E Leos “Quasi-usufruct and Shares: Some Possible Approaches” (2006) 123 SALJ 126-146 138-146.

as part of a broader discussion on strategies for a flexible approach to the *salva rei substantia* requirement. Arguments for a modern adaptation of usufruct over universalities have been advanced by *inter alia* extending the scope of application of universalities to examples such as databases, businesses and stock portfolios.<sup>86</sup> Doctrinally, this seems to be a challenge in South African law. It is accepted that a universality or collection of things (*res universalis*)<sup>87</sup> can be the subject of usufruct.<sup>88</sup> Complex things are subdivided into composite things (*universitas rerum cohaerentium*); aggregates or collections of similar things (*universitas rerum distantium*) and universalities of rights and things (*universitas iuris*).<sup>89</sup> Composite things consist of predominantly single corporeal things comprising a principal thing and either accessory or auxiliary things.<sup>90</sup> Shares do not comfortably fit into this category since they are not corporeal. Furthermore, they are not listed as the subject of usufruct.<sup>91</sup> Aggregates or collections of things are made up of similar individual corporeal things “subsumed under one designation” that do not lose their identity by virtue of being part of a collection.<sup>92</sup> Again, shares do not fit into this category since they are not corporeal. A universality of rights and things consists of incorporeals

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<sup>86</sup> A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129.

<sup>87</sup> According to PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 41 a complex thing consists of various parts or components which are treated by the law as a unit.

<sup>88</sup> *D* 7 4 31; Voet 7 1 15; Van der Keessel *Praelectiones ad Gr* 2 39 2; *Geldenhuis v Commissioner for Inland Revenue* 1947 3 SA 256 (C) 264; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 339; CG van der Merwe *Sakereg* (2 ed 1989) 509.

<sup>89</sup> *D* 4 1 3 30 *pr*; Van der Keessel *Praelectiones ad Gr* 2 1 6-7; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 41.

<sup>90</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 41.

<sup>91</sup> 339.

<sup>92</sup> 42.

(rights) and corporeals that, as separate components, exist independently as things.<sup>93</sup> A collection of shares *per se*, although incorporeal, would not meet the requirement of including corporeals as well and therefore does not fit into this category either. Accordingly, conceiving of a portfolio of shares as a universality on its own to allow for a more flexible approach to the *salva rei substantia* requirement would not easily fit into the traditional doctrinal structure unless the doctrine is amended or expanded. There has been no mention of or support for this proposition in case law up to this point. Therefore, so as to maintain the focus of the research question, I am not considering usufruct of shares in this dissertation.

The choice of jurisdictions considered in this dissertation merits a short explanation. In chapter three I embark on a comparative analysis of the *salva rei substantia* requirement in French, Belgian, Dutch, German and Louisiana state law to identify viable alternative approaches to the *salva rei substantia* requirement. As civilian or partly civilian jurisdictions they all share the Roman heritage of the law of usufruct, but each jurisdiction has developed different strategies to cope with the inherent limitations of the *salva rei substantia* requirement.

The inclusion of a discussion on the French law of usufruct is necessitated by its relation to the Belgian, Dutch and Louisiana state law of usufruct. A discussion of Belgian law would scarcely be possible without referring to French law. With the exception of amendments, Belgian property law is still based on the provisions of the French Civil Code (CC) and French law has exerted a huge influence on Belgian scholars and case law.<sup>94</sup> Furthermore, the Dutch Civil Code (*BW*) has been influenced

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<sup>93</sup> 43.

<sup>94</sup> V Sagaert "The Fragmented System of Land Burdens in French and Belgian Law" in S van Erp & B Akkermans (eds) *Towards a Unified System of Land Burdens?* (2006) 31-52 32.

by both German and French Law.<sup>95</sup> Dutch legislation dating from 1838 was premised on the CC.<sup>96</sup> In 1992 the *BW* was transformed under the influence of German law. Akkermans remarks that Dutch law now takes the middle ground between French and German law but is at the same time complicated by traditional choices in the 1992 *BW*.<sup>97</sup> The Louisiana Civil Code (*La CC*) is also based on the CC and Louisiana scholars rely extensively on the writings of French legal scholars for their doctrinal discussions.<sup>98</sup>

Recent academic writing on the law of usufruct in Belgium provides a useful starting point for rethinking the doctrinal and practical impact of usufruct in a modern context. Contributions on the Belgian law of usufruct were prompted by the need for clarity articulated by practitioners and the aspiration to optimize the boundaries of usufruct both fiscally and in terms of civil law.<sup>99</sup> Creative ways are for instance sought to optimize usufruct within the context of the law of succession for the benefit of the

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<sup>95</sup> B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 9. B Akkermans, V Sagaert & W Swadling "Introduction: Essential Directions on Using the Casebook" in S van Erp & B Akkermans (eds) *Cases, Materials and Text on Property Law* (2012) 1-36 35 note that Dutch law has a position in-between French and German law.

<sup>96</sup> B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 10. AN Yiannopoulos *Civil Law System Louisiana and Comparative Law a Coursebook: Texts, Cases and Materials* (2 ed 1999) 52 remarks that the *BW* of 1838 "preserved much of the spirit, content and legislative technique" of the CC.

<sup>97</sup> B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 10-11.

<sup>98</sup> JD Smith "Foreword" in M Planiol & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (Translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959)) iii-v. See also AN Yiannopoulos *Civil Law System Louisiana and Comparative Law a Coursebook: Texts, Cases and Materials* (2 ed 1999) 52.

<sup>99</sup> See V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) dust cover and A Verbeke "Inleiding" in A Verbeke *Creatief met Vruchtgebruik M & D Seminars* (2001) 3-7 3-4.

testator and the heir, while minimizing loss of control and income.<sup>100</sup> Belgian law emphasises the destination of the object rather than its material identity to enable certain acts of disposition; allows for alteration of the destination where socio-economic transformation in society is evident; and utilizes a strategic construction of the object of the usufruct. These mechanisms allow for a flexible approach to the *salva rei substantia* requirement.

The Dutch law on usufruct as it is articulated in the 1992 *BW* provides perhaps the most compelling evidence of a shift in the approach to the *salva rei substantia* requirement.<sup>101</sup> By eliminating the requirement from the definition of usufruct in the *BW* and removing the obligation to return the object of the usufruct, Dutch law prompts the question whether the *salva rei substantia* requirement is still relevant.

The transformation of the Dutch law regarding usufruct indicates a radical doctrinal shift in the position of the usufructuary. From a comparative perspective this departure provides ultimate flexibility, compared to French and Belgian law. Apart from omitting the *salva rei substantia* requirement, the removal of the distinction between consumables and traditional objects of usufruct thus redefines the duties, rights and position of the usufructuary. An investigation into the implications of the legislative change in Dutch law and the policy considerations underlying this transformation might augment the South African discourse on the need for a flexible approach to the *salva rei substantia* requirement.

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<sup>100</sup> A Verbeke "Inleiding" in A Verbeke *Creatief met Vruchtgebruik M & D Seminars* (2001) 3-7 4.

<sup>101</sup> JPM Stubbé, TJ Mellema-Kranenburg, CA Kraan & IJFA Van Vijfeijken *Vruchtgebruik Preadvies Koninklijke Notariële Beroepsorganisatie* (1999) 11 note that usufruct generated a lot of interest because of the broader application possibilities opened up by the *BW* of 1992. In the context of the revised law of succession the institution of usufruct takes on new significance: the surviving spouse can be compelled to transfer property to the heirs, but with the retention of usufruct.

It has been suggested that the German law on usufruct was potentially more flexible regarding the *salva rei substantia* requirement than the French and Louisiana state law (that is, before the revision of the *La CC* during 1976).<sup>102</sup> LeVan and Yiannopoulos note that the *BGB* exhibited a conservative approach,<sup>103</sup> but according to Yiannopoulos it was more flexible in application than the theory of destination in the *CC*.<sup>104</sup> German law excludes the *salva rei substantia* requirement from the definition of usufruct but includes it in other provisions of the *BGB*.<sup>105</sup> The emphasis is on the economic destination of the object, although the material identity of the object must still be preserved, with certain exceptions. The foregrounding of the economic destination, along with the noted exceptions, may be important points to consider in South African law.

The recent revision of the Louisiana law on usufruct<sup>106</sup> provides an interesting point of departure for reassessing the treatment of the *salva rei substantia* obligation in civil law jurisdictions in general. The inflexibility of the obligations relating to the *salva rei substantia* requirement led to the codification of the usufructuary's power and

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<sup>102</sup> AN Yiannopoulos "Obligations of the Usufructuary; Louisiana and Comparative Law" (1967) 42 *Tul L Rev* 1-51.

<sup>103</sup> G LeVan "The Usufructuary's Obligation to Preserve the Property" (1962) 22 *La L Rev* 808-818 817 views the German position as "perhaps too limited in the context of a modern economy".

<sup>104</sup> AN Yiannopoulos "Obligations of the Usufructuary; Louisiana and Comparative Law" (1967) 42 *Tul L Rev* 1-51 25 and AN Yiannopoulos *Louisiana Civil Law Treatise Vol 3 Personal Servitudes: Usufruct – Habitation – Rights of Use* (2 ed 1978) 269. AN Yiannopoulos *Louisiana Civil Law Treatise Vol 3 Personal Servitudes: Usufruct – Habitation – Rights of Use* (2 ed 1978) 268-269 notes that art 558 of the *La CC* (revised 1976) "has suppressed the theory of destination". He therefore does not refer to the *La CC* as being less flexible than the *BGB* in his 1978 publication.

<sup>105</sup> Compare for example §§ 1036(2), 1037 and 1048 *BGB*.

<sup>106</sup> M Nathan "2010 Revision of the Law of Usufruct" (2011) 57 *Loy L Rev* 227-236 227 refers to Act no 881 of the 2010 Legislative Session of Louisiana which adopted revisions as result of the recommendations from a four year study on the laws of usufruct and bare ownership done in the light of Hurricanes Katrina and Rita.

right to dispose of nonconsumables in 1976. Recent revisions attempted to clarify the power of the usufructuary by stating that the power to dispose includes the right of alienation, lease (even beyond the length of the usufruct) and encumbrance of the property. Scholars are divided on the impact of the revision. Louisiana state law also provides an example of a jurisdiction where innovations in the law of usufruct were implemented during the twentieth century, with unanticipated consequences which resulted in practical and theoretical problems. Similar to the *BW* and the *BGB*, the *La CC* definition does not contain the *salva rei substantia* requirement but acknowledges that the nature of the object plays a pivotal role in the determination of its characteristics.

Exploring whether the balance between the usufructuary and the owner has shifted in South African law, and whether it should shift, could prove to be an interesting question. Another point to ponder would be if the current balance is warranted, considering constitutional objectives. Exploring the implications of the 2010 revision might also contribute to the question of whether more flexible interpretations of the *salva rei substantia* requirement indeed do provide the answer.

To summarise, a preliminary comparative overview of the five foreign jurisdictions indicates a range of responses to the inherent limitations of the *salva rei substantia* requirement. In some jurisdictions a significant shift from a rigid to a flexible approach occurred due to pragmatic reasons, socio-economic changes or legal developments. Approaches range from eliminating the preservation requirement and increasing the disposition capacity of the usufructuary to creative interpretations of the destination and substance concepts. Analysis of foreign usufruct law serves to identify alternative approaches to the limitations of the *salva rei substantia* requirement with the aim of subjecting them to constitutional scrutiny.

To conclude, a few comments on my methodological orientation are in order. It is not the purpose of this dissertation to provide a legal historical analysis of the *salva rei substantia* requirement, tracing its development from Roman law to modern South African law.<sup>107</sup> I would like to reconsider the position of the usufructuary *vis-à-vis* the bare owner with reference to the *salva rei substantia* requirement as a hierarchy-confirming device within a constitutional context, without merely reiterating the preservation requirement as another inevitable mechanism affirming the dominant position of ownership in South African servitude law.

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<sup>107</sup> For more material that may be used as a starting point in this regard, at least as far as Roman and Roman Dutch law is concerned, see CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University and CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20.

## CHAPTER 2:

# THE CURRENT POSITION IN SOUTH AFRICAN LAW

### 2 1 Introduction

Definitions of usufruct in both Roman Dutch and South African law can generally be traced back to the one formulated by Paul:<sup>1</sup> “*Usufructus est ius alienis rebus utendi fruendi salva rerum substantia*”.<sup>2</sup> The *salva rei substantia* requirement forms a significant component of this definition and was adopted by Roman Dutch<sup>3</sup> and South African legal writers.<sup>4</sup> Therefore, insight into the requirement is significant for the proper understanding of usufruct as a legal institution.

However, as foreign<sup>5</sup> and South African literature<sup>6</sup> indicates, the requirement presents conceptual difficulties. These problems have always been inherent in the requirement, as is evident from the discourse on the content of the original term. Two brief examples serve as illustration. According to Schön the Latin term “*substantia*” is

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<sup>1</sup> D 7 1 *pr.*

<sup>2</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 11, 46 & 48.

<sup>3</sup> See definitions by Grotius 2 38 5, Van Leeuwen *RHR* 2 9 1, Voet 7 1 3 & 14, Van der Keessel *Praelectiones ad Grotius* 2 38 5 & *Vinnius ad I* 2 4 *pr.*

<sup>4</sup> See for example CG van der Merwe *Sakereg* (2 ed 1989) 508; CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 164. See also R Zimmermann *Das Römisch-Holländische Recht in Südafrika: Einführung in die Grundlagen und Usus Hodiernus* (1983) 175-176.

<sup>5</sup> W Schön *Der Nießbrauch an Sachen: Gesetzliche Struktur und Rechtsgeschäftliche Gestaltung* (1992) 5-6.

<sup>6</sup> CG van der Merwe “Regsbegrippe en Regspolitiiek” (1979) 42 *THRHR* 9-20. It is notable that even a recent student textbook such as H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250-251 devotes a separate excerpt to the *salva rei substantia* requirement and the challenges it presents.

derived from the Greek “*hypostasis*”.<sup>7</sup> This term refers to the persisting underlying essence of a thing and not the accidental characteristics of and alterations to the object.<sup>8</sup> This definition is unsatisfactory, since a quality can only be described as persisting if it continues over time and therefore lasts throughout the duration of the usufruct. Whatever continues to exist until the termination of the limited real right accrues to the bare owner. Applied to the usufructuary’s obligation not to impair the substance of the property subject to the usufruct, it amounts to a *petitio principii*: what is due to the owner is the quality of the property that outlasts the usufruct.<sup>9</sup> This exposition of the requirement seems to render the prohibition on impairing the substance pointless. If only that which persists qualifies as the substance of the usufructuary property, it follows that any attribute which will not endure and which is therefore vulnerable to impairment will not qualify as substance. An obligation not to impair the substance is therefore a contradiction in terms. In response to this deadlock, Schön asserts that the requirement can at best be interpreted as a general obligation on the usufructuary to act lawfully.<sup>10</sup> To determine the ambit of the lawful conduct of the usufructuary, his range of obligations must nevertheless be determined.

Another illustration of the conceptual difficulties inherent in the requirement is evident from the ambiguous definition of usufruct as included in the first modern civil

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<sup>7</sup> W Schön *Der Nießbrauch an Sachen: Gesetzliche Struktur und Rechtsgeschäftliche Gestaltung* (1992) 5.

<sup>8</sup> 6.

<sup>9</sup> W Schön *Der Nießbrauch an Sachen: Gesetzliche Struktur und Rechtsgeschäftliche Gestaltung* (1992) 6 n 10 notes that I Kant *Kritik der Reinen Vernunft* 125 Rz 184 also aptly commented on the logical deadlock inherent in the definition of the concept: “*In der That ist der Satz, daß die Substanz beharrlich sei, tautologisch. Denn blos diese Beharrlichkeit ist der Grund, warum wir auf die Erscheinung die Kategorie der Substanz anwenden*”.

<sup>10</sup> W Schön *Der Nießbrauch an Sachen: Gesetzliche Struktur und Rechtsgeschäftliche Gestaltung* (1992) 6.

code. The French Civil Code defines usufruct as “the right to enjoy things, of which another has the ownership’, as the owner himself but subject to the charge of preserving the substance of things”.<sup>11</sup> This definition is unclear, since the latter part of the definition requires elaboration with reference to the rights and obligations of the usufructuary.<sup>12</sup> Although Planiol and Ripert admit that the phrase might mean that the usufructuary should not change that which is essential to the usufructuary property, by altering its destination or the manner in which it is exploited, they do not agree that this would have been a correct translation of the ambiguous “*salva rerum substantia*”.<sup>13</sup> They interpret the Latin phrase as referring to the “extinction of the right through the loss of the thing”.<sup>14</sup> These examples from foreign literature show that the phrase is problematic. Certain interpretations tied to the etymology of the word “*substantia*” seems to lead to conceptual deadlocks and furthermore, authors do not agree on the content of the phrase “*salva rerum substantia*”. In South African law the phrase *salva rei substantia* is translated as “without impairment of the substance”.<sup>15</sup> This translation incorporates the conceptual vagueness referred to earlier in the South African law of usufruct. South African legal writers have also recognised the conceptual and practical difficulties inherent in the *salva rerum substantia* requirement.<sup>16</sup>

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<sup>11</sup> M Picard *Traité Pratique de Droit Civil Français par Marcel Planiol et Georges Ripert* Tome III (2 ed 1952) 754 para 757: “le droit de jouir des choses don’t un autre a la propriété, comme le propriétaire lui-même, mais à la charge d’en conserver la substance”.

<sup>12</sup> M Planiol & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (Translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959)) 630 para 2747.

<sup>13</sup> 663 para 2818.

<sup>14</sup> 663 para 2818.

<sup>15</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 340; CG van der Merwe *Sakereg* 508.

<sup>16</sup> H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250-251; CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20 10, 19-20.

Although the requirement has been incorporated in South African servitude law,<sup>17</sup> South African literature on the subject is sparse and fairly limited in scope.<sup>18</sup> Apart from Van der Merwe's article<sup>19</sup> and textbook,<sup>20</sup> Bezuidenhout provides the most comprehensive discussion on the topic.<sup>21</sup>

In South African academic literature the phrase "without impairment of the essential qualities of things"<sup>22</sup> signifies the obligation of the usufructuary to preserve the substance of the object of the usufruct.<sup>23</sup> South African authors mostly tend to adopt a pragmatic approach and describe this requirement in terms of the duties it entails.<sup>24</sup> This approach is also reflected in case law from the constitutional era.<sup>25</sup> However, Van der Merwe has attempted to analyse the requirement conceptually in earlier work.<sup>26</sup> His recognition of the conceptual difficulties presented by the phrase

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<sup>17</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340; CG van der Merwe *Sakereg* 508.

<sup>18</sup> It is apparent from the literature that the *salva rei substantia* requirement is problematic in South African law. The obligation seems to present challenges on a typological, conceptual and a pragmatic level.

<sup>19</sup> CG van der Merwe "Regsbegrippe en Regspolitiek" (1979) 42 *THRHR* 9-20.

<sup>20</sup> CG van der Merwe *Sakereg* (2 ed 1989) 516-520.

<sup>21</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University.

<sup>22</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340.

<sup>23</sup> See for example H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250-251; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340.

<sup>24</sup> See for example PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340.

<sup>25</sup> See for example *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 11, where Van der Byl AJ describes this obligation as entailing maintenance, the defraying of costs of "all current repairs necessary to keep it in good order and condition", except for fair wear and tear, and the payment of all rates and taxes.

<sup>26</sup> CG van der Merwe "Regsbegrippe en Regspolitiek" (1979) 42 *THRHR* 9-20 10-16, 19-20.

“*salva rei substantia*”<sup>27</sup> affirms the challenges illustrated in foreign literature. As a consequence of this conceptual vagueness, South African case law does not portray a uniform approach to the requirement. Furthermore, South African case law on usufruct does not differentiate clearly between a rigid and a flexible approach to the requirement. Although McGregor J in *Fourie v Munnik*<sup>28</sup> seems to allow for some flexibility with regard to the use of the object where enjoyment might become “unsubstantial, unproductive or illusory”, he nevertheless states that the principle remains that “no destruction or substantial impairing or undue deterioration to the usufructuary property” should take place.<sup>29</sup> This affirmation of the requirement therefore suggests a rigid interpretation.

The purpose of this chapter is to investigate and establish the South African common law position regarding the *salva rei substantia* requirement within the context of personal servitudes and specifically usufruct as the most comprehensive and prevalent personal servitude. More specifically, the research questions addressed in this chapter are what a flexible and a rigid approach to the requirement would entail; whether both a flexible and a rigid approach can be discerned in South African case law; and whether a predilection for one or the other exists. To establish the current approach to the *salva rei substantia* requirement, I determine the content of the *salva rei substantia* requirement in personal servitudes by firstly distinguishing praedial from personal servitudes to indicate how, due to the nature of these servitudes and the relative burdens they impose on the servient owner and bare owner respectively, they need similar as well as different types of regulation to protect the parties. The *civilliter*

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<sup>27</sup> 10, 19-20.

<sup>28</sup> *Fourie v Munnik* 1919 OPD 73.

<sup>29</sup> 87.

requirement provides protection in the case of both praedial and personal servitudes and regulates these servitudes in general. However, since personal servitudes substantially differ from praedial servitudes, they require specialised regulation. To explain this particular type of regulation, it is necessary to explain the nature of personal servitudes, and particularly usufruct as the most comprehensive personal servitude. Accordingly, I give a cursory overview of the nature, rights and obligations of the usufructuary. This synopsis underpins the conceptual discussion of the *salva rei substantia* requirement as a specialised mechanism regulating personal servitudes. Apart from providing a conceptual interpretation of the *salva rei substantia* requirement, I also articulate how a rigid approach to the requirement would differ from a flexible one. I subsequently consider how the *civiliter* requirement differs from the *salva rei substantia* requirement and why both are necessary according to traditional doctrinal considerations. This provides the scaffolding for reflecting on the research question. The foundational question is how the *salva rei substantia* is expressed and interpreted in current South African law. I examine how the requirement is articulated and interpreted in terms of the rights and duties allocated to the usufructuary; how the requirement plays a role in the termination of usufruct; and how noncompliance with the requirement triggers remedies available to the bare owner. In terms of the right of use and enjoyment (*ius utendi*) allocated to the usufructuary, I discuss the entitlements

to possession,<sup>30</sup> administration,<sup>31</sup> and control<sup>32</sup> of the object of the usufruct. Does the treatment of these entitlements in case law and literature allow the usufructuary a measure of flexibility where the *salva rei substantia* requirement is concerned? In particular, I consider whether they reveal a flexible measure of disposition and if so, under what conditions. In terms of the usufructuary's obligations, I contemplate whether the duties to frame an inventory of the property subject to the usufruct, to render security for its proper use, enjoyment and return, and to provide for ordinary repairs and expenses necessary for the normal maintenance of the property<sup>33</sup> are applied strictly. I also consider how the courts deal with noncompliance by the usufructuary. The question is whether noncompliance is met by severe sanctions or whether contextual factors are taken into account in these decisions. Finally, I consider remedies and causes of termination in which the *salva rei substantia* requirement plays a role. I briefly discuss the *actio negatoria* as a possible remedy available to the bare owner when the requirement is breached. Subsequently I consider methods of extinction that are relevant to the *salva rei substantia* requirement, namely termination by permanent impossibility of exercise or enjoyment and termination by misuse.

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<sup>30</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340 cite Voet 7 1 32.

<sup>31</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 585 n 1 cite *Garmany v Templeton's Executors* 1936 SR 139 159; *Steyn v Registrar of Deeds* 1933 CPD 109 112; *Van der Merwe v Van Wyk* 1921 EDL 298 302 and *Furnivall v Cornwell's Executors* (1895) 12 SC 6.

<sup>32</sup> MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 386 cite *Geldenhuys v CIR* 1947 3 SA 256 (C) 264 and *Steyn v Registrar of Deeds* 1933 CPD 109 112.

<sup>33</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 594.

## 2 2 Praedial and personal servitudes

### 2 2 1 Distinction

In South African law a servitude is defined as a limited real right that enables the servitude holder either to use and enjoy another person's property or to require that the latter desists from exercising particular ownership entitlements regarding his property.<sup>34</sup> Accordingly, this *ius in re aliena* suspends or restricts certain entitlements of the owner<sup>35</sup> and establishes a direct relationship between the holder and the relevant property.<sup>36</sup> The restriction on the entitlements of the owner by the concurrent servitude, and therefore the relationship between the owner and the servitude holder, is regulated by certain guidelines.<sup>37</sup> The most relevant guideline to this dissertation is the *civiliter* principle that pertains to servitudes in general. The *salva rei substantia* requirement extends and specifies this principle within the realm of personal servitudes. In order to understand the relationship between the two, it is necessary to distinguish praedial from personal servitudes.

Praedial servitudes differ from personal servitudes in several respects.<sup>38</sup> Essentially, the difference is related to the distinct economic functions of praedial and personal servitudes.<sup>39</sup> The former is intended to enhance the use of the dominant

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<sup>34</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 321; CG van der Merwe *Sakereg* (2 ed 1989) 458-459.

<sup>35</sup> CG van der Merwe *Sakereg* (2 ed 1989) 459.

<sup>36</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 321.

<sup>37</sup> CG van der Merwe *Sakereg* (2 ed 1989) 464-467.

<sup>38</sup> *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 2 SA 400 (A); *Lorenz v Melle* 1978 3 SA 1044 (T) 1049-1050; *Resnekov V Cohen* 2012 1 SA 314.

<sup>39</sup> CG van der Merwe *Sakereg* (2 ed 1989) 459.

tenement, whereas the latter aims to benefit an individual in his personal capacity.<sup>40</sup> A praedial servitude benefits a dominant tenement while it simultaneously burdens a servient tenement.<sup>41</sup> The holder of a praedial servitude exercises it in his capacity as owner of the dominant tenement and enforces the servitude against the servient owner in his capacity as owner of the servient tenement.<sup>42</sup> The identities of the owners are therefore immaterial and the benefits and burdens relating to the land are passed to consecutive owners when the land is transferred. Conversely, a personal servitude benefits a specific person by conferring the specified right of use and enjoyment of the bare owner's property to the servitude holder and<sup>43</sup> is consequently not transferable by the servitude holder.<sup>44</sup> However, personal servitudes may be enforced against the servient owner, irrespective of his identity.<sup>45</sup>

A second difference between praedial and personal servitudes which also relates to their diverse economic functions is their duration.<sup>46</sup> Since they are inseparably connected to the servitude holder, personal servitudes are restricted to a specific period or connected to the lifespan of the beneficiary, except in the case of legal

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<sup>40</sup> Van Leeuwen *CF* 1 2 14 2; CG van der Merwe *Sakereg* (2 ed 1989) 460.

<sup>41</sup> Van Leeuwen *CF* 1 2 14 2; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 321-322.

<sup>42</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 322.

<sup>43</sup> Van Leeuwen *CF* 1 2 14 2; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 322.

<sup>44</sup> *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 281; *Lorentz v Melle* 1978 3 SA 1044 T 1049C-D; CG van der Merwe *Sakereg* (2 ed 1989) 460.

<sup>45</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 322.

<sup>46</sup> See also 2 3 2 below.

entities, where the maximum duration is restricted to a century.<sup>47</sup> Therefore, they may not be alienated or inherited. In contrast to personal servitudes, praedial servitudes may be perpetual, although time limitation is also possible.<sup>48</sup>

A third difference relates to the scope of the servitudes, both in terms of the objects on which they can be constituted and the burden in terms of use. Praedial servitudes can only be constituted on immovables, whereas personal servitudes can be constituted on both movables and immovables.<sup>49</sup> In terms of use, praedial servitudes impose a rather limited burden on the servient owner compared to the scope of use of the most important personal servitude, usufruct.<sup>50</sup> In the case of the latter the bare owner is necessarily excluded from the use of the property subject to the usufruct.<sup>51</sup>

All of these characteristics burden and restrict the ownership entitlements of the owner. They therefore necessitate measures to ensure that both the owner and the servitude holder are treated reasonably. Nevertheless, the burdens imposed by praedial servitudes differ from those imposed by personal servitudes. Consequently, both the *civiliter* principle as general guideline applicable to praedial and personal

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<sup>47</sup> Grotius *Inleiding* 2 39 5; Voet *Commentarius* 7 4 1; *Bhamjee v Mergold Beleggings (Edms) Bpk* 1983 4 SA 555 (T) 560; *Goliath v Estate Goliath* 1937 CPD 312; *SAR&H v Paarl Roller Flour Mills Ltd* 1921 CPD 62; *Willoughby's Consolidated Co Ltd v Cophall Stores Ltd* 1913 AD 267 282; CG van der Merwe *Sakereg* (2 ed 1989) 460; 506.

<sup>48</sup> Sections 75 and 76 of the Deeds Registries Act of 1937 were amended by sections 34 and 35 of the Amendment Act 43 of 1957; CG van der Merwe *Sakereg* (2 ed 1989) 460.

<sup>49</sup> Van Leeuwen *CF* 1 2 14 2; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 322; CG van der Merwe *Sakereg* (2 ed 1989) 460.

<sup>50</sup> Dernburg *Pandekten* para 245; CG van der Merwe *Sakereg* (2 ed 1989) 460-461; 506.

<sup>51</sup> JC Sonnekus "Bewoningsreg (*Habitatio*) Aard van die Regsobjek en die Effek Dáárvan oo die Registrasie van die Reg" (2015) 26 *Stell LR* 63-85 67; JC Sonnekus "Erfdiensbaarhede en die Uitoefening daarvan *Civiliter Modo*" (2007) 70 *THRHR* 351-370 353.

servitudes and the *salva rei substantia* requirement, which only concerns personal servitudes, exist to regulate the relationship between the two parties. The question arises why both these mechanisms exist. How do they relate to one another?

### 2 2 2 *Civiliter* principle

As stated above, the ownership entitlements of a servient owner are inherently restricted by servitudes.<sup>52</sup> Principles governing the relationship between the two parties are therefore necessary.<sup>53</sup>

In general, four principles apply to the relationship between the holder of a servitude and the owner of the object of the servitude. Firstly, the servitude holder enjoys priority concerning the exercise of the servitude, while the servient owner may only use the object in a manner that does not restrict the rights of the servitude holder.<sup>54</sup> Secondly, the servitude holder must be able to perform all acts necessary for the proper exercise of the servitude.<sup>55</sup> Thirdly, the *civiliter modo* principle<sup>56</sup> governs

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<sup>52</sup> JC Sonnekus "Erfdiensbaarhede en die Uitoefening daarvan *Civiliter Modo*" (2007) 70 *THRHR* 351-370 352.

<sup>53</sup> CG van der Merwe *Sakereg* (2 ed 1989) 464.

<sup>54</sup> 464-465.

<sup>55</sup> 465-466.

<sup>56</sup> J Scott "A Growing Trend in Source Application by Our Courts Illustrated by a Recent Judgment on Right of Way" (2013) 76 *THRHR* 239-251 243 discusses the correct use of the term "*modo*" and concludes that although the term should be translated as "only, "merely" or "but", the prevailing translation as "manner" is so entrenched as a "handy shorthand way to express the gist of the (longer) Latin rule" that it will probably continue to be applied. There seems to be a divergent approach to the nature of the *civiliter modo* principle in South African literature. According to MJ de Waal "Die Vereistes vir die Vestiging van Grondserwiture: 'n Herformulering" (1990) 2 *Stell LR* 171-185 180-181 the principle has been labelled a requirement for the establishment of praedial servitudes by some Pandectist, Romanist and South African writers. However, it has also been described as a general characteristic. J Scott "*Aqueductus* en Sommige Gevolge van Goeie Buurmanskap" 2013 *TSAR* 561-575 565 uses the

the way in which the holder may exercise the servitude.<sup>57</sup> The servitude holder must exercise his servitude in a considerate way, causing as little inconvenience to the servient owner as possible. The express or implied terms of the servitude determine the burden on the servient land.<sup>58</sup> Therefore, the dominant owner may not cause this burden to be more onerous than these terms indicate.<sup>59</sup> The degree of care and consideration is determined by the *bonus paterfamilias* standard.<sup>60</sup> Fourthly, the servient owner may exercise the entitlements of ownership that are not contrary to the servitude and may grant other servitudes if the latter would not infringe upon the exercise of existing servitudes.<sup>61</sup>

For the purposes of this dissertation the third principle requires closer examination. Although the *civiliter* principle has been investigated in relation to praedial

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term requirement (“*vereiste*”) and established characteristic (“*gevestigde eienskap*”) to describe the principle. CG van der Merwe *Sakereg* (2 ed 1989) 464 refers to guidelines (“*riglyne*”). MJ de Waal “Die Vereistes vir die Vestiging van Grondserwitute: ’n Herformulering” (1990) 2 *Stell LR* 171-185 182 suggests that a distinction must be drawn between requirements and characteristics. The *civiliter modo* principle, he submits, cannot be characterised as a requirement for the establishment of a praedial servitude, but comes into play when the emphasis is on the exercise of the servitude. In this regard he distinguishes between the allowed content and the acceptable exercise of the servitude, a distinction which is also mentioned in German commentaries.

<sup>57</sup> See CG van der Merwe *Sakereg* (2 ed 1989) 466-467 and specifically in regard to praedial servitudes JC Sonnekus “Erfdiensbaarhede en die Uitoefening Daarvan *Civiliter Modo*” (2007) 70 *THRHR* 351-370.

<sup>58</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 544. See also CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 12 and 23.

<sup>59</sup> CG van der Merwe & A Pope “Servitudes and Other Real Rights” in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille’s Principles of South African Law* (9 ed 2007) 591-629 593.

<sup>60</sup> CG van der Merwe *Sakereg* (2 ed 1989) 466-467.

<sup>61</sup> 467.

servitudes,<sup>62</sup> case law on the application of the principle to personal servitudes<sup>63</sup> and particularly usufruct<sup>64</sup> in South African law is scarce. Accordingly, the principle is explained with reference to case law on praedial servitudes.

The *civiliter modo* principle is described as one of the “principles of reasonableness”.<sup>65</sup> However, the term “reasonableness” in this description should be contextualised, given the doctrinal predisposition towards a notion of absolute ownership.<sup>66</sup> Essentially, this principle amounts to use that causes “the owner of the servient tenement the least damage or inconvenience”.<sup>67</sup> Rumpf AJA has singled out the ethical element of “courteousness” as essentially characteristic of the principle.<sup>68</sup>

With reference to *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*<sup>69</sup> Sonnekus states that the *civiliter* principle has been acknowledged as the only starting

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<sup>62</sup> JC Sonnekus “Erfdiensbaarhede en die Uitoefening Daarvan *Civiliter Modo*” (2007) 70 *THRHR* 351-370.

<sup>63</sup> *Texas Co (SA) Ltd Appellant v Cape Town Municipality Respondent* 1926 AD 467.

<sup>64</sup> *Houghton Estate v McHattie and Barrat* (1894) 1 OR 92 104 compares the rights of a lessee regarding *sylva caedua* with the entitlements of a usufructuary and in this regard mentions that a usufructuary may cut and sell such timber on condition that he does so “*civiliter modo*, as a good husbandman”. See also CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 104, 108; CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 168.

<sup>65</sup> J Scott “A Growing Trend in Source Application by Our Courts Illustrated by a Recent Judgment on Right of Way” (2013) 76 *THRHR* 239-251 242. Also see J Scott “*Aqueductus* en Sommige Gevolge van Goeie Buurmanskap” 2013 *TSAR* 561-575 565; JC Sonnekus “Erfdiensbaarhede en die Uitoefening Daarvan *Civiliter Modo*” (2007) 70 *THRHR* 351-370.

<sup>66</sup> See in this regard AJ van der Walt *The Law of Neighbours* (2010) 42-43; 384.

<sup>67</sup> CG van der Merwe *Sakereg* (2 ed 1989) 466; J Scott “A Growing Trend in Source Application by Our Courts Illustrated by a Recent Judgment on Right of Way” (2013) 76 *THRHR* 239-251 239. Scott 242 also refers to *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A). Also see JC Sonnekus “Erfdiensbaarhede en die Uitoefening Daarvan *Civiliter Modo*” (2007) 70 *THRHR* 351-370 352.

<sup>68</sup> HP Viljoen *The Rights and Duties of the Holder of Mineral Rights* LLD dissertation Leiden University (1975) 58 citing Rumpf AJA in *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 A 233.

<sup>69</sup> 2007 2 SA 363 (HHA) 373A-B.

point for the balancing of the conflicting interests of the servitude holder and the servient owner,<sup>70</sup> although Brand JA does not view this principle in isolation but considers it along with the complementary principle that the servient owner must permit the servitude holder to do “whatever is reasonably necessary for the proper exercise of his rights”.<sup>71</sup>

The scope of the *civiliter modo* principle is determined by the *bonus paterfamilias* standard.<sup>72</sup> The phrases *arbitratu boni viri*,<sup>73</sup> *ac si optimus paterfamilias uteretur*<sup>74</sup> and *bonus paterfamilias*<sup>75</sup> *prima facie* all seem to refer to this standard<sup>76</sup> and are mentioned

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<sup>70</sup> JC Sonnekus “Erfdiensbaarhede en die Uitoefening Daarvan *Civiliter Modo*” (2007) 70 *THRHR* 351-370 352.

<sup>71</sup> *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (HHA) 373 para 21-22.

<sup>72</sup> HP Viljoen *The Rights and Duties of the Holder of Mineral Rights* LLD dissertation Leiden University (1975) 58 citing Hoexter JA in *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 A 231.

<sup>73</sup>. CG van der Merwe CG & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 593 cites *I 2 1 38*. CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 28 cites *D 45 1 1 pr 6*. JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 157 refers to the more comprehensive formula “*uit frui boni viri arbitratu*” and notes that the formula was extremely flexible. Through case law Roman jurists gradually developed the content of the formula based on the measure as paraphrased by Ulpian in *D 7 9 1 3* “*non deteriore se causum ususfructus facturum ceteraque facturum quae in re sua faceret*”.

<sup>74</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 28 refers to *D 7 1 38-39*.

<sup>75</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 28 refers to *D 7 1 15 2*, *7 1 45*, *7 1 65 pr*, *7 9 1 3* and *I 2 1 38*. See also CG van der Merwe *Sakereg* (2 ed 1989) 518 n 446 and MM Corbett “Usufruct, Usus and Habitatio” in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401389 n 72.

<sup>76</sup> Compare CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 25, 28, 65, 67, 121 & CG van der Merwe *Sakereg* (2 ed 1989) 466, 518. See also E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 17 referring to G. Grosso *Usufrutto e fi gure affi ni nel diritto romano* 1968 285.

in connection with usufruct.<sup>77</sup> The *bonus paterfamilias* standard<sup>78</sup> can be interpreted as conduct deemed “right” or “proper” and resembles the *boni viri arbitratu* measure, which is often used as “a standard of proper conduct or fair judgment”.<sup>79</sup> A functional translation of *boni viri arbitratu* would be “as a good man would judge fit”.<sup>80</sup> The *ac si optimus paterfamilias uteretur* norm, “to use in a proper manner”, is also equated to the *boni viri arbitratu* standard.<sup>81</sup> However, Giannozzi draws a distinction between the *bonus paterfamilias* and the *arbitrium boni viri* standard.<sup>82</sup> To her, although both phrases refer to “the idea of respectability and integrity”, the scope of the *vir bonus* is larger in the sense that it does not only refer to liability for behaviour in conflict with the

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<sup>77</sup> E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 14.

<sup>78</sup> F Parisi “*Alterum non Laedere: An Intellectual History of Civil Liability*” (1994) 39 *Am J Juris* 317-351 322-323 notes that the *bonus paterfamilias* standard had its origin in Aristotle’s idea of the “prudent father of the family”. It was deemed an objective standard, and a measure that could be implemented by a layman. This was necessitated by the fact that the evaluation of fault in an Aquilian action was undertaken by a layman, the *iudex unus*. The Roman *iudices* frequently consulted expert jurists in delictual or quasi-delictual cases and were advised to apply an objective standard of behaviour. Lack of compliance with the *bonus paterfamilias* standard amounted to *culpa*, absence of conduct which could be expected of a diligent *paterfamilias* under the circumstances.

<sup>79</sup> HJ Roby *An Introduction to the Study of Justinian’s Digest: Containing an Account of its Composition and of the Jurists Used or Referred to therein, together with a Full Commentary on One Title (De Ususfrutu)* (2010 digitally printed version) 70.

<sup>80</sup> 68.

<sup>81</sup> HJ Roby *Roman Private Law in the Times of Cicero and of the Antonines Volume 1* (1902) 487.

<sup>82</sup> E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 17 bases this distinction on a text by Venuleius *D 45 1 137 2*: “*Cum ita stipulatus sum ‘Ephesi dari?’ inest tempus: quod autem accipi debeat, quaeritur. Et magis est, ut totam eam rem ad iudicem, id est ad virum bonum remittamus, qui aestimet, quanto tempore diligens pater familias confidere possit, quod facturum se promiserit [...]*” She quotes the definition by Watson: “When I stipulate thus, ‘to be paid at Ephesus’ time is implicitly allowed. How much is questioned. It is preferable to have recourse to the judge, as a good man, who will assess the time which the conscientious head of a household would need to do what is promised”.

*bonus* or *diligens pater familias* standard of behaviour, which measures *culpa*.<sup>83</sup> It may be prudent not to use the phrases indiscriminately and further to keep in mind that the standard (*bonus paterfamilias*) should not be conflated with the norm (*civilliter*).<sup>84</sup>

The dominant owner has to adhere to the degree of care required of a *bonus paterfamilias* and has to take into account the interests of the servient owner.<sup>85</sup> Exercise of the servitude that does not meet the required degree of care amounts to negligence.<sup>86</sup> Furthermore, the holder of the servitude must not place a more onerous burden on the servient owner than is necessary for the exercise of his right.<sup>87</sup>

It is questionable whether the *civilliter modo* principle can be excluded from a servitude, as was stated in *Du Plessis v Pieterse*.<sup>88</sup> The servitude holder (appellant) obtained a servitude to lay a pipeline over the respondent's farm. The manner in which the pipe had to be laid was stipulated in a notarial deed. The servient owner (respondent) damaged the pipe while working with a bulldozer. In the magistrate's court the appellant's claim for damages due to the respondent's negligence was dismissed because he (the appellant) had *inter alia* not acted *civilliter*. In the court of

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<sup>83</sup> E Giannozzi "Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?" (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 18.

<sup>84</sup> See 2 3 3 below.

<sup>85</sup> CG van der Merwe *Sakereg* (2 ed 1989) 466; HP Viljoen *The Rights and Duties of the Holder of Mineral Rights* LLD dissertation Leiden University (1975) 58-59; CP Joubert "Die Vruggebruiker se Verpligting om Verbeterings aan te Bring" (1958) 21 *THRHR* 256-276 256.

<sup>86</sup> HP Viljoen *The Rights and Duties of the Holder of Mineral Rights* (1975) unpublished LLD dissertation Leiden University 58 citing Schreiner JA in *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 A 217.

<sup>87</sup> HP Viljoen *The Rights and Duties of the Holder of Mineral Rights* (1975) unpublished LLD dissertation Leiden University.

<sup>88</sup> *Du Plessis v Pieterse* 1970 3 SA 468 (C). This case has been accepted as authority by RC Laurens *Die Ontstaan en Tenietgaan van Saaklike Regte in die Lig van die SA Stelsel van Akteregistrasie* (1980) unpublished LLD dissertation Unisa 184-185; MJ de Waal "Die Vereistes vir die Vestiging van Grondserwitute: 'n Herformulering" (1990) 2 *Stell LR* 171-185 183.

appeal the appellant was granted damages because it was held that the application of the *civiliter modo* principle was excluded by the provisions of the deed of servitude. In this respect, argument was based on a statement by Schreiner JA in *Kakamas Bestuursraad v Louw*:

“The more precise the description in the grant of the ways in which the servitude is to be exercised, the less room there is for complaint on the ground that it has not been exercised *civiliter modo*.”<sup>89</sup>

Diemont J noted that the parties carefully determined which steps the appellant had to take in the exercise of his rights and that the appellant had fulfilled his duties.<sup>90</sup> According to Diemont J the respondent did not act with the care expected of a reasonable man and the damage sustained by the appellant was caused by the respondent’s negligent actions.<sup>91</sup>

However, the judgement in *Du Plessis v Pieterse*<sup>92</sup> was reversed in *Pieterse v Du Plessis*.<sup>93</sup> In this case the legal question was whether the plaintiff had laid the pipeline according to the instructions in the agreement. According to Van Blerk JA the deed does not state the degree of care to be taken by the servitude holder in laying the pipeline (hence not detailing the steps of the agreement and not excluding the *civiliter modo* requirement). As his point of departure in construing the agreement, the judge

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<sup>89</sup> *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A) 218.

<sup>90</sup> The parties expressly agreed that in cases where the pipeline crosses a road the appellant would be obliged to lay the pipe at a suitable depth and cover it with sufficient groundcover (“*genoegsame grondlaag*”) to allow the vehicles and machinery of the servient owner to pass without damaging the pipeline. Furthermore the appellant had to lay the pipeline no less than 16 inches beneath the surface where arable or cultivated land was at issue. See *Du Plessis v Pieterse* 1970 3 SA 468 (C) 474.

<sup>91</sup> *Du Plessis v Pieterse* 1970 3 SA 468 (C) 474-475.

<sup>92</sup> *Du Plessis v Pieterse* 1970 3 SA 468 (C).

<sup>93</sup> *Pieterse v Du Plessis* 1972 2 SA 597 (A).

refers to the property principle that the servitude agreement should be interpreted strictly and in the least onerous way because it is contrary to the freedom of the servient owner. He therefore argues that the pipeline should have been laid in an expert (“*vakkundig[e]*”) manner. He supports his argument by referring to a statement by Schreiner JA that one may not conclude from an imperfect agreement that the parties thereby sanctioned imperfect works. The statement of Schreiner JA regarding the scope for *civilliter modo*-related complaints must be approached in a nuanced way and does not necessarily imply that the *civilliter modo* principle can be excluded by agreement.<sup>94</sup> Van Blerk JA’s reliance on a property principle as point of departure in the interpretation of a servitude agreement emphasises the importance of property principles in the construction of servitude agreements. Given that agreements do not always contemplate all circumstances or stipulate every aspect in detail (as Van Blerk J’s judgment illustrates), there might generally be room to supplement provisions in a contract by means of property law principles such as the *civilliter* principle. To explain the difference between the *civilliter* principle and the *salva rei substantia* requirement, the nature and characteristics of personal servitudes and, in the context of this dissertation usufruct, need to be fleshed out.

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<sup>94</sup> CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 3 do not mention *Du Plessis v Pieterse* 1970 3 SA 468 (C) or *Pieterse v Du Plessis* 1972 2 SA 597 (A) but state Schreiner JA’s *dictum* without extrapolating. CG van der Merwe *Sakereg* (2 ed 1989) 466 and CG van der Merwe CG & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 544 only refer to *Pieterse v Du Plessis* 1972 2 SA 597 (A).

## 2 3 Usufruct

### 2 3 1 Introduction

Usufruct is a personal servitude that grants the usufructuary a limited real right to use the object of another and to draw the fruits thereof, with the obligation to return the object to the bare owner without impairing its substance.<sup>95</sup>

Usufruct functions as a means to provide the usufructuary with an income derived from the usufructuary object as well as the use and enjoyment of the property and fruit during his lifetime, while the object remains the property of another.<sup>96</sup> Especially within the testate law of succession,<sup>97</sup> usufruct functions as a means to provide for the beneficiary without giving the latter the right of disposal, as in the case of a surviving spouse.<sup>98</sup> Various reasons might exist for this arrangement, ranging from securing the usufructuary object as family property by devolving it to an heir, to facilitating a solution where the beneficiary is not deemed a competent protector of business interests.<sup>99</sup> Usufruct may also be used as an estate planning instrument for advantageous tax

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<sup>95</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508. MJ de Waal “Servitudes” In R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 785-817 810 notes that this definition corresponds with the Roman Dutch definition.

<sup>96</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508 describes this as the social function of usufruct. See also CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 89.

<sup>97</sup> The South African Law Commission *Verslag oor die Hersiening van die Erfreg: Intestate Erfreg* (1985) 19 noted that a usufruct is not so commonly used in wills as to be prescribed as a norm in intestate succession as a measure to provide for the surviving spouse.

<sup>98</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508. CP Joubert “Die Vruggebruiker se Verpligting om Verbeterings aan te Bring” (1958) 21 *THRHR* 256-276 256. W Abrie, CR Graham, MC Schoeman-Malan, P de W van der Spuy, LN van Schalkwyk & HF Gerrys *Bestorwe Boedels* (5 ed 2003) 82 also remark that usufruct is particularly used in farming communities.

<sup>99</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508 and CG van der Merwe CG & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 581.

consequences.<sup>100</sup> It is not exclusively used as an instrument in the law of succession and may also be established *inter vivos*.<sup>101</sup>

### 2 3 2 Nature

Certain aspects of the nature of usufruct are not strictly relevant to the argument and are not discussed here. These include erroneous classifications of usufruct due to its highly personal nature<sup>102</sup> and the differences between a usufruct and a *fideicommissum*.<sup>103</sup> However, it is necessary to briefly discuss the object of a usufruct

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<sup>100</sup> CJ Maritz *Die Aanwending van Vruggebruik by Boedelbeplanning* (1997) unpublished LLM thesis Potchefstroom University of CHE 1, 26 and 31. E Muller “Skepping van ’n Vruggebruik, hetsy deur Voorbehoud, of Aparte Aankoop: Pluk die Suid-Afrikaanse Inkomstediens die Vrugte?” (2007) 40 *De Jure* 353-369 368 notes that the usufructuary may benefit from a construction where the usufruct is retained or created for a specific period. Where the usufructuary survives the period, the usufruct is free from transfer duty and estate tax reverts to the bare owner.

<sup>101</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508.

<sup>102</sup> As a “limited real right of a ‘highly personal’ nature” usufruct has sporadically been construed as a personal right. See in this regard *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 2 SA 419 (T); *Kruger v Gunter* 1995 1 SA 344 and *Cowley v Hahn* 1987 1 SA 440 (E). However, this interpretation has met with criticism. In this regard *Cowley v Hahn* 1987 1 SA 440 (E) is discussed by AJ van der Walt & GJ Pienaar *Introduction to the Law of Property* (6 ed 2009) 237; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 339 n 150; P de W van der Spuy “Aard van ’n Persoonlike Serwituut” (1995) 2 *De Jure* 458-463; A Domanski “How Personal is a Personal Servitude?” (1988) 105 *SALJ* 205-210; MCJ Bobbert “Correspondence” 1987 *De Rebus* 194 and PF Breed “Usufruct: a Personal or a Real Right? A Ground of Eviction or a Latent Defect?” (1987) 50 *THRHR* 352-356; J Scott “Koopkontrak van Grond: Aard van Vruggebruik oor Grond” (1987) 1 *De Jure* 181-185; CG van der Merwe “Law of Property (Including Mortgage and Pledge)” 1987 *ASSAL* 205-236 221; AJ van der Walt “Saaklike Regte en Persoonlike Serwitute” (1987) 50 *THRHR* 343-352. The decision was described as wrong in law in *Felix v Nortier* 1996 3 All SA 143 (SE).

<sup>103</sup> In general the distinction is discussed in *Estate Watkins-Pitchford v Commissioner for Inland Revenue* 1955 2 SA 437 (A) 447 and J Jamneck “*Fideicommissum*, Vruggebruik en *Modus*” (1991) 54 *THRHR* 316-322. Although both distinguish between one party who is awarded the use and enjoyment (respectively the usufructuary and the *fiduciarius*) and another who receives or retains ownership (respectively the *dominus* and the last *fideicommissarius*), important differences are evident. In the case

in order to distinguish usufruct from quasi-usufruct, since the latter falls outside the scope of this dissertation. Furthermore, it needs to be emphasised that the possibility of establishing usufruct on such a diverse range of objects of which some are more vulnerable to deterioration and destruction than others inevitably necessitates special regulatory and protective measures. In this sense demarcating the objects of personal servitudes explains the differences in the regulatory measures applicable to servitudes in general and to personal servitudes *per se*. In other words, it makes the distinction between the *civiliter* principle and the *salva rei substantia* requirement clearer.

The object of the usufruct may be a single object or a collection of things (*universitas rerum* or *facti*)<sup>104</sup> and includes the accessories and pertinences attached to it, serving the destination of the principal thing. Usufruct may also be established on

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of a *fideicommissum*, the *fiduciarius* receives ownership of the fiduciary property, which is eventually to be transferred to the *fideicommissarius*, either at the appointed time or in the event of an uncertain future event. In the case of usufruct the usufructuary does not become the owner but is entitled to a limited real right which terminates eventually so that full ownership reverts to the *dominus*. A van der Linde “Inhoud van Testamente – Substitusie, Vruggebruik en Aanwas” in J Jamneck, C Rautenbach (eds), M Paleker, A van der Linde & M Wood-Bodley *Erfreg in Suid-Afrika* (2010) 182 notes that the nature of the testamentary interest is determined with reference to the testator. Where the testator intended that the ownership should vest in the first beneficiary, subject to a condition to be met or a specified period which has to run its course before ownership vests in the second beneficiary, the interest is constructed as a *fideicommissum* as the example *Van Staden v Van Staden* 1984 4 SA 507 (T) shows. If the testator intended a specific limited real interest to vest in the first beneficiary, subject to the clause that when it terminates, full ownership vests in the *dominus*, the interest is interpreted as a usufruct, as the decision *Schaumberg v Stark* 1956 4 SA 462 (A) illustrates. According to *Singh v Singh* 1959 2 SA 192 (D); *Schaumberg v Stark* 1956 4 SA 462 (A) Voet 7 1 9; MJ de Waal & MC Schoeman-Malan *Law of Succession* (4 ed 2008) 150; 167 there exists a presumption in favour of a *fideicommissum* and against usufruct in doubtful cases.

<sup>104</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 58 mention a herd of animals, a library or a whole estate and in n 4 cite Voet 7 1 14; *Antje Komen v Hendrik de Heer* (1908) 29 NLR 237 and *Geldenhuis v Commissioner for Inland Revenue* 1947 3 SA 256 (C).

objects with a purely aesthetic value.<sup>105</sup> The object may be movables<sup>106</sup> or immovables,<sup>107</sup> whether corporeal or incorporeal.<sup>108</sup> Usufruct may however not be constituted over *res consumptibiles*<sup>109</sup> as the property must be “intrinsically capable of being returned in a good condition, fair wear and tear excepted”.<sup>110</sup> If the object changes in substance, can be extinguished or is consumed by use, it does not

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<sup>105</sup> CG van der Merwe *Sakereg* (2 ed 1989) 509.

<sup>106</sup> CG van der Merwe *Sakereg* (2 ed 1989) 509 cites *Geldenhuis v Commissioner for Inland Revenue* 1947 3 SA 256 (C)

<sup>107</sup> CG van der Merwe *Sakereg* (2 ed 1989) 509 cites Grotius 2 39 2; Voet 7 1 14 and Van der Linden *Supplementum ad Voet* 7 1 14.

<sup>108</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 39 n 158 give the example of shares, citing *Cooper v Boyes* 1994 4 SA 521 (C).

<sup>109</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 40 state that *res consumptibiles* may be described as things consumed by use in accordance with their normal destiny. The scope of this classification is contested. While it is accepted that things which are destroyed when used for the first time fall into this category, writers differ on the classification of things which are impaired through a longer period of use. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 40 suggest that the reduction in value which results from the normal use of such things should be determinative. A substantial reduction should indicate that the object should be classified as consumable. The same object, for example clothing, could therefore be classified as either consumable or not and consequently be subject to either quasi-usufruct or usufruct depending on the use and resulting deterioration of the object. In *Cooper v Boyes* 1994 4 SA 521 (C) 535D-E Van Zyl J excluded shares from this category. See also R Jooste & J Yeats “Shares, Securities and Transfer” in FHI Cassim (ed), MF Cassim, R Cassim, R Jooste, J Shev & J Yeats *Contemporary Company Law* (2 ed 2012) 212-261 213-215 on the Companies Act 71 of 2008 including the 2011 amendments and regulations still citing *Cooper v Boyes* 1994 4 SA 521 (C) and confirming that shares are incorporeal and movable. See also the Companies Act 71 of 2008 s 35(1) amending s 91 of the Companies Act 61 of 1973. The implication of this exclusion from the category *res consumptibiles* is that shares may be the object of usufruct and not quasi-usufruct. E Leos “Quasi-usufruct and Shares: Some Possible Approaches” (2006) 123 *SALJ* 126-146 discussing *Cooper v Boyes* 1994 4 SA 521 (C) in an article published prior to the implementation of the Companies Act 71 of 2008, criticised the view that shares should be uniformly categorised as the object of usufruct and suggested that the question of whether a share should be subject to quasi-usufruct should be approached by considering the nature of the actual share.

<sup>110</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 583 n 1.

constitute a suitable usufructuary object.<sup>111</sup> It may however be the object of quasi-usufruct, an institution serving a similar social and economic function as usufruct. In the case of quasi-usufruct, the beneficiary becomes the owner of the property subject to the quasi-usufruct and only has to return the equivalent of the property to the *dominus* on termination of the usufruct. However, as was indicated in chapter 1, quasi-usufruct falls outside the scope of this dissertation.

From this brief discussion it is clear that the objects that are suitable as usufructuary objects, vary in durability and their proneness to wear and tear and destruction. To safeguard vulnerable usufructuary property special regulatory and protective measures are needed.

A second aspect of the nature of usufruct that is relevant is its limited duration. Generally, usufruct continues during the lifetime of usufructuary.<sup>112</sup> However, it may also be granted for a limited period or until the fulfilment of a condition,<sup>113</sup> but in such a case it would also be terminated by the earlier death of the usufructuary.<sup>114</sup> This is the case since the usufruct is attached to the usufructuary and cannot exist apart from

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<sup>111</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 583. E Leos "Quasi-Usufruct and Shares: Some Possible Approaches" (2006) 123 *SALJ* 126-146 132 notes that the distinction between the rights allocated to the usufructuary, namely the *ius utendi* and the *ius fruendi* (the right of use and enjoyment) and the rights remaining with the *dominus*, namely the *ius abutendi* (the right of abuse or destruction) and the *ius disponendi* (the right of disposal) cannot exist.

<sup>112</sup> Grotius 2 39 1; CG van der Merwe *Sakereg* (2 ed 1989) 520.

<sup>113</sup> *Watson v Fraetas* 1899 16 SC 263; Voet 7 4 11; CG van der Merwe *Sakereg* (2 ed 1989) 520; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 379.

<sup>114</sup> *Day's Trustees v Registrar of Deeds & Another* 1910 CPD 361; CG van der Merwe *Sakereg* (2 ed 1989) 520; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 379; Voet 7 4 11, 12.

him.<sup>115</sup> Consequently, it cannot be inherited when the usufructuary dies.<sup>116</sup> Accordingly, a point of return and of assessment as to the maintenance of the property is inevitable. In order to facilitate and ensure the return of the property the usufructuary has the obligation to return the usufructuary property *salva rei substantia*.

To maintain the usufructuary object without impairing its substance so that it may be returned *salva rei substantia*, certain rights are granted to the usufructuary and specific duties are allocated to him. These rights and duties are noted briefly in the following section in order to contextualise and introduce the *salva rei substantia* requirement.

### 2 3 3 Rights and duties of the usufructuary

The usufructuary's right entails the entitlements to possession,<sup>117</sup> administration,<sup>118</sup> use and enjoyment of the object of the usufruct (*ius utendi*) and to take the fruits of the usufructuary property (*ius fruendi*).<sup>119</sup> The fruits may be consumed or alienated,

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<sup>115</sup> MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 379.

<sup>116</sup> 379.

<sup>117</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340 cite Voet 7 1 32.

<sup>118</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 585 n 1 cite *Furnivall v Cornwell's Executors* (1895) 12 SC 6; *Van der Merwe v Van Wyk* 1921 EDL 298 302; *Steyn v Registrar of Deeds* 1933 CPD 109 112 and *Garmany v Templeton's Executors* 1936 SR 139 159.

<sup>119</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) citing Voet 7 1 28 and *Barnett v Rudman* 1934 AD 203 210 note that this entitlement extends to natural, industrial or civil fruits.

regardless of whether they are natural,<sup>120</sup> industrial<sup>121</sup> or civil.<sup>122</sup> In terms of the *ius fruendi* the usufructuary therefore has the full right of disposition and he becomes the owner of fruits. As such, this entitlement does not demonstrate how the *salva rei substantia* requirement functions.

Most South African academic writers proceed with the discussion of the duties of the usufructuary by stating a general underlying principle. Sources either refer to the usufructuary's duty to exercise his entitlements like a rational man<sup>123</sup> or sensible person.<sup>124</sup> The Latin phrase used to express this duty is "*arbitratu boni viri*".<sup>125</sup>

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<sup>120</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 586 give the examples of vegetables, crops and plantations planted for the purpose of being felled, services rendered by animals, milk, manure, wool, their young and carcasses, citing *Morkel v Malan* 1933 CPD 370 374 and *Houghton Estate Co v FS McHattie & WS Barrat* (1894) 1 OR 92 103; Voet *Commentarius* 7 1 22 and 26; Van Leeuwen *CF* 1 2 15 9; Van der Keessel *Prael ad Gr* 2 39 7 and *I* 2 1 37.

<sup>121</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 102 cites *Barnet v Rudman* 1934 AD 203 and only distinguishes two main categories, namely natural and civil fruits. Industrial fruits are civil fruits which are the result of significant human contribution.

<sup>122</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 589 give the examples of rent, quitrent and interest citing Grotius *Inleiding* 2 38; Voet *Commentarius* 7 1 30; Van Leeuwen *RHR* 2 9 3, *CF* 1 2 15 4; *Ex parte Marks & Marks* 1926 TPD 1 and *Beneke v Van der Vijver* (1905) 22 SC 523.

<sup>123</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 593.

<sup>124</sup> CG van der Merwe & A Pope "Servitudes and Other Real Rights" in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 591-629 608.

<sup>125</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 593 citing *I* 2 1 38; CG van der Merwe & A Pope "Servitudes and Other Real Rights" in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 591-629 608; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 116; AFS Maasdorp "Personal Servitudes;

Alternatively, writers refer to the *civiliter* principle.<sup>126</sup> These two phrases partly share a certain semantic field<sup>127</sup> and the basis of both seems to be reasonableness.<sup>128</sup> Furthermore, there seems to be a conflation of the principles based on reasonableness denoting the behaviour required of the usufructuary and the standard of behaviour ascribed to the *civiliter* principle, namely that of the *bonus paterfamilias*.<sup>129</sup> The general principle is usually discussed in conjunction with the

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Usufruct, Usus and Habitatio” rev Hall CG in Hall CG (ed) *Maasdorp’s Institutes of South African Law: Volume II The Law of Property* (10 ed 1976) 190.

<sup>126</sup> CG van der Merwe *Sakereg* (2 ed 1989); CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 108.

<sup>127</sup> JG Kotzé “The Jurisprudence of Holland by Hugo Grotius Translated by RW Lee DCL” (1927) 44 *SALJ* 147-157 155 reviewing Lee’s translation describes the Dutch term *heusschelik*, the equivalent of the Latin *civiliter*, as “in a way befitting an honest and good citizen”. This description accords with the explanation by E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 15 of the phrase “*arbitru boni viri*” as denoting behaviour of the usufructuary as an honest man. It seems therefore that the concepts of “*civiliter*” and “*arbitru boni viri*” (at least partly) denote the same manner of behaviour. Assuming total equivalence might be premature. The *civiliter* principle applies to both praedial and personal servitudes and according to also E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 18-19 the phrase *arbitratu boni viri* also has a wide application in the various legal institutions such as sale, lease, corporations, dowry, will and *fideicommissum*. The sources stated as authority for both phrases do not overlap in South African literature on servitudes. Further conclusions in this regard might be drawn from the work of E Giannozzi who also defended her doctoral dissertation entitled *Le Bonus Vir en Droit Romain* on 28 March 2015. See also E Giannozzi “Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?” (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19.

<sup>128</sup> See for example JC Sonnekus “*Aquaeductus* en Sommige Gevolge van Goeie Buurmanskap: *Zeeman v De Wet* 2012 6 SA 1 (HHA)” 2013 *TSAR* 561-575 565, 571; JC Sonnekus “Waterserwitute, Verjaring en die Kennisleer: *Cillie v Geldenhuys* 2009 2 SA 325 (HHA)” 2009 *TSAR* 776-785 778 in relation to the *civiliter* principle. Regarding the phrase *arbitratu boni viri* see HJ Roby *An Introduction to the Study of Justinian’s Digest: Containing an Account of its Composition and of the Jurists Used or Referred to therein, together with a Full Commentary on One Title (De Ususfrutu)* (2010 digitally printed version) 70.

<sup>129</sup> See for example CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 116; CG van der Merwe *Sakereg* (2 ed 1989) 518 and CP Joubert “Die Vruggebruiker se Verpligting om Verbeterings aan te Bring” (1958)

*salva rei substantia* requirement. The principle of reasonableness and the *salva rei substantia* requirement can be interpreted as constituting one overarching point of departure covering the exercise of the usufructuary's rights in general and giving rise to particular duties of the usufructuary. Firstly, he has to exercise his rights *civiliter*.<sup>130</sup> Secondly, he has to return the property *salva rei substantia*.<sup>131</sup> This requirement is discussed below.

The other duties of the usufructuary flow from this overarching point of departure. The usufructuary has to frame an inventory of the property subject to the usufruct, render security for the proper use, enjoyment and return thereof and take responsibility for the ordinary repairs and expenses necessary for normal maintenance of the property.<sup>132</sup> The usufructuary does not have to pay for extraordinary repairs, insurance premiums or the replacement of buildings that have fallen into disrepair due to age or that have been accidentally destroyed. Normal deterioration is not for the account of the usufructuary either and he only has to return the property in the state that it is in at the termination of usufruct.<sup>133</sup> These duties are listed by all South African academic writers. However, Van der Merwe adds another duty, namely the duty not to damage, destroy or change the nature of the object substantially.<sup>134</sup>

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21 *THRHR* 256-276 256 and 261 no 4. The conflation could probably be related to proximity of the phrases "*arbitratu boni viri*" and "*bonus paterfamilias*" in the phrase "*arbitratu boni viri ac tanquam bonus paterfamilias*" in Voet 7 1 22. Also see E Giannozzi "Uti Frui Arbitrio Boni Viri: Standard of Behaviour or Reference to an Arbitrator?" (2011) 4 *Krakowskie Studia z Historii Państwa i Prawa* 13-19 17 referring to G Grosso *Usufrutto e figure affi ni nel diritto romano* (1968) 285.

<sup>130</sup> See discussion of the *civiliter* requirement in 2 2 2 above.

<sup>131</sup> CG van der Merwe *Sakereg* (2 ed 1989) 516.

<sup>132</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 594.

<sup>133</sup> Paras 595-597.

<sup>134</sup> CG van der Merwe *Sakereg* (2 ed 1989) 519.

In the following section the *salva rei substantia* requirement is discussed as overarching requirement specifically applicable to personal servitudes and as the requirement from which all other duties of the usufructuary flow.

#### 2 3 4 The *salva rei substantia* requirement

The *salva rei substantia* requirement<sup>135</sup> applies to the personal servitudes of usufruct,<sup>136</sup> use<sup>137</sup> and habitation.<sup>138</sup> Within the context of usufruct<sup>139</sup> it can be described as the obligation of the usufructuary to use and enjoy the object of the usufruct “without impairment of the essential quality of things”.<sup>140</sup>

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<sup>135</sup> CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20 10 uses the term “requirement” (“vereiste”). PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 340 utilize the term “duty”. H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250 and CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University employ the term “obligation” (“verpligting”). G Pugliese “On Roman Usufruct” (1966) 40 *Tul L Rev* 523-554 548 discusses Roman usufruct and also uses the term “obligation”.

<sup>136</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508.

<sup>137</sup> 521.

<sup>138</sup> 523.

<sup>139</sup> The author defines the *salva rei substantia* requirement within the context of usufruct because it has been described as the most “comprehensive” (“omvattendste”) personal servitude. See CG van der Merwe *Sakereg* (2 ed 1989) 506.

<sup>140</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 340. Case law from the constitutional era also recognises this obligation, see *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng, and Others (KwaZulu-Natal Law Society and Msundzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) para 55 and *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 11. See also CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 581 and CG van der Merwe & A Pope “Servitudes and Other Real Rights” in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann,

The concept has both a physical denotation and a teleological signification.<sup>141</sup> Where it pertains to a physical object, it must in the first place be construed as a negative duty prohibiting or limiting interference with the substance, form or physical configuration of the object during the usufruct and in the second place as a positive duty to maintain the object where it consists of a corpus of for example livestock, fruit trees or game.<sup>142</sup> In its teleological manifestation, the concept refers to the character or the economic destination of the object of the usufruct. The usufructuary must refrain from altering either of the two, even if such a change would not transform the matter or physical configuration of the object of the usufruct.

Either a flexible or a rigid approach to the interpretation of the *salva rei substantia* requirement can be followed.<sup>143</sup> A rigid approach would entail strictly prohibiting the deterioration or impairment of the object of the usufruct, without taking into account the nature of the object, the context (including the locality and circumstances regarding its enjoyment) or the practice and custom of prudent users of similar property.<sup>144</sup> It

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R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 591-629 604-605 for recent definitions incorporating the requirement. H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250-251 devote an insert to the *salva rei substantia* requirement, concentrating on its practical application.

<sup>141</sup> Reference in this section to CG van der Merwe "Regsbegrippe en Regspolitiek" (1979) 42 *THRHR* 9-20 10-12 unless otherwise noted.

<sup>142</sup> *Beneke v Van der Vijver* (1905) 22 SC 523 529 is an example of a decision where the usufructuary had a positive duty to maintain the *corpus* of flocks and herds from the increase yielded occasionally.

<sup>143</sup> The existence of both a flexible and a narrow approach can be deduced from the pronouncements of the judiciary opting for a flexible approach. See for example Ward J in *Fourie v Munnik* 1919 OPD 73 79: "I think the expression 'without deteriorating' used by van der Linden and the other Roman and Roman Dutch writers must not be taken in too narrow a sense".

<sup>144</sup> The review of old authorities by Kotzé J in *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 74ff in general seems to confirm the rigid approach. See also *Geldenhuis v Commissioner for Inland Revenue* 1947 3 SA 256 (C) 263-264 per Steyn J. See for an example to the contrary Ward

seems that a rigid approach primarily pertains to the preservation of the physical object, based on a literal interpretation of the *salva rei substantia* requirement. Strict enforcement of the *salva rei substantia* requirement implies that the usufructuary would not be able to change the economic destination of the object of the usufruct even if its value would be increased by the alteration.<sup>145</sup> In *Fourie v Munnik*<sup>146</sup> McGregor J points out the negative consequences of a narrow interpretation:

“[F]or while on the one hand there must be no destruction or substantial impairing or undue deterioration of the usufructuary property, one should, conversely, not insist on such counsels of perfection regarding the user as to make the enjoyment something unsubstantial, unproductive or illusory.”

A flexible approach normally allows for some physical interference, provided that the economic destination of the object of the usufruct is not altered. Interference would be justified by contextual factors such as the locality, established practices in the area, the nature of the object of the usufruct and circumstances relevant to its enjoyment.<sup>147</sup> Secondly, it might also entail replacing the *salva rei substantia* requirement with the more flexible *salva rei aestimatione*<sup>148</sup> requirement, which would take economic considerations into account.<sup>149</sup> Thirdly, it has been proposed that a flexible approach might also entail accepting economic gain (in the sense that it increases the value of

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J in *Fourie v Munnik* 1919 OPD 73 79 who takes into account the locality (in this case a district where sowing supplements other farming practices and provides food for livestock) and the practice of the “experienced prudent farmer in the same neighbourhood”. McGregor J in *Fourie v Munnik* 1919 OPD 73 86-87 takes into account the nature of the object of the usufruct and the “circumstances attending its enjoyment”.

<sup>145</sup> CG van der Merwe *Sakereg* (2 ed 1989) 14.

<sup>146</sup> 1919 OPD 73 87.

<sup>147</sup> *Fourie v Munnik* 1919 OPD 73 79, 87.

<sup>148</sup> CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20 15 explains the term as preserving the value of the usufructuary object.

<sup>149</sup> 15-16.

the object of the usufruct) as a valid and sufficient reason for changing the economic destination of the object of the usufruct.<sup>150</sup> This South African differentiation between a rigid and a flexible approach is supported by a recent international publication.<sup>151</sup>

The discussion above prompts the question how the *salva rei substantia* requirement differs from the *civiliter* principle discussed in 2.2.2. In view of the differences between praedial and personal servitudes the two regulatory mechanisms can be distinguished from each other.

### 2.3.5 Differences between the requirement and the *civiliter* principle<sup>152</sup>

The *civiliter* principle pertains to all servitudes, whereas the *salva rei substantia* requirement applies only to personal servitudes. The *civiliter* principle is therefore a more general principle than the *salva rei substantia* requirement. The standard of care for both is that of the *bonus paterfamilias*.<sup>153</sup> Furthermore, both the *civiliter* principle and the *salva rei substantia* requirement protect the interests of the bare owner.<sup>154</sup>

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<sup>150</sup> R Zimmermann *Das Römisch-Holländische Recht in Südafrika: Einführung in die Grundlagen und Usus Hodiernus* (1983) 175.

<sup>151</sup> A Verbeke, B Verdickt & D Maasland "The Many Faces of Usufruct" in C van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56.

<sup>152</sup> I am indebted to Professor AJ van der Walt and the 2013 SARCPL research group for comments in this regard.

<sup>153</sup> CG van der Merwe *Sakereg* (2 ed 1989) 466 citing *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A) 231 and CG van der Merwe *Sakereg* (2 ed 1989) 518. See also CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 25 n 94 citing *I 2 1 38*.

<sup>154</sup> CG van der Merwe *Sakereg* (2 ed 1989) 466; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 379, 389.

The differences between the two principles relate to the differences between praedial and personal servitudes. Firstly, as personal servitudes are of limited duration<sup>155</sup> and the object of the servitude consequently has to be returned, there inevitably has to be a point of return and of assessment as to the maintenance of the property. In order to facilitate and ensure the return of the property the usufructuary has the obligation to return the usufructuary property *salva rei substantia*. Maintenance and repair duties are accordingly placed on the usufructuary. Furthermore, since assessment of the fulfilment of this criterion is necessary, specific duties are imposed on the usufructuary, such as the framing of inventory and the provision of security. These duties are discussed in section 2 4 1. Since praedial servitudes are generally not of a limited duration and the object of the praedial servitude does not have to be returned, there is no point of return and assessment concerning the maintenance of the property.

Secondly, the scope of the use and enjoyment of the property is much more extensive in the case of personal servitudes.<sup>156</sup> The beneficiary of a personal servitude mostly has full and exclusive use of the object of the servitude,<sup>157</sup> whereas the beneficiary of a praedial servitude is usually entitled to more limited use.<sup>158</sup> This is particularly the case with usufruct. The bare owner is excluded from the use of the usufructuary property,<sup>159</sup> while the usufructuary's full use and enjoyment of the

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<sup>155</sup> See 2 2 1 and 2 3 2 above.

<sup>156</sup> CG van der Merwe *Sakereg* (2 ed 1989) 460-461.

<sup>157</sup> JC Sonnekus "Bewoningsreg (*Habitatio*) Aard van die Regsobjek en die Effek Dáárvan oo die Registrasie van die Reg" (2015) 26 *Stell LR* 63-85 67; JC Sonnekus "Erfdiensbaarheid en die Uitoefening Daarvan *Civiliter Modo*" (2007) 70 *THRHR* 351-370 353.

<sup>158</sup> Dernburg *Pandekten* para 245; CG van der Merwe *Sakereg* (2 ed 1989) 460-461; 506.

<sup>159</sup> JC Sonnekus "Bewoningsreg (*Habitatio*) Aard van die Regsobjek en die Effek Dáárvan oo die Registrasie van die Reg" (2015) 26 *Stell LR* 63-85 67.

usufructuary property provide ample opportunity for wear and tear, misuse and even destruction or loss. The owner of the usufructuary property therefore requires more customised protection to ensure that he does have the use and enjoyment of the usufructuary property when it reverts to him on termination of the usufruct. This correlation between increased protection through customised measures and greater substantive burdens on the bare owner's property is not only evident when praedial and personal servitudes are compared. Where personal servitudes differ in terms of the burden they impose on the bare owner's property and the entitlements granted, the respective duties also vary. In the case of *usus*, for example, the usuary is only entitled to the fruits necessary for his daily needs. The owner is not entirely excluded from the use of the property subject to the right of use.<sup>160</sup> The owner may for instance temporarily enter the farm given in use to collect the remainder of the fruits not necessary for the needs of the usuary.<sup>161</sup> Accordingly, the duties of the usuary are also less extensive than those of the usufructuary: the usuary is not liable for the same running costs as the usufructuary.<sup>162</sup> This was confirmed in *Vairetti v Zardo*,<sup>163</sup> where Erasmus J stated that "[t]he limited nature of the right carries, as a corollary, a commensurately limited set of obligations, in particular as regards the upkeep of the property".<sup>164</sup> Conversely, "an extension of the usuary's right of use (i.e. to cater for increased needs) extends the usuary's obligations".<sup>165</sup>

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<sup>160</sup> CG van der Merwe *Sakereg* (2 ed 1989) 522.

<sup>161</sup> 522.

<sup>162</sup> 523.

<sup>163</sup> [2010] ZAWCHC I46 paras 22-27.

<sup>164</sup> Para 25.

<sup>165</sup> Para 27.

The *salva rei substantia* requirement in personal servitudes therefore differs from the *civiliter* principle due to the increased scope of the burden on the bare owner's property in comparison to the burden on the servient owner's property in a praedial servitude. The bare owner needs more protection in comparison to the owner of a servient tenement where a praedial servitude is concerned. This protection is provided by the duties flowing from the *salva rei substantia* requirement.

Thirdly, the objects of praedial and personal servitudes differ.<sup>166</sup> Praedial servitudes are always tied to the use of land, while movables may be the object of personal servitudes. Movables are inherently more vulnerable to wear and tear and to destruction, and therefore they need to be protected in the interest of the bare owner who will eventually take possession of them on termination of the usufruct.

All these factors contribute to the conclusion that the *civiliter modo* principle differs from the *salva rei substantia* requirement in the sense that the latter affords customised protection that is more extensive than in the case of the *civiliter* principle. Taking into account the duration, scope and object of usufruct the regulation required needs to be more detailed and comprehensive.

## **2 4 The *salva rei substantia* requirement in case law and literature**

### **2 4 1 The rights and duties of the usufructuary**

As was previously mentioned, the usufructuary is entitled to the possession, administration and control,<sup>167</sup> use and enjoyment of the object of the usufruct (*ius*

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<sup>166</sup> See 2 3 2 above.

<sup>167</sup> Voet 7 1 32; *Geldenhuis v Commissioner of Inland Revenue* 1947 3 SA 256 2 (C) 264; *In re Cooper's Estate* 1939 CPD 309 311; *Garmany v Templeton's Executors* 1936 SR 139 159; *Steyn v Registrar of*

*utendi*) and to take the fruits of the usufructuary property (*ius fruendi*).<sup>168</sup> Although some authors note that the entitlements to possession, administration and control flow from the entitlement to use and enjoy the usufructuary property,<sup>169</sup> this relationship is not indicated by all writers.<sup>170</sup> As a point of departure the usufructuary has the entitlement to use the usufructuary property to the extent necessary for the cultivation and acquisition of fruits.<sup>171</sup> The question is whether this wide entitlement of use allows the usufructuary some flexibility where the *salva rei substantia* requirement is concerned in terms of his entitlements to administer and control the usufructuary property. As will be evident from chapter 3, these entitlements are fleshed out and

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*Deeds* 1933 CPD 109 112; *Van der Merwe v Van Wyk* 1921 EDL 298 302; *Furnivall v Cornwell's Executors* (1895) 12 SC 6; CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 585; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340; NJ van der Merwe "Testate Erfreg (Vervolg) Die Inhoud van Testamente" in NJ van der Merwe, CJ Rowland & MB Cronje *Die Suid-Afrikaanse Erfreg* (6 ed 1990) 250-407 267; CG van der Merwe *Sakereg* (2 ed 1989) 510 n 381; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 386; AFS Maasdorp "Personal Servitudes; Usufruct, Usus and Habitatio" rev Hall CG in Hall CG (ed) *Maasdorp's Institutes of South African Law: Volume II The Law of Property* (10 ed 1976) 189.

<sup>168</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) citing Voet 7 1 28 and *Barnett v Rudman* 1934 AD 203 210 note that this entitlement extends to natural, industrial or civil fruits.

<sup>169</sup> NJ van der Merwe "Testate Erfreg (Vervolg) Die Inhoud van Testamente" in NJ van der Merwe, CJ Rowland & MB Cronje *Die Suid-Afrikaanse Erfreg* (6 ed 1990) 250-407 267; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 386; AFS Maasdorp "Personal Servitudes; Usufruct, Usus and Habitatio" rev Hall CG in Hall CG (ed) *Maasdorp's Institutes of South African Law: Volume II The Law of Property* (10 ed 1976) 189.

<sup>170</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 585; CG van der Merwe & A Pope "Ownership" in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 469-556.

<sup>171</sup> *Barnett & Others v Rudman & Another* 1934 AD 203; CG van der Merwe *Sakereg* (2 ed 1989) 510.

discussed in some detail in comparative jurisdictions in order to determine whether use may in any sense sanction disposition. This is not the case in South African literature and case law. In fact, it is not an easy task to determine the scope of these entitlements. In *Steyn v Registrar of Deeds*<sup>172</sup> it was noted that the right to possession, administration and control is an essential feature of usufruct. It would therefore seem necessary to determine the scope of these entitlements and particularly of administration and control. In case law these entitlements are sometimes conflated. For example, in *Furnivall v Cornwell's Executors*<sup>173</sup> the right of administration was described as the right to especially control, along with possession and custody, of the usufructuary property.<sup>174</sup> Another case in point is *Garmany v Templeton's Executors*,<sup>175</sup> in which Russell CJ elaborates on his statement that the usufructuary had not taken over control and administration of the estate, namely that the accounts and bank accounts were not in the usufructuary's name and that the working of the farm, although undertaken under supervision of the usufructuary, was not undertaken by her. On the other hand, these entitlements are sometimes distinguished. In *Steyn v Registrar of Deeds*<sup>176</sup> Watermeyer J decided that the interest involved did not amount to a usufruct since the survivor did not have possession, control or administration. He distinguishes between control and administration *in casu*, with the former allocated to

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<sup>172</sup> 1933 CPD 109 112.

<sup>173</sup> (1895) 12 SC 6.

<sup>174</sup> *Furnivall v Cornwell's Executors* (1895) 12 SC 6 concerned the usufruct of an estate consisting of movables and immovables. The usufructuary was permitted to let the houses and to take control of the property. She also took due care that the premises were repaired and insured.

<sup>175</sup> 1936 SR 139 160.

<sup>176</sup> 1933 CPD 109 112.

the lessee, while the latter entitlement was tied to the executor of the estate as lessor who would have to deal with issues arising from a lease.<sup>177</sup>

In the case of usufruct on an estate the usufructuary is entitled to sue if debts are due to the estate; to call up mortgage bonds; sue for money due upon the latter, but only in so far as it would benefit the estate.<sup>178</sup> What clearly falls outside of this demarcation is the power to mortgage the farm or to risk more than the usufructuary interest.<sup>179</sup> Control and administration therefore do not seem to involve the entitlement to conclude juristic acts such as financing farming ventures from the capital of the estate in usufruct, mortgaging or pledging the usufructuary property. Furthermore, it also excludes the entitlement to cede the usufruct to anyone except the bare owner.<sup>180</sup> Case law does not elaborate on the juristic acts which would be acceptable as acts of administration and control within the ambit of the *salva rei substantia* requirement. This aspect is subjected to more scrutiny in foreign case law, as is evident from chapter 3, since it also allows a measure of flexibility where the requirement is concerned. What is clear is that general acts of disposition do not form part of administration and control.<sup>181</sup> To summarise, the entitlements of administration and control are acknowledged in South African law but the scope of these entitlements is not clear. Therefore, it is also not clear how this entitlement might facilitate a flexible approach to the *salva rei substantia* requirement in South African law.

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<sup>177</sup> *Steyn v Registrar of Deeds* 1933 CPD 109 112.

<sup>178</sup> *Garmany v Templeton's Executors* 1936 SR 139 161.

<sup>179</sup> 160.

<sup>180</sup> *Van der Merwe v Van Wyk* 1921 EDL 298 302.

<sup>181</sup> *Sheriff Bloemfontein-East v Gainsford* 2013 JDR 2285 (FB) 5-6 paras 9-11; *Geldenhuis v Commissioner of Inland Revenue* 1947 3 SA 256 2 (C) 264; *Steyn v Registrar of Deeds* 1933 CPD 109; *Van der Merwe v Van Wyk* 1921 EDL 298 301-302.

The *salva rei substantia* requirement is most often discussed in relation to the duties that follow from the obligation not to impair the substance of the usufructuary object. Case law and literature dealing with the neglect of the duties flowing from the requirement are therefore examined in this section. The duty to defray rates and taxes is not discussed here as this duty does not particularly highlight the approach of the courts to the *salva rei substantia* requirement. However, case law focussing on the duty to frame inventory, provide security and to maintain and repair the object of the usufruct is examined here.

#### 2 4 1 1      *Inventory*

The usufructuary is under the obligation to frame an inventory on request of the bare owner.<sup>182</sup> The inventory informs the *dominus* of the scope and the nature of the usufructuary object to be returned at the termination of the usufruct.<sup>183</sup> The inventory therefore plays an instrumental role in establishing whether the usufructuary property was returned *salva rei substantia*.

Recent case law indicates that there seems to be uncertainty as to the formal requirements of an inventory. In *Van den Heever NO and Others v Coetzee and Another*<sup>184</sup> an inventory was demanded but Van der Byl AJ notes that it is not clear what the fourth applicant intended with his request. Van der Byl AJ suggests that if the

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<sup>182</sup> *Van Rensburg v Mulder* 1998 JDR 0756 (T); *Stain v Hiebner* 1976 1 SA 34 (C) 36; *Schoeman v Schoeman and Another* 1953 2 SA 441 (T) 442; Grotius 2 39 20; Voet *Commentarius* 7 9 2, 7 9 7; Groenewegen *ad* Grotius 2 39 2; Van Leeuwen *RHR* 2 9 10, *CF* 1 2 15 6; Schorer *ad* Grotius 2 39 3; Van der Keessel *Praelectiones ad* Grotius 2 39 3; CG van der Merwe *Sakereg* (2 ed 1989) 516.

<sup>183</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 109-110.

<sup>184</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T).

purpose was to describe the condition of the usufructuary object, this was already taken care of by the fourth applicant himself.<sup>185</sup> Similarly, in *Heukelman v Heukelman*<sup>186</sup> an inventory pertaining to the *corpus* was demanded, but Makgoka J states that the first and final liquidation and distribution account in the estate served as the inventory for the estate and the *corpus* of the usufruct.<sup>187</sup> It therefore seems that the judiciary takes a pragmatic approach to the framing of an inventory and judges are open to the use of different documents, as long as it fulfils the purpose of describing the property subject to the usufruct and its condition. The uncertainty regarding the formal requirements of an inventory may be related to the tendency not to demand an inventory in practice.<sup>188</sup>

However, the framing of a functional inventory is a useful practice,<sup>189</sup> particularly where the fulfilment of the *salva rei substantia* requirement is concerned, as was illustrated in *Beneke v Van der Vijver*.<sup>190</sup> In this case an inventory was provided that was “so obviously and admittedly insufficient and incorrect” that it was set aside because the condition of the estate at the time it was framed could not be determined from it.<sup>191</sup> The judge proceeded to determine the value of the movable usufructuary objects at the death of the usufructuary and used the value realised after the goods in

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<sup>185</sup> 5.

<sup>186</sup> *Heukelman v Heukelman* NO 2012 JDR 1378 (GNP).

<sup>187</sup> 13 para 25.

<sup>188</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 109.

<sup>189</sup> 109.

<sup>190</sup> *Beneke v Van der Vijver* (1905) 22 SC 523.

<sup>191</sup> 528.

the estate of the usufructuary had been sold.<sup>192</sup> Had a complete and correct inventory been framed at commencement of the usufruct, the value of the usufructuary property would probably have been higher than it would have been on termination of the usufruct and consequently the position of the bare owners would have been more advantageous.

Taking into account the relative benefit of the framing of an inventory at the commencement of the usufruct, the question arises whether inventory can also be demanded at a later stage, since this would make it possible, and perhaps even encourage, the usufructuary to waste of the *corpus* up to the point of inventory. There would be no record of the initial scope and condition of usufructuary property and consequently it would be difficult to determine to what an extent the usufructuary has complied with the *salva rei substantia* requirement before the framing of inventory. However, demanding inventory at a later stage of the usufruct would at least act as a deterrent against subsequent wasting of the *corpus*.

Academic literature and case law state that the inventory can be demanded at the commencement of the usufruct or at a later stage.<sup>193</sup> In *Stain v Hiebner*<sup>194</sup> the applicants sought an order against their stepmother in respect of certain furniture

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<sup>192</sup> *Beneke v Van der Vijver* (1905) 22 SC 523 529. See also CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 110.

<sup>193</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) citing Voet 3 9 11 and GG van der Merwe *Sakereg* 368. In *Stain v Hiebner* 1976 1 SA 34 (C) at 36 Diemont J stated that he saw no reason why the applicants could not insist on an inventory and security in the light of the possibility that the respondent may have been disposing of the usufructuary property even though they had not demanded it initially. Also see CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 110, citing *Stain v Hiebner* 1976 1 SA 34 (C) and CG van der Merwe *Sakereg* (2 ed 1989) 516.

<sup>194</sup> 1976 1 SA 34 (C) 35.

subject to usufruct.<sup>195</sup> Diemont J states that where the subject of the usufruct “may easily be lost or damaged it is only reasonable that the heirs should be entitled to ask for inventory”.<sup>196</sup> In this case the applicants also had “reason to apprehend that the usufructuary may be disposing of the property”.<sup>197</sup> The Court ordered the usufructuary to provide inventory of the movable assets subject to the usufruct within 21 days of the order and in the event of a failure to furnish inventory or to provide security, she had to restore the assets to the applicants. This decision is problematic in the sense that the passage from Voet provided as authority for stating that security *and* inventory may be claimed during usufruct only refers to security and does not mention inventory.<sup>198</sup> Voet does mention the framing of inventory in another section, where he refers to Ulpian’s proposition<sup>199</sup> that the heir or legatee should give a description of the usufructuary property (particularly its condition) before witnesses *at the commencement* of his enjoyment so that the extent to which the usufructuary has diminished the value (if at all) of the property subject to the usufruct can be determined.<sup>200</sup> Voet adds that the inventory can furthermore indicate “to what the sureties have been bound”, prevents lawsuits and relieves the proprietor from the “often troublesome necessity of proof”.<sup>201</sup> Framing an inventory can be compelled “just as much as to give security”.<sup>202</sup> On this point it might perhaps be argued that if the obligation to frame inventory might be compelled to the same degree as the provision

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<sup>195</sup> 35.

<sup>196</sup> 36.

<sup>197</sup> 36.

<sup>198</sup> *Stain v Hiebner* 1976 1 SA 34 (C) 36 citing Voet 7 9 11.

<sup>199</sup> Voet 7 9 2 refers to *D 7 9 1 4*.

<sup>200</sup> *D 7 9 1 4*.

<sup>201</sup> Voet 7 9 2.

<sup>202</sup> Voet 7 9 2.

of security (or perhaps more so),<sup>203</sup> the bare owner may also demand inventory during the usufruct, similar to the way in which security may be required after commencement of the usufruct. In the section on the remission of security,<sup>204</sup> Voet notes that an inventory is obligatory even if the provision of security is not required of a parent as usufructuary. Gane<sup>205</sup> suggests that the cross-reference made by Voet<sup>206</sup> refers to Voet 10 2 3 dealing with the division of a family inheritance. Presumably this is to the section noting that division of inheritance by consent may be made between majors without inventory. However, in this section Voet asserts that minors have the right of correction: if “noteworthy damage” has occurred, they may “lawfully claim that inventory be framed and that the allotment of properties, previously made unfairly or deceptively without inventory, be corrected in their favour”.<sup>207</sup> From this passage it seems that an inventory can indeed be framed at a later stage than the division of the family inheritance. Although one cannot therefore find express authority for the decision in *Stain v Hiebner*,<sup>208</sup> arguments in this regard cannot unequivocally be ruled out. If the law as it stands in this case is accepted, the failure to frame inventory after the commencement of the usufruct in response to a court order may result in the loss of movables subject to usufruct.

According to Corbett there are no exceptions to the general duty to frame inventory and in this respect it differs from the duty to provide security.<sup>209</sup> Whereas a

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<sup>203</sup> Voet 7 9 2; 7 (concluding paragraph).

<sup>204</sup> Voet 7 9 9.

<sup>205</sup> P Gane with reference to Voet 7 9 7 in Voet 7 9 7 n (c).

<sup>206</sup> Voet 7 9 7 concluding sentence.

<sup>207</sup> Voet 10 2 3.

<sup>208</sup> 1976 1 SA 34 (C).

<sup>209</sup> MM Corbett “Usufruct, Usus and Habitatio” in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 393.

father who is granted usufruct over his children's property is not required to provide security, he still has to frame inventory.<sup>210</sup> Likewise, the testator may not dispense with the obligation to furnish an inventory.<sup>211</sup> However, Bezuidenhout mentions that a donor of usufruct *inter vivos* may relieve the usufructuary of the duty to frame inventory.<sup>212</sup>

The importance of this duty flowing from the *salva rei substantia* requirement is emphasised by the sanction for noncompliance with the request to frame inventory. Where there is insistence on an inventory, compliance is viewed as a condition that must be satisfied in order for the usufructuary to use and enjoy the property subject to the usufruct.<sup>213</sup> Accordingly, the usufructuary is not entitled to its use and enjoyment until he meets this condition.<sup>214</sup> He may even be denied possession if he refuses to comply. The usufructuary who fails to comply with a court order demanding an inventory (and security) may be ejected or dispossessed (when movables are involved).<sup>215</sup> These sanctions show that the determination of the content and condition of the usufructuary property which will enable the usufructuary to return it *salva rei substantia* is significant.

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<sup>210</sup> Groenewegen *ad* Grotius 2 39 3; Voet 7 9 7; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 393.

<sup>211</sup> Grotius 2 39 20; MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 393.

<sup>212</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 109.

<sup>213</sup> MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 391.

<sup>214</sup> 392.

<sup>215</sup> *Schoeman v Schoeman* 1953 2 SA 441 (T). Whether such an order will still be accepted in a constitutional dispensation is questionable. Ejectment might infringe the s 26 right of access to adequate housing enshrined in the Constitution in cases where the residence subject to the usufruct is the only housing available to the usufructuary. This aspect is discussed in chapter 5.

Given that there are generally no exceptions to the duty to frame inventory, whereas this is permitted in the case of the duty to provide security; that refusal to satisfy a demand for inventory is met with sanctions like refusal to grant the usufructuary property, or dispossession and ejectment where the property is already in the possession of the usufructuary; and the possibility of demanding an inventory not only at the commencement of but also during the usufruct, this duty of the usufructuary seems to be regarded as significant. The severity of the remedies available to the bare owner in case of noncompliance seems to point to a strict interpretation of the *salva rei substantia* requirement as far as doctrine is concerned. However, since case law on inventory that shows evidence of this approach in practice is nevertheless scant and relatively old, conclusions in this regard need to be approached with caution. Furthermore, in practice inventory is seldom demanded unless a dispute arises.<sup>216</sup> In fact, nude owners seem to be ignorant as to the nature of a document that would satisfy this demand.<sup>217</sup> On the other hand, judges appear to take a pragmatic and functional approach by accepting different documents such as a first and final liquidation and distribution account of an estate<sup>218</sup> and a handwritten note.<sup>219</sup> Bearing in mind that a demand for inventory at commencement of the usufruct would place the usufructuary in the position to prove that he complied with the *salva rei substantia* requirement throughout the duration of the usufruct and assist him in

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<sup>216</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 109.

<sup>217</sup> See *Heukelman v Heukelman* NO 2012 JDR 1378 (GNP) para 25; *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 5.

<sup>218</sup> See *Heukelman v Heukelman* NO 2012 JDR 1378 (GNP) para 25.

<sup>219</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 5, 7, 9.

challenging allegations of dissipation of the usufructuary property, it still seems like a useful duty. Measures to encourage compliance at the outset would be constructive.

A duty related to the framing of an inventory, namely the provision of security, is discussed in the following section. Compliance with these two duties should usually be demanded when the usufruct is established. However, as has already been evident from the discussion of the duty to frame an inventory, they are not always enforced in practice. This might lead to unnecessary litigation and usually complicates judgements.

#### 2 4 1 2 Security

If required by the *dominus*,<sup>220</sup> the usufructuary is obliged to provide security<sup>221</sup> that he will exercise the usufruct *civiliter modo*<sup>222</sup> and return the usufructuary object *salva rei*

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<sup>220</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 111 notes that apart from a demand by the bare owner, the Administration of Estates Act 66 of 1965 s 44 (1) requires that the usufructuary must provide security if the bare owner is a minor. However, this section must be read in conjunction with section 43.

<sup>221</sup> *Van Rensburg v Mulder* 1998 JDR 0756 (T) 7; *Stain v Hiebner* 1976 1 SA 34 (C) 36; *Ex parte Estate Wagenaar* 1953 4 SA 435 (C) 438-439; *Olivier v Venter* 1933 EDL 206; *Ex parte Newberry* 1924 OPD 219 223; *Ex parte Pistorius* 1920 TPD 297 301; *Klopper v Van Rensburg* 1920 EDL 239 241-242; *Gibaud v Bagshaw* 1918 CPD 202 205; *Ex parte Kock* 1917 TPD 713 716; *Ex parte Estate Van Blerck* 1909 CTR 846; *Furnivall v Cornwell's Executors* 1895 12 SC 6 10; Voet 7 9 1; Grotius 2 39 3; Schorer *ad Grotius* 2 39 3; Van der Keessel *Thes Sel* 371; Van der Linden *Koopmans Handboek* 1 11 5; Antonius Matthaeus *Disputationes de Servitutibus* 2 no 9; CG van der Merwe *Sakereg* (2 ed 1989) 517; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* LLD dissertation Stellenbosch University (1990) 111; CG van der Merwe *Sakereg* (2 ed 1989) 516.

<sup>222</sup> CG van der Merwe *Sakereg* (2 ed 1989) 516; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 111. The measure of care required to satisfy the *civiliter modo* requirement is the *bonus paterfamilias* standard. See CP Joubert "Die Vruggebruiker se Verpligting om Verbeterings aan te Bring" (1958) 21

*substantia*<sup>223</sup> upon termination of the usufruct.<sup>224</sup> Returning the property in the same condition in which he received it would satisfy the goal of the bare owner to receive the property in an undamaged condition.<sup>225</sup> However, even if the usufructuary uses the property in a proper manner without damaging it or allowing it to be damaged, it will inevitably be subject to deterioration due to age.<sup>226</sup> The usufructuary is not liable for this fair wear and tear<sup>227</sup> or for devaluation which he did not cause.<sup>228</sup> Therefore, security must only provide for the depreciation in value due to misuse by the usufructuary and reflect the difference between the value of the property as it would have been if it had been properly used and the value in case of misuse.<sup>229</sup>

Security may be demanded at the commencement or during the course of the usufruct.<sup>230</sup> To determine the amount of the security that must be rendered the value of the object of the usufruct at the commencement of the usufruct is taken into

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*THRHR* 256-276 256 and HP Viljoen *The Rights and Duties of the Holder of Mineral Rights* (1975) unpublished LLD dissertation Leiden University 58-59.

<sup>223</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 111 and CG van der Merwe *Sakereg* (2 ed 1989) 516 state that the usufructuary object must be returned in a “good condition”.

<sup>224</sup> CG van der Merwe *Sakereg* (2 ed 1989) 516. CP Joubert “Die Vruggebruiker se Verpligting om Verbeterings aan te Bring” (1958) 21 *THRHR* 256-276 256, 257 notes that it is acceptable to return the object of the usufruct in the same condition in which the usufructuary received it, fair wear and tear (“*natuurlike slytasie*”) through *bona fide* use excepted.

<sup>225</sup> *Van Rensburg v Mulder* 1998 JDR 0756 (T) 8.

<sup>226</sup> 8.

<sup>227</sup> See n 208.

<sup>228</sup> *Van Rensburg v Mulder* 1998 JDR 0756 (T) 8.

<sup>229</sup> 9.

<sup>230</sup> Voet 7 9 11; CG van der Merwe *Sakereg* (2 ed 1989) 517.

account.<sup>231</sup> However, in *Van Rensburg v Mulder*<sup>232</sup> Hartzenberg J argues for a nuanced approach to the determination of the amount of security due. In fact, he argued that judges, who are awarded a discretion to determine whether and to what amount an impecunious usufructuary should provide security, also have the discretion to determine a reasonable amount where an unreasonable demand for security is made.<sup>233</sup> He discusses the factors that may be taken into account such as the type of property given in usufruct, whether improvements were made to the property, the extent of the improvements, the nature of the improvements and furthermore, the risks of depreciation involved due to improper use or negligence on the part of the usufructuary.<sup>234</sup> Particularly the risks related to the usufruct must be determined and security must be given against these risks. However, where factors are involved over which the usufructuary has no control, for example theft, the usufructuary is not liable for depreciation.<sup>235</sup> *Van Rensburg v Mulder*<sup>236</sup> exemplifies a nuanced and reasonable approach to the duty of the usufructuary to provide security.

Traditionally, the exemptions from the duty to provide security as well as arguments in favour of judicial discretion also mitigated what could be an onerous burden on the usufructuary in relation to the *salva rei substantia* requirement. In this regard, certain usufructuaries are exempted from the duty to provide security. These

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<sup>231</sup> CG van der Merwe *Sakereg* (2 ed 1989) 517; Voet 7 9 2. MM Corbett “Usufruct, Usus and Habitatio” in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 393 notes that the amount and nature of security would normally in lieu of agreement between the parties be determined by the Master.

<sup>232</sup> 1998 JDR 0756 (T).

<sup>233</sup> *Van Rensburg v Mulder* 1998 JDR 0756 (T) 11.

<sup>234</sup> 9-10

<sup>235</sup> 10.

<sup>236</sup> 1998 JDR 0756 (T).

include a father who is usufructuary of the property where his children are the nude owners<sup>237</sup> and a mother exempted by the testator from the duty to furnish security in the case where her children are the owners.<sup>238</sup> This exemption also applies to the former owner who reserved a usufruct when he sold or donated the usufructuary object,<sup>239</sup> the usufructuary exempted from the duty to provide security by a usufruct established *inter vivos*<sup>240</sup> and the *fiscus* when it is appointed as the usufructuary.<sup>241</sup> Clauses in a will exempting a usufructuary from the duty to furnish security that do not refer to the above instances are invalid.<sup>242</sup>

If the usufructuary fails to furnish security, he is not entitled to the fruits of the usufructuary object.<sup>243</sup> The fruits of the usufructuary object are then deemed part and parcel of the capital to which the owner is entitled.<sup>244</sup> The failure to provide security may even result in a court order entitling the owner to redeem the usufructuary object

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<sup>237</sup> Voet 7 9 7; Van der Keessel *Praelectiones ad Grotius* 2 39 3; Carpzovius *Definitiones Forenses* 2 10 9; Huber *HR* 2 39 23; *Holl Cons* 1 57 2; Schorer *ad Grotius* 2 39 3; *Van Staden v Van Wyk* 1958 2 SA 682 (O) 684; CG van der Merwe *Sakereg* (2 ed 1989) 517. The original common law exception which clearly discriminates against mothers in this regard has not been tested in a case, but would probably not pass constitutional muster when scrutinized in the light of section 9 of the Constitution of the Republic of South Africa, 1996. This exception will be discussed in chapter 5. Other examples of usufructuaries that might be negatively affected by the exclusivity of this exception might be stepmothers as GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 87 notes, or two female parents.

<sup>238</sup> Voet 7 9 7; Schorer *ad Grotius* 2 39 3; *Contra Van der Keessel Praelectiones ad Grotius* 2 39 3; *Ex parte Newberry* 1924; OPD 219 223-224; *Van Staden v Van Wyk* 1958 2 SA 682 (O); *Ex parte Wagenaar* 1953 4 SA 435 (C); *Olivier v Venter* 1933 EDL 206.

<sup>239</sup> Voet 7 9 8; Huber *HR* 2 39 23; Wissenbach *ad Pandectas* vol 2 *disp* 16 *th* 11 *in medio*; Antonius Matthaeus II *De Servitutibus disp* 3 *th* 15.

<sup>240</sup> Voet 7 9 9.

<sup>241</sup> Voet 7 9 7.

<sup>242</sup> CG van der Merwe *Sakereg* (2 ed 1989) 518.

<sup>243</sup> Voet 7 9 1, 2, 3; Schorer *ad Grotius* 2 39 3; *Holl Cons* VI 326 *in fine*; Van der Keessel *Praelectiones ad Grotius* 2 39 3; CG van der Merwe *Sakereg* (2 ed 1989) 517.

<sup>244</sup> CG van der Merwe *Sakereg* (2 ed 1989) 517.

in certain circumstances.<sup>245</sup> These two sanctions indicate that the noncompliance with the security duty as safeguard for the fulfilment of the *salva rei substantia* requirement may be met with severe consequences, depending on the circumstances. The protection of usufructuary property must in the absence of security be ensured by other measures, for instance regarding the fruits as part of the capital that belongs to the bare owner or even depriving the usufructuary of the usufructuary object by means of a court order. However, relevant circumstances are taken into account. In cases where the usufructuary cannot comply with the demand for security due to financial reasons, the court may use its discretion by for example ordering that the usufructuary property should be let.<sup>246</sup>

The problem of the impecunious usufructuary has received academic attention in terms of the duty to provide security.<sup>247</sup> Wright notes that it is not unusual that the usufruct is the sole asset of the surviving spouse appointed as usufructuary and who therefore does not have the capacity to furnish security.<sup>248</sup> The Roman Dutch authorities were divided on the issue and consequently the question arose whether a court is entitled to exempt the usufructuary from his duty to provide security.<sup>249</sup> According to Voet<sup>250</sup> the judge should be able to exercise his discretion in cases where sufficient sureties cannot be found.<sup>251</sup> This discretion would be in line with the intention

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<sup>245</sup> *Schoeman v Schoeman* 1953 2 SA 441 T; CG van der Merwe *Sakereg* (2 ed 1989) 517.

<sup>246</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 112.

<sup>247</sup> GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91.

<sup>248</sup> 88.

<sup>249</sup> 86.

<sup>250</sup> Voet 7 9 3.

<sup>251</sup> GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 88.

of the testator to grant a usufruct as an act of generosity.<sup>252</sup> Voet mentions three factors that should be taken into consideration, namely the quality of the usufructuary, the amount of property given in usufruct and the likelihood of loss of the usufructuary property.<sup>253</sup> He suggests different options open to the judge, namely that the usufructuary's oath be regarded as sufficient security, or the giving of pledges, the attachment of the usufructuary object for safe custody, the hiring out of the usufructuary object, or leave to the proprietor to gather the fruits and to hand them over to the usufructuary.<sup>254</sup> Voet's point of view is supported by Corbett,<sup>255</sup> Van der Merwe,<sup>256</sup> Nathan<sup>257</sup> and Wright.<sup>258</sup>

Although Van der Linden admits that Voet's view is suited to "legal analogy and court practice",<sup>259</sup> he is of the opinion that in strict law the usufructuary may not be exempted from his duty to furnish security, since the directive not to grant the action is an emphatic statement and the obligation to render security is not impossible to fulfil, although it might be difficult.<sup>260</sup> Van der Keessel is not in favour of exempting the

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<sup>252</sup> Voet 7 9 3; GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 88.

<sup>253</sup> Voet 7 9 3; GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 90 uses Voet's factors as a starting point and formulates eight factors that should play a role in the exercise of the judge's discretion.

<sup>254</sup> Voet 7 9 3; GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 88.

<sup>255</sup> MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 393.

<sup>256</sup> CG van der Merwe *Sakereg* (2 ed 1989) 517.

<sup>257</sup> M Nathan *The Common Law of South Africa. A Treatise Based on Voet's Commentaries on the Pandects, with References to the Leading Roman-Dutch Authorities, South African Decisions, and Statutory Enactments in South Africa* vol 1 *Persons and Property* (1913) 480.

<sup>258</sup> GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 88-89.

<sup>259</sup> Van der Linden *Supplementum ad Voet* 7 9 3.

<sup>260</sup> Van der Linden *Supplementum ad Voet* 7 9 3 refers to *D* 7 2 13 (*sic*) – the reference should be to *D* 7 1 13 *pr*; GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 88 therefore also cites the the wrong passage.

usufructuary nor of giving the judge a discretion, because a solution already exists in the form of allowing the bare owner to gather the fruits and handing them over to the usufructuary.<sup>261</sup> Furthermore, Van der Keessel is not in favour of diverging from the form on the authority of the writers unless convincing evidence of a contrary practice exists.<sup>262</sup>

At the time of Wright's article South African case law was undecided on this point,<sup>263</sup> with *Van der Westhuizen v Van Aardt's Estate*<sup>264</sup> ruling that the court did indeed have the discretion to exempt the usufructuary from his duty to furnish security, whilst the opposite point of view may be inferred from *Ex parte Estate Wagenaar*.<sup>265</sup>

Wright concludes that Voet's point of view is the most equitable and also gives effect to the intention of the testator to benefit the usufructuary, whereas Van der Keessel's solution would result in practical problems and be unsatisfactory since it would defeat the intention of the testator.<sup>266</sup> Wright also mentions another option based on Voet,<sup>267</sup> namely that the usufructuary may renounce a part of his usufruct, especially where certain usufructuary objects do not hold advantages for the usufructuary but where he nevertheless bears the burden of providing security.<sup>268</sup>

In 2003 Van der Byl AJ upheld Voet's point of view and referred to Wright's article, ruling that he was of the opinion that the case demanded that he should

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<sup>261</sup> Van der Keessel *Praelectiones* 2 39 3; GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 88.

<sup>262</sup> Van der Keessel *Praelectiones* 2 39 3.

<sup>263</sup> GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 89.

<sup>264</sup> *Van der Westhuizen v Van Aardt's Estate* 1943 EDL 299 310.

<sup>265</sup> *Ex parte Estate Wagenaar* 1953 4 SA 435 (C) 438-439B.

<sup>266</sup> GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 89.

<sup>267</sup> Voet 7 2 1.

<sup>268</sup> GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 89.

exercise his discretion according to Roman Dutch principles, in favour of the first respondent.<sup>269</sup> The latter was the stepmother of the second, third and fourth applicants and was granted the usufruct of the house of the testator. After initially occupying the house, the usufructuary let it and used the rent to pay the property tax as well as the maintenance costs of the house and the garden. After deduction of these expenses as well as the commission of the renting agent she received R1500 per month. Having no other assets apart from a vehicle, she was utterly dependent on this income for her subsistence. She vacated the house in order to let it and thus to obtain an income. She was neither able to do any other repairs to the house apart from general maintenance, nor to furnish security for the usufruct.<sup>270</sup> Van der Byl AJ exempted the usufructuary from her duty to provide security and emphatically stated his dissatisfaction with the applicants, who should have been aware of the usufructuary's inability to furnish the extremely high and unsubstantiated security ("*hemelhoë en ongesubstansieerde sekuriteit*").<sup>271</sup> It is disappointing that this case, along with *Van Rensburg v Mulder*,<sup>272</sup> decided during the constitutional dispensation, makes no mention of the Constitution, although the judges in both clearly opt for an equitable outcome. Furthermore, *Van der Heever NO and Others v Coetzee and Another*<sup>273</sup> would have been an opportunity to examine the rather limited and biased exceptions that do exist in terms of exempting the usufructuary within a constitutional context.<sup>274</sup>

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<sup>269</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T).

<sup>270</sup> 2.

<sup>271</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 14. The pronouncement of Van der Byl AJ would also point to additional factors that could be considered in the security is properly substantiated. See n 108 for factors identified by Wright.

<sup>272</sup> 1998 JDR 0756 (T).

<sup>273</sup> 2003 JDR 0863 (T).

<sup>274</sup> See ch 5.

In terms of case law, therefore, it seems that thus far a small number of cases favour awarding discretion to the court to exempt the usufructuary from the duty to provide security. Since case law decided in this regard during the constitutional era is scant, the material cannot lead to a conclusive result in terms of signalling a predisposition towards releasing a usufructuary of the security duty in suitable circumstances. One case argues for discretion and a contextual approach to limit security where unreasonable demands are made. Furthermore, the unwillingness to depart from the duty to provide security except where common law principles allow a margin of discretion might still indicate a strict approach to the *salva rei substantia* requirement in general. It does seem, however, that reasonableness has an important role to play in determining the extent of the duty to provide security.

#### 2 4 1 3      *Maintenance and repairs*

Maintenance has been listed as a separate duty of the usufructuary and distinguished from the duty to repair,<sup>275</sup> but generally this distinction is ignored by South African authors.<sup>276</sup> Bezuidenhout describes maintenance (*instandhouding*) as work that must be done continually, sometimes daily or otherwise with longer breaks, to extend or guarantee the life of the object of the usufruct, especially due to day-to-day wear and

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<sup>275</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 118-119 distinguishes these two concepts based on their dictionary meanings but does not give references to case law to support this distinction.

<sup>276</sup> MM Corbett "Usufruct, Usus and Habitatio" in HR Hahlo (ed), MM Corbett, HR Hahlo, G Hofmeyr & E Kahn *The Law of Succession in South Africa* (1980) 378-401 389; CG van der Merwe *Sakereg* (2 ed 1989) 518-519; CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 595; Voet 7 1 36; CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 169.

tear.<sup>277</sup> He distinguishes repairs from maintenance by asserting that the latter has a wider field of application<sup>278</sup> and notes that repairs are needed when maintenance was not done or when damage resulted from some external occurrence, for example due to a fire, vandalism or an earthquake.<sup>279</sup> It seems from Bezuidenhout's definition of maintenance that the impact of wear and tear should be addressed by the usufructuary. However, according to other South African authors the duty to maintain the usufructuary property "in good order and condition" is restricted by the "fair wear and tear" exception,<sup>280</sup> and on termination of the usufruct the usufructuary is therefore not responsible for deterioration in this regard. Case law on usufruct does not normally elaborate on this exception and it has mostly been discussed within the context of leases.<sup>281</sup> According to Claassen<sup>282</sup> this exception would not require repairs of "dilapidation or depreciation which comes by reason of lapse of time, action of weather, etc, and normal user".<sup>283</sup> Perhaps the duty can be explained as follows: The

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<sup>277</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 119.

<sup>278</sup> 119.

<sup>279</sup> 120.

<sup>280</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 12; CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 583 n 1, 597; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340; Voet *Commentarius* 7 9 1.

<sup>281</sup> RD Claassen *Dictionary of Legal Words and Phrases s.v. "wear and tear"*. In *Cradock Municipality v Philips* 1938 EDL 382 387 usufructuaries donated the bare property to a hospital and contractually bound themselves to take care of the "upkeep and maintenance of the said premises at their or her own cost while they or she retain possession thereof, loss by fire or act of God excepted". It was held, therefore, that this obligation "much exceeded fair wear and tear, and was sufficiently large to embrace all damage done to the property by delict". This case does not indicate what normal fair wear and tear entails.

<sup>282</sup> RD Claassen *Dictionary of Legal Words and Phrases s.v. "wear and tear"*.

<sup>283</sup> RD Claassen *Dictionary of Legal Words and Phrases s.v. "wear and tear"* citing *Radloff v Kaplan* 1914 EDL 361.

usufructuary is responsible for maintenance; therefore he must also address what can be described as repairs necessitated by fair wear and tear during the usufruct. Fair wear and tear that would nevertheless, despite repairs conducted according to the *bonus paterfamilias* standard, be evident on termination of the usufruct would not result in liability. Therefore, the question is what type of repairs would be required as part of the maintenance.<sup>284</sup> According to Joubert, South African academic writing corresponds to Roman Dutch law, which placed a maintenance duty on the usufructuary, but not a duty to improve the property.<sup>285</sup> The usufructuary had to do ordinary repairs (*modicae refectioes*) which a reasonable person would have done to temporarily (*ad temporaneam rei conservationem spectant*) keep the usufructuary property in a good condition (*sarta tecta*). Ordinary expenses (*modicae refectioes* or *sumptus modici*) are distinguished from *impensae necessariae* or *necessariae refectioes* in the sense that the former involves the temporary maintenance of the usufructuary property, while the latter refers to the permanent maintenance of the property and can increase the value, use or enjoyment of the usufructuary property. The measure for determining whether ordinary repairs are necessary is the judgment of a reasonable person. Joubert views the criterium as flexible since it is objective. Although Joubert's article gives a comprehensive overview of the usufructuary's obligation in terms of repairs, he only refers to an earlier version of Maasdorp and

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<sup>284</sup> This question has also been investigated in comparative literature recently. See P Hellwege "Enforcing the Liferenter's Obligation to Repair" (2014) 18 *The Edinburgh LR* 1-28; P Hellwege "Die Erhaltung der Nießbrauchsache: Römisches Recht, Gemeines Recht und Schottisches Recht" (2011) 79 *TRG* 81-119; R Caterina "A Comparative Overview of the Fair Wear and Tear Exception: the Duty of Holders of Temporary Interests to Preserve Property" (2002) 6 *The Edinburgh LR* 85-100.

<sup>285</sup> Reference to CP Joubert "Die Vruggebruiker se Verpligting om Verbeterings aan te Bring" (1958) 21 *THRHR* 256-276 275-276 unless indicated otherwise.

does not discuss case law. Consequently, it is necessary to investigate the contribution of case law in this regard.

In *Ex parte Praetorius*<sup>286</sup> Gardiner J confirmed that the usufructuary is liable for the rates and ordinary repairs and that he should defray them before he takes the revenue. This would have been the case even if the usufructuary would not be able to provide for his own living expenses if the liabilities (rates, repairs and interest) had been discharged. *In casu* the usufructuary was 76 years old, suffered from senile cataract in both eyes and could not work. Leave was granted to the usufructuary to mortgage the property<sup>287</sup> to prevent the Municipal and Divisional Council from selling the property in execution in order to exact its rates and the interest incurred, and to enable the usufructuary to pay for repairs. Gardiner J was not without sympathy for the position of the usufructuary but clearly took into account the traditional legal duties of the usufructuary flowing from the *salva rei substantia* requirement and the interests of the bare owners in preserving the property. Here, as in the *Ex parte De Douallier*,<sup>288</sup> which was cited as authority, the court allowed for mortgages to be granted over the usufructuary property on request of the usufructuary where this would enable the usufructuary to meet his maintenance duty by repairing the property and paying rates

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<sup>286</sup> Reference to *Ex parte Praetorius* 1915 CPD 819 820-821 unless indicated otherwise.

<sup>287</sup> The dominium of one half of the property belonged to the usufructuary and according to Gardiner J the Municipal and Divisional Councils could sell this half in execution.

<sup>288</sup> Gardiner J referred to *Ex parte Douallier* (1907) 24 SC 282 as authority, but in the latter case the beneficiary is not referred to as an usufructuary, although the case information refers to a "life interest". A mortgage was granted contrary to the condition for the bequest that she was not to mortgage or alienate the property. De Villiers CJ granted leave to the petitioner to mortgage the property in order to effect the necessary transfers and to place the property "in a habitable state of repair". The petitioner was too poor to meet the costs and furthermore the eldest child was still a minor whose interest would suffer if means were not devised to assist the petitioner in preserving the property. The application for future repairs was not pressed or granted.

and interest incurred. Mortgaging a property given in usufruct usually requires the consent and collaboration of both the usufructuary and the bare owner.<sup>289</sup> Authorising such a juristic act without the co-operation of the bare owner is unusual and consequently a court should not grant leave to mortgage without good motivation.<sup>290</sup> This decision accordingly indicates that the preservation of the usufructuary property is an important consideration. Particularly, the duties to maintain the property by means of ordinary repairs and to safeguard it against loss stemming from a sale in execution to recover rates and interest incurred are significant enough to grant leave to the usufructuary to mortgage the property in order to meet his obligations. Although this decision confirms that the usufructuary is liable for ordinary repairs, it does not distinguish between ordinary and other repairs. This question was addressed in *Ex parte Standard Bank Ltd: In Re Estate Rodger*,<sup>291</sup> where Young J decided that the usufructuary is liable for “such moderate repairs as are needed to keep the property in proper repair”, whereas repairs resulting from “buildings [that] have become dilapidated with age” are not his responsibility.<sup>292</sup> However, as Young J indicates, determining which amounts should be apportioned to the bare owner and the

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<sup>289</sup> *Zulu and Others v Van Rensburg and Others* 1996 (4) SA 1236 (LCC) 1263; CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 592; DP van Huyssteen “Die Persoonlike Serwituut Vruggebruik – ’n Akteperspektief (Deel 2)” 1989 *De Rebus* 215-221 215.

<sup>290</sup> Compare *Ex parte Sem NO en Andere* 1970 4 SA 403 (NC) 405 regarding the competence of the court to confirm a transaction by a usufructuary and beneficiaries to sell property in terms of a provisional deed of sale where Van den Heever J stated that in cases where the consent of all the interested parties cannot be obtained, the court would only authorise transactions which are necessary to protect the estate against losses or which would beyond any doubt be beneficial to all interested parties.

<sup>291</sup> 1963 3 SA 683 (SR).

<sup>292</sup> *Ex parte Standard Bank Ltd: In Re Estate Rodger* 1963 3 SA 683 (SR) 686. See also *Ex parte Atkins and Others NO: In Re Estate Lazarus* 1933 WLD 76 77-78 where it was held that the usufructuary was not liable for structural alterations and repairs since it amounted to capital expenditure.

usufructuary respectively, is no easy task and could not be established on the information available to the court.<sup>293</sup>

Apart from distinguishing moderate repairs from extraordinary repairs, the duty of the usufructuary in terms of repairs and maintenance should further be delineated by distinguishing improvements from repairs. *Ex parte Borland*<sup>294</sup> illustrates the difference between repairs for which the usufructuary may be compensated and improvements for which the usufructuary may not receive compensation. In this case Hathorn J granted the usufructuary's claim against the estate to be refunded for "the cost to her of ensuring that the house did not collapse".<sup>295</sup> The farmhouse was old, "had suffered from the depredations of termites" and "was in a seriously dilapidated condition when the testator died". Consequently, the house had to be repaired and "a considerable quantity of its timbers and other materials" had to be replaced to prevent the usufructuary object from falling down and becoming "useless". In contrast, the other claim in the same case for improvements and replacements effected to two other properties also subject to a usufruct in favour of the widow was not granted. Nevertheless, Hathorn J confirmed that it had been established that the absence of these improvements and additions to the latter properties made it increasingly difficult to let them, even to the point where it seemed likely that letting would become an impossibility. The additions entailed building a garage and servants' quarters, while the improvements amounted to alterations to the bathrooms and floors and the replacement of some windows and doors. Hathorn J confirmed that the usufructuary is not entitled to compensation for improvements. He has to keep the property in repair

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<sup>293</sup> *Ex parte Standard Bank Ltd: In Re Estate Rodger* 1963 3 SA 683 (SR) 686.

<sup>294</sup> *Ex parte Borland* 1961 1 SA 6 (SR).

<sup>295</sup> Reference to *Ex parte Borland* 1961 1 SA 6 (SR) 339-340 unless otherwise indicated.

at his own expense and has to pay for all ordinary expenses, but not for special or extraordinary costs. Compensation for the latter “may properly be claimed”.

Hathorn J mentioned that there seems to be a discrepancy between the point of view of Schorer commenting on Grotius and other old authorities regarding the possibility of claiming for useful and ornamental improvements. This issue was addressed in *Brunsdon's Estate v Brunsdon Estate and Others*,<sup>296</sup> where Sir John Kotze J concluded that Schorer's commentary on Grotius<sup>297</sup> was unfounded with reference to the work of Huber<sup>298</sup> and Voet<sup>299</sup> and that compensation could therefore not be granted.<sup>300</sup> Huber related the question to the prohibition against the transformation of the usufructuary object due to the *salva rei substantia* requirement.<sup>301</sup> The latter also accounts for the duty to repair and the concomitant responsibility for expenses in this regard. However, the usufructuary may claim for high or extensive costs or those relating to permanent use. Voet explains the prohibition on claiming for improvements by distinguishing the duty to maintain from renovation.<sup>302</sup> He elaborates on the consequences of the *salva rei substantia* requirement by stating that the usufructuary is not allowed to complete a building begun by the owner even in circumstances where the usufructuary would have no use of the structure, as the usufruct is not established on the portion unfit for use. Voet also demarcates the duty of the usufructuary by asserting that he is not responsible for buildings which have fallen into decay, but if he rebuilds, he has a claim for

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<sup>296</sup> *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159.

<sup>297</sup> Schorer *ad* Grotius 2 39 13.

<sup>298</sup> Huber *HR* 2 39 25-26.

<sup>299</sup> Voet 7 1 21.

<sup>300</sup> *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 178.

<sup>301</sup> Huber 2 39 25-26; *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 174.

<sup>302</sup> Voet 7 1 21; *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 174.

compensation.<sup>303</sup> On the basis of Huber and Voet Sir John Kotze J concluded that the usufructuary who does what the law does not permit him to do by effecting improvements, does so “at his own risk and is not entitled in law to claim compensation”.<sup>304</sup> The court also pointed out an important policy consideration underlying the prohibition against a claim for compensation for improvements, namely that it would allow the usufructuary to “arbitrarily impose” a claim for compensation on the bare owner for improvements which he did not want.<sup>305</sup> Moreover, the usufructuary voluntarily made improvements, knowing that his duty was limited to maintenance of the usufructuary property and benefited from them in terms of convenience and enjoyment.

Both *Ex parte Estate Borland*<sup>306</sup> and *Brunsdon's Estate v Brunsdon's Estate and Others*<sup>307</sup> were criticised by Joubert as not corresponding to the common law.<sup>308</sup> He argues that the judge should have enquired whether the improvements to the stands were of a permanent nature or not. If improvements are of a permanent nature and are made with the purpose to permanently preserve the property, the usufructuary is entitled to be compensated for both necessary (*refectiones necessariae, impensae necessariae*) and useful (*refectiones utiles, impensae utiles*) improvements.<sup>309</sup> It does

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<sup>303</sup> Voet 7 1 35, 36; *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 174.

<sup>304</sup> *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 175.

<sup>305</sup> Sir John Kotze J in *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159 178 referred to a thesis by CHQ van Stryen *De Verplichtingen van den Vruchtgebruiker* (1862). This reference should be to CHQ van Stryen *Iets over de Verplichtingen van den Vruchtgebruiker* (1864).

<sup>306</sup> *Ex parte Borland* 1961 1 SA 6 (SR).

<sup>307</sup> *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159.

<sup>308</sup> References to CP Joubert “Law of Property (Including Mortgage and Pledge)” 1961 ASSAL 220-241 229 unless indicated otherwise.

<sup>309</sup> Expenses for necessary and useful improvements that are permanent in nature are also known as *expensa magna, gravior sumptus, impensae grandes* or *impensae extraordinariae*. See CP Joubert “Law of Property (Including Mortgage and Pledge)” 1961 ASSAL 220-241 229.

not seem to be clear which criterion Hathorn J would use to classify expenditure as special or extraordinary expenses.

From the discrepancy between Joubert's view and the two judgments in point, one might discern a divergent approach to the *salva rei substantia* requirement. On the one hand there is the rather strict approach illustrated by the judgment of Kotzé J that focuses on the physical violation of preservation requirement, while on the other hand, as asserted by Joubert, permanent improvements with the aim of preserving the object permanently may be encouraged by the incentive of compensation, which seems to indicate a more teleological approach. To summarise, it seems that ordinary repairs must firstly be distinguished from extraordinary repairs to demarcate the liability of the usufructuary in terms of the duty to repair. Secondly, repairs need to be distinguished from improvements. Although improvements do not form part of the duty to repair and maintain the property, there seems to be an incentive involved for improving the property to the extent that it has as a goal the preservation of the substance. Usufructuaries may be compensated in cases where improvements are of a permanent nature and has as their object the permanent preservation of the property. At the same time, this incentive is limited to protect the interests of the bare owner. In this regard, South African courts adhere to the requirement even though it would be economically more viable to improve the usufructuary object, not only for the sake of enhancing the use and enjoyment afforded to the usufructuary but to improve the value of the property which will be returned to the *dominus*.<sup>310</sup> Therefore, the *salva*

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<sup>310</sup> *Ex parte Borland* 1961 1 SA 6 (SR); *Brunsdon's Estate v Brunsdon's Estate and Others* 1920 CPD 159.

*rei substantia* requirement qualifies the duty to maintain and repair and the related question of compensation for improvements.

## 2 4 2 Remedies and termination

### 2 4 2 1 Introduction

Remedies and termination are two other aspects of usufruct, apart from the duties of the usufructuary, which reflect the strict approach to the *salva rei substantia* requirement. The severity with which impairment of the substance of the object of the usufruct is visited is a telling indicator. Historically, Roman Dutch law provided the *actio negatoria* as a remedy to an owner in cases where ownership was infringed.<sup>311</sup> The infringement had to be factually similar to the exercise of either a praedial servitude or a usufruct. It could be instituted against anyone who unlawfully asserted a usufruct or who, as though he were a usufructuary, disturbed the owner in his possession and enjoyment of the usufruct.<sup>312</sup> Today there still seems to be room for this remedy in South African law, although it is contested whether it still exists and case law does not provide a clear answer.<sup>313</sup>

The grounds for termination related to the *salva rei substantia* requirement seemed to be marginally wider in Roman Dutch law, since a fraudulent transfer of land

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<sup>311</sup> See PC van Es *De Actio Negatoria: Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht* (2005) 121-122 with reference to Voet 7 6 1, 7 6 3, 8 5 5 and Huber 2 41 8, 2 44 16; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 82-83.

<sup>312</sup> Voet 7 6 3; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 83.

<sup>313</sup> See *Moller v South African Railways and Harbours* 1969 3 SA 374 (N) 381B; *Botha v Minister of Lands* 1965 (1) SA 728 (A) 741; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 263.

by the usufructuary was also in very specific circumstances held to terminate the usufruct.<sup>314</sup> Causes of termination that are connected to the *salva rei substantia* requirement include the abuse of right and termination by permanent impossibility of exercise or enjoyment. The latter category consists of two subcategories, namely impossibility due to destruction and impossibility due to substantial change to the usufructuary property.

#### 2 4 2 2 Remedies

The remedies available to the *dominus* in case of impairment of the substance of the usufructuary object and the strictness with which they are enforced to ensure the return of the usufructuary object *salva rei substantia* may be an indication of a strict approach towards the *salva rei substantia* requirement.

The South African common law remedies<sup>315</sup> may still include the *actio negatoria* in cases where the holder of the servitude does not respect the limits of the servitude and acts outside the right afforded to him.<sup>316</sup> Lindenbergh notes that this action may

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<sup>314</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 79 with reference to A Duyck *Decisien en Resoluties van den Hove van Holland* (1751) 74, 100 where a father who held the usufruct over a house, mortgaged it and transferred it to an official to be sold in a sale of execution in response to a court order.

<sup>315</sup> According to CG van der Merwe *Sakereg* (2 ed 1989) 543-544 the common law permitted the bare owner to use the following remedies against the usufructuary: the *actio negatoria*, an interdict, a declaratory order and a delictual claim for damages. He notes that the *actio negatoria* was replaced by the declaratory order accompanied by or without a prohibitory interdict and an action for damages. However, PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 263 does not rule out that this remedy may still be available.

<sup>316</sup> JC Sonnekus "Bewoningsreg (*Habitatio*) – Aard van die Regsobjek en die Effek Dáárvan op die Registrasie van die Reg" (2015) 26 *Stell LR* 63-85 63; PJ Badenhorst, JM Pienaar & H Mostert

be one of the “oldest routes to prohibitory injunctions and have over the ages developed into a rather strong procedural position for the owner”.<sup>317</sup> Although the Roman *actio negatoria* was not directly based on the right to property but could rather be perceived as an action to deny the existence of a servitude, it has especially through later development contributed to the content of the right to property.<sup>318</sup> From initially being an *actio de servitude* in Roman law, the *actio negatoria* has developed into a general action available to the owner for any infringement except for the loss of possession. The right to property thus became a source of injunctive power.<sup>319</sup>

The *actio negatoria* currently allows the owner to claim a prohibition on further infringement, damages, security against future infringement,<sup>320</sup> removal of any unlawfully erected structures<sup>321</sup> and a declaration of rights.<sup>322</sup> Although certain South African writers assert that the *actio negatoria* was substituted by a declaratory order with or without an application for a prohibitory interdict and an action for damages,<sup>323</sup>

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*Silberberg and Schoeman's The Law of Property* (5 ed 2006) 262 referring to Voet 8 5 5 and *JH Wade v AM Paruk* (1904) 25 NLR 219.

<sup>317</sup> SD Lindenbergh “Enforcing the Right to Property Properly” (2010) 17 *Maastricht J Eur & Comp L* 48-57 49.

<sup>318</sup> SD Lindenbergh “Enforcing the Right to Property Properly” (2010) 17 *Maastricht J Eur & Comp L* 48-57 49. For an extensive analysis of this development see PC van Es *De Actio Negatoria: Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht* (2005).

<sup>319</sup> SD Lindenbergh “Enforcing the Right to Property Properly” (2010) 17 *Maastricht J Eur & Comp L* 48-57 49.

<sup>320</sup> CG van der Merwe *Sakereg* (2 ed 1989) 543 citing Voet 7 6 1, 8 5 5 and Huber *HR* 2 44 16.

<sup>321</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 262 citing *D* 8 5 14 pr and Voet 8 5 5.

<sup>322</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 262 citing Voet 8 5 6.

<sup>323</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 623; CG van der Merwe *Sakereg* (2 ed 1989) 543 citing *Wade v Paruk* (1904) 25 NLR 219 223 and CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 154 citing the same case as well as Van Leeuwen *RHR* 2 22 6.

Badenhorst *et al* submit that “the obsolescence of a remedy in favour of an alternative one must not lightly be inferred if it is to the prejudice of the claimant”.<sup>324</sup> Van der Merwe and Pope also note that it still remains uncertain whether this action has been superseded by other remedies.<sup>325</sup> Badenhorst *et al* explain the implications for the plaintiff, which in the case of a usufruct would be the bare owner, if it were to be the case that the *actio legis Aquiliae* should replace the *actio negatoria* where the recovery of damages is at issue. In the case of the *actio legis Aquiliae* the bare owner would have to prove fault, whereas this would not be a requirement to claim damages in the case of the *actio negatoria*.<sup>326</sup>

In his assessment of the South African position, Van Es contends that the South African position as explained by Sonnekus and Neels seems to be more accurate than the description rendered by Van der Merwe.<sup>327</sup> Van der Merwe asserts that during the reception of Roman law in Holland the *actio negatoria* evolved into a measure which could be used against any party factually disturbing ownership of an immovable.<sup>328</sup> He bases this statement on texts by Voet<sup>329</sup> and Huber.<sup>330</sup> However, Van Es uses the

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<sup>324</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 263.

<sup>325</sup> CG van der Merwe & A Pope “Ownership” in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille’s Principles of South African Law* (9 ed 2007) 469-556 541.

<sup>326</sup> JC Sonnekus “Ongegronde Verryking van Staatskas en Ontnemning van Vermoënsregte” 2011 *TSAR* 79-99 97; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 263; JC Sonnekus “Rei Vindicatio vir Vorderingsregte?: Regspraak” 2005 *TSAR* 410-427 412; JC Sonnekus & JL Neels *Sakereg Vonnisbundel* (2 ed 1994) 100.

<sup>327</sup> PC van Es *De Actio Negatoria: Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht* (2005) 123.

<sup>328</sup> CG van der Merwe *Sakereg* (2 ed 1989) 360.

<sup>329</sup> Voet 7 6 1; 7 6 3; 8 5 5.

<sup>330</sup> Huber 2 44 16.

same texts to show that this action remained an *actio de servitude* and had not developed to this extent in these texts.<sup>331</sup> He prefers the statement of the law as rendered by Sonnekus<sup>332</sup> since the later deduces that the *actio negatoria* can also be used against the servitude holder from the statement that the owner can use the action against a third party who exceeds the bounds of his servitude, without citing Voet or Huber as authority. Van Es also refers to an earlier version of *Silberberg and Schoeman's The Law of Property*,<sup>333</sup> but this source also mentions one of the contested Voet sources.<sup>334</sup> The analysis by Van Es raises the question whether the wider interpretation of the Voet and Huber texts by South African writers was justified and whether the logical deduction by Sonnekus should therefore not be a preferred explanation. Van Es argues that the broader interpretation of the *actio negatoria* cannot be said to be evident in the texts of Roman Dutch authors.<sup>335</sup>

The availability of this remedy seems to point to the importance of retaining the substance of the usufructuary object, as the *actio negatoria* compels the usufructuary to restore the *status quo ante*.<sup>336</sup>

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<sup>331</sup> PC van Es *De Actio Negatoria: Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht* (2005) 123.

<sup>332</sup> JC Sonnekus & JL Neels *Sakereg Vonnisbundel* (2 ed 1994) 475.

<sup>333</sup> See H Silberberg & J Schoeman *The Law of Property* (2 ed 1983). This most current version PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 262 still cites Voet 8 5 5.

<sup>334</sup> Voet 8 5 5.

<sup>335</sup> PC van Es *De actio negatoria: Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht* (2005) 120-122.

<sup>336</sup> CG van der Merwe "Ownership" in WA Joubert & JA Faris (eds) *LAWSA* vol 27 (2 ed 2014) para 241; JC Sonnekus "Sessie van die Rei Vindicatio Anderhalf Eeu ná Jhering" (2011) *TSAR* 302-325 303.

## 2 4 2 3 Termination

South African legal scholars acknowledge that servitudes may be terminated in a number of ways.<sup>337</sup> However, the only methods of extinction that are relevant to the *salva rei substantia* requirement are termination by permanent impossibility of exercise or enjoyment, that is, by destruction or substantial change of the object, and termination by misuse. However, the latter seems to be disputed.<sup>338</sup> Moreover, the terminology used is not defined. For example, it is not entirely clear how disfigurement (*skending*)<sup>339</sup> should be distinguished from abuse (*misbruik*). It seems that

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<sup>337</sup> CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 175-176 discuss the termination of usufruct separately and lists the death of the usufructuary, expiry of the time for which the usufruct was granted or fulfilment or resolutive condition, dissolution if the usufructuary is a legal person or after the lapse of a 100 years, total destruction of the usufructuary property or a total change of its form, non-user for the period of prescription, merger, abandonment of the right, cession to the owner and fraudulent transfer by a father who is usufructuary over his children's property by means of a joint will. CG van der Merwe *Sakereg* (2 ed 1989) 534 lists permanent impossibility of exercise or exercise or enjoyment of the servitude, expiry of the time for which the usufruct was granted or fulfilment or resolutive condition, merger, abandonment, prescription and the death of the usufructuary. To this list CG van der Merwe & A Pope "Servitudes and Other Real Rights" in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 591-629 613-615 add the following: termination of the interest of the grantor in the servient land, termination by agreement, expropriation, registration of transfer of land free from usufruct on a sale of execution. The list by CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 617 corresponds with the list in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 591-629 613-615.

<sup>338</sup> According to CG van der Merwe *Sakereg* (2 ed 1989) 540 and CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 176 a usufructuary may not be deprived of his right of usufruct if he misuses the usufructuary property. The usufructuary can be interdicted and compelled to give security for the return of the object of the usufruct in a proper condition. However, CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 141 cautiously does not rule out the possibility.

<sup>339</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 141.

disfigurement is a narrower concept denoting an action by the usufructuary to the physical detriment of the usufructuary object. I could not find reported case law pertaining to this issue. In his discussion of disfigurement and abuse Bezuidenhout does not mention any other illustration apart from the unreported case of *CF Zietsman v KA Leeuwner NO*.<sup>340</sup> The term “abuse” might have a wider field of application. Abuse might refer to any action leading to the permanent depreciation in value of the usufructuary property and might also include the disposition of the usufructuary property.<sup>341</sup> In this regard, a distinction drawn by Bell between disrepair triggering liability and fair wear and tear might be illuminating. His description of the former as “allied to injury or dilapidation, and arising from negligence or hard usage”<sup>342</sup> is akin to one of the meanings inherent to abuse. It seems that the distinction between disfigurement and abuse drawn by Bezuidenhout is not applied by other academic writers such as Van der Merwe (who does distinguish between serious and “normal” abuse)<sup>343</sup> and Hall and Kellaway.<sup>344</sup>

The question whether abuse could amount to termination of usufruct was contentious in Roman Dutch law.<sup>345</sup> In this regard Van der Merwe refers to the *Institutes* of Justinian and the commentary of the Roman Dutch authors Voet,

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<sup>340</sup> 1986 K (Case 86/9797).

<sup>341</sup> See *Heukelman v Heukelman NO* 2012 JDR 1378 (GNP) for possible dissipation of the *corpus* of shares and cash subject to usufruct of the surviving spouse; *Stain v Hiebner* 1976 1 SA 34 (C) for possible disposition of corporeal movables in the form of furniture subject to usufruct of the surviving spouse and *Olivier v Venter* 1933 EDL 206 for dissipation of capital and alienation or encumbrance of a bond subject to a usufruct of the surviving spouse.

<sup>342</sup> R Caterina “A Comparative Overview of the Fair Wear and Tear Exception: the Duty of Holders of Temporary Interests to Preserve Property” (2002) 6 *The Edinburgh LR* 85-100 99 citing Bell *Principles* § 1254.

<sup>343</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540.

<sup>344</sup> Hall & EA Kellaway *Servitudes* (3 ed 1973) 176.

<sup>345</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540.

Vinnius<sup>346</sup> and Heineccius<sup>347</sup> on Vinnius.<sup>348</sup> According to the *Institutes* of Justinian usufruct terminates “by its improper exercise”.<sup>349</sup> Voet<sup>350</sup> qualifies this statement by asserting that it only applies when a definitive measure of use and enjoyment was specified during the establishment of the usufruct. Van der Linden<sup>351</sup> denies that usufruct terminates when the usufructuary property is not used according to measure. He does, however, state that the stipulation whereby the usufructuary promised security to use and enjoy the property according to the discretion of a good man is activated and that, accordingly, an action may be brought at once instead of at the termination of the usufruct. Furthermore, he claims that the phrase “according to measure and time” must actually be understood to mean “according to the measure of time” which signifies that the usufruct is lost through non-user. Van der Linden justifies this reading with reference to a phrase added by Justinian, namely “all which things our ordinance has enacted”. This phrase apparently refers to C 3 33 16<sup>352</sup> but this text does not mention non-user according to measure, only non-user according to the time. Voet<sup>353</sup> also adds reasons of his own to indicate why usufruct is not terminated by misuse. He argues that if it were the case that usufruct could be terminated by abuse, it would not have been possible for the bare owner to demand

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<sup>346</sup> Vinnius *ad I 2 4 3* par 2.

<sup>347</sup> Heineccius *ad Vinnius ad I 2 4 3*.

<sup>348</sup> 540 n 626.

<sup>349</sup> *I 2 4 3*: “*Finitur autem usufructus [...] non utendo per modum*”. Although this phrase appears in the parallel Latin source text, it is not translated or commented upon by JAC Thomas *The Institutes of Justinian Text, Translation and Commentary* (1975) 88-89 but the English translation appears in JB Moyle *The Institutes of Justinian Translated into English with an Index* (5 ed 1913) 48.

<sup>350</sup> Voet 7 4 5.

<sup>351</sup> Van der Linden *Supplementum ad Voet 7 4 5*.

<sup>352</sup> See P Krueger (ed) *Codex in Corpus Iuris Civilis* (1899) Berolini: Weimannos

<sup>353</sup> Voet 7 4 5.

security from the usufructuary “that he will use and enjoy in the discretion of a good man” from time to time while the usufruct lasts.

However, in contrast to Voet, other Roman Dutch authorities, namely Christinaeus,<sup>354</sup> Antonius<sup>355</sup> and Castillo Sotomayor<sup>356</sup> are of the opinion that a usufructuary may be evicted since a lessee and a quitrenter can be evicted.<sup>357</sup> Voet<sup>358</sup> disagrees. He distinguishes the position of the usufructuary from the position of the lessee and the quitrenter. In instances where the lessee and the quitrenter are evicted, they keep the quitrent or rent whilst the usufructuary keeps nothing.

It therefore seems that this first measure of termination is heavily qualified. According to Roman Dutch law, transgression of a definitive measure of use indicated in the agreement that establishes the servitude terminates usufruct. According to certain South African authors, extreme abuse may terminate usufruct.<sup>359</sup> Examples of serious abuse include instances when the usufructuary fraudulently sells the usufructuary property or attempts to destroy the substance of the usufructuary

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<sup>354</sup> Voet cites P Christinaeus *In Leges Municipales eiusdem Civitatis ac Provinciae Commentaria ac Notae (in Leges Municipales Civium Mechliniensium Notae seu Commentationes)* 15 4 11 and additions note 11.

<sup>355</sup> Voet cites A Faber *Codex Fabrianus Definitionum Forensium et Rerum in Sacro Sabaudiae Senatu Tractatarum, Ad Ordinem Titulorum Codicis Justiniani, quantum fieri potuit ad usum forensem accomodatus. Et in novem Libros Distributus* 3 23 2.

<sup>356</sup> Voet cites DJ del Castillo Sotomayor *Quotidianarum Controversiarum Juris: S. Rotae Romanae Decisiones Recentissimae Opera omnia Amplectentes, Confirmantes, Laudantes Super Materiam De Usufructu* chs 21, 23 & 24.

<sup>357</sup> Reference to Voet 7 4 5 unless stated otherwise.

<sup>358</sup> Voet 7 4 5.

<sup>359</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 141.

property.<sup>360</sup> It is, however, not clear where the boundary between extreme and normal abuse lies. The contentious nature of this measure of termination makes it difficult to draw conclusions regarding the way it reflects the *salva rei substantia* requirement. It seems that the threshold for termination in terms of misuse is very high and accordingly allows a relative wide discretion in terms of use.

Secondly, total destruction of the usufructuary property will terminate the usufruct.<sup>361</sup> Some authors<sup>362</sup> base their position on Grotius<sup>363</sup> and Voet.<sup>364</sup> Grotius<sup>365</sup> mentions two examples, namely alteration of the character of the land by inundation and a house that is burnt down. What seems to be important is whether the object of the usufruct (in the latter example the building, according to Grotius) is destroyed and secondly whether it is totally lost or whether a portion remains. In the case a remnant of the usufructuary property survives, the usufruct may continue on the portion. Voet<sup>366</sup> agrees that a usufruct is inevitably terminated when the object of the usufruct is destroyed, but that usufruct may be retained if the object was only partially destroyed. He further adds that in the case of usufruct on a universality, the usufruct continues

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<sup>360</sup> CG van der Merwe *Sakereg* (1989) 540 n 626 cites Voet 7 4 4; Van Leeuwen *CF* 1 2 15 25. Cf Groenewegen *ad* Grotius 2 39 16; Van Leeuwen *RHR* 2 9 14.

<sup>361</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 140; CG van der Merwe *Sakereg* 534; CG Hall & EA Kellaway *Servitudes* (3 ed 1973) 176; AFS Maasdorp "Personal Servitudes; Usufruct, Usus and Habitatio" rev Hall CG in Hall CG (ed) *Maasdorp's Institutes of South African Law: Volume II The Law of Property* (10 ed 1976) 196-197.

<sup>362</sup> Hall & EA Kellaway *Servitudes* (3 ed 1973) 176; AFS Maasdorp "Personal Servitudes; Usufruct, Usus and Habitatio" rev Hall CG in Hall CG (ed) *Maasdorp's Institutes of South African Law: Volume II The Law of Property* (10 ed 1976) 196-197.

<sup>363</sup> Grotius 2 39 14.

<sup>364</sup> Voet 7 4 8.

<sup>365</sup> Grotius 2 39 14.

<sup>366</sup> Voet 7 4 8.

on the remaining objects constituting the universality, save when the universality no longer constitutes one, for example when the numbers of a flock have to such an extent diminished that it can no longer be considered as a universality. According to Bezuidenhout, neither reconstruction nor restoration of the usufructuary property to its original form revives the usufruct.<sup>367</sup>

In terms of the termination of the usufruct due to the total destruction of the usufructuary property, the *Kidson* case provides an example which has received ample academic attention recently.<sup>368</sup> Although the case refers to the personal servitude of *habitatio*, the principles applicable to the problem are similar. Van der Walt assumes that Scott is correct when he argues that a servitude of habitation is terminated when the dwelling is destroyed.<sup>369</sup> In the *Kidson* case, a strict application of the common law principle whereby the servitude is terminated *ex lege* in the event of destruction of the dwelling, would allow the bare owner to refuse rebuilding of the dwelling and consequently the continuation of the right of habitation.<sup>370</sup> The Roman Dutch authorities do not provide a solution where considerations of equity and fairness would call for it and therefore Van der Walt agrees with Scott and Van der Merwe that

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<sup>367</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 140.

<sup>368</sup> The most recent contribution is AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 which provides guidance on constitutional analysis of a dispute involving servitudes and critically reviews the articles by J Scott "Effect of the Destruction of a Dwelling on the Personal Servitude of *Habitatio*" (2011) 74 *THRHR* 155-169; CG van der Merwe "Extinction of Personal Servitude of *Habitatio*" (2010) 73 *THRHR* 657-665; JC Sonnekus, 'Bewoningsreg (*Habitatio*)—Verval dit Weens Versteuring (Vernietiging) van die Bouwerk?' 2009 *TSAR* 450-469. Recently, JC Sonnekus "Bewoningsreg (*Habitatio*) – Aard van die Regsobjek en die Effek Dáárvan op die Registrasie van die Reg" (2015) 26 *Stell LR* 63-85 made another contribution to this debate.

<sup>369</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 732.

<sup>370</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 746.

development of the common law is required.<sup>371</sup> Furthermore, this outcome is at odds with the right of access to adequate housing enshrined in section 26(1) and requires analysis to decide whether the limitation of section 26(1) can be justified or rectified by weighing up the right of access to adequate housing of the servitude holder and the property rights of the bare owner.<sup>372</sup> By analogy, the termination of usufruct due to the breach of the *salva rei substantia* requirement may therefore also compromise the constitutional right of access to housing. Should a constitutional analysis of a similar set of facts pertaining to usufruct reveal that development of the common law is necessary, a flexible approach to the *salva rei substantia* requirement may be required on constitutional grounds. In chapter 5 I consider the constitutional implications of the extinction of usufruct due to the *salva rei substantia* requirement in detail. Again, this measure of termination, similar to the case of abuse, reveals a high threshold. Usufruct may still continue where a part of the usufructuary property or the universality remains. This also reveals a rather flexible approach to the consequences of termination through destruction.

Thirdly, in Roman Dutch law usufruct was terminated in cases where the object of the usufruct was substantially transformed, “just as though it had perished”.<sup>373</sup> Examples of such substantial transformation include the erection of a building on land given in usufruct, the creation of agricultural fields through the reclamation of lakes, the melting of gold or silver objects with the purpose of casting it in bars, the felling of all trees given in usufruct to clear land that could generate income, and the transformation of a house into a bathhouse or a workshop into a dining room. The

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<sup>371</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 732.

<sup>372</sup> 746.

<sup>373</sup> Voet 7 4 9.

South African common law position still holds that the usufruct is extinguished when the object of the usufruct is fundamentally changed,<sup>374</sup> but not when it undergoes partial change.<sup>375</sup> An example of the latter would be the case of *Philips v Cradock Municipality*.<sup>376</sup> Just as in the case of total and partial destruction, it is not clear where the boundary between substantial change in form and partial change lies. This measure of termination directly represents the *salva rei substantia* requirement.

Finally, Voet<sup>377</sup> addresses an interesting question, namely how far a usufruct revives when the usufructuary property is re-established or reverts to its old form. Voet suggests that a distinction should be made between reinstatement of the property “not the same in number but merely as a like property with a like form” and property “the same in number as that which has been destroyed”, “reawakened after destruction”. In the first case, for example if a house was demolished, the presence of a new house would not revive the usufruct, since the reinstated property is not the same as the property over which the usufruct was granted.<sup>378</sup> In the second case, the usufruct revives, for example if the usufruct on a site ceased due to the erecting of a house, it may revive if the house is destroyed because the object of the usufruct is the same.<sup>379</sup> Perhaps this question of revival as it is addressed in the Roman Dutch sources is a particularly revealing one: it indicates a rigid interpretation of the *salva rei substantia*

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<sup>374</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 621 citing *D* 7 4 2 pr; Grotius *Inleiding* 2 37 5; Voet *Commentarius* 8 6 4 and *Wiener v Van der Byl* (1904) 21 SC 92 95.

<sup>375</sup> Voet 7 4 9.

<sup>376</sup> 1937 EDL 389.

<sup>377</sup> Voet 7 4 10.

<sup>378</sup> Voet 7 4 10 refers to *D* 7 1 36; 7 4 10 1; Annaeus Robertus *Res Judicatae* Bk 4 ch 8 (the title should probably be *Rerum Judicatarum*); Johannes Paponius, Bk 14 tit 2 arrest 4.

<sup>379</sup> Voet 7 4 10.

requirement, since the usufruct may only revive if the object of the usufruct exactly corresponds to the original usufructuary property. Revival is, however, highly unlikely in South African law. According to Van der Merwe a servitude would only lapse permanently if it becomes perpetually impossible to exercise.<sup>380</sup> However, since personal servitudes are not perpetual in nature, it is not readily accepted that the usufruct would revive where the servient property is restored in the previous condition.<sup>381</sup>

## 2 5 Conclusion

The purpose of this chapter is to establish the South African common law position regarding the *salva rei substantia* requirement within the context of personal servitudes, and specifically usufruct as the most comprehensive and prevalent personal servitude. The *salva rei substantia* requirement is still an element of the definition of usufruct. Furthermore, it is related to the *civiliter* principle that is applicable to all servitudes, but the former fulfils a specialised regulatory function. This distinction is related to the differences between praedial and personal servitudes. The *civiliter* principle, together with the *salva rei substantia* requirement, determines the duties of the usufructuary and regulates the relationship between the usufructuary and the bare owner by restricting the use and enjoyment of the usufructuary.

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<sup>380</sup> CG van der Merwe *Sakereg* (1989) 535; CG van der Merwe CG & A Pope "Servitudes and Other Real Rights" in Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG & Visser D *Wille's Principles of South African Law* (9 ed 2007) 591-629 615 refer to D 7 4 2 *pr*; Grotius 2 37 5; Voet 8 6 4; *Wiener v Van der Byl* (1904) 21 SC 92 at 95.

<sup>381</sup> CG van der Merwe *Sakereg* (1989) 535 refers to Voet 7 4 10; Huber *HR* 2 40 14. Cf D 7 4 23, 24; Grotius 2 39 14; Van der Keessel *Praelectiones* on Grotius 2 39 14.

In terms of the rights allocated to the usufructuary, the use right of the usufructuary allows for administration and control. A measure of flexibility is evident from decisions taking into account contextual factors such as the locality, established practice in the area, the nature of the object of the usufruct and circumstances relevant to its enjoyment. However, these factors are still subject to both the destination and the *bonus paterfamilias* criteria. Furthermore, it is not clear which juristic acts amounting to control and administration of the usufructuary property are compatible with the *salva rei substantia* requirement. Given that case law particularly discussing the entitlements of administration and control is scarce, it is therefore difficult to answer the question whether these entitlements might in any way reflect a flexible approach to the *salva rei substantia* requirement. Nevertheless, it appears clear that they do not accommodate acts of disposition pertaining to the usufructuary property such as mortgage, pledge and sale. In this regard South Africa lacks the detailed discourse evident in comparative jurisdictions.

Decisions relating to the duties of the usufructuary generally still show evidence of a somewhat rigid approach. This observation must, however, be qualified. Firstly, since case law on the *salva rei substantia* requirement is sparse, mostly dates from the preconstitutional era, and is predominantly restricted to provincial courts, it is difficult to gauge whether the previously established doctrinal positions will still be upheld by courts. Secondly, case law still does not reflect deference to the Constitution. These factors must lead to a circumspect assessment of the available material.

The duties to frame inventory and to provide security are still in theory open to enforcement by severe measures such as the possibility to refuse delivery of the usufructuary property and ejectment. However, these sanctions have not been subject

to constitutional scrutiny. It is doubtful whether such severe penalties will be upheld in the current constitutional dispensation in cases where they compromise constitutional provisions by for example infringing the right to equality and non-discrimination or the right of access to housing. A few cases indicate that courts are using the discretion allotted to them to reach equitable outcomes, particularly where the usufructuary is vulnerable or subjected to unreasonableness.

The importance of maintenance is highlighted by the courts' response to situations where the lack of repairs and maintenance poses a threat to the usufruct and might lead to a breach of the *salva rei substantia* requirement. Although the usufruct is not transferable or heritable due to its highly personal nature and the usufructuary may accordingly neither alienate nor burden the object of the usufruct nor his real right to the object, judgements allowing mortgage to finance maintenance and repairs but not improvements point to strict adherence to the *salva rei substantia* requirement. Furthermore, overreaching by means of improvements, as contrasted to maintenance repairs, is met with restraint since the usufructuary who does what the law does not permit him to do by effecting improvements does so at his own risk and is not entitled to compensation. Improvements may not generally be claimed, except where they also indicate a propensity to enable the usufructuary to comply with the *salva rei substantia* requirement. That is, where the improvement is of a permanent nature and has as its object the permanent preservation of the usufructuary property, compensation may be claimed. This concession reveals a slightly more teleological approach to the *salva rei substantia* requirement.

The availability of the *actio negatoria* as a remedy which enables the bare owner to insist on the restoration of the *status quo ante* might also be an indication of a rigid approach to the *salva rei substantia* requirement. Case law might eventually establish

that this remedy has been superseded by the declaration of rights, coupled with either a mandatory or a prohibitory interdict and, where applicable, a claim for damages.

The grounds for termination of the usufruct also indicate that the *salva rei substantia* requirement is important, although the threshold for termination seems to be high – impairment to the usufructuary object has to be fundamental. Abuse of right by the usufructuary does not generally attract the same sanction as it did in Roman Dutch law, which might indicate a slightly less strict approach to the *salva rei substantia* requirement as far as grounds for termination is concerned. The abuse of right can still meet with the penalty of an interdict and the demand for security. As stated above, the law as it stands, namely that usufruct terminates due to impossibility, still has to be subjected to constitutional scrutiny and might, as Van der Walt has argued, require constitutional development. This question will be addressed in chapter 5. This ground for termination still exist in South African law and might theoretically still indicate a rigid approach the *salva rei substantia* requirement.

Therefore, it seems that doctrinally at least, taking into account the qualifications mentioned above, the *salva rei substantia* requirement is still approached in a somewhat rigid way, although there seems to be indications that an equitable outcome would be favoured where a usufructuary is vulnerable and subject to unreasonable treatment.

## CHAPTER 3:

# COMPARATIVE CONSIDERATIONS

### 3 1 Introduction

Developments in foreign civil-law and mixed jurisdictions indicate that there has to an extent been a shift from a rigid to a flexible approach concerning the *salva rei substantia* requirement.<sup>1</sup> This move is more pronounced in jurisdictions where the shift was formalised in recent versions of the civil codes.<sup>2</sup> A second group of jurisdictions achieved the same result by focusing on the economic destination of the object of the usufruct.<sup>3</sup> By foregrounding this teleological denotation of the *salva rei substantia* requirement, scope is created for a flexible approach to the application of the requirement. Thirdly, in other jurisdictions revision of the law of usufruct indicates that the balance between the usufructuary and the owner has shifted and that the

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<sup>1</sup> See A Verbeke, B Verdickt & D Maasland “The Many Faces of Usufruct” in C van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56 47: “We may conclude that the modern approach as to both control and income offers substantially more leeway to the donor-usufructuary”. CJ van Zeben, JW du Pon & MM Olthof *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 3 Vermogensrecht in het Algemeen* (1981) 642 (with reference to footnote 1) mention that the Spanish Civil Code (in art 467) was the first to acknowledge the possibility of broadening the competencies of the usufructuary. The Spanish example was followed in various South American civil codes. One of the most explicit developments occurred in the Dutch Civil Code of 1992. CJ van Zeben, JW du Pon & MM Olthof *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 3 Vermogensrecht in het Algemeen* (1981) 641 note that the *salva rei substantia* requirement previously embodied in article 803 was dropped from the new Dutch Civil Code.

<sup>2</sup> See for example the *BW 201*.

<sup>3</sup> See for example *BGB* § 1041. CJ van Zeben, JW du Pon & MM Olthof *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 3 Vermogensrecht in het Algemeen* (1981) 642 (with reference to footnote 1) also mention the Italian Civil Code, art 981.

usufructuary is endowed with an increasing competence to dispose of the object of the usufruct.<sup>4</sup> This revision has implications for the application of the *salva rei substantia* requirement. Fourthly, in jurisdictions where the *salva rei substantia* requirement is still retained in the civil code, the interpretation of the *salva rei substantia* requirement in case law reveals a preference for a less rigid approach.<sup>5</sup>

This chapter considers the shift in the application of the *salva rei substantia* requirement in French, Belgian, Dutch, German and Louisiana state law. As civilian or partly civilian jurisdictions they share the Roman heritage of the law of usufruct, but each jurisdiction has developed different strategies to cope with the inherent limitations of the *salva rei substantia* requirement.

The law of usufruct in Belgium, the Netherlands and the state Louisiana is historically and in certain cases doctrinally related to the French law of usufruct. A discussion of Belgian law would hardly be possible without referring to French law. With the exception of amendments, Belgian property law is still largely based on the French Civil Code (CC). Moreover, French law has exerted significant influence on Belgian scholars and case law.<sup>6</sup> The Dutch Civil Code (*BW*) has been influenced by both German and French Law<sup>7</sup> and the *BW* dating from 1838 was premised on the

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<sup>4</sup> See for example AN Matasar “The Usufruct Revisions: the Power to Dispose of Nonconsumables Now Expressly Includes Alienation, Lease and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct?” (2012) 86 *Tul L Rev* 787-822 821 and EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 185.

<sup>5</sup> L Aynès “Property Law” in GA Bermann & E Picard (eds) *Introduction to French Law* (2008) 164.

<sup>6</sup> V Sagaert “The Fragmented System of Land Burdens in French and Belgian Law” in S van Erp & B Akkermans (eds) *Towards a Unified System of Land Burdens?* (2006) 31-52 32.

<sup>7</sup> B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 9. B Akkermans, V Sagaert & W Swadling “Introduction: Essential Directions on Using the Casebook” in S van Erp & B Akkermans (eds) *Cases, Materials and Text on Property Law* (2012) 1-36 35 note that Dutch law occupies an intermediate position between French and German law”.

CC.<sup>8</sup> In 1992 the *BW* was transformed under the influence of German law.<sup>9</sup> Akkermans remarks that Dutch law takes the middle ground between French and German law but is at the same time complicated by traditional choices embodied in the 1992 Dutch Civil Code.<sup>10</sup> The Louisiana Civil Code (*La CC*) is also based on the *CC* and Louisiana scholars rely extensively on the writings of French legal scholars for their doctrinal discussions.<sup>11</sup>

The Dutch law on usufruct articulated in the 1992 *BW* may be the most compelling example of a shift in the approach to the *salva rei substantia* requirement.<sup>12</sup>

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<sup>8</sup> B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 10. AN Yiannopoulos *Civil Law System Louisiana and Comparative Law: A Coursebook: Texts, Cases and Materials* (2 ed 1999) 52 remarks that the *BW* of 1838 “preserved much of the spirit, content and legislative technique” of the *CC*.

<sup>9</sup> B Akkermans, V Sagaert & W Swadling “Introduction: Essential Directions on Using the Casebook” in Van Erp S & Akkermans B (eds) *Cases, Materials and Text on Property Law* (2012) Oxford & Portland: Hart Publishing 1-36 35.

<sup>10</sup> B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 10-11. See also B Akkermans, V Sagaert & W Swadling “Introduction: Essential Directions on Using the Casebook” in Van Erp S & Akkermans B (eds) *Cases, Materials and Text on Property Law* (2012) Oxford & Portland: Hart Publishing 1-36 35.

<sup>11</sup> JD Smith “Foreword” in M Planiol & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959)) iii-v iii. See also MG Algero “The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation” (2005) 65 *La L Rev* 775-822 777, 780 and 798 and AN Yiannopoulos *Civil Law System Louisiana and Comparative Law a Coursebook: Texts, Cases and Materials* (2 ed 1999) 52. I am not negating the Spanish influence on Louisiana Law. On the Spanish influence see for example RA Pascal “Of the Civil Code and Us” (1998) 59 *La L Rev* 301- 324 302-303.

<sup>12</sup> JPM Stubbé, TJ Mellema-Kranenburg, CA Kraan & IJFA Van Vijfeijken *Vruchtgebruik Preadvies Koninklijke Notariële Beroepsorganisatie* (1999) 11 note that usufruct generated a lot of interest because of the broader application possibilities opened up by the *BW* of 1992. In the context of the revised law of succession the institution of usufruct takes on new significance: the surviving spouse can be compelled to transfer property to the heirs, but with the retention of usufruct.

By eliminating the requirement from the definition<sup>13</sup> of usufruct<sup>14</sup> in article 3: 201 and removing the obligation to maintain the object of the usufruct,<sup>15</sup> Dutch law reshapes usufruct as an institution.

The transformation of the Dutch law regarding usufruct indicates a radical doctrinal shift in the position of the usufructuary. From a comparative perspective this departure provides flexibility, compared to French and Belgian law. Apart from omitting the *salva rei substantia* requirement, the removal of the distinction between consumables and traditional objects<sup>16</sup> of usufruct thus redefines the duties, rights and position of the usufructuary. An investigation into the repercussions of the legislative change in Dutch law and the policy considerations underlying the transformation might stimulate South African discourse on the need for a flexible approach to the *salva rei substantia* requirement.

The recent revision of the Louisiana state law on usufruct<sup>17</sup> provides an interesting point of departure for reassessing the treatment of the *salva rei substantia* obligation in civil law jurisdictions in general.

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<sup>13</sup> As HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 510 notes the description in art 3: 201 cannot be termed a definition since it only notes the entitlements of the usufructuary.

<sup>14</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 319.

<sup>15</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 319; MS van Gaalen *Vruchtgebruik* (2001) 23.

<sup>16</sup> CJ van Zeben, JW du Pon & MM Olthof *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek* Boek 3 *Vermogensrecht in het Algemeen* (1981) 239.

<sup>17</sup> M Nathan "2010 Revision of the Law of Usufruct" (2011) 57 *Loy L Rev* 227-236 227 refers to Act No 881 of the 2010 Legislative Session of Louisiana which adopted revisions as a result of the recommendations from a four year study on the laws of usufruct and bare ownership done in the light of Hurricanes Katrina and Rita.

A preliminary comparative overview of the five foreign jurisdictions indicates a range of responses to the inherent limitations of the *salva rei substantia* requirement. In a few of these jurisdictions a significant shift from a rigid to a flexible approach occurred due to pragmatic reasons, socio-economic changes or legal developments. Approaches range from eliminating the preservation requirement, increasing the disposition capacity of the usufructuary to creative interpretations of the destination and substance concepts. An analysis of foreign usufruct law serves to identify alternative approaches to the limitations of the *salva rei substantia* requirement with the aim of subjecting them to constitutional scrutiny.

## 3 2 Usufruct in Dutch law

### 3 2 1 Introduction

The new *Burgerlijke Wetboek* of 1992 already stimulated debate about the changed nature of usufruct in the Netherlands. Furthermore, relatively recent changes in the law of succession took place in 2003.<sup>18</sup> The new law of succession of 1 January 2003 stipulated a system of legal partition whereby the surviving spouse became the heir of the complete estate by law, while each of the children as heirs has a monetary claim against the spouse which can in principle be claimed on the death of the surviving spouse. Usufruct can play a role when the children use their voluntary right (*wilsrecht*)

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<sup>18</sup> In comparison to other jurisdictions there has been a marked resistance against using usufruct as a mechanism to provide for the surviving spouse in the intestate law of succession. HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511 note that the Design of Book 4 (*Ontwerp Boek 4*) originally stated that the surviving spouse would become the intestate usufructuary of the estate of the deceased. However, this became a contentious issue between the legislator (*het departement*) and notaries.

to claim transfer of the goods.<sup>19</sup> This transfer then takes place under retention of usufruct. If a testamentary disposition (*uiterste wilsbeschikking*) by the testator causes a deviation from the intestate law of succession (*versterf-erfrecht*) in the sense that the spouse is not the only heir of the house with the contents (*inboedel*) he may claim the usufruct.<sup>20</sup> Furthermore, a spouse who can prove that her income and patrimonial position are inadequate to provide for her living expenses may claim the usufruct of other goods than the house and contents. The heirs are obliged to cooperate to establish the usufruct.<sup>21</sup> These legislative changes have prompted renewed interest in the law of usufruct and resulted in a few detailed studies on the nature of usufruct.<sup>22</sup> Accordingly, the question of the approach to the preservation requirement has also been addressed in these studies.

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<sup>19</sup> *BW* 4: 19; *BW* 4: 21; HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 512. A voluntary right can be defined as the competence to unilaterally create a new legal position (*rechtstoestand*) or subjective right irrespective of whether it is accompanied by a legal decision or not. See WHM Reehuis, AHT Heisterkamp, GE van Maanen & GT de Jong *Goederenrecht* (13 ed 2012) 70 para 102 and HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 24 para 30. In terms of this right, children may claim their voluntary right when the surviving spouse decides to marry again. If they claim this right, they become bare owners of property to the value of their claim, but the surviving parent enjoys the usufruct on this property. See <<http://www.erfwijzer.nl/wilsrechten.html>> (accessed 18-08-2015).

<sup>20</sup> *BW* 4: 29; HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 512.

<sup>21</sup> *BW* 4: 30; HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 512.

<sup>22</sup> See for example EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Venootschapsrecht* (2005); MS van Gaalen *Vruchtgebruik* (2001); BWM Nieskens-Isphording "Praktijkgerichte Evaluatie van het Vruchtgebruik Leidt tot Vraag naar Meer 'Maatwerk'" 1999 *WPNR* 617-621; BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893; WM Kleijn *Monografieën Nieuw BW Vruchtgebruik* (1990).

Bos describes usufruct as the “most complicated limited right” in Dutch property law,<sup>23</sup> a view to which other scholars also subscribe.<sup>24</sup> Factors that contribute to the intricate nature of Dutch usufruct include the fact that usufruct may be established on all types of property.<sup>25</sup> Furthermore, not a lot of boundaries exist to delineate the division of competencies between the bare owner and the usufructuary. This is for example evident from the fact that the usufructuary may be permitted to consume the usufructuary property. Indeed, the usufructuary can to an extraordinary extent exercise disposition powers usually assigned to the owner, should the right to dispose of and to consume the usufructuary property be granted. As a result of these far-reaching disposition powers, the position of the bare owner is weakened. Although it is usually argued that the bare owner creates this situation by assigning these powers of disposition to the usufructuary, and therefore weakens his own position, Bos argues that this is not always the case in practice. An example would be where the usufruct is established due to the operation of the law of succession. In this case the conditions for the acquisition and establishment of the usufruct are determined by a testament or by means of the rules governing the law of intestate succession.<sup>26</sup>

It therefore appears that both as consequence of legislative changes and due to the intricate nature of the right, particularly since the changes brought about by the

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<sup>23</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 39.

<sup>24</sup> See for example the description by JW Zwemmer “Fiscale Aspecten van Vruchtgebruik” (1999) 6368 *WPNR* 624-629 624 who vividly portrays usufruct as “een veelzijdig monster dat zich tooide met een dubbele Januskop. De ene kop vertoonde om beurten de trekken van vermogen en inkomen en de andere kop die van verzorgingsbehoefte en manipulatie-instrument”.

<sup>25</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 39.

<sup>26</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 39.

*BW* of 1992, the right of usufruct in the Netherlands presents an intriguing example of legal innovation. This is also the case where the preservation requirement is concerned.

### 3 2 2 Changed nature of usufruct

Article 803 of the 1838 *BW* defined usufruct as a real right to enjoy the fruits of the property belonging to another, as if one were the owner, provided that the object of the usufruct was preserved.<sup>27</sup> The equivalent of this provision in the 1992 *BW* was changed substantially: the preservation requirement was omitted.<sup>28</sup> Instead, *BW* 3: 8: 201 only refers to the rights of the usufructuary, namely the right to use the objects belonging to another and to enjoy the fruits of the object.<sup>29</sup> The new provision introduced fundamental changes to the law of usufruct,<sup>30</sup> doing away with the reference to the *salva rei substantia* principle and broadening the scope of the usufructuary's entitlements.<sup>31</sup> Instead of formulating the *salva rerum substantia*

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<sup>27</sup> I Jansen (ed) *Burgerlijk Wetboek* (1985) 461 article 803 states "Vruchtgebruik is een zakelijk regt om van eens anders goed de vruchten te trekken, als of men zelf eigenaar daarvan was, mits zorgende dat de zaak zelve in stand blijve".

<sup>28</sup> WM Kleijn *Monografieën Nieuw BW Vruchtgebruik* (1990) 1 claims that the removal of this requirement was motivated by the changed views regarding the use of object of the usufruct. This departure from the age old tradition concerning usufruct was already anticipated in the legislative design of Meijers, see JC van Oven "Een Kort Begrip van Ons Toekomstig Vermogensrecht" (1955) 86 *WPNR* 369-372 371; JC van Oven "Het Vruchtgebruik in het Ontwerp Nieuw *BW*" (1959) 90 *WPNR* 361-363 361-362.

<sup>29</sup> JH Nieuwenhuis, CJJM Stolker & WL Valk (eds) *Burgerlijk Wetboek Tekst & Commentaar De Tekst van de Boeken 3,5 en 6 Voorzien van Commentaar* (1994) 165 state "Vruchtgebruik geeft het recht om goederen die aan een ander toebehoren, te gebruiken en daarvan de vruchten te genieten".

<sup>30</sup> MS van Gaalen *Vruchtgebruik* (2001) 1.

<sup>31</sup> MS van Gaalen *Vruchtgebruik* (2001) 2. See also B Akkermans *The Principle of Numerus Clausus in European Property Law* (2008) 275; TJ Mellema-Kranenburg "Vruchtgebruik" in CJH Brunner, WM

requirement as part of a definition of usufruct, the usufructuary is obliged not to change the substance of the usufruct.<sup>32</sup>

Furthermore, the distinction between the use of consumables and usufruct that was encoded in article 804 of the 1838 *BW* was not included in the 1992 *BW*.<sup>33</sup> Berenschot views the fundamental change brought about by title 3.8 of the current *BW* as exemplary of the accomplishments of a modernising legislator.<sup>34</sup> Changes break with ancient tradition, resulting in fundamental changes to and revolutionary transformation of “archaic provisions”,<sup>35</sup> particularly with regard to the powers of the usufructuary.<sup>36</sup>

In the old *BW* the definition of usufruct was modelled on article 578 of the French *CC*.<sup>37</sup> The French definition referred to the last part of the Roman definition of usufruct, which stipulates that the objects subject to the usufruct should be maintained without impairment of the substance, with the words “mits zorgende dat de zaak zelve in stand blijve”. The usufructuary was therefore required to care for the object of the usufruct

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Kleijn, ALM Soons & YG Brie Weissmann (eds) *Vermogensrecht* (Suppl 23 1997) title 8 article 201–1-201–2.

<sup>32</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511.

<sup>33</sup> JH Nieuwenhuis, CJJM Stolker & WL Valk (eds) *Burgerlijk Wetboek Tekst & Commentaar De Tekst van de Boeken 3,5 en 6 Voorzien van Commentaar* (1994) 166.

<sup>34</sup> EB Berenschot “Enige Aspecten van de Plaats van het Vruchtgebruik in het Vermogensrechtelijk Systeem” (1983) 5730 *WPNR* 170-179 170.

<sup>35</sup> EB Berenschot “Enige Aspecten van de Plaats van het Vruchtgebruik in het Vermogensrechtelijk Systeem” (1983) 5730 *WPNR* 170-179 170 refers to JC van Oven “Een Kort Begrip van Ons Toekomstig Vermogensrecht” *WPNR* 4411 371; “Het Vruchtgebruik in het Ontwerp *NBW*” (1959) 4595 *WPNR* 361; G de Grooth *Preadvies Broederschap der Notarissen* (1955) 66.

<sup>36</sup> EB Berenschot “Enige Aspecten van de Plaats van het Vruchtgebruik in het Vermogensrechtelijk Systeem” (1983) 5730 *WPNR* 170-179 170.

<sup>37</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser’s Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 319.

in such a way as to preserve it. However, this requirement was not included in the current article 201. Instead, the article stipulates the competencies of the usufructuary.<sup>38</sup> The right of usufruct allows the usufructuary to use the things (*goederen*) of another and to enjoy the fruits thereof. Therefore, usufruct can be applicable to both things (*zaken*) and rights.

Van Mijnsen, Van Velten and Bartels motivate this new formulation by stating that the usufructuary sometimes is competent to use fungible things (*verbruikbare zaken*). Furthermore, the requirement would not be valid where things lose their value due to normal use. Apart from these considerations, the formulation also reflects the different role that usufruct plays in the modern Dutch society. In the past, the protection of the family patrimony was important.<sup>39</sup> It mainly consisted of immovables<sup>40</sup> and the protection of these assets for the use of the family of the grantor of the usufruct was paramount.<sup>41</sup> Although the emphasis was on the maintenance and protection of the patrimony, the institution of usufruct allowed adequate provision for the usufructuary. This was particularly the case in the testate law of succession, where one beneficiary was typically appointed heir and the other as usufructuary. Spouses could provide for each other in this way, leaving the bare ownership to their children.

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<sup>38</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 510.

<sup>39</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511; EM Meijers *Ontwerp voor een Nieuw Burgerlijk Wetboek: Toelichting Eerste Gedeelte Boek 1-4* (1954) 264.

<sup>40</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511; FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 320. FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 320 mention that the comprehensive arrangements regarding “kaphout, hoopopgaand geboomte and fruit trees” in articles 813 to 818 of the old *BW* are examples illustrating the emphasis on immovables.

<sup>41</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511.

Eventually the substance of patrimony changed.<sup>42</sup> It now consists mainly of movables and investments in the form of securities and consequently the need to use these objects of the usufruct has arisen.<sup>43</sup> Article 803 of the old *BW* complicated matters for the usufructuary by restricting his competence to deal with securities.<sup>44</sup> The nature of usufruct has therefore changed to accommodate the different content of patrimony in general and the needs of the usufructuary. In particular, the usufruct of consumables has received more attention and the usufructuary has received more competencies than in the past. Old Dutch law only allowed the usufructuary to enjoy the fruits without the right of use while the object of the usufruct had to remain intact.<sup>45</sup> In the modern law of usufruct the usufructuary has the right of use, and the requirement to maintain the object of the usufruct has lapsed. All things are subject to usufruct: the distinction between usufruct and quasi-usufruct has thus lapsed.

### 3 2 3 Rights of the usufructuary

The usufructuary has the right to enjoy the fruits of the usufructuary property, to use the object subject to the usufruct, and to control and dispose of it.<sup>46</sup> According to *BW* 3: 216 all the fruits that can be collected or harvested during the usufruct belongs to

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<sup>42</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 2.

<sup>43</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 320; HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511; JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 162.

<sup>44</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 320.

<sup>45</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511.

<sup>46</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 15.

the usufructuary. These fruits include civil and natural fruits as stated in *BW 3: 9: 1* and 2. This classification is dependent on the public opinion.

The competence to use or consume the objects subject to the usufruct is afforded by *BW 3: 207: 1*.<sup>47</sup> Use or consumption of the object is governed by the rules agreed upon by the parties at the commencement of the usufruct or by taking into account the nature of the property and local custom regarding the use or consumption of the property. According to Bos it is unclear from the literature how the nature of the usufructuary property and local custom should be determined. Bos sides with Kleijn in asserting that “normal use and consumption” should be determined by objective criteria.<sup>48</sup> The Dutch Civil Code of 1992 allows the usufructuary to consume the usufructuary property.<sup>49</sup> In this way, the preservation requirement (*instandhoudingsverplichting*) that was still part of the old Dutch Civil Code was done away with. Although the 1992 Dutch Civil Code does not define consumption, Bos asserts that generally it must be interpreted as destruction through first time or more frequent use, but not to include alienation.<sup>50</sup> The competence to consume or destroy should be delineated with reference to *BW 3: 212* and *BW 3: 215*.

According to *BW 3: 207* the usufructuary is competent to execute acts that would constitute acts of good control. The concept “control” is not defined in the article but Bos describes it as “daily acts that cannot be postponed and would serve the normal exploitation of the usufructuary property”. The direct competence to dispose of the usufructuary object is given in *BW 3: 207: 2* which necessitates that the usufructuary

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<sup>47</sup> 20.

<sup>48</sup> 20-21.

<sup>49</sup> 20.

<sup>50</sup> 21.

may dispose of the property to comply with the requirement of good control.<sup>51</sup> The reason for the wide scope of the acts in *BW* 3: 207 is related to the protection of third parties. If a third party would clearly interpret an act as good control, he must be able to assume that the usufructuary is competent to act in this way; this might include acts of disposition. The rules of control compel the usufructuary to take care of the usufructuary property and enable third parties to judge whether the usufructuary is competent to execute certain acts concerning the usufructuary property.<sup>52</sup>

The usufructuary has the competence to alienate and mortgage the property.<sup>53</sup> The competence to dispose of the usufructuary property is determined by the nature of the object of the usufruct. Firstly, the usufructuary may dispose of his right of usufruct as stated in *BW* 3: 223. Where property other than rights is subject to usufruct, the usufructuary may be competent to dispose in three cases. Firstly, he may be competent if the destination provides for disposition as is evident from *BW* 3: 212: 1. Secondly and thirdly, disposition may be possible with reference to *BW* 3: 212 and *BW* 3: 215.

According to Bos the wording of *BW* 3: 212: 1 leaves scope for the changing views of society in terms of whether the destination allows for disposition. Bos views the subjectivity of the destination criterium (the destination which the grantor had in mind) as a counter measure for the objectivity of the nature of the usufructuary

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<sup>51</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 890-893.

<sup>52</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 21-22.

<sup>53</sup> 23.

property. If the bare owner earmarks certain objects of the usufructuary property as suitable for alienation, the usufructuary also has the competence to alienate them.<sup>54</sup>

The disposition powers of the usufructuary can be increased to full disposition powers by the grantor or bare owner according to *BW* 3: 212: 2 giving him discretion to decide on the composition of the usufructuary property.<sup>55</sup> He may even change the destination of the object of the usufruct according to *BW* 3: 208: 2 and can therefore alienate original objects of the usufruct and substitute them for objects which bear more fruit. The usufructuary can also receive more disposition power on the grounds of *BW* 3: 212: 3 when the bare owner or judge (*kantonrechter*) grants consent. When the judge has to make the decision he has to weigh the different interests and according to section 3 he may only authorise more disposition power if the interest of the usufructuary or the bare owner is served by the alienation or burdening of the property and it is not to the detriment of the interest of the other party.

Apart from the limited and full disposition powers which may be granted through *BW* 3: 212, *BW* 3: 215 provides that the bare owner may grant the usufructuary a very extensive right of disposition to alienate but also to consume the proceeds of the alienation.<sup>56</sup> Consumption can in this case be described as disposition over the

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<sup>54</sup> 23-24.

<sup>55</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 24; Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511; BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 890.

<sup>56</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 24-25 uses the phrase "een bijna alomvattend recht tot beschikking" to describe the powers of disposition that the bare owner may grant the usufructuary. See also BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 890.

proceeds of the alienation with the aim of appropriating it.<sup>57</sup> The bare owner may request delivery of the burdened property to the extent that the usufructuary or his heirs do not prove that the property has been consumed or accidentally perished. *BW* 3: 215 can therefore be interpreted as relief from the obligation to reinvest as stated in *BW* 3: 214: 1.

### 3 2 4 Duties of the usufructuary

The usufructuary has to comply with two duties before he can exercise the usufruct: he has to frame inventory and provide security. According to *BW* 3: 205: 1 the usufructuary is obliged to frame an inventory (*boedelbeschrijving*)<sup>58</sup> at the

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<sup>57</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 25.

<sup>58</sup> JH Lichtenbelt *Enkele Opmerkingen over het Vruchtgebruik* (1879) discussed the question whether the words *staat* and *beschrijving* have the same meaning. According to Lichtenbelt some writers were of the opinion that they differ substantially: *staat* pertaining to a summary of immovables and *beschrijving* to a formal notarial description according to article 681. The difference ought to be sought in the words and in the origin of this article as taken over from of the *Code Napoleon* In the *Code Napoleon* article 600 the word *inventaire* was used. This was taken over as *boedelbeschrijving* in article 28 of the Act of 28 February 1825 containing the 9<sup>th</sup> title of the 2<sup>nd</sup> Book of the *BW*. Eventually the word was changed by the law of 19 March 1833 to *beschrijving*. From this then ought to follow that the legislature had intended the same as with the word *boedelbeschrijving*, but had only taken over the word *beschrijving* because usufruct seldom pertains to a complete estate. This would also have been the case with article 221 of the *BW*. Lichtenbelt viewed this construction of the intention of the legislature as arbitrary. He proposed that the legislature perceived that the same formalities need not be taken into account with the framing of a *beschrijving* in comparison to a *boedelbeschrijving*. According to Lichtenbelt a *beschrijving* is nothing else than an enumeration of the goods with certain characteristics. The value of the goods is not taken into account because when the usufructuary property is returned they should be returned in the condition in which they were after use and not their value. No estimation is therefore needed. However, in the case of consumables the value is a main component and should be added, but without the need for estimators. The law itself does not demand estimation as is evident from article 804. *Staat* and *beschrijving* are used as synonyms with the first pertaining to immovables and the second to movables.

commencement of the usufruct, unless there is already a record due to the usufruct being placed under administration (*onderbewindstelling*).<sup>59</sup> Although the inventory is usually framed in a notarial deed, the usufructuary may with the collaboration of the bare owner use a non-notarial document (*onderhandse akte*). According to section 2 of the same article the possibility exists of including details pertaining to the legal relationship between the bare owner and the usufructuary in the deed.

The duty to provide security for the fulfilment of his obligations toward the bare owner is encoded in *BW* 3:206. Bos notes that the article does not provide guidelines as to how security should be provided. However, according to Waaijer security can be personal as well as patrimonial according to *BW* 831 and *BW* 6: 51: 1.<sup>60</sup> According to Bos a judge may be approached if there is a deadlock in terms of consensus.<sup>61</sup>

The duty to act like a good usufructuary<sup>62</sup> is not only the main duty but the other duties of the usufructuary stem from this source obligation.<sup>63</sup> It ought to be seen in relation to the concepts of reasonableness and fairness (*redelijkheid en billijkheid*) and forms the framework of the remaining duties and the way in which the usufructuary exercises his powers of disposition.<sup>64</sup> If he does not act as a good usufructuary he will

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<sup>59</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 27.

<sup>60</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 892.

<sup>61</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 27.

<sup>62</sup> *BW* 3: 207(3).

<sup>63</sup> WHM Reehuis, AHT Heisterkamp, GE van Maanen & GT de Jong *Goederenrecht* (13 ed 2012) 506; EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 26.

<sup>64</sup> 26-27.

be liable for the damage resulting from his failure to comply with this duty.<sup>65</sup> Bos asserts that it not clear whether the usufructuary should always take into account the interests of the bare owner, for example when the usufructuary has to use his voting rights pertaining to shares.

The bare owner should be informed of the condition, scope, substitutions made and benefits received concerning the usufructuary property by means of an annual statement, as stated in *BW* 3: 205: 4. Bos argues that the duty to ensure the usufructuary property could rather be categorised as a subset of the obligation to act as a good usufructuary according to *BW* 3: 207.<sup>66</sup> However, the Civil Code specifically refers to this duty in *BW* 3: 209. The usufructuary only has to ensure the usufructuary property against risks that would normally form the subject of insurance. When money forms the object of the usufruct, the usufructuary should invest it in consultation with the bare owner. If other usufructuary property should be derived from this investment, it is assimilated in the usufructuary property by means of substitution and forms part of the patrimony of the bare owner.

If the usufructuary should fail to fulfil his duties, to the extent that it can be categorised as a serious failure (*ernstig tekortschieten*),<sup>67</sup> the bare owner may, in accordance with *BW* 3: 221, approach a court to grant control of the usufructuary

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<sup>65</sup> 27.

<sup>66</sup> 28.

<sup>67</sup> On the strength of HR 9 December 1994 *NJ* 1995 224 (*Van Opstal/Van Miert*) r o 3 3, EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 28 n 146 argues that the term “*tekortschieten*” does not reach far enough as the court in this instance decided that grave failures in the past can also be grounds for administration in order to prevent grave failures in the future.

property or to place the usufruct under administration (*onder bewind te stellen*).<sup>68</sup> This type of administration, which even the bare owner may manage, has a penal function (*strafbewind*) and must be distinguished from the administration that can be arranged from the commencement of the usufruct according to *BW* 3: 204. The latter type of administration often protects both the bare owner and the usufructuary in the context of a legacy. In both types of administration the usufructuary loses control of the usufructuary property but may still dispose of his right of usufruct.

### 3 2 5 Protection mechanisms supplementing the preservation requirement

Other protection mechanisms exist apart from the obligation to maintain the substance. The principles of substitution and reinvestment protect the patrimony.<sup>69</sup> The usufructuary also has the duty to act with the necessary care towards the object of the usufruct and to provide security. Furthermore, the principles of reasonableness and fairness (*billikheid*) play a role. Finally, in cases where the usufructuary property is at risk, the institution of administration (*bewind*) can also be utilised.

Waaijer notes that *BW* 3: 207 obliges the usufructuary to act with the necessary care towards the property subject to the usufruct and the control that he has over it.<sup>70</sup> This standard of care does not permit limitless disposition or consumption. However, *BW* 3: 215: 3 allows for small customary gifts. Apart from the standard of care, *BW* 6: 248 read together with *BW* 216 determines that the principles of reasonableness and

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<sup>68</sup> EC Bos *Vruchtgebruik op Aandelen: Over de Grenzen van Goederenrecht, Erfrecht en Vennootschapsrecht* (2005) 28.

<sup>69</sup> HJ Snijders & EB Rank-Berenschot *Goederenrecht* (5 ed 2012) 511.

<sup>70</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 890.

fairness also guide other disposition powers not covered by this article. Waaijer also points out that where the grantor grants more than the usual disposition powers to the usufructuary, its effect is limited to the lifetime of the usufructuary as *BW 3: 223* indicates.<sup>71</sup> Waaijer asks whether this article in combination with *BW 3: 226* is not an indication that the extra competencies should be used exclusively for the usufructuary and his family.<sup>72</sup>

If the usufructuary breaches the norm of good care stipulated in *BW 3: 207*, he incurs an obligation to pay damages on termination of the usufruct. Furthermore, breach of the good care standard may, if a judge intervenes, lead to transfer of control of the usufructuary object to the bare owner or to administration (*onderbewindstelling*). However, these measures only allow the bare owner to protect his property after the breach has occurred.

Another protection mechanism is substitution. In the case of substitution the object that replaces the original usufructuary object due to a valid act of disposition on the part of the usufructuary belongs to the bare owner and is also subject to usufruct. When claims subject to usufruct are recovered they are subject to usufruct. Remuneration received for usufructuary objects sold is also subject to usufruct. According to *BW 3: 213: 1* claims regarding loss of value of the usufructuary object (*waardevermindering*) are also included. Both a right of bare dominium and a right of usufruct are vested in the substitutionary goods. However, there is one exception to this rule: usufructuary objects on an inventory (*register*). If the usufructuary validly disposes of a usufructuary object on the inventory or a right in his name, and uses the

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<sup>71</sup> 890-891.

<sup>72</sup> 891.

substitutionary gain to buy other inventory objects (*registergoed*), the usufructuary becomes the only holder of a right. This can be explained in terms of the publicity principle.<sup>73</sup> To safeguard the position of the bare owner, Waaijer suggests that the disposition competence of the usufructuary should be connected to the condition that he would only be allowed to dispose of the inventory objects and rights (*registergoederen en rechten*) if he uses the gains from the disposition to acquire goods that are both in the name of the bare owner and the usufructuary.<sup>74</sup> This should happen on the same day as the disposition. The restrictive condition should be noted in the deed that establishes the usufruct.

In cases of invalid disposition there can be no substitution.<sup>75</sup> Therefore, no automatic substitution takes place and a third party can become the owner of the objects subject to the usufruct, if the rules of third party protection are applicable.<sup>76</sup> The bare owner has recourse to damages. Another alternative would be that the bare owner consents to the disposition or that the judges authorises the act. The invalid act of disposition then becomes enforceable on the supposition that the interested parties have affirmed the disposition. Usually it is argued that the bare owner would be burdened with objects in which he has no interest, and that he would presumably rather receive damages. However, Waaijer<sup>77</sup> points out that this argument against automatic substitution has its limits. In cases where the usufructuary disappears and

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<sup>73</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 891 refers to *BW* 1: 97: 1 third sentence, WM Kleijn *Monografie Nieuw BW: Vruchtgebruik* (1990) ch 6.

<sup>74</sup> 891.

<sup>75</sup> *BW* 3: 213: 1; BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 891.

<sup>76</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 891.

<sup>77</sup> 891.

no damages are available or where authorisation is not an option (where the usufructuary was aware of the invalidity of his act of disposition and only informed the interested parties after a third party acquired the goods in good faith), the bare owner is not protected. Automatic substitution would have allowed the bare owner to acquire goods but with the possibility of receiving damages due to the obsolescence of the relevant goods (*vanwege de incurantheid van het goed daarenboven*). Another disadvantage of only having damages as remedy is that the claim for damages is only based on the value of the goods when the claim for damages was instituted.<sup>78</sup> A considerable loss of value could have taken place.<sup>79</sup>

Another safeguard for the bare owner lies in the obligation of the usufructuary to provide security for the fulfilment of his duties as stipulated in *BW* 3: 206 which was also found in the old *BW* in articles 831 and 832.<sup>80</sup> However, the usufructuary can be released from this obligation and also does not have to comply when administration (*onderbewindstelling*) is instituted.

According to *BW* 832: 2 there formerly was a release of the duty to provide security in the case where usufruct was established by transfer with the reservation of usufruct, but this is no longer the case in title 3.8. Therefore, such a release must be arranged by agreement.

It is in the interest of the bare owner that security should be given at the commencement of the usufruct. According to Waaijer the bare owner would be able to suspend the delivery of the objects subject to usufruct on the basis of *BW* 6: 52 read

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<sup>78</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vructgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 891 refers to HR 16 januari 1959, NJ 1959, 355, Swieringa.

<sup>79</sup> 891.

<sup>80</sup> 892.

together with *BW* 6: 55 until security is arranged.<sup>81</sup> However, in certain instances delivery is not necessary as in the case where usufruct is acquired through the division of a parental estate (*krachtens ouderlijke boedelverdeling*).<sup>82</sup> A device that Waaijer suggests as protection mechanism is the stipulation of security as suspensive condition before division of the parental estate.<sup>83</sup>

Another protection mechanism to ensure the provision of security that may be utilised would be stipulating that the usufructuary is not entitled to the fruits of the usufruct in the period before security is provided. According to *BW* 835 the usufructuary would normally have a claim to fruits in this period but Waaijer classifies this claim as within the law of obligations if the commencement of usufruct was suspended only due to the duty to provide security. Therefore a stipulation denying entitlement until security is provided would be acceptable.

Waaijer discusses some uncertainties regarding the scope of the security required. The scope of the security required depends on the duties of the usufructuary which are in turn dependent on the usufruct that was instituted. A particular example he probes is that of the usufructuary who has the competence to alienate, burden or consume the object of the usufruct. If the usufructuary should alienate or consume

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<sup>81</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruktgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 892 refers to article 3: 205: 3 which states that bare owner may suspend the delivery of the usufructuary goods if the the usufructuary does not frame an inventory at the same time. Waaijer mentions that this article is a development or elaboration (*uitwerking*) of article 6: 52 according to *Parl Gesch* Book 6 204.

<sup>82</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruktgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 892 refers to WG Huijgen & WM Kleijn "Verdeling, Vruktgebruik en het Nieuwe *BW*" (1992) 45 *JBN* 45.

<sup>83</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruktgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 892.

all the goods which he is in principle allowed to do if he proves it according to *BW* 3: 215: 1, security poses a question. Waaijer contends that he should provide security for the value of the object of the usufruct minus the value of the usufruct. This could be too much because the competence to consume places a heavy hypothec on the value of the main right, or too little if the value of the object subject to the usufruct rises or if the life expectancy of the usufructuary decreases sharply.

Waaijer views the required concretization of the value of the duties of the usufruct in the case of hypothec<sup>84</sup> and surety as evidence of the real nature of the difficulty of quantifying the worth of these obligations.<sup>85</sup>

In cases where the usufructuary does not have property apart from his usufruct and if he cannot obtain personal security, the patrimonial (*goederrechtelijke*) security rests on his right of usufruct. Waaijer questions whether this type of security is enough. A usufructuary to whom the grantor granted more than the usual disposition powers can cause more damage than his usufruct is worth. The person who acquires the usufruct after execution (*executie*) does not acquire the larger powers of disposition granted to the original usufructuary according to *BW* 3: 223. Due to these dangers, Waaijers views the inability to provide security as a instance that seriously falls short as indicated in *BW* 3: 221. Therefore, he argues that the judge should be able to grant control to the bare owner or to put the usufruct under administration (*bewind*).

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<sup>84</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vructgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 892 refers to article 3:260 which states that the deed should state the amount for which the hypothec was granted or the maximum amount that can be claimed if the amount has not been established yet. The usufructuary may be forced to provide additional security according to article 6: 51.

<sup>85</sup> 892.

A final mechanism Waaijers discusses is administration (*bewind*). Administration can be instituted by the intervention of a judge according to *BW* 3: 221. In this case the usufructuary should have seriously fallen short in the fulfilment of his duties. However, the bare owner can only act once problems have occurred. Administration can however also be instituted according to *BW* 3: 204 by a testator or by an agreement between the bare owner and the usufructuary at the establishment of the usufruct. Administration according to *BW* 3: 204 can protect both the bare owner and the usufructuary and should with this aim in mind be established on the objects of the usufruct.

If the sole aim is the protection of the bare owner against the usufructuary, the right of usufruct should be placed under administration. The administrator (*bewindvoerder*) has the same competencies as the usufructuary would have had regarding control and disposition.<sup>86</sup> According to *BW* 1: 438: 1 the administrator controls the objects subject to the usufruct. Waaijer notes that *BW* 3: 204: 2 is not applicable and that is not clear why this is the case. He tries to interpret this with reference to the parliamentary commentary (*toelichting*) *BW* 3: 168: 2 and concludes that the legislator intended that the usufructuary should be able to dispose of his right of usufruct without intervention by die administrator.<sup>87</sup> However, Waaijer indicates that it is not clear whether the usufructuary can dispose over the objects subject to the usufruct if the content of the right of usufruct allows this. Waaijer is of the opinion that

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<sup>86</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruktgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 893 refers to the *Par Gesch* Book 3 (Inv 3, 5 and 6) 1314.

<sup>87</sup> BCM Waaijer "Hoe Kan de Hoofdgerechtigde Tegen de Vruktgebruiker Worden Beschermd?" (1993) 124 *WPNR* 890-893 893 refers to WM Kleijn *Monografie NBW B10 Vruktgebruik* (1990) 67.

this would not be the case as it would give too little protection to the bare owner.<sup>88</sup> Waaijer ascribes the ambiguity and uncertainty to the fact that the words “de onder (het) bewind staande goederen” in *BW* 1: 438 are not interpreted in the same way in *BW* 3: 204. *BW* 1: 438: 1 indicates that the goods should be controlled by the administrator. Section 2 would relate to the usufruct placed under administration. Furthermore *BW* 3: 215: 2 also indicates that if the usufruct is placed under bewind, alienation and consumption can only take place with the collaboration of the administrator. This article ensures the bare owner that the administrator will be involved. However, *BW* 3: 215 is only applicable where the usufructuary was granted the competence to alienate or consume the objects subject to the usufruct.

The efficiency of the administration is related to the administrator publicising the administration in the public registers for register goods. *BW* 1: 439 read with *BW* 3: 204 protects other parties against legal acts or acts of disposition which are not valid due to the administration (*onderbewindstelling*).

### 3 2 6 Termination and remedies

The usufruct can be terminated if ownership of the usufructuary property is extinguished.<sup>89</sup> Therefore, in cases where the usufructuary property is destroyed, for example if it is consumed, the usufruct terminates.<sup>90</sup> However, the usufruct may not

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<sup>88</sup> BCM Waaijer “Hoe Kan de Hoofdgerechtigde Tegen de Vruchtgebruiker Worden Beschermd?” (1993) 124 *WPNR* 890-893 893 also refers to article 3: 206: 1.

<sup>89</sup> *BW* 3: 81: 2 sub a; MS van Gaalen *Vruchtgebruik* (2001) 187.

<sup>90</sup> See also WHM Reehuis, AHT Heisterkamp, GE van Maanen & GT de Jong *Goederenrecht* (13 ed 2012) 446 para 601 and 511 para 701.

be terminated when the usufructuary seriously defaults on his duties.<sup>91</sup> The legislature expressly stepped away from the option of abrogation (*vervallenverklaring*) that was contained in the old *BW*, since the possibility of placing the usufruct under management allocated by the court safeguards the interests of the bare owner.<sup>92</sup>

### **3 3 *Nießbrauch* in German Law**

#### 3 3 1 Introduction

In German law usufruct or *Nießbrauch* is practically though not dogmatically viewed as an independent institution due to its scope.<sup>93</sup> It affords wide-ranging powers to the usufructuary in comparison to other real rights. Furthermore, usufruct can have other functions apart from the traditional role it plays in family law and law of succession.<sup>94</sup> In this case the purpose of the usufruct is determined by the intention of the parties.<sup>95</sup>

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<sup>91</sup> FHJ Mijnsen, AA van Velten & SE Bartels *Mr C Asser's Handleiding to de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* (2008) 342.

<sup>92</sup> 342.

<sup>93</sup> C Ahrens *Dingliche Nutzungsrechte* (2007) 42.

<sup>94</sup> C Ahrens *Dingliche Nutzungsrechte* (2007) 42. J Wilhelm *Sachenrecht* (4 ed 2010) 767-768 also mentions donation with the reservation of usufruct, tax benefits and provision for families as applications.

<sup>95</sup> C Ahrens *Dingliche Nutzungsrechte* (2007) 42.

Usufruct is defined as the right to take the emoluments of a thing.<sup>96</sup> However, this definition can be criticised since a right can also be the object of a usufruct.<sup>97</sup> Furthermore, usufruct can be established on the patrimony of a person but it attaches to the individual objects that form part of the patrimony.<sup>98</sup> Therefore, Wilhelm reformulates the definition: “*Nießbrauch is die Belastung (eines Gegenstands) derart, dass der Begünstigte berechtigt ist, die Nutzungen (des Gegenstands) zu ziehen*”.<sup>99</sup> He defines the burdening (*Belastung*) as the splitting off (*Abspaltung*) of competencies (*Befugnissen*) from the right of origin or mother right (*Quellrecht*) and accordingly describes the usufruct of things as a usufruct burdening property and the usufruct of rights as the usufruct that burdens other rights.<sup>100</sup> It is clear that German law excludes the *salva rei substantia* requirement from the definition. However, it is included in other provisions of the *BGB*.<sup>101</sup> The emphasis is on the economic destination of the object. The foregrounding of the economic destination may be an important point to consider in South African law.

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<sup>96</sup> *BGB* § 1030 I states: “*Eine Sache kann in der Weise belastet werden, dass derjenige, zu dessen Gunsten die Belastung erfolgt, berechtigt ist, die Nutzungen der Sache zu ziehen*”. *BGB* § 100 defines “Nutzungen” as “*die Früchte einer Sache oder eines Rechts sowie die Vorteile, welche der Gebrauch der Sache oder des Rechts gewährt*”. The official translation of *BGB* § 1030 reads: “A thing can be encumbered in such a way that the person for whose benefit the encumbrance is made is entitled to take the emoluments of the thing”. See <[www.gesetze-im-internet.de/englisch-bgb/englisch-bgb.html#p4032](http://www.gesetze-im-internet.de/englisch-bgb/englisch-bgb.html#p4032)> (accessed 19-08-2015). See also J Wilhelm *Sachenrecht* (4 ed 2010) 766. The term “emoluments” seems unusual and is for example not utilised by B Akkermans & W Swadling “Types of Property Rights – Immovables and Movables (Goods)” in S van Erp & B Akkermans (eds) *Cases, Materials and Text on Property Law* (2012) 211-364 254 in their translation of *BGB* § 1030.

<sup>97</sup> *BGB* § 1068; J Wilhelm *Sachenrecht* (4 ed 2010) 766.

<sup>98</sup> *BGB* § 1085; J Wilhelm *Sachenrecht* (4 ed 2010) 766-767.

<sup>99</sup> J Wilhelm *Sachenrecht* (4 ed 2010) 767.

<sup>100</sup> J Wilhelm *Sachenrecht* (4 ed 2010) 767.

<sup>101</sup> Compare for example *BGB* §§ 1036 II, 1037 II and 1041.

### 3 3 2 Rights of the usufructuary

The usufructuary has the right to extensive use of the thing subject to the usufruct.<sup>102</sup> Limitations of this right are only permitted regarding individual uses,<sup>103</sup> and not to the extent that it is detrimental to the character of usufruct as a comprehensive use right.<sup>104</sup> The usufructuary acquires all fruits, both natural and civil, inclusive of the surplus fruits.<sup>105</sup> The usufructuary may also use the fruits and rights which are connected to the thing through the property.<sup>106</sup>

The right of possession is also allocated to the usufructuary.<sup>107</sup> This allows him to use the property. The grantor becomes the indirect possessor and the usufructuary normally the direct possessor.<sup>108</sup> However, if the usufructuary leases the object of the usufruct, he becomes an indirect possessor of the first degree.<sup>109</sup>

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<sup>102</sup> BGB § 1030; J Wilhelm *Sachenrecht* (4 ed 2010) 770; KH Schwab & FL Lent *Sachenrecht: Ein Studienbuch von Dr Hanns Prütting* (33 ed 2008) 361.

<sup>103</sup> BGB § 1030 II; J Wilhelm *Sachenrecht* (4 ed 2010) 770.

<sup>104</sup> See for a detailed discussion W Schön *Der Nießbrauch an Sachen: Gesetzliche Struktur und Rechtsgeschäftliche Gestaltung* (1992) 296-308. R Jansen & M Jansen *Der Nießbrauch im Zivil- und Steuerrecht* (8 ed 2009) 32. See also S Wolf *Besteuerung der Bodenschatzverwertung* (2011) 202; L Pahlow *Lizenz und Lizenzvertrag im Recht des Geistigen Eigentums* (2006) 362.

<sup>105</sup> BGB §§ 954, 1039 I 1; J Wilhelm *Sachenrecht* (4 ed 2010) 770.

<sup>106</sup> KH Schwab & FL Lent *Sachenrecht: Ein Studienbuch von Dr Hanns Prütting* (33 ed 2008) 362.

<sup>107</sup> BGB § 1036 I; J Wilhelm *Sachenrecht* (4 ed 2010) 770; R Jansen & M Jansen *Der Nießbrauch im Zivil- und Steuerrecht* (8 ed 2009) 41; KH Schwab & FL Lent *Sachenrecht: Ein Studienbuch von Dr Hanns Prütting* (33 ed 2008) 361.

<sup>108</sup> BGB § 868; R Jansen & M Jansen *Der Nießbrauch im Zivil- und Steuerrecht* (8 ed 2009) 41; KH Schwab & FL Lent *Sachenrecht: Ein Studienbuch von Dr Hanns Prütting* (33 ed 2008) 361.

<sup>109</sup> KH Schwab & FL Lent *Sachenrecht: Ein Studienbuch von Dr Hanns Prütting* (33 ed 2008) 361.

The usufructuary may not consume the usufructuary property, either by selling it or mortgaging it, even if § 92<sup>110</sup> declares things destined for consumption according to destiny.<sup>111</sup> Only use that preserves the possession of the thing or the actual possibility to use the thing is acceptable according to § 100.<sup>112</sup> Although the usufructuary in principle does not have the right to dispose of the usufructuary property,<sup>113</sup> he has the right to dispose of the individual items of stock if land together with stock is given in usufruct.<sup>114</sup> He may do so within the boundaries of proper management. However, he may not dispose of the property.<sup>115</sup>

The usufructuary may lease the object of the usufruct or give it in leasehold. If he has done so beyond the term of the usufruct, the lessee or the leaseholder is protected.<sup>116</sup> On termination of the usufruct the owner becomes party to the obligation.<sup>117</sup>

The entitlement to use the usufructuary property is limited by the duty to respect the economic destination of the property and to act according to the rules of orderly

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<sup>110</sup> *BGB* § 92 defines consumables in the following way:

“Verbrauchbare Sachen im Sinne des Gesetzes sind bewegliche Sachen, deren bestimmungsmäßiger Gebrauch in dem Verbrauch oder in der Veräußerung besteht. Als verbrauchbar gelten auch bewegliche Sachen, die zu einem Warenlager oder zu einem sonstigen Sachinbegriff gehören, dessen bestimmungsmäßiger Gebrauch in der Veräußerung der einzelnen Sachen besteht”.

<sup>111</sup> P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 120.

<sup>112</sup> 120.

<sup>113</sup> R Wörlen & K Metzler-Müller *Sachenrecht: Lehrbuch Strukturen Übersichten* (6 ed 2005) 211.

<sup>114</sup> *BGB* §1048.

<sup>115</sup> J Wilhelm *Sachenrecht* (4 ed 2010) 770.

<sup>116</sup> §§ 1056 and 566; J Wilhelm *Sachenrecht* (4 ed 2010) 771.

<sup>117</sup> KH Schwab & FL Lent *Sachenrecht: Ein Studienbuch von Dr Hanns Prütting* (33 ed 2008) 362.

management.<sup>118</sup> He is not entitled to reshape/remodel/redesign/transform (*umzugestalten*) the object of the usufruct or to substantially change it.<sup>119</sup> Furthermore, the provision permits the usufructuary of land to build new plants (*Anlagen*) for the mining (*Gewinnung*) of stone, gravel, sand, loam, clay, shell-marl (“*mergel*”), peat and other soil elements (*Bodenbestandteilen*) as long as the economic destination of the land is not substantially changed.<sup>120</sup> Commentary underlines the complementary

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<sup>118</sup> BGB §§ 1036 II; 1037, 1038; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 295; J Wilhelm *Sachenrecht* (4 ed 2010) 771; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 181.

<sup>119</sup> BGB § 1037; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 181. P Pohlmann “Titel 2: Nießbrauch: § 1037” in *Münchener Kommentar zum Bürgerliches Gesetzbuch* (6 ed 2013) Rn 2 discusses examples where the requirement of § 1037 I will either necessitate permission, where alterations will be permissible and when it would not be sanctioned. Permission would be required when a usufructuary wants to convert one residence into three smaller ones and where the alteration would significantly impair the substance. If the change is of lesser scope and serves the economic destination of the usufructuary object, permission is not required. Examples of such measures would include installing a sewerage system, applying new plaster or putting up a new roof covering. Changes that would not be sanctioned by BGB § 1037 I would include fundamental building alterations, new buildings, measures that would initially lead to the deterioration of the usufructuary object such as the building up of a building and flooded gravel pits remaining after the mining of pebbles unless it only relates to a small piece of the land. Measures dictated by public law for example to provide protection against noise or to save energy, will be permissible if it is not detrimental to the interest of the bare owner. In cases where the usufructuary has a usufruct on an agricultural enterprise, he may abandon a few business branches for maintenance purposes of the enterprise. The dominant view is that the usufructuary of land is not allowed to build on the land in terms of § 1037 I and II (by implication). However, cases where the building would be in line with the economic destination, for example where additional stables are erected, would not amount to a substantial change. Contrary to the view of the *Kammergericht* the right to erect a building can in the view of the supported derogation of BGB § 1037 I be made the content of a usufruct. The permission to erect the building must however be entered into the Land Register for it to be an action *in rem*. This building does not become a substantial part of the land according to BGB § 95 I.

<sup>120</sup> According to BGB § 1037. P Pohlmann “Titel 2: Nießbrauch: § 1037” in *Münchener Kommentar zum Bürgerliches Gesetzbuch* (6 ed 2013) Rn 3 states that the dominant view is that the right to erect facilities (*Anlagen*) functions as an exception to BGB § 1037 I. In this case, according to the

nature of the prohibition on altering the substance and the obligation on the usufructuary to respect the economic destination of the usufructuary object. These two legislative requirements delineate the competences of the usufructuary and the bare owner. Within these prescriptive boundaries, subsection two functions as an exception allowing the raising of facilities for the mining of soil elements on the condition that the economic destination of the land is not substantially altered.<sup>121</sup>

There is a general obligation to use the object of the usufruct within the boundaries of the economic destination<sup>122</sup> and to provide for the maintenance of the usufructuary property in terms of normal repairs and renovations.<sup>123</sup> The principle underlying § 1036 was laid down by Johow in the preliminary draft for the substantively similar § 294. Since the usufruct is only a temporary interruption of the use of the owner, the owner may not be forced against his will to accept the changes of the destination undertaken by the usufructuary, if these were not already foreseen. The will of the owner determines the economic destination. According to an opposite view that exclusively focuses on the objective realities, consent must be denied. It fails to recognise the character of *BGB* § 1036 that together with the remaining paragraphs of the legal obligation relationship ensures the protection of the owner. The objective

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understanding of *BGB* § 1037 I whereby it is not permissible to substantially transform the usufructuary object, *BGB* § 1037 II must be understood as a concretisation of *BGB* § 1037 I. There is no assumption in *BGB* § 1037 II that the land is destined for the mining of soil elements. What is decisive however, is whether the mining changes the economic destination substantially. This is determined according to the criterion of *BGB* § 1036 II half sentence 1. Apart from mining the soil elements which the section makes provision for, the use of a source must also be considered. New plants/facilities are those which are completely renewed as well as those that replace old ones. See also J Wilhelm *Sachenrecht* (4 ed 2010) 771.

<sup>121</sup> §1037 BGB. P Pohlmann "Titel 2: Nießbrauch: § 1037" in *Münchener Kommentar zum Bürgerliches Gesetzbuch* (6 ed 2013) Rn 1.

<sup>122</sup> *BGB* § 1036 II; J Wilhelm *Sachenrecht* (4 ed 2010) 771.

<sup>123</sup> *BGB* § 1041; J Wilhelm *Sachenrecht* (4 ed 2010) 771.

condition of the land is only determined in *BGB* § 1037 II, according to which objectively possible use always will be unlawful when it substantially changes the economic destination determined by the owner.<sup>124</sup> The relation between *BGB* §§ 1036 and 1037 seems to be contested. On the one hand, it is presumed that *BGB* § 1037 I delineates the competencies of the usufructuary independently from *BGB* § 1036. On the other hand, it is also proposed that *BGB* § 1037 I functions as a concretisation of *BGB* § 1036. In this case the permissibility of substantial transformation depends on whether the economic destination is maintained or whether it is substantially impaired and if the changes are compatible with the rules of a properly constituted economy.<sup>125</sup> This would for example leave scope for changing a factory to a different kind of factory without altering the destination of the factory as an industrial establishment.<sup>126</sup> Material change of the substance is proscribed even when a material change would not amount to an alteration of the destination. Examples would include extensive remodelling or raising of a floor, erecting buildings on vacant lots, converting orchards into arable lands. Woodlands, mines and quarries are subject to special rules.

The minority view that the economic destination should be the primary consideration in relation to the maintenance of the substance holds that *BGB* § 1037 II is applicable to a specific change to the substance. Furthermore, the permissibility of the transformation is dependent on the condition that the economic destination of

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<sup>124</sup> P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 183.

<sup>125</sup> *Münchener Kommentar zum Bürgerliches Gesetzbuch* (6 ed 2013) Rn 2.

<sup>126</sup> See AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 295 with a systematic comparative perspective with reference to German law.

the land must not be changed substantially. How substantial the transformation is, can only be defined in relation to the economic destination.<sup>127</sup>

The dominant view of *BGB* § 1037 I holds that the prohibition against substantial impairment of the substance of the usufructuary object is not subject to disposition by the parties. Therefore, when parties agree to conditions that deviate from this provision, it cannot be entered into the land register. According to another more correct view, the usufructuary may freely change and transform the usufructuary object, since he is still bound by *BGB* § 1036 II and therefore any change would not be permissible. Personal obligations are in any case permissible. The prohibition on altering the usufructuary object has always been important: both in Roman and the common law the jurists acknowledged the obligation.<sup>128</sup> Today certain alterations are allowed if they are sensible according to the assessment of both the interests of the owner and the usufructuary.<sup>129</sup> Exceptions to the prohibition to remodeling are described in *BGB* § 1037 II.<sup>130</sup> The interaction between *BGB* § 1036 II and *BGB* § 1037 II probably entails that the economic destination of the usufructuary object is still maintained when the land is only used for mining temporarily in such a way that the owner is not at a later stage frustrated in his use preferences. The usufructuary may defy the will of the owner in terms of a contrary use as long as it is possible to place the usufructuary object that

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<sup>127</sup> *Münchener Kommentar zum Bürgerliches Gesetzbuch* (6 ed 2013) Rn 2.

<sup>128</sup> P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 184.

<sup>129</sup> 184.

<sup>130</sup> *BGB* § 1037 II; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 184.

enables the owner to exercise his preferred use back in a suitable condition before returning the usufructuary object.

The *BGB* uses the standard of “orderly management”.<sup>131</sup> The rules of orderly management are not determined by the views of the owner since otherwise the usufructuary could in that case be obliged to use inefficient or uneconomical methods if either the owner himself did not use optimal methods, or changed them during the course of time.<sup>132</sup> General principles concerning the content of orderly management can currently scarcely be determined, since the usufructuary object can come from diverse economic sectors for which own rules have been developed.<sup>133</sup> Usufructuaries should guard against excessive wear and tear. Any fruits produced as result of “wasteful methods of exploitation must either be returned to the owner or the value thereof should be restored.

The rights of the usufructuary in German law are therefore limited in general by the duty to be a proper manager. However, he is not allocated the power of disposition. The rights of the usufructuary do therefore not generally afford him more flexibility in terms of the *salva rei substantia* requirement.

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<sup>131</sup> *BGB* § 1036 II; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 286.

<sup>132</sup> P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 183.

<sup>133</sup> 183.

### 3 3 3 Duties of the usufructuary and the preservation requirement

The authoritative obligation of the usufructuary is to maintain the economic destination of the usufructuary property.<sup>134</sup> Therefore, if needs be he should do repairs or restoration work,<sup>135</sup> insure the property,<sup>136</sup> take responsibility for the public charges<sup>137</sup> and as far as his conduct causes a significant infringement of the rights of the owner provide security if the owner requires it.<sup>138</sup>

German law affords both the usufructuary and the bare owner the opportunity to demand determination of the condition of the movable or immovable usufructuary property by experts, at the cost of the party instituting the determination.<sup>139</sup> The usufructuary has the obligation to tolerate the determination of the condition of the usufructuary property, if the owner demands it.<sup>140</sup> Should the usufruct pertain to a universality of things, both parties may demand an inventory.<sup>141</sup> Both the owner and the usufructuary should cooperate in the process.<sup>142</sup> The formal requirements include

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<sup>134</sup> R Wörlen & K Metzler-Müller *Sachenrecht: Lehrbuch Strukturen Übersichten* (6 ed 2005) 212.

<sup>135</sup> *BGB* § 1036; R Wörlen & K Metzler-Müller *Sachenrecht: Lehrbuch Strukturen Übersichten* (6 ed 2005) 212.

<sup>136</sup> *BGB* § 1045; R Wörlen & K Metzler-Müller *Sachenrecht: Lehrbuch Strukturen Übersichten* (6 ed 2005) 212.

<sup>137</sup> *BGB* § 1047; R Wörlen & K Metzler-Müller *Sachenrecht: Lehrbuch Strukturen Übersichten* (6 ed 2005) 212.

<sup>138</sup> *BGB* § 1051; R Wörlen & K Metzler-Müller *Sachenrecht: Lehrbuch Strukturen Übersichten* (6 ed 2005) 212.

<sup>139</sup> *BGB* § 1034; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 260.

<sup>140</sup> *BGB* § 1035; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität.

<sup>141</sup> *BGB* §§ 1034 and 1035; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 260-261.

<sup>142</sup> *BGB* § 1035.

that the inventory should include the date of entry and the signature of both parties.<sup>143</sup> Furthermore, a party may require notarial certification of the signatures and demand that the inventory be made by a competent authority or official or notary.<sup>144</sup> The party who requests the certification must bear the cost. In contrast to the law of Louisiana, the *BGB* does not mention estimation. However, Yiannopoulos is of the opinion that an interested party may pay experts to determine the value of the usufructuary property.<sup>145</sup>

In cases where the conduct of the usufructuary is a cause for concern and the risk of material injury to the rights of the owner exists, the owner may require security.<sup>146</sup> This duty originated in the Roman *cautio usufructuaria* but does not constitute a general obligation prior to entry into the usufruct, since it has been restricted to cases where there is a risk that the usufructuary will infringe the rights of the bare owner.<sup>147</sup>

The usufructuary has the duty to maintain the usufructuary property. This means that he has to repair and restore the object of the usufruct. However, he also has to take maintenance measures that become necessary to restore damage due to his

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<sup>143</sup> *BGB* § 1035.

<sup>144</sup> *BGB* § 1035.

<sup>145</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 262.

<sup>146</sup> *BGB* § 1051; J Wilhelm *Sachenrecht* (4 ed 2010) 772; R Jansen & M Jansen *Der Nießbrauch im Zivil- und Steuerrecht* (8 ed 2009) 69; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 244.

<sup>147</sup> P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 244.

unlawful and culpable actions.<sup>148</sup> Outside this range, § 1041 states that the usufructuary is primarily responsible to keep the usufructuary property in good order by taking care of the maintenance. More specifically, he has to maintain the property according to its economic destination. In addition he must also see to the usual repairs and restoration. These maintenance measures are those that become unavoidable and would be done normally and at shorter periodic intervals. However, accidental damage and damage caused by third parties are not excluded. The usufructuary is however not obligated to repair the usufructuary property that ages and becomes worn out despite continual maintenance.<sup>149</sup> Extraordinary repairs are not the responsibility of either the usufructuary or the bare owner. However, the usufructuary should inform the bare owner that these repairs are necessary.<sup>150</sup> The usufructuary may nevertheless undertake these extraordinary repairs, and if land is the object of the usufruct he may use components of the usufructuary property to accomplish this.<sup>151</sup> However, he must nevertheless use it directly for this purpose. If the usufructuary makes expenditures to the usufructuary property that benefit it when he is not obligated to do so, he can, according to the rules about management or agency without

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<sup>148</sup> BGB § 823; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 172.

<sup>149</sup> BGB § 1050; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 172.

<sup>150</sup> BGB § 1042; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 177.

<sup>151</sup> BGB § 1043; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 173.

authorisation,<sup>152</sup> claim reimbursement (*Verwendungersatz*) from the owner.<sup>153</sup> On termination of the usufruct, these claims can be the grounds for a retention right.<sup>154</sup> If the usufructuary does not undertake these repairs or if he omitted doing normal maintenance, the owner may initiate the work.<sup>155</sup> The usufructuary's right to do the work nevertheless takes precedence and the owner should allow him reasonable time to do so.<sup>156</sup> If the owner has done so and proceeds with the maintenance, he will be entitled to the fruits and accessories (components of the land subject to the usufruct).<sup>157</sup>

Certain duties may prevent or defend against the breach of the *salva rei substantia* requirement by other parties. These include the duty to inform the bare owner of encroachment on his immovable property or other violations of his rights<sup>158</sup> to prevent accrual of prescription. The latter obliges the usufructuary of a claim not producing interest to collect payment on time and in the case of a claim producing interest, to cooperate with the bare owner so that the claim may be collected timely.<sup>159</sup> The usufructuary is liable where a predial servitude is lost due to non-use or where he

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<sup>152</sup> BGB § 677.

<sup>153</sup> BGB § 1049; J Wilhelm *Sachenrecht* (4 ed 2010) 771; BGB § 273; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 173; 174

<sup>154</sup> BGB § 273; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 173.

<sup>155</sup> BGB § 1044.

<sup>156</sup> Analogous to BGB § 326 I.

<sup>157</sup> BGB §§ 1044, 1043; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 173.

<sup>158</sup> BGB § 1042.

<sup>159</sup> BGB § 1042.

allows acquisition of a servitude on the property.<sup>160</sup> His responsibility does not, however, include bringing an action against a party about to complete acquisitive prescription, but only to provide information to the owner.

In German law, it is argued that the usufructuary should insure the usufructuary property against casualty or loss in the event that orderly management would require it.<sup>161</sup> The usufructuary takes out an insurance policy in his own name and nominates the bare owner as the beneficiary. In instances where the usufructuary property is already insured, the usufructuary continues the payments that correspond to his obligation to insure.<sup>162</sup>

On termination of the usufruct, the usufructuary must return the usufructuary property to the owner.<sup>163</sup> If he allowed a third party to exercise the usufruct or has somehow lost the property, he must place the owner in possession.<sup>164</sup> If he rented out

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<sup>160</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 289.

<sup>161</sup> BGB § 1045; J Wilhelm *Sachenrecht* (4 ed 2010) 771; BGB § 273; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 771-772; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 181. See also AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 290.

<sup>162</sup> BGB §§ 1045 and 1046; R Jansen & M Jansen *Der Nießbrauch im Zivil- und Steuerrecht* (8 ed 2009) 68. See also AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 290.

<sup>163</sup> BGB § 1055; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 187.

<sup>164</sup> BGB § 1059; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 187.

or pledged the property he must give indirect possession to the owner.<sup>165</sup> The owner becomes the substitute of the usufructuary in the agreement with the third party.<sup>166</sup>

To summarise, the duties of the usufructuary according to German law is still subject to the pervasive requirement to respect the economic destination of the usufructuary property. However, there seems to be differing opinions about the flexibility that this specific wording allows, some more conservative than others. In terms of specific duties it is interesting to note that the burden of framing inventory is conceptualised as a right and that the liability for payment is accorded to the party who requests the inventory. Furthermore, the security duty is qualified in the sense that the bare owner may only demand it where the risk of impairment of the substance exists. On the other hand, the duty to ensure differentiates the German law from other jurisdictions and places a more onerous burden on the usufructuary, but in a sense explains the rather limited scope of the security duty. In this sense, the duty to ensure would probably be a better solution than demanding security. It is therefore difficult to make an unqualified statement about the extent to which the *salva rei substantia* requirement is flexible in German law. The general limitation of good management does not distinguish the German law from other jurisdictions, but the emphasis on the economic destination might to a certain extent – although writers are divided on this point.

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<sup>165</sup> P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 187.

<sup>166</sup> BGB § 1056 I; 571 I; P Deichmann *Das Rechtsverhältnis zwischen Eigentümer und Nießbraucher (ENV) im Antiken Römischen Recht und im Heutigen Zivilrecht* (1998) unpublished doctoral dissertation Rheinischen Friedrich-Wilhelms-Universität 187-188.

### 3 3 4 Termination and remedies

The usufruct ends when the property is totally destroyed.<sup>167</sup> However, if a house is burnt down the usufruct on the land does not end, but continues on the rebuilt house.<sup>168</sup> Usufruct can only be terminated if the usufructuary property is disposed of and the person who acquires it was in good faith.<sup>169</sup> In cases of real subrogation the usufruct continues on the substitute of the usufructuary property.<sup>170</sup>

## 3 4 Usufruct in Belgian law

### 3 4 1 Introduction

In Belgium the changes to usufruct were earlier than in the Netherlands. Usufruct, quitrent and building rights are old concepts of law that were infrequently used until the 1960s.<sup>171</sup> Usufruct was particularly made more popular as a legal institution due to the Act of 14 May 1981 that amended the Belgian law of succession pertaining to the surviving spouse.<sup>172</sup> Since usufruct originated in a time when there were few provisions of mandatory law (“*dwingend recht*”) it is flexible and therefore deviations

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<sup>167</sup> R Jansen & M Jansen *Der Nießbrauch im Zivil-und Steuerrecht* (8 ed 2009) 73; HJ Wieling *Sachenrecht Sachen, Besitz und Rechte an Beweglichen Sachen* (2 ed 2006) 681.

<sup>168</sup> *BGH DNotZ* 1965, 165; R Jansen & M Jansen *Der Nießbrauch im Zivil-und Steuerrecht* (8 ed 2009) 73; H Prütting, F Lent & KH Schwab *Sachenrecht Ein Studienbuch* (33 ed 2008) 365 Rn 915.

<sup>169</sup> *BGB* §§ 936 & 892; R Jansen & M Jansen *Der Nießbrauch im Zivil-und Steuerrecht* (8 ed 2009) 73

<sup>170</sup> *BGB* §§ 1046 & 1075.

<sup>171</sup> D Michiels “Actuele Ontwikkelingen inzake Vruchtgebruik, Erfpacht en Opstal” (2006) 7 *Not Fisc M* 191-209 191.

<sup>172</sup> D Michiels “Actuele Ontwikkelingen inzake Vruchtgebruik, Erfpacht en Opstal” (2006) 7 *Not Fisc M* 191-209 191; G Poppe “Hoe Veilig Zijn Vruchtgebruikoperaties?” 1999 *T Not* 293-303 293. See also P Carlier & K Verheyden *Vruchtgebruik* (1998) 15 no 10.

from most legislative provisions that regulate them are possible – this frequently happens in practice.<sup>173</sup>

In contrast to Dutch law, the definition of usufruct in the Belgian civil code still retains the maintenance obligation. *BBW 578* describes usufruct as:

“Het recht om van een zaak waarvan een ander de eigendom heeft, het genot te hebben, zoals de eigenaar zelf, maar onder verplichting om de zaak zelf in stand te houden”.

This definition should be qualified since the obligation to preserve the substance of the usufructuary object is not applicable to all usufructs.<sup>174</sup> Furthermore, the reference to enjoyment *like the owner* can be misleading, since although the usufructuary has the right to use the usufructuary object and to enjoy the fruits, he does not have the right to dispose of the property.<sup>175</sup> The usufructuary is restricted in his use and enjoyment of the object by the limits set by the destination allocated by the owner at the commencement of the usufruct.<sup>176</sup> Moreover, the standard of the *bonus paterfamilias*

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<sup>173</sup> D Michiels “Actuele Ontwikkelingen inzake Vruchtgebruik, Erfpacht en Opstal” (2006) 7 *Not Fisc M* 191-209 191.

<sup>174</sup> *BBW 587* deals with quasi-usufruct (*oneigenlijk vruchtgebruik*); P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 11.

<sup>175</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 1-2; R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 51; P Carlier & K Verheyden *Vruchtgebruik* (1998) 9; A Kluyskens *Zakenrecht. Beginselen van Burgerlijk Recht* (1940) 162 no 143.

<sup>176</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 1-2.

also delineates his use and enjoyment.<sup>177</sup> Carette and Del Corral therefore rather endorse the definition of Herbots, who describes usufruct as a real and temporary right to use the property of another in accordance with its destination and to enjoy the usufructuary object as a *bonus paterfamilias*.<sup>178</sup> Recently, the gendered concept of the *bonus paterfamilias* has also been challenged in French law and the question remains whether Belgian law will follow suit.<sup>179</sup>

Verbeke and Vanhove view the duty to return the usufructuary property (*teruggaveplicht*) embodied in article 578 *BBW* as a pivotal concept of usufruct and accordingly all rights and obligations of the usufructuary should be fleshed out with reference to it.<sup>180</sup> In the following sections these rights and duties which specifically reflect the *salva rei substantia* requirement will be discussed.

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<sup>177</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 1-2. For further criticism see R Derine, F van Neste & H Vandenberghe *Zakenrecht Deel II A* (1984) 331 no 840.

<sup>178</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 1-2. See also P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 11 citing Cass 3 July 1879 *Pas* 1879 I 342 and H Vandenberghe “Actuele Problemen van het Vruchtgebruik” (1983) *TPR* 53-88.

<sup>179</sup> I want to thank Professor Vincent Sagaert for pointing this change out to me. The French Assembly amended legislation resulting in the replacement of the concept of the *bonus paterfamilias* by the terms ‘raisonnable’ or ‘raisonnablement’. According to article 26 of Law 2014-873 issued on 4 August 2014 the term “*bon père de famille*” must be substituted in nine articles of the *CC* and one article of *Code de Consommation*, the *Code Rural et de la Pêche*, the *Code de l’Urbanisme* and the *Code de la Construction et de l’Habitation*. The rationale for this substitution is the real equality between men and women. See L Waelkens “Geen Goede Huisvaders meer in het Franse Recht” (2014) 8 *RW* 282; JM Smits “Adieu Bon Père de Famille” (2014) 145 *WPNR* 303-304.

<sup>180</sup> A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 77.

Recent academic writing on the law of usufruct in Belgium provides a useful starting point for rethinking the doctrinal and practical impact of usufruct in a modern context. Contributions on the Belgian law of usufruct were prompted by the need for clarity articulated by practitioners and the aspiration to optimize the boundaries of usufruct both fiscally and in terms of civil law.<sup>181</sup> Creative ways are for instance sought to optimize usufruct within the context of the law of succession for the benefit of the testator and the heir, while minimizing loss of control and income.<sup>182</sup> Belgian law emphasises the destination of the object rather than its material identity to enable certain acts of disposition; allows for alteration of the destination where socio-economic transformation in society is evident; and utilizes a strategic construction of the object of the usufruct. These mechanisms allow for a flexible approach to the *salva rei substantia* requirement.

#### 3 4 2 Rights of the usufructuary

The usufructuary has the right to use the property subject to the usufruct and to enjoy its fruits.<sup>183</sup> The right to enjoy the fruits does not present problems in relation to the duty to maintain the usufructuary property, since the fruits become the property of the usufructuary.

Regarding the right to use the property subject to the usufruct, on the other hand, the question might be whether an entitlement to use could conflict with the duty to

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<sup>181</sup> See V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) dust cover; A Verbeke “Inleiding” in A Verbeke *Creatief met Vruchtgebruik M & D Seminars* (2001) 3-7 3-4.

<sup>182</sup> A Verbeke “Inleiding” in A Verbeke *Creatief met Vruchtgebruik M & D Seminars* (2001) 3-7 4.

<sup>183</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 405, 412-413.

maintain the usufructuary property and in this sense impact the *salva rei substantia* requirement. Use refers to material acts<sup>184</sup> that preserve the capital value<sup>185</sup> of the usufructuary property and to acts of control,<sup>186</sup> that is, juristic acts which do not modify the proprietary deed (*zakerechtelijke statuut*) of the property given in usufruct. Jansen and Swinnen set out the content of the right to use in more detail.<sup>187</sup> They categorise the competencies into acts of control, acts of preliminary (*voorlopige*) control and acts of maintenance, the right to build on the immovable property, the right to grant praedial servitudes on immovables which are the object of the usufruct, the right to grant a building right (*opstalrecht*), the right to grant a usufruct, the right to grant a long lease and the right to grant personal rights of enjoyment.<sup>188</sup>

Acts of control must be in harmony with the *bonus paterfamilias* standard.<sup>189</sup> Acts of preliminary control serve the purpose of protecting the goods or the fruit produced against sudden disadvantages or events or to prevent the loss of sudden or temporary

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<sup>184</sup> According to R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 52 material acts refer to the normal use rights and the usufructuary may make use of all material and juristic accessories of the property given in usufruct as well as the objects which become part of the property during usufruct. V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 188 notes that material acts might for example include access to the relevant premises or the use of a house.

<sup>185</sup> According to V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 188 preserving the capital value would allow for fair wear and tear, but not for additional damage to the usufructuary property.

<sup>186</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 188.

<sup>187</sup> R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 52-57.

<sup>188</sup> 52-57.

<sup>189</sup> 52.

benefits.<sup>190</sup> Acts of maintenance serve to safeguard the capital value of a usufructuary object, the existence, scope or the effectiveness of a right. The right to build on the immovable property subject to the usufruct may only be utilised in accordance with the destination of the usufructuary object and conditions in the deed.<sup>191</sup>

The right to dispose of the usufructuary object does in principle not form part of the competencies inherent to the right to use the object of the usufruct,<sup>192</sup> nor can the usufructuary grant a pledge or a hypothec on the usufructuary property.<sup>193</sup> Certain rights of disposition, namely certain juristic acts granting real rights, may under certain conditions be granted to the usufructuary.<sup>194</sup> These rights are delineated by the destination of the usufructuary object and the *nemo plus* rule.

In cases where the usufructuary has full enjoyment over immovables given in usufruct, he may grant praedial servitudes on them.<sup>195</sup> Since he has full enjoyment, he may also have lesser enjoyment due to the burdening of his right of enjoyment by a praedial servitude. However, the duration of such a praedial servitude is restricted to the duration of the usufruct unless the bare owner collaborated with the usufructuary at the granting of the usufruct and the former granted the usufruct without any reservation concerning the duration. In this case the praedial servitudes might potentially be perpetual and survive the duration of the usufruct.

Jansen and Swinnen do not see the granting of a building right (*opstalrecht*) as problematic on the condition that the content of the right specifies that the facilities will

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<sup>190</sup> 53.

<sup>191</sup> 53-54.

<sup>192</sup> 54.

<sup>193</sup> 56-57.

<sup>194</sup> 54.

<sup>195</sup> 55.

not alter the destination of the immovable goods given in usufruct.<sup>196</sup> The granted building right will also be restricted to the duration of the usufruct. In cases where the usufructuary grants a usufruct, the second usufructuary may not receive more rights than the first.<sup>197</sup> The obligation to respect the destination of the property subject to the usufruct also rests on the second usufructuary. However, in the case of a long lease, the same obligation does not rest on the lessee. The granting of a long lease by a usufructuary will also result in a more onerous burden on the lessee in relation to the bare owner. Jansen and Swinnen question whether this long lease still qualifies as a long lease and whether it should not rather be viewed as a usufruct.<sup>198</sup>

The usufructuary does not have the power to grant real security rights on usufructuary property.<sup>199</sup> This right would be in conflict with the right to use the usufructuary property as a *bonus paterfamilias* and the requirement to return the property subject to the usufruct on termination of the usufruct. Furthermore, article 73 of the *Hypotheek Wet* stipulates that the mortgagor should have the capacity to alienate the immovable property. This is also true of the pledgor. Security rights granted by the usufructuary will not stand in relation to the bare owner either.

According to *BBW* 595, the usufructuary may grant personal rights of enjoyment.<sup>200</sup> *BBW* 1165 states that these rights will not hold against the bare owner on termination of the usufruct either, based on the relativity of agreements. An

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<sup>196</sup> R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 55.

<sup>197</sup> 56.

<sup>198</sup> 56.

<sup>199</sup> 56.

<sup>200</sup> 57.

important exception is the granting of leases for periods longer than nine years. In this case the bare owner should tolerate the lease agreement until the termination of the nine year period during which the usufruct comes to an end.

The entitlement to use the usufructuary property is restricted by the destination of the property and by the obligation to use it as a *bonus paterfamilias*.<sup>201</sup> The obligation to act as a *bonus paterfamilias* also follows from *BBW* 578 and is even applicable where the owner did not take care of his property and or misused it (that is the owner did not respect the destination of the usufructuary property).<sup>202</sup>

Although the content of the entitlement of control is to certain extent specified and there exists safeguards where control might be interpreted as the competence to dispose, Jansen and Swinnen note two instances where the content of the usufructuary's entitlements are not so clear. In the first place the content of the right of use and enjoyment is not always clearly delineated.<sup>203</sup> Secondly, cases where the usufructuary is allowed to dispose of the usufructuary property under particular conditions also present a challenge, since there is not consensus about this entitlement and the boundaries of the entitlement to dispose need to be clarified.<sup>204</sup> Jansen and Swinnen focus on contemporary examples of usufructuary property presenting problems.<sup>205</sup> An example more relevant to this study is the question

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<sup>201</sup> V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 406.

<sup>202</sup> 407.

<sup>203</sup> R Jansen & K Swinnen "De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker" in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 62.

<sup>204</sup> 62; 68.

<sup>205</sup> Examples from Belgian law noted by R Jansen & K Swinnen "De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker" in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 62-64 but not considered here

whether the bare owner or the usufructuary should be able to collect debt claims.<sup>206</sup> The majority opinion seems to be that the usufructuary has the right of collection since the normal use of a debt would involve the collection of it, the destination of the claim will be collection and the patrimonial value of the usufructuary property would be maintained through collection. Arguments against allowing the usufructuary to collect the claim include that the usufruct changes its structure through collection, since the usufruct would henceforth be on a consumable. The usufructuary therefore becomes a quasi-usufructuary and becomes the owner of the payment received. This result has both practical and juridical disadvantages.<sup>207</sup> In terms of the practical outcome the bare owner becomes responsible for the risk of insolvency. Juridically, the usufructuary acquires property through his own actions and the claim amounts to an act of disposition. Advocates<sup>208</sup> of this position propose that the usufructuary and the bare owner should collect the debt together to avoid the transformation of usufruct into quasi-usufruct. Proponents<sup>209</sup> of the view that the bare owner is the only viable collector of the debt argue that a consequence of the right to collect the interest on the debt would be that the collection of the debt itself would not be possible. Jansen and Swinnen try to reconcile the opposing positions by suggesting that the usufructuary collects the debt by transferring the claimable amount to an account opened especially

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since they fall outside the scope of the study are the use and enjoyment on a partnership share and the delineation of voting rights in the general meeting of co-owners.

<sup>206</sup> 64.

<sup>207</sup> 65.

<sup>208</sup> See H de Page & R Dekkers *Traité Élémentaire de Droit Civil Belge* VI (1953) 252-254 paras 323; R Dekkers & Dirix *Handboek Burgerlijk Recht* II (2005) 212-213 paras 533-534; V Sagaert *Zakelijke Subrogatie* (2003) 127-129 para 146.

<sup>209</sup> See Brussel 8 March 1988 *RW* 1988-89 650; E van Arensbergh *Traité de l'Usufruit* (1936) para 1029.

for this purpose.<sup>210</sup> The usufruct then remains on a debt claim against the credit institution while the usufructuary has collected the debt.

The second problematic entitlement concerns the question of the extent to which a usufructuary is allowed to dispose of the usufructuary property. The usufructuary has the power to dispose of the object of the usufruct when it amounts to an act of control, for example when a usufruct is granted on a universality and when consumables form the object of the usufruct and his right to use will amount to an act of disposition. In the first case, usufruct on a business concern and usufruct on a portfolio of shares (*effectenportefeuille*) would be examples,<sup>211</sup> but the latter fall outside the scope of this study. In these examples the usufructuary may dispose of the things constituting the universality, without having the power to dispose of the universality as a whole, since he has to maintain the latter. Since the usufructuary has the right to exploit the business concern, he may sell the stock and buy new stock with the proceeds. Equipment must also be replaced if it becomes worn out. The usufructuary's acts of disposition flow from his position as controller of the usufructuary property.

The disposition powers of the usufructuary are restricted by the requirement that the acts must be necessary for good control according to an objective standard.<sup>212</sup> A high risk of loss of value should prompt the granting of these disposition powers.

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<sup>210</sup> R Jansen & K Swinnen "De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker" in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 65.

<sup>211</sup> 66.

<sup>212</sup> 68.

The usufructuary also has disposition powers if his right pertains to consumables. This results from the fact that the use of consumables amounts to an act of disposition extinguishing the usufructuary property. However, this example also falls outside the scope of this study.

Both Jansen and Swinnen and Sagaert<sup>213</sup> caution that the entitlement to dispose<sup>214</sup> must be carefully delineated and approached with care. There has been a tendency to grant “functional disposition powers” to the usufructuary in the sense that he only has to respect the destination of the usufructuary property.<sup>215</sup> This development is motivated by the Dutch construct of usufruct with the entitlement to “alienate and spend” (*interingsbevoegdheid*).<sup>216</sup> Jansen and Swinnen are of the opinion that this “disposition power” is dictated by the destination of the usufructuary property that allows the usufructuary to dispose as an act of control. In these cases it must be necessary, objectively speaking, to dispose of the usufructuary property to avert the concrete risk of value loss.<sup>217</sup> According to Sagaert the underlying principle of the *nemo plus* rule cannot be avoided and consequently the entitlements granted

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<sup>213</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 416.

<sup>214</sup> For literature in favour of a wider interpretation of disposition see A Verbeke & K Vanhove “Spelen met het voorwerp van vruchtgebruik” (2004) in Lecocq P, Tilleman B & Verbeke A *Zakenrecht* 173-216; A Verbeke 1999 “Creatief met Vruchtgebruik” *T Not* 530-579 547 paras 54-55; A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129 and A Verbeke, B Verdickt and D Maasland “The Many Faces of Usufruct” in CG Van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56 43-44.

<sup>215</sup> 415-416.

<sup>216</sup> *The Civil Code of the Netherlands* (H Warendorf, R Thomas & I Curry-Sumner transl) (2009) art 215.

<sup>217</sup> R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 68.

to the usufructuary resemble disposition powers but cannot be equated to it.<sup>218</sup> Furthermore, the decisions of the courts are not unanimous in this regard.<sup>219</sup> It therefore seems that although the entitlement to control might create circumstances where the power to dispose seems to be granted to the usufructuary, this entitlement flows from the obligation to respect the destination of the usufructuary property. Therefore, it seems that at least doctrinally, the *salva rei substantia* requirement is still recognised and safeguarded. However, as Sagaert indicated there are indications that functional disposition powers are granted to the usufructuary.<sup>220</sup>

### 3 4 3 Duties of the usufructuary and the preservation requirement

Despite the formulation in *BBW 578* that states that the usufructuary may enjoy the usufructuary property like the owner (“*zoals de eigenaar zelf*”), his powers are still restricted.<sup>221</sup> These restrictions are evident from the obligations resting on the usufructuary. Authors agree on the duties prior to entry, namely the obligation to frame inventory and to provide security or surety<sup>222</sup> Furthermore, there is consensus on the

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<sup>218</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 416. This concerns cases where the usufruct is for example established on universalities and debts. In these cases the value of the usufructuary property is more important than the substance of the property.

<sup>219</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 416 refers to Cass 21 February 2006, *Arr Cass* 2006 417 *RABG* 2006 951 note B Meganck and *T Not* 2007 294, note M Muylle; Cass 8 April 2008 *Pas* 2008 845 *TROS* 2008 264.

<sup>220</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 415.

<sup>221</sup> R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 58.

<sup>222</sup> A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 77-78; N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in

duty to pay rates and taxes.<sup>223</sup> However, as far as the other obligations are concerned, there appears to be a confluence of obligations and divergent approaches. The obligation to maintain the usufructuary property, to respect the destination of the property and to use and control it as a *bonus paterfamilias* are either treated as separate duties<sup>224</sup> or conflated.<sup>225</sup> Finally, the term maintenance may refer to “*instandhouding*” in which case authors tend to discuss the duty *in abstracto* without referring to repairs *per se*,<sup>226</sup> or “*onderhoud*” in which case the duty of the usufructuary to effect repairs in order to maintain the usufructuary property is discussed. These duties are to a large extent interwoven.<sup>227</sup>

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V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 18; V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 401-403.

<sup>223</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 23; V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 422.

<sup>224</sup> R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 58.

<sup>225</sup> A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 78.

<sup>226</sup> A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 78 states “De verplichting om de zaak in stand te houden is derhalve een verplichting om de bestemming van die zaak te bewaren en te vrijwaren”. R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 58-59 notes that traditionally this duty refers to the maintenance of the substance of the usufructuary property but that for some types of usufruct such as a usufruct on debts or a universality maintenance would refer to the value of the usufructuary property.

<sup>227</sup> R Jansen & K Swinnen “De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 61.

The usufructuary must firstly frame an inventory (*inventaris of boedelbeschrijving*)<sup>228</sup> concerning movables and a statement (*staat*)<sup>229</sup> pertaining to immovables subject to the usufruct.<sup>230</sup> However, the creation of a right of usufruct is not dependent on the framing of an inventory or a statement.<sup>231</sup> These two documents can be used firstly to determine the scope of the usufruct.<sup>232</sup> Secondly, on termination of the usufruct, they can be used to determine which usufructuary property needs to be returned<sup>233</sup> and thirdly, whether the usufructuary has complied with his duty to return the usufructuary property *salva rei substantia*.<sup>234</sup> In the case of loss of value, it is useful to determine how much damages are owed to the bare owner.<sup>235</sup> The

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<sup>228</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17 describes an inventory as a “summary and description of the movables which form the object of the usufruct”.

<sup>229</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17 describes a statement as a “summary and a description of the immovables which are the object of the usufruct”.

<sup>230</sup> *BBW* 600; V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 401; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 335; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17.

<sup>231</sup> V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 335.

<sup>232</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17.

<sup>233</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 401.

<sup>234</sup> A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 77.

<sup>235</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 401; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 335; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17. V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 401 n 84 suggests that an estimation report might be a useful addition to the statement and the inventory to establish the loss of value on termination of the usufruct. This comment seems to suggest that indications of value in these documents is not a necessary attribute.

descriptions in these documents portray the condition of the usufructuary property at commencement of the usufruct.<sup>236</sup> Another function of the inventory or statement, namely to allow the usufructuary to request the delivery of all the property given in usufruct, can be deduced.<sup>237</sup>

The duty to frame an inventory and a statement is applicable both in the case of a reserved usufruct and where a usufruct is granted, but in terms of a usufruct to the surviving spouse he or she may be relieved where he or she obtained possession of the property by operation of law.<sup>238</sup> In this instance the bare owners may claim an inventory.<sup>239</sup> If the usufructuary does not frame an inventory or prepare a statement, the bare owner may refuse delivery of the usufructuary property, except if he waived the right to an inventory or a statement contractually,<sup>240</sup> or if the usufructuary has the *saisine* of the usufructuary property.<sup>241</sup> Vits is of the opinion that the usufructuary who does not comply with the duty to provide an inventory or a statement cannot enter into enjoyment of the usufructuary property.<sup>242</sup> He cannot use the object of the usufruct or collect the fruits, although the bare owner must account for the fruits that he held back

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<sup>236</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17.

<sup>237</sup> See P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18 citing Cass 16 June 1989 *Arr Cass* 1988-89 1242 and *RW* 1989-90 402.

<sup>238</sup> V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 335.

<sup>239</sup> *BBW 745ter*, V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 335.

<sup>240</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401 refers to Cass 16 June 1989 *Arr Cass* 1988-89 1242 *RW* 1989-90 402; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 335.

<sup>241</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401.

<sup>242</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18 citing Cass 14 November 1958 *Pas* 1959 269 and *RW* 1958-59 888.

during the period of noncompliance.<sup>243</sup> It would be possible for the bare owner to claim an inventory or statement at a later stage even though an initial agreement relieved the usufructuary of the obligation, but the bare owner must then carry the costs involved.<sup>244</sup> This is the case since the obligation to frame inventory is a question of public policy (*openbare orde*)<sup>245</sup> or at least mandatory law (*dwingend recht*), while the liability of costs is a question of supplementary law (*aanvullende recht*).<sup>246</sup> In fact, the obligation to frame inventory and provide a statement is applicable to almost every type of usufruct, even where a reserved usufruct is concerned, except where a hereditary usufruct is at issue and the surviving spouse obtained possession of the usufructuary property by operation of law.<sup>247</sup> In this case the bare owners may require a statement and inventory but may not restrain the usufructuary (the surviving spouse) from obtaining possession of the usufructuary property.<sup>248</sup> The usufructuary is responsible for the costs related to the framing of the inventory and the statement,

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<sup>243</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18.

<sup>244</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 402; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18

<sup>245</sup> *Contra* N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 19 citing Rb Doornik 12 October 1988 *JLMB* 1990 635 636 and Rb Ghent 10 June 2003 *T Not* 2003 622 629. According to the latter case an obligation that is one of public policy would be one that concerns the “essential interests” of the State and the collective or belongs to the fundamental juridical principles underlying the economic and moral regulation of society.

<sup>246</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 402 n 88 notes that there seems to be a growing tendency to view this obligation as mandatory law.

<sup>247</sup> 401.

<sup>248</sup> Art 745ter *BBW*; V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 401 cites Liège 9 December 2003 *TBBR* 2006 135.

since he is the debtor in terms of the legal obligation.<sup>249</sup> Both parties should be pressed to be present when the inventory or statement is drawn up.<sup>250</sup> If a party does not comply he does not have the right to challenge the document.<sup>251</sup> If the usufructuary and the bare owner cannot agree, the usufructuary may turn to the court of first instance for a detailed legal report (*gerechtelijke plaatsbeschrijving*).<sup>252</sup> There are no formal requirements regarding the documents; although notarial documents may be used, non-notarial (*onderhandse*) documents are sufficient.<sup>253</sup> The usufructuary may even make a declaration that he received the usufructuary property in good condition without significant defects and where a hereditary usufruct is concerned the notification of the inheritance will also qualify.<sup>254</sup> If no inventory or statement was drawn up the assumption is that the usufructuary property is returned in the same condition that in which it was received.<sup>255</sup> It is then up to the bare owner to prove the

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<sup>249</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>250</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18 merely notes this as a recommendation to avoid problems connected with contested documents at a later stage.

<sup>251</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>252</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401.

<sup>253</sup> V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 17.

<sup>254</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 401-402.

<sup>255</sup> V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

condition and value of the usufructuary property at inception of the usufruct with all legal evidence (“*met alle bewysmiddelen rechtens*”).<sup>256</sup>

The mandatory character of the inventory in Belgian law seems to be preferable to the legal position in South Africa, where inventory only has to be provided on request of the bare owner, at least to the extent that it would minimise evidentiary complications during litigation regarding the maintenance requirement. Requiring the presence of both the bare owner and the usufructuary during the framing of the inventory also seems like a practical guideline that might be strongly advised in the South African context, where litigants seem uncertain as to the nature and purpose of the inventory.<sup>257</sup> Furthermore, shifting the costs of framing inventory during a later stage to the bare owner where he initially relieved the usufructuary of the duty by means of contract, also seems to be preferable to the South African position where the inventory can probably be required at any point but where it is not clear who bears the costs. Moreover, placing the burden of proof concerning the initial condition of the usufructuary property on the bare owner if no inventory was framed also encourages the framing of inventory at the initial stage. As a peremptory legal provision, the obligation to frame inventory confirms the importance of compliance with the *salva rei substantia* requirement. However, the exception to the sanction of refusing possession in the case of the surviving spouse in a hereditary usufruct points to an important aspect of public policy balancing the requirement, namely to provide for the

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<sup>256</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 402 cites Brussel 3 April 1957 *Pas* 1957 II 253 *Rev Prat Not B* 1960 157; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>257</sup> See 2 4 1 1.

maintenance of the beneficiary,<sup>258</sup> who in most cases would be the surviving spouse.<sup>259</sup> In fact, the hereditary usufruct is the most prevalent type of legal usufruct.<sup>260</sup> The alimentary function is further bolstered by the possibility of converting the usufruct into ownership.<sup>261</sup>

Another duty that should also be complied with prior to entering into usufruct is the duty to provide security or surety.<sup>262</sup> The usufructuary must provide security or surety (*borg te stellen*) at the commencement of the usufruct that he will enjoy his right of usufruct like a prudent administrator (*goede huisvader*)<sup>263</sup> and return the usufructuary property in a condition that can be expected after long term use by a conscientious and prudent person.<sup>264</sup> The duty to provide surety or security is aimed at ensuring that the liability for not complying with the restitution obligation can be

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<sup>258</sup> Compare V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 377; P Carlier & K Verheyden *Vruchtgebruik* (1998) 10, 11.

<sup>259</sup> P Carlier & K Verheyden *Vruchtgebruik* (1998) 11.

<sup>260</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 398.

<sup>261</sup> 398.

<sup>262</sup> Article 601 *BBW* only provides for surety (*borgstelling*). However, according to V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 402 security (*zekerheid*) may be provided in different forms such as surety, mortgage, bank guarantee, pledges on movables or debts, consignment of caution money, or depositing of caution money in a trust client bank account. See also A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 78. I therefore refer to both terms here.

<sup>263</sup> *BBW* 601; V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 402; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18.

<sup>264</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in Meulemans D (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 19.

met<sup>265</sup> and insures the bare owner against possible insolvency of the usufructuary.<sup>266</sup> Surety or security should not be viewed as consideration for the use and enjoyment.<sup>267</sup> Should the usufructuary default on this obligation, the bare owner may refuse to deliver the usufructuary property save where exceptions are concerned.<sup>268</sup> Furthermore, the bare owner may also insist on security not only at the commencement of the usufruct but during the usufruct.<sup>269</sup> Security can be provided in various ways.<sup>270</sup> The value of surety or security must be equal to the amount of the damage the usufructuary would cause if he does not take care of the usufructuary property like a prudent administrator.<sup>271</sup>

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<sup>265</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 402; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>266</sup> A Verbeke & K Vanhove “Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden” in *Zakenrecht Themis* no 16 (2002) 73-102 78; P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 18.

<sup>267</sup> P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 19.

<sup>268</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 403.

<sup>269</sup> 403.

<sup>270</sup> See n 262. V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 402; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336. P Vits “Vruchtgebruik: Burgerrechtelijke Aspecten” in Meulemans D (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 19 also mentions a pledge and cites article 2041 of the *BBW*. However, he states that these options are only available when a surety cannot be found. According to arts 2018-2019 *BBW* and V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 402 should surety be the means of securing the usufructuary property, the surety should be financially able to meet the obligation and his house should be within the jurisdiction of the court. In the case of a *kosteloze borgtocht* arts 2043bis would be applicable.

<sup>271</sup> V Sagaert “Goederenrecht” in *Beginselen van Belgisch Privaatrecht* (2014) 402; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336; Liège 26 July 1893 *Pas.* II 392; Rb Brussel 25 February 1992 *TBBR* 1992 438.

Certain usufructuaries are exempt from providing security, namely parents acquiring legal usufruct on the property of their children and a party reserving usufruct.<sup>272</sup> The purpose of these exemptions is to prevent tension in family relationships due to the obligation.<sup>273</sup> However, it is notable that the surviving spouse is not exempted from the duty to provide security.<sup>274</sup> The bare owner may also exempt the usufructuary from the duty,<sup>275</sup> except where the usufruct is established on property identified as the reserved part of heirs.<sup>276</sup> The possibility of exemption exists since, contrary to the duty to frame inventory, the obligation to provide security is supplementary law.<sup>277</sup> If this exemption takes place, it is in principle irrevocable.<sup>278</sup>

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<sup>272</sup> *BBW* 601; V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 403; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>273</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 403; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336

<sup>274</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 403 cites Liège 9 December 2003 *TBBR* 2006 135.

<sup>275</sup> According to N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 20 and V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 403 this exemption may be express or tacit since it is supplementary law; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>276</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 20; V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 403.

<sup>277</sup> N Carette & J del Corral “De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur” in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 20.

<sup>278</sup> V Sagaert “Goederenrecht” in *Beginnselen van Belgisch Privaatrecht* (2014) 403; V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336

However, if the usufructuary abuses his right, the bare owner can claim security instead of abrogation (*vervalvenverklaring*).<sup>279</sup> Furthermore, the court may also order that security be given in cases of abuse, or even revoke an exemption, since the court has the power to institute conservatory measures to safeguard the interests of the bare owner during the usufruct. An order for security might be a less drastic measure than the other option open to the court, namely abrogation.<sup>280</sup>

In comparison to the South African position the obligation to provide security, unless exemption or contractual exemption applies, provides more legal certainty. Furthermore, the exceptions to the duty to provide security are more limited than in the case of South African law. It therefore seems that the entry level duties of the usufructuary are approached in a more rigid way.

The temporary nature of usufruct compels the usufructuary to maintain the usufructuary property since he has to return the object of the usufruct on termination of the usufruct.<sup>281</sup> Maintenance encompasses both the material, form and character of the object of the usufruct.<sup>282</sup> This traditional approach to the content of the maintenance obligation was developed in relation to usufruct on corporeals, but seems ill-suited to certain forms of usufruct such as usufruct on consumables, usufruct on debts (*schuldvorderingen*) and usufruct on a universality of things (*algemeenheid van*

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<sup>279</sup> V Sagaert, B Tillemans & A Verbeke *Vermogensrecht in Kort Bestek: Goederen- en Bijzondere Overeenkomstenrecht* (2 ed 2010) 336.

<sup>280</sup> N Carette & J del Corral "De Kwalificatie van het Recht van Vruchtgebruik: Contractuele Mogelijkheden en Afbakening tegenover Opstal, Erfpacht en Huur" in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 1-50 21.

<sup>281</sup> R Jansen & K Swinnen "De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker" in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 58.

<sup>282</sup> 59.

*goederen*). In the case of a universality, the composition varies and identification of the universality is therefore problematic. Consequently, the value of the universality is subject to maintenance. The usufructuary must therefore meet the requirement of returning the object of the usufruct by ensuring that the value of the universality at the termination of the usufruct is identical to the value of it at the commencement.

According to Jansen and Swinnen the traditional interpretation of the obligation to respect the destination of the usufruct indicated that the usufructuary may not use the usufructuary property in a different way than the owner.<sup>283</sup> The particular habits and uses of the bare owner pertaining to the property must be emulated. This would enable the bare owner to resume his use after termination of the usufruct. Jansen and Swinnen distinguish the obligation to respect the destination of the usufructuary object from the maintenance obligation.<sup>284</sup> The former dictates that the usufructuary makes identical use of the usufructuary property in comparison to the owner, and the latter that the usufructuary may not let the usufructuary property perish even if the bare owner may do so.

Recently, calls have been made for a more flexible interpretation of the content of this obligation,<sup>285</sup> taking into account the reason why the object of the usufruct is of

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<sup>283</sup> 60.

<sup>284</sup> 60.

<sup>285</sup> R Jansen & K Swinnen "De Contractuele Modulering van de Gebruiks- en Beschikkingsbevoegdheden van de Vruchtgebruiker" in V Sagaert & A Verbeke (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en Innovaties* (2012) 51-90 60. V Sagaert "Oude Zakenrechtelijke Figuren met Nut voor een Moderne Familiale Vermogensplanning" in *XXXe Postuniversitaire Cyclus Willy Delva 2003-04 Familiale Vermogensplanning* (2004) 205-274 231 refers to A Verbeke & K Vanhove "Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden" in *Zakenrecht Themis* no 16 (2002) 73-102 78; A Verbeke 1999 "Creatief met Vruchtgebruik" *T Not* 530-579 547 para 54 and E Dockes "Essai sur la Notion d'Usufruit" 1995 *Rev Trim Dr Civ* 479-507 487-494.

importance. In instances where the patrimonial value of the object is more important than its material value, a flexible interpretation would allow for the sale of the usufructuary object and reinvestment in things of a similar nature. The locus of the destination is therefore the value of the object. What must be maintained is the financial value and the potential to realise the usufructuary object. The duty to maintain is also an obligation to respect and reserve the destination of the usufructuary object. This reciprocity underlines the fact that the boundary between the duty to maintain and the duty to respect the destination may blur in certain instances.<sup>286</sup> Jansen and Swinnen note that the flexible approach is not a justification for allowing the usufructuary to dispose of the usufructuary property.<sup>287</sup>

The usufructuary acts as a *bonus paterfamilias* when he respects the destination.<sup>288</sup> He must therefore act in such a way that the financial value of the usufructuary object is not less at the termination of the usufruct than it was at the commencement of the usufruct. The requirement to respect the destination of the object of the usufruct raises questions when the owner used the property in an abusive way. The usufructuary should then be allowed to choose another way of use which corresponds to the way of use a “normal, reasonable and cautious” *bonus paterfamilias* would select. This would also be a prudent option when the bare owner has not designated a destination for the usufructuary property.<sup>289</sup>

Based on the duties to maintain the object, to respect the destination of the usufructuary property and to act as a *bonus paterfamilias*, the usufructuary must effect

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<sup>286</sup> 61.

<sup>287</sup> 61.

<sup>288</sup> 61.

<sup>289</sup> 62.

repairs where it is necessary to maintain the property, regardless of whether the repairs were caused by a reason beyond his control. The scope of these repairs<sup>290</sup> excludes extraordinary repairs (*grove herstellingen*),<sup>291</sup> except when these were caused by the lack of maintenance since commencement of the usufruct<sup>292</sup> or were necessary at the commencement of the usufruct.<sup>293</sup> Although article 606 *BBW* describes extraordinary repairs that mainly concern walls and roofs, it is only applicable to buildings for daily use foreseen by the legislature in 1804. It excludes movables and certain immovables. In cases where article 606 is not applicable, large renovations and building work to ensure the stability and maintenance of the entire building and which would be exceptional and would be a capital expense, qualify as serious repairs.<sup>294</sup>

Finally, the usufructuary is also obligated to pay the normal or annual rates and taxes, while extraordinary rates and taxes should be paid by the bare owner. This duty is also supplementary law and therefore the parties may deviate from this obligation contractually.<sup>295</sup>

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<sup>290</sup> See the examples given by the Ruling Commission which include paint work (not including initial paint work), varnishing, cleaning wells, repairing floors, ceilings, stairs, roofs, cleaning and repairing chimneys, maintenance and repairs of lifts and water pumps, replastering, new carpeting.

<sup>291</sup> *BBW* 605-606; V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 419.

<sup>292</sup> A Verbeke & K Vanhove "Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden" in *Zakenrecht Themis* no 16 (2002) 73-102 80.

<sup>293</sup> V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 420.

<sup>294</sup> V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 420; A Verbeke & K Vanhove "Actualia Vruchtgebruik, Erfpacht, Opstal en Erfdienstbaarheden" in *Zakenrecht Themis* no 16 (2002) 73-102 80 citing Cass 22 Januari 1970 *RCJB* 1971 470 note J Hansenne and Liège 7 July 1998 *TBBR* 2001 107.

<sup>295</sup> V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 422.

### 3 4 4 Termination and remedies

If the usufructuary property is destroyed either materially or juridically, the usufruct is terminated.<sup>296</sup> The destruction must be of a permanent nature and be caused by an accident or *force majeure*. Temporary impossibility due to for instance a flood, does not result in termination of the usufruct. In Belgian law usufruct may be terminated due to the abuse of the usufructuary property by the usufructuary.<sup>297</sup> Abuse might entail damaging or refraining from maintaining the property. The latter constitutes the most prevalent form of abuse. Normal wear and tear resulting from normal use according to the destination of the usufructuary property does not lead to liability.<sup>298</sup> Furthermore, not respecting the destination of the property or not acting as a *bonus paterfamilias* or acts of disposition can be grounds for abrogation.<sup>299</sup> However, the court should take into account all the relevant circumstances before giving an order of abrogation. The court has a discretion in this regard and may give an order for a partial abrogation, damages or additional security.<sup>300</sup> On termination of the usufruct the property subject to the usufruct must be returned *in natura*.<sup>301</sup> In cases where the usufructuary cannot return the usufructuary property, he is liable, except where he can prove that his noncompliance is due to *force majeure*.

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<sup>296</sup> 617: 6 *BBW*; <sup>296</sup> P Vits "Vruchtgebruik: Burgerrechtelijke Aspecten" in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 31.

<sup>297</sup> Art 618; V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 442; P Vits "Vruchtgebruik: Burgerrechtelijke Aspecten" in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 32.

<sup>298</sup> Art 589 *BBW*; V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 445.

<sup>299</sup> Rb Aarlen 19 October 1971 *Jur Liège* 1971-72 304; V Sagaert "Goederenrecht" in *Beginselen van Belgisch Privaatrecht* (2014) 442; P Vits "Vruchtgebruik: Burgerrechtelijke Aspecten" in D Meulemans (ed) *Vruchtgebruik, Erfpacht en Opstal* (1998) 11-36 32-33.

<sup>300</sup> 443.

<sup>301</sup> 445.

In contrast to South African law and German law the duties to frame inventory and provide security afford more legal certainty. The effect of these duties are also somewhat less severe on the usufructuary in the sense that an owner who does not demand inventory at an initial stage, but changes his mind must bear the costs himself. These duties before entry do not reflect a flexible approach to the *salva rei substantia* requirement. In terms of the disposition powers of the usufructuary, there seems to be difference of opinion. Although some authors argue that flexibility regarding the *salva rei substantia* requirement may be possible due to the granting of functional disposition powers, it seems that the caution advocated by others might lead to the conclusion that the powers of the usufructuary might only *prima facie* appear more flexible, since it seems that in certain circumstances he has disposition powers, but that these powers actually just resemble the entitlement to dispose. Where powers resemble disposition powers, they are finally still subject to the destination of the usufructuary property and the *bonus paterfamilias* standard. The fact that usufruct may be terminated due to abuse, particularly due to an omission to maintain, confirms that the *salva rei substantia* requirement is still significant.

## 3 5 Usufruct in Louisiana state law

### 3 5 1 Changed nature of usufruct

In Louisiana state law usufruct has always played an important role in the law of succession, but even in this jurisdiction changes were unavoidable and the legislator revised the law pertaining to usufruct in 1976.<sup>302</sup> Changes were the result of the work

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<sup>302</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) xix; AN Matasar "The Usufruct Revisions: The Power to Dispose of Nonconsumables Now Expressly Includes

of a committee consisting of experts who took into account the substance and form of the civilian tradition in Louisiana, possible solutions emerging from doctrine, jurisprudence, legislation from other civil law countries such as France, Germany and Greece, and contemporary conditions.<sup>303</sup> These changes were necessary because the provisions pertaining to usufruct in the 1870 *La CC* were mainly drafted with conventional usufructs<sup>304</sup> of immovables in mind and were out of step with a context where more than ninety percent of usufructs in Louisiana are legal usufructs<sup>305</sup> and usufructuary property includes both movables and immovables.<sup>306</sup> The redactors consequently formulated rules that were suitable for the objects of legal usufructs and particularly focused on the usufruct of the surviving spouse,<sup>307</sup> the most prevalent usufruct.<sup>308</sup> The prevalence of the usufruct of the surviving spouse must be seen in the context of the general tendency to increase the rights and particularly the succession status of the surviving spouse.<sup>309</sup> Furthermore, where the provisions of the

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Alienation, Lease and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct?" (2012) 86 *Tul L Rev* 787-822; D Tooley-Knoblett, JL Carriere & JR Trahan *Yiannopoulos' Civil Law Property Coursebook* (9 ed 2009) 733-734; Committee on Significant Legislation, Real Property Division "Legislation Affecting Real Property" (1977) 12 *Real Prop Prob & Tr J* 1-48 8.

<sup>303</sup> D Tooley-Knoblett, JL Carriere & JR Trahan *Yiannopoulos' Civil Law Property Coursebook* (9 ed 2009) 733-734.

<sup>304</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 12 notes that a conventional usufruct is a usufruct established by a juridical act. Conventional usufructs are categorised as either contractual or testamentary usufructs.

<sup>305</sup> According to JR Trahan *Louisiana Law of Property: A Précis* (2012) 188 and AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 12 legal usufructs are established by operation of law.

<sup>306</sup> D Tooley-Knoblett, JL Carriere & JR Trahan *Yiannopoulos' Civil Law Property Coursebook* (9 ed 2009) 734.

<sup>307</sup> Article 890 *La CC*.

<sup>308</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011)

<sup>309</sup> DM Lloyd "New Hope for the Survivor: The Changes in the Usufruct of the Surviving Spouse" (1982) 28 *Loy L Rev* 1095-1195 1097-1098. This movement is not restricted to the state of Louisiana – Lloyd

1870 code were aimed at expressing the intention of the contract parties or of the grantor, the new legislation had the purpose to balance the interests of the bare owner and the usufructuary. Taking into account that the most typical example of a usufructuary is a surviving spouse whereas the most prevalent bare owners would be children from the marriage of the deceased, the broadening of the rights of the usufructuary may be justifiable. Moreover, where a conventional usufruct still exists, the grantor may restrict the rights of the usufructuary through express provisions.

Particularly, a shift in the composition of patrimony from predominantly immovable property to movables with an emphasis on securities, coupled with a shift in societal views concerning the protection of patrimony versus the preference regarding provision for the surviving spouse can be observed. The inflexibility of the obligations relating to the *salva rei substantia* requirement led to the codification of the usufructuary's power and his right to dispose of nonconsumables in 1976. Recent revisions attempted to clarify the power of the usufructuary by stating that the power to dispose includes the right of alienation, lease (even beyond the length of the usufruct) and encumbrance of the property. Scholars are divided on the impact of the revision. Nathan concludes that the revision does not amount to a fundamental change, but that it does clarify the law and provides "more modern and flexible rules that account for societal and legal developments that have taken place since 1976".<sup>310</sup> Matasar states that the change has "significantly broadened the codification of this

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also mentions the example of Quebec. The trend relates to changes in the family structure and the diminishing importance of the biological relationships and of keeping family wealth secured by transmitting it to blood relations. Furthermore, marriage ties which in the past were of an economic nature, have acquired an emotional character and therefore provision for the surviving spouse has become an important factor in the law of succession.

<sup>310</sup> M Nathan "2010 Revision of the Law of Usufruct" (2011) 57 *Loy L Rev* 227-236 227.

freedom” as the usufructuary may now control the property in a way that will “potentially impact and obligate the bare owner long after the termination of the usufruct”.<sup>311</sup> Louisiana also provides an example of a jurisdiction where innovations in the law of usufruct were implemented during the twentieth century, having unanticipated consequences which resulted in practical and theoretical problems. Similar to the *BW* and the *BGB*, the *La CC* definition does not contain the *salva rei substantia* requirement but acknowledges that the nature of the object plays a pivotal role in the determination of its characteristics.

Matasar remarks that the balance between the usufructuary and the owner has shifted with each revision<sup>312</sup> and that the 2010 *La CC* revision “reflects a continuing trend whereby the usufructuary is granted increasing authority”. Exploring whether the balance between the usufructuary and the owner has shifted in South African law and whether it should shift could prove to be an interesting question. Another point to ponder would be if the current balance is warranted, considering constitutional objectives. The implications of the 2010 revision might also indicate whether more flexible interpretations of the *salva rei substantia* requirement indeed do provide the answer.

The definition of usufruct as worded in the 1976 Revision and incorporated in *La CC* 535 does not refer to the *salva rei substantia* requirement:

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<sup>311</sup> AN Matasar “The Usufruct Revisions: The Power to Dispose of Nonconsumables Now Expressly Includes Alienation, Lease and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct?” (2012) 86 *Tul L Rev* 787-822 795-796.

<sup>312</sup> 788.

“Usufruct is a real right of limited duration on the property of another. The features of the right vary with the nature of things subject to it as consumables or nonconsumables”.<sup>313</sup>

In contrast, the 1870 *La CC 534* distinguished between perfect and imperfect or quasi usufruct.<sup>314</sup> Perfect usufruct was applicable to nonconsumables which could be enjoyed without altering their substance, taking into account that the substance could nevertheless diminish or deteriorate as a result of time or due to use.<sup>315</sup> Imperfect usufruct applied to consumables which would only be of use to the usufructuary if consumption, expending or altering the substance was possible.

Although on the surface it seems as if the institution of imperfect usufruct was done away with, the fact that different rules still apply in effect still maintains the distinction. Instead, the Louisiana classification of the usufructuary object determines the characteristics of the usufruct.<sup>316</sup> The inherent features and objective criteria are used to classify usufructuary objects. The features of consumables stipulated by article 536 include use which would inevitably amount to consumption or expending or altering the substance. Examples of consumables are “money, harvested agricultural products, stocks of merchandise, foodstuffs, and beverages”.<sup>317</sup> The second paragraph of the source provision of the 1870 *La CC 534*, was interpreted by case law to refer to

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<sup>313</sup> *La CC 535*; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 2-3.

<sup>314</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 2.

<sup>315</sup> 3-4.

<sup>316</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 4.

<sup>317</sup> *La CC 536*; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 4.

money,<sup>318</sup> promissory notes,<sup>319</sup> certificates of deposit,<sup>320</sup> negotiable instruments to the bearer,<sup>321</sup> bales of cotton<sup>322</sup> and stocks of merchandise.<sup>323</sup>

Nonconsumables can be enjoyed without changing their substance, allowing for deterioration or diminishing as result of time passing or by use.<sup>324</sup> Examples are “lands, houses, shares of stock, animals, furniture, and vehicles”.<sup>325</sup> Case law related to the first paragraph of the source provision held that shares of stock were nonconsumables.<sup>326</sup>

Yiannopoulos notes that it is also possible to treat specific nonconsumables as consumables in the service of contractual freedom.

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<sup>318</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 4 n 14 cites *Mariana v Eureka Homestead Soc* 181 La 125 158 So 642 (1935); *Gryder v Gryder* 37 La Ann 638 (1885); *Succession of Bickham* 197 So 924 (La Ct App 1st Cir 1940); *Danna v Danna* 161 So 348 (La Ct App 1st Cir 1935) and *Johnson v Bolt* 146 So 375 (La Ct App 2d Cir 1933).

<sup>319</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 4 note 15 cites *Succession of Block* 137 La 302 68 So 618 (1915); *Miguez v Delcambre* 125 La 176 51 So 108 (1910); *Kahn v Becnel* 108 La 296 32 So 444 (1902).

<sup>320</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5 note 16 cites *Vivian State Bank v Thomason-Lewis Lumber Co* 162 La 660 111 So 51 (1926).

<sup>321</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5 note 17 cites *Taylor v Taylor* 189 La 1084 181 So 543 (1938) and *Johnson v Bolt* 146 So 375 (La Ct App 2d Cir 1933).

<sup>322</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5 note 18 cites *Succession of Hayes* 33 La Ann 1143 (1881).

<sup>323</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5 note 19 cites *Succession of Trouilly* 26 So 851 (La 1899) and *Succession of Blancand* 19 So 683 (La 1896).

<sup>324</sup> *La CC 537*; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5.

<sup>325</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5.

<sup>326</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5 note 22 cites *Leury v Mayer* 122 La 486 47 So 839 (1908); *Succession of Heckert* 160 So 2d 375 (La Ct App 4th Cir 1964); *Milton v Mulla* 526 F 2d 968 (5th Cir 1976).

The rights of the usufructuary also flow from the classification of the object of the usufruct as either consumables or nonconsumables. The usufructuary may in the case of nonconsumables possess the usufructuary property and enjoy the “utility, profits and advantages” thereof, but remains under the obligation to preserve the substance of the usufructuary object.<sup>327</sup> However, the usufructuary may be relieved from the obligation to preserve the substance by the grantor.<sup>328</sup> An example would be where the grantor gives the usufructuary the power to sell the thing. The usufruct of nonconsumables may in this instance be converted into a usufruct of consumables, and the right of enjoyment consequently attaches to the proceeds of the sale. Another example would be where a usufructuary sells the assets of a succession to meet obligations toward creditors and the usufruct attaches to the residual cash after payment of debts.<sup>329</sup> A third example would be when nonconsumables are converted to money after an expropriation in the interest of public utility. Liquidation instituted without any act of the usufructuary will also convert the usufruct to one of consumables based on the principle of real subrogation.<sup>330</sup>

However, the conversion of nonconsumables into consumables must be authorised, otherwise, the Louisiana Supreme court held, based on the 1870 *La CC*, the usufruct does not become imperfect.<sup>331</sup> Yiannopoulos interprets the decision to mean that the usufructuary does not become the owner of the proceeds and that he would still be liable to the bare owner for not preserving the substance of the thing. He

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<sup>327</sup> *La CC* 539; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 5 states that article 539 was based on the 1870 *La CC* 533.

<sup>328</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 6.

<sup>329</sup> 8.

<sup>330</sup> 8-9.

<sup>331</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 9 citing *Wainer v Wainer* 210 La 324 26 So 2d 829 (1946).

would, in other words, not be able to only return the value of the thing at the time of conversion supplemented by the interest from the date of the termination of the usufruct, since alienation of nonconsumables would violate his obligation of preserving the substance of the usufructuary object. A further consequence may be that his usufruct terminates according to *La CC 623* and that he will then be liable for losses due to his “fraud, default or neglect”.

Yiannopoulos underlines the difference between a usufruct of consumables and a usufruct of nonconsumables. In the case of the former, the usufructuary becomes the owner of the thing and the bare owner a general creditor. The usufructuary bears the risk of deterioration or loss of the thing and as an owner he is also entitled to capital appreciation as result of investment.

Apart from these doctrinal changes to usufruct, it is also worth noting that proposals have been made to use usufruct in a novel way as an alternative to condemnation.<sup>332</sup> In the wake of hurricane Katrina New Orleans had to be rebuilt. The reconceptualization of usufruct would have allowed the city to obtain an interest in private properties that were “blighted and uninhabitable”.<sup>333</sup> The city could rehabilitate and control the properties while the owners retained title. After rehabilitation the city would have assumed the mortgage notes to the properties and rented it out to “essential city employees”. The owner would have had the option of returning to his home after a certain period of time on the condition that he reimbursed the city for repairs. Should the owner have decided not to move into his renovated home, he could have shared in the profits of a sale of the property. Had this proposal been successful,

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<sup>332</sup> M Johnson “Addressing Housing Needs in the Post Katrina Gulf Coast” (2006) 31 *T Marshall L Rev* 327-351 337-341.

<sup>333</sup> 338.

it would have repositioned usufruct as a tool of social upliftment and an institution of significant public interest.<sup>334</sup>

### 3.5.2 Rights of the usufructuary

Since usufruct can be established on both consumables and nonconsumables,<sup>335</sup> the usufructuary has different rights regarding both categories. In terms of the former, he is the owner of the consumables and has the entitlement to destroy it by either consumption or transfer. He may further grant real rights less than full ownership on the usufructuary property. On the other hand, when nonconsumables are concerned, he may in principle not dispose of them.<sup>336</sup> However, there are two exceptions. A usufruct created by a juridical act and whereby the grantor clearly gave the usufructuary the right of disposal, would be the first.<sup>337</sup> The second is that corporeal movables which are prone to wear and tear are subject to the usufruct may be disposed of subject to the standard of prudent administration.<sup>338</sup> The right to use entails possession, and enjoying the utility of the usufructuary property.<sup>339</sup>

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<sup>334</sup> Compare S Viljoen “Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 1)” 2014 *TSAR* 359-376; “Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 2)” 2014 *TSAR* 520-535 and J Strydom & S Viljoen “Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved” (2014) 17 *PER* 1207-1261 1239-1240 for temporary expropriations of a use right in the South African context.

<sup>335</sup> JR Trahan *Louisiana Law of Property: A Précis* (2012) 190.

<sup>336</sup> *La CC* 568; JR Trahan *Louisiana Law of Property: A Précis* (2012); AN Matasar “The Usufruct Revisions: the Power to Dispose of Nonconsumables Now Expressly Includes Alienation, Lease, and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct?” (2011-2012) 86 *Tul L Rev* 787-822 79.

<sup>337</sup> *La CC* 568; JR Trahan *Louisiana Law of Property: A Précis* (2012) 190.

<sup>338</sup> JR Trahan *Louisiana Law of Property: A Précis* (2012) 190.

<sup>339</sup> 191.

The theory of destination applied to the 1870 *La CC* 552 (mines and quarries), 568 and 569 (buildings).<sup>340</sup> Yiannopoulos therefore argues that apart from mines, quarries and buildings the usufructuary was allowed to improve other usufructuary objects without being restricted to the way that previous owners used the property if he did not cause injury to the estate or alter its condition.<sup>341</sup> As examples, Yiannopoulos proposes that acts such as crop rotation, contour plowing and cattle raising on lands no longer suitable for cultivation should be permitted. However, land could not be put to its most profitable use if the grantor did not consent and the original destination could be maintained. Furthermore, the substance could not be substantially changed.

The theory of destination was abolished in *La CC* 558<sup>342</sup> the 1976 Revision. The usufructuary was henceforth allowed to improve and change the usufructuary property at his cost if the court approved. These improvements and alterations would have to correspond with the behaviour of a prudent administrator. The destination could therefore be changed on condition that the substance was not altered.

*La CC* 539 places the duty on the usufructuary to use the usufructuary property “as a prudent administrator”.<sup>343</sup> This provision is complemented by *La CC* 576, which

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<sup>340</sup> 292-293.

<sup>341</sup> 293.

<sup>342</sup> *La CC* 558 states: “The usufructuary may make improvements and alterations on the property subject to the usufruct at his cost and with the written consent of the naked owner. If the naked owner fails or refuses to give his consent, the usufructuary may, after notice to the naked owner and with the approval of the court, make at his cost those improvements and alterations that a prudent administrator would make.”

<sup>343</sup> 285.

indicates that the usufructuary is liable for “losses resulting from his fraud, default or neglect”.

According to Yiannopoulos the prudent administrator should maintain a certain standard of care and comply with the related duties.<sup>344</sup> In terms of the standard of care, the usufructuary should act as diligently as “an attentive and careful man [...] in the management of his own affairs”. This equates to “slight fault”, which is defined as “that want of care which a prudent man usually takes of his business” in the 1870 *La CC* 3506(13). The test can be equated to the Roman *culpa levis in abstracto* and in case of loss or deterioration caused by the usufructuary the bare owner would be entitled to recover the value the property would have had at termination of the usufruct.<sup>345</sup>

### 3 5 3 Duties of the usufructuary and the preservation requirement

The usufructuary is compelled to frame an inventory.<sup>346</sup> A “detailed descriptive list” is also allowed as a substitute for the inventory.<sup>347</sup> The inventory and the determination of the condition of the property on commencement of the usufruct serve as evidence on termination of the usufruct during the settlement of accounts between the parties.<sup>348</sup> Furthermore, they may also be used to determine the restoration duty of the usufructuary and serve to indemnify the owner against loss or deterioration of the property. Inventories and descriptions of condition may therefore function as another

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<sup>344</sup> 286.

<sup>345</sup> 286-287.

<sup>346</sup> *La CC* 570(1).

<sup>347</sup> *La CC* 570(2) and article 3136 of the Louisiana Civil Procedure Act; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 260.

<sup>348</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261.

protection mechanism for the benefit of the bare owner. The estimated value of both movable and immovable usufructuary property must be stated in the inventory.<sup>349</sup> An appraiser must specifically state the fair market value of the usufructuary property.<sup>350</sup>

In general, security should be furnished to guarantee the fulfilment of the usufructuary's duties towards the bare owner. In case of default, the bare owner may enforce his security right and accordingly receive monetary compensation.<sup>351</sup> Certain usufructuaries are exempted from the duty to provide security,<sup>352</sup> for example the legal usufructuary (except where the bare owner is a forced heir or not the child of the usufructuary) and the usufructuary reserving a usufruct for himself while transferring the bare ownership. The means of providing security are flexible: the usufructuary usually either renders surety in the form of a bond or by a special mortgage on his other property.<sup>353</sup> The amount of security must be equal to the value of the usufructuary property but may be reduced or increased by a court "on proper showing".

A major obligation of the usufructuary entails preserving the substance of things. The usufructuary may use and enjoy the usufructuary property but must meet the obligation of preserving its substance.<sup>354</sup> The 1870 *La CC* 533 and the 1825 *La CC* 525 also included this obligation.<sup>355</sup> The 1808 *La CC* was similar to the French *CC*

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<sup>349</sup> *La CC* 570(2); AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261.

<sup>350</sup> Art 3133(4) of the Louisiana Code of Civil Procedure; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261.

<sup>351</sup> JR Trahan *Louisiana Law of Property: A Précis* (2012) 194.

<sup>352</sup> *La CC* 573; JR Trahan *Louisiana Law of Property: A Précis* (2012) 194.

<sup>353</sup> *La CC* 572; JR Trahan *Louisiana Law of Property: A Précis* (2012) 194.

<sup>354</sup> *La CC* 539; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 291.

<sup>355</sup> 291.

because it included the phrase “as the owner himself could do”.<sup>356</sup> The redactors of the 1825 *La CC* rightfully recommended that these words be struck out since the owner may do various things without changing the substance of the usufructuary property but which the usufructuary may not do. The 1825 *La CC* also phrases the obligation differently than the French *CC*: The *La CC* utilises the phrase “without altering its substance” while the French *CC* reads “to preserve the substance” (*à la charge d’en conserver la substance*):<sup>357</sup> *La CC* 558 seems to be in conflict with this obligation since it permits the usufructuary to improve and alter the property at his own cost and on condition that the owner provides written consent. However, if the bare owner does not give his consent the usufructuary may notify the bare owner and obtain court approval to improve and alter the property in the way a prudent administrator would do. The usufructuary may of course remove the improvements if he restores the property to its former condition.

Apart from *La CC* 558, *La CC* 568 and 569 of the 1870 *La CC*, unique to the *La CC* and not incorporated in either the French *CC* or German *BGB*, also pertained to the duty of the usufructuary to preserve the substance of things.<sup>358</sup> There seems to have been a distinction between the preservation duty regarding buildings and the preservation duty pertaining to other objects of the usufruct. In the case of the latter, the rules seemed to be less strict. Article 1870 *La CC* 568(1) presumably applied to the latter and provided that the usufructuary could make useful and necessary repairs and could even make improvements and repairs for the sake of convenience, on the condition that the estate is not injured or changed. Where buildings were concerned,

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<sup>356</sup> 291.

<sup>357</sup> 291.

<sup>358</sup> 292.

the 1870 *La CC 568* placed the duty on the usufructuary to preserve the buildings already erected on the land in the condition in which they were received at the commencement of the usufruct, without altering their “form, distribution or destination”, unless he had the consent of the bare owner. However, the usufructuary was allowed to create openings for windows or doors if he lived in a house given to him in usufruct. The usufructuary could not finish buildings left unfinished by the owner or build new buildings, except in cases of decay or accident,<sup>359</sup> nor could the usufructuary destroy or demolish buildings erected by him or remove materials.<sup>360</sup> These facilities had to be handed over to the bare owner on termination of the usufruct and the usufructuary did not receive any compensation.<sup>361</sup> Nevertheless, provisions to the contrary in the act or agreement creating the usufruct could change these obligations.

Yiannopoulos lists the duties that are connected with the obligation to act as a prudent administrator. Firstly, the usufructuary should preserve the substance of nonconsumables.<sup>362</sup> Secondly, he should make repairs that are necessary and thirdly, he should pay the annual charges. Fourthly, he should prevent excessive wear and tear; fifthly he should inform the bare owner if third parties encroach on the estate; in the sixth place he should prevent liberative or acquisitive prescription to the detriment of the bare owner and finally, he should insure the usufructuary property against casualty or loss.

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<sup>359</sup> 1870 *La CC 568*; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 292.

<sup>360</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 292.

<sup>361</sup> 292.

<sup>362</sup> 287.

The fourth duty entails that the usufructuary should prevent excessive wear and tear and from causing “exhaustive or uneconomic exploitation”.<sup>363</sup> Fruits that are the result of “wasteful methods of exploitation” must either be restored or the equivalent value be returned to the bare owner. Furthermore, the usufruct may be terminated. However, the usufructuary is not liable for normal deterioration of usufructuary property which by its nature is subject to war or decay.

The fifth duty of the usufructuary is expressed in *La CC 598*. The usufructuary must inform the bare owner if a third party “encroaches on the immovable property or violates in any other way the rights of the naked owner”. Failing to notify the bare owner may lead to liability for the damages suffered by the bare owner.<sup>364</sup>

A sixth duty of the usufructuary entails that he prevents accrual of liberative or acquisitive prescription.<sup>365</sup> For instance, if a usufruct of a credit is granted, the usufructuary should collect payment before liberative prescription in favor of the debtor. In cases where a predial servitude is lost by non-use or where the usufructuary allows acquisition of a servitude on a property by prescription, he is liable to the bare owner, according to *La CC 597*. According to Yiannopoulos it is possible to argue that the usufructuary has an obligation to bring a possessory action preventing the acquisition of servitudes by third parties who rely on the rules of acquisitive prescription on the grounds of *La CC 597* and the 1870 *La CC 590*.<sup>366</sup>

Yiannopoulos is of the opinion that *La CC 539* and *576*, read together with *La CC 617*, should be interpreted to entail the duty of the usufructuary to insure the

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<sup>363</sup> 288.

<sup>364</sup> 288-289.

<sup>365</sup> 289.

<sup>366</sup> 290.

property against casualty and loss based on at least one court decision interpreting the corresponding provisions in the French civil code.

The usufructuary as a prudent administrator should keep the usufructuary property in good order by taking responsibility for maintenance and repairs.<sup>367</sup> Rules governing the task allocation between the usufructuary and the bare owner prescribe that the bare owner should take care of extraordinary repairs, while the usufructuary has the duty to provide ordinary maintenance and repairs.<sup>368</sup> The usufructuary only becomes liable for extraordinary repairs if he causes damage through his fault or neglect.<sup>369</sup> The usufructuary is not held liable for fair wear and tear; this risk is allocated to the bare owner. However, during his enjoyment he must see to maintenance and ordinary repairs.<sup>370</sup>

The obligation to maintain the usufructuary property and to make repairs originates in the duty of the usufructuary to be a prudent administrator, but Yiannopoulos label them as “charges of the enjoyment”.<sup>371</sup> The latter determines who takes responsibility for repairs necessitated at the commencement of the usufruct, whether the bare owner can force the usufructuary to do repairs during his enjoyment

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<sup>367</sup> La CC 539, 576, 577 & 581; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296.

<sup>368</sup> La CC 577 & 581; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296.

<sup>369</sup> La CC 576 & 577; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296.

<sup>370</sup> La CC 569; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296.

<sup>371</sup> La CC 582; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 297.

and whether the usufructuary may relieve himself of his duties of maintenance and repairs if he abandons the usufruct.<sup>372</sup>

#### 3 5 4 Termination and remedies

Usufruct may terminate due to destruction of nonconsumables.<sup>373</sup> This destruction must however be permanent, total and due to accident or age but not the fault of the third party.<sup>374</sup> This termination is nevertheless relative, since the principles of real subrogation are applicable.<sup>375</sup> The usufruct does not terminate due to transformation of the usufructuary property in the cases specified in *La CC* 615, but attach to the money or property resulting from the termination through real subrogation.<sup>376</sup> Furthermore, if the usufructuary property is sold on agreement between the owner and the usufructuary or when partition takes place, the usufruct falls on the proceeds generated by the sale.<sup>377</sup>

In contrast to Dutch law, the usufruct can be extinguished when the usufructuary seriously defaults on his preservation duty regarding nonconsumables.<sup>378</sup> The relevant range of default includes committing waste, unlawfully alienating usufructuary property, neglecting to repair or abuse of enjoyment in any other way.<sup>379</sup> These grounds do not amount to termination by operation of law, but require court intervention.<sup>380</sup> When the

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<sup>372</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 297.

<sup>373</sup> *La CC* 614, 617; JR Trahan *Louisiana Law of Property: A Précis* (2012) 199-200.

<sup>374</sup> *La CC* 613; JR Trahan *Louisiana Law of Property: A Précis* (2012) 199.

<sup>375</sup> *La CC* 613; JR Trahan *Louisiana Law of Property: A Précis* (2012) 199.

<sup>376</sup> *La CC* 615; JR Trahan *Louisiana Law of Property: A Précis* (2012) 200.

<sup>377</sup> *La CC* 616; JR Trahan *Louisiana Law of Property: A Précis* (2012) 201.

<sup>378</sup> *La CC* 623; JR Trahan *Louisiana Law of Property: A Précis* (2012) 201.

<sup>379</sup> *La CC* 623; JR Trahan *Louisiana Law of Property: A Précis* (2012) 201.

<sup>380</sup> JR Trahan *Louisiana Law of Property: A Précis* (2012) 201.

usufructuary commits waste, it must amount to active neglect. Furthermore, the bare owner is not entitled to the right to have the usufruct terminated, but only the right to approach the court in this regard.<sup>381</sup> The court may terminate the usufruct or may declare that the usufructuary property should be delivered to the bare owner, who must pay a “reasonably annuity” to the usufructuary until termination of the usufruct.<sup>382</sup> However, the usufructuary may avert the preceding two measures by providing security that he will correct his default before the deadline set by the court.

## 3 6 Usufruct in French law

### 3 6 1 Introduction

The institution of usufruct has a wider scope in French law than the comparable German institution of *Nießbrauch*, since usufruct may not only be created by a legal transaction but may also originate in various other contexts based in family law and law of succession.<sup>383</sup> According to article 578 CC usufruct is “the right to enjoy things, of which another has the ownership’, as the owner himself but subject to the charge of preserving the substance of things”.<sup>384</sup> Article 581 CC states that usufruct can be established on all kinds of property. Therefore, according to the definition usufruct can be established on movable and immovable, corporeal and incorporeal property. However, Planiol and Ripert disagree and assert that there are certain things upon which usufruct cannot be established because use of these objects would amount to

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<sup>381</sup> La CC 624; JR Trahan *Louisiana Law of Property: A Précis* (2012) 201.

<sup>382</sup> La CC 624; JR Trahan *Louisiana Law of Property: A Précis* (2012) 201.

<sup>383</sup> M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1099.

<sup>384</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 630.

consumption or alienation and the “*jus utendi* is nothing without the ‘*jus abutendi*’”.<sup>385</sup> Due to this distinction between things which can be the object of usufruct and things which cannot, the institution of quasi-usufruct is necessary. This right permits the usufructuary to consume things on condition that he returns similar things on termination of the usufruct. Furthermore, the parties to the agreement giving rise to the usufruct can also, when they create a usufruct on non-consumables, choose to establish a quasi-usufruct rather than a “veritable usufruct”.<sup>386</sup>

### 3 6 2 Rights of the usufructuary

The usufructuary has the right to use usufructuary property, and to enjoy its fruits.<sup>387</sup> The use and enjoyment of the usufructuary property necessarily imply that the usufructuary must have certain powers of control or management.<sup>388</sup> These acts may be categorised as either material acts or juridical acts.<sup>389</sup> In terms of material acts, the usufructuary or his family<sup>390</sup> may use the usufructuary property but he is restricted in his use.<sup>391</sup> According to Carbonnier he has to conform to the habits of the owner that

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<sup>385</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 631.

<sup>386</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 631 citing Cass req March 30 1926 *Gazette du Palais* May 18 1926.

<sup>387</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 107 no 72; J Carbonnier *Droit Civil 3: Les Biens* (1973) 110 no 32; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 642 no 2775.

<sup>388</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 112 no 74.

<sup>389</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 116 no 33.

<sup>390</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 107 no 72

<sup>391</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 116 no 33.

used the thing before him and the development and destination given to the usufructuary property prior to the usufruct. Marty and Raynaud assert that the restriction lies in the general duty to act as a *bonus paterfamilias* (*bon père de famille*).<sup>392</sup> Material acts that the usufructuary may not perform include material disposition, consumption, destruction or degradation of the usufructuary property.<sup>393</sup> The only exceptions are usufruct on property that are consumed upon the first use, in which case the usufructuary must reconstitute the equivalent of the usufructuary property,<sup>394</sup> and property that deteriorates progressively through use which if it was subjected to normal use,<sup>395</sup> can be returned in the condition it was in on termination of the usufruct.<sup>396</sup>

Juridical acts are categorised as acts of administration and acts of disposition.<sup>397</sup> Administrative acts are acts of normal exploitation with the aim of developing the usufructuary property as a source of income, for example leasing.<sup>398</sup> The usufructuary may perform widely diversified acts of administration.<sup>399</sup> Juridical acts cannot in principle be acts of disposition since the usufructuary does not have the *ius abtendi*.<sup>400</sup>

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<sup>392</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 107 no 72.

<sup>393</sup> Arts 591 CC, 598 CC para 1; J Carbonnier *Droit Civil 3: Les Biens* (1973) 116 no 33.

<sup>394</sup> Art 587 CC.

<sup>395</sup> Art 589 CC.

<sup>396</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 117 no 33 notes that this exception can be viewed as conferring a limited *ius abutendi*.

<sup>397</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 117 no 33.

<sup>398</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 117 no 33; L Aynès "Property Law" in GA Bermann & E Picard (eds) *Introduction to French Law* (2008) 164 states that the usufructuary may decide on the exploitation of the usufructuary property and may rent it to a third party. He may act alone without obtaining the consent of the bare owner, except when he wants to lease real estate.

<sup>399</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (1980 2 ed) 112 no 74.

<sup>400</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 380 no 2332 defines

The usufructuary does not have the right to dispose of the usufructuary property.<sup>401</sup> For example, he may not alienate the usufructuary object, donate it, or burden it with a mortgage or with a praedial servitude, since he cannot transfer entitlements which he does not possess.<sup>402</sup> However, where alienation would be judged good administration and preservation, it is authorized on condition that proceeds are re-used.<sup>403</sup> Furthermore, the usufructuary may alienate the use of his usufruct by means of gift, sale or exchange, since he does not alienate a right in his patrimony.<sup>404</sup>

### 3 6 3 Duties of the usufructuary and the preservation requirement

The usufructuary must comply with two obligations before he enters into possession, namely firstly to draw up an inventory (*inventaire*) of movables or to record the condition of immovables in a statement (*état*)<sup>405</sup> and secondly, to furnish security.<sup>406</sup> These obligations safeguard the bare owner against the possibility of the usufructuary's insolvency or dishonesty.<sup>407</sup> The framing of inventory is only applicable

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*abuti* as consumption and not abuse of the property. The phrase *ius abutendi* originated with the Commentators.

<sup>401</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 118 no 33.

<sup>402</sup> L Aynès "Property Law" in GA Bermann & E Picard (eds) *Introduction to French Law* (2008) 164; J Carbonnier *Droit Civil 3: Les Biens* (1973) 118 no 33. The term servitude is used in the French texts here, since personal servitudes are not classified as servitudes in French law. Since it only applies to praedial servitudes, I have used the latter term.

<sup>403</sup> L Aynès "Property Law" in GA Bermann & E Picard (eds) *Introduction to French Law* (2008) 164.

<sup>404</sup> L Aynès "Property Law" in GA Bermann & E Picard (eds) *Introduction to French Law* (2008) 164; J Carbonnier *Droit Civil 3: Les Biens* (1973) 118 no 33.

<sup>405</sup> Article 600 CC; J Carbonnier *Droit Civil 3: Les Biens* (1973) 119 no 34. Also see AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261.

<sup>406</sup> Article 601 CC; J Carbonnier *Droit Civil 3: Les Biens* (1973) 119-120 no 34; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>407</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 119 no 34.

to movables, since the existence of immovables is proved by titles.<sup>408</sup> However, for immovables a statement is drawn up noting their physical condition on the commencement of possession by the usufructuary.

The inventory serves as proof of the condition and nature of the movables.<sup>409</sup> On termination of the usufruct the inventory, if properly framed, will be used to determine the duties as well as the scope of restitution to be made by the usufructuary or his heirs in case of damage or loss.<sup>410</sup> Sometimes the inventory or statement contains indications of the value of the contents, but this is only a complementary measure to identify the usufructuary property and to determine its condition, since it is the usufructuary property itself or, if this is not possible, its value on termination of the usufruct which should be returned to the bare owner.<sup>411</sup> In fact, the value indicated on the original estimation can be much less than the value on termination of the usufruct if the usufruct continued for a long time and the property was subject to serious economic or monetary fluctuations.<sup>412</sup>

There are only a few instances in which the inventory must state the estimated value of movables.<sup>413</sup> If the usufruct is created by an *inter vivos* donation according to

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<sup>408</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 639.

<sup>409</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 no 68; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>410</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>411</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 no 68 cites Trib civ de Périgueux 27 July 1932 DH 1932 566.

<sup>412</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 no 68.

<sup>413</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261.

article 948 CC, if the title of the usufruct states an obligation to frame an inventory with estimation of the value of the movables and if the usufructuary becomes owner for example with a usufruct of consumables, of a business enterprise or an estimation-sale. Although the bare owner may demand determination of the value of any movables when the inventory is framed, or at a later stage, courts have the discretion to accept or reject his demand if he makes it at a later time.<sup>414</sup>

The inventory or statement should be framed in the presence of the owner or after he has been summoned.<sup>415</sup> This practical measure ensures that the owner is assured of the accuracy of the documents.<sup>416</sup> Without this arrangement, documents drawn up by the usufructuary alone cannot be used against claims by the owner. It is not necessary for a notary to frame the inventory, although the inventory may be framed by one or he may assist in cases where it is necessary.<sup>417</sup>

The usufructuary is liable for the costs of framing an inventory or a statement, since it is his duty to draw up the documents.<sup>418</sup> According to Planiol and Ripert these costs may be extensive and it often happens that usufructuaries are poor.<sup>419</sup> They therefore suggest that the impecunious usufructuary be relieved from the obligation to

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<sup>414</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 261-262.

<sup>415</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 no 68; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>416</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>417</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 no 68.

<sup>418</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 68; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>419</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

frame an inventory or a statement or alternatively, that “acts under private signature” be drawn up. Although the act constituting the usufruct often relieves the usufructuary of the duty to frame an inventory or a statement, this clause should only be understood as to relieve him from the responsibility of paying for these documents.<sup>420</sup> In this case, the heir who eventually receives the property has the right to have the documents drawn up, but should then pay the related costs.<sup>421</sup> The heir cannot be deprived of the only measure available to determine issues of restitution and which could act as “regular proof”.<sup>422</sup>

The second option to solve the costs issue would be applicable when the title does prescribe conditions relating to the inventory. In this instance the usufructuary and the bare owner could agree to draw up an informal inventory or statement on condition that both parties are majors and capable.<sup>423</sup> However, the general consensus, probably based on tradition, is that notarial documents cannot be avoided if a minor or an interdict is involved.<sup>424</sup>

The provisions of article 1442 CC, which deprives the surviving spouse as usufructuary from her right of enjoyment when an inventory was not framed, qualifies as “an exceptional severity”, which should not be extended to other usufructuaries and

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<sup>420</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 103 no. 68; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>421</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 639.

<sup>422</sup> 639.

<sup>423</sup> 639-640.

<sup>424</sup> 640.

therefore, the failure to provide an inventory should not lead to the loss of the usufruct.<sup>425</sup>

However, the owner may refuse to deliver the usufructuary property if inventory was not framed.<sup>426</sup> Alternatively, restitution may be demanded on termination of the usufruct.<sup>427</sup> In the absence of an inventory, the owner may prove his claim “by oral testimony, by presumptions, and even by common repute (*la commune renommée*)”.<sup>428</sup>

The usufructuary also has the obligation to provide surety that he will use the property as a *bonus paterfamilias* before he enters into possession of the usufruct.<sup>429</sup> This amounts to finding a solvent person<sup>430</sup> who is willing to assume an obligation with

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<sup>425</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

<sup>426</sup> Article 600 CC; G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 103 no 68; J Carbonnier *Droit Civil 3: Les Biens* (1973) 119; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

<sup>427</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

<sup>428</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 119; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 685 note that this kind of proof is exceptional since it is based on hearsay, is prone to exaggeration and is only permitted by the law as a penalty according to articles 1415, 1442 and 1504.

<sup>429</sup> Article 601 CC; J Carbonnier *Droit Civil 3: Les Biens* (1973) 119; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

<sup>430</sup> Articles 2040, 2018, 2019 CC; G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 103 no 69; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

the usufructuary serving as security<sup>431</sup> for the bare owner.<sup>432</sup> The possibility exists that the usufructuary may at some point owe an excessive amount of money as a result of his abuse of enjoyment, or deterioration, loss or destruction for which he is accountable. In the case of consumables he might not be able to reimburse the bare owner for the value.<sup>433</sup> According to Planiol and Ripert the motivation for this duty lies in the guarantee it provides against a situation where the usufructuary becomes insolvent and as result decide to abscond.<sup>434</sup>

Finding a surety might prove to be a challenge, since the scope of the obligation is not ascertainable in advance.<sup>435</sup> The law provides for situations where a delay in securing a surety occurs.<sup>436</sup> In this case the fruits collected or received during the period should be reimbursed to the usufructuary.<sup>437</sup> If the surety defaults, the court (*le tribunal*) has the power to order measures to conserve the usufructuary property in the interest of the bare owner.<sup>438</sup> In cases where it is too difficult to find a surety, the usufructuary might comply with the duty by providing a pledge or other security.<sup>439</sup>

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<sup>431</sup> See article 2011 CC.

<sup>432</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 119; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

<sup>433</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 640.

<sup>434</sup> 640.

<sup>435</sup> 640-641.

<sup>436</sup> 641.

<sup>437</sup> Article 604 CC; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641.

<sup>438</sup> Articles 602 & 603 CC; J Carbonnier *Droit Civil 3: Les Biens* (1973) 120.

<sup>439</sup> Article 2041 CC; G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 103 no 69; J Carbonnier *Droit Civil 3: Les Biens* (1973) 119-120; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641.

Examples would include depositing money or securities in a public depository<sup>440</sup> or by giving the bare owner a mortgage on his movables.<sup>441</sup> Case law confirms that these facilities should be available to the usufructuary where the CC imposes the surety obligation.<sup>442</sup>

Where the usufructuary is unable to either find a surety or to give equivalent security, the usufruct may be taken away.<sup>443</sup> Such a situation serves as proof of the dire need of the usufructuary. Nevertheless, the owner should also not be subjected to an insolvent usufructuary for an undetermined period. Therefore, articles 602 and 603 CC provide for measures aimed at protecting the interests of both the bare owner and the usufructuary.

In the case of liquid cash or food that is sold, the money should be invested. If the owner requires that other movables that may possibly perish, be sold, the price should also be invested. However, the usufructuary may request the court to order delivery of movables that he needs for his personal use, on condition that he takes an oath to preserve the usufructuary property and to return them. Immovables may be cultivated or given to a sequestrator who acts as guardian managing the property and

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<sup>440</sup> Article 2041 CC.

<sup>441</sup> Article 2041 CC; G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 103 no. 69; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641.

<sup>442</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641 citing Cass Aug 7 1882 D 83 1 220 and Angers July 13 1930 S 1931 2 12.

<sup>443</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641.

rendering an account of its revenue.<sup>444</sup> The sequestrator receives a salary from the fruits of the usufructuary property.<sup>445</sup>

Finally, certain parties may be relieved from the obligation to provide surety.<sup>446</sup> The grantor may dispense with the obligation in the title constituting the usufruct<sup>447</sup> or relief might be tacit as indicated by case law.<sup>448</sup> These clauses are most often associated with testaments.<sup>449</sup> When the grantor retains usufruct and alienates the bare ownership, he is not required to provide surety. This relief from the obligation is based on an assumption based on the intent of the vendor or donor, namely that he meant to establish the arrangement for his own benefit. Parents are also exempt from the provision of surety due to their bond of natural affection with their children. When usufructuaries are exempted in this way, they may take possession of the usufructuary property in its existing condition without providing “exceptional guarantees”. However, the relief granted to these usufructuaries in terms of the obligation to provide surety is

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<sup>444</sup> Article 1956 CC; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641.

<sup>445</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 641.

<sup>446</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 120; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 642.

<sup>447</sup> Article 601 CC.

<sup>448</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 642 citing Cass October 28 1889 D 90 1 67.

<sup>449</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 642.

not final.<sup>450</sup> Judges may order measures to preserve the usufructuary property during the usufruct if it seems that the rights of the bare owner are threatened.<sup>451</sup>

The definition of usufruct in article 578 of the CC includes the preservation of the substance requirement. The theory of destination delineates the scope of this preservation duty of the usufructuary pertaining to nonconsumables.<sup>452</sup> According to Yiannopoulos, French courts and writers hold that the usufructuary is obliged to maintain the destination of the object of the usufruct and to employ the same methods of use and enjoyment used by previous owners.<sup>453</sup> However, Marty and Raynaud assert that although this interpretation is evident in several usufruct cases, it must rather be viewed as a secondary way of delimiting the right of enjoyment of the usufructuary.<sup>454</sup> Instead, the focus should be on the conservation of the usufructuary property, an obligation included in the broader duty to enjoy as a *bon pere de famille*. Where conflict for instance arises between the concrete standard of the use of the previous owner Planiol and Ripert mention that several writers trace the theory of destination to article 578 of the CC, stating that the substance of the usufructuary property should be preserved.<sup>455</sup> The phrase “provided the substance of the thing be preserved” (“à la charge d’en conserver la substance”) originated from the Latin phrase *salva rerum substantia*.<sup>456</sup> Although Planiol and Ripert acknowledge the

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<sup>450</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 120.

<sup>451</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 102 no 68; J Carbonnier *Droit Civil 3: Les Biens* (1973) 120.

<sup>452</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 293.

<sup>453</sup> 293

<sup>454</sup> G Marty & P Raynaud *Droit Civil: Les Biens* (2 ed 1980) 120.

<sup>455</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 293; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 663.

<sup>456</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 293.

possibility that the redactors of the code could have meant that the usufructuary should not change what is essential, that is the destination, by changing its purpose or use, they state that if this was the intention of the compilers, they did not use the correct translation of the Latin phrase.<sup>457</sup> Planiol and Ripert<sup>458</sup> as well as Yiannopoulos<sup>459</sup> are of the opinion that the compilers did not use the phrase to refer to destination. The Latin phrase points to the “extinction of the right as a result of the loss of the thing”.<sup>460</sup> However, Planiol and Ripert do not attach too much importance to the intended meaning of the redactors in the ambiguous phrase since the principles involved do not create uncertainty.<sup>461</sup>

The theory of destination originated in Roman texts,<sup>462</sup> was developed in medieval French law<sup>463</sup> and is applied in some articles of the CC such as article 578, stating that the usufructuary may enjoy the property “like the owner himself” and several other articles on timberlands, mines and quarries prescribing that the

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<sup>457</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 663.

<sup>458</sup> 663.

<sup>459</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 293.

<sup>460</sup> 293.

<sup>461</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 663.

<sup>462</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 663 note that the Roman jurists often spoke of the duty to respect the owner’s habits but did not consider it a distinct obligation. M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 663 illustrates this with reference to Ulpian. According to *D 7 1 9* Ulpian for example said “*sicut pater familias coedebat ..., unde palo solebat pater familias uti*”.

<sup>463</sup> See M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 663.

usufructuary must continue the use or customs of the owners.<sup>464</sup> In these articles the use made by or the custom of the owners is mentioned as a criterion whereby the usufructuary should regulate his conduct.<sup>465</sup>

As a consequence of this theory and based on articles 578 and 590 to 598 CC it would not, according to French writers, be permissible to convert a house into a hotel, store or warehouse, except where the original destination cannot be maintained.<sup>466</sup> Leases seem to be possible on condition that the lessee also honours the destination. The mode of cultivation of lands may also not be changed, except where an accident destroys the cultivated areas. An exception seems to be uncultivated marshlands: cultivation would qualify as an improvement rather than a change of the substance. The exploitation of woodlands, mines and quarries is also subject to the theory of destination.

Although the strict theory of destination is advocated in Roman and medieval texts, French writers have indicated that there is scope for a wider interpretation of provisions on the duty to preserve the usufructuary property.<sup>467</sup> The general duty applicable to usufructs states that the substance of the usufructuary property must be preserved without indicating that the usufructuary is limited to using the property in the same way as the previous owner.<sup>468</sup> According to Yiannopoulos, the usufructuary

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<sup>464</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 293-294. M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 663 also mentions articles 590, 591, 593, 597 and 598.

<sup>465</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos. 1610-3097* (1959) 663.

<sup>466</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 294.

<sup>467</sup> 295.

<sup>468</sup> 294-295.

should be allowed to make improvements and alterations which would keep the concern up to date, but on condition that the economic purpose of the usufructuary object is maintained.<sup>469</sup>

The second main obligation stated in article 601 CC to which the usufructuary is bound within the context of French law, is the duty to enjoy the usufruct as a “prudent father of a family” (*bon père de famille*).<sup>470</sup> Planiol and Ripert note that the French expression has retained the meaning inherent in the Latin concept *pater familias*, namely to signify a good owner.<sup>471</sup> Historically, the *pater* “absorbed in his person the personality of all those who were subject to his power” and seemed to be the single owner of all the family’s property. Therefore, the concept *bonus pater familias* implies that the usufructuary should enjoy the usufruct “as a careful and diligent owner”.<sup>472</sup>

The French CC imposes the duty to act as prudent administrator in the same sentence in which it sets out the duty to give security.<sup>473</sup> According to Yiannopoulos this causes the provision to be “obscure”.<sup>474</sup> Planiol and Ripert explain this ambiguous

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<sup>469</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 295.

<sup>470</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 120; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 660. This phrase has been struck from a number of laws since it discriminates on the grounds of gender. See JM Smits “Adieu Bon Père de Famille” (2014) 145 *WPNR* 303-304 and L Waelkens “Geen Goede Huisvaders meer in het Franse Recht” (2014) 8 *RW* 282.

<sup>471</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 661.

<sup>472</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 120; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 661.

<sup>473</sup> Article 601 CC.

<sup>474</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 286.

phrase as a result of the changed meaning of the Latin term “*cautio*”.<sup>475</sup> The Latin term was incorporated in a formula meaning to “assume a personal engagement by means of a stipulation”. Article 601 can be traced back to the *homo diligens et studiosus paterfamilias* in Roman law, who had to commit to the obligation flowing from the *cautiones* and *sponsiones* required of usufructuaries by the Roman praetors.<sup>476</sup> The obligation later became less formalised and was implied as part and parcel of usufruct law. However, in French the linguistically related phrase “*donner caution*” has the meaning of furnishing surety.<sup>477</sup> In French law the duty not to cause undue wear and tear and to refrain from “exhaustive or uneconomic exploitation” of the usufructuary property exists as well.

The duty to inform the bare owner of third parties encroaching on the immovable property or violating his rights is also found in article 614 of the CC.<sup>478</sup> In terms of the duty to prevent accrual of prescription, the usufructuary must, in case of a usufruct on a credit, collect payment before accrual of liberative prescription benefitting the debtor.<sup>479</sup> In the case of loss of a predial servitude by lack of use or acquisition of a servitude on the property, the usufructuary is liable.<sup>480</sup> However, the duty to prevent accrual of prescription does not entail that the usufructuary bring an action against the

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<sup>475</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 661.

<sup>476</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 286.

<sup>477</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 661.

<sup>478</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 288.

<sup>479</sup> 289.

<sup>480</sup> Article 614 CC; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 289.

person about to complete acquisitive prescription: the only requirement is to provide information to the owner.<sup>481</sup>

According to the majority opinion in France, the duty to insure the property or continue insurance payments, is not an obligation on the usufructuary.<sup>482</sup> It is rather viewed “as an act of extraordinary precaution not required of a prudent administrator”.<sup>483</sup> However, at least one court in France has decided that a duty to insure the usufructuary property against casualty and loss should be placed on the usufructuary, arguing that the usufructuary’s position as a prudent administrator should be treated analogous to that of a tutor.<sup>484</sup> Yiannopoulos refers to criticism of the civil code by Planiol and Ripert, who suggested that this “veritable lacuna in the French law” should be amended, since a prudent administrator ought to take out insurance where practices or the nature of the usufructuary property dictates it.<sup>485</sup>

As a prudent administrator the usufructuary has the duty to keep the usufructuary property in good order, according to article 605(1) CC. Flowing from the obligation, the usufructuary should attend to ordinary maintenance and repairs.<sup>486</sup> However, the usufructuary is not responsible for all repairs and rules govern the relationship between the usufructuary and the bare owner in this regard.<sup>487</sup> Usually, the bare owner

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<sup>481</sup> 289-290.

<sup>482</sup> 290-291.

<sup>483</sup> 291.

<sup>484</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 290 cites Besançon April 1st 1863 D 1863 2 93.

<sup>485</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 291.

<sup>486</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 120 citing article 618 paragraph 1; AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296; M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1105.

<sup>487</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296; M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1105.

takes care of extraordinary repairs and the usufructuary of maintenance and ordinary repairs.<sup>488</sup> If the usufructuary causes damage through his fault or neglect, he becomes responsible for extraordinary repairs.

Where the object of the usufruct deteriorates due to normal wear and tear, the bare owner carries the risk.<sup>489</sup> In this case the usufructuary does not have to replace usufructuary property, but he must take care of maintenance and ordinary repairs required during enjoyment.

The obligation of maintenance and repairs flows from the obligation of the usufructuary to act as a prudent administrator.<sup>490</sup> Furthermore, these duties must be viewed as “charges of the enjoyment”, an idea that assists in responding to questions such as determining the responsible party if repairs are needed at the commencement of the usufruct, whether the bare owner can force the usufructuary to make repairs during the usufruct and whether the usufructuary can relieve himself of these duties by abandonment of his usufruct.<sup>491</sup>

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<sup>488</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296; M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1105. According to M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1105 this does however not imply that the owner has an obligation towards the usufructuary to do the the main repairs. Whether such gross repairs are depends more on the person who bears the obligation to pay the costs internally (“*der intern Kostentragungspflichtige*”). M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1105 states that article 607 is proof of this, but cautions that the idea expressed in this article is risky as it encourages wasteful possession of land (“*Verluderung des Grundbesitzes*”): If the usufructuary voluntarily completes a gross repair, he will have on termination of the usufruct a claim on the then existing additional value. M Ferid *Das Französische Zivilrecht Zweiter Band* (1971) 1105 proposes that the usufructuary should only bear the burden of gross repairs when it necessarily arises due to his inappropriate exercise of his usufruct, according to article 605(2).

<sup>489</sup> AN Yiannopoulos *Personal Servitudes: Usufruct, Habitation, Rights of Use* (5 ed 2011) 296.

<sup>490</sup> 296-297.

<sup>491</sup> 297.

### 3 6 4 Termination and remedies

Two of the grounds for termination specifically concern the *salva rei substantia* requirement, namely termination through total loss of the usufructuary property and forfeiture<sup>492</sup> due to abuse of enjoyment.<sup>493</sup> The usufruct is terminated when the usufructuary property is destroyed, since the object of the usufruct ceases to exist and the usufructuary is not entitled to the remains of the property.<sup>494</sup> However, in the case of partial loss, the usufruct continues on the part of the usufructuary property that still remains.<sup>495</sup>

Where forfeiture is concerned, the point of departure is that the usufructuary's right is dependent on his compliance with his obligations.<sup>496</sup> If he does not comply, his usufruct may be withdrawn from him and in this sense, usufruct is similar to a synallagmatic contract. Generally, forfeiture may occur in cases where the

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<sup>492</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 681 no 2852 note that this cause for termination neither existed in Roman law, nor was it evident from the work of the seventeenth century jurist Domat. It only became prevalent in old cases where it was applied to dowagers. In the CC the provisions applicable to the dowager was applied to usufructuaries in general.

<sup>493</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 677 no 2842.

<sup>494</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 677 no 2842 note two examples in the CC namely the hides of dead animals (art 615, 616) and the soil and material that remain after a building collapsed or burned down.

<sup>495</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 678 no 2843 mention the example in art 624 para 2 of a building forming part of a larger unit. When the building is partially destroyed, the usufructuary still enjoys the usufruct on the soil and the material.

<sup>496</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 681 no 2852.

usufructuary defaults on his obligations and his noncompliance endangers the usufructuary property.<sup>497</sup> More particularly, abuse justifying forfeiture occurs when the usufructuary damages the property subject to the usufruct or allows it to deteriorate due to a lack of maintenance.<sup>498</sup> Since forfeiture only grants the bare owner the right to obtain a judgment of forfeiture if he provides evidence of abuse, the court's intervention is necessary and forfeiture therefore cannot happen by operation of law.<sup>499</sup> Moreover, the court should only use its discretion to grant an order of forfeiture where the abuse is very serious. Less drastic measures are available to avoid termination of the usufruct and to protect the interests of the bare owner. These include returning the usufructuary property to the owner but with the understanding that he pays the usufructuary an annual sum equal to the profit of the usufruct.<sup>500</sup> Furthermore, the special measures in articles 602 and 603 CC may be used.<sup>501</sup> In terms of these measures cash is invested, perishables sold and the return invested, immovables cultivated or handed over to a sequestrator. However, movables for personal use may be granted by the court on the basis of the usufructuary's oath to maintain and return them. A usufructuary may also be allowed to retain the property if he merely protects

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<sup>497</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 681 no 2853 cite Paris June 7 1926 *Gazette du Palais* July 8 and Cass req Jan 3 1934 *Gazette du Palais* Feb 18.

<sup>498</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 681 no 2853.

<sup>499</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 682 no 2854.

<sup>500</sup> Art 618 CC; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 682 no 2855.

<sup>501</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 682 no 2855 and 641 no 2770.

the owner's interests by providing surety, depositing securities or by means of a pledge.<sup>502</sup> The owner's interests may also be protected by the usufructuary's creditors in the interest of preserving the usufructuary's income as a probable source of payment. Creditors can offer to pay the damages caused by the usufructuary or provide guarantees.<sup>503</sup> Whether the forfeiture is made an order of court or the usufruct allowed to continue, the usufructuary should repair damages caused at his own cost.<sup>504</sup>

When the usufruct ends, the usufructuary or his heirs has the duty to restore the usufructuary property to the owners.<sup>505</sup> However, a settlement of adjustment of account (*règlement des comptes*) can also be made between the parties. Restitution can also be made in money if the property has been valued at the time of the constitution of the usufruct.<sup>506</sup> Money is also suitable when the property has been lost through fault of the usufructuary. By contrast, no restoration obligation exists if the loss occurred through *force majeure*.<sup>507</sup>

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<sup>502</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 682 no 2855 and 682 no 2856.

<sup>503</sup> Art 618, par. 2 CC; M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 682 no 2855 and 682 no 2856.

<sup>504</sup> M Planiol M & G Ripert *Planiol Traité Élémentaire de Droit Civil* (1939) (translation Louisiana State Law Institute *Treatise on the Civil Law Volume 1, Part 2 Nos 1610-3097* (1959) 682 no 2855 and 682 no 2856.

<sup>505</sup> J Carbonnier *Droit Civil 3: Les Biens* (1973) 120.

<sup>506</sup> Article 587 CC.

<sup>507</sup> Articles 607 & 1302 CC.

### 3 7 Reasons for a shift in the approach to usufruct

Firstly, on a doctrinal level, it seems from the discussion of the various jurisdictions that the limitations on the right to use still seem to be prevalent in most of the countries: the duty to act as a *bonus paterfamilias*, *bon père de famille*, or prudent manager still demarcates the acceptable use of the usufructuary property. Furthermore, destination still seems to be a significant consideration. However, in terms of the latter, it seems that there is some divergence of views, for example in German and Belgian literature on destination. Writers who are in favour of a more flexible approach to the destination requirement seem to view the powers of the usufructuary in a wider sense, allowing for disposition subject to destination. They also promote the idea that the object of the usufruct must be interpreted widely to allow disposition as a normal act of control. On the other hand, other writers caution that these powers only seem similar to disposition powers but cannot be.

Furthermore, by not including the *salva rei substantia* requirement in the definition of usufruct, some codes do seem to open up the possibility of a more flexible approach. This is related to the abolition of the strict distinction between usufruct and quasi-usufruct. By establishing that usufruct can be granted on both consumables and nonconsumables, the inevitable outcome was that the *salva rei substantia* requirement could not be incorporated in the more inclusive description of usufruct.

In terms of the duties allocated to the usufructuary, it seems that some countries place more stringent requirements on the entry requirements such as the duty to frame inventory and provide security.<sup>508</sup> This at least provides legal certainty and prevents

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<sup>508</sup> In French (600 CC), Belgian (), Dutch (3: 205 BW), it is mandatory to frame inventory while this is not a requirement but a choice in German law (§ 1034 BGB). In French (601 CC), Belgian (601 BBW)

unnecessary litigation. At the same time, it emphasises the *salva rei substantia* requirement. Interestingly enough, the duty to ensure has also become an obligation and in this sense supports the contention that the requirement is still of importance. This seems to account for shifts pertaining to the prominence of the duty to provide security. Furthermore, usufructuary has maintenance obligations.<sup>509</sup> It seems therefore, that apart from the Netherlands, all other jurisdictions still value the *salva rei substantia* requirement, although there are arguments for a more flexible approach to it, particularly where it concerns the limitation on the disposition powers of the usufructuary. However, general conclusions in this regard should be approached in a nuanced way.

Secondly, in terms of societal changes, it seems that usufruct as an ancient property institution has experienced a revival due to legislative changes pertaining to the law of succession in different jurisdictions. These changes are not only linked to doctrinal flexibility concerns. They also reflect shifts in moral and societal views in terms of the growing importance given to provision for the surviving spouse, compared to maintaining patrimony within the traditional family structure. Moreover, changes signal a shift in the composition of patrimony from predominantly immovable property to movables, with an emphasis on securities. Legislative changes were in part responses to these changes.

Pragmatic arguments have been made in for instance Louisiana, where legislative revisions have been made in the service of practical considerations,

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Dutch (3:206 *BW*), German (§ 1051) and Louisiana state law (571 *La CC*) the usufructuary is generally, subject to certain exceptions, required to furnish security.

<sup>509</sup> In French (605-606 *CC*), Belgian (605-606 *BBW*), Dutch (3: 220 *BW*), German (§§ 1045, 1047, 1048 II *BGB*) and Louisiana state law (571 *La CC*) law the usufructuary is responsible for the costs of ordinary maintenance and repairs.

adjusting the rights of usufruct. Particularly, the 1976 and 2010 revisions have aimed to expand the rights of the usufructuary to “balance the interests of the usufructuary and of the bare owner and to reach desirable solutions”.<sup>510</sup> Since the traditional requirements of usufruct were inflexible, the Legislature codified the usufructuary’s power to dispose of nonconsumables, for example vehicles and other property subject to usufruct that are gradually and to a large extent impaired by use.<sup>511</sup> Moreover the testator could grant the power to dispose of nonconsumables to the usufructuary. In 2010 the power to dispose was clarified by the Legislature by stating that the power to dispose includes the right to alienate and encumber the property and even to lease it beyond the duration of the usufruct.

Finally, it might be considered whether protecting the bare owner through alternative measures, without strictly adhering to the preservation requirement, would be effective.<sup>512</sup>

It therefore seems that there are reasons for a shift towards a more flexible approach to the preservation requirement in comparative law. However, there remains a tension between measures increasing flexibility and measures tending towards rigidity in all systems. The relevant question would finally be whether these reasons provide persuasive arguments for a flexible approach to the *salva rei substantia* requirement in South African law.

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<sup>510</sup> AN Matasar “The Usufruct Revisions: the Power to Dispose of Nonconsumables Now Expressly Includes Alienation, Lease, and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct?” (2011-2012) 86 *Tul L Rev* 787-822 792.

<sup>511</sup> 794-795.

<sup>512</sup> BCM Waaijer “Hoe Kan de Hoofdgerechtigde Tegen de Vruktgebruiker Worden Beschermd?” (1993) 124 *WPNR* 890-893 891.

### 3 8 Questions for consideration in South African law

In South African law the legislator has not utilised usufruct as a legal concept within the law of intestate succession to provide for the surviving spouse. In this regard the South African Law Commission came to the conclusion in 1985 that it seldom happens that the surviving spouse is left destitute and that usufruct is not so commonly used in testaments as to be prescribed as a norm in intestate succession and as a measure to provide for the surviving spouse.<sup>513</sup> However, usufruct still plays a role in the testate law of succession to provide for the surviving spouse. Thirty years have passed since the report by the South African Law Commission. One could ask whether, in a context where blended families are becoming more prevalent, a reconsideration of usufruct within the context of providing for the surviving should not be investigated.

Secondly, one could ask whether the changing nature of patrimony might be an argument for a more flexible approach to usufruct. It is still open to question whether the nature of patrimony in South Africa has changed in a way comparable to the change that took place in other jurisdictions. Although the usufruct of securities has received and is receiving attention in some of these jurisdictions, only one article on the subject was published in South Africa in 2006.<sup>514</sup> With the institution of the new Companies Act<sup>515</sup> reconsideration of the subject might be warranted.

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<sup>513</sup> South African Law Commission *Verslag oor die Hersiening van die Erfreg: Intestate Erfreg* (1985) 19.

<sup>514</sup> E Leos "Quasi-usufruct and Shares: Some Possible Approaches" (2006) 123 *SALJ* 126-146.

<sup>515</sup> The *Companies Act* 71 of 2008.

Thirdly, it remains to be seen if the distinction between usufruct and quasi-usufruct will be abolished in South African law. This certainly can lead to a flexible approach to usufruct as is evident from the Dutch approach.

Finally, pragmatic considerations might, like in other jurisdictions, prompt new applications of usufruct to address societal concerns. Proposals regarding the use of usufruct in Louisiana might provide a point of departure in this regard. Taking into consideration the dire need for housing, arguments have been made for expropriating a use right of inner-city buildings.<sup>516</sup>

A comparative perspective might be point of departure for the reconsideration of usufruct as a legal concept in South Africa and particularly whether the preservation requirement can be approached in a flexible way.

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<sup>516</sup> S Viljoen “Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 1)” 2014 *TSAR* 359-376; “Temporary Expropriation of a Use Right as Interim Measure in the South African Housing Context (Part 2)” 2014 *TSAR* 520-535 and J Strydom & S Viljoen “Unlawful Occupation of Inner-City Buildings: A Constitutional Analysis of the Rights and Obligations Involved” (2014) 17 *PER* 1207-1261.

## CHAPTER 4:

# POLICY AND THEORETICAL CONSIDERATIONS

### 4 1 Introduction: Approach to theory and policy

The question addressed in this chapter is whether persuasive policy and theoretical arguments exist for a flexible approach to the *salva rei substantia* requirement. More specifically: How do we deal with use conflicts and the rules governing them in a usufruct situation more flexibly in terms of changing circumstances and other social considerations? I will briefly illustrate the problem underlying this question by means of two cases dealing with use conflicts and the *salva rei substantia* requirement governing them. These two cases demonstrate different approaches of the court to use conflicts. But more importantly, they also illustrate the constraints of a legal system biased towards the interests of the owner and ill-disposed to accommodation of the interests of a non-owner in terms of solving a use conflict triggered by the *salva rei substantia* requirement.

*Olivier v Venter*<sup>1</sup> dealt with an interdict against a usufructuary exceeding his rights. The applicant had obtained an interdict pending action against his mother. This interdict restrained her as usufructuary from diminishing the capital of a sum of money or alienating or encumbering a bond. Both the capital and the bond were the property of the applicant. The applicant had proof that the respondent had drawn approximately one-third of the capital. He sought orders that would direct the respondent to furnish security for the payment of the money and the delivery of the bond and to extend the interim interdict until security was given. Furthermore, he sought an order to the effect

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<sup>1</sup> 1933 EDL 206.

that should the security not be given within one month, the capital should be invested in his name instead of the respondent's name, subject to payment of interest being paid to the respondent for the duration of her usufruct. Finally, he sought orders for the attachment of the accrued and accruing interest on the capital to pay the costs of the interdict proceedings and the application. The application was granted.

The applicant alleged that the respondent had made the withdrawal despite his objection and that she had expressed the intention of drawing further sums. In this case the respondent had breached the *salva rei substantia* requirement by not maintaining the usufructuary property and by not providing security for its return. Although the case provides indications that there was probably an attempt on the side of the usufructuary to communicate her intentions and needs to the bare owner, the latter had the power to veto her request to dispose of the usufructuary object. The court did not display reluctance to extend the temporary interdict. The interdict effectively curtailed further impairment of the substance of the usufructuary property until the obligation of the provision of security was met. There is no indication whether there was consideration of the question of use and needs of the parties that had an interest in the dispute and specifically the financial position and the ability of the usufructuary to provide security. One might ponder whether consideration of these issues could have resulted in a more nuanced interdict.

In *Klopper v Van Rensburg*<sup>2</sup> the applicant initially obtained a rule *nisi* operating as a temporary interdict to restrain the respondent from selling stock and movable property. The applicant had an interest in the usufructuary property. The respondent had advertised the property for sale. The sale was scheduled for a date after the rule

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<sup>2</sup> 1920 EDL 239.

*nisi* was obtained. At the hearing for the temporary interdict counsel for the applicant did not object to the tender of security as a condition to meet the case. This security, along with an inventory, was tendered before the sale date. It was held that although the applicant had grounds for his original application, he was bound to accept security as an offer of compromise. It was also held that the rule *nisi* should be discharged and not made absolute.

In his judgment Gane AJ exhibits a rather sympathetic stance towards the usufructuary. He notes that the usufructuary had documents signed by the applicant indicating consent for the donation of furniture and an erf to the usufructuary's second wife but that one of the claims by the applicant was for the setting aside of these documents as bad in law and as void on the ground of failure of consideration. This claim amounts to the treatment of a *prima facie* valid agreement as an attempt by the usufructuary to exercise an act of disposal which would be to the detriment of himself as well as the other heirs. Another point the judge takes note of is that the respondent's attorneys sent a "very reasonable letter" stating that he had let the farm property in the joint estate and did not therefore have capacity to graze the stock, that he was old and had relinquished farming and hence did not have use for the farm implements and could not look after the stock. Furthermore, he did not intend to appropriate the money for his own use but intended to invest it. This letter received no reply.

Even the court to which the original application was made, indicated that "it was a pity to interrupt the sale at such a propitious time as the present"<sup>3</sup> and therefore suggested the tender of security to safeguard the interests of the applicant and to void the need for an interdict. However, this offer of security was not accepted by the

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<sup>3</sup> *Klopper v Van Rensburg* 1920 EDL 239 241.

applicant, resulting in further costs. In refusing the security, Gane AJ asserts, the applicant “recklessly incurred costs and cannot be heard to say that he was obliged to seek redress by way of an interdict”.<sup>4</sup>

Gane AJ asserts that it was foolish of the applicant to object to the sale, especially as it was a handsome one and indeed not out of keeping with practices to rather secure the value of the stock instead of the stock itself. The applicant was nevertheless, as Gane AJ admits, within his rights in doing so.<sup>5</sup>

It is clear from the judgment that the court, although it was bound to acknowledge the legal rights of the applicant, exhibited a nuanced approach to the question of granting an interdict and the necessity of doing so. Gane AJ highlights the behaviour of the respondent as reasonable, points to his needs and circumstances – including his age, the letting of the farm and the lack of use for the farming implements which renders the usufructuary property an impediment – and does not in the process negate the legitimate interests of the applicant. However, there is a marked disapproval of the applicant’s behaviour as bordering on the unreasonable and as a misuse of his disposition power in relation to the respondent. This case exhibits a nuanced approach to the remedies applicable to a *salva rei substantia* dispute, but nevertheless illustrates the constraints of a legal system prejudicial to the interests of non-owners. In order to deal with these constraints, use conflicts and the *salva rei substantia* requirement that governs them, we need to consider both policy and theoretical arguments for a more flexible approach.

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<sup>4</sup> 242-243.

<sup>5</sup> 241.

Policy analysis plays a role in the development of servitude law.<sup>6</sup> This is evident from decisions such as *Van der Heever NO and Others v Coetzee and Another*<sup>7</sup> (*Van der Heever*) and *Linvestment CC v Hammersley*<sup>8</sup> (*Linvestment*). In the *Van der Heever* case<sup>9</sup> Van der Byl AJ examined the common law and concluded that the court could use its discretion to exempt the usufructuary from a duty originating in the *salva rei substantia* requirement. On the policy ground of fairness Van der Byl AJ exempted the impecunious usufructuary from the duty to provide security.

In the *Linvestment* case the unilateral relocation of a specified servitude of right of way was justified by comparative, historical and policy arguments. However, both the comparative and historical arguments advanced in the case were problematic. In terms of comparative law, predominantly secondary sources were relied on, without providing contextual evidence justifying why and demonstrating how a flexible approach is utilised in foreign jurisdictions.<sup>10</sup> The historical argument is insubstantial due to misplaced reliance on a draft Dutch civil code that never formed part of Roman Dutch law, and the dismissal of the applicable authority of Voet as well as established precedent in the relevant case law.<sup>11</sup> On the other hand, Kiewitz argues with reference to the *Linvestment* decision that policy considerations provide relatively convincing arguments for allowing the unilateral relocation of a specified servitude of right of

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<sup>6</sup> AJ van der Walt *The Law of Servitudes* (forthcoming 2016) ch 1 44.

<sup>7</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T).

<sup>8</sup> 2008 3 SA 283 (SCA).

<sup>9</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T).

<sup>10</sup> L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 2, 34.

<sup>11</sup> 2, 33.

way.<sup>12</sup> In fact, as Van der Walt remarks, the *Linvestment* decision is in the end justified by policy reasons.<sup>13</sup>

Although policy analysis plays a role in the development of servitude law, it must be approached with caution and at least in some instances it cannot be the only basis for development.<sup>14</sup> Van der Walt points out two problems related to both economic analysis<sup>15</sup> and doctrinal analysis as justification for legal development on policy grounds.<sup>16</sup> Firstly, the underlying premise of both economic and doctrinal analysis is that the initial (or current) land distribution is just. Taking into account the history of unequal land distribution and unequal access to natural resources, this premise and consequently the suitability of economic analysis may be questioned, at least in the South African context.<sup>17</sup> Secondly, neither economic analysis nor doctrinal analysis adequately takes account of the intricate social policy issues that may be at stake in servitude cases. Van der Walt points out that servitudes encompass the distribution of land-use rights and are linked to other attendant social issues of access to land, markets and capital. Furthermore, economic analysis might not offer a sufficient explanation for the shift from an agrarian to a mainly urban, technology-dependent society. Most importantly, economic analysis does not engage with the constitutional or democratic considerations that are pressing and inevitable in property law. Apart from the challenges mentioned above, a discussion of policy considerations is also

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<sup>12</sup> AJ van der Walt *The Law of Servitudes* (forthcoming 2016) ch 1 44.

<sup>13</sup> 44.

<sup>14</sup> Caution against the use of policy as justification for an argument is not a new idea. Burrough J for example already encouraged prudence relating to this practice in 1824. See *Richardson v Mellish* 1824 2 Bing 229 130 ER 294.

<sup>15</sup> Economic analysis is a significant form of policy inquiry.

<sup>16</sup> AJ van der Walt *The Law of Servitudes* (forthcoming 2016) ch 1 48.

<sup>17</sup> Ch 1 49.

impeded by the conceptual elusiveness of the term policy; the relatively scant material on policy considerations in relation to personal servitudes; the divergent perspectives on the proper use of policy in legal decision-making and scholarly work; and methodological considerations.

Taking into consideration these inadequacies of policy analysis, this chapter nevertheless considers policy justifications for both a rigid and a flexible approach to the *salva rei substantia* requirement. Van Aswegen reiterates the truism that law as a social institution must adapt to changing circumstances, values and perceptions if it purports to stay valid, legitimate and effective.<sup>18</sup> Policy plays a role in the development, extension and adaptation of the law and must therefore be considered.<sup>19</sup> The core question addressed in this chapter is whether it would be justifiable for South African courts to interpret the *salva rei substantia* requirement flexibly on the basis of policy and theoretical considerations. Therefore, considering both the value and the problems associated with policy analysis, the discussion of policy in this chapter is qualified by considering the challenges that it poses. I argue that policy as a concept is not defined in a way that makes it useful and relevant as a research tool. In the face of scant material, identifying clear and strong policy arguments in favour of a flexible approach might prove challenging. Therefore, I utilise theory, since it underpins policy.<sup>20</sup> Consequently, the larger part of this chapter explores theoretical considerations that might bolster an argument in favour of a flexible approach. The theories drawn on in this chapter generally present two fundamentally different schools of thought. However, as has been pointed out within the context of policy theory, there

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<sup>18</sup> A van Aswegen "Policy Considerations in the Law of Delict" (1993) 56 *THRHR* 171-195 172.

<sup>19</sup> 173.

<sup>20</sup> Compare PA Sabatier "The Need for Better Theories" in PA (ed) *Theories of the Policy Process* (2007) 3-17 4-6.

are advantages to using multiple theories. It actively resists the assumption that a certain theory is the only valid option, it displays the comparative advantages of diverse theories in different contexts and sensitises the researcher to the “implicit assumptions” underlying a preferred theory.<sup>21</sup> By drawing on explanations from both information and progressive theorists<sup>22</sup> a unidimensional answer is resisted. Furthermore, the strengths of each school of thought might be applied to explain different approaches to the *salva rei substantia* requirement. By juxtaposing the different schools of thought their underlying assumptions are also exposed.

After the initial excursion into policy considerations, I firstly examine arguments in favour of flexibility by proponents of information theory. In particular, I enquire whether Law and Economics theory with its focus on efficiency provides support for a more flexible approach to the *salva rei substantia* requirement. As a starting point, I outline the Coase theorem. Subsequently, the extension of his work by Calabresi and Melamed in terms of their property and liability rules model is considered. A further development of this model by Bell and Parchomovsky concerned pliability rules. The question is whether especially pliability rules can provide theoretical support for a flexible interpretation of the *salva rei substantia* requirement. The picture would not be

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<sup>21</sup> P Cairney “Standing on the Shoulders of Giants: How Do We Combine the Insights of Multiple Theories in Public Policy Studies?” (2013) 41 *The Policy Studies Journal* 1-21 9, citing P Sabatier “Fostering the Development of Policy Theory” in P Sabatier (ed) *Theories of the Policy Process* (2 ed 2007) 321-336 330. According to PA Sabatier “The Need for Better Theories” in PA (ed) *Theories of the Policy Process* (2007) 3-17 6 the consideration of different theories might ultimately prompt clarification of distinctive assumptions instead of implicitly harbouring a specific set, foster the generation of “competing hypotheses that should lead ideally to ‘strong inference’” or to mounting evidence favouring certain perspectives and eventually make clear under which conditions a particular theory would be more useful than another.

<sup>22</sup> JB Baron “The Contested Commitments of Property” (2010) 61 *Hastings LJ* 917-968 explains and elaborates on this distinction by utilising the metaphors of a machine and a conversation to represent the contested commitments of the information theorists and progressive theorists respectively.

complete without recognising that the tenets of Law and Economics only accommodate a flexible approach to the requirement to a limited extent. Drawing on the work of Parisi regarding fragmentation of property rights and Mackaay on opportunism, I consider how these theories conversely reinforce a more rigid approach to the *salva rei substantia* requirement.

Moving to the proponents of Progressive Property theory, I reflect on the work of Alexander regarding governance property and Dyal-Chand on sharing in property. In contrast to the information theorists, both point out that the traditional dominant paradigm of ownership with its focus on exclusion in property law results in a perception that sharing is a peripheral phenomenon in property law. Actually, as their examples show, sharing is prevalent in property institutions. The question is how the theories of these Progressive theorists can be applied to usufruct, particularly if their work provides arguments in favour of a flexible approach to the *salva rei substantia* requirement.

It needs to be reiterated that policy and theoretical considerations cannot serve as a standalone justification for either a rigid or a flexible approach to the *salva rei substantia* requirement in a constitutional dispensation like South Africa. Therefore, the arguments in this chapter cannot be considered in isolation or be seen as conclusive evidence that irrefutably justifies either point of view.

## **4 2 Challenges in relying on policy considerations**

### 4 2 1 Introduction

In a comment on Dworkin's distinction between arguments of principle and arguments of policy, Neil MacCormick asserted: "Policy' has become a hideously inexact word in

legal discourse”.<sup>23</sup> This point of criticism is probably also true of South African legal discourse.<sup>24</sup> Therefore, this chapter on theoretical and policy considerations should be introduced with a demarcation of the concept of policy as it pertains to private law. The conceptual elusiveness of the term “policy” is intensified because it is not readily seen as a dominant consideration in all fields of law.<sup>25</sup> Accordingly, the conceptual grafting of policy analysis onto areas of law that are not usually integrated in policy discourse proves to be challenging. Within the context of property law, usufruct as an example of a personal servitude is not often the topic of policy-related discussions. Furthermore, the *salva rei substantia* requirement is susceptible to a similar diagnosis: it is not usually associated with public policy analysis.<sup>26</sup> Therefore, defining public policy for purposes of investigating policy considerations relevant to the *salva rei substantia* requirement presents a challenge.

Case law in fields of law other than property reveals broad and sweeping definitions of policy that attempt to pin down the concept and courts admit the difficulty of definition.<sup>27</sup> Affirming this, Hoexter in an article on judicial policy in the South African

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<sup>23</sup> N MacCormick *Legal Reasoning and Legal Theory* (1978) 263.

<sup>24</sup> See in this regard A van Aswegen “Policy Considerations in the Law of Delict” (1993) 56 *THRHR* 171-195 173; C Hoexter “Judicial Policy in South Africa” (1986) 103 *SALJ* 436-449 441.

<sup>25</sup> See for example MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 125, who highlights constitutional law as a field where policy is examined, but notes that the converse is true for estate planning. A van Aswegen “Policy Considerations in the Law of Delict” (1993) 56 *THRHR* 171-195 171, 172 points out the important role of policy in the law of delict.

<sup>26</sup> Two articles that do touch on policy considerations are GF Wright “Die Onvermoënde Vruggebruiker” (1995) 58 *THRHR* 86-91 and CG van der Merwe “Regsbegrippe en Regspolities” (1979) 42 *THRHR* 9-20.

<sup>27</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 145, citing *Tunstall v Wells* 50 Cal Rptr 3d 468 (Cal Ct App 2006) 474 (internal citations omitted): “In sum, ‘it is generally agreed that ‘public policy’ as a concept is notoriously resistant to precise definition”. See also AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 303.

context typifies policy as “a very slippery concept” with a shifting and context-dependent meaning.<sup>28</sup> Furthermore, academics point to the uncertain and changing nature of public policy.<sup>29</sup> This unstable character of policy can be ascribed to evolving “economic needs, social customs, and moral aspirations”.<sup>30</sup>

Taking into account the unstable and slippery nature of policy, the two South African authors Hoexter<sup>31</sup> and Van Aswegen<sup>32</sup> revert to a definition by Bell, who defines policy as “substantive justifications to which judges appeal when the standards and rules of the legal system do not provide a clear resolution of a dispute”.<sup>33</sup> These justifications are contrasted with “authoritative reasons for a decision, which are the clear legal rules and principles established by statute or precedent”.<sup>34</sup> Bell also

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<sup>28</sup> C Hoexter “Judicial Policy in South Africa” (1986) 103 *SALJ* 436-449 441.

<sup>29</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 136 provides an example, citing a definition from *Grant v Butt* 17 S E 2d 689 (S C 1941) 693, quoting *Weeks v New York Life Ins Co* 122 S E 586 S C 1924. GN Williams “Importance of Public Policy Considerations in Judicial Decision-Making” (2000) 25 *International Legal Practitioner* 134-139 134 (with reference to Australian law) quotes Jordan CJ in *Re Jacob Morris (deceased)* (1943) S R NSW 352 355: “Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that ‘public policy’ is a variable thing. It must fluctuate with the circumstance of the time ... New heads of policy come into being, and old heads undergo modification”.

<sup>30</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 136, citing definitions from *Grant v Butt* 17 S E 2d 689 S C 1941 693, quoting *Weeks v New York Life Ins Co* 122 S E 586 S C 1924; *Girard Trust Co v Schmitz* 20 A 2d 21 N J Ch 1941 29 (internal citation omitted), quoting *State v Bowman* 170 S W 700 (Mo Ct App 1914) 701.

<sup>31</sup> C Hoexter “Judicial Policy in South Africa” (1986) 103 *SALJ* 436-449 441.

<sup>32</sup> A van Aswegen “Policy Considerations in the Law of Delict” (1993) 56 *THRHR* 171-195 173.

<sup>33</sup> J Bell *Policy Arguments in Judicial Decisions* (1983) 22-23. The definition of AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 303, 307 broadly corresponds to that of Bell since Handler includes utilitarian and moral considerations. He asserts that policy cannot be avoided where legal precepts, rules of law and principles cannot lead to the resolution of cases. Where precedent and authority do not provide answers, public policy will mirror the social priorities of daily life.

<sup>34</sup> A van Aswegen “Policy Considerations in the Law of Delict” (1993) 56 *THRHR* 171-195 173.

categorises policy considerations according to substance: they can be either ethical, “conforming to an ethical standard such as fairness or justice” and “may be consequentialist in nature” or goal-based, “advancing some social goal”. Van Aswegen describes this social goal as a goal of “collective welfare, such as effective loss spreading or free economic competition”.<sup>35</sup> Van Aswegen consolidates the highlighted traits into a working definition of policy in accordance with the general view in South Africa:

“Policy considerations are substantive reasons for judgments reflecting values accepted by society. They consist in moral or ethical values, valuable in themselves, or in desirable goals of collective societal welfare, but there is no reason why these two types of policy consideration cannot overlap. A decision determined by such considerations – a policy decision – comprises a balancing of the various values, and is thus a value judgment by the decision-maker.”<sup>36</sup>

This definition seems useful and compatible with the main tenets of other definitions.<sup>37</sup> It also emphasises that the distinction between different types of policy does not have

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<sup>35</sup> A van Aswegen “Policy Considerations in the Law of Delict” (1993) 56 *THRHR* 171-195 173-174.

<sup>36</sup> 174.

<sup>37</sup> Some other definitions seem to foreground the social, collective or community dimension of policy. See R Dworkin *Taking Rights Seriously* (1977) 90, who defines policies as propositions describing goals, and arguments of policy as arguments aimed at establishing a collective goal. Policies are contrasted with principles which are propositions describing rights. Arguments of principle are aimed at establishing an individual right. N MacCormick *Legal Reasoning and Legal Theory* (1978) 262-264 criticises Dworkin’s definition and takes as a starting point the more commonly accepted dictionary definition of the concept as an advantageous or expedient course of action. He defines policy “as denoting those courses of action adopted by courts as securing or tending to secure states of affairs conceived to be desirable”. Following from this definition, a policy argument “shows that to decide the case in *this* way will tend to secure a desirable state of affairs”. In contrast to Dworkin, MacCormick does not juxtapose policy and principle artificially. The question whether a certain policy is desirable is entwined with the question of principle. To prescribe a goal to be secured, is to articulate a principle or a judgment depending on some unstated but presupposed principle. Furthermore, for MacCormick, the postulated goal to be achieved by the course of action cannot *per se* be equated to the policy as Dworkin

to be clear-cut. Furthermore, it indicates a methodological approach to policy considerations. However, it does have certain limitations. Firstly, it was developed within the framework of the law of delict and not specifically with reference to property law. Secondly, it does not cover policy considerations gleaned from property theory, which does play a significant role in this chapter where theoretical, comparative and analogous arguments have to augment sparse case law references to policy.

Scholars hold divergent perspectives on the proper use of policy in legal decision-making.<sup>38</sup> Hence, a discussion on the use of policy in private law should secondly be embedded in an overview of the different positions culminating in a choice for either an instrumentalist or formalist view or a *via media* between the two

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postulates. A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 262-263 defines policy considerations as “justifications (for or against a legal rule or outcome in a particular case) that are concerned with community interests not related to the form of law”. Robertson qualifies his definition of policy as community oriented justifications relating to legal rules or outcomes in four ways. Firstly, he asserts that policy considerations may be either consequentialist or deontological. (Therefore he does not exclude the ethical dimension, but highlights the community aspect.) Secondly, the formal legal considerations (certainty, consistency and coherence) should be excluded from discussions of broader social or economic considerations. Thirdly, where policy considerations relate to community interests they must be distinguished from considerations of justice and fairness pertaining to litigants in a particular dispute. Fourthly, policy considerations do not equate to justifications for legal rules because they do not always operate as justifications for rules, nor are they the only justification for rules. MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 136-141 attempts to demarcate the boundaries of public policy under the common law with reference to the sources of public policy, namely the Constitution, statutes, judicial decisions and the “customs and connections of the people ... their clear consciousness and conviction of what is naturally and inherently just and right between man and man”. He focuses on the latter: the prevalent conceptions of the community, as it appears in the Restatement (Second) of Trust. Begleiter prefers it to the conception of public policy in the Restatement (Third) of Trust.

<sup>38</sup> These views can be classified as formalist or instrumentalist. See n 27 for definitions.

perspectives.<sup>39</sup> A related issue is that a significant proportion of the material is generated by writers with a formalist stance or who rely on sources written by formalists, which leads to a theoretical bias.<sup>40</sup> A further distinction should be drawn between perspectives on the use of policy arguments in legal decision-making and the role of policy arguments in scholarly arguments. Most of the literature on policy analysis in private law pertains to legal decision-making and not to scholarly analysis *per se*.<sup>41</sup>

Thirdly, a discussion on policy should also be set within a framework of methodological considerations. Here methodological considerations pertaining to judicial decision-making should also be distinguished from methodological issues regarding scholarly work.

Robertson<sup>42</sup> notes that the question whether policy should play a role in private law scholarship relates to whether a formalist or an instrumentalist view is held. Formalists do not believe that private law can have goals and therefore there is no

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<sup>39</sup> A formalist view would not endorse the use of policy considerations whereas an instrumentalist view would subscribe to the use of private law as a tool of public policy. See A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 261, who proposes that a *via media* between formalist and instrumentalist perspectives is acceptable.

<sup>40</sup> See for example A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 and N MacCormick *Legal Reasoning and Legal Theory* (1978) 259-264. Robertson, although advocating a *via media* between instrumentalist and formalist approaches, frequently refers to the work of Weinrib, an academic with a strong formalist bias, judging from his work. See for example EJ Weinrib *The Idea of Private Law* (1995) with its strong pronouncements against functionalism.

<sup>41</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 and AJ van der Walt *The Law of Servitudes* (forthcoming 2016) ch 1 44-50 might be starting points for a discussion on the proper use of policy argument in scholarly literature regarding servitude law.

<sup>42</sup> A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 261-268.

legitimate role for policy considerations in court decisions or the development of rules. Conversely, instrumentalists deem private law a tool in the service of public policy. However, from both perspectives policy considerations guiding judgements are used without constraint. Judges utilising public policy take on the role of legislators in choosing between various legal answers to particular problems. The unfettered use of policy is embraced by instrumentalists, while formalists reject it. Against this background, Robertson attempts to demarcate the constraints on the utilisation of policy considerations and to trace the contours of a *via media* between the two theoretical approaches.<sup>43</sup>

Therefore, the function of courts is not to declare policy but to decide whether a statute articulates policy and to determine the content of the policy accordingly.<sup>44</sup> However, this is done cautiously in order to avoid inferring broad policy where the statute does not justify such an interpretation. In the absence of statutes, the courts may develop policy more liberally, but courts should do so “with great care and due deference to the judgment of the legislative branch”.<sup>45</sup> Policy does not focus on “the litigants’ purely personal or proprietary interests” or turn on “a particular court’s sense of fairness”, but pertains to “society at large”.<sup>46</sup> Begleiter not only cautions courts to consider whether the policy is based on the “substantial belief in the community” but

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<sup>43</sup> A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 261.

<sup>44</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 143.

<sup>45</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 145, citing *Tunstall v Wells* 50 Cal Rptr 3d 468 (Cal Ct App 2006) 474 (internal citations omitted).

<sup>46</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 145, citing *Tunstall v Wells* 50 Cal Rptr 3d 468 (Cal Ct App 2006) 474 (internal citations omitted).

also suggests documenting factors that justify the latter assumption.<sup>47</sup> What should be avoided, is “the temptation to substitute the judge’s own beliefs for the settled beliefs of the community”.<sup>48</sup>

Policy particularly needs to be considered when more than the interests of the litigants are at stake.<sup>49</sup> When the collective interests of the community necessitate the preservation of litigants’ rights, policy considerations must be taken into account. The remedy protecting these interests must not only vindicate the parties’ rights but also be a way to reach a societal goal.<sup>50</sup>

The discussion above emphasises certain aspects that have to be taken into account when considering policy. Firstly, there are divergent perspectives regarding the nature of private law as either having no goal in itself or as a tool in the service of policy. This is an important consideration, since it determines whether policy is in any way relevant in adjudication and the development of law. Secondly, there seems to be different opinions as to the nature of policy. Does it denote goals, courses of action or justifications? In this dissertation policy will mainly refer to justifications, particularly because it accords with South African definitions of policy. However, Robertson’s qualification that policy considerations are not always the justification for legal rules, or the only justification for legal rules, is important. Thirdly, an indispensable element seems to be the concern with community interests. Fourthly, categorisation seems to indicate that consequentialist or utilitarian considerations can be distinguished from

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<sup>47</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 148.

<sup>48</sup> MD Begleiter “Taming the ‘Unruly Horse’ of Public Policy in Wills and Trusts” (2012) 26 *Quinnipiac Prob LJ* 125-155 148.

<sup>49</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 307.

<sup>50</sup> 303.

deontological or moral considerations. Finally, a hierarchy of sources can be discerned, starting with statutes as the primary source but not negating community conceptions as a significant contributor.

#### 4 2 2 Role and use of policy

Public policy has in the past been hailed as “the secret root from which the law draws all the juices of life” and the source of “[e]very important principle which is developed by litigation”.<sup>51</sup> These quotations suggest that policy plays or should play a dominant role in legal development.<sup>52</sup> Conversely, legal theorists caution against the use of

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<sup>51</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 304, citing OW Holmes *The Common Law* (1881) 35-36. For a more recent expression of a similar sentiment, see GN Williams “Importance of Public Policy Considerations in Judicial Decision-Making” (2000) 25 *International Legal Practitioner* 134-139 139: “[T]he notion of public policy is the backbone of the common law, it provides its strength and its mobility”.

<sup>52</sup> Apart from OW Holmes, mentioned by Handler and Roederer, the latter also mentions B Cardozo as defending the view that judges may legislate “within the gaps of the law” by referring to policy. See CJ Roederer “Third Path Theorists: Between Positivism and Natural Law, Fuller and Dworkin” in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 84-116 99 and fn 58. K Greenawalt “Policy, Rights and Judicial Decision” (1977) 11 *Georgia LR* 991-1053 991 mentions the analytical positivist Hart along with the legal realists and writers within the tradition of sociological jurisprudence as exponents of the assumption that judges may exercise “legislative discretion” where the law as it exists does not provide answers to legal questions. Greenawalt associates with this stream through his criticism of Dworkin’s stance against judges relying on policy arguments.

public policy as the dominant consideration in judicial decision-making<sup>53</sup> or discourage the use of policy entirely.<sup>54</sup>

In a recent South African article by Van der Walt referring to the role of policy in the development of the common law, it is suggested that policy, along with other considerations, only comes into play when “traditional historical or doctrinal analysis does not provide satisfactory answers”.<sup>55</sup> Along with the use of comparative sources, “economic and other policy considerations” may suggest “alternative possibilities”. Van der Walt does not discuss policy as a source “of authority or inspiration” but cautions firstly, that policy considerations, as is the case for “historical authorities, foreign law [...] and normative principles” will only justify the development of the common law where proper and thorough analysis has been conducted subject “to its own requirements and traditions”. The article does not elaborate on the requirements and traditions associated with policy analysis in South African legal writing. Even

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<sup>53</sup> In *Richardson v Mellish* 1824 2 Bing 229; 130 ER 294 Burrough J cautioned against leaning too strongly on policy in argument when he made the well-known pronouncement: “[Policy] is a very unruly horse, and once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail”. For a cautionary approach in post-constitutional South African law see AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 736; AJ van der Walt *The Law of Servitudes* (forthcoming) ch 1 48-50.

<sup>54</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 304 refers to Ronald Dworkin. According to CJ Roederer “Third Path Theorists: Between Positivism and Natural Law, Fuller and Dworkin” in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 84-116 98 Dworkin ties the integrity of the law to the similar treatment of like cases based on principle and not on “whim, policy, or expediency”. K Greenawalt “Policy, Rights and Judicial Decision” (1977) 11 *Georgia LR* 991-1053 992 notes Dworkin’s insistence that existing legal materials are sufficient to provide answers to legal questions and that even hard cases should be approached in terms of principle. A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 261 also mentions other proponents questioning the justification of decisions based on policy considerations, including “scholars advocating a strict corrective justice or rights-based approach” for example EJ Weinrib, A Beaver, R Stevens within the context of tort law.

<sup>55</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 736.

assuming that policy analysis has been done properly, “such analysis (and hence the grounds that we put forward for a particular development of the common law) will often remain controversial”. Only rarely can this analysis result in a “simple, uncontroversial solution [...] to any given dispute”. This caveat against using policy analysis as justification for common law development should be duly noted. Fairly recent academic theses on servitude law, including those of Kiewitz<sup>56</sup> and Raphulu,<sup>57</sup> relied on arguments partly based on policy analysis but not as the first and only consideration.

Whereas Van der Walt endorses the use of policy as a guide to “alternative possibilities”, Dworkin argues that “well-established legal rules” should be the foundation for decisions, followed by principle, but does not subscribe to the use of policy.<sup>58</sup> Principles (contrary to rules) refer to general (often implicit) standards which underpin the various legal rules. They provide “weight or gravitational pull” and can thus compete because they do not apply in an “all-or-nothing way” but may be balanced and given precedence in specific contexts.<sup>59</sup> Principles are prompted by the “requirements of justice, fairness, or some other dimension of morality” and give rise to the rights of litigants.<sup>60</sup> Dworkin views policy as the prerogative of the legislator and defines it as “that kind of standard that sets out a goal to be reached, generally an

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<sup>56</sup> See L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 109-150. Law and Economics analysis forms a substantial part of Kiewitz’s chapter on policy analysis.

<sup>57</sup> See NT Raphulu *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University § 3 3 79-84 and § 3 4 92-98 who distinguishes between “public policy” and “law and economics” considerations.

<sup>58</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 304.

<sup>59</sup> CJ Roederer “Third Path Theorists: Between Positivism and Natural Law, Fuller and Dworkin” in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 84-116 96-97.

<sup>60</sup> 100.

improvement in some economic, political or social feature of the community”. The use of policy is discouraged because it is viewed as “utilitarian-like calculation pitting the damage to some litigant’s financial position against the gains to society generally”.<sup>61</sup> This aversion to utilitarian considerations and policy as justification for judicial decisions reveal a reductionist view of policy, which conceptually eludes demarcation and is often characterized broadly.<sup>62</sup>

#### 4 2 3 Methodological considerations

According to Handler, courts are faced with a challenge because they must safeguard a sufficient and fully informed basis for the incorporation of policy.<sup>63</sup> This requires an identification and explanation of the application of public policy. He also points out that knowledge must be used responsibly, in a trustworthy and understandable manner.

Handler breaks down the policy analysis process into normative steps. Firstly, courts must use appropriate means to determine public policy.<sup>64</sup> Competing policies must be rationally compared and weighed. Therefore courts must determine the acceptable level of certainty needed before information that buttresses policies may be incorporated in its jurisprudence. When faced with an information shortfall, where even knowledgeable experts cannot meet the need, courts must ensure that the demand is dealt with. The level of certainty may then even be adjusted, taking into consideration “the consequences in failing to recognize and accept apparent, though

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<sup>61</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 304.

<sup>62</sup> For a similar view of the role of policy by a South African author, see the discussion of Fagan’s inaugural lecture in AJ van der Walt *Constitutional Property Law* (3<sup>rd</sup> ed 2011) 92-97.

<sup>63</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 308.

<sup>64</sup> 308.

accepted, levels of knowledge, thereby denying redress for a perceived harm and [...] the drawbacks inherent in resorting to less certain knowledge, thereby imposing liability and responsibility for the harm on a potentially or theoretically innocent party”.<sup>65</sup> The individual and social consequences of each alternative are context-dependent and variable. The issues that have to be determined influence the different standards of acceptable knowledge as basis for the justification of a decision. The acceptable level of reliable knowledge mirrors the demarcation of legal issues, the legal questions and the court’s interpretation as well as the understanding of public policy. Secondly, courts should also have “comprehensive, straightforward and understandable” explanations so that the decision is not treated in a dismissive manner but is regarded as strong and valid.<sup>66</sup> MacCormick’s levels of argument over issues of policy may inform the process of weighing and comparing that Handler refers to. According to MacCormick, arguments for and against a particular policy can be conducted on different levels:

“[M]eans-effectiveness arguments – will doing *x* in this context actually achieve *y*?, means-desirability arguments – regardless of efficacy is it on other grounds undesirable to do *x*, or undesirable to use *x* as a means to *y*, and goal-desirability arguments – is it desirable to procure *y* by any means?”<sup>67</sup>

In contrast to Handler, Robertson does not so much provide a normative framework for the use of policy in judicial decisions, but discusses constraints on the use of policy. Firstly, the use of policy in case law is constrained by broader institutional

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<sup>65</sup> AB Handler “Judging Public Policy” (2000) 31 *Rutgers LJ* 301-324 308.

<sup>66</sup> 309.

<sup>67</sup> N MacCormick *Legal Reasoning and Legal Theory* (1978) 262.

considerations.<sup>68</sup> Secondly, conventional techniques of legal reasoning such as the doctrine of precedent also act as constraints. Thirdly, the formal legal aim of “consistency between related principles and related bodies of law” also constrains courts in their decision-making. Fourthly, the use of policy is constrained by the need to do justice to the parties to litigation. Every plaintiff’s entitlement corresponds to an obligation or liability of the defendant. Consequently, the plaintiff can only receive a remedy if liability is attributed to the defendant, and the latter can only be relieved from liability if the plaintiff is denied. This bipolar structure of private law constrains the use of policy in private law. Robertson notes that the strength of the “bipolarity constraint” must be determined:

“How are judges constrained in private law decision-making by the correlativity between right and obligation, and the consequent need to reconcile the pursuit of public goals with the need to do justice to individual plaintiffs and defendants?”<sup>69</sup>

The level of constraint depends on whether an instrumentalist or a formalist stance is taken. Instrumentalists do not consider the need to do justice to both parties, but focus on the “goal of producing socially desirable outcomes”.<sup>70</sup> Formalists argue that

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<sup>68</sup> A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 268-269 explains that reasons for judgments must be disclosed publicly and therefore are open to peer scrutiny. Where unorthodox justifications can hence be challenged and a judge’s reputation is open to criticism, self-constraint is enforced. Furthermore, as A Robertson “Constraints on Policy-Based Reasoning in Private Law” in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 269 citing *Mount Isa Mines Ltd v Pusey* 1970 125 CLR (High Court of Australia) 396 notes, appellate courts develop legal principles through collective judicial input and are influenced by “analogies in other courts [...] persuasive precedents as well as authoritative pronouncements”. Policing by textbooks and scholarly literature concerning consistency, coherence and doctrinal stability as well as scrutiny and criticism of assumptions regarding the “potential social and economic consequences of particular legal rules” also contribute to institutional constraints.

<sup>69</sup> 272.

<sup>70</sup> 272-273.

reasons for a right and a corresponding liability should be found in the interactions between the litigants and accordingly the reasons for the defendant's obligation should correlate with the reasons for the plaintiff's entitlement. Between these two extremes, Robertson notes, a middle ground exists. Robertson refers to the work of Dagan:<sup>71</sup> For Dagan the fact that it is "socially desirable for a class of people that includes the defendant to bear a responsibility to a class of people that includes the plaintiff" is not sufficient.<sup>72</sup> The constraint of the bipolar structure lies in "the requirement of reconciling the promotion of community interests with the need to do justice as between individual parties". Robertson characterises the bipolarity constraint in terms of three questions:

"First, can an obligation be imposed on a defendant purely on the basis of community welfare concerns? Secondly, can the extent of the defendant's secondary or remedial obligation be determined exclusively by community welfare concerns? Thirdly, can a right that might otherwise be recognised be denied solely on the basis of community welfare concerns?"

This section highlights the challenges inherent in a discussion on policy considerations and in adjudication involving policy arguments. Courts need to assess their methodology for incorporating policy as argument in a responsible manner. Apart from developing a normative framework for decisions, certain constraints also need to be taken into account, namely broader institutional considerations, conventional techniques of legal reasoning, consistency and justice considerations.

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<sup>71</sup> See H Dagan "The Limited Autonomy of Private Law" (2008) 56 *Am J Comp L* 809-833 813-818.

<sup>72</sup> A Robertson "Constraints on Policy-Based Reasoning in Private Law" in A Robertson & TH Wu (eds) *The Goals of Private Law* (2009) 261-280 273-274.

## 4 3 Theoretical arguments

### 4 3 1 Introduction

Explicit and detailed reference to policy in case law concerning the *salva rei substantia* requirement is scarce. What could be gathered from chapter two and three is that the alimentary function of usufruct, the changed content of patrimony and the considerations of heirs, especially the best interests of minors, seem to be important policy considerations. Of these the alimentary function, the changed content of patrimony and in very limited circumstances the best interest of minors can be construed as policy arguments in favour of flexibility. However, taking into account the dearth of material, it needs to be supplemented and supported by a discussion of theoretical arguments in favour of flexibility that underpin policy.

Theoretical arguments in favour of a flexible approach can be constructed from two very different current schools of property theory. In the following sections I follow the recent distinction between information theorists and Progressive Property theorists. The former work within the efficiency paradigm of Law and Economics and focus on exclusion, while the latter argue against exclusion as the main tenet of property law. Instead, Progressive Property theorists argue that sharing is a much more prevalent form of property than is often recognised and that consequently, governance and enforcement mechanisms need to reflect and accommodate this reality by not merely prioritising the interests of owners but also considering the interests of non-owners.

#### 4 3 2 Information theorists: Law and Economics

According to Schäfer and Ott a society meets the efficiency standard when “under the given endowments it is no longer possible to improve the welfare of any individual and at the same time no individual has been made worse off”.<sup>73</sup> To achieve an efficient allocation of resources, the creation and protection of rights that encourage exchange and investment is necessary.<sup>74</sup> The allocation of resources may be affected by the rules that exist for enforcing property rights.<sup>75</sup> The rules determine how property rights can be transferred and indicate the remedies for infringements. According to Mackaay, Law and Economics theory provides a tool to assess legal rules in relation to their “expected social effects as opposed to their justice or fairness qualities”.<sup>76</sup> It is important to evaluate legal rules because they affect the costs and benefits involved in particular courses of action and therefore have an impact on whether certain actions are considered more attractive and viable than others. Law and Economics analysis can be conducted on three levels. Firstly, Law and Economics clearly expresses the main foreseeable consequences that a change in legal rules might have, specifically relating to how people may adapt their behaviour as a response to the change. Secondly, economic analysis of law sets out the rationale for existing rules. Finally, it acts as a normative agent because it probes which rules “we ought to have” and gauges “whether existing rules are desirable or wise”.

This section addresses the selection of an appropriate rule from a Law and Economics point of view that will result in an efficient outcome for both the bare owner

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<sup>73</sup> H Schäfer & C Ott *The Economic Analysis of Civil Law* 3-13 8.

<sup>74</sup> TJ Miceli “Property” in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 at 246.

<sup>75</sup> TJ Miceli *The Economic Approach to Law* (2004) 176.

<sup>76</sup> E Mackaay *Law and Economics for Civil Law Systems* (2013) 6.

and the usufructuary when the *salva rei substantia* requirement is applied. Building on the work of Coase, I consider how the property and liability rule paradigm developed by Calabresi and Melamed can be applied to the requirement. Subsequently, I rely on Bell and Parchomovsky's liability rules paradigm,<sup>77</sup> which argues for even more flexibility by expanding on the work done by Calabresi and Melamed. I propose that these Law and Economics models, considered progressively, allow for a more flexible approach to property to enhance efficiency and that this argument supports a flexible approach to the *salva rei substantia* requirement.

#### 4 3 2 1      *Coase Theorem*

Coase considered efficiency in situations involving conflicting property rights.<sup>78</sup> He argued that parties will bargain to change the initial allocation of property rights.<sup>79</sup> An efficient outcome will result irrespective of which party originally acquired the property

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<sup>77</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79.

<sup>78</sup> RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44 1-2, 27, 42-43 specifically dealt with the problem in the context of actions inducing harmful effects and the question of which parties should bear the costs. He argued that the problem had a reciprocal nature and that the object of such an inquiry should be to "avoid the most serious harm". His article was a response to the work of AC Pigou *The Economics of Welfare* (4 ed 1932) and his exponents who argued that the liability should only be allocated to the harm-inducing agent and therefore the focus is on measures of restraint. Coase argued for a change in approach in the sense that the focus should not be on removing harm ("particular deficiencies") from the system, but on reducing the cost of the harm. In this sense Coase already proposes a more flexible approach than Pigou.

<sup>79</sup> See RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44 15 "It is always possible to modify by transactions on the market the initial legal delimitation of rights."

right, on condition that the transaction costs<sup>80</sup> associated with bargaining are zero.<sup>81</sup> However, when transaction costs play a role, rearrangement of the initial allocation of rights will only take place if such a rearrangement would result in an increase in the value of production that exceeds the costs involved in attaining the rearrangement.<sup>82</sup> Should the increase in value production be less than the costs involved, a possible or actual injunction or the liability to pay damages may cause the relevant party to not initiate or discontinue an activity which would have taken place in a situation where transactions costs are zero. Consequently, where transaction costs are taken into account, the initial allocation of legal rights matter, since it affects the efficiency with which the economic system operates. A specific allocation of rights by the legal system may bar the option of reaching an efficient or optimal result since the costs of reaching the result through the modification and combination of rights by means of the market would be too high.

Where usufruct is concerned, the two bargaining parties would be the usufructuary and the bare owner. When transaction costs are zero, they might bargain for a more flexible approach to the *salva rei substantia* requirement to reach an optimal

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<sup>80</sup> RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44 15 explained transaction costs in the following way: "In order to carry out a market transaction it is necessary to discover who it is that one wishes to deal with, to inform people that one wishes to deal and on what terms, to conduct negotiations leading up to a bargain, to draw up the contract, to undertake the inspection needed to make sure that the terms of the contract are being observed, and so on. These operations are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost". However as Coase acknowledged, transaction costs are seldom zero.

<sup>81</sup> See RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44 10: "With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources" and 15: "[I]f such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production".

<sup>82</sup> 15-16.

arrangement of rights, or more accurately an optimal distribution of the entitlements to dispose, control and manage the usufructuary property. However, where market transactions are not costless, this optimal arrangement might not occur where the usufructuary is faced with a threatened injunction or liability for damages. Coase argues that the availability of “an alternative form of economic organisation” that is geared to obtain an optimal result at less cost<sup>83</sup> than would be the case if the market is involved, could act as a measure to raise the value of production. Another alternative might be government regulation by administrative decisions, but this solution might not necessarily be less expensive or effective and has been assessed overoptimistically by economists and policy-makers. Coase is therefore in favour of curtailing government regulation.<sup>84</sup> Since both these alternatives may not have an optimal outcome, it is important that the courts must understand the economic repercussions of the initial allocation of property rights and take into account the consequences in their decisions. In this way they can reduce the need for market transactions to change the allocation of rights and the associated transaction costs. Courts do seem to acknowledge the economic problems involved in conflicting property rights when they refer to criteria of reasonableness or accepted use.<sup>85</sup> Within the context of usufruct, the criteria that Coase mentions as evidence that a court is taking into account the economic consequences of the allocation of rights, are already integrated into the principles governing the relationship between the usufructuary and the bare owner. In this sense the common law may already to a limited extent pre-empt considerations

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<sup>83</sup> RH Coase “The Problem of Social Cost” (1960) 3 *J L & Econ* 1-44 16-17 states that less costs can be achieved by substituting a market transaction for an administrative decision, although administrative costs may not necessarily be less than the costs of a market transaction.

<sup>84</sup> 17-18.

<sup>85</sup> 22.

of economic consequences in legal disputes. However, this statement would have to be qualified since these principles and their specific applications in for example the *salva rei substantia* requirement do not *only* embody economic considerations. Given the alternatives which Coase mentions, one could ask which options are open to the bare owner and the usufructuary in a situation where transaction costs have to be taken into account and an optimal arrangement would not result from applying the property rules as they currently stand. Government regulation might be an option, but given the highly context-sensitive nature of the problem of flexibility, this would not necessarily result in an optimal arrangement. The onus would most likely fall on courts. They have to take into account whether their decisions bring about the optimal allocation of entitlements. Of course courts are currently restrained in the solutions they can provide, as was evident from the case law discussed in the introduction to this chapter and as will be evident from the discussion of remedies in Dyal-Chand's work below. The Coase theorem opens up the possibility of allocating costs not only to the harm-inducing agent but to the party to whom it would cause the least costs, since a property conflict is seen as reciprocal. Furthermore, his theory opens up the possibility of factoring in costs rather than merely applying property rules mechanically and in this sense does to a limited extent argue for flexibility in the service of economic efficiency.

Bell and Parchomovsky point out the gaps in Coase's theorem and show how they were addressed by Calabresi and Melamed.<sup>86</sup> Although Coase was in favour of the courts assigning property rights in such a way that efficiency was maximised, he

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<sup>86</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79 5 10-11. See further JA Lovett "A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2006) 38 *Conn L Rev* 1-77 9-11.

did not give guidelines to the courts in this regard. These guidelines are especially necessary to curb the court's discretion. Furthermore, his analysis did not clearly indicate the function of legal norms in promoting efficiency or signal how entitlements should be protected by the legal system once they were allocated. These questions were subsequently addressed by Calabresi and Melamed.

#### 4 3 2 2 *Calabresi and Melamed's property and liability rule paradigm*

Micelli asserts that, apart from the Coase theorem,<sup>87</sup> Calabresi and Melamed's proposition<sup>88</sup> building on the work of Coase<sup>89</sup> and guiding the choice between property and liability rules, established "the core of the economic theory of property law".<sup>90</sup> Lovett<sup>91</sup> summarises the importance of their contribution by referring to the way it firstly enabled legal scholars to schematise "a pattern of entitlement enforcement" vindicating the prevailing party in a property dispute by either a property or a liability rule. This pattern applies irrespective of who wins and reveals a "bilateral symmetry". Calabresi and Melamed's work also led to a normative inquiry into the selection of property or liability rules, along with their benefits and risks, by courts and policy makers.

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<sup>87</sup> RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44.

<sup>88</sup> G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128.

<sup>89</sup> RH Coase "The Problem of Social Cost" (1960) 3 *J L & Econ* 1-44. See s 3 3 2 1 above.

<sup>90</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>91</sup> JA Lovett "A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2005) 38 *Conn L Rev* 1-77 9.

Calabresi and Melamed investigate the rules that govern both the voluntary and involuntary transfer of rights.<sup>92</sup> Apart from inalienability rules, which are not discussed here,<sup>93</sup> they identified two types of rules for the protection of legal entitlements or rights, namely property and liability rules.<sup>94</sup> Right holders may use property rules to protect their entitlements or rights by enjoining attempts to obtain the right or entitlement on unacceptable terms. They may also use liability rules by demanding monetary compensation when their rights or entitlements are seized. Consent distinguishes the two types of rules: transfer according to a property rule takes place when consent is required, whereas transfer by means of a liability rule takes place without consent.<sup>95</sup> Although consent assures mutually beneficial and therefore efficient exchanges, the transaction costs of obtaining consent might be so high that otherwise efficient exchanges may not be completed.<sup>96</sup> Therefore property rules might be the most appropriate when transaction costs are low.<sup>97</sup> This might imply that liability rules should be the preferred choice when transaction costs are high, because these rules

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<sup>92</sup> G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128 1092; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>93</sup> See G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128 1092-1093.

<sup>94</sup> G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128 1092; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>95</sup> G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128 1092, 1105-1106; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>96</sup> G Calabresi & AD Melamed "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 *Harv L Rev* 1089-1128 1092, 1106; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>97</sup> TJ Miceli "Property" in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

enable the courts to coerce exchanges when bargaining is out of the question.<sup>98</sup> However, the choice for liability rules in the context of high transaction costs must be qualified.<sup>99</sup> Courts may not usually take account of subjective values and accordingly inefficient transfers may take place. Therefore, “the cost of potentially inefficient exchanges under liability rules needs to be weighed against the cost of forgone transactions under property rules”.<sup>100</sup>

To concretise their paradigm, Calabresi and Melamed refer to a nuisance case where a homeowner complains about the pollution caused by a nearby cement factory.<sup>101</sup> The dispute can be resolved by applying either two alternative property rules or two alternative liability rules. Rule one is applied when the homeowner has the initial entitlement to be free of pollution and as result the court enjoins the activity causing the emissions. A property rule is also used when rule three is applied. In this case the assumption is that the factory owner has the entitlement to pollute and the court therefore allows the continuation of the emissions, ruling that no nuisance exists. Conversely, liability rules may also be applied. Rule two is applied when the court protects the homeowner’s initial entitlement to be free from pollution by a damage award that compensates him for damage inflicted upon his entitlement. A rarely used

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<sup>98</sup> G Calabresi & AD Melamed “Property Rules, Liability Rules and Inalienability: One View of the Cathedral” (1972) 85 *Harv L Rev* 1089-1128 1092, 1110; TJ Miceli “Property” in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>99</sup> TJ Miceli “Property” in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>100</sup> TJ Miceli “Property” in JG Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-260 249.

<sup>101</sup> G Calabresi & AD Melamed “Property Rules, Liability Rules and Inalienability: One View of the Cathedral” (1972) 85 *Harv L Rev* 1089-1128 1092, 1115-1116 draws this example from the work of FI Michelman “Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs” (1971) 80 *Yale LJ* 647-686 670; JA Lovett JA “A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2005) 38 *Conn L Rev* 1-77 10.

liability rule, rule four, is utilised when the assumed entitlement to pollute can be bought by the homeowner “at some measure of just compensation”.

The property and liability rules theory developed by Calabresi and Melamed has been applied to property law issues in the South African context with regard to encroachment cases<sup>102</sup> and praedial servitudes.<sup>103</sup> Within the context of servitude law, Calabresi and Melamed’s property and liability paradigm has been used as a framework for a deliberation on the relocation of servitudes. However, it has not been applied within the context of personal servitudes and specifically with reference to usufruct and the *salva rei substantia* requirement.

The *salva rei substantia* requirement can be represented as a property rule that entitles the bare owner of the usufructuary property to receive the object of the usufruct without impairment of the substance on termination of the usufruct.<sup>104</sup> According to the traditional common law principle, the entitlement of the bare owner will be protected through an interdict (a property rule correlating with rule one of Calabresi and Melamed’s paradigm) because failure to return the usufructuary property *salva rei substantia* or to fulfil the duties ascribed to the usufructuary originating in this requirement, will be an unlawful interference with the rights of the bare owner. The usufructuary may only deviate from this requirement by for example disposing of the

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<sup>102</sup> AJ van der Walt “Replacing Property Rules with Liability Rules: Encroachment by Building” (2008) 125 *SALJ* 592-628.

<sup>103</sup> L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 108.

<sup>104</sup> In developing the argument regarding the *salva rei substantia* requirement as a property rule I rely on the analogous arguments in L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 123 and JA Lovett “A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2005) 38 *Conn L Rev* 1-77 24-25.

object of the usufruct with the consent of the bare owner. If economic efficiency is the object of this servitude agreement, and if the cost of bargaining with the bare owner and the transaction costs involved are low, it could be argued that the strict application of the property rule would be efficient. However, transaction costs may not be low. As Van der Walt argues in relation to the application of rule 1 to encroachment cases, the bargaining situation might not always be governed by rational negotiations.<sup>105</sup> The bare owner might decide to act strategically and withhold consent for an act of disposition or for acts that will result in transformation unless an exorbitant price is paid. A point analogous to Van der Walt's assertion about the primacy of the affected landowner can be made regarding the affected bare owner in a usufruct case. He is given the crucial choice, while the usufructuary has the option of exercising his usufruct in accordance with the original destination of the usufructuary property and with a less than efficient result, or alternatively to alienate his usufructuary interest, which would not be a very attractive option to buyers as it is still tied to the person of the usufructuary and may hence be terminated unexpectedly if the usufructuary for example dies. To expound this argument, the other theoretical alternatives posited by Calabresi and Melamed should also be developed.

If the second rule formulated by Calabresi and Melamed is applied, the court finds that the *salva rei substantia* requirement has not been met, and applies a liability rule instead of insisting on the property rule. The usufructuary exceeding his usufructuary entitlements remains in possession of the usufructuary property but must pay compensation to the bare owner in accordance with an amount prescribed by the court or restore the substance if that is a more viable option. In this case it is significant

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<sup>105</sup> AJ van der Walt "Replacing Property Rules with Liability Rules: Encroachment by Building" (2008) 125 SALJ 592-628 618-620.

that the usufructuary is given a choice and that the affected bare owner does not have the option of negotiating an alternative outcome because the compensation is set down by the court.

In terms of Calabresi and Melamed's third rule, the court is likely to find that the *salva rei substantia* requirement was not breached and that compensation is therefore not necessary. Similar to encroachment cases, this option should only be possible when the usufructuary's "breach" is "either illusory or really insignificant".<sup>106</sup> This property rule will leave open the option of negotiating an alternative outcome, where the bare owner would probably buy out the usufructuary in order to prevent further infringement.

If Calabresi and Melamed's fourth rule is applied, the court would allow the usufructuary to continue impairing the substance of the usufructuary property. A liability rule acts as protection and would allow the bare owner to terminate the impairing of the substance by paying compensation to the usufructuary. The affected bare owner may choose to act, depending on whether he deems termination of the impairment of the substance worth the prescribed amount of damages. As Van der Walt remarks with reference to encroachments this might be a viable option if the bare owner deems the usufructuary property of a high personal value and the usufructuary attaches a lower value to impairing the substance.<sup>107</sup>

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<sup>106</sup> AJ van der Walt "Replacing Property Rules with Liability Rules: Encroachment by Building" (2008) 125 *SALJ* 592-628 619.

<sup>107</sup> 619-620.

Bell and Parchomovsky noted that Calabresi and Melamed's model does not adequately explain the protection of legal rights in the system.<sup>108</sup> They propose that contrary to the static property and liability rules Calabresi and Melamed advocated, dynamic liability rules can better serve to protect property rights over time.

#### 4.3.2.3 *Bell and Parchomovsky's liability rules*

Lovett points out a deficiency in Calabresi and Melamed's model and in those of scholars rethinking their paradigm.<sup>109</sup> According to Lovett none of the models acknowledges that:

“[W]hen a person chooses to buy or acquire an easement or servitude, although the law often describes the right in absolute terms, the choice in some sense initiates a long-term relationship that is itself bounded and limited. In other words, by selecting a property interest that gives him less than full fee simple ownership, but instead the limited and quasi-possessory rights of an easement or servitude holder, the creator or acquirer of such an interest is not just getting a ‘thing’, but instead is voluntarily entering into a long-term relationship that necessarily will entail a degree of mutual neighborly accommodation and liability rule regulation”.<sup>110</sup>

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<sup>108</sup> A Bell & G Parchomovsky “Pliability Rules” (2002) 101 *Mich L Rev* 1-79 4-5; JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77 5.

<sup>109</sup> JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77 refers to I Ayres & E Talley “Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade” (1995) 104 *Yale LJ* 1027-1118 1031-1033, 1041; CM Rose “The Shadow of the Cathedral” (1999) 106 *Yale LJ* 2175-2200 2179 and L Kaplow & S Shavell “Property Rules versus Liability Rules: An Economic Analysis” (1996) 109 *Harv L Rev* 713-790 715-723.

<sup>110</sup> JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77 11-12.

Bell and Parchomovsky endeavour to address these relational implications in their pliability rules model. The relationship between the usufructuary and the bare owner also has the potential to be a long-term relationship that requires that the bare owner accommodates the usufructuary's exercise of his powers of enjoyment and use. Therefore, the pliability rules model might also provide a theoretical point of departure to conceptualise the relational implications of the relationship between the usufructuary and the bare owner.

In contrast to Calabresi and Melamed, Bell and Parchomovsky deny that decision makers are only presented with the option of a choice between property rules and liability rules.<sup>111</sup> Instead, they propose that property and liability rules are combined in certain legal structures into what they term "pliability rules", dynamic and contingent means of protecting entitlements. These rules initially provide for either a property or liability rule but the initial rule is altered when a relevant condition changes and the circumstances prescribes a different rule.

A related shortcoming of Calabresi and Melamed's paradigm is that it reduces the choice of a remedy to a one-time decision which cannot be reconsidered over time or as circumstances between the parties change.<sup>112</sup> Bell and Parchomovsky seek to address changed circumstances with their pliability rule model.<sup>113</sup> According to Bell

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<sup>111</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79 4-5; JA Lovett "A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2006) 38 *Conn L Rev* 1-77 5.

<sup>112</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79 7; R Dyal-Chand "Sharing the Cathedral" (2013) 46 *Conn LR* 647-723 664.

<sup>113</sup> R Dyal-Chand "Sharing the Cathedral" (2013) 46 *Conn L Rev* 647-723 664.

and Parchomovsky, pliability rules can be understood as amalgamated rules combining property and liability rules in various combinations.<sup>114</sup>

Lovett states that Bell and Parchomovsky justify their model by asserting that pliability rules enable rule makers to deal with changed circumstances and to absorb them into a legal rule by pinpointing the change as the trigger-shifting protection modes.<sup>115</sup> In effect, Bell and Parchomovsky's model creates what Dyal-Chand terms a "glider switch" allowing for transitions from injunctions to damages or vice versa.<sup>116</sup> In this way policy makers sidestep the snares of static property or liability rule regimes.<sup>117</sup> Property rules tend to lead to anti-competitive holdout situations and liability rules discourage investment and planning. In contrast, pliability rules might function as an incentive to entitlement holders to evade the unwanted change in circumstances. Changed circumstances may end in the switch to a different entitlement protection phase in cases where the triggering event can be impacted by the behaviour of the original entitlement holder. In comparison with a model of inflexible property and liability rules, pliability rules can provide an alternative to policy makers attempting to balance efficiency and justice.

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<sup>114</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79 26.

<sup>115</sup> JA Lovett "A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2006) 38 *Conn L Rev* 1-77 18.

<sup>116</sup> R Dyal-Chand "Sharing the Cathedral" (2013) 46 *Conn L Rev* 647-723 665. Bell and Parchomovsky were not the sole creators of "glider-switches" as Dyal-Chand "Sharing the Cathedral" (2013) 46 *Conn L Rev* 647-723 665 (particularly footnote 94) notes. See I Ayres & E Talley "Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade" (1995) 104 *Yale LJ* 1027-1118 for an example of another "glider switch", namely temporal division of property.

<sup>117</sup> JA Lovett "A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2006) 38 *Conn L Rev* 1-77 18-19.

Conceptually, the triggering event is preceded and followed on either side by a liability or a property rule that provides protection.<sup>118</sup> Triggering devices can be brought about by the passage of time, changed circumstances, scale or nature of use, or a combination of these aspects. Time triggers mark a period of specific protection followed by a change of the protection regime. Where changed circumstances act as trigger, market power, carelessness and the emergence of a higher value use may be considered. In instances where magnitude of use determines the trigger, ordinary protection can be set aside if low magnitudes are involved. Nature of use, or to put it differently, the behaviour of the initial entitlement holder, may also be correlated with trigger events. Liability rules may incentivise the entitlement holder to practice self-regulation or to act according to socially desirable standards.

Bell and Parchomovsky also suggest the circumstances in which their model would be beneficial.<sup>119</sup> The conditions they state are contexts where policy makers foresee circumstances that might change to a large extent; situations where contending interests need to be accommodated in one rule; and cases where the inherent limitations of property and liability rules should be surmounted. In these conditions the application of a liability rule enables planning by the entitlement holder and bargaining with potential acquirers.

A change in circumstances may require a modification of the initial protection mechanism so that the legal rule corresponds to reality.<sup>120</sup> Since liability rules are flexible they may enable policy makers to accommodate changed circumstances and

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<sup>118</sup> A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79 65-68.

<sup>119</sup> 66.

<sup>120</sup> References to A Bell & G Parchomovsky "Pliability Rules" (2002) 101 *Mich L Rev* 1-79 67-69 unless stated otherwise.

absorb them into the legal rule by pinpointing change as the trigger-shifting protection modes. In contrast, neither property nor liability rule protection can adjust to changed circumstances. In the case of uniform property rule protection, the owner's right to exclude and to withhold consent regarding acts of disposition is preserved. Although uniform liability rules facilitate non-consensual uses, they undermine the owner's incentive to develop his property. Consequently, changed circumstances lead to efficiency loss where parties may only resort to property and liability rule protection. Pliability rules are able to preserve the efficiency advantages related to both rules even in changed circumstances. Furthermore, pliability rules also facilitate the balancing of incompatible interests, for example efficiency and justice. Finally, pliability rules may overcome the inherent limitations of property or liability rule protection. Where property rules may grant exclusion, they may allow owners to invest optimally in their property. At the same time, inefficiencies may result when property rule protection resulting in monopolies encourages underproduction, supra-competitive pricing and a deadweight loss.

Within the context of servitude law, these conditions for the application of pliability rules also exist.<sup>121</sup> The point of departure in the law of usufruct is that the bare owner is protected by the *salva rei substantia* requirement. The usufructuary must return the usufructuary property without impairment of the substance. However, changed circumstances may well indicate that a bare owner, protected by the *salva rei substantia* requirement, ought to allow the usufructuary to exercise his usufruct outside the bounds of the destination set apart for the usufructuary property. There might also be a need for balancing of the efficiency arguments for allowing a new use of the

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<sup>121</sup> See for example JA Lovett "A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2006) 38 *Conn L Rev* 1-77 5-6.

usufructuary object and the concerns of justice relating to the bare owner and his legitimate expectations about the exercise of the usufruct as stipulated by the common law. Pliability rules might also overcome the inherent limitations of applying only property or liability protection by incentivising both parties with the possibility of a changed property rule protection regime.

Lovett endeavours to apply Bell and Parchomovsky's pliability paradigm within the context of servitudes, particularly to the problem of the unilateral relocation of a specified servitude of right of way.<sup>122</sup> Classic pliability rules apply when the protection awarded to an entitlement changes from property rule protection to liability rule protection. Classic pliability rules can accommodate situations where default property rule protection becomes inefficient or unfair. The baseline protection in terms of classic pliability rules involves property rules. The property rules promote efficient allocation of resources. They facilitate the creation of *in rem* rights in assets and thereby allow owners to invest optimally in the item's use. This *in rem* protection involves low costs where the extrinsic costs are low, since the object will still be acquired by the highest value user. Property rights also bring down transaction costs and enable exchange by lowering the cost of defining ownership and usage rights. Moreover, the benefit of baseline property rule protection is maintained because the triggering event for transforming property into liability rules is demarcated by classic property rules. They

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<sup>122</sup> JA Lovett "A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes" (2006) 38 *Conn L Rev* 1-77 5-6 typifies the flexible approach to the unilateral relocation of a specified servitude of right of way as a classic pliability rule. Due to the length of this chapter and the specific relevance of the classic pliability rules, the other five pliability rule types are not discussed here. They are zero order pliability rules, simultaneous pliability rules, property rules, title shifting pliability rules and multiple stage pliability rules. See L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 132 n 198.

also provide the flexibility to adapt to changes. The baseline property rule delineates a triggering event signalling the shift from property rules to liability rules.

The flexible interpretation of the *salva rei substantia* requirement can probably also be typified as a classic property rule.<sup>123</sup> The relevant entitlement protected by a property rule is the right of the owner to receive the usufructuary property without impairment of the substance on termination of the usufruct. This right is protected by the *salva rei substantia* requirement that functions as a property rule. If a triggering event such as changed circumstances or even a passage of time occurs and the rule is interpreted flexibly, the classic property rule protection in the form of a declaratory order attended by an interdict may be suspended. The property rule may accordingly be substituted by liability rule protection. Other variations of this shift can be achieved by not mandating compliance with the duties of the usufructuary originating in the *salva rei substantia* requirement. In effect, this shift can lead to a more flexible reconceptualization of servitudes, and specifically usufruct, as changing relationships between the usufructuary and the bare owner who exercise concurrent rights in the usufructuary property. From the development of this example it seems that application of the pliability rules paradigm concerns more than one property rule layer preceding the triggering event, namely the *salva rei substantia* requirement and the declaratory order accompanied by the interdict. The liability rule protection would entail the payment of compensation for impairment of the substance after the triggering event.

A significant aspect of Bell and Parchomovsky's model and of "glider switches" in general is that they accomplish sharing without the apparent aim of doing so.<sup>124</sup>

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<sup>123</sup> Developed according to the example of L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 133.

<sup>124</sup> R Dyal-Chand "Sharing the Cathedral" (2013) 46 *Conn L Rev* 647-723 665.

However, Dyal-Chand asserts that the sharing that they accomplish is limited. Hence, it is necessary to look at a model that foregrounds this justification for a more flexible approach to the *salva rei substantia* requirement, specifically by investigating a more creative approach to remedies that might be applied in this regard. This model was developed by Dyal-Chand within the context of Progressive Property theory and will accordingly be discussed in the relevant section.

#### 4 3 2 4      *Limitations to flexibility argument: fragmentation and opportunism*

Although the theoretical arguments of the proponents of Law and Economics theory can be applied to construct an argument in favour of a flexible approach, they only do so up to a point. It is therefore necessary to demarcate the flexibility argument by considering to what extent Law and Economics theory does not support measures of flexibility and consequently in which circumstances it would rather support a rigid approach to the *salva rei substantia* requirement. There are mainly two instances where this would be the case, namely to curb fragmentation and opportunism.

According to Depoorter and Parisi servitudes can be viewed as a partitioning of property rights, since the use rights are divided between the owner and the servitude holder.<sup>125</sup> This can be conceptualised as either a legal or an economic division. Partitioning may result in different forms of fragmentation, namely spatial, functional and atypical forms. Usufruct can be construed as a “non-conforming property arrangement”<sup>126</sup> resulting from partitioning. As such it is an example where the “closely

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<sup>125</sup> BWF Depoorter & F Parisi “Fragmentation of Property Rights: a Functional Interpretation of the Law of Servitudes” (2003) 3 *Glob Jurist Front* 1535-1654.

<sup>126</sup> F Parisi “Entropy and the Asymmetric Coase Theorem” in D Porrini & GB Ramello (eds) *Property Rights Dynamics: A Law and Economics Perspective* (2012) 67.

complementary attributes” of ownership have been dismembered between the bare owner and the usufructuary.<sup>127</sup> Although this explanation works within legal systems which subscribe to the bundle of rights metaphor, it would not be a correct doctrinal conceptualisation in South African law.<sup>128</sup> In the South African legal system the principle of elasticity, whereby the owner consents to the suspension of his ownership entitlements until the termination of a restriction, is accepted. On termination of the restriction, for example on extinction of the usufruct, the owner may again exercise all his entitlements. Nevertheless, the arguments that Parisi formulates regarding the disadvantages resulting from fragmentation and the legal mechanisms for countering them are also valid in regard to usufruct and explain the function of the *salva rei substantia* requirement and a rigid approach to it. Therefore, I briefly discuss the disadvantages resulting from dismemberment.

Fragmentation may lead to inefficient use unless the property division costs are less than the externalities resulting from concentrated use.<sup>129</sup> Dismemberment results in welfare losses and a discrepancy between the complementary rights of use and exclusion, for example uncoordinated decision rights in terms of reunification. When these decision rights are not coordinated it leads to suboptimal reunification since every owner of a fragment will attempt to maximise his total revenue in a joint venture

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<sup>127</sup> E Mackaay *Law and Economics for Civil Law Systems* 257 .F Parisi “Entropy and the Asymmetric Coase Theorem” in D Porrini & GB Ramello (eds) *Property Rights Dynamics: A Law and Economics Perspective* (2012) 67 discusses usufruct as an example of a dismembered right where a scarce resource is utilised through property forms giving rights to several persons at once. In the case of usufruct the usufructuary and the bare owner share the ownership rights in a complementary manner with the bare owner only retaining *abusus* for the period of the usufruct.

<sup>128</sup> CG van der Merwe *Sakereg* (2 ed 1989) 174.

<sup>129</sup> F Parisi “Entropy and the Asymmetric Coase Theorem” in D Porrini & GB Ramello (eds) *Property Rights Dynamics: A Law and Economics Perspective* (2007) 69-93 71-72.

without consideration of the effect on others. This might lead to under-exploitation of the joint investment. Furthermore, every owner of a fragment may veto a unanimous decision with the effect that no-one can use the full benefits and costs of his control over the resource. Consequently the resource may remain idle. Under-exploitation may generate externalities such as a decrease or even elimination of the value of the fragmented right of the other owner. Productive resources may also be withheld.

These disadvantages are also relevant to limited real rights and to usufruct as an institution. Firstly, they involve nonconformity between complementary entitlements and may lead to conflict in terms of decisions and friction regarding the reallocation of resources. In the case of limited real rights it is possible to assign some entitlements to other individuals than the owner so that ownership is not marked by the permanent or simultaneous presence of all entitlements.<sup>130</sup> Functionally, the entitlements may be viewed as “fragmented”, even more so when the entitlement of disposition is involved. The usufructuary may neither alienate nor encumber the usufructuary property or the real right of usufruct.<sup>131</sup> Conversely, the bare owner may alienate, pledge and grant other real rights regarding the usufructuary property.<sup>132</sup> However, the owner may not prejudice the usufructuary’s rights by preventing, hindering or diminishing the right of use and enjoyment.<sup>133</sup> Consequently, the bare

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<sup>130</sup> H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 92.

<sup>131</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 340.

<sup>132</sup> CG van der Merwe *Sakereg* (1989 2 ed) 515; AJ van der Walt “Saaklike Regte en Persoonlike Serwitute” (1987) 50 *THRHR* 343-352 351.

<sup>133</sup> CG van der Merwe & MJ de Waal “Servitutes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 592.

owner may only grant a servitude with the consent of the usufructuary.<sup>134</sup> The bare owner also needs the consent and cooperation of the usufructuary to deal with the nude property, for example to sell and mortgage it.<sup>135</sup> In fact, dealings are always subject to the usufruct. These examples show that both the usufructuary and the bare owner are jointly involved in certain decisions to dispose. Moreover, consent is needed from both parties to overreach the traditional restrictions on disposition. One of the consequences of shared disposition is that a decision to dispose may inevitably be vetoed by one of the parties.<sup>136</sup> In this case, both the usufructuary and the bare owner who have to consent to a joint venture would probably be interested in maximising their own interests in terms of the usufructuary property. If a party does not view the joint venture as personally advantageous, he may veto decisions in this regard and consequently no act of disposition is possible. This may result in under-exploitation of the property. Accordingly, the value of one party's interest may decrease and productive resources are withheld.

Although both the usufructuary and the bare owner can be disadvantaged by this veto power, there are limited options available to the usufructuary to circumvent such a deadlock. His limited power of disposal is to a certain extent countered by the possibility to convey the usufructuary interest by means of sale, pledge, mortgage, rent, lease or loan.<sup>137</sup> This power of disposal, in effect temporarily circumventing the restrictive implications of the *salva rei substantia* principle for the decision-making

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<sup>134</sup> CG van der Merwe *Sakereg* (1989 2 ed) 515; Voet 7 1 20.

<sup>135</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 592.

<sup>136</sup> See for example *Klopper v Van Rensburg* 1920 EDL 239.

<sup>137</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 591.

powers of the usufructuary, is curbed by the same principle at the death of the usufructuary. A third party loses the interest gained during the usufruct at the death of the usufructuary because the usufruct is terminated. The usufructuary interest is still subject to the limited real right, which is in itself inalienable.<sup>138</sup> The power to dispose of the usufructuary interest is a device to temporarily circumvent functional unity and the *numerus clausus* principle. In effect, it renders the usufructuary able to exercise wider and atypical powers of disposal than the rules of usufruct and the *salva rei substantia* principle allow. However, it does not provide typical property-type protection to third parties.

Parisi has also pointed out the difficulty concerned “when two or more individuals jointly hold decision rights”.<sup>139</sup> This problem has historically been addressed by adopting rules facilitating the reunification of use and by giving exclusion rights to a single individual.<sup>140</sup> The *salva rei substantia* requirement acts as a reunification device since it compels the usufructuary to return the property subject to the usufruct on termination of the right. Therefore, the *salva rei substantia* requirement acts as an anti-fragmentation device in terms of both legal and functional unity.

The *salva rei substantia* requirement acts as an anti-fragmentation device in the sense that it compels the usufructuary to return the object of the usufruct to the bare

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<sup>138</sup> CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 591, discussing *Durban City Council v Woodhaven Ltd* 1987 3 SA 555 (A).

<sup>139</sup> F Parisi “The Fall and Rise of Functional Property” in D Porrini & GB Ramello (eds) *Property Rights Dynamics: A Law and Economics Perspective* (2007) 31-53 41.

<sup>140</sup> F Parisi “The Fall and Rise of Functional Property” in D Porrini & GB Ramello (eds) *Property Rights Dynamics: A Law and Economics Perspective* (2007) 31-53 41 discusses the example of joint tenancy. Although Parisi does not refer to limited real rights and specifically personal servitudes like usufruct in his discussion of different types of unity, personal servitudes present problems comparable to those inherent in joint ownership regarding the principle of absolute disposition.

owner without impairing the substance. Even if the usufructuary dies and is personally unable to restore the usufructuary object to the bare owner, the obligation to return the object *salva rei substantia* rests on his heirs.<sup>141</sup> If the usufructuary disposes of the object of the usufruct, for example by selling it in order to be able to live from the interest on the capital returns, or because the use of usufructuary object has become obsolete or because the usufructuary object presents a risk of diminishing value,<sup>142</sup> the disposal would result in failure to comply with the *salva rei substantia* requirement. However, if the *salva rei substantia* requirement is met, the decision-making powers are no longer shared between the usufructuary and the bare owner. Accordingly, legal unity is restored.

The usufructuary effectively controls the object but does not have title.<sup>143</sup> He has to return the object at the end of the usufruct. Therefore, the usufructuary has the incentive to exploit the object of the usufruct to the maximum in order to acquire all it can produce. He will expend his energy and inventiveness on what will be of personal benefit, not on efforts benefitting the owner.<sup>144</sup> Mackaay refers to this challenge as the “economic problem of agency”.<sup>145</sup> This extensive exploitation can be to the detriment of the preservation of the capital belonging to the owner.<sup>146</sup> The incentive structure can be improved by allowing the user “to keep all or a large share of the results of the use of the resource, even though the resource itself remains the property of the

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<sup>141</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 126.

<sup>142</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 126, citing *Gibaud v Bagshaw* 1918 CPD 202.

<sup>143</sup> E Mackaay *Law and Economics for Civil Law Systems* (2013) 260.

<sup>144</sup> 258.

<sup>145</sup> E Mackaay *Law and Economics for Civil Law Systems* (2013) 258.

<sup>146</sup> 260.

owner.<sup>147</sup> Certain rules curtail this potential for opportunism.<sup>148</sup> Apart from the limited duration of the usufruct, the *salva rei substantia* requirement, with all the related duties imposed on the usufructuary are designed to minimise opportunism.

Firstly, the duty to make an inventory limits the possibility for opportunistic misappropriation of the property by the usufructuary. Secondly, there is a duty to provide security to ensure meeting of usufructuary obligations, good management and compensation at the end of the usufruct. If the usufructuary does not adhere to this obligation, the usufructuary object may be withdrawn from the usufructuary's control. Although the usufructuary may utilise the natural and legal products of the property, sale or other forms of disposition of the property is prohibited, except in the case of consumable products. In this case opportunism is curtailed by the obligation to return similar items of equal quality and quantity.<sup>149</sup> Where the usufruct pertains to items that deteriorate rapidly with use, the value must be returned at the termination of the usufruct.<sup>150</sup>

Opportunism is also prevented in terms of the reimbursement that is allowed for expenses related to maintenance of the usufructuary property.<sup>151</sup> To curtail the risk of the bare owner being charged for expenditures mainly benefitting the usufructuary, only necessary expenses are reimbursable, but not improvements made or for the increase in usefulness or attractiveness of the property. The usufructuary is allowed to remove the improvements, provided that the property is returned in its original state. On a superficial level, Mackaay's comments on the duties of the usufructuary explain

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<sup>147</sup> 258.

<sup>148</sup> 260.

<sup>149</sup> 260-261.

<sup>150</sup> 261.

<sup>151</sup> 261.

how the *salva rei substantia* requirement is designed to curb opportunism and provides limited incentive to the usufructuary to maintain the property.<sup>152</sup>

Presenting the *salva rei substantia* requirement as a traditional property rule, within the context of Law and Economics analysis and specifically the property and liability rules paradigm, opens up the possibility of discussing formal arguments supporting traditional property rules as justification for the preservation requirement.<sup>153</sup> Kiewitz (with reference to Lovett)<sup>154</sup> summarises the reasons for preferring property rules and includes a few formal policy considerations, namely simplicity, clarity, and reduction of uncertainty.<sup>155</sup>

Lovett notes that property rules hold the advantage of defining the entitlements of the involved parties “crisply”.<sup>156</sup> In this sense he refers to the work of Sterk,<sup>157</sup> who discusses the “geometric-box” allocation of rights which facilitates market exchange because it promotes certainty.<sup>158</sup> It establishes a “definite framework for negotiation, thus increasing the chances for bargaining”.<sup>159</sup> When rules promote certainty, all parties valuing a particular right will know who has the right to dispose of it.<sup>160</sup> Crisp definition of rights thus enhances the efficiency of property rights. The simplicity of

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<sup>152</sup> 260-261.

<sup>153</sup> See 3 3 2 2 1 above.

<sup>154</sup> JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77.

<sup>155</sup> L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 124.

<sup>156</sup> JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77 12.

<sup>157</sup> See SE Sterk “Neighbors in American Land Law” (1987) 87 *Colum L Rev* 55-104 93.

<sup>158</sup> 55.

<sup>159</sup> 56.

<sup>160</sup> 55.

property rules also enables consensual bargaining, particularly because it tends to define right holders “clear or mechanistically”.<sup>161</sup>

Property rules also reduce uncertainty by giving entitlement holders the guarantee of the ability to preserve their property interest.<sup>162</sup> Entitlement holders do not have to fear the risk of their interest being appropriated by opportunists. Certainty also encourages investment and promotes planning and labour associated with the entitlement. Lovett also notes Smith’s argument about certainty.<sup>163</sup> The need for owners to resort to expensive forms of self-help in order to protect their interests from opportunistic takers is eliminated by property rules.<sup>164</sup> Certainty also discourages unnecessary litigation.<sup>165</sup>

These formal policy considerations in favour of the traditional *salva rei substantia* requirement serve to constrain the broader and economic and social policy considerations. The *salva rei substantia* does provide certainty because it safeguards the interests of the bare owner by requiring that the usufructuary property should be returned without impairment of the substance. In this sense it curtails opportunism, discourages self-help and aims to minimise litigation.

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<sup>161</sup> JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77 13.

<sup>162</sup> 12.

<sup>163</sup> JA Lovett “A Bend in the Road Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes” (2006) 38 *Conn L Rev* 1-77 13 refers to HE Smith “Property and Property Rules” *NYU L Rev* 1719-1798 1724-1726 and 1729-1730. HE Smith “Property and Property Rules” *NYU L Rev* 1719-1798 1727 argues that property rules provide a superior answer in comparison to liability rules as a response to uncertainty. He develops three arguments based on information costs to support his preference for property rules.

<sup>164</sup> 12-13.

<sup>165</sup> 20.

### 4 3 3 Progressive Property theorists

#### 4 3 3 1 Alexander: governance device

In this section I argue that the concept of governance property provides a useful analytic tool for explaining the function of the *salva rei substantia* requirement as a governance mechanism. In this sense a flexible approach to the requirement would enhance governance, especially in use conflicts.

The concept of governance property needs to be understood against the background of two current approaches to property, namely viewing it as exclusion property and conversely viewing it as governance property. The dominant perspective of property advocated by exclusion or Law and Economics theorists only takes account of the relationship between owners and non-owners and therefore neglects the internal relationships between property stakeholders.<sup>166</sup> For the sake of argument, although he acknowledges that this is an oversimplification, Alexander differentiates between two types of property, namely exclusion property and governance property.<sup>167</sup> When one owner basically exercises all control over an object and his rights are *in rem*, the property can be classified as exclusion property. Governance property, on the other hand, refers to multiple-ownership property. This type of property necessitates governance norms to regulate ownership's internal relations. Governance property differs from exclusion property because it involves the fragmentation of various concurrent rights relating to an object.<sup>168</sup> These two types of

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<sup>166</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1854-1856.

<sup>167</sup> 1855-1856.

<sup>168</sup> Examples that GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1856 points out include "concurrent estates; marital and domestic partnership property; common interest communities including condominiums and housing cooperatives; certain forms of business organizations, including partnerships and close corporations; leaseholds; and trusts, including statutory

property are posited as theoretical concepts demarcating two ends of a spectrum where real property institutions occupy different positions between the two poles.<sup>169</sup> Furthermore, these two theoretical concepts can also be associated with two property theories in the property discourse, namely the exclusion theory and the human flourishing theory.

Governance theory may take on different forms. The owners may be concurrent, sequential, or combined. Multiple owners may simultaneously own various portions of the property as a whole and other portions individually. This is a combination of governance and exclusion property. Another arrangement might entail some owners having non-beneficial interests while others have the contrary. In terms of its form, usufruct as an example of governance property can probably be described as both concurrent in the sense that the bare owner and the usufructuary simultaneously possess various entitlements over the usufructuary property and sequential in the sense that the use and enjoyment as well as the fruits of the usufructuary property will on termination of the usufruct become entitlements that the bare owner may exercise, rendering his position that of a full owner. Therefore, during the usufruct the usufructuary will have beneficial ownership in the sense that he is allowed to use and

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trusts (e.g. pensions)". It can probably be argued that usufruct may in certain respects, for purposes of the argument here, be likened to a trust. This comparison is more convincing in the phraseology of common law and other mixed systems. AJ Corroero "Trusts – the Usufruct in Trust" (1963)24 *La L Rev* 127-131 127 compared the Louisiana usufruct bare ownership to a trust containing both a principal and an income beneficiary, the usufructuary being analogous to the trust's income beneficiary and the bare owner resembling the principal beneficiary. However, the administration of the property and its enjoyment is not wholly partitioned in the case of usufruct, where the usufructuary retains physical control. MJ de Waal "The Uniformity of Ownership, *Numerus Clausus* and the Reception of the Trust in South African Law" in JM Milo & JM Smits *Trusts in Mixed Legal Systems* (2001) 43-54 48 notes that under South African law the trustee is the owner of the trust assets whereas the trust beneficiary only has a personal right against the trustee. This construction avoids the problem related to split ownership.

<sup>169</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1856.

enjoy the usufructuary property, while the bare owner may only dispose of the property and has therefore in many respects non-beneficial ownership.

Apart from its form, governance property is further demarcated as a form of property in terms of the following attributes,<sup>170</sup> namely the access it provides to the property, the agency it involves, horizontality as opposed to verticality and non-currency of enjoyment. Firstly, governance property excludes open-access resources but allow for limited access regimes.<sup>171</sup> Secondly, governance property, especially with vertical power relationships, provides for agency.<sup>172</sup>

Thirdly, in terms of horizontality compared to verticality, where the relationship among interest holders is “formally vertical”, certain interest holders have “exclusive or greater control” compared to others.<sup>173</sup> Examples include the trust<sup>174</sup> and the leasehold.<sup>175</sup> In terms of the characterisation of the relationship between the parties, the usufructuary and the bare owner also to a certain extent have a vertical

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<sup>170</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1857-1866 distinguishes governance property from commons in this regard.

<sup>171</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1857. Certain limited access regimes have traits that are not necessarily part of the governance property regime, namely a horizontal relationship among the co-owners characterised by relative equality of legal rights, privileges and powers and concurrency of privileges of possession, use and enjoyment of the property

<sup>172</sup> 1857.

<sup>173</sup> 1865.

<sup>174</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1865 notes that the trustee, being the legal titleholder, holds an interest that differs from the beneficiary. Their interests differ in terms of the control they hold over the trust assets: only the trustee controls the trust assets, although he must exercise this power for the exclusive benefit of the beneficiary.

<sup>175</sup> According to GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1865-1866 the leasehold, where there is a vertical relationship between the landlord and the tenant because the tenant holds immediate control over the leased premises, but the landlord has more fundamental control as his reversion interest allows him to control the tenant’s use of the premises in various ways formally recognised by property doctrines such as the law of waste or the law of fixtures.

relationship. The bare owner holds the ultimate power of disposal. In cases where the usufructuary seeks to exercise acts of disposition the bare owner may veto decisions in this regard by the usufructuary.<sup>176</sup> Furthermore, the usufructuary's disposition powers are curtailed by the *salva rei substantia* requirement.

Lastly, governance property involves non-currency of enjoyment.<sup>177</sup> Beneficiaries of governance property may have successive rights of enjoyment.<sup>178</sup> This attribute of governance property is important since it generates conflict of interest. Usufructuaries and bare owners enjoy non-currency of enjoyment since the former may use and enjoy the usufructuary property for the duration of the usufruct, while the bare owner is only entitled to the use and enjoyment once the usufruct terminates. The conflicts which Alexander discusses in relation to this non-currency of enjoyment provide a useful basis for the analysis of the conflicts inherent in usufruct. Non-currency of enjoyment and potential conflicts between the usufructuary and the bare owner necessitate governance mechanisms (coordination norms and mechanisms) such as the *salva rei substantia* requirement.<sup>179</sup>

Alexander identifies three contexts in which potential conflicts among interest holders in governance property may arise, namely the consumption and enjoyment of

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<sup>176</sup> See for example *Klopper v Van Rensburg* 1920 EDL.

<sup>177</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1866.

<sup>178</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1866 notes the example of personal trusts where "the right to possess and use the trust property is divided sequentially between life beneficiaries and remainder beneficiaries". There exists a temporal division of interest because the right of beneficiaries to possess the property is triggered when the preceding life estate is terminated, except when the trustee has been granted the power to "invade the trust principal for their benefit".

<sup>179</sup> 1866.

governance property assets, the investment and managerial control of the assets and the membership in the governance property institution.<sup>180</sup>

In terms of consumption and enjoyment of governance property assets, in governance property institutions, where interest holders have simultaneous privileges to possess or enjoy the asset, the potential for overuse and underinvestment might arise.<sup>181</sup> Where relations are not strictly horizontal, or where successive rights of possession or enjoyment exist, two types of conflict arise, namely opportunistic behaviour by the interest holders with the power to manage the asset and conflicting investment goals where interests holders have successive enjoyment rights.<sup>182</sup> Conflicting investment goals result from the division of beneficial ownership between beneficiaries with current possessory interests and those with future beneficiary interests. With the temporal division of possessory and enjoyment rights conflict arises regarding the proper investment objectives. Current possessory interest holders prefer investments that will maximise current yield at the expense of long-term capital growth, while future interest holders will have a preference for the opposite strategy. Therefore, some coordinating norms are necessary. These types of conflicts are also notable with regard to usufruct. The *salva rei substantia* requirement firstly addresses opportunistic behaviour in the sense that it places specific duties on the usufructuary to facilitate the return of the usufructuary property without impairment of the substance. This acts as a deterrent in situations where the usufructuary consumes and enjoys with only short

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<sup>180</sup> 1867.

<sup>181</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1867-1868 notes that in the case of co-tenancies, the impossibility of simultaneous occupation necessitates conflict resolution and questions of contributions for improvements and repairs might arise.

<sup>182</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1868 discusses trusts as an example: the trustee holds the legal title and has the power to sell the assets and therefore the risk exists that he might use his position as trustee for personal gain and to harm the intended beneficiaries.

term returns in mind and in this sense may use the opportunity to dissipate the *corpus*. Secondly, the requirement also regulates situations where conflicting investment goals exist and the usufructuary would most likely like to maximise current yield at the expense of long-term capital growth, while the bare owner might have the opposite aim. In this sense the *salva rei substantia* requirement acts as a governance device to resolve conflicts of interest.<sup>183</sup>

In terms of the preservation and managerial control of assets, Alexander does not work out his examples as clearly as he does with the previous source of conflict.<sup>184</sup> Management of governance property assets might not be a problem in vertical governance property institutions where the institution's structure dictates who has the power to manage and invest assets. However, in horizontally structured institutions, authority to manage and liability for decisions made by one party might create conflict.<sup>185</sup> The problem with usufruct is that it is to an extent a hybrid institution that is both horizontally and vertically structured. While only the bare owner has the power of disposition, he may only dispose of the property subject to the usufruct. The usufructuary, on the other hand, has the entitlements of possession, control and administration. In this sense he has wide managerial control, especially if acts that qualify as use and enjoyment conform to the destination of the usufructuary property and would objectively amount to conduct of a *bonus paterfamilias*. Accordingly, disagreements about acts of management might arise between the bare owner and

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<sup>183</sup> See 3 3 2.

<sup>184</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1869 briefly refers to the examples of co-tenants and residents of common interest communities who might disagree on expenditures for repairs or improvements pertaining to co-owned structures and married couples who might have conflicts about capital investments in family residences.

<sup>185</sup> Here GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1869 mentions community property in marriages and other forms of co-ownership.

the usufructuary. For example, disagreements about repairs and improvements as managerial strategies do arise in the context of usufruct and because they concern the substance of the usufructuary property, the *salva rei substantia* requirement also acts as a managerial and preservation device to deal with conflicts.<sup>186</sup>

Membership in governance property institutions might also present a source of conflict in terms of entry, exit and alienability.<sup>187</sup> According to Alexander, exit might cause similar if not greater conflict.<sup>188</sup> Membership conflicts might arise in terms of usufruct. However, not all membership conflicts are relevant to the *salva rei substantia* requirement.<sup>189</sup> Two instances may be relevant. Firstly, when the usufructuary disposes of his entitlement to use and enjoy (he is not able to dispose of his usufruct)<sup>190</sup> another party is entitled to use the usufructuary property until termination of the usufruct. Although in law this does strictly amount to a membership conflict, in practice it might have the same effect. This could be the case where the bare owner does not agree on the disposition of enjoyment or the party who acquires the

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<sup>186</sup> Case law concerning repairs and improvements are discussed in chapter two.

<sup>187</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1869-1870 considers the example of controversial members who seek to join the institution but whose membership might create conflict and the coordination norms and enforcement mechanisms needed to resolve this.

<sup>188</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1870 refers to co-tenants with irreconcilable differences wishing to terminate the arrangement and owner-residents in common interest communities who desire the freedom to transfer their property to whomever they choose but who are countered by homeowners associations restraining alienability of members’ interests. Trust beneficiaries and trust creators may also not agree on alienation.

<sup>189</sup> In terms of entry, the *actio communi dividundo* as a measure of creating usufruct may present membership conflicts. In this case, when the object of joint ownership cannot be divided between the joint owners, the court has the power to order by which bare ownership is allocated to one owner and the usufruct to the other. See in this regard CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 94. This may understandably escalate an existing conflict in terms of the parties not agreeing on the division.

<sup>190</sup> *Steyn v Registrar of Deeds* 1933 TPD 109.

enjoyment from the usufructuary. Secondly, the bare owner is allowed to dispose of the usufructuary property, but always subject to the usufruct. In such a case the successors in law to the bare owner would have to allow the usufructuary the use and enjoyment of the usufructuary property, but may not necessarily agree with his exercise of his entitlements. Here the entry of the successors may also present a membership conflict. In both these cases this membership conflict may be connected with conflicts around the permitted use of the usufructuary property and perhaps therefore the interpretation of the *salva rei substantia* requirement.

Inevitably, the three areas of conflict arising from the non-currency of enjoyment in terms of usufruct necessitate coordination norms and mechanisms of enforcement. As Alexander remarks, a significant part of property law consist of heterogeneous norms and doctrines that facilitate coordination among multiple interest holders of governance property assets.<sup>191</sup> They include operative default rules underpinning social interactions and mandatory rules that resolve conflict in different ways by facilitating participation or permitting exit. The type of coordination device also depends on the nature of the relationships involved. Relationships may be personal, social or commercial. According to Dagan and Heller proximity to the social pole determines the emphasis a property institution places on participation in management, that is, whether it focuses on voice.<sup>192</sup> A more social orientation also indicates more collective control on exit and entry and greater use of substantive equality norms. In this regard it might seem that a distinction might be considered between usufructuaries according to the relationship they have with the bare owner. One may ask whether

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<sup>191</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1871.

<sup>192</sup> H Dagan & MA Heller "Conflicts in Property" in *Property: Values and Institutions* (2011) 229-244 236-237.

proximity to the social pole in comparison to proximity to the commercial pole might not be an argument for greater “voice” and deliberation concerning the application of the *salva rei substantia* requirement. For example, where usufruct is bequeathed to the surviving spouse and bare ownership to her children, more deliberation should be possible than in the case of a usufruct for commercial purposes. This contextualisation with regard to the type of governance property could result in context-sensitive treatment of the mandatory *salva rei substantia* requirement. Such an approach can further be informed by fairness and equality norms.

Alexander identifies two main types of legal norms regulating governance property institutions, namely fairness and equality.<sup>193</sup> Fairness norms also consist of two kinds of norms. The first responds to horizontal consumption and use conflicts among multiple interest holders with either successive or concurrent legal interests, for example the duty against waste in landlord-tenant law. The second fairness norm deals with management and control conflicts of governance property assets, for example fiduciary duties of interest holders controlling governance property to manage the governance property assets in a manner consistent with the interests of beneficiaries.<sup>194</sup> Fairness norms of the first kind also underlie the *salva rei substantia* requirement as an expression of the *civilliter* principle with its appeal to reasonableness and good management. Fairness norms of the second kind would especially come into play where a usufructuary has the management and control of the usufructuary

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<sup>193</sup> According to GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1871. Equality norms function in the context of consumption and exit where social type governance property is involved, for example in concurrent estates or as distributive norm upon divorce and are not particularly relevant here.

<sup>194</sup> GS Alexander “Governance Property” (2012) 160 *U Pa L Rev* 1854-1887 1871 notes the example of trust law where the duty to be impartial implies that trustees may not favour one group of beneficiaries above another when investing assets or allocating receipts between them.

property belonging to minors and has the duty to manage and control it in a way not detrimental to the interests of the vulnerable bare owners.<sup>195</sup>

To summarise, the discussion indicates that usufruct shares the qualities attributed to governance property and can therefore be conceptualised in these terms. Consequently, the *civilliter* principle and the *salva rei substantia* requirement as measures regulating usufruct can be evaluated and conceptualised as coordination norms and mechanisms of enforcement developed for governance property. On face value it seems that the theory of governance property provides a basis for the justification of the *salva rei substantia* requirement. However, since it emphasises the *constructive* quality of the requirement as a governance device instead of merely a restrictive requirement (as would predominantly have been the case in a purely exclusion theory paradigm) and argues for different variables to be taken into account when considering coordination norms and mechanisms of enforcement such as the type of relationship involved, the nature of the rule and the norms of fairness and equality, it also provides support for a context-sensitive approach to the *salva rei substantia* requirement. This is particularly the case where this requirement may act as a governance device regulating governance conflicts.

#### 4 3 3 2 *Dyal-Chand's model of sharing*

Alexander is not the only Progressive Property theorist who recently confirmed that sharing in property is actually more prevalent than exclusion theorists would admit. With reference to the work of Calabresi and Melamed, Dyal-Chand argues that the work of Law and Economics theorists who focus on efficiency does not accommodate

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<sup>195</sup> GS Alexander "Governance Property" (2012) 160 *U Pa L Rev* 1854-1887 1871.

sharing, and discourages “the development of an outcome-focused mode of dispute resolution that incorporates sharing”.<sup>196</sup> This view also contributes to the “impoverished outcomes in property law”<sup>197</sup> which are also evident from court decisions in the face of disputes concerning sharing. Courts usually deal with sharing by creating exceptions to the owner’s right to exclude. Instead, they could accommodate sharing through rethinking remedies. Although courts may recognise rights of non-owners that limit the property rights of the owner, they are currently restricted in the remedies that they can provide because ownership remains the dominant consideration in terms of outcome.

Within the context of increasingly scarce resources and inequality of distribution, Dyal-Chand emphasises that one of the implications of the view that the right to exclude lies at the core of property is that property rights must remain concentrated where information costs can be reduced.<sup>198</sup> Therefore dismemberment is opposed in the interest of efficiency. She notes that “the blunt power of ‘keep out’ injunctions leaves decisions about resource use and allocation entirely in the hands of private owners”.<sup>199</sup> In the context of usufruct, decisions about resource allocation and use may also be vetoed by private owners because their consent is required for acts that challenge the *salva rei substantia* requirements. Furthermore, injunctions as non-negotiable property rules are at their disposal.

Dyal-Chand envisions the potential of property outcomes to resolve “acute problems of fairness and distributive justice” and to “alleviate the harsh externalities

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<sup>196</sup> R Dyal-Chand “Sharing the Cathedral” (2013) 46 *Conn L Rev* 647-723 663-664.

<sup>197</sup> 652.

<sup>198</sup> 670.

<sup>199</sup> 653.

that result from ignoring the uses of property made by non-owners”.<sup>200</sup> In particular, she aims to explore the potential of injunctions to achieve sharing and to develop “a model for enhancing property outcomes and, in particular, for promoting sharing as a preferred outcome”.<sup>201</sup> According to Dyal-Chand, her model is applicable where legitimate interests regarding a disputed property exist on both sides of the dispute and enables the evaluation of the interests not to determine rights but to achieve an outcome that involves sharing. This sharing leads to “court-imposed or settled outcomes” that can be seen as compromises between the parties’ varying interests.<sup>202</sup> Since both parties’ interests and judgments would be relevant to determine whether sharing has in fact been achieved, certain types of sharing would represent the core of the model, for example simultaneous uses or uses necessitating continuous collaboration or coordination.<sup>203</sup> However, her model also accommodates transfers of property and other forms of sharing over time and therefore covers sharing that does not necessitate a continuous relationship.<sup>204</sup> The promotion of property sharing places Dyal-Chand’s model in the “middle space between exclusive ownership and a commons”, which it endeavours to expand.<sup>205</sup>

The interest-outcome approach commences the dispute resolution process by recognising and defining the legitimate interests regarding the property on both sides of the dispute.<sup>206</sup> Instead of starting with formal entitlements, Dyal-Chand notes that the concept of property entitlements can be expanded, firstly by referring to notions of

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<sup>200</sup> 653-654.

<sup>201</sup> 654.

<sup>202</sup> 679.

<sup>203</sup> 679-680.

<sup>204</sup> 680.

<sup>205</sup> 656.

<sup>206</sup> 677.

“social obligation, capabilities, personhood, democratic community, positive rights and interconnectedness”.<sup>207</sup> Secondly, the court would consider outcomes that would best suit each party’s legitimate interests.<sup>208</sup> Thirdly, the court would have to consider the extent to which formal title and more broadly defined entitlements are relevant to the dispute.

Dyal-Chand is particularly interested in cases where uses overlap and which involves legitimate interests not based in entitlements.<sup>209</sup> She proposes three sub-questions about use that determines the legitimate interests of the parties. Firstly, it should be determined how both the owner and the non-owner parties to the dispute are using the property. Secondly, one should ask how the world perceives these uses. Thirdly, the intent of the parties regarding the property should be determined. Their intent refers to their intended uses and their intention concerning the other interests that form part of ownership. These three questions assist in determining possible outcomes, including sharing. In this regard, uses would be evaluated for compatibility, which could lead to “sharing along one or more dimensions or at least injunctions that would not exclude one or more parties completely”.<sup>210</sup> To summarise, this model does not identify owners and assign outcomes accordingly, but urges judges to look for outcomes and then assign and define entitlements to match those outcomes.<sup>211</sup>

The question that remains is how the insights gleaned from Dyal-Chand can be applied to answer questions about the preference of a rigid or flexible approach to the *salva rei substantia* requirement. Can the focus on use as a point of inquiry rather than

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<sup>207</sup> 704.

<sup>208</sup> 677.

<sup>209</sup> 706-707.

<sup>210</sup> 707.

<sup>211</sup> 714.

on ownership be relevant? Can foregrounding sharing as a value and an outcome prompt the investigation of other considerations where the rigid interpretation of the *salva rei substantia* requirement would dictate a remedy, impede the disposition powers of the usufructuary and diminish the potential for more distributive uses of the property?

Personal servitudes and specifically the institution of usufruct traditionally allows for sharing in a limited sense. While the usufructuary is granted a limited real right in the form of usufruct, ownership is still vested in the bare owner.<sup>212</sup> Disposition powers are to an extent shared between the bare owner and the usufructuary. In certain cases disposition may be vetoed by one of the parties.<sup>213</sup> The usufructuary may neither alienate nor encumber the usufructuary property or the real right of usufruct.<sup>214</sup> Conversely, the bare owner may alienate, pledge and grant other real rights regarding the usufructuary property.<sup>215</sup> However, the owner may not prejudice the usufructuary's rights by preventing, hindering or diminishing the right of use and enjoyment.<sup>216</sup> Consequently, the bare owner may only grant a servitude with the consent of the usufructuary.<sup>217</sup> The bare owner also needs the consent and cooperation of the

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<sup>212</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 95; CG van der Merwe *Sakereg* (2 ed 1989) 515.

<sup>213</sup> See for example *Klopper v Van Rensburg* 1920 EDL 239.

<sup>214</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340.

<sup>215</sup> CG van der Merwe *Sakereg* (2 ed 1989) 515; AJ van der Walt "Saaklike Regte en Persoonlike Servitute" (1987) 50 *THRHR* 343-352 351.

<sup>216</sup> CG van der Merwe & MJ de Waal "Servitutes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 592.

<sup>217</sup> CG van der Merwe *Sakereg* (2 ed 1989) 515; Voet 7 1 20.

usufructuary to deal with the nude property for example to sell and mortgage it.<sup>218</sup> In fact, dealings are always subject to the usufruct. Consent is needed from both parties to overreach the traditional restrictions on disposition. The common law distribution of entitlements and shared entitlements therefore indicates that usufruct as an institution is an example of sharing.

Consequently, Dyal-Chand's guidelines for approaching a dispute can be applied to enrich the judicial inquiry where a dispute involving the *salva rei substantia* requirement is at hand. In terms of the first question, taking into account that the non-owner or usufructuary in this case is the party who uses the property, while the bare owner does not, might provide a useful starting point for reasoning that the usufructuary's use is a significant factor in determining the outcome of the dispute. If the usufructuary for instance uses a house subject to the usufruct as a permanent residence, the case for a remedy requiring sharing would be more compelling than in the case of usufruct over a movable not necessary for sustenance. Furthermore, if the usufructuary property provides a livelihood to the usufructuary it would also invite serious consideration. If, on the other hand, the bare owner has a strong moral and personal connection with land given in usufruct and the usufructuary does not reveal such an interest and only sporadically uses the property, the ownership entitlement might bear more weight. Enabling the usufructuary to make optimal use of the usufructuary property could be an important consideration, but it need not be. Secondly, judging the use against public norms might indicate the acceptability and reasonableness of the practice. If the usufructuary uses his usufructuary property in a way that contributes to his community and regional economy or enhances

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<sup>218</sup> CG van der Merwe & MJ de Waal "Servitudes" rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 592.

development of the area, it would be a significant factor. Thirdly, an inquiry into the intended uses of the usufructuary property might also be useful since it balances the inquiry by also taking into account the intended future uses that the bare owner has in mind. Anticipating the use that a bare owner would make of the property in the future might guide decisions on use allocation. Furthermore, it might even be the case that the intended future use of the property might be compatible with the current use of the usufructuary. These examples<sup>219</sup> indicate how these three questions can be used to assist in determining possible outcomes, which might include sharing. If the use of the usufructuary and the intended use of the bare owner are compatible, an outcome accommodating sharing or at least an interdict that would not entirely exclude the usufructuary could be in order. An important question would be how the current use of the property could be protected. Furthermore, to achieve sharing, combining remedies in innovative ways both in terms of division of time and in terms of the division of duties and rights, a nuanced and context-sensitive approach would be necessary.

#### **4 4 Conclusion**

In this chapter I examine the policy and theoretical reasons for a flexible approach to the *salva rei substantia* requirement. Although arguments based on policy in favour of a flexible approach may be constructed, the material is scarce. Furthermore, as I indicate in 4 2 above, using policy involves various challenges in terms of constructing a working definition, methodological issues and more broadly, in terms of its role in the legal system. Consequently, I examine theoretical arguments in favour of a flexible

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<sup>219</sup> I draw on examples discussed by R Dyal-Chand “Sharing the Cathedral” (2013) 46 *Conn L Rev* 647-723 715-720 in different contexts.

approach to the requirement. These arguments can be grouped according to the general theoretical orientation ascribed to its proponents.

The first group of arguments are based on the work of the information theorists or Law and Economics scholars. Starting from Coase, these writers formulated models progressively incorporating increased flexibility to enhance efficiency. Coase formulated the seminal theorem explaining how parties bargain in conflicting property use disputes. Although he indicates that courts should play a pivotal role in situations where transaction costs have an effect, he does not provide guidelines to courts to indicate how these entitlements should be protected. Calabresi and Melamed address the gaps in Coase's theorem by developing guidelines for the protection of entitlements. In this regard they formulate the distinction between property and liability rules and indicate how and when these rules should be applied in the protection of property rights. However, as Bell and Parchomovsky argue, these rules do not account for all property protection mechanisms. Accordingly, they develop dynamic pliability rules that allow for a shift between property and liability rules based on the realisation of a changed condition. Their model takes account of protection afforded to property entitlements over time and is therefore less static. Based on these developments of property rules which allow for enhanced flexibility, I argue that the *salva rei substantia* requirement can also be interpreted flexibly. The flexible interpretation of the *salva rei substantia* requirement can probably be typified as a classic property rule. The relevant entitlement protected by a property rule is the right of the owner to receive the usufructuary property without impairment of the substance on termination of the usufruct. This right is protected by the *salva rei substantia* requirement that functions as a property rule. If a triggering event such as changed circumstances or even a passage of time occurs and the rule is interpreted flexibly, the classic property rule

protection in the form of a declaratory order attended by an interdict may be suspended. The property rule may accordingly be substituted by liability rule protection. Other variations of this shift can be achieved by not mandating compliance with the duties of the usufructuary originating in the *salva rei substantia* requirement. In effect, this shift can lead to a more flexible reconceptualization of servitudes, and specifically usufruct, as changing relationships between the usufructuary and the bare owner who exercise concurrent rights in the usufructuary property. From the development of this example it seems that application of the liability rules paradigm concerns more than one property rule layer preceding the triggering event, namely the *salva rei substantia* requirement and the declaratory order accompanied by the interdict. The liability rule protection would entail the payment of compensation for impairment of the substance after the triggering event.

The second group of arguments concern the work of Progressive Property theorists. Applying the work of Alexander, I argue that usufruct can be construed as a form of governance property. Consequently it needs both coordination and enforcement mechanisms. The *salva rei substantia* requirement functions as such a device. Since the concept of governance property focuses on sharing, these devices are portrayed as mechanisms enhancing sharing and therefore less emphasis is given to the restrictive qualities they possess as would have been the case in an exclusion-dominated paradigm. The *salva rei substantia* requirement is therefore construed as a constructive device facilitating sharing of governance property and in this regard an argument for a flexible approach that would enhance the use, management, investment and membership of usufruct as a governance institution could be made. Finally, I consider the work of Dyal-Chand. With her outcomes-based approach she argues for a dispute resolution process that takes into account the interests of both

owners and non-owners and which should not be constrained by rigid application of property remedies. In this regard I argue for a creative and flexible approach to remedies in disputes where the *salva rei substantia* requirement is concerned. Her emphasis on the prevalent nature of sharing is supported by an overview of the manner in which disposition in terms of usufruct is treated in other jurisdictions. In jurisdictions where this issue of limited disposition has been addressed, the empowerment of the usufructuary has received attention as it impedes efficient management of the usufructuary property.<sup>220</sup> Empowerment of the usufructuary has been achieved by various mechanisms. The more conservative jurisdictions<sup>221</sup> advocate creative use of usufruct and support devices such as foregrounding the destination of the usufructuary property as standard for demarcating the disposition powers of the usufructuary, the application of the rules of usufruct to a universality of goods rather than a single usufructuary asset, and contractual extension of quasi-usufruct to all types of usufructuary objects.<sup>222</sup> Although this approach allows for some flexibility it still pivots on the disposition power of the full owner.

In other jurisdictions a more radical approach is advocated. The central role of ownership was examined and the disposition powers shifted. In the Netherlands, this shift amounts to a removal of the *salva rei substantia* requirement from the description of usufruct. Since the introduction of the new *BW* in 1992 the control and income may

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<sup>220</sup> A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129 120 citing A Verbeke, B Verdickt and D Maasland “The Many Faces of Usufruct” in CG Van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56 54-55. For a discussion see chapter 3 of this thesis.

<sup>221</sup> Jurisdictions that maintain this approach include France and Belgium. See A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129 118.

<sup>222</sup> 118-119.

be fully vested in the usufructuary.<sup>223</sup> Furthermore, the usufructuary may in certain circumstances dispose of and consume the assets subject to the usufruct. These different approaches to the disposition power of the usufructuary in foreign jurisdictions are discussed in chapter 3. Some jurisdictions have addressed sharing in terms of widening the disposition powers of the usufructuary.

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<sup>223</sup> A Verbeke, B Verdickt and D Maasland “The Many Faces of Usufruct” in CG Van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56 36.

## CHAPTER 5:

# CONSTITUTIONAL CONSIDERATIONS

### 5 1 Introduction

The purpose of this chapter is to investigate the constitutional implications of various approaches to the *salva rei substantia* requirement. Constitutional analysis has hardly been used in property law and specifically in servitude law.<sup>1</sup> According to Van der Walt, both property and some constitutional lawyers do not necessarily consider constitutional analysis of servitude law necessary.<sup>2</sup> To them, the development of servitude law is not really contentious,<sup>3</sup> and the impact of the Constitution on this development does not elevate this field to a problematic one. In fact, literature on the law of servitude reveals that property lawyers frequently resort to the “traditional logic of private-law doctrine” in order to develop the common law, sometimes merely with a nod in the direction of the Constitution, as was evident in a case note on *Kidson v Jimspeed Enterprises CC*<sup>4</sup> by Scott.<sup>5</sup> Even section 39(2) of the Constitution,<sup>6</sup> which requires development of the common law where it does not reflect the spirit, purport

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<sup>1</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 736-737.

<sup>2</sup> 723.

<sup>3</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Prop L Rev* 3-35 29; AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 723.

<sup>4</sup> 2009 5 SA 246 (GNP).

<sup>5</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 30; AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 724; J Scott “Effect of the Destruction of a Dwelling on the Personal Servitude of *Habitatio*” (2010) 73 *THRHR* 155-169 163-164.

<sup>6</sup> The Constitution of the Republic of South Africa, 1996.

and objects of the Bill of Rights, does not persuade all academics of the prime importance of constitutional scrutiny of the common law.<sup>7</sup>

Van der Walt asserts that one of the consequences of the constitutional dispensation is that constitutional law should play a pivotal role in justifying and structuring the development of the common law in contrast to doctrinal or historical arguments.<sup>8</sup> Questions about the development of servitude law have an unavoidable constitutional dimension, implying that the point of departure for considering the interpretation and development of servitude law needs to be the supremacy of the Constitution<sup>9</sup> and the “single-system-of-law principle”.<sup>10</sup> As part of a single system of law, the law of servitudes, and in this case the law of usufruct, derives its force from the Constitution, is shaped and controlled by it, and by regulation giving effect to the Constitution.<sup>11</sup> Consequently, one integrated process guided by constitutional

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<sup>7</sup> See A Fagan “The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law’s Development” (2010) 127 *SALJ* 611-627; AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 723 n 1 refers to the debate engendered by this article.

<sup>8</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 735.

<sup>9</sup> F Michelman “The Rule of Law, Legality and the Supremacy of the Constitution” in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed OS 2003) ch 11 35 distinguishes between constitutional supremacy as a value and as “a rule for the construction of a determinate, hierarchical relation among legal norms emanating from various, recognised sources of law in and for South Africa”. Section 2 of the Constitution of the Republic of South Africa, 1996, establishes the supremacy of the Constitution and states that law inconsistent with it is invalid. Hence, should the common law of usufruct be inconsistent with the Constitution, it would be invalid.

<sup>10</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 738; AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 31. The “single-system-of-law” principle was unequivocally articulated in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44: “There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control”.

<sup>11</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 32.

principles is necessary for the development of the system, as indicated by the Constitution and the Constitutional Court.<sup>12</sup>

The analytic point of departure should, as in the case of any other legal dispute subject to South African law, be constitutional. This first step entails determining both “the relationship between and the relative authority of various sources of law” applicable to the servitude problem.<sup>13</sup> The selection of the sources (including legislation, constitutional provisions and the common law) is a constitutional issue<sup>14</sup> and is guided by subsidiarity principles.<sup>15</sup> The subsidiarity principles and a proviso as formulated by the Constitutional Court flow from the single-system-of-law principle.<sup>16</sup> According to the first principle formulated in *South African National Defence Union v Minister of Defence*,<sup>17</sup> litigants must turn to legislation enacted to give effect to a right in the Constitution and cannot rely on the constitutional provision pertaining to the right directly.<sup>18</sup> This principle is qualified in the sense that it applies when an action is brought to protect a particular right against infringement, but not in a case where the constitutional validity of the legislation is questioned.<sup>19</sup> The constitutional validity of the legislation may be challenged by a direct appeal to the relevant constitutional

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<sup>12</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 739.

<sup>13</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 32; AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 738; AJ van der Walt *Property and Constitution* (2012) 15.

<sup>14</sup> AJ van der Walt *Property and Constitution* (2012) 15.

<sup>15</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756; AJ van der Walt *Property and Constitution* (2012) 35.

<sup>16</sup> AJ van der Walt *Property and Constitution* (2012) 35.

<sup>17</sup> 2007 5 SA 400 (CC) paras 51-52.

<sup>18</sup> AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77-128 100.

<sup>19</sup> 100-101.

provision.<sup>20</sup> The first subsidiarity principle is based on the democratic principle, that is, on acknowledgement of the duty of the legislature to respect, protect, promote and fulfil the rights in the Bill of Rights. If a litigant is allowed to appeal to the relevant constitutional provision and to ignore the legislation enacted to give effect to the constitutional provision, the basis for the principle would be negated.<sup>21</sup> The qualification to the first principle is based on the norm that holds the majority accountable to and allows testing of legislation against the Constitution.

The second subsidiarity principle prescribes that litigants may not turn directly to the common law to protect a right against infringement if that right is already protected by legislation enacted to give effect to it.<sup>22</sup> Therefore, application or development of the common law is not an option once legislation has been enacted to protect the right. The common law may, however, still guide interpretation of the legislation to the extent that it accords with the Constitution, the relevant legislation and in so far as it is viable to augment the interpretation in line with section 39(2), that is, to promote the spirit, purport and objects of the Bill of Rights. The second subsidiarity principle is also based on the single-system-of-law-principle and aimed at the prevention of parallel systems of law and jurisprudence. The subsidiarity approach can therefore be summed up as a norm preventing litigants from relying directly on a constitutional provision or the common law if legislation is enacted to give effect to a constitutional right. The constitutional provision may only be applied directly if the litigant wishes to attack the constitutional validity of the legislation.

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<sup>20</sup> 101.

<sup>21</sup> 102.

<sup>22</sup> 103.

Van der Walt argues that, flowing from the logic of the *SANDU* subsidiarity principle, in the absence of legislation protecting a constitutional right,<sup>23</sup> a litigant must turn to the common law and may not directly rely on the relevant constitutional right, except when he challenges the constitutional validity of the common law.<sup>24</sup> Section 39(2)<sup>25</sup> states the duty to develop the common law in line with the spirit, purport and objects of the Bill of Rights.<sup>26</sup> Should it not be possible to apply or develop the common law in accordance with the Constitution to give effect to the constitutional right, a litigant may turn directly to the constitutional provision to challenge a rule or institution of the common law that restricts or conflicts with the constitutional right or as basis for the creation of a special constitutional remedy.<sup>27</sup> According to Van der Walt, the proviso to the second subsidiarity principle demarcates the space where the common law may be developed according to section 39(2) and may on the one hand be viewed as a “common-law development principle”.<sup>28</sup> On the other hand, the first and second

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<sup>23</sup> AJ van der Walt *Property and Constitution* (2012) 36 clarifies this deduction by stating that it is applicable when legislation was not aimed at covering that aspect of law or where it does not cover it.

<sup>24</sup> AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77-128 115.

<sup>25</sup> The Constitution of the Republic of South Africa, 1996.

<sup>26</sup> AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77-128 115; AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 723 notes that Fagan views the role of the spirit, purport and objects of the Bill of Rights as secondary and as a tiebreaker indicating the preferred way of developing the common law when development is already justified by alternative reasons. Fagan’s view was criticised by both AJ van der Walt and Davis in further articles: for details see AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 723 n 1.

<sup>27</sup> AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77-128 115.

<sup>28</sup> AJ van der Walt *Property and Constitution* (2012) 37.

principles interact as an interpretive principle and the proviso to the first principle acts as a “constitutional review principle”.<sup>29</sup>

If no relevant legislation is identified, the possibility emerges of relying on either a constitutional provision or the common law as the basis for litigation.<sup>30</sup> Application of the common law must take into account relevant constitutional provisions, starting with section 173, which sanctions the high courts to develop the common law through their inherent power, and section 39(2), which provides the constitutional framework for development of the common law since it prescribes that courts should promote the spirit, purport and objects of the Bill of Rights when developing the common law.<sup>31</sup> It follows from these subsidiarity principles that in the case of servitude law, particularly usufruct, where there is no legislation to activate the second principle, a litigant must turn directly to either the common law or a relevant constitutional provision.<sup>32</sup>

Once the appropriate sources of law have been identified, the first concern in a servitude case would be to work out the “implications that application, amendment or termination of any existing servitude arrangement (and the law that regulates it) might have for the shaping of democratic society foreseen in the *Constitution*”.<sup>33</sup> The Constitution provides guidelines structuring this process which I consider in section 5.2. This process involves determining the common law position by law by way of

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<sup>29</sup> AJ van der Walt *Property and Constitution* (2012) 37.

<sup>30</sup> AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77-128 100.

<sup>31</sup> The Constitution of the Republic of South Africa, 1996; AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 738.

<sup>32</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 740.

<sup>33</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 32.

historical analysis.<sup>34</sup> Once the position is determined, the next step would be to determine if the “outcome predicated on the common-law position is acceptable”.<sup>35</sup> Although persuasive non-constitutional reasons (for example policy and fairness considerations) may exist, constitutional evaluation of the outcome set by the common law is required. Assessment must determine whether the outcome dictated by the common law conflicts with “non-utilitarian, democratic constitutional provisions”.<sup>36</sup> To determine whether the outcome based on the common law position is acceptable, a limitation analysis is necessary. This analysis determines whether a right in the Bill of Rights has been infringed by law of general application and whether this limitation is arbitrary or meets constitutional muster. Within the context of constitutional analysis in general, this is usually done by means of the “two-step approach” which I discuss in section 5 2 2 7. Within the context of property law, this analysis has been adapted in what is known as the *FNB*<sup>37</sup> methodology,<sup>38</sup> which I discuss in section 5 2 3 and 5 3 1. The constitutional provisions that inform the present chapter necessitate that either

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<sup>34</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 738; 745.

<sup>35</sup> 745.

<sup>36</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 745.

<sup>37</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>38</sup> According to AJ Van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 749-750 the *FNB* test involves seven questions:

“(a) Is there a protected property interest involved? (b) If there was property, was there a deprivation of that property? (c) If there was a deprivation, was the deprivation arbitrary? (d) If the deprivation was arbitrary, can it be justified in terms of section 36(1)? (If the arbitrary deprivation cannot be justified, it is unconstitutional and that ends the constitutional inquiry.) (e) If the deprivation was not arbitrary or if it could be justified in terms of section 36(1), does it also constitute expropriation? (f) If the deprivation does constitute expropriation, does it comply with the requirements in section 25(2)? (f) If the expropriation does not comply with the section 25(2) requirements, can it be justified in terms of section 36(1)? If the expropriation does not comply and cannot be justified, it is unconstitutional.”

the generic “two-step approach” or its specification in the form of the *FNB*-methodology is utilised to determine whether the consequences of the *salva rei substantia* requirement is acceptable in an open and democratic society based on equality, freedom and human dignity.

The outcome of this inquiry determines whether “development of the common law is either constitutionally required or prohibited”.<sup>39</sup> The decision to apply or develop the common law must be motivated by a constitutional argument (since “constitutional arguments for or against development of the common law would, in view of the supremacy of the Constitution, probably trump any utilitarian, non-constitutional considerations that might exist”)<sup>40</sup> because a mere consideration of the logic and coherence of the common law doctrine or policy considerations would be inadequate.<sup>41</sup>

In the previous chapters I have already investigated comparative,<sup>42</sup> policy and theoretical considerations<sup>43</sup> for a shift to a flexible position that might have persuasive force. This chapter presents, firstly, constitutional reasons that support a flexible approach to the *salva rei substantia* requirement based on constitutional provisions aimed at securing democratic liberty.<sup>44</sup> Therefore, the analysis will focus on the consequences of applying a rigid approach, that is, of the common law position as it currently stands. Noncompliance with the requirement, either wilfully or as a result of circumstances, results in termination of the usufruct where (a) the obligation to frame

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<sup>39</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 745.

<sup>40</sup> 745.

<sup>41</sup> 741.

<sup>42</sup> See ch 3.

<sup>43</sup> See ch 4.

<sup>44</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 32.

inventory and the obligation to provide security are not complied with in response to a court order, (b) the usufructuary property is subjected to disfigurement or serious abuse and (c) where the usufructuary property is destroyed or substantially changed. If constitutional provisions aimed at securing democratic liberty are compromised by the rigid approach the Constitution requires development of the common law and a shift to a flexible approach would be mandatory. Where the right to equality and non-discrimination<sup>45</sup> or the right of access to adequate housing<sup>46</sup> is compromised, this would be the case. Moreover, where the right of access to housing is involved, it usually impacts on the right to dignity.<sup>47</sup> If the usufructuary's right of access to adequate housing is threatened in a case involving the deprivation of a usufruct right or where his property right in the form of a usufruct is terminated due to the disfigurement, misuse or substantial change in form or destruction of the usufructuary object, these provisions might be compromised.

However, a discussion of constitutional considerations would not be complete without also reflecting on the consequences for the bare owner resulting from a shift to a flexible approach. Non-termination of the right of usufruct may impact the bare owner's right not to be arbitrarily deprived of property.<sup>48</sup> The question is, firstly, whether a deprivation of the bare owner's right occurs and secondly, whether this deprivation provides a compelling reason for not adopting a flexible approach.

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<sup>45</sup> The Constitution of the Republic of South Africa, 1996 s 9.

<sup>46</sup> The Constitution of the Republic of South Africa, 1996 s 26

<sup>47</sup> The Constitution of the Republic of South Africa, 1996 s 10. Section 10 of the Constitution entrenches the right to human dignity – a right that might be adversely impacted by the loss of the right of access to housing. See also R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 60 n 3.

<sup>48</sup> The Constitution of the Republic of South Africa, 1996 s 25.

In the constitutional analyses that follow, I follow the principles developed in Van der Walt's articles on the continued relevance and the development of the common law to direct the inquiry.<sup>49</sup>

## **5 2 Non-property constitutional provisions that require a flexible approach**

### 5 2 1 Introduction

Van der Walt proposes that non-property constitutional provisions which “entrench and guarantee democratic liberty” should be considered first in any constitutional analysis.<sup>50</sup> Relevant constitutional guarantees include the right to equality and the right of access to adequate housing. The right not to be arbitrarily deprived of property is also relevant, but Van der Walt argues that this right is economic rather than democratic and must therefore feature on a different level:

“Normatively, consideration of the ‘higher’, democratic constitutional provisions has to take precedence over purely economic or efficiency interests because they concern higher, broader values that affect the overall wellbeing of the democratic society rather than just the economic utility of one individual. Constitutionally, they have to be considered prior to economic interests because the *Constitution* is the highest law and because these guarantees enshrine the rights of all people in the country and affirm the democratic values of human dignity, equality and freedom.”<sup>51</sup>

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<sup>49</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756; AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35.

<sup>50</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 32.

<sup>51</sup> 33.

Based on this hierarchical differentiation argued by Van der Walt I therefore firstly investigate the section 9 and 26 implications of the *salva rei substantia* requirement and subsequently proceed with the section 25 analysis. The question as Van der Walt frames it is whether “these constitutional provisions explicitly prescribe, implicitly require, explicitly prohibit or implicitly preclude [...] the enforcement, amendment or revocation of the legal rule or principle that regulates it”.<sup>52</sup> The question is therefore whether any of these non-property constitutional provisions prescribes or requires development of the common law principles relating to the *salva rei substantia* requirement as it is currently understood and applied.

## 5 2 2 Section 9

The usufructuary has a duty to provide security where it is demanded by the bare owner. The duty to provide security ensures that the usufructuary complies with the *salva rei substantia* requirement. However, there are exceptions to these duties and in these cases the duty to provide security is not enforced. These exceptions have the effect of rendering compliance with the *salva rei substantia* requirement (providing security) unnecessary. They can therefore be seen as measures that promote flexibility.

One of these exceptions relates to fathers who have the usufruct of usufructuary property of which their children are the owner. A father who has the usufruct of usufructuary property of which his child is the owner, does not have to furnish security to ensure that he will return the usufructuary *salva rei substantia*. This exception does not apply to mothers or stepparents. It is necessary to determine whether this

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<sup>52</sup> 33.

exception which discriminates on the basis of gender, infringes the right to equality of the Constitution.

### 5 2 2 1      *The nature and content of section 9*

Section 9(1) of the Constitution<sup>53</sup> states that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(2) fleshes out the content of the right to equality: “Equality includes the full and equal enjoyment of all rights and freedoms”. Furthermore, section 9(3) states that discrimination on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” is prohibited. Discrimination may not take place “directly or indirectly”, as described in section 9(4). The right is limited<sup>54</sup> in cases “where it is established that discrimination is fair” but otherwise discrimination on the grounds listed in 9(3) is unfair. According to section 9(3) and (4), section 9 is applicable to the state and all persons. To actualise this right “legislative and other measures” may be taken in order to protect or advance parties “disadvantaged by unfair discrimination”. Moreover, section 9(4) compels “[n]ational legislation” to “be enacted to prevent or prohibit unfair discrimination”. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)<sup>55</sup> was enacted to fulfil this function.<sup>56</sup>

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<sup>53</sup> The Constitution of the Republic of South Africa, 1996 s 9.

<sup>54</sup> See also The Constitution of the Republic of South Africa, 1996 s 7(3) and s 36.

<sup>55</sup> Act 4 of 2000.

<sup>56</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 244.

The right of equality is significant since it is underpinned by the democratic constitutional values of creating a society based on equality, dignity and freedom.<sup>57</sup> Notably, it is the first right listed in the Bill of Rights and protects the right to equality in the sense that it not only provides a constitutional guarantee of equal protection and benefit by the law but also prohibits unfair discrimination.<sup>58</sup> In terms of the right to equality, parties who are in a similar position, should be treated in the same way where it is relevant.<sup>59</sup> This would prompt the question what the content of similar treatment of people in a similar position should be and whether the outcome of similar treatment would give the parties access to the same opportunities, that is, to the “full and equal enjoyment of rights and freedoms” as stated in section 9(2).<sup>60</sup>

Section 9 must be understood against the historical context of a preconstitutional political and legal system inextricably tied to inequality and discrimination and the ambitions of the Constitution to rectify this entrenched injustice.<sup>61</sup> Particularly relevant here is the “long-embedded culture of patriarchy”.<sup>62</sup> The listed grounds in section 9(3) recognise this legacy by prohibiting unfair discrimination based on gender, sex, pregnancy, marital status and sexual orientation. The Constitutional Court in *Harksen v Lane NO*<sup>63</sup> reiterated that, among others, these grounds have previously been

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<sup>57</sup> See in this regard section 7(1) of the Constitution of the Republic of South Africa, 1996: “This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of people in our country and affirms the democratic values of human dignity, equality and freedom”. I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 211.

<sup>58</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 211.

<sup>59</sup> 210.

<sup>60</sup> Constitution of the Republic of South Africa, 1996 s 9(2); I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 211.

<sup>61</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 211.

<sup>62</sup> 212.

<sup>63</sup> 1998 1 SA 300 CC para 49; I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 227.

employed “to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics”. The Court pointed out that these grounds may “when manipulated” [...] demean persons in their inherent humanity and dignity” and commented on the “complex relationship” between them. The Court also cautioned against forcing the grounds “into neatly self-contained categories”. This caveat is also important in this chapter where, for clarity of argument, the discussion of the relevant provisions of the Bill of Rights is compartmentalised. With reference to section 8(2) of the interim Constitution the Court described the aim of the equality provision as a deterrent against discrimination “based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history”. Furthermore, in *President of the Republic of South Africa v Hugo*<sup>64</sup> the Court noted that:

“[e]ach case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context”.

For the purposes of this discussion, the relevant ground of discrimination is gender.<sup>65</sup> Gender pertains to “ascribed social and cultural male and female roles”.<sup>66</sup> In this case the exception from the duty to provide security granted to a father who enjoys the right

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<sup>64</sup> 1997 4 SA 1 (CC) para 41; I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 214.

<sup>65</sup> Gender needs to be differentiated from sex. The latter, according to I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 227 refers to “biological and physical differences between men and women”.

<sup>66</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 227.

of usufruct over property of which his child or children are the bare owner(s)<sup>67</sup> requires scrutiny. Mothers or stepparents in a similar position are not exempted unless a testator grants them this exemption.<sup>68</sup> Taking into account that usufructuaries may experience economic hardship, this exception grants fathers a particular advantage in the sense that they are not required to provide security on demand, whereas an impecunious mother or stepparents must take recourse to a court in terms of The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>69</sup> which was enacted to give effect to section 9 of the Constitution. Furthermore, a court might use its discretion to intervene where an unreasonable demand in relation to security is made.<sup>70</sup>

#### 5 2 2 2      *Legislation promulgated to give effect to section 9*

To give effect to section 9(4), PEPUDA<sup>71</sup> was enacted. According to its preamble the act aims to eradicate “social and economic inequalities, especially those of a systemic nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people”.<sup>72</sup> In order to

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<sup>67</sup> Voet 7 9 7; Van der Keessel *Praelectiones ad Grotius* 2 39 3; Carpzovius *Definitiones Forenses* 2 10 9; Huber *HR* 2 39 23; *Holl Cons* 1 57 2; Schorer *ad Grotius* 2 39 3; *Ex parte Wagenaar* 1953 4 SA 435 (C); *Van Staden v Van Wyk* 1958 2 SA 682 (O); CG van der Merwe *Sakereg* (2 ed 1989) 517.

<sup>68</sup> Voet 7 9 7; Schorer *ad Grotius* 2 39 3; *Contra Van der Keessel Praelectiones ad Grotius* 2 39 3; *Ex parte Newberry* 1924; OPD 219 223-224; *Ex parte Wagenaar* 1953 4 SA 435 (C); *Van Staden v Van Wyk* 1958 2 SA 682 (O); *Olivier v Venter* 1933 EDL 206.

<sup>69</sup> Act 4 of 2000.

<sup>70</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T); *Van Rensburg v Mulder* 1998 JDR 0756 (T) 11.

<sup>71</sup> Act 4 of 2000.

<sup>72</sup> References to The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 244-247 unless indicated otherwise.

fulfil this mandate it prohibits unfair discrimination, provides remedies for the victims of unfair discrimination and promotes the achievement of substantive equality. Unfair discrimination is generally prohibited by chapter 2.

Since the Act has horizontal application, it binds the state and other parties. According to *MEC for Education, Kwazulu-Natal v Pillay*,<sup>73</sup> any equality challenge not challenging the Act itself should be brought in terms of the substantive and procedural provisions of PEPUDA. In accordance with subsidiarity principles, litigants may only base their cases on the right to equality if a provision of the Act itself or other litigation or conduct not falling in the scope of the Act is at issue. The assumption is that the Act is consistent with the Constitution.

In comparison to litigation previously based on section 9, the Act places the burden of proof on the respondent once a *prima facie* case of discrimination is established by the complainant.<sup>74</sup> In section 8 the Act lists different instances of unfair discrimination.<sup>75</sup> The list includes discrimination based on gender. A respondent cannot argue that discrimination on one of the grounds can never amount to discrimination. Sections that might be relevant in a case brought on the grounds of the exemption of fathers from the duty to provide security might include section 8(d), which refers to “any practice [...] that impairs the dignity of women and undermines equality between women and men”, and section 8(d), which adds “any policy or conduct that unfairly limits access of women to land rights, finance, and other resources”.

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<sup>73</sup> 2008 1 SA 474; Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 215, 245.

<sup>74</sup> 246.

<sup>75</sup> 247.

This Act was only enacted in 2000, brought partially in operation with effect from 1 September 2000, with the remaining sections coming into effect from 16 June 2003.

### 5 2 2 3      *Application of section 9 and PEPUDA*

Prior to the enactment of PEPUDA,<sup>76</sup> the approach to an infringement of the equality provision was set out in *Harksen v Lane NO*.<sup>77</sup> Firstly, it had to be established whether the law differentiates between people or categories of people.<sup>78</sup> Such a differentiation should have been rationally connected to a legitimate government purpose. If this was not the case, section 9(1) was infringed and the inquiry ended. However, a rational connection did not rule out discrimination. Secondly, the question was whether the differentiation came down to unfair discrimination. A “two-stage analysis” was then used in this inquiry. The first question was whether differentiation amounted to discrimination. If a ground specified in section 9 was involved, the differentiation amounted to discrimination. If the ground was not specified, it might have been based on “attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”. If the differentiation came down to discrimination, it had to be established whether it was unfair. In the case of a specified ground, unfairness was presumed, but in the case of an unspecified ground, the complainant needed to establish unfairness. The impact of the discrimination on the complainant and other parties in the same situation accordingly had to be determined. If the differentiation

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<sup>76</sup> Act 4 of 2000.

<sup>77</sup> 1998 1 SA 300 (CC) para 53.

<sup>78</sup> References to I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 216-217 unless indicated otherwise.

was not unfair, there would have been no infringement of section 9(3) and (4). However, if the discrimination was unfair, the next question would have been if the provision could be justified by means of the limitation clause, section 36.

In the case of the exemption from the duty to provide security, the challenged common law exception differentiates between fathers on the one hand and mothers or stepparents on the other who enjoy the usufruct of property of which their children are the bare owners.<sup>79</sup> In terms of mothers the common law differentiates between

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<sup>79</sup> I only discuss discrimination based on gender here. The question is whether a discrimination argument can also be made regarding stepparents. The argument can probably be attempted on “analogous grounds”. A stepparent that has to provide for a child may suffer from the same financial hardship as a biological parent. In South Africa the structure of families has changed so that stepparents play a significant role in families and frequently support children. However, South African case law referring to stepparents focuses on the right of stepchildren and not specifically on the right of non-discrimination where stepparents are concerned. See for example *Heystek v Heystek* 2002 2 SA 754 (T) where it was held that a child also has a right to parental care from a stepparent. This decision is discussed by LN van Schalkwyk & A van der Linde “Onderhoudsplig van Stiefouer *Heystek v Heystek* 2002 2 SA 754 (T)” (2003) 66 *THRHR* 301-312. See also J Heaton “Family Law and the Bill of Rights” in Y Makgoro & P Tlakula *Bill of Rights Compendium* (RS 34 2014) 1-86 para 3C46 who suggests that the term “parent” might be afforded a liberal interpretation in the future. Consequently, stepparents may be held responsible for certain duties of a parent or other family member in relation to the child. Heaton refers to *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 31 and *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC) para 19. However, as *Flynn v Farr No and Others* 2009 1 SA 584 (C) shows, proving discrimination on analogous grounds can be difficult, since it is difficult to prove that discrimination in terms of a *de facto* and *de lege* relationships (*in casu* between a *de facto* and *de lege* child of a stepfather based on s 1(4)(e) of the Intestate Succession Act 81 of 1987) impairs the dignity of a party. Furthermore, even if discrimination is established, the differentiation might be rationally connected to a legitimate government purpose. In *MB v NB* 2010 3 SA 220 (GSJ) para 25 Brassey AJ noted that certain passages in the *Flynn* decision “suggest that a *de facto* relationship should not be given legal recognition where, as here, nothing prevents the creation of its *de jure* equivalent”. In other words, if the reasoning of Brassey AJ is followed, when circumstances do not prevent the adoption of a child by a stepparent, the *de facto* relationship between the child and the stepparent should not be recognised. Consequently, the exception to the duty to provide security based on the parental relationship between the stepparent as usufructuary and the stepchild as bare owner cannot be applied to the stepparent. However, insistence on security where a usufruct is granted may ultimately be to the

mothers and fathers on the grounds of gender. Accordingly, a two-stage analysis had to be applied. Legitimate differentiation was distinguished from “constitutionally impermissible differentiation” by means of the criteria listed in section 9(3),<sup>80</sup> and since gender is a listed ground it amounted to impermissible differentiation. Moreover, in modern society the differentiation did not seem to bear a rational connection to a legitimate government purpose. Although there seems to be a rational connection between the law that protects the interests of minors who are bare owners, that is, between the common law rule to give security and the protection of the bare owner, an exception to this rule can only be justified if it is in the interests of minors. However, *differentiating* between mothers and fathers in this regard in modern South African society does not bear a rational connection to protection of the interests of minors. The exception denies equal protection and benefit of the law of usufruct to mothers who are usufructuaries of property of which their children have the bare ownership. A mother who is a usufructuary may suffer the same hardship as a father in a similar position. Therefore, it seems that there is an infringement of section 9(1). The exception thus failed at the first stage of the inquiry and it was not necessary to proceed with the second stage of the constitutional inquiry or to do a section 36 limitations analysis. Therefore, in terms of a section 9 analysis it seems a compelling reason existed for developing the common law position regarding the exceptions to the duty to provide security.

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detriment of the child if the usufructuary needs access to the usufructuary property in order to provide for the child. Therefore, an argument based on s 28(2) concerning the primacy of the best interests of the child can probably also be constructed in favour of applying the exemption to stepparents.

<sup>80</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 219.

However, since the enactment of *PEPUDA*,<sup>81</sup> in terms of the subsidiarity principles litigation has to be brought in terms of the Act. The Act affirms the jurisprudence of the Constitutional Court since it also separates the question of discrimination from the question whether the discrimination is unfair.<sup>82</sup> The outcome of litigation on the exemption of fathers from the duty to provide security would probably also mirror the section 9 inquiry. Section 13(2)(a) of PEPUDA states that if discrimination takes place on a ground listed in paragraph (a) of the definition of ‘prohibited grounds’ then it is unfair, unless the defendant proves the contrary. Gender is included in the prohibited grounds listed in paragraph (a) of the definition and since it would be unlikely that it can be proven that the discrimination is fair, a challenge to the common law exception will probably succeed.

It is not clear what the remedy in such a case would be. The point of departure is that a law that is inconsistent with the Constitution is invalid and must be declared so.<sup>83</sup> It could be declared invalid to the extent that it is inconsistent with section 172(1)(a) or rectified by a common law remedy similar to “reading in”.<sup>84</sup> The exception could be upheld, but applied to all parents and stepparents since only applying it to mothers and fathers would still discriminate against stepparents and female same-sex parents. In any event the remedy would have to amount to a reading or development of the common law that brings it in line with the Constitution. In a way, this amounts to a flexible reading of the common law principles relating to the *salva rei substantia*

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<sup>81</sup> Act 4 of 2000.

<sup>82</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 245.

<sup>83</sup> The Constitution of the Republic of South Africa, s 172; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) paras 81-87; *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) para 71; I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 183.

<sup>84</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 183-184.

requirement, resulting mandatorily from a non-property constitutional obligation. Such a development will deprive the bare owner of the right to be protected against impairment of the substance of the usufructuary property. However, this deprivation would not be arbitrary since compliance with the Constitution and the legislation giving effect to the right to equality mandates the development of the common law.

### 5 2 3 Section 26

#### 5 2 3 1 *Introduction*

Usufruct, like the other personal servitude of habitation, has the function of securing “personal residential or housing interests” in cases involving immovables.<sup>85</sup> Consequently, these servitudes reveal a public law dimension since they have the potential to trigger constitutional scrutiny where the right of access to adequate housing is concerned. Apart from enhancing economic liberty through its utilitarian purpose of securing housing interests, constitutional liberty is also bolstered by personal servitudes, since the rules governing their creation, amendment and termination help shape a free and democratic society.<sup>86</sup> This civic or democratic function of servitude law implies that the Constitution as bulwark of a democratic society needs to be the point of departure for the examination and, if need be, the development of the law of servitude. Furthermore, as was argued in section 5 2, the investigation and development should be guided by constitutional guidelines prioritising the analysis of the impact of the common law on higher democratic constitutional provisions. This would include analysis of the impact of the law of

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<sup>85</sup> AJ van der Walt “The Continued Relevance of Servitude” (2013) 3 *Property Law Review* 3-35 30.

<sup>86</sup> 31.

usufruct and particularly the *salva rei substantia* requirement on the operation of the housing clause. Does enforcement of the *salva rei substantia* requirement in certain instances exacerbate of the already prevalent housing problem in South Africa? Usufructuaries faced with the enforcement of the preservation requirement may, like those affected by the enforcement of mortgage bonds, be living in poverty, or experience a decrease in welfare.<sup>87</sup> Whereas other areas of law, such as mortgage law, have already been shaped by developments to deal with homelessness,<sup>88</sup> this is not the case for the common law of usufruct. The question is whether development is not required to address possible consequences of enforcement of the preservation requirement that may worsen homelessness.

The usufructuary's right of access to adequate housing is only threatened in limited circumstances, namely in a case involving the deprivation of a usufruct right due to noncompliance with the security and inventory duties where the usufructuary is "holding over". The main question in this section of the chapter is whether and how the substantive law that governs usufruct should develop in response to the housing clause.<sup>89</sup> More concretely, when and how should the law of usufruct allow for a usufructuary to be evicted? And furthermore, when is it unjustifiable to evict the usufructuary, for example, if less invasive measures exist to protect the bare owner, or if the result of the limitation of the right of usufruct is disproportionate?

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<sup>87</sup> Compare R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 60; GF Wright "Die Onvermoënde Vruggebruiker" (1995) 58 *THRHR* 86-91 86.

<sup>88</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 61.

<sup>89</sup> 67.

In the following subsections I first discuss preconstitutional evictions to contextualise the discussion of the the housing clause. Secondly, I consider the nature and content of the clause to indicate how the substantive content of the right of access to housing has been fleshed out to a degree in which it could assist in an eviction inquiry pertaining to a usufructuary. Thirdly, I discuss the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)<sup>90</sup> as legislation promulgated to give effect to this right and consider whether and how this legislation would be applicable to former usufructuaries faced with eviction.

### 5 2 3 2 *Eviction of usufructuaries in the preconstitutional era*

In the preconstitutional era, according to the common law of usufruct, eviction orders could be obtained against the noncompliant usufructuary who did not comply with a court order mandating the framing of inventory or the provision of security.<sup>91</sup>

Particularly in the preconstitutional era the rules and procedures in eviction proceedings gave precedence to the right of ownership.<sup>92</sup> The plaintiff, which would be the bare owner, could merely prove that he was the owner of the property and that the defendant, which would be the usufructuary, was in occupation. The onus was then on the usufructuary to establish a right to continue occupation. If the usufructuary pleaded lawful occupation in terms of usufruct, the bare owner had to answer this plea. If the bare owner conceded the existence of a usufruct, he was burdened with proving

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<sup>90</sup> 19 of 1998.

<sup>91</sup> *Schoeman v Schoeman and Another* 1953 2 SA 441 (T); *Stain v Hiebner* 1976 1 SA 34 (C).

<sup>92</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 587.

lawful termination of the usufructuary's right to occupy the property in terms of the usufruct.

In regard to a usufructuary faced with the threat of eviction in reaction to his failure to provide security mandated by a court order, the preconstitutional case of *Schoeman v Schoeman*<sup>93</sup> could serve as an illustration of the manner in which the courts approached the eviction of a usufructuary prior to the Constitution. In this case Roper J considered whether the bare owner was entitled to an order of ejectment against a noncompliant usufructuary and holder of a servitude of habitation of the usufructuary property.<sup>94</sup> With reference to Voet,<sup>95</sup> he concluded that the applicant was entitled to an order of ejectment if the usufructuary did not comply with an order of court for inventory and security to be supplied within one month from the date of the order.<sup>96</sup> In the particular case the applicant was the registered owner of immovable property subject to usufruct, in respect of one-half thereof, in favour of the first respondent.<sup>97</sup> Furthermore, the usufructuary was entitled to reside in a house on one of the pieces of land until his death. The second respondent was in occupation of the house or of a portion thereof<sup>98</sup> as lessee from the first respondent<sup>99</sup> and the order was also applicable to him.<sup>100</sup> The case does not mention the personal circumstances of the usufructuary or of the second respondent. The question arises whether the

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<sup>93</sup> 1953 2 SA 441 (T).

<sup>94</sup> *Schoeman v Schoeman and Another* 1953 2 SA 441 (T) 442.

<sup>95</sup> Voet 7 9 2; 7 9 9; 7 9 11.

<sup>96</sup> *Schoeman v Schoeman and Another* 1953 2 SA 441 (T) 391.

<sup>97</sup> 390.

<sup>98</sup> It is unclear whether the other portion was occupied by the usufructuary, but the possibility cannot be ruled out. By implication the usufructuary may also have been denied access to adequate housing as result of the court order for eviction.

<sup>99</sup> *Schoeman v Schoeman and Another* 1953 2 SA 441 (T) 390.

<sup>100</sup> 391.

conclusion reached in this decision (that a bare owner would be entitled to an order of ejectment should a usufructuary fail to frame an inventory and provide security in response to a court order), based solely on passages from Voet, without considering the circumstances of the respondents, would pass in a constitutional dispensation. Not only the usufructuary but the occupier would be affected since the landlord would only have a limited real right to the property, which would be terminated.<sup>101</sup> Rigid application of the inventory and security obligations tied to the *salva rei substantia* requirement would result in the usufructuary and the second respondent as occupiers being deprived of their right to occupy the premises. This outcome would be at odds with section 26 of the Constitution because both the usufructuary and the second respondent would probably be deprived of their right of access to adequate housing by being ejected.<sup>102</sup>

The common law concerning eviction would not have given effect to the requirements of section 26(3) of the Constitution.<sup>103</sup> Hence, the legislature promulgated legislation aimed at preventing homelessness by protecting occupiers from inequitable eviction.<sup>104</sup> Within the context of the law of usufruct, PIE prevents default evictions and requires the relevant circumstances to be considered before an

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<sup>101</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 433 and n 51.

<sup>102</sup> Compare AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 743. G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (2011) unpublished LD dissertation Stellenbosch University 92 remarks that courts have not considered that "evictions more often than not lead to homelessness, which undermines the right of access to adequate housing".

<sup>103</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 587.

<sup>104</sup> 588.

eviction order can be granted. It furthermore gives the court a broad discretion to decline an eviction order where justice and equity would require it to do so.

### 5 2 3 3      *The nature of section 26*

Section 26(1) of the Constitution<sup>105</sup> states: “[e]veryone has the right to have access to adequate housing”. Furthermore, subsection 3 prescribes that “[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions”. These provisions of the Bill of Rights protect the right of access to adequate housing and provide for procedural fairness where a party who has access to adequate housing is faced with eviction. The right of access to adequate housing is categorised as a socio-economic right.<sup>106</sup>

Socio-economic rights embody the transformative impetus of the Constitution.<sup>107</sup> As such, they create the opportunity to live a “life of dignity, freedom and equality”.<sup>108</sup>

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<sup>105</sup> The Constitution of the Republic of South Africa, 1996 s 26(1)

<sup>106</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 565; R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 62 particularly n 8.

<sup>107</sup> S Liebenberg “The Application of Socio-economic Rights to Private Law” 2008 *TSAR* 464-480 464; I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 564.

<sup>108</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 564. In contrast to the first-generation rights which are premised on the notion that government interference in individual liberty should be curbed, and which are conceptualised as negative rights restraining the power of government, socio-economic rights are categorised as second-generation rights. Second-generation rights are predominantly conceptualised as positive rights imposing duties on the government based on the interconnection between human rights and basic social living conditions. They may however entail both positive and negative duties. R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 62 states that socio-economic rights are mainly associated with public law, but not limited to this field. As S Liebenberg

Liebenberg emphasises that judicial review in terms of these constitutional rights and values functions to create the possibility to disengage the entrenched power and privileged position of those who already have access to socio-economic resources and works against the “exclusion and marginalisation of those who currently lack the means to participate meaningfully in the social and economic institutions of society”.<sup>109</sup>

The right of access to adequate housing has the purpose of alleviating homelessness and to prevent its unjustified escalation.<sup>110</sup> In this regard, the first two subsections are aimed at the alleviation of homelessness. The first subsection may also be viewed as preventing existing housing being lost, along with subsection three, which regulates evictions.<sup>111</sup> Within the context of eviction of unlawful usufructuaries, only section 26(1) and (3) would be relevant to the discussion.

#### 5 2 3 4      *The content of section 26(1)*

According to section 26(1), everyone has the right of access to adequate housing. Although this right places the duty on the state to provide access to adequate housing, it does not entail an unqualified obligation. The duty is not only imposed on the state but is also binding on private parties, as was indicated in *Government of the Republic of South Africa v Grootboom*,<sup>112</sup> where it was held that section 26(1) entails “at the

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“The Application of Socio-economic Rights to Private Law” 2008 *TSAR* 464-480 464 and I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 565 note, this is the case since common-law rules (including the law of usufruct) “structure access to socio-economic resources” in property law.

<sup>109</sup> S Liebenberg “The Application of Socio-economic Rights to Private Law” 2008 *TSAR* 464-480 465.

<sup>110</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 62.

<sup>111</sup> 62-63.

<sup>112</sup> 2001 1 SA 46 (CC) para 34.

very least, a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing”.<sup>113</sup> In *Jaftha v Schoeman; Van Rooyen v Stolz*<sup>114</sup> the content of this negative duty was fleshed out. The Court decided that “any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)”.<sup>115</sup> As Liebenberg notes, this finding indicates that private law rules which allow parties to be deprived of existing access to socio-economic rights such as the right of access to adequate housing are inconsistent with section 26(1).<sup>116</sup>

### 5 2 3 5      *The content of section 26(3)*

When a usufruct is terminated as result of noncompliance with a court order to frame inventory or provide security, a usufructuary may lose his home and his right of access to adequate housing may be threatened or compromised. According to the common law the bare owner therefore has the right to evict the usufructuary, since the latter qualifies as an unlawful occupier after termination of the right of usufruct.

Subsection 26(3), entails procedural and substantive requirements safeguarding parties against arbitrary eviction.<sup>117</sup> In terms of the procedural requirements, literature points to a gradual “proceduralisation to give ‘remedial bite’ to the right”.<sup>118</sup> Procedural principles, particularly those relating to joinder of municipalities, the obligation to report and meaningful engagement are used “to move towards establishing the substantive

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<sup>113</sup> S Liebenberg “The Application of Socio-economic Rights to Private Law” 2008 *TSAR* 464-480 467.

<sup>114</sup> 2005 2 SA 140 (CC).

<sup>115</sup> 2005 2 SA 140 (CC) para 34.

<sup>116</sup> S Liebenberg “The Application of Socio-economic Rights to Private Law” 2008 *TSAR* 464-480 468.

<sup>117</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 589.

<sup>118</sup> 589.

content of the section 26 housing right".<sup>119</sup> However, the substantive requirements of the subsection are not developed to the same extent.<sup>120</sup> Brits notes that section 26(1) informs the content of section 26 as a whole.<sup>121</sup> The section aims to provide and protect access to adequate housing.<sup>122</sup> Therefore, the judicial oversight and discretion mandated by section 26(3) is aimed at ensuring that all the relevant circumstances are taken into account when the right to access to adequate housing is limited. In the application of PIE, the principal piece of legislation promulgated to give effect to section 26, consideration of the relevant circumstances is of significance.

Upon termination of usufruct the owner may evict the usufructuary by means of PIE. It is therefore necessary to determine the relevant circumstances that need to be taken into account in deciding whether the usufructuary should be evicted. However, determining what these circumstances encompass is a challenging and individualised exercise. Section 26(3) does not provide guidance as to the scope of relevant circumstances.<sup>123</sup> Pienaar and Mostert note that a *numerus clausus* of relevant circumstances does not exist.<sup>124</sup> They do however attempt to draw conclusions from case law in this regard.<sup>125</sup> Firstly, the identity of the applicant is significant. In cases

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<sup>119</sup> 589.

<sup>120</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 590; R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 65.

<sup>121</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 65-66.

<sup>122</sup> 66.

<sup>123</sup> R Brits & AJ van der Walt "Application of the Housing Clause during Mortgage Foreclosure: a Subsidiarity Approach to the Role of the National Credit Act (Part 1)" 2014 *TSAR* 288-305 291.

<sup>124</sup> JM Pienaar & H Mostert "Uitsettings onder die Suid-Afrikaanse Grondwet: die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)" 2006 *TSAR* 522-536 527.

<sup>125</sup> Although JM Pienaar & H Mostert "Uitsettings onder die Suid-Afrikaanse Grondwet: die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)" 2006 *TSAR* 522-536 533-534 discuss

where the state is the applicant more stringent requirements and additional duties are involved.<sup>126</sup> In a usufruct case where a bare owner is the applicant in eviction proceedings the requirements would therefore probably be less strict. Secondly, the vulnerability, indigence, and exigence of the defendants would also be serious considerations where an eviction order is at issue.<sup>127</sup> In the case of an impecunious usufructuary the court would have to consider the dire need and vulnerability of the defendant, as was amply illustrated in *Van den Heever NO and Others v Coetzee and Another*.<sup>128</sup> Thirdly, the social responsibility of the owner of the property might be a consideration.<sup>129</sup> If the latter can or does not want to use the property at issue for better social objectives it might count in favour of the defendant. In the context of eviction cases concerning usufructuaries, this might imply that the bare owner set on evicting a usufructuary might have to bring evidence of a worthy use for the property which would probably not outweigh the usufructuary's need to housing. Fourthly, considerations of equity and fairness are paramount – but need not *per se* imply that the occupier's interests will trump those of the applicant.<sup>130</sup> In terms of this factor, in cases where owners of private property seek eviction, courts have started to develop the content of subsection 26(3) by giving meaning to the “just and equitable” requirement mandated in the legislation enacted to give effect to the housing right,

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other considerations such as land grabs, queue-jumping and commercial property (these are not applicable to eviction disputes involving usufructuaries and I do not discuss them here).

<sup>126</sup> JM Pienaar & H Mostert “Uitsettings onder die Suid-Afrikaanse Grondwet: die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)” (2006) *TSAR* 522-536 528.

<sup>127</sup> JM Pienaar & H Mostert “Uitsettings onder die Suid-Afrikaanse Grondwet: die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)” (2006) *TSAR* 522-536 531.

<sup>128</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T).

<sup>129</sup> JM Pienaar & H Mostert “Uitsettings onder die Suid-Afrikaanse Grondwet: die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)” (2006) *TSAR* 522-536 533.

<sup>130</sup> 534.

namely PIE.<sup>131</sup> In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*<sup>132</sup> Van der Westhuizen J established that the court should take an “open list of factors” into consideration when determining whether the eviction would be just and equitable.<sup>133</sup> These factors could include the duration of occupation, previous lawfulness and potential homelessness of either of the two litigating parties. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd*,<sup>134</sup> the Court held that the right of property owners is not absolute, which would imply that there are cases where an eviction order in favour of a private landowner would not be just and equitable. Private owners should even, in cases where it would be just and equitable to grant an eviction order, exercise patience where needed to fulfil the requirements of PIE and to prevent temporary homelessness.<sup>135</sup>

Furthermore, in *Ndlovu v Ngcobo; Bekker and Another v Jika*<sup>136</sup> the court held that the personal circumstances of occupiers are relevant circumstances.<sup>137</sup> As Muller observes, the obligation to consider all relevant circumstances marks a significant shift from the common law position where eviction was treated as “an abstract or absolute

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<sup>131</sup> 19 of 1998.

<sup>132</sup> 2012 2 SA 104 (CC) para 39.

<sup>133</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 39; I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 590.

<sup>134</sup> 2012 6 SA 294 (SCA) n 22.

<sup>135</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 40; 100; *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd and Others* 2011 ZACC 36 paras 11, 13; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 25.

<sup>136</sup> 2003 (1) SA 113 (SCA).

<sup>137</sup> G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (2011) unpublished LLD dissertation Stellenbosch University 101.

remedy for a private land owner without regard for the personal circumstances of the occupiers".<sup>138</sup>

The factors above may also be considered in disputes where a usufructuary as unlawful occupier is faced with eviction. A usufructuary will be an unlawful occupier when his right of usufruct is terminated and he still occupies the usufructuary property. According to PIE the court is mandated to consider all relevant factors when deciding whether an unlawful occupier should be evicted. Although *Troksie and Another v Liquidator of RSD Construction CC Wilbecar Liquidators CC t/a Bureau Trust Gauteng RSD Construction CC and Others*<sup>139</sup> dealt with an unregistered usufruct, it not only gives an indication of relevant factors the court might consider in a usufruct case, but also how unlawful occupiers in an eviction case should take responsibility for providing sufficient supporting evidence that the court can take into consideration when determining whether an eviction would be just and equitable.<sup>140</sup> Furthermore, the court also distinguished between unlawful occupiers who may be categorised as poor and vulnerable, those whose "protection was obviously foremost in the Legislature's mind when it enacted PIE"<sup>141</sup> and those who do not belong to this class.<sup>142</sup> Factors considered in the decision include the age of the holder of the personal right, the

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<sup>138</sup> 99.

<sup>139</sup> Case no 71322/2010 [2015] ZAGPPHC 321.

<sup>140</sup> Paras 70-71.

<sup>141</sup> Van der Berg AJ in *Troksie and Another v Liquidator of RSD Construction CC Wilbecar Liquidators CC t/a Bureau Trust Gauteng RSD Construction CC and Others* (71322/2010) [2015] ZAGPPHC 321 referred to *Wormald NO v Kambule* 2006 3 SA 569 571E-F para 20. In paras 25-26 of the latter case it was assumed without deciding that according to customary law the widow "enjoys a type of personal servitude of *usus* or *habitatio*" of the residence she was permitted occupy. However, the court found her occupation to be unlawful and had to decide whether her eviction would be just and equitable. She was likened to an affluent tenant holding over and consequently not "in dire need for accommodation". Therefore the court concluded that an eviction would be equitable and fair.

<sup>142</sup> Para 72.

duration of occupation of the premises, whether the property was used to generate an income and whether another source of income was available, whether alternative accommodation was available, the health of the holder of the personal right, the urgency of the party bringing the application for an eviction order.<sup>143</sup> *In casu* the parties were elderly people who had lived on the property for 37 years, and the first applicant had acute heart problems. However they did not reveal their financial position. Van der Berg AJ ruled that they did not belong to the class of persons PIE was enacted to protect from eviction and did not disclose their. Consequently, the eviction order was granted. It seems that an open list of factors is taken into account as relevant circumstances to determine whether an eviction would be just and equitable. Although these factors might *prima facie* indicate that an eviction might not be just and equitable, certain factors such as the financial position of the unlawful occupier might weigh more than other indicators of vulnerability.

### 5 2 3 6      *Legislation promulgated to give effect to section 26(3)*

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act<sup>144</sup> (PIE) repealed the old Prevention of Illegal Squatting Act<sup>145</sup> and was enacted with the aim of protecting constitutional housing and property rights where evictions are concerned.<sup>146</sup> PIE is applicable to the eviction of unlawful occupiers of all land in South

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<sup>143</sup> Paras 69; 73.

<sup>144</sup> 19 of 1998.

<sup>145</sup> 52 of 1951.

<sup>146</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 270 n 11.

Africa.<sup>147</sup> As such, it gives effect to section 26(3) of the Constitution. It is not the only legislation relevant in an evictions context.<sup>148</sup> Evictions may also be subject to The Extension of Security of Tenure Act<sup>149</sup> (ESTA) or other legislation aimed at protecting security of tenure such as the Informal Protection of Land Rights Act.<sup>150</sup> For the most part, evictions are either regulated by PIE or ESTA. Since ESTA<sup>151</sup> defines an occupier as a party residing on the land of another with consent or another right in law, it would not be applicable in instances where the usufructuary is an unlawful occupier. In that case the relevant legislation to apply in the event of imminent eviction proceedings would therefore be PIE<sup>152</sup>.

In *City of Cape Town v Rudolph*<sup>153</sup> the court found that the provisions of PIE replace the *rei vindicatio* if this action would result in eviction.<sup>154</sup> The pivotal question here would be whether a usufructuary subject to an eviction order due to the noncompliance with the security or inventory requirement, would qualify as an unlawful occupier. Section 1 of PIE defines the latter as someone who either does not have

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<sup>147</sup> ZT Boggenpoel "Does Method Really Matter? Reconsidering the Role of Common-Law Remedies in the Eviction Paradigm (2014) 25 *Stell LR* 72-98 72; S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 271.

<sup>148</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 270 n 11.

<sup>149</sup> 62 of 1997.

<sup>150</sup> 31 of 1996.

<sup>151</sup> 62 of 1997.

<sup>152</sup> 19 of 1998.

<sup>153</sup> 2004 5 SA 39 (C) 61 E & 59 I.

<sup>154</sup> JM Pienaar & H Mostert "Uitsettings onder die Suid-Afrikaanse Grondwet: die Verhouding tussen Artikel 25(1), Artikel 26(3) en die Uitsettingswet (Deel 1)" (2006) *TSAR* 277-299 292.

“express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land”.<sup>155</sup>

In *Schoeman v Schoeman and Another*<sup>156</sup> the Court established that a usufructuary and holder of the right of habitation would not “be entitled to the use and enjoyment of the property” until an inventory and security have been provided on the bare owner’s insistence.<sup>157</sup> Roper J relied on Voet, who emphatically states that wilful noncompliance with the security requirement will deprive the usufructuary “of all the benefit of the usufruct” for the period of his noncompliance.<sup>158</sup> Furthermore, the bare owner is entitled to claim the property by means of *vindicatio*. For the duration of his noncompliance the usufructuary therefore does not have a right in law to the usufructuary property.<sup>159</sup> The definition of an unlawful occupier would therefore be applicable to the usufructuary who does not provide security on the insistence of the bare owner in response to a court order.

Furthermore, in *Ndlovu v Ngcobo; Bekker v Jika*<sup>160</sup> the Court elaborated on the definition of an unlawful occupier by including parties who previously were lawful occupiers but who later became unlawful. These cases are referred to as cases of “holding over”. Therefore, PIE also applies to occupiers who refuse to vacate the property after a lease termination or a sale of execution resulting from the calling up

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<sup>155</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 271-272.

<sup>156</sup> 1953 2 SA 441 (T).

<sup>157</sup> *Schoeman v Schoeman and Another* 1953 2 SA 441 (T) 391.

<sup>158</sup> 391.

<sup>159</sup> Thanks to Regard Brits for a conversation on this point.

<sup>160</sup> 2003 1 SA 113 (SCA).

of a mortgage bond.<sup>161</sup> Although the term “holding over” was generally reserved for these instances, the court in *Vorster v Van Niekerk, Van Niekerk en Enige Ander Onregmatige Okkupeerders Welke Gevind Mag Word op Eiendom Bekend as Saffierstraat 6, Jordania*,<sup>162</sup> with reference to *Ndlovu v Ngcobo; Bekker and Another v Jika*,<sup>163</sup> interpreted the facts as an example of “holding over” where PIE was applicable.<sup>164</sup> *In casu* the first respondent averred that the respondents (the applicant’s maternal grandfather and his wife) had acquired a life right (*lewensreg*)<sup>165,166</sup>. Therefore, based on case law expanding the scope of the definition of an unlawful occupier, it would seem plausible that PIE could also be applicable to usufructuaries who are “holding over”.

Having established that PIE would be applicable in situations where the usufructuary qualifies as an unlawful occupier faced with eviction, the relevant circumstances that need to be considered in an eviction application should be investigated. In section 5.2.3.5 I discuss the scope of these circumstances with reference to factors identified by Pienaar and Mostert as a starting point for such an inquiry in eviction disputes. I also indicated that the consideration of personal circumstances falls in this category.

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<sup>161</sup> S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 272 n 20.

<sup>162</sup> Case no 6723/2008 (OFSPD) decided 2009-02-05.

<sup>163</sup> 2003 (1) SA 113 (SCA).

<sup>164</sup> Case no 6723/2008 (OFSPD) decided 2009-02-05 para 9.

<sup>165</sup> W du Plessis, J Pienaar & N Olivier “Land Matters and Rural Development: 2009 (2)” (2009) 24 *SAPR/PL* 599 translates the term “*lewensreg*” as “usufruct. In *Ex parte Van Zijl and Bilse* 1946 OPD 46 the term used in a will was interpreted to encompass the notion of *habitatio*.

<sup>166</sup> Case no 6723/2008 (OFSPD) decided 2009-02-05 para 5.

5 2 3 7      *Eviction of usufructuaries in the constitutional era*

Section 34 governs the right of access to courts and mandates judicial oversight in the settling of private disputes.<sup>167</sup> Brits views section 26(3) as an embodiment of this constitutional value in eviction law, since it underlines that an eviction may only be effected where a court has taken all the relevant circumstances into account.<sup>168</sup> It therefore combines a procedural and substantive safeguard. Furthermore, as Van der Walt points out, *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*<sup>169</sup> established that court procedures and particularly those facilitating “‘normal’ commercial processes may not be abused “to exploit or exacerbate the economic and social weakness and marginality of the poor, especially when doing so has a negative impact on state efforts to alleviate homelessness”.<sup>170</sup> It is therefore imperative that eviction proceedings, in what would traditionally be seen as private law disputes, take place within this constitutional framework. Evictions can no longer be based on administrative decisions only, but require the authority of court order granted after all the relevant circumstances have been taken into account.<sup>171</sup> A relevant question would subsequently be how the courts should approach this inquiry where a potential eviction may infringe the right to adequate housing.

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<sup>167</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 92.

<sup>168</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 92.

<sup>169</sup> 2005 2 SA 140 (CC).

<sup>170</sup> AJ van der Walt “Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa” (2008) 3 *Stell LR* 325-346 331-332; R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 76.

<sup>171</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 587.

Case law pertaining to an eviction order issued to a usufructuary who fails to provide security on the insistence of the bare owner is scarce both prior to and during the constitutional dispensation. *Schoeman v Schoeman and Another*<sup>172</sup> typifies the common law response during the preconstitutional era. One notable case after the enactment of the Constitution illustrates the consideration of relevant circumstances pertaining to the usufructuary where an eviction order was demanded. However, this case neither refers to the Constitution, nor revises the common law position on the requirement to provide security as stated in *Schoeman v Schoeman*, although it marks the exercise of judicial discretion regarding the enforcement of the security obligation.

In *Van der Heever NO and Others v Coetzee and Another*<sup>173</sup> the usufructuary was clearly impecunious.<sup>174</sup> Van der Byl AJ mentions that she only possessed an old vehicle and no other assets. Furthermore, she was dependent on the monthly rental income received from letting the house. Accordingly, the court found that she was not able to provide the security that was demanded of her.<sup>175</sup> In the absence of relevant case law, the Court referred to an article of Wright on the impecunious usufructuary.<sup>176</sup> Wright discusses the common law authorities and comes to the conclusion that the viewpoint taken by Voet, namely that the judge should exercise his discretion where an impecunious usufructuary is involved, is the most equitable.<sup>177</sup> Following this

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<sup>172</sup> 1953 2 SA 441 (T).

<sup>173</sup> 2003 JDR 0863 (T).

<sup>174</sup> 12.

<sup>175</sup> 13.

<sup>176</sup> 12-13.

<sup>177</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 12-13. The viewpoint of Voet is also supported by Van der Linden and is the predominant approach of textbook writers. Van der Keessel however advocates a stricter approach not allowing for a lenient approach towards the impecunious usufructuary.

approach would also give effect to the intention of the deceased testator to benefit the usufructuary.<sup>178</sup> According to Van der Byl AJ equity was an important consideration *in casu*.<sup>179</sup> The Court applied its common law discretion and relieved the usufructuary of the obligation to provide security.<sup>180</sup>

The approach advocated by Van der Byl AJ not only aligns with the dominant viewpoint of Roman Dutch writers,<sup>181</sup> but would also be in accordance with section 26(3) of the Constitution, which prescribes consideration of all the relevant circumstances. It therefore seems to be possible to approach cases where an eviction order is demanded on noncompliance with the security requirement, in a way that takes cognisance of the relevant circumstances, although it was clearly mandated by the position of the respondent as an impecunious usufructuary. In the absence of further relevant case law on this point dating from the constitutional dispensation, it is unclear whether the Court would in every instance consider the relevant circumstances.

### 5 2 3 Assessment

From the discussion of the non-property constitutional provisions above, it is evident that sections 9 and 26 provide mandatory reasons for development of the common law regarding the *salva rei substantia* requirement. Firstly, exemption from certain obligations under the requirement may not establish unjust discrimination. In particular

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<sup>178</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 13.

<sup>179</sup> *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 13.

<sup>180</sup> 13.

<sup>181</sup> See discussion of Voet and Van der Linden in GF Wright “Die Onvermoënde Vruggebruiker” (1995) 58 *THRHR* 86-91.

exemption from the obligation to furnish security may not result in unjustified discrimination against mothers<sup>182</sup> Therefore, the common law will have to be developed to treat mothers and fathers the same.

Secondly, enforcement of the *salva rei substantia* requirement that ends in termination of the usufruct will have to comply with the PIE requirements for eviction when applicable. In some instances it might require development of the common law to avoid eviction.

Since it is within the power of the courts to develop the common law, and they are constitutionally mandated to do so, they have no discretion to avoid development. Mandatory development of the common law required by the equality clause and the housing clause will have to be considered before property issues are even addressed.

## **5 3 Section 25 reasons for a flexible approach**

### 5 3 1 Introduction

Reasons for developing the common law relating to the *salva rei substantia* requirement in view of mandatory non-property constitutional provisions have been established in section 5 2. The next question is whether section 25 also requires a flexible approach to or development of the common law, seeing that it protects the usufructuary's right.

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<sup>182</sup> If the exemption establishes unjustified discrimination against stepparents on the basis of analogous grounds it would also be unconstitutional. I have not developed this argument here. See further 5 2 2 3.

### 5 3 2 The nature and content of section 25

The property clause does not aim to protect private property but constitutional property.<sup>183</sup> Therefore, it does not act as a shield or guarantee for existing property rights against all infringements. It is rather aimed at establishing and maintaining a balance between “individually vested rights” and “the public interest in the regulation of property”.<sup>184</sup> Since the rights in the Bill of Rights are not absolute, individual property interests may also be limited and in general, these limitations do not warrant compensation.

In line with this balancing aim, the property clause is structured into “two seemingly contradictory parts that exhibit “structural tension”.<sup>185</sup> The first part focuses on the protection of property interests, the second on reform.<sup>186</sup> These two parts can also be related to the historical context of the Constitution and its purpose of transformation.<sup>187</sup>

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<sup>183</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 295.

<sup>184</sup> 295.

<sup>185</sup> 295-296.

<sup>186</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 16; R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 295-296.

<sup>187</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) refers to Sachs J's historical and contextual approach in terms of a “broad constitutional matrix” in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14 ff as example. R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 296.

According to section 25(1) no one may be deprived of property except in terms of law of general application. Woolman and Botha conceptualised a “four-pronged test”<sup>188</sup> for law of general application:

“[T]he authorising law must be generally and equally applicable and ensure parity of treatment; non-arbitrary in the sense that the law is applied according to a discernible standard; precise enough so that people can arrange their conduct to meet its standards; and accessible in the sense that the law has been publicly promulgated and is available to the public at large”.<sup>189</sup>

In terms of this test, the principles of the common law would qualify as law of general application.<sup>190</sup> Since the phrase “law of general application” in section 25(1) is inclusive of the common law, a regulatory deprivation of property can also be sanctioned by a common law rule.<sup>191</sup> As law of general application the common law may also not authorise arbitrary deprivations of property. Accordingly, the law of usufruct and the *salva rei substantia* requirement would by implication also meet the requirements for law of general application. The requirement for law of general application is a formal minimum requirement.<sup>192</sup> Therefore, the court should determine if the law in question is authority for the deprivation in the sense that it foresaw and authorised it. Should

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<sup>188</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 232; 233.

<sup>189</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 232 refers to S Woolman & H Botha “Limitations” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* vol 2 (2 ed OS 2006) chapter 34 48-49.

<sup>190</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 233 refers to S Woolman & H Botha “Limitations” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* vol 2 (2 ed OS 2006) chapter 34 51-53.

<sup>191</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 234.

<sup>192</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 297.

the deprivation be unauthorised, it would not meet constitutional muster and the inquiry would end without the need to apply the arbitrariness test.

The law may not allow arbitrary deprivation of property, which indicates that a deprivation should be authorised by law that makes provision for and results in regulation.<sup>193</sup> This implies that the specific law allowing the deprivation and not the deprivation itself must be challenged. A law authorising arbitrary deprivation of property would either be unconstitutional or would be read down so that it would not allow arbitrary deprivations.

For the purposes of this dissertation, only section 25(1) would be relevant, since the expropriation clause and the clauses dealing with land reform are not applicable to common law disputes.<sup>194</sup> These clauses are exclusively related to legislation and direct state involvement. I therefore limit the discussion of both the content and the application of section 25 to section 25(1), otherwise known as the deprivation clause.

### 5 3 3 Application of section 25

In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services (FNB)*<sup>195</sup> the “two-stage approach” was modified and applied to decide a section 25 property dispute.<sup>196</sup> The *FNB* test involves seven questions:

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<sup>193</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 297.

<sup>194</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 235 n 131.

<sup>195</sup> 2002 4 SA 768 (CC).

<sup>196</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 301; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 75.

“(a) Is there a protected property interest involved? (b) If there was property, was there a deprivation of that property? (c) If there was a deprivation, was the deprivation arbitrary? (d) If the deprivation was arbitrary, can it be justified in terms of section 36(1)? (If the arbitrary deprivation cannot be justified, it is unconstitutional and that ends the constitutional inquiry.) (e) If the deprivation was not arbitrary or if it could be justified in terms of section 36(1), does it also constitute expropriation? (f) If the deprivation does constitute expropriation, does it comply with the requirements in section 25(2)? (g) If the expropriation does not comply with the section 25(2) requirements, can it be justified in terms of section 36(1)? If the expropriation does not comply and cannot be justified, it is unconstitutional.”<sup>197</sup>

Ackermann J forged the *FNB* methodology from the two-stage approach and the initial questions from the first stage were reworked into questions (a) to (c), while question (d) marks the commencement of the stage two inquiry.<sup>198</sup>

Section 25(1) states: “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”.<sup>199</sup> Therefore, it should be determined whether the interest involved does indeed qualify for protection as property under specifically sections 25(1) and (2).<sup>200</sup> Furthermore, section 25 requires that the constitutional analysis be framed in terms of the question whether an interference with the property interest has occurred and whether this interference conflicts with the property clause.<sup>201</sup> Consequently, in the *FNB* case

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<sup>197</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 749-750.

<sup>198</sup> I Currie & J de Waal *The Bill of Rights Handbook* (6 ed 2013) 163-164.

<sup>199</sup> The Constitution of the Republic of South Africa, 1996.

<sup>200</sup> T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* vol 3 (2 ed OS 2003) 46; L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 78. AJ van der Walt *Constitutional Property Law* (3 ed 2011) 112.

<sup>201</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 749.

Ackermann approached the constitutional inquiry by first addressing whether in the particular dispute a property interest is involved.<sup>202</sup>

From the outset, constitutional cases have shied away from adopting a universal definition of property,<sup>203</sup> endorsing a wide definition accommodating “all rights and interests that have to be protected according to international standards”.<sup>204</sup> The *FNB* decision confirmed the pragmatic difficulty of providing a comprehensive definition but gave guidance in its preference for a “dynamic public law view of property” as advocated by Van der Walt.<sup>205</sup> Regardless of the academic debates about the scope of property for purposes of section 25, there is authority for the proposition that a limited real right, and particularly a servitude, qualifies.<sup>206</sup>

If usufruct is terminated either due to noncompliance with a court order for security or inventory or as consequence of the disfigurement, destruction or substantial transformation of the usufructuary property, the usufructuary is deprived of all his entitlements to enjoy and use the object of the usufruct under the limited real right granted in the property of the bare owner. Since the limited real right at issue

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<sup>202</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 749.

<sup>203</sup> See *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) paras 70-75; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 112 referring to para 72 of the *FNB* decision.

<sup>204</sup> L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 78.

<sup>205</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 51-52; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 112.

<sup>206</sup> See *Ex parte Optimal Property Solutions* CC 2003 2 SA 136 (C); *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 2 SA 157 (SCA) and AJ van der Walt *Constitutional Property Law* (3 ed 2011) 139-140.

(usufruct) is recognised as property in terms of section 25 of the Constitution,<sup>207</sup> the answer to the first question of the *FNB* methodology is that property is involved.

Having dealt with the property question in general, I consider the deprivation question, followed by the arbitrariness test drawn from the *FNB* methodology. I will not consider the other steps of the methodology, since they would not apply to the analysis of usufruct disputes. I restrict the analysis to examples where enforcement of the *salva rei substantia* requirement prescribes the termination of a usufruct by way of a judicial order or *ex lege* through the lapsing of the right. The analysis will entail discussion of the termination of usufruct in instances where the obligations on the usufructuary to frame inventory and provide security are not complied with in response to a court order, as well as terminations of usufruct that flow from the violation of or impossibility to comply with the *salva rei substantia* requirement with regard to the condition of the usufructuary property, due to disfigurement or serious abuse, substantial change or destruction of the object of the usufruct.

In the *FNB* decision, the term “deprivation” was demarcated broadly as “any interference with the use, enjoyment or exploitation of private property”.<sup>208</sup> This definition was complicated and qualified<sup>209</sup> by subsequent decisions,<sup>210</sup> but it is

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<sup>207</sup> L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 81.

<sup>208</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57; L Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010) unpublished LLM thesis Stellenbosch University 82; AJ van der Walt *Constitutional Property Law* (3 ed 2011) 203.

<sup>209</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 204.

<sup>210</sup> See *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) para 32; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*

nevertheless clear that any termination of a usufruct resulting from enforcement of the *salva rei substantia* requirement will establish a deprivation for purposes of section 25(1).

Brits notes that the pivotal question in a constitutional property inquiry amounts to whether the interference with the relevant property right can be characterised as a non-arbitrary deprivation of property.<sup>211</sup> In the *FNB* decision a deprivation is defined as arbitrary “when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”.<sup>212</sup> Drawing from this definition, the two criteria for an arbitrary deprivation seem to be lack of sufficient reason (substantive arbitrariness)<sup>213</sup> and procedural unfairness.<sup>214</sup> Although the *FNB* decision elaborated on the substantive arbitrariness test, it did not dwell on the concept of procedural unfairness.<sup>215</sup>

The substantive arbitrariness inquiry involves the consideration of the connection

“between ‘a complexity of relations’ [...] including the relationship between the means employed and the ends sought to be achieved; the relationship between the purpose of the deprivation and the person whose property is affected; and the

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2009 6 SA 391 (CC); *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 1 SA 293 (CC); *National Credit Regulator v Opperman* 2013 2 SA 1 (CC).

<sup>211</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 303.

<sup>212</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

<sup>213</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245.

<sup>214</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 304

<sup>215</sup> According to AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245, 269 procedural arbitrariness would mainly be applicable in cases where a deprivation results from legislation. Since this would probably rule out application in cases where the common law is the source of law, I therefore focus on the substantive arbitrariness test.

relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation.”<sup>216</sup>

The Court also indicated that the purpose of the deprivation would have to be more significant where ownership is affected and where all incidents of ownership were impacted by the deprivation.<sup>217</sup> Van der Walt adds examples of other factors which could benefit the analysis such as “personal autonomy and the sanctity of the home”.<sup>218</sup> Furthermore, it could be argued that a limitation could be more acceptable in cases where the property interest is located further from the personal sphere and home of the party subject to the deprivation and *vice versa*.

Depending on the context, the arbitrariness inquiry might vary from a thin rationality test to a thick proportionality test closer to the section 36(1) analysis.<sup>219</sup> In the application of this test the court has a wide discretion and should resist a formulaic approach entailing mere employment of the factors identified in the *FNB* decision.<sup>220</sup>

Overall, the arbitrariness test seems to involve both a broader and a narrower question.<sup>221</sup> In terms of the implicit broader inquiry, it has to be determined if the deprivation is connected with a valid and legitimate public purpose. In contrast, the narrower question concerns the details of the case and probes whether the deprivation might result in an unjustifiable outcome pertaining to the rights of the litigants involved

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<sup>216</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245.

<sup>217</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245 refers to *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

<sup>218</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245-246 n 165.

<sup>219</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245-246.

<sup>220</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 247.

<sup>221</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 305.

in the specific case.<sup>222</sup> In terms of this approach to the arbitrariness test the expressions of the *salva rei substantia* requirement can be investigated on both a broader and a narrower level. Prior to a discussion of the broader inquiry I will in each case state the common law position which triggers the constitutional inquiry. Since the narrower inquiry involves case specific details and such an inquiry would always be context sensitive, a general discussion is challenging and speculative in nature. I nevertheless draw on the factual matrixes of existing case law as illustrative material.

Should a deprivation be found to be arbitrary, the *FNB*-test allows for the limitation to be justified in terms of section 36(1). As Van der Walt indicates, it is not clear whether the *FNB*-methodology “leaves any room for” the section 36 analysis.<sup>223</sup> Although the court in *FNB* assumed that section 36 analysis was an option Van der Walt questions whether “it will analytically and logically be possible to justify, in terms of the requirements set out in section 36(1) a deprivation that failed the section 25(1) test because it was arbitrary or procedurally unfair”.<sup>224</sup> Uncertainty about the relationship between sections 25 and 36 remains,<sup>225</sup> and I therefore only consider aspects of the arbitrariness test in section 25(1).

The *FNB* test can firstly be applied to the common law position providing that a usufruct terminates in the event of noncompliance with a court order to frame inventory or to provide security. Although the common law position relating to the noncompliance with the security duty is clear, this does not seem to be the case in terms of the duty to frame inventory. In terms of this question, case law is even more of a rarity than is

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<sup>222</sup> R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 305.

<sup>223</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 285.

<sup>224</sup> 285.

<sup>225</sup> 287.

the case with security and decisions do not address the issue of termination as a result of noncompliance with a court order to frame security in isolation but *in tandem* with the security obligation. The only case specifically highlighting the possibility of terminating usufruct as result of noncompliance with an order to frame inventory is the preconstitutional case of *Stain and Another v Hiebner*.<sup>226</sup> This somewhat problematic decision is discussed in chapter 2. Assuming that the law as it stands is reflected in *Stain v Hiebner*,<sup>227</sup> failure to frame inventory after the commencement of the usufruct in response to a court order may result in the loss of the usufruct. In terms of the termination of the right of usufruct in response to noncompliance with a court order to provide security, the common law position was established in *Schoeman v Schoeman*,<sup>228</sup> namely that the usufruct may terminate.

A judicial order for the termination of a usufruct in response to noncompliance with an order of court to provide an inventory or to provide security will result in a deprivation of the usufructuary's property.

The third question of the *FNB test* concerning arbitrariness of the deprivation concerned can be rephrased: Is there sufficient reason, judging on the basis of the constitutional provisions involved, the historical and social context and all other circumstances to deprive the usufructuary of the usufruct? On a broader level the arbitrariness question would be whether the termination of the right of usufruct as consequence of noncompliance with a court order to frame inventory or to provide security serves a valid and legitimate public purpose.

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<sup>226</sup> 1976 1 SA 34 (C).

<sup>227</sup> 1976 1 SA 34 (C).

<sup>228</sup> 1953 2 SA 441 (T).

In Roman law, there was no obligation on the usufructuary to frame an inventory although the practice was encouraged.<sup>229</sup> It seems to have originated from a suggestion made by Ulpian.<sup>230</sup> Voet is in favour of the measure of framing inventory and observes that it has “passed by slow degrees into permanent observance” to the point where in Roman Dutch law inventory could be compelled “just as much as to give security” where inventory was requested.<sup>231</sup> According to Bezuidenhout there was no general obligation on the usufructuary in Roman Dutch law to frame an inventory. However, where an inventory was requested, he was compelled to provide one.<sup>232</sup> Bezuidenhout does not specifically discuss the purpose of inventory in relation to either Roman or Roman Dutch law, but states the purpose of the duties of the usufructuary in general in his conclusion.<sup>233</sup> In South African law of usufruct, usufructuaries are not compelled to frame inventories or provide security either, but encouraged to do so.<sup>234</sup> Where a demand is made by the bare owner, the usufructuary is compelled to frame inventory and to provide security. Although Bezuidenhout mentions the general purpose of an inventory, namely to inform the usufructuary as to the scope and nature of usufructuary property he needs to return on termination of the usufruct, and mentions the consequences should the usufructuary disregard a court

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<sup>229</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 27 refers to *D 7 19 14* which is incorrect: it should be *D 7 9 1 4*.

<sup>230</sup> *D 7 9 1 4*.

<sup>231</sup> Voet 7 9 2.

<sup>232</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 64.

<sup>233</sup> Compare CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 216.

<sup>234</sup> 109.

order demanding inventory, he does not discuss the public purpose for the termination of the usufruct in such a case.<sup>235</sup>

The purpose for terminating the usufruct where a usufructuary does not frame an inventory, or provide security in response to a court order, would be to safeguard the remaining property subject to the usufruct, since the bare owner would have no way of ascertaining how much of the *corpus* has been damaged, diminished or disposed of. The framing of inventory is closely connected to the obligation to provide security, since it makes it possible to determine “over what, what kind of and what amount of property”<sup>236</sup> the usufruct has been established. This determination is important so that it may be clear if the usufructuary has fulfilled the *salva rei substantia* requirement and if or to what extent he has worsened the property subject to the usufruct. Furthermore, it indicates the extent to which the sureties are bound. Security provision protects the bare owner so that he “may not be landed in loss through the ill-will or poverty of the usufructuary”.<sup>237</sup> According to Voet:

“[...] usufructuary security on the contrary is primarily for the sake of the heir. That is because the testator’s decision has already realized its effect when the heir by entering upon the estate has acquired proprietorship of the properties of which the usufruct has been bequeathed to another. The aim of such usufructuary security is thus not the acquisition of something to be afforded under the testator’s will, as is the case with the security given on account of legacies. It is rather that the proprietorship already acquired in accord with the testator’s disposition shall thenceforward be secured to the heir. It cannot be doubted that that is an especial favour to the heir and not to the testator. Favour to the latter is not concerned with the legatees’ keeping legacies which have once accrued to them, or on the other hand with their alienating or losing them, if a burden of *fideicommissum* has not

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<sup>235</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 109-110.

<sup>236</sup> Voet 7 9 2.

<sup>237</sup> Voet 7 9 1, 9.

been attached to them. In like manner it is no favour to him that an heir who has once and for all by adiation obtained proprietorship under his will should thereafter have it kept safe and sound for himself through the medium of security.”<sup>238</sup>

Voet’s argument in favour of security, namely that it benefits the heir, was followed in *Ex parte Pistorius*.<sup>239</sup> Furthermore, in this case De Villiers JP referred to the Court of Holland, which stated that “it was a matter of *jus publicum* which nobody could renounce”.<sup>240</sup> In his judgment, Mason J noted that the object of security is to “secure the minors during the long period when their estate is under the control of the surviving parent” and agreed that this obligation cannot be dispensed with “by the terms of a will purporting to release the survivor from the obligation to give security”.<sup>241</sup> In this case, the interest of the heir was noted as a reason why security cannot be remitted. It therefore seems that the common law provides for a public purpose, namely the protection of the heirs, particularly minors, as a legitimate reason to compel the usufructuary to give security. To terminate the usufruct and to return the usufructuary property to the bare owners where an inventory is not provided in response to a court order would aid this purpose and is invariably connected with it. Therefore, in terms of the broader inquiry of the substantive arbitrariness test, a legitimate and valid public purpose exists for the termination of the usufruct on noncompliance with a court order to frame inventory and to provide security and deprivations in these cases would probably not be arbitrary.

The second level of the non-arbitrariness inquiry revolves around the details of the case. The question is whether the termination of the usufruct on noncompliance

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<sup>238</sup> Voet 7 9 9.

<sup>239</sup> 1920 TPD 297 301. See Voet 7 9 9 n (e).

<sup>240</sup> *Ex parte Pistorius* 1920 TPD 297 301 citing Neostadius, *Dec 20 van den Hove van Holland*.

<sup>241</sup> *Ex parte Pistorius* 1920 TPD 297 301-302.

with a court order to frame inventory or provide security would have an unjustifiable effect on the usufructuary in the circumstances of a particular case. In terms of the narrower question, the complexity of relationships need to be considered. It might be useful to reiterate the factors singled out by Ackermann J in the *FNB* case, namely: “the relationship between the means employed and the ends sought to be achieved; the relationship between the purpose of the deprivation and the person whose property is affected; and the relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation”.<sup>242</sup>

In the first place, the relationship between the means, namely the termination of the usufruct in response to noncompliance with a court order to frame an inventory or to provide security, and the ends of protecting the usufructuary property for the sake of the bare owner burdened by the usufruct must be considered. There is a connection between the termination of the usufruct in response to noncompliance with a court order for inventory and the protection of the usufructuary property which approximates the connection between the termination of usufruct in response to noncompliance with a court order for security. Where the usufructuary property is returned to the bare owner upon termination of the usufruct, the bare owner may ascertain the condition of the property and if and to what extent the property has been diminished by the usufructuary, which corresponds to the purpose of inventory in general. Furthermore, the usufructuary property is then protected against abuse or disposal by the usufructuary. An example would be where the bare owner does not have the means to ascertain the continued existence of the property subject to the usufruct and

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<sup>242</sup> AJ van der Walt *Constitutional Property Law* (3 ed 2011) 245.

furthermore has reason to believe that a *corpus* of movables, for instance furniture, is being dissipated due to loss or alienation.<sup>243</sup>

Secondly, the relationship between the affected property holder and the property needs to be considered. The usufructuary as affected property holder is often dependent on the property (namely the usufruct of the movables) to support him and to provide an income. If the usufruct is terminated due to the noncompliance with a court order to frame inventory or to provide security, the usufructuary is deprived of this property right. In cases where the usufruct is established on a residence, the usufructuary may even be deprived of a home.

Thirdly, the relationship between the affected property holder (usufructuary) and the reason for the deprivation (extinction of the usufruct due to noncompliance with a court order to frame inventory or to provide security with the aim of preserving the *corpus*) needs to be taken into account. The reasons for the deprivation is twofold. Firstly, the termination takes place due to the noncompliance of the usufructuary. Whereas inability to provide security would not necessarily be the fault of the usufructuary (for example if he is impecunious), failure to frame inventory can probably more readily be ascribed to the usufructuary. Therefore, there is a direct relationship between this reason for the deprivation and the affected property holder. Secondly, the reason for the deprivation involves a policy consideration, namely the preservation of the property in the interest of the heirs. This reason is also related to the affected usufructuary, since his omission resulted in the need for this preservation measure. Finally, the nature of the property (the usufruct) and the extent of the deprivation must be taken into account. In terms of the nature of the usufruct, it is a limited real right of

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<sup>243</sup> *Stain v Hiebner* 1976 1 SA 34 (C).

limited duration. The usufruct usually continues until a relevant condition is fulfilled or a particular time limit of the usufruct is reached or the death of the usufructuary. The usufruct is therefore limited in time and amounts to a limited restriction on the bare owner's rights. The extent of the deprivation of the usufruct, on the other hand, is severe, unless the usufructuary frames an inventory or provides security. The usufructuary is deprived of his usufruct and all the entitlements associated with it. He may no longer use and enjoy the property and collect its fruits. If the usufruct has mainly an alimentary function, the effect of this deprivation is worse.

If these relationships are considered in the context of all relevant circumstances, the conclusion would probably be that the deprivation is justified by the reasons for terminating the usufruct (preserving the *corpus* in the interests of heirs) and that it is therefore not arbitrary, especially if the requirement is applied in a flexible manner, with the court judging a termination to be justified based on the circumstances of a specific case. Since a judicial decision is involved entailing discretion that allows the court to consider all the relevant circumstances, the resulting deprivation would not be arbitrary. Since there is no arbitrary deprivation and the *FNB* questions regarding expropriation are irrelevant,<sup>244</sup> the inquiry ends here.

According to Van der Merwe, Roman Dutch writers did not agree on the question whether a usufruct may be terminated through abuse.<sup>245</sup> Abuse is incompatible with the obligation on the usufructuary to use the usufructuary property in a reasonable

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<sup>244</sup> There is no common law authority for expropriation since the latter is a state action authorised by statute. See AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 755 and AJ van der Walt *Constitutional Property Law* (3 ed 2011) 346 and 453.

<sup>245</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540 n 626 cites *I 2 4 3*: "*Finitur usufructus non utendo per modum*"; Voet 7 4 5; Vinnius *ad I 2 4 3* para 2; Heineccius *ad Vinnius ad I 2 4 3*.

manner.<sup>246</sup> Normal abuse presumably does not terminate usufruct since the owner is protected by the security provided by the usufructuary.<sup>247</sup> Since some South African authors<sup>248</sup> recognise serious abuse as a cause of termination, I develop the constitutional argument in this regard. The point of departure is that in the case of serious abuse, for instance when the usufructuary fraudulently sells the usufructuary property or attempts to destroy the substance of the usufructuary property, it is assumed that the usufruct lapses.<sup>249</sup>

In terms of a section 25 analysis it is difficult to determine the legal nature of the lapsing of a usufruct: there is no South African case law on the point and it is uncertain whether there is a court order involved. Claassen<sup>250</sup> states that the term “lapse” has the consequence that the claimholder ceases to hold the claim and that the claim vests in the Government.<sup>251</sup> In *Pietermaritzburg Corporation v Union Government*<sup>252</sup> the word “lapse”<sup>253</sup> is defined as “com[ing] to an end altogether” or “ceas[ing] to exist”.<sup>254</sup> In *Darlington v Union and Rhodesian Wholesale Ltd (in liquidation)*<sup>255</sup> it was held

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<sup>246</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 117.

<sup>247</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540.

<sup>248</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540; CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 141. CG van der Merwe *Sakereg* (2 ed 1989) 540 n 626 cites Voet 7 4 4; Van Leeuwen *CF* 1 2 15 25. Cf Groenewegen *ad Grotius* 2 39 16; Van Leeuwen *RHR* 2 9 14.

<sup>249</sup> CG van der Merwe *Sakereg* (2 ed 1989) 540 n 626 cites Voet 7 4 4; Van Leeuwen *CF* 1 2 15 25. Cf Groenewegen *ad Grotius* 2 39 16; Van Leeuwen *RHR* 2 9 14.

<sup>250</sup> CJ Claassen (ed) *Dictionary of Legal Words and Phrases* Vol 3 J-P (2 ed 1997) s v “lapse”.

<sup>251</sup> CJ Claassen (ed) *Dictionary of Legal Words and Phrases* Vol 3 J-P (2 ed 1997) s v “lapse refers to a decision by Solomon J in *Van Ryn Gold Mines East Ltd v Frames* 1904 TS 986.

<sup>252</sup> 1935 NPD 51.

<sup>253</sup> S 5 of Act 15 of 1910 (N).

<sup>254</sup> CJ Claassen (ed) *Dictionary of Legal Words and Phrases* Vol 3 J-P (2 ed 1997) s v “lapse”.

<sup>255</sup> 1926 OPD 173-174.

consequent to a forfeiture clause in a contract, lapsing occurs “at the option of the party aggrieved”.<sup>256</sup> Analogous to these examples, the usufructuary ceases to hold the right if it lapses. It vests in the bare owner and therefore constitutes a forced transfer of the right to the bare owner. This process can be construed as a compulsory unilateral *ex lege* termination of the right of usufruct – one of the examples of forced transfers Van der Walt notes in his article on the development of the common law.<sup>257</sup> The lapsing of the right of usufruct clearly constitutes a deprivation. Assuming that usufruct is terminated as a consequence of noncompliance with the preservation requirement in cases of serious misuse, the arbitrariness test should be applied.

The broader inquiry concerns whether there is a legitimate and valid public purpose for the lapsing of the usufruct in cases of serious abuse or disfigurement. According to the general principles which govern the relationship between the servitude holder and the servient owner, the exercise of a right must be *civilter*, that is, in a civilized, considerate and the least burdensome way.<sup>258</sup> Furthermore, in the case of personal servitudes such as usufruct, the usufructuary must meet the *salva rei substantia* requirement.<sup>259</sup> To disfigure or abuse the usufructuary property is in direct contravention of these requirements<sup>260</sup> and violates the very nature of usufruct as a limited real right. Furthermore, serious disfigurement or abuse would also place the property of the bare owner at risk and be detrimental to the interest of heirs who have the expectation of receiving their property in the same condition, subject to fair wear and tear. If the right lapses, the usufructuary can no longer endanger the property of

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<sup>256</sup> CJ Claassen (ed) *Dictionary of Legal Words and Phrases* Vol 3 J-P (2 ed 1997) s v “lapse”.

<sup>257</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 750.

<sup>258</sup> CG van der Merwe *Sakereg* (2 ed 1989) 466.

<sup>259</sup> 509, 516-520.

<sup>260</sup> 519.

the bare owner or the interests of heirs involved. It seems that protection of the usufructuary property in the interest of the bare owner<sup>261</sup> would be a legitimate and valid purpose for the deprivation.

In terms of the narrower question, the relationship between the means (lapse of the usufruct) and the ends (protection of the usufructuary property) needs to be considered. There seems to be a strong connection between the two, as the lapse of the usufruct will result in the usufructuary being deprived of the usufructuary property. Therefore, further damage due to disfigurement or abuse of right can be avoided and the necessary repairs and restoration can be undertaken in order to restore the farm to a functional property.

Secondly, the relationship between the affected property holder and the property needs to be considered. The usufructuary as affected property holder is often dependent on the property (the usufruct of the movables) to support him and to provide an income. Conduct amounting to abuse might indicate a different relationship between the usufructuary and the right of usufruct, namely that the usufructuary does not deem the usufruct an important means of support that needs to be sustained, since he abuses it to such an extent that protective measures are necessary. If the usufruct is terminated due to the abuse, the usufructuary will be deprived of this property right. In cases where the usufruct is established on a residence, the usufructuary may even be deprived of a home.

Thirdly, the relationship between the affected property holder (usufructuary) and the reason for the deprivation (extinction of the usufruct due to abuse of the

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<sup>261</sup> Compare CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 216.

usufructuary property with the aim of preserving the *corpus*) needs to be taken into account. Again, the reasons seem to be twofold. Firstly, there seems to be a direct relationship between the usufructuary and the reason for the deprivation, since he is responsible for the conduct resulting in the termination. Secondly, the reason for the deprivation involves a policy consideration, namely the preservation of the property in the interest of the heirs. This reason is also related to the affected usufructuary, since his abuse resulted in the need for this preservation measure. Finally, the nature of the property (the usufruct) and the extent of the deprivation must be taken into account. A usufruct is a limited real right of limited duration, which usually continues until a relevant condition is fulfilled or a particular time limit reached or the death of the usufructuary. Since the usufruct is limited in time, it amounts to a limited restriction on the bare owner's rights. The extent of the deprivation of the usufruct, on the other hand, is severe, but the severity might not be an issue for the usufructuary since his conduct does not lead to the conclusion that he values the usufruct. The usufructuary is deprived of his usufruct and all the entitlements associated with it. He may no longer use and enjoy the property and collect its fruits.

If a usufructuary exposes property subject to a usufruct to serious neglect, reaching a degree which would impair or prevent the normal operations on the property to the detriment of the bare owner, and the latter intends to resume these operations on termination of the usufruct, the relationship between the purpose of the deprivation (protection of the usufructuary property and the interests of the bare owner) and the person whose property interest is affected would be relevant. Terminating the usufruct on the grounds of serious misuse could allow normal farming operations to resume where it clearly was not possible during the usufruct. The lapsing

of the usufruct would enable the bare owner who would eventually possess it to address the neglect, and to protect his property and his use and enjoyment thereof.<sup>262</sup>

The relationship between the purpose of the deprivation, the nature of the property and the extent of the deprivation is also of significance. For example, if the property subject to the usufruct is agricultural land, its nature would be of significance<sup>263</sup> because agricultural land is a scarce and valuable resource central to economic growth, which has to be used in an optimal way for the benefit of the population as a whole.<sup>264</sup> The extent of the deprivation is severe – where the usufruct lapses, the usufructuary is deprived of all her entitlements. Where the property is rented out, the livelihood of the usufructuary may also be at risk. However, it can be reasoned that the abuse indicates that this is not a significant concern for the usufructuary. Roux asserted that where the deprivation is not in the service of “land reform or other reforms aimed at broadening access to South Africa’s natural resources”, the general law of application is unlikely to be constitutional.<sup>265</sup> In the case of a usufruct on immovables consisting of agricultural land, the preservation of the usufructuary property would be in the public interest, since it preserves natural resources.<sup>266</sup>

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<sup>262</sup> Compare facts of *CF Zietsman v KA Leeuwner NO* 1986 K (case no 86/9797).

<sup>263</sup> CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik* (1990) unpublished LLD dissertation Stellenbosch University 146.

<sup>264</sup> Compare JM Pienaar *Land Reform* (2014) 201.

<sup>265</sup> T Roux “Property” in S Woolman *et al* (eds) *Constitutional Law of South Africa* vol 3 (2 ed OS 2003) 46-24.

<sup>266</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100.

If these relationships are considered in the context of all relevant circumstances, the conclusion would probably be that the deprivation is justified by the reasons for terminating the usufruct (preserving the *corpus* in the interests of heirs or in public interest) and that it is therefore not arbitrary, especially if the *salva rei substantia* requirement is applied in a flexible manner and a court judges the deprivation to be justified based on the circumstances of the specific case. Since a judicial decision is involved entailing discretion that allows the court to consider all the relevant circumstances, the deprivation would not be arbitrary. Since there is no arbitrary deprivation and the *FNB* questions regarding expropriation are irrelevant,<sup>267</sup> the inquiry ends here.

According to some South African scholars, usufruct is extinguished when it becomes impossible to exercise a servitude.<sup>268</sup> Instances where the usufructuary property is destroyed or fundamentally changed belong in this category.<sup>269</sup> According to Van der Merwe, a servitude would only lapse permanently if it becomes perpetually impossible to exercise.<sup>270</sup> However, since personal servitudes are not perpetual in

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<sup>267</sup> See s 5.3.3 n 283 above.

<sup>268</sup> CG van der Merwe CG & A Pope "Servitudes and Other Real Rights" in Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG & Visser D *Wille's Principles of South African Law* (9 ed 2007) 591-629 615; CG van der Merwe *Sakereg* (1989) 534.

<sup>269</sup> CG van der Merwe CG & A Pope "Servitudes and Other Real Rights" in Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG & Visser D *Wille's Principles of South African Law* (9 ed 2007) 591-629 615 refer to D 7 4 2 pr; Grotius 2 37 5; Voet 8 6 4; *Wiener v Van der Byl* (1904) 21 SC 92 at 95.

<sup>270</sup> CG van der Merwe *Sakereg* (2 ed 1989) 535; CG van der Merwe CG & A Pope "Servitudes and Other Real Rights" in Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG & Visser D *Wille's Principles of South African Law* (9 ed 2007) 591-629 615 refer to D 7 4 2 pr; Grotius 2 37 5; Voet 8 6 4; *Wiener v Van der Byl* (1904) 21 SC 92 at 95.

nature, it is not readily accepted that a usufruct would revive where the servient property is restored in its previous condition.<sup>271</sup>

A substantial change to the form of the usufructuary property results in the termination of the usufruct.<sup>272</sup> Voet states that usufructuary property that has undergone a complete change of form results in the usufruct being lost just as if it has perished.<sup>273</sup> This is the case irrespective of whether the proprietor or a stranger is responsible for the change.<sup>274</sup>

In terms of the arbitrariness test, it would probably be debatable whether a deprivation in the form of a termination as a result of substantial change to the object of the usufruct would be constitutionally valid. What would for example happen if the usufructuary is able and willing to restore the usufructuary property to its previous condition? Would it not be possible to revive the usufruct by means of substitution of the previous object subject to the usufruct? It might be argued that sufficient reason does not in each case exist for terminating the usufruct. As far as termination of a usufruct due to the total destruction of the usufructuary property is concerned, the *Kidson* case provides an example which has received academic attention recently.<sup>275</sup> Although the case refers to the personal servitude of *habitation*, the principles applicable to the problem are similar. Van der Walt assumes that Scott is correct when he argues that a servitude of habitation is terminated when the dwelling is

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<sup>271</sup> CG van der Merwe *Sakereg* (2 ed 1989) 535 refers to Voet 7 4 10; Huber *HR* 2 40 14. Cf *D* 7 4 23, 24; Grotius 2 39 14; Van der Keessel *Praelectiones* on Grotius 2 39 14.

<sup>272</sup> CG van der Merwe *Sakereg* (2 ed 1989) 535.

<sup>273</sup> Voet 7 4 9.

<sup>274</sup> Voet 7 4 9 refers to *D* 7 4 5 2.

<sup>275</sup> The most recent contribution is AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 which provides guidance on constitutional analysis of a dispute involving servitudes and critically reviews the articles by Sonnekus, Van der Merwe en Scott published previously.

destroyed.<sup>276</sup> In the *Kidson* case a strict application of the common-law principle whereby the servitude is terminated *ex lege* in the event of destruction of the dwelling, would allow the bare owner to refuse rebuilding of the dwelling and consequently the continuation of the right of habitation.<sup>277</sup>

According to the accepted common law position, usufruct would terminate *ex lege* where the usufructuary property is destroyed or substantially changed. Therefore the initial entitlement that was assigned to the usufructuary is terminated.<sup>278</sup> The former bare owner then enjoys a right unburdened by usufruct. This might not meet constitutional muster if it compromises provisions in the Bill of Rights such as for example the right of access to adequate housing as appears from 5 2 3 above. However, this deprivation must also be tested against the criteria of section 25 of the Constitution as set out in the *FNB* decision. Since it has been established that there is a deprivation of property involved, it must be established whether this deprivation is arbitrary. In this particular case, relevant considerations include the relationship between the means (*ex lege* termination of the usufruct by destruction or substantial change) and the ends (protection of the bare owner's right of ownership and advancing legal certainty). Van der Walt points out that in the light of *Port Elizabeth Municipality v Various Occupiers*<sup>279</sup> courts must not primarily consider the interests of the owner above other rights in the property involved, but must take a contextual approach and reflect on the relevant circumstances and constitutional provisions. Secondly, the affected property holder, namely the usufructuary, and the property involved (the

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<sup>276</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 732.

<sup>277</sup> 746.

<sup>278</sup> Analysis based on AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 751-756.

<sup>279</sup> 2005 1 SA 217 (CC) para 23.

usufruct) need to be taken into account. In cases of total destruction, the usufructuary would probably be deprived of at least a source of income in the form of rent and, in some instances, of a primary residence. In this case his right of access to adequate housing would be the primary constitutional ground for reviewing the deprivation, as appears from 5 2 3 above. Thirdly, the relationship between the affected property holder (usufructuary) and the reason for the deprivation (extinction of the usufruct due to destruction or substantial change based on breach of the *salva rei substantia* requirement) needs to be considered. In cases where the usufructuary was not at fault and could not prevent the destruction or substantial change, it might not seem equitable to terminate the usufruct. However, the property being lost, there is an inescapable reason for the deprivation, although the connection with the usufructuary may be strained. Finally, the nature of the property (the usufruct) and the extent of the deprivation must be taken into account. In this case the extent of the deprivation would be severe, since the usufructuary would be deprived of all enjoyment and fruits of the usufructuary property.

If these relationships are considered in the context of all relevant circumstances, the conclusion would probably be that the deprivation is justified by the reasons for the termination of the usufruct and that it is therefore not arbitrary, especially if the *salva rei substantia* requirement is applied in a flexible manner and a court judges it to be justified in the circumstances of a specific case. Since a judicial decision is involved, entailing a discretion that allows the court to consider all the relevant circumstances, the deprivation would not be arbitrary. Since there is no arbitrary deprivation and the *FNB* questions regarding expropriation are irrelevant,<sup>280</sup> the inquiry ends here.

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<sup>280</sup> See s 5 3 3 n 283 above.

In view of the analysis in this section the deprivation of property that occurs when a usufruct is terminated upon application of the various common law principles involved in the *salva rei substantia* requirement is generally not arbitrary, because there generally seems to be sufficient reason for it. In itself section 25(1) does therefore not require development of the common law in this regard, although it appears that the requirement is less likely to result in arbitrary deprivation if it is applied in a flexible manner.

#### **5 4 Constitutional assessment of the effect on the bare owner's right if a flexible approach is followed**

It is clear from the preceding analysis that the Constitution may mandate development of the common law relating to the *salva rei substantia* requirement in so far as it infringes certain non-property provisions in the Bill of Rights, such as the right to equality or the right of access to adequate housing. Should the right of usufruct not be terminated because of one of these non-property constitutional rights, it inevitably leads to a more flexible approach to the *salva rei substantia* requirement. It further appears that section 25 in itself does not require a development of the common law to protect the usufructuary's right, although a flexible application of the *salva rei substantia* requirement is less likely to result in arbitrary deprivation of that right when the usufruct is terminated. However, from chapter 3 and 4 it appears that there are some comparative and theoretical or policy support for development of the common law towards a more flexible approach, which may result in a usufruct not being terminated in circumstances where rigid application of the requirement might have resulted in termination. If the right of usufruct does not terminate because of any of

these reasons, it has an effect on the right of the bare owner. The following section analyses the effect of such an extension of the right of usufruct on the right of the bare owner in terms of the property clause.

According to the common law, usufruct would terminate *ex lege* where the usufructuary property is destroyed or substantially changed or seriously abused or disfigured. The former bare owner then enjoys a right unburdened by usufruct.<sup>281</sup> Development of the common law which would lead to a flexible application of the common law principles, which might allow the usufructuary to exercise the usufruct even when the usufructuary property was substantially changed or destroyed. Development of the common law may be based on policy decisions, supported by comparative examples and theory. It might take place where an impecunious usufructuary is involved, by not enforcing obligations under the *salva rei substantia* requirement strictly, for example the duty to furnish security. Further, in instances where the value of the usufructuary property can either be maintained or increased, a measure of replacement or development of the property may be allowed. The bare owner is thus deprived of his the right to have the usufruct terminated *ex lege* upon destruction or substantial change of the usufructuary property and to enjoy ownership of his unburdened property. This deprivation through the development of the common law must be tested against the criteria of section 25 of the Constitution as set out in the *FNB* decision.

Since it has been established that there is a deprivation of property involved when the usufruct is not terminated in circumstances where strict application of the

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<sup>281</sup> Analysis based on AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 751-756.

common law would have resulted in termination, it must be established whether this deprivation is arbitrary. A deprivation would be substantively arbitrary if there is insufficient reason for it, to be determined on the basis of “a complexity of contextual relationships”.<sup>282</sup> Relevant relationships according to the *FNB* decision include “the relationship between the means employed and the ends sought to be achieved, [...] between the affected property holder and the property, between the [...] affected property holder and the reason for the deprivation, the extent of the deprivation and the nature of the affected property”. The question can be rephrased: “is there sufficient reason, judging on the basis of the constitutional provisions involved, the historical and social context and all other circumstances to take the right to own land free of a servitude from the owner and transfer that right to the [usufructuary] in the form of continuation of the servitude”? Firstly, the relationship between the means (here the policy decision not to terminate of the usufruct despite destruction or substantial change of the property) and the ends (protection of the usufructuary’s right of ownership and advancing policy objectives) should be considered. Van der Walt points out that in the light of *Port Elizabeth Municipality v Various Occupiers*<sup>283</sup> courts must not primarily consider the interests of the owner above other rights in the property involved, but must take a contextual approach and reflect on the relevant circumstances and constitutional provisions. Secondly, the affected property holder, namely the bare owner, and the property involved (the usufruct) need to be taken into account. If the usufruct is not terminated, the bare owner is deprived of the right to have the servitude terminated *ex lege* upon destruction or substantial change of the

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<sup>282</sup> See 5 3 3.

<sup>283</sup> 2005 1 SA 217 (CC) para 23.

usufructuary property.<sup>284</sup> He is therefore deprived of his right to enjoy his property unburdened by the usufruct. Considering the limited lifetime of a usufruct, the deprivation would not be of a permanent nature. Thirdly, the relationship between the affected property holder (bare owner) and the reason for the deprivation (non-extinction of the usufruct despite destruction or substantial change for policy reasons) needs to be considered. In cases where the usufructuary was not at fault and could not prevent the destruction or substantial change, it would clearly not seem equitable to terminate the usufruct. Finally, the nature of the property (the bare owner's right to have the usufruct terminated and to enjoy full ownership not burdened with the usufruct) and the extent of the deprivation must be taken into account. The bare owner's ownership continues to be burdened by the usufruct until a relevant condition is fulfilled or a particular time limit of the usufruct is reached or the death of the usufructuary. Personal servitudes have a restricted duration, and although the extent of the burden will depend on the context, it is unlikely to be of very long duration.

If these relationships are considered in the context of all relevant circumstances, the conclusion would probably be that the deprivation is justified by the policy reasons for continuing the usufruct and that it is therefore not arbitrary, especially if the requirement is applied in a flexible manner and a court judges it to be justified, based on the relevant policy considerations and the circumstances of a specific case. Since a judicial decision is involved, entailing exercise of a discretion that allows the court to consider all the relevant circumstances, the deprivation would possibly not be arbitrary

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<sup>284</sup> Compare AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 751-752.

in most cases. Since there is no arbitrary deprivation and the *FNB* questions regarding expropriation is irrelevant,<sup>285</sup> the inquiry ends here.

## 5 5 Conclusion

The purpose of this chapter was to investigate the constitutional implications of the *salva rei substantia* requirement. The constitutional provisions that inform the analyses in this chapter are the equality clause, the housing clause and the property clause. In pursuit of this aim I rely on the principles and normative and methodological considerations developed in Van der Walt's articles on the continued relevance and development of the common law to direct the inquiry.<sup>286</sup> Furthermore, I utilise the classic two-stage approach and its particular application in the *FNB* decision to assess the outcome of the preservation requirement.

In the first part of this chapter the impact of non-property constitutional provisions aimed at securing democratic liberty which are compromised by the rigid approach the Constitution are analysed. These provisions require mandatory development of the common law and a concomitant shift to a flexible approach. Where the right to equality and non-discrimination<sup>287</sup> or the right of access to adequate housing<sup>288</sup> is compromised by rigid application of the *salva rei substantia* requirement, development is required. Moreover, where the right of access to housing is involved, it usually

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<sup>285</sup> See 5 3 3 n 2 8 3 above.

<sup>286</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756; AJ van der Walt "The Continued Relevance of Servitude" (2013) 3 *Property Law Review* 3-35.

<sup>287</sup> The Constitution of the Republic of South Africa, 1996 s 9.

<sup>288</sup> The Constitution of the Republic of South Africa, 1996 s 26

impacts on the right to dignity.<sup>289</sup> However, the usufructuary's right of access to adequate housing is only threatened in limited circumstances, namely in a case involving the deprivation of a usufruct right due to noncompliance with the security and inventory duties and the usufructuary is "holding over", or where his property right in the form of a usufruct is terminated due to the disfigurement, misuse or substantial change in form or destruction of the usufructuary object and his access to adequate housing is therefore terminated. In the case where the usufructuary is facing ejection due to unlawful occupation or "holding over", the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>290</sup> should be used to prevent an illegal eviction and all relevant circumstances should be taken into account.

I also consider the impact of a possible deprivation of the usufructuary's right to property resulting from a rigid application of the *salva rei substantia* requirement. I have chosen to focus on the consequences of noncompliance with the *salva rei substantia* requirement as subject for constitutional scrutiny. Noncompliance with the requirement either wilfully or as a result of circumstances, result in termination of the usufruct where (a) the obligation to frame inventory and the obligation to provide security is not complied with in response to a court order, (b) the usufructuary property is subjected to disfigurement or serious abuse, (c) where the usufructuary property is destroyed and (d) where the usufructuary property is substantially changed.

In terms of all the expressions of the preservation requirement resulting in termination of the right of usufruct, the resulting deprivation generally does not present

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<sup>289</sup> The Constitution of the Republic of South Africa, 1996 s 10. Section 10 of the Constitution entrenches the right to human dignity – a right that might be adversely impacted by the loss of the right of access to housing. See also R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 60 n 3.

<sup>290</sup> 4 of 2000.

a problem. All the expressions of the preservation requirement result in termination of the right of usufruct and thus a deprivation of the entitlements of use, enjoyment and exploitation or disposal of the usufruct. In all cases the deprivation is properly authorised in terms of law of general application, namely the common law of usufruct and more specifically the *salva rei substantia* requirement. Should a court order provision of security or an inventory and be met with noncompliance, the bare owner is entitled to an order of ejectment.<sup>291</sup> In these cases a deprivation authorised by the common law of usufruct pertaining to the preservation requirement would occur. The usufructuary would be deprived of his right of usufruct, since he will no longer be able to use, enjoy exploit or in certain limited instances dispose of the object of the usufruct. Again, in the case of termination of the usufruct due to destruction, substantial change or serious abuse of the usufructuary property, a deprivation occurs. The question is whether these deprivations are arbitrary. This question is answered with reference to the relationships identified in the *FNB* decision in the light of all the relevant circumstances.<sup>292</sup>

If these relationships are considered in the context of all relevant circumstances, the conclusion would generally be that the deprivation is justified by the reasons for terminating the usufruct (preserving the *corpus* in the interests of heirs or in public interest) and that it is therefore not arbitrary, especially if the *salva rei substantia*

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<sup>291</sup> CG van der Merwe CG & A Pope "Servitudes and Other Real Rights" in Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG & Visser D *Wille's Principles of South African Law* (9 ed 2007) Cape Town: Juta 591-629 609 citing Grotius 2 39 3, 30; Voet 7 9 1, 2; Van Leeuwen *RHR* 2 9 10; Van der Keessel *Thes Sel* 371; *Furnivall v Cornwell's Executors* 1895 12 SC 6 at 10; *Ex parte Pistorius* 1920 TPD 297; *Ex parte Newberry* 1924 OPD 219 at 223; *Olivier v Venter* 1933 EDL 206. *Schoeman v Schoeman* 1953 2 SA 441 (T) at 442; *Ex parte Estate Wagenaar* 1953 4 SA 435 (C); *Stain v Hiebner* 1976 1 SA 34 (C).

<sup>292</sup> See 5 3 3 above.

requirement is applied in a flexible manner and a court judges the deprivation to be justified based on the circumstances of the specific case. Since a judicial decision is involved entailing discretion that allows the court to consider all the relevant circumstances, the deprivation would probably not be arbitrary. Since there is no arbitrary deprivation and the *FNB* questions regarding expropriation are irrelevant, the inquiry ends here.

Section 25(1) does not in itself require development to protect the usufructuary. However development could be undertaken for policy reasons. When development of the common law is undertaken for policy reasons and the right of usufruct does not terminate, despite noncompliance with the obligations to provide inventory or security, destruction or substantial change of the usufructuary property, it also has an effect on the right of the bare owner. A discussion of constitutional considerations would not be complete without also reflecting on the consequences for the bare owner triggered by a shift to a flexible approach. Non-termination of the right of usufruct in circumstances where non-property constitutional provisions require development of the common law may also impact the bare owner's right not to be arbitrarily deprived of property.<sup>293</sup> The question is whether such a deprivation of the bare owner's right is arbitrary. Although a deprivation occurs, it would probably, taking into account all relevant relationships and circumstances, not be arbitrary according to the *FNB* decision since a judicial decision is involved entailing discretion that allows the court to consider all the relevant circumstances.

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<sup>293</sup> The Constitution of the Republic of South Africa, 1996 s 25.

## CHAPTER 6: CONCLUSION

### 6 1 Introduction

Legal transformation does not only hinge on altering the entrenched distribution patterns concerning property, but also requires changes in the law governing property rights.<sup>1</sup> Moreover, legal reform is not restricted to interstitial development but might entail substantial changes to property rules, which may be detrimental to existing property rights and interests.<sup>2</sup> In this sense, this dissertation adds to the body of literature questioning the absoluteness of property, and affirms that it is subject to limitations and restrictions, on the condition that these constraints must be legitimate, authorised and proportionate to their purpose.<sup>3</sup> Scholars taking this stance have advanced reasons for questioning the absolutist idea of property and arguments in favour of restrictive regulation, bolstered by notions of morality and the public interest.

Relating to this line of enquiry, the purpose of this dissertation is to reconsider the role of the *salva rei substantia* requirement in a constitutional legal order. As a measure of constraint aimed at protecting the property interests of the bare owner, this requirement has been questioned in both South African and foreign literature as part of a general trend to reconsider old legal constructs such as usufruct and their application in modern contexts.<sup>4</sup> These enquiries generally incline towards a search

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<sup>1</sup> AJ van der Walt *Property in the Margins* (2009) 10.

<sup>2</sup> 13.

<sup>3</sup> 15.

<sup>4</sup> See for example C Mostin, A Culot, B Goffaux & J Thilmany *L'Emphytéose et la Superficie* (2 ed 2015 forthcoming); BC Mouthaan *Opstal en Erfpacht als Juridische Instrumenten voor Meervoudig Grondgebruik* (2013); Sagaert V & Verbeke A (eds) *Vruchtgebruik: Mogelijkheden, Beperkingen en*

for flexibility, albeit not necessarily in service of a constitutionally driven transformative impulse. In step with this prevalent tendency, but specifically prompted by the need for transformation of the South African legal system in the constitutional context, the research question of this dissertation is whether there are sufficient reasons for moving towards a flexible approach to the *salva rei substantia* requirement. In view of the Constitution, some arguments in favour of flexibility hinge on the compatibility of the requirement with constitutional provisions premised on and guaranteeing the values of equality, freedom and human dignity. However, I also consider other arguments in favour of a flexible approach drawing from comparative material and policy and theoretical considerations to support this conclusion.

Although the *salva rei substantia* requirement<sup>5</sup> applies to the personal servitudes of usufruct,<sup>6</sup> use<sup>7</sup> and habitation<sup>8</sup> I have chosen to focus on its application within the

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*Innovaties* (2012); J de Jong & HD Ploeger *Erfpacht en Opstal* (3 ed 2008); G Blockx, F Lens & L Wynant *Erfpacht, Opstal en Erfdienstbaarheden* (2006); J Verstappen “Een Nieuwe Kijk op Drie Oude Zakelijke Rechten: Erfpacht, Opstal en Vruchtgebruik” in J Verstappen, K Verheyden, M Eeman, J Verhoeve, P van Melkebeke, E Spruyt & H Pelgroms *Zakelijke Rechten en Fiscaliteit* (2004) 13-98; A Verbeke *Creatief met Vruchtgebruik M & D Seminars* (2001); EB Berenschot EB, JM Hoekstra & JB Vegter (eds) *Eigendom en Beperkte Rechten naar BW en NBW* (1986); EB Berenschot “Enige Aspecten van de Plaats van het Vruchtgebruik in het Vermogensrechtelijk Systeem” (1983) 5730 *WPNR* 170-179.

<sup>5</sup> CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20 10 uses the term “requirement”. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 340 utilize the term “duty”. H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250 and CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University employ the term “obligation”. G Pugliese “On Roman Usufruct” (1966) 40 *Tul L Rev* 523-554 548 discusses Roman usufruct and also uses the term “obligation”.

<sup>6</sup> CG van der Merwe *Sakereg* (2 ed 1989) 508.

<sup>7</sup> 521.

<sup>8</sup> 523.

context of usufruct<sup>9</sup> as the most comprehensive personal servitude. In South African literature it has been described as the obligation of the usufructuary to use and enjoy the object of the usufruct “without impairment of the essential quality of things”.<sup>10</sup> This rather vague definition can be traced back to problems inherent in defining the term *substantia* which leads to what might be described as conceptual slippage.<sup>11</sup> The concept *salva rei substantia* has both a physical denotation and a teleological signification.<sup>12</sup> Where it pertains to a physical object, it must in the first place be construed as a negative duty prohibiting or limiting interference with the substance,

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<sup>9</sup> The author defines the *salva rei substantia* requirement within the context of usufruct because it has been described as the “most comprehensive” personal servitude. See CG van der Merwe *Sakereg* (2 ed 1989) 506.

<sup>10</sup> PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* (5 ed 2006) 340. Case law from the constitutional era also recognises this obligation, see *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng, and Others (KwaZulu-Natal Law Society and Msundzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC) para 55 and *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) 11. See also CG van der Merwe & MJ de Waal “Servitudes” rev CG van der Merwe in WA Joubert & JA Faris (eds) *LAWSA* vol 24 (2 ed 2010) para 581 and CG van der Merwe & A Pope “Servitudes and Other Real Rights” in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille's Principles of South African Law* (9 ed 2007) 591-629 604-605 for recent definitions incorporating the requirement. H Mostert, A Pope (eds), P Badenhorst, W Freedman, J Pienaar & J van Wyk *The Principles of the Law of Property in South Africa* (2010) 250-251 devote an insert to the *salva rei substantia* requirement, concentrating on its practical application.

<sup>11</sup> The term slippage is predominantly associated with Semiotics. S Simpkins *Literary Semiotics: A Critical Approach* (2001) 11 defined semiotic slippage as “the deferral of meaning inherent in a process of signification based on difference and relation as opposed to the transparent conveyance of meaning without mediation”. I use it loosely here to indicate that the bond between the phrase and the concept that it signifies is unstable and open to questioning and multiple interpretations. See for example the discussion of the etymology of the word *substantia* and its Greek counterpart *hypostasis* by Schön and debates about the translation of the term in French literature on usufruct referred to in chapter two.

<sup>12</sup> Reference in this section to CG van der Merwe “Regsbegrippe en Regspolitiek” (1979) 42 *THRHR* 9-20 10-12 unless otherwise noted.

form or physical configuration of the object during the usufruct and in the second place as a positive duty to maintain the object.<sup>13</sup> In its teleological manifestation, the concept refers to the character or the economic destination of the object of the usufruct. The usufructuary must refrain from altering either of the two, even if such a change would not transform the matter or physical configuration of the object of the usufruct. Both the conceptual slippage and layering cause typological ambiguity in the sense that the requirement can be construed as both a limitation of the disposition powers of the usufructuary and as a general obligation informing and resulting in various specific duties allocated to the usufructuary.<sup>14</sup> Moreover, it invites different interpretations of the concept and approaches to its application.

In general two approaches are identified. A rigid approach would entail strictly prohibiting the deterioration or impairment of the object of the usufruct, without considering contextually relevant factors. It implies that the usufructuary would not be able to change the economic destination of the object of the usufruct, even if its value would be increased by the alteration.<sup>15</sup> A flexible approach normally allows for some physical interference, provided that the economic destination of the object of the usufruct is not altered. Secondly, it might also entail replacing the *salva rei substantia* requirement with the more flexible *salva rei aestimatione* requirement.<sup>16</sup> Finally, a

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<sup>13</sup> *Beneke v Van der Vijver* (1905) 22 SC 523 529 is an example of a decision where the usufructuary had a positive duty to maintain the *corpus* of flocks and herds from the increase yielded occasionally.

<sup>14</sup> See for example CG van der Merwe *Sakereg* (2 ed 1989) 516 and 519-520 where the *salva rei substantia* requirement is simultaneously listed as a main obligation restricting the use right of the usufructuary and a subobligation. See also CP Bezuidenhout *Sakeregtelike Aspekte van Vruggebruik in die Suid-Afrikaanse Reg* (1990) unpublished LLD dissertation Stellenbosch University 101,115 and 125-126.

<sup>15</sup> CG van der Merwe *Sakereg* (2 ed 1989) 14.

<sup>16</sup> CG van der Merwe "Regsbegrippe en Regspolities" (1979) 42 *THRHR* 9-20 15 explains the term as preserving the value of the usufructuary object.

flexible approach might also entail accepting economic gain (in the sense that it increases the value of the object of the usufruct) as a valid and sufficient reason for changing the economic destination of the object of the usufruct.<sup>17</sup>

## 6 2 Current position

In chapter two I establish the South African common law position regarding the *salva rei substantia* requirement within the context of personal servitudes, and specifically usufruct as the most comprehensive and prevalent personal servitude. The *salva rei substantia* requirement is still an element of the definition of usufruct. The requirement is related to the *civiliter* principle that is applicable to all servitudes, but the former fulfils a specialised regulatory function in terms of personal servitudes. This distinction is related to the differences between praedial and personal servitudes. The *civiliter* principle, together with the *salva rei substantia* requirement, determines the various entitlements and duties of the usufructuary and regulates the relationship between the usufructuary and the bare owner by restricting the use and enjoyment entitlements of the usufructuary.

In terms of the entitlements allocated to the usufructuary, the use right of the usufructuary allows for administration and control of the usufructuary object. A measure of flexibility is evident from decisions taking into account contextual factors such as the locality, established practices in the area, the nature of the object of the usufruct and circumstances relevant to its enjoyment. However, these factors are nevertheless subject to both the destination and the *bonus paterfamilias* criteria.

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<sup>17</sup> R Zimmermann *Das Römisch-Holländische Recht in Südafrika: Einführung in die Grundlagen und Usus Hodiernus* (1983) 175.

Furthermore, it is not clear which juristic acts amounting to control and administration of the usufructuary property within these boundaries are compatible with the *salva rei substantia* requirement. Given that case law particularly discussing the entitlements of administration and control is scarce, it is therefore difficult to answer the question whether the regulation of these entitlements might in any way reflect a flexible approach to the *salva rei substantia* requirement. Nevertheless, it appears that they do not accommodate acts of disposition such as mortgage, pledge and sale of the usufructuary property. In this regard, South African law lacks the detailed discourse concerning these entitlements evident in comparative jurisdictions such as Belgium and Germany.<sup>18</sup>

Decisions relating to the duties of the usufructuary generally show evidence of a rigid approach. This observation must, however, be qualified. Firstly, since case law on the *salva rei substantia* requirement is scarce, mostly dates from the preconstitutional era, and is predominantly restricted to provincial courts, it is difficult to gauge whether the previously established doctrinal positions will still be upheld by courts.<sup>19</sup> Secondly, case law still does not reflect deference to the Constitution. These factors must lead to a circumspect assessment of the available material.

The duties to frame inventory and to provide security are in theory open to rigid enforcement by severe measures such as the possibility to refuse delivery of the usufructuary property and ejectment. However, these sanctions have not been subject to constitutional scrutiny. It is doubtful whether such severe penalties will be upheld in the constitutional dispensation in cases where they compromise constitutional

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<sup>18</sup> See 3 3 2 and 3 4 2.

<sup>19</sup> See 1 1, 2 1 and 2 5 and chapter 2 in general.

provisions, for example by infringing the right to equality and non-discrimination or the right of access to housing. A few cases dating from the constitutional era indicate that courts are using the discretion allotted to them to reach equitable outcomes, particularly where the usufructuary is vulnerable or subjected to unreasonableness.<sup>20</sup>

The importance of maintenance is highlighted by the courts' response to situations where the lack of repairs and maintenance poses a threat to the usufruct and might lead to a breach of the *salva rei substantia* requirement. Although the usufruct is not transferable or heritable due to its personal nature and the usufructuary may accordingly neither alienate nor burden the object of the usufruct nor his real right to the object, judgements allowing mortgage to finance maintenance and repairs (but not improvements) point to strict adherence to the *salva rei substantia* requirement.<sup>21</sup> Furthermore, overreaching by means of improvements (as opposed to maintenance repairs), is met with restraint, since the usufructuary who effects improvements, does so at his own risk and is not entitled to compensation.<sup>22</sup> Improvements may generally not be claimed, except where they also indicate a propensity to enable the usufructuary to comply with the *salva rei substantia* requirement. That is, where the improvement is of a permanent nature and has as its object the permanent preservation of the usufructuary property, compensation may be claimed.<sup>23</sup> This concession reveals a slightly more teleological approach the *salva rei substantia* requirement.

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<sup>20</sup> See *Van der Heever NO and Others v Coetzee and Another* 2003 JDR 0863 (T) and *Van Rensburg v Mulder* 1998 JDR 0756 (T).

<sup>21</sup> See 2 4 3 1.

<sup>22</sup> See 2 4 3 1.

<sup>23</sup> See 2 4 3 1.

The availability of the *actio negatoria* as a remedy which enables the bare owner to insist on the restoration of the *status quo ante* might also be an indication of a rigid approach to the *salva rei substantia* requirement.<sup>24</sup> By permitting the bare owner to insist on restoration of the *status quo ante* it focuses on the physical denotation of the *salva rei substantia* requirement. Case law might eventually establish that this remedy has been superseded by the declaration of rights coupled with either a mandatory or a prohibitory interdict and where applicable, a claim for damages.

The grounds for termination of the usufruct also indicate that the *salva rei substantia* requirement is important, although the threshold for termination seems to be high – impairment to the usufructuary object has to be fundamental. An abuse of right can still meet with the penalty of an interdict and the demand for security. The law as it stands, namely that usufruct terminates due to impossibility, still has to be subjected to constitutional scrutiny and might, as Van der Walt has argued in relation to the right of *habitatio*, require constitutional development.<sup>25</sup> This ground for termination still exists in South African law and might theoretically indicate a rigid approach the *salva rei substantia* requirement.

Therefore, it seems that doctrinally at least, taking into account the qualifications mentioned above, the *salva rei substantia* requirement is approached in a rigid way,

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<sup>24</sup> See CG van der Merwe “Ownership” in WA Joubert & JA Faris (eds) *LAWSA* vol 27 (2 ed 2014) para 241; CG van der Merwe & A Pope “Ownership” in F du Bois (ed), G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe & D Visser *Wille’s Principles of South African Law* (9 ed 2007) 469-556 541; SF du Toit “PC van Es De Actio Negatoria: Een Studie naar de Rechtsvorderlijke Zijde van het Eigendomsrecht” 2006 *TSAR* 431–432 431; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* (5 ed 2006) 246.

<sup>25</sup> AJ van der Walt “Development of the Common Law of Servitude” (2013) 130 *SALJ* 722-756 748-749.

although there seems to be indications that an equitable outcome would be favoured where a usufructuary is vulnerable and subject to unreasonable treatment.

### **6 3 Reasons for a flexible approach in comparative law**

In chapter three I investigate five jurisdictions, namely the Netherlands, Belgium, Germany, France and the state of Louisiana to determine whether there are reasons for a move towards a flexible approach to the *salva rei substantia* requirement. In jurisdictions where the issue of limited disposition has been addressed, the empowerment of the usufructuary has received attention as it impedes efficient management of the usufructuary property.<sup>26</sup> Empowerment of the usufructuary has been achieved by various mechanisms. In more conservative jurisdictions,<sup>27</sup> advocates of a flexible approach to usufruct support devices such as foregrounding the destination of the usufructuary property as a standard for demarcating the disposition powers of the usufructuary, the application of the rules of usufruct to a universality of goods rather than a single usufructuary asset, and contractual extension of quasi-usufruct to all types of usufructuary objects.<sup>28</sup> Although this approach allows for some flexibility, it still pivots on the disposition power of the full owner. Furthermore,

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<sup>26</sup> A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129 120 citing A Verbeke, B Verdickt and D Maasland “The Many Faces of Usufruct” in CG Van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56 54-55. For a discussion see chapter 3 of this thesis.

<sup>27</sup> Jurisdictions that maintain this approach include France and Belgium. See A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 1 *TSAR* 117-129 118.

<sup>28</sup> A Apers & A Verbeke “Modern Usufruct – Empowering the Usufructuary” 2014 *TSAR* 117-129 118-119.

not all writers view the powers allocated to the usufructuary as disposition powers; some see them as powers merely resembling disposition powers.<sup>29</sup>

In other jurisdictions a more radical approach is advocated, resulting in the central role of ownership being reconsidered and the disposition powers being shifted. In the Netherlands, this shift has amounted to a removal of the *salva rei substantia* requirement from the definition of usufruct.<sup>30</sup> Since the introduction of the new *BW* in 1992 the control and income may be fully vested in the usufructuary.<sup>31</sup> Furthermore, the usufructuary may in certain circumstances dispose of and consume assets subject to the usufruct.

Some jurisdictions have therefore expanded the disposition powers of the usufructuary. However, on a doctrinal level, it seems from the discussion of the various jurisdictions that limitations on the right to use are still prevalent: the duty to act with care or to exercise good control, to act as a *bonus paterfamilias*, *bon père de famille*, or prudent manager still demarcates the acceptable use of the usufructuary property.<sup>32</sup> Furthermore, destination still seems to be a significant consideration and indeed even the deciding factor.<sup>33</sup> However, in terms of the latter, there are some divergence of views, for example in the German and Belgian literature on destination.<sup>34</sup> Consequently, writers who are in favour of a flexible approach to the destination requirement seem to view the powers of the usufructuary in a wider sense, allowing

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<sup>29</sup> See 3 4 2.

<sup>30</sup> See 3 2 3

<sup>31</sup> A Verbeke, B Verdickt and D Maasland "The Many Faces of Usufruct" in CG Van der Merwe & A Verbeke (eds) *Time-Limited Interests in Land* (2012) 33-56 36.

<sup>32</sup> See 3 2 3, 3 2 5, 3 3 2, 3 3 3, 3 4, 3 7, 3 6 2, 3 6 3.

<sup>33</sup> See ch 3 in general.

<sup>34</sup> See 3 3 and 3 4.

for disposition.<sup>35</sup> On the other hand, other writers caution that these powers only seem similar to disposition powers but cannot be the same.

By not including the *salva rei substantia* requirement in the definition of usufruct, some codes do seem to open up die possibility of a flexible approach. This is related to the abolition of the strict distinction between usufruct and quasi-usufruct. By establishing that usufruct can be granted on both consumables and nonconsumables, the inevitable outcome is that the *salva rei substantia* requirement could not be incorporated in the more inclusive definition of usufruct.

In terms of the duties allocated to the usufructuary, some countries have mandatory entry requirements such as the duty to frame inventory and provide security.<sup>36</sup> This at least provides legal certainty and prevents unnecessary litigation. At the same time, it emphasises the *salva rei substantia* requirement. Another development is that the duty to ensure has also become an obligation and thus supports the contention that the requirement is still of importance. However, it also reveals a more pragmatic approach to the risk involved in usufruct, since it would be a more viable alternative to a usufructuary who might struggle to provide surety and security. The obligation to ensure the usufructuary property seems to account for shifts pertaining to the prominence of the duty to provide security: in certain jurisdictions, such as Belgium, security is not viewed as mandatory law but rather as supplementary law, compared to the duty to frame inventory, which is law of public order.<sup>37</sup>

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<sup>35</sup> See 3 4 2.

<sup>36</sup> See 3 2 4, 3 3 3, 3 4 3, 3 5 3, 3 6 3 and 3 7.

<sup>37</sup> See 3 4 3.

Maintenance obligations are generally placed on the usufructuary.<sup>38</sup> It seems, therefore, that apart from the Netherlands all other jurisdictions still value the *salva rei substantia* requirement, although there are arguments for a more flexible approach to it, particularly where it concerns limitation of the disposition powers of the usufructuary.<sup>39</sup> However, general conclusions in this regard should be approached in a nuanced way.

Secondly, in terms of societal changes, it seems that usufruct as an ancient property institution has experienced a revival due to legislative changes pertaining to the law of succession in different jurisdictions.<sup>40</sup> These changes are not only linked to doctrinal flexibility concerns, but also reflect shifts in moral and societal views in terms of the growing importance of provision for the surviving spouse, compared to maintaining patrimony within the traditional family structure.<sup>41</sup> Moreover, changes signal a shift in the composition of patrimony from predominantly immovable property to movables, with an emphasis on securities. Legislative changes were in part responses to these changes.<sup>42</sup>

Pragmatic arguments have been forwarded, for instance in Louisiana, where legislative revisions were introduced in the service of practical considerations, adjusting the rights and obligations of usufructuaries.<sup>43</sup> Particularly, the 1976 and 2010

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<sup>38</sup> See 3 7.

<sup>39</sup> See for example 3 4 2.

<sup>40</sup> See 3 2 1, 3 4 1 and 3 5 1.

<sup>41</sup> See 3 2 1.

<sup>42</sup> See 3 2 2.

<sup>43</sup> See 3 7.

revisions aimed to expand the rights of the usufructuary to “balance the interests of the usufructuary and of the naked owner and to reach desirable solutions”.<sup>44</sup>

It therefore seems that there are reasonably strong reasons for a shift towards a flexible approach to the preservation requirement in comparative law. However, a tension remains between measures increasing flexibility and measures tending towards rigidity in all systems. The question would finally be whether these reasons provide persuasive arguments for a flexible approach to the *salva rei substantia* requirement in South African law.

In South Africa, the legislator has not utilised usufruct as a legal concept within the law of intestate succession to provide for the surviving spouse. In this regard the South African Law Commission came to the conclusion in 1985 that it seldom happens that the surviving spouse is left destitute and that usufruct is not so commonly used in testaments as to be prescribed as a norm in intestate succession as a measure to provide for the surviving spouse.<sup>45</sup> However, usufruct still plays a role in the testate law of succession to provide for the surviving spouse. Thirty years have passed since the report by the South African Law Commission. One could ask whether, in a context where blended families are becoming more prevalent, a reconsideration of usufruct within the context of providing for the surviving should not be investigated.

Secondly, one could ask whether the changing nature of patrimony might be an argument for a flexible approach to usufruct. It is still open to question whether the nature of patrimony in South Africa has changed in a way comparable to the change

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<sup>44</sup> AN Matasar “The Usufruct Revisions: the Power to Dispose of Nonconsumables Now Expressly Includes Alienation, Lease, and Encumbrance; Has the Louisiana Legislature Fundamentally Altered the Nature of Usufruct?” (2011-2012) 86 *Tul L Rev* 787-822 792.

<sup>45</sup> South African Law Commission *Verslag oor die Hersiening van die Erfreg: Intestate Erfreg* (1985) 19.

that took place in other jurisdictions. Thirdly, it remains to be seen if the distinction between usufruct and quasi-usufruct will be abolished.<sup>46</sup>

Finally, pragmatic considerations might, like in other jurisdictions, prompt new applications of usufruct to address societal concerns. Proposals regarding the use of usufruct to restore cities in Louisiana might provide a point of departure in this regard.<sup>47</sup> Taking into consideration the dire need for housing, arguments have been made for expropriating a use right of inner-city buildings.<sup>48</sup> Usufruct may also be potentially useful in this regard.

A comparative perspective might be a useful point of departure for the reconsideration of usufruct as a legal concept in South African law and particularly whether the preservation requirement can be approached in a flexible way.

## **6 4 Policy and theoretical reasons for a flexible approach**

In chapter four I examine policy and theoretical reasons for a flexible approach to the *salva rei substantia* requirement. Although arguments based on policy in favour of a flexible approach may be constructed, the material is scarce. Furthermore, using policy involves various challenges in terms of constructing a working definition, methodological issues and more broadly, in terms of its role in the legal system.<sup>49</sup> However, policy is undergirded by theoretical considerations. Consequently, I examine theoretical arguments in favour of a flexible approach to the requirement. These

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<sup>46</sup> See 3 5 2 n 334.

<sup>47</sup> See 3 5 1.

<sup>48</sup> See 3 5 1 n 334.

<sup>49</sup> See 4 2.

arguments can be grouped according to the general theoretical orientation ascribed to its proponents. The first group of arguments I discuss is based on the work of the information theorists or Law and Economics scholars.<sup>50</sup> Starting from Coase, these writers progressively formulated models to enhance efficiency by incorporating increased flexibility. Coase formulated the seminal Coase theorem, indicating how bargaining takes place between parties in conflicting property use disputes.<sup>51</sup> Although he indicates that courts should play a pivotal role in situations where transaction costs have an effect, he does not provide guidelines to courts to indicate how the initial allocation of property rights takes place. Furthermore, his work raises the question of how these entitlements should be protected once they are allocated. Calabresi and Melamed address the gaps in Coase's theorem by developing guidelines that could structure the protection of property interests.<sup>52</sup> They formulated the distinction between property and liability rules and indicate how and when these rules should be applied in the protection of property rights. However, as Bell and Parchomovsky argue, these rules do not account for all property protection disputes.<sup>53</sup> Accordingly, they developed a theory of dynamic liability rules that allow for a shift between property and liability rules based on the realisation of a changed condition. Their model takes account of protection afforded to property entitlements over time and is therefore less static.

Based on these developments of property rules which allow for enhanced flexibility, I argue that the *salva rei substantia* requirement can also be interpreted flexibly.<sup>54</sup> The flexible interpretation of the *salva rei substantia* requirement can be

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<sup>50</sup> See 4 3 2.

<sup>51</sup> See 4 3 2 1.

<sup>52</sup> See 4 3 2 2.

<sup>53</sup> See 4 3 2 3.

<sup>54</sup> See 4 3 2 3.

typified as a classic property rule. The relevant entitlement protected by a property rule is the right of the owner to receive the usufructuary property without impairment of the substance on termination of the usufruct. This right is protected by the *salva rei substantia* requirement functioning as a property rule. If a triggering event such as changed circumstances or even a passage of time occurs and the rule is interpreted flexibly, the classic property rule protection in the form of a declaratory order attended by an interdict may be suspended. The property rule may accordingly be substituted by liability rule protection.<sup>55</sup> Other variations of this shift can be achieved by not mandating compliance with the duties of the usufructuary originating in the *salva rei substantia* requirement. In effect, this shift can lead to a flexible reconceptualization of servitudes and specifically usufruct as changing relationships between the usufructuary and the bare owner who exercise concurrent rights in the usufructuary property. From the development of this example it seems that application of the liability rules paradigm concerns more than one property rule layer preceding the triggering event, namely the *salva rei substantia* requirement and the declaratory order accompanied by the interdict. The liability rule protection would entail the payment of compensation for impairment of the substance after the triggering event.

The second group of arguments concern the work of Progressive Property theorists. Applying the work of Alexander, I argue that usufruct can also be construed as a form of governance property.<sup>56</sup> Consequently, it also needs both coordination and enforcement mechanisms. The *salva rei substantia* requirement functions as such a device. Since the concept of governance property focuses on sharing, these devices are portrayed as mechanisms enhancing sharing and therefore less emphasis is

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<sup>55</sup> See 4 3 2 3.

<sup>56</sup> See 4 3 3 1.

placed on the restrictive qualities they possess than would have been the case in an exclusion-dominated paradigm. The *salva rei substantia* requirement is therefore construed as a constructive device facilitating sharing of governance property and in this regard an argument for a flexible approach that would enhance the use, management, investment and membership of usufruct as a governance institution could be made. Finally, I consider the work of Dyal-Chand,<sup>57</sup> whose outcomes-based approach she provides for a dispute-resolution process that takes into account the interests of both owners and non-owners and which should not be constrained by rigid application of property remedies. In this regard I argue for a creative and flexible approach to remedies in disputes where the *salva rei substantia* requirement is concerned.<sup>58</sup> The manner in which disposition in terms of usufruct is treated in other jurisdictions may also support arguments in favour of sharing.

To conclude, both information theorists and Progressive Property theorists present arguments which can be developed within the context of usufruct to support a flexible approach to the *salva rei substantia* requirement.

## **6 5 Constitutional reasons for and implications of a flexible approach**

The purpose of this chapter is to investigate the constitutional reasons for and implications of the *salva rei substantia* requirement. The constitutional provisions that

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<sup>57</sup> See 4 3 3 2.

<sup>58</sup> See 4 3 3 2.

inform the analysis in this chapter are the equality clause, the housing clause and the property clause.

In the first part of chapter five the impact of constitutional provisions aimed at securing democratic liberty which are compromised by a rigid approach to the *salva rei substantia* requirement are analysed. These provisions require development of the common law and a shift to a flexible approach. Where the right to equality and non-discrimination<sup>59</sup> or the right of access to adequate housing<sup>60</sup> is compromised, development of the requirement is required. The exception to the duty to provide security which only permits a father who enjoys the usufruct of property of which his children are the bare owners, but still requires a mother to provide security, discriminates against mothers on the basis of gender.<sup>61</sup> There does not seem to be compelling reasons for this discrimination. Consequently, this exception infringes the equality provision in the Constitution and is invalid. Development of the common law is mandated to allow parents in general to equally enjoy the advantage of the exception. Such a development will narrow the application of the *salva rei substantia* requirement since the duty would allow for more exceptions. In this sense it will result in a deprivation of the right of the bare owner to be safeguarded against impairment of the substance of the usufructuary property by the provision of security. However, this deprivation would not be arbitrary since the obligation to comply with the equality provision in the Constitution mandates the change of the common law.<sup>62</sup>

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<sup>59</sup> The Constitution of the Republic of South Africa, 1996 s 9.

<sup>60</sup> The Constitution of the Republic of South Africa, 1996 s 26

<sup>61</sup> See 5 2 2 3. I have not developed the argument regarding stepparents in ch 5. See further n 88.

<sup>62</sup> See 5 2 2 3.

Where the right of access to housing is involved, limitations usually also impact on the right to dignity.<sup>63</sup> The usufructuary's right of access to adequate housing is only threatened in limited circumstances, namely in a case involving the deprivation of a usufruct right due to noncompliance with the security and inventory duties, following which the usufructuary is "holding over", or where the usufruct is terminated due to the disfigurement, misuse or substantial change in form or destruction of the usufructuary object and access to adequate housing is therefore terminated.<sup>64</sup> In the case where the usufructuary is facing ejection due to unlawful occupation or "holding over", PIE should be used to prevent an illegal eviction and all relevant circumstances should be taken into account.<sup>65</sup> This development could take place by means of an exception to the common law rule or by means of utilising a different principle.<sup>66</sup> However, should it be achieved via an exception, judicial discretion should be involved to avoid arbitrary decisions.<sup>67</sup>

When an infringement of the access to adequate housing provision takes place, the justifications for this infringement should be taken into account in each situation. Given the compelling effect of the constitutional provisions safeguarding the right of equality, or the right of access to housing coupled with the right to dignity, it is clear that development of the common law is mandatory. Nevertheless, this development would only be applicable in limited circumstances.

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<sup>63</sup> The Constitution of the Republic of South Africa, 1996 s 10. Section 10 of the Constitution entrenches the right to human dignity – a right that might be adversely impacted by the loss of the right of access to housing. See also R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (2012) unpublished LLD dissertation Stellenbosch University 60 n 3.

<sup>64</sup> See 5 2 3 1.

<sup>65</sup> See 5 2 3 6.

<sup>66</sup> See 5 2 2 3.

<sup>67</sup> AJ van der Walt "Development of the Common Law of Servitude" (2013) 130 *SALJ* 722-756 749.

In the second part of the analysis, I subject the consequences of noncompliance with the *salva rei substantia* requirement to constitutional scrutiny. Noncompliance with the requirement, either wilfully or as a result of circumstances, results in termination of the usufruct where (a) the obligation to frame inventory and the obligation to provide security are not complied with in response to a court order, (b) the usufructuary property is subjected to disfigurement or serious abuse, (c) where the usufructuary property is destroyed and (d) where the usufructuary property is substantially changed.

The question in this second part of the constitutional analysis is whether the impact of termination of the usufruct and the consequent deprivation of the usufructuary's right to property require development of the common law. In terms of all the expressions of the preservation requirement resulting in termination of the right of usufruct, the deprivation of the usufructuary's right does not constitute an arbitrary deprivation.<sup>68</sup> All the expressions of the preservation requirement result in termination of the right of usufruct and bring about a deprivation of the right to use, enjoyment and exploitation or disposal (which is only possible to a limited extent) of the property.<sup>69</sup> In all cases the deprivation is properly authorised by law of general application, namely the common law of usufruct and more specifically the *salva rei substantia* requirement.<sup>70</sup> Should a court order be issued for the provision of security or an inventory and be met with noncompliance, the owner is entitled to an order of ejectment.<sup>71</sup> In these cases a deprivation authorised by the common law of usufruct

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<sup>68</sup> See 5 3 3.

<sup>69</sup> See 5 3 3.

<sup>70</sup> See 5 3 3.

<sup>71</sup> CG van der Merwe CG & A Pope "Servitudes and Other Real Rights" in Du Bois F (ed), Bradfield G, Himonga C, Hutchison D, Lehmann K, Le Roux R, Paleker M, Pope A, Van der Merwe CG & Visser D

pertaining to the preservation requirement would occur. The usufructuary would be deprived of his right of usufruct, since he will no longer be able to use, enjoy, exploit or in certain limited instances dispose of the object of the usufruct. Again, in the case of termination of the usufruct due to destruction, substantial change or serious abuse of the usufructuary property, a deprivation occurs.<sup>72</sup>

The question is whether these deprivations are arbitrary with reference to the relationships identified in the *FNB* decision, in the light of all the relevant circumstances.<sup>73</sup> If these relationships are considered in the context of all relevant circumstances, the conclusion would probably be that the deprivation is justified by the reasons for terminating the usufruct (preserving the *corpus* in the interests of heirs or in the public interest) and that it is therefore not arbitrary, especially if the *salva rei substantia* requirement is applied in a flexible manner, with a court deciding that it is justified based on the circumstances of the specific case. Since a judicial decision is involved entailing a discretion that allows the court to consider all the relevant circumstances, the deprivation would not be arbitrary according to the *FNB* decision.<sup>74</sup> Since there is no arbitrary deprivation and the *FNB* questions regarding expropriation are irrelevant,<sup>75</sup> the inquiry ends here.

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*Wille's Principles of South African Law* (9 ed 2007) 591-629 609 citing Grotius 2 39 3, 30; Voet 7 9 1, 2; Van Leeuwen *RHR* 2 9 10; Van der Keessel *Thes Sel* 371; *Furnivall v Cornwell's Executors* 1895 12 SC 6 10; *Ex parte Pistorius* 1920 TPD 297; *Ex parte Newberry* 1924 OPD 219 223; *Olivier v Venter* 1933 EDL 206. *Schoeman v Schoeman* 1953 2 SA 441 (T) 442; *Ex parte Estate Wagenaar* 1953 4 SA 435 (C); *Stain v Hiebner* 1976 1 SA 34 (C).

<sup>72</sup> See 5 3 3.

<sup>73</sup> See 5 3 3.

<sup>74</sup> See 5 3 3.

<sup>75</sup> See 5 3 3.

It was clear from the preceding analysis that the Constitution requires development of the common law when rigid application of the *salva rei substantia* requirement infringes provisions in the Bill of Rights such as the right to equality or the right of access to adequate housing. Should the right of usufruct as a result of the development not be terminated, it inevitably leads to a more flexible approach to the *salva rei substantia* requirement. Since the deprivation of the usufructuary's property right resulting from a rigid application of the requirement is not arbitrary, development is not required by section 25, although the deprivation is less likely to be arbitrary if applied flexibly.

When development of the common law is necessary and the right of usufruct does not terminate it also has an effect on the right of the bare owner. Furthermore, development could be undertaken on the basis of policy considerations, strengthened by comparative and theoretical argument. That might increase the incidence of flexible application of the requirement, so that the usufruct is not terminated in circumstances where it otherwise might have been. A discussion of constitutional considerations would not be complete without reflecting on the consequences for the bare owner triggered by such a shift to a flexible approach. Non-termination of the right of usufruct resulting from a flexible approach may impact the bare owner's right not to be arbitrarily deprived of property.<sup>76</sup> The question is, firstly, whether a deprivation of the bare owner's right occurs and secondly, whether this deprivation is arbitrary. Although a deprivation occurs, it would probably, taking into account all relevant relationships and circumstances, not be arbitrary according to the *FNB* decision, since a judicial decision

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<sup>76</sup> The Constitution of the Republic of South Africa, 1996 s 25.

is involved entailing a discretion that allows the court to consider all the relevant circumstances.

The constitutional analysis shows that in certain cases a shift to a flexible approach to the *salva rei substantia* requirement is inevitable and mandatory. When a shift is non-mandatory, courts may consider other reasons for a flexible approach. In both instances article 25(1) analysis is necessary to protect the rights of the usufructuary and the bare owner. Regulation and mandatory transformation are within the powers of the courts and can therefore be achieved.

## **6 6 Concluding remarks**

Given the reasons stated above, an argument in favour of a flexible approach to the *salva rei substantia* requirement can be made based on comparative, policy, theoretical and, finally, on constitutional grounds. Only the constitutional arguments mandate a flexible approach in very specific circumstances, particularly where the right of equality or the right of access to adequate housing is infringed. In other circumstances, a flexible approach is not mandated by the Constitution, but where a deprivation resulting from the application of a flexible approach is not arbitrary, the Constitution does not prohibit a flexible approach. Therefore, a flexible approach may be used based on comparative, policy and mainly theoretical considerations.

In the first chapter I discuss the questions underlying this dissertation. Firstly, I asked whether there are different interpretations and approaches to the *salva rei substantia* requirement. Doctrinally at least, different interpretations and approaches are possible, but in South African law, the requirement is approached in a rigid way, subject to certain qualifications. Nevertheless, there seems to be indications that an

equitable outcome would be favoured where a usufructuary is vulnerable and subject to unreasonable treatment. Secondly, I inquired whether a shift has taken place from a rigid to a flexible approach or whether these approaches co-exist. I have concluded that there is no clear indication of a shift. Therefore, I investigated whether there are reasons to promote a shift to a flexible approach. Reasons emerge from comparative, policy, theoretical and constitutional considerations. Among these reasons, non-property constitutional provisions require a mandatory shift where the rights to equality and access to housing are infringed. This development cannot be postponed and must be realised by the courts. To conclude, a rigid approach to the *salva rei substantia* requirement is prohibited by constitutionally mandated considerations in certain circumstances. Moreover, comparative, policy and theoretical considerations provide additional reasons to pursue a flexible approach to the requirement. Constitutionally such a move towards a flexible approach is therefore possible.

## LIST OF ABBREVIATIONS

<i>Am J Comp L</i>	<i>American Journal of Comparative Law</i>
<i>Am J Juris</i>	<i>American Journal of Jurisprudence</i>
ASSAL	<i>Annual Survey of South African Law</i>
CCR	<i>Constitutional Court Review</i>
<i>Colum L Rev</i>	<i>Columbia Law Review</i>
<i>Conn L Rev</i>	<i>Connecticut Law Review</i>
<i>Edin LR</i>	<i>Edinburgh Law Review</i>
<i>Erasmus L Rev</i>	<i>Erasmus Law Review</i>
<i>Ga L Rev</i>	<i>Georgia Law Review</i>
<i>Glob Jurist Front</i>	<i>Global Jurist Frontiers</i>
<i>Harv L Rev</i>	<i>Harvard Law Review</i>
<i>Hastings LJ</i>	<i>Hastings Law Journal</i>
ILP	<i>International Legal Practitioner</i>
JBN	<i>Juridische Berichten voor het Notariaat</i>
<i>J L &amp; Econ</i>	<i>The Journal of Law and Economics</i>
<i>La L Rev</i>	<i>Louisiana Law Review</i>
LAWSA	<i>The Law of South Africa</i>
<i>Loy L Rev</i>	<i>Loyola Law Review</i>

<i>Maastricht J Eur &amp; Comp L</i>	<i>Maastricht Journal of European and Comparative Law</i>
<i>Mich L Rev</i>	<i>Michigan Law Review</i>
<i>Not Fisc M</i>	<i>Notariaat: Notarieel en Fiscaal Maandblad</i>
<i>NYU L Rev</i>	<i>New York University Law Review</i>
<i>PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
<i>Policy Stud J</i>	<i>Policy Studies Journal</i>
<i>Prop L Rev</i>	<i>Property Law Review</i>
<i>Quinnipiac Prob LJ</i>	<i>Quinnipiac Probate Law Journal</i>
<i>Real Prop Prob &amp; Tr J</i>	<i>Real Property, Probate and Trust Journal</i>
<i>Rev Prat Not B</i>	<i>Revue Pratique du Notariat Belge</i>
<i>Rutgers LJ</i>	<i>Rutgers Law Journal</i>
<i>RW</i>	<i>Rechtskundig Weekblad</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i>
<i>SAPL</i>	<i>South African Public Law</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>T Marshall L Rev</i>	<i>Thurgood Marshall Law Review</i>
<i>T Not</i>	<i>Tijdschrift voor Notarissen</i>

<i>TPR</i>	<i>Tijdschrift voor Privaatrecht</i>
<i>TRG</i>	<i>Tijdschrift voor Rechtsgeschiedenis</i>
<i>TSAR</i>	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
<i>Tul L Rev</i>	<i>Tulane Law Review</i>
<i>U Pa L Rev</i>	<i>University of Pennsylvania Law Review</i>
<i>WPNR</i>	<i>Weekblad voor Privaatrecht, Notariaat en Registratie</i>
<i>Yale LJ</i>	<i>Yale Law Journal</i>

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