

# INTANGIBLE CONSTITUTIONAL PROPERTY: A COMPARATIVE ANALYSIS

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## 1 Introduction

A recent decision<sup>1</sup> of the Constitutional Court of Moldova raised interesting constitutional property law questions for Moldovan and South African constitutional property law. The questions were whether a certificate of graduation from a particular institution, required by law for its holder to contest for the position of a judge or prosecutor, gave the holder a legitimate expectation to gain income from an activity as either a judge or a prosecutor, and whether this was an asset within the meaning of Article 1 of Protocol No 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms (“Article 1 ECHR”).<sup>2</sup> The Constitutional Court of Moldova held that the graduates had a legitimate interest that involved a material interest, making it an asset for the purposes of Article 1 and therefore guaranteed by the property clause found in Article 46 of the Constitution of the Republic of Moldova (adopted on 29 July 1994, amended and supplemented on 5 July 2000) (“Moldovan Constitution”).

The aim of this article is to provide an analysis of the approach the South African Constitutional Court took in recent decisions that also dealt with novel intangible property interests, such as the decisions of *National Credit Regulator v Opperman* (“Opperman”)<sup>3</sup> (claim for restitution of money paid), *Cool Ideas 1186 CC v Hubbard* (“Hubbard”)<sup>4</sup> (claim based on unjustified enrichment) and *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* (“Shoprite Checkers”)<sup>5</sup> (grocer’s wine licence). Interestingly, Charles Reich started the debate in the 1960’s about whether licenses and government largesse are eligible for property status.<sup>6</sup> It is clear that this debate still dominates modern literature and the question of whether new forms of property should be recognised still remains a pressing issue. Reich explains

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<sup>1</sup> Judgment No 15 of §13-09-2011.

<sup>2</sup> Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 20 March 1952, entered into force 18 May 1954) 1952 ETS 9.

<sup>3</sup> 2013 2 BCLR 170 (CC).

<sup>4</sup> 2014 8 BCLR 869 (CC).

<sup>5</sup> 2015 9 BCLR 1052 (CC).

<sup>6</sup> CA Reich “The new property” (1964) 73 *Yale LJ* 733-787.

that “[t]o an individual, these new forms, such as a profession, job, or right to receive income, are the basis of his various statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses”.<sup>7</sup> Using Moldova as the starting point to set out the research problem, this article will investigate the extent to which South Africa follows an approach to the protection of intangible property interests that resembles German and United States of America (“US”) law. It should be noted that the Moldova case is used simply as a marker to facilitate conversation about the recognition (and importance) of intangible interests in society, with the ultimate aim of determining whether constitutional protection of these “property” interests is necessary (and indeed favourable) in South African law. The focus of the article is therefore essentially on the direction that South African law is moving, and reference to US, Moldovan and German law is made in order to benchmark South African law in comparison to these jurisdictions.

## 2 Setting the scene

### 2.1 Introduction to the problem

The Moldovan decision dealt with legislation that required persons to graduate from the National Institute of Justice in order to apply for a position as a judge or a prosecutor. The complainant in this case argued that the limitation of the right of graduates from the National Institute of Justice to apply for the position of judge or prosecutor to a period of three years, commencing from the date of graduation, is incompatible with a number of constitutional provisions including Article 46, being the property clause. The Constitutional Court analysed the challenged legislation according to the constitutional norms referred to by the complainant while also taking the relevant provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms (“European Convention”) as well as the relevant principles and case law of the European Court of Human Rights (“ECHR”) into account.<sup>8</sup> This is because of the prior practice of the Constitutional Court of Moldova in applying the principles of the ECHR and the provisions of the European Convention.

### 2.2 Moldovan law

Article 46(1)<sup>9</sup> of the Moldovan Constitution guarantees the right to possess private property. The Constitutional Court of Moldova also applies the principles and case law of the ECHR regarding Article 1 ECHR when determining whether a particular interest is protectable as private property under Article 46(1). Article 1 ECHR states that everyone is entitled to the peaceful enjoyment of his or her possessions. In this regard, the Constitutional

<sup>7</sup> 739.

<sup>8</sup> Judgment No 15 of §13-09-2011 para 29.

<sup>9</sup> For the purposes of this article, we focus only on section 46(1) because we deal with the threshold question of determining whether an interest qualifies as property for constitutional purposes. We do not focus on section 46(2), which states the requirements for the expropriation of property.

Court has stated that a property right guaranteed by Article 46 is “[...] in its substance, a person’s right to respect for his or her movable and immovable property”.<sup>10</sup>

### 2.3 Meaning of “possessions” in Article 1 ECHR

The ECHR interprets the concept of “possessions” broadly.<sup>11</sup> In its *Gasus Dossier- und Födertechnik GmbH v The Netherlands* judgment,<sup>12</sup> it decided that:

“[T]he notion ‘possessions’ in Article 1 of Protocol No 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’ and thus as ‘possessions’, for the purposes of this provision. Where the proprietary interest is in the nature of a claim, it may be regarded as an ‘asset’ only where it has sufficient basis in national law, for example where the claim is confirmed by domestic case law.”<sup>13</sup>

This judgment establishes that the autonomous meaning doctrine<sup>14</sup> applies to Article 1 ECHR and, more specifically, to the interpretation of “possessions”. One of the purposes served by the autonomous meaning doctrine is to prevent member states from circumventing their obligations under the European Convention by simply re-labelling existing private property so as to put it beyond the protection of the Convention.<sup>15</sup> Article 1 ECHR provides no

<sup>10</sup> Judgment No 15 of §13-09-2011 para 40.

<sup>11</sup> L Sermet *The European Convention on Human Rights and Property Rights* (1998) 11-18; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 116-118; S Djajic “The right to property and the Vasilescu v Romania case” (2000) 27 *Syracuse J Int’l L & Comm* 363 369-378; M Carss-Frisk *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) 6, 10-20; D Rook *Property Law and Human Rights* (2001) 96-104; T Allen “The autonomous meaning of ‘possessions’ under the ECHR” in E Cooke (ed) *Modern Studies in Property Law II* (2003) 57 59; T Allen *Property and the Human Rights Act 1998* (2005) 39-94; A van Rijn “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in P van Dijk, F van Hoof, A van Rijn & L Zwaak (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863 865-872; A Grgić, Z Mataga, M Longar & A Vilfan *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) 6-9; AJ van der Walt *Constitutional Property Law* 3 ed (2011) 120-121, 164-165; S Praduroux *The Protection of Property Rights in Comparative Perspective* (2013) 56-58.

<sup>12</sup> *Gasus Dossier- und Födertechnik GmbH v Netherlands* 1995 20 EHRR 403.

<sup>13</sup> Para 53.

<sup>14</sup> The ECHR has developed the autonomous meaning doctrine regarding the definition of “possessions” for the purposes of Article 1. This doctrine was initially developed with a focus on Article 6 but was later used in property disputes. This doctrine allows the ECHR to determine for itself whether a particular interest constitutes a possession for purposes of Article 1 without being restricted to the relevant domestic law. This prevents the member states from legislating that a particular interest is not property so as to frustrate or prevent potential applicants’ claims from being brought before the ECHR. If the interest is regarded as property in the relevant domestic law, it will be regarded as a possession for the purpose of Article 1. If the interest is not recognised as property in the relevant domestic law, the ECHR will apply the autonomous meaning doctrine to determine if the interest in question is a possession for purposes of Article 1 or not.

<sup>15</sup> Allen *Property* 44. See further Allen “The autonomous meaning of ‘possessions’” in *Modern Studies in Property Law* 57 61 where Allen refers to *Brumărescu v Romania* 2001 33 EHRR 35. In this case, a declaration by the Romanian court that reversed earlier judicial declarations that the applicant held certain property, was treated as an interference with possessions.

guidance or direction regarding the meaning of “possessions”, leaving the Strasbourg institutions to determine its scope.<sup>16</sup>

#### 2.4 Case discussion

The Constitutional Court of Moldova first investigated whether the diploma received by the graduates of the National Institute of Justice constituted an “asset” for the purposes of Article 46 and Article 1 ECHR.<sup>17</sup> Based on its prior practice, the Court applied the doctrine of the ECHR relevant to this dispute that has evolved in the case law of the ECHR. Assets for the purposes of Article 1 ECHR can be either existing assets or assets, including claims, in respect of which the applicant can argue that they have a legitimate expectation that they will actually acquire a property right.<sup>18</sup> Where an interest in property is part of the claim, the person who invokes it can be seen as having a legitimate expectation if there is a sufficient basis for that interest under national law.<sup>19</sup> The Court reiterated that, as a principle, the term “asset” in Article 1 ECHR has an autonomous meaning, independent of formal classification in the national law of the member state in question and which is not limited to the ownership of tangible property.<sup>20</sup> The question is whether the circumstances of the case, considered together, give the persons concerned a right to a material interest protected by Article 1 ECHR.<sup>21</sup>

The Constitutional Court of Moldova noted that the ECHR has consistently held that a licence to conduct an activity is an asset within the meaning of Article 1 ECHR insofar as it provided a right to a material interest, including the licence of a lawyer.<sup>22</sup> Applying the reasoning of the ECHR, the Court concluded that the expectation of obtaining a paid job as a result of holding a diploma from the National Institute of Justice was a property right in terms of Article 46 and Article 1 ECHR because the holder has the opportunity to earn income, which implies a material interest.<sup>23</sup> Furthermore, the graduates had a legitimate expectation to access the office of a judge or prosecutor because the law stated that such a right existed and that this legitimate expectation involved a material interest, thus making it an asset in the sense of the rights protected by Article 46 and Article 1 ECHR.<sup>24</sup> South Africa is another example of a relatively young constitutional democracy that has had to deal with the question of whether certain intangible interests, similar to the Moldovan example illustrated above, can be regarded as constitutional property.

<sup>16</sup> Rook *Property Law* 96. See further Van der Walt *Constitutional Property Clauses* 116-118; Carss-Frisk *The Right to Property* 10-17; Allen “The autonomous meaning of ‘possessions’” in *Modern Studies in Property Law* 57 62-63; Van Rijn “Right to the peaceful enjoyment of one’s possessions” in *Theory and Practice* 865-872; Grgić et al *A The Right to Property under the European Convention on Human Rights* 6-9; Van der Walt *Constitutional Property Law* 120-121; Praduroux *The Protection of Property Rights* 56-57.

<sup>17</sup> Judgment No 15 of §13-09-2011 paras 44-52.

<sup>18</sup> *Balan v Moldova* 19247/03 29 January 2008 para 29.

<sup>19</sup> Para 31.

<sup>20</sup> Judgment No 15 of §13-09-2011 para 46.

<sup>21</sup> Para 46.

<sup>22</sup> Paras 46-47.

<sup>23</sup> Paras 48-50.

<sup>24</sup> Para 51.

### 3 Recent South African law examples

The South African Constitutional Court was recently confronted with the question of whether certain intangible interests can be considered property for the purposes of section 25 of the Constitution of the Republic of South Africa, 1996 (“Constitution”). Section 25(1) states that no one may be deprived of property unless the deprivation is authorised by law of general application and is not arbitrary. While section 25 does not provide a definition of property, section 25(4)(b) provides some assistance in determining what constitutes property for the purposes of section 25 by stating that property is not limited to land. 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* (“FNB”),<sup>25</sup> it was held that comprehensively defining property was both impossible and unwise.<sup>26</sup> Instead, the Constitutional Court uses an incremental approach to the determination of whether a particular interest is property, deciding the question of property on a case-by-case basis.<sup>27</sup>

In *Opperman*,<sup>28</sup> the Constitutional Court had to determine whether the right to restitution of money paid, based on unjustified enrichment, is property for the purposes of section 25. The main question before the Constitutional Court was whether section 89(5)(c) of the National Credit Act 34 of 2005 is consistent with the right not to be arbitrarily deprived of property, recognised in section 25(1) of the Constitution. The High Court concluded that section 89(5)(c) deprives a credit provider of their goods or money by denying them their restitution rights.<sup>29</sup> Furthermore, the claim has monetary value, can be disposed of and transferred and could therefore be counted as an asset in a person’s estate and is part of the person’s patrimony.<sup>30</sup>

The Constitutional Court reiterated that assigning a comprehensive definition to the term property is neither possible nor wise.<sup>31</sup> The right to claim restitution on the basis of enrichment is a personal right enforceable only against a specific person, in this case the consumer who received the money. While it is not a real right like ownership that is enforceable against all, section 25 is concerned with property and not ownership.<sup>32</sup> The Constitutional Court held that the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is both logical and

<sup>25</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 7 BCLR 702 (CC).

<sup>26</sup> Para 51.

<sup>27</sup> Para 51. See further Van der Walt *Constitutional Property Law* 108; I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 535; T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 46-10.

<sup>28</sup> *National Credit Regulator v Opperman* 2013 2 BCLR 170 (CC). For a more in-depth discussion of this case see R Brits “Arbitrary deprivation of unregistered credit provider’s right to claim restitution of performance rendered: *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)” (2013) 16 *PELJ* 422 434-441; EJ Marais “The constitutionality of section 89(6)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman & Others*” (2014) 131 *SALJ* 215 217-222.

<sup>29</sup> *National Credit Regulator v Opperman* 2013 2 BCLR 170 (CC) para 58.

<sup>30</sup> Para 58.

<sup>31</sup> Para 60, referring 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 7 BCLR 702 (CC) para 51.

<sup>32</sup> Para 61.

realistic and would be in accordance with developments in other jurisdictions where personal rights have been recognised as constitutional property.<sup>33</sup> The importance of intangible property in modern-day society means that the concept of property should not be construed so narrowly as to diminish the worth of the protection provided by section 25(1).<sup>34</sup> Therefore, an enrichment claim falls within the scope of section 25.<sup>35</sup> In *Hubbard*,<sup>36</sup> the Constitutional Court confirmed that the right of restitution of money paid based on unjustified enrichment constitutes property for the purposes of section 25(1).<sup>37</sup>

In *Shoprite Checkers*,<sup>38</sup> the Constitutional Court had to determine whether a grocer's wine licence constituted property for the purposes of section 25. The majority judgment of Froneman J and the minority judgment of Madlanga J found that this licence is property for the purposes of section 25.<sup>39</sup> Therefore, a grocer's wine licence is property in terms of section 25.

In his majority judgment in *Shoprite Checkers*, Froneman J acknowledged the need for a constitutional concept of property that extends beyond the private law notion of property to allow for the later inclusion of other potential constitutional entitlements that may deserve protection and to ensure that section 25 does not become an obstacle to transformation.<sup>40</sup> Froneman J placed the property inquiry within a normative constitutional framework, stating that the fundamental values of dignity, equality and freedom necessitate a conception of property that allows for individual self-fulfilment in the holding of property and recognised that the holding of property also carries with it a social obligation not to harm the public good.<sup>41</sup> Based on this approach, the strength of the protection afforded to a particular interest as property depends on the extent to which this interest promotes the fundamental rights of dignity, equality and freedom. According to this approach, if Shoprite's interest in the grocer's wine licence is one that could conceivably serve individual self-fulfilment in the sense of running a business that forms part of its identity and dignity, then a finding that this interest is property for the purposes of section 25(1) is likely due to the strength of the correlation between the holding of the licence and the fundamental right to choose one's vocation or trade.<sup>42</sup> However, if Shoprite, as a commercial corporate entity, does not fit the notion of serving individual self-fulfilment, it must be determined whether the legislation in question includes persons that may have been holders of

<sup>33</sup> Para 63.

<sup>34</sup> Para 63.

<sup>35</sup> Para 64.

<sup>36</sup> *Cool Ideas 1186 CC v Hubbard* 2014 8 BCLR 869 (CC).

<sup>37</sup> Para 38.

<sup>38</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 9 BCLR 1052 (CC).

<sup>39</sup> Paras 70 and 150 respectively. Madlanga J disagreed with Froneman J's majority judgment regarding the issue of property, saying that the majority judgment's approach of linking the protection of property to the fulfilment of other fundamental rights waters down the potency of the right to property to the point where the right to property becomes secondary to other rights such as human dignity and freedom of trade, occupation and profession. The minority judgment of Moseneke DCJ found that the grocer's wine licence did not constitute property for the purposes of section 25.

<sup>40</sup> Para 46.

<sup>41</sup> Para 50.

<sup>42</sup> Para 61.

similar grocer's wine licences and who could conceivably be entitled to the close constitutional connection.<sup>43</sup> According to Froneman J, a natural person in Shoprite's position would have an easier task of convincing a court that the grocer's wine licence enabled them to conduct a business vocation of their choice that is essential to their living a life of dignity.<sup>44</sup> Shoprite's holding of this property interest as a juristic person merely affects the issue of standing and does not affect the objective nature of the constitutional challenge.<sup>45</sup>

This potential objective link to constitutionally sanctioned self-fulfilment coupled with the High Court's finding that the granting of the licence vests in the recipient an enforceable personal incorporeal right to trade in accordance with the conditions attached, points towards the fact that this incorporeal right is property for constitutional property law purposes. The right is transferable subject to approval by the relevant authority, definable, identifiable by persons other than the holder, has value and is sufficiently permanent in the sense that the holder is protected from arbitrary revocation by the issuing authority. Therefore, there is a strong case for its recognition as property.<sup>46</sup> Therefore, Froneman J concluded that the holding of the grocer's wine licence constitutes property for the purposes of section 25(1).<sup>47</sup>

Rautenbach argues that a few aspects of Froneman J's approach to the property issue in this case are unclear.<sup>48</sup> Firstly, Froneman J's establishment of a link between the right to property and other rights such as human dignity and the right to choose a vocation is inconsistent with section 8(2) of the Constitution.<sup>49</sup> Juristic persons, such as Shoprite in this case, cannot be the beneficiaries of certain rights in the Bill of Rights, including the right to human dignity. Froneman J attempted to resolve this inconsistency by arguing that if the grocer's wine licence could objectively be regarded as constitutional property in the hands of a natural person and the legislation regulating that licence also applies to juristic persons, the absence of a link to these other rights does not preclude a grocer's wine licence belonging to a juristic person from being recognised as constitutional property as well.<sup>50</sup> This solution has the effect of elevating legislative provisions to a higher status than constitutional provisions because, while ordinary legislation may provide for more entitlements than the Constitution, those entitlements are not protected by the Constitution.<sup>51</sup> The problem with Froneman J's analysis is that it starts with the link between property and other rights as an essential characteristic of constitutional property, a problem that does not arise when one considers property as a stand-alone right.<sup>52</sup> Secondly, it is unclear

<sup>43</sup> Para 61.

<sup>44</sup> Para 64.

<sup>45</sup> Para 65.

<sup>46</sup> Para 68.

<sup>47</sup> Para 70.

<sup>48</sup> IM Rautenbach "Dealing with the social dimensions of property" (2015) *TSAR* 822 826.

<sup>49</sup> 826.

<sup>50</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 9 BCLR 1052 (CC) para 61. See further Rautenbach (2015) *TSAR* 826.

<sup>51</sup> Rautenbach (2015) *TSAR* 826.

<sup>52</sup> 826.

whether Froneman J intended that the existence of this link between property and other constitutional rights and values is essential for the recognition of constitutional property.<sup>53</sup>

Marais argues that Froneman J's approach of linking the right to property with other fundamental rights unnecessarily complicates the question of whether an interest should be recognised as property for the purposes of section 25.<sup>54</sup> The main problem with this approach is that it "collapses the threshold issue (*ie* does the affected interest amount to constitutional property?) and the justification issue (*ie* does the deprivation satisfy the relevant section 25(1) requirements?) into one phase".<sup>55</sup> According to the methodology set out in the *FNB* decision, the meaning of constitutional property and the level of constitutional protection afforded to such property constitute the first and third steps for the adjudication of section 25 disputes.<sup>56</sup> The factors for determining whether an interest qualifies as constitutional property differ from those used to determine the level of protection that should be afforded to such an interest.<sup>57</sup>

While Madlanga J also concludes in his minority judgment that the grocer's wine licence is property for the purposes of section 25(1), he does so based on a very different approach from that of Froneman J. Rejecting the notion of linking the protection of property with the promotion of other rights, Madlanga J held that the value of the right to property inheres in the right as a self-standing unit and is worth protecting as a stand-alone right.<sup>58</sup> Furthermore, there is no basis in the Constitutional Court's previous decisions regarding whether rights should be recognised as property for acknowledging the relationship between the right to property and other rights.<sup>59</sup> Referring to *Opperman*, Madlanga J held that the right to restitution of money paid based on unjustified enrichment is much further removed from readily acceptable property rights than a grocer's wine licence, but yet it was readily recognised as property.<sup>60</sup> Whereas an enrichment claim may only be enforced against a specific party and is rendered valueless by a successful defence of it in court, a grocer's wine licence is something in hand that grants an entitlement to sell wine under specific circumstances, may endure indefinitely, has value and is transferable. Based on these considerations, Madlanga J concluded that a grocer's wine licence is property for purposes of section 25(1).<sup>61</sup>

In deciding that the grocer's wine licence is not property for the purpose of section 25, Moseneke DCJ held that the entitlement to commercial trade under a state licence does not fit comfortably within the constitutional notions of property: licences are subject to administrative withdrawal and change; they

<sup>53</sup> 827.

<sup>54</sup> EJ Marais "Expanding the contours of the constitutional property concept" (2016) *TSAR* 576 583.

<sup>55</sup> 583.

<sup>56</sup> 583.

<sup>57</sup> 583.

<sup>58</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 9 BCLR 1052 (CC) para 139.

<sup>59</sup> Para 140.

<sup>60</sup> Para 142.

<sup>61</sup> Para 143.

are never absolute; they are subject to specified pre-conditions and they are not freely transferable.<sup>62</sup> Furthermore, the licence does not vest in its holder, but is derived from and open to legitimate state regulation.<sup>63</sup> Moseneke DCJ furthermore found that vesting is still seen by both foreign and South African courts as something that prompts the recognition of a right, and therefore for a right to constitute property it must be a vested right.<sup>64</sup> Moseneke DCJ raised the question of whether recognising the grocer's wine licence as property would render the definition so wide as to make legislative regulation impracticable and concluded that doing so may create difficult property jurisprudence.<sup>65</sup>

In the *Opperman* and *Shoprite Checkers* decisions, the Court used the private law notion of property as a starting point to determine whether the relevant intangible interest could be regarded as property. Importantly, the Court does not end with the private law notion of property. The Court will determine if the intangible interest can be regarded as property under a wider, constitutional interpretation of property. In this manner, the constitutional concept of property is incrementally expanded on a case-by-case basis. This avoids the problem of expanding the constitutional concept of property so much as to make the regulation of property impossible. The Court will also consult foreign law to provide guidance on whether a particular interest should be regarded as property for the purposes of section 25. In *Opperman*, the Court held that the right to claim restitution based on unjustified enrichment did not fit comfortably within the private law notion of property, however the same could not be said for the constitutional notion of property. The Court noted that this type of claim was recognised as property in other jurisdictions and that its recognition as property for the purpose of section 25 was logical, realistic and in line with developments in other jurisdictions.

However, the judgments in *Shoprite Checkers* approached the property issue differently, with Froneman J and Madlanga J finding that a grocer's wine licence does constitute property for the purposes of section 25 of the Constitution, albeit for different reasons, and Moseneke DCJ finding that it did not constitute property. Both Froneman J and Madlanga J used private law considerations as a foundation for their conclusions that the grocer's wine licence did constitute property. Froneman J coupled these considerations with the potential objective link to constitutionally sanctioned self-fulfilment to justify the recognition of the grocer's wine licence as property for the purposes of section 25. Madlanga J argued that the grocer's wine licence was more readily recognisable as property for the purpose of section 25 than the right to claim restitution based on unjustified enrichment in *Opperman* and that this, coupled with the private law considerations, meant that the grocer's wine licence is property for the purposes of section 25. Using these same private law considerations, Moseneke DCJ concluded that the grocer's wine licence is not property for the purposes of section 25, arguing that the grocer's

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<sup>62</sup> Para 122.

<sup>63</sup> Para 123.

<sup>64</sup> Para 123.

<sup>65</sup> Paras 124-125.

wine licence does not fit comfortably within the private law notion of property and that its recognition would make the definition of constitutional property so wide as to make legislative regulation impracticable. The *Opperman* decision better illustrates the Court's approach in determining whether a particular interest is property for purposes of section 25. The decision shows that a court begins with the private law notion of property and if the interest does not fit well within that notion, a court will then determine if the interest can be regarded as property under a wider, constitutional interpretation of the concept of property. If so, then the interest will be regarded as property and the constitutional definition of property will be expanded to include the particular interest.

#### 4 German and US law

German private law views property as a relationship between persons and things in which they have a concrete and vested right, but a much wider range of interests are recognised as property for the purposes of Article 14 of the Basic Law for the Federal Republic of Germany (as amended on and up to 30 December 1993) ("Basic Law") than under the German private law definition of property.<sup>66</sup> Article 14 protects the property of a person and not their wealth in general.<sup>67</sup> Therefore, Article 14 must be relied on in relation to a specific item of property that is recognised as such under Article 14. Tangible things are obviously protected under Article 14, but a number of intangible objects are also regarded as property for the purposes of Article 14. Examples of these intangible objects are intellectual property rights such as copyright<sup>68</sup> and trade marks.<sup>69</sup> Commercial property interests such as contractual<sup>70</sup> and delictual claims<sup>71</sup> are also recognised as property, as well as workers'

<sup>66</sup> GS Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124-131. See further H Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 226-227; Van der Walt *Constitutional Property Law* 117-119.

<sup>67</sup> Van der Walt *Constitutional Property Law* 119. The US Supreme Court also follows this approach, in that it protects only identifiable assets and not general financial interests. See further D Kleyn "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 *SAPL* 402-414; Mostert *The Constitutional Protection and Regulation of Property* 227-229; Alexander *The Global Debate* 127-128.

<sup>68</sup> BVerfGE 31, 229 (1971) (*Urheberrecht*), discussed in Van der Walt *Constitutional Property Law* 147 and translated in DP Kommers & RA Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* 3 ed (2012) 651-654. See further Mostert *The Constitutional Protection and Regulation of Property* 233-234.

<sup>69</sup> BVerfGE 51, 193 (1979) (*Warenzeichen*), discussed in Van der Walt *Constitutional Property Law* 118. See further Van der Walt *Constitutional Property Clauses* 152; Mostert *The Constitutional Protection and Regulation of Property* 233-234.

<sup>70</sup> BVerfGE 83, 201 (1991) (*Vorkaufsrecht*), discussed in Van der Walt *Constitutional Property Law* 118. See further Van der Walt *Constitutional Property Clauses* 152; Mostert *The Constitutional Protection and Regulation of Property* 230.

<sup>71</sup> BVerfGE 42, 263 (1976) (*Contergan*), discussed in Van der Walt *Constitutional Property Law* 118. See further Van der Walt *Constitutional Property Clauses* 152-153; Mostert *The Constitutional Protection and Regulation of Property* 230.

rights<sup>72</sup> and certain public-law participation rights.<sup>73</sup> Despite this wide constitutional view of property adopted by the German Federal Constitutional Court (*Bundesverfassungsgericht*) (“*BVerfG*”), it has nevertheless held that intangible interests are only recognised as property once they have vested in the beneficiary of the interest in accordance with the law on the basis of own investment or performance and not merely on the basis of contingent interests or expectations.<sup>74</sup>

The *BVerfG* embraces a wide concept of property, subject to the requirements that recognised rights must be both concrete in nature and vested.<sup>75</sup> Only specific assets are regarded as property for purposes of the Basic Law and not a person’s general wealth or financial status.<sup>76</sup> The wider notion of property that the *BVerfG* developed on the basis of a general constitutional principle allows for future extrapolation of the concept of property.<sup>77</sup> In line with this principle, the *BVerfG* has held that it is for the courts to bring the range of objects to be protected under Article 14 in line with developments in private law as well as with social needs in general, thereby extending the concept of property to new objects continuously as the need arises.<sup>78</sup>

US law also views property as a relationship between people with regard to things and not between people and things, even in private law.<sup>79</sup> The question of whether a particular interest or object constitutes property plays a relatively minor role in the adjudication of property disputes under this view, which allows for a wide range of interests to fall under the property protection

<sup>72</sup> BVerfGE 50, 290 (1979) (*Mitbestimmung*), discussed in Van der Walt *Constitutional Property Law* 118. See further Van der Walt *Constitutional Property Clauses* 140-142; Mostert *The Constitutional Protection and Regulation of Property* 238; Alexander *The Global Debate* 100, 114.

<sup>73</sup> BVerfGE 69, 272 (1985) (*Eigenleistung*), discussed in Van der Walt *Constitutional Property Law* 118. See further Kleyn (1996) *SAPL* 421; Van der Walt *Constitutional Property Clauses* 156-157; Mostert *The Constitutional Protection and Regulation of Property* 238; Alexander *The Global Debate* 128-131.

<sup>74</sup> Van der Walt *Constitutional Property Law* 119; BVerfGE 69, 272 (1985) (*Eigenleistung*), discussed in Van der Walt *Constitutional Property Law* 118. See further Kleyn (1996) *SAPL* 421; Van der Walt *Constitutional Property Clauses* 156-157; Mostert *The Constitutional Protection and Regulation of Property* 238; Alexander *The Global Debate* 128-131.

<sup>75</sup> Van der Walt *Constitutional Property Law* 163. See further Kleyn (1996) *SAPL* 421-422; Van der Walt *Constitutional Property Clauses* 156-157; Mostert *The Constitutional Protection and Regulation of Property* 229; Alexander *The Global Debate* 128-131.

<sup>76</sup> Van der Walt *Constitutional Property Law* 119. The US Supreme Court also follows this approach, in that it protects only identifiable assets and not general financial interests. See further Kleyn (1996) *SAPL* 414; Mostert *The Constitutional Protection and Regulation of Property* 227-229; Alexander *The Global Debate* 127-128.

<sup>77</sup> Van der Walt *Constitutional Property Law* 117. See further Kleyn (1996) *SAPL* 419; Mostert *The Constitutional Protection and Regulation of Property* 224-225; Alexander *The Global Debate* 125.

<sup>78</sup> Kleyn (1996) *SAPL* 419. See further Mostert *The Constitutional Protection and Regulation of Property* 225; Alexander *The Global Debate* 125; Van der Walt *Constitutional Property Law* 119, where Van der Walt states that a purposive or functional approach, which relies on the constitutional purpose of the property clause, ensures a generous understanding of the objects of property rights in German-language jurisdictions, where such an approach might seem counterintuitive in view of the narrow definition of property as tangible things in private law.

<sup>79</sup> JW Singer *Introduction to Property* 2 ed (2005) 2. See further Alexander *The Global Debate* 4; Van der Walt *Constitutional Property Law* 103-104.

provided for in the Fifth<sup>80</sup> and Fourteenth<sup>81</sup> Amendments to the Constitution of the United States of America, 1787 (“US Constitution”) without much concern for any differences between private- and constitutional law. What is at issue in property disputes under US law are the rights and duties pertaining to the legal relationship between the parties in so far as these rights and duties pertain to property interests.

The Fifth and Fourteenth Amendments to the US Constitution, read together, provide protection for property.<sup>82</sup> These two clauses are usually referred to as the “Takings Clause”<sup>83</sup> and the “Due Process Clause”<sup>84</sup> respectively.<sup>85</sup> The Takings Clause provides that private property shall not be taken for public use without just compensation and the Due Process Clause provides that nobody shall be deprived of property without due process of law. In case law and literature, concerns about the objects of property play a very minor role.<sup>86</sup> A wide range of intangible interests tend to be recognised as property for purposes of US constitutional property law because there were few concerns with this issue in private law and therefore it was unnecessary to set off constitutional law against a narrow private law tradition as in German law. The result is that a range of objects are regarded as property in US constitutional law, including some personal or creditor’s rights, the mainstream intellectual property interests, intangible commercial interests, certain social or welfare interests and the right to pursue certain legal remedies.<sup>87</sup>

Similar to German law, not just any intangible interest of value is recognised as property in US law.<sup>88</sup> Certain categories of intangible interests are not regarded as constitutional property, such as general financial interests falling short of being identifiable assets,<sup>89</sup> contingent future interests such as prospective clients for a business<sup>90</sup> and benefits that derive directly from the government, such as

<sup>80</sup> Fifth Amendment 1791. DA Dana & TW Merrill *Property: Takings* (2002) 1: The Fifth Amendment, as part of the original Bill of Rights, directly constrains the federal Government.

<sup>81</sup> Fourteenth Amendment 1868. Dana & Merrill *Property* 1-2: The protection afforded by the Fifth Amendment is applied to the individual states through the Due Process Clause of the Fourteenth Amendment.

<sup>82</sup> Van der Walt *Constitutional Property Clauses* 398-408, 441-450; Dana & Merrill *Property* 68-85; Singer *Property* 2-6; Alexander *The Global Debate* 69-70; Van der Walt *Constitutional Property Law* 121-123, 174-175.

<sup>83</sup> The Fifth Amendment states that:

“No person shall be [...] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”

<sup>84</sup> The Fourteenth Amendment states that “... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.”

<sup>85</sup> Van der Walt *Constitutional Property Clauses* 398-399. See further Dana & Merrill *Property* 1-2.

<sup>86</sup> Van der Walt *Constitutional Property Law* 121. See further, for example, *Goldberg v Kelly* 397 US 254 (1970) and *Board of Regents v Roth* 408 US 564 (1972).

<sup>87</sup> Van der Walt *Constitutional Property Law* 122, 135-137, 147-148.

<sup>88</sup> 135. See further Alexander *The Global Debate* 69.

<sup>89</sup> *Eastern Enterprises v Apfel* 524 US 498 (1998). See further Dana & Merrill *Property* 70-71; Van der Walt *Constitutional Property Law* 135.

<sup>90</sup> *College Savings Bank v Florida Prepaid Secondary Educational Expense Board* 527 US 666 (1999). See further Dana & Merrill *Property* 74-75; Van der Walt *Constitutional Property Law* 135.

future social security payments.<sup>91</sup> This indicates that in US law a wide range of intangibles are recognised as property for constitutional purposes, but the mere fact that an intangible interest is valuable does not necessarily qualify it as property. This is similar to the position in German law, where interests amounting to mere expectancies or contingent interests and general financial interests or wealth do not qualify as property either.<sup>92</sup>

## 5 Conclusion

In accordance with its established practice, the Constitutional Court of Moldova applies the ECHR's principles regarding the determination of whether a particular interest is a possession for purposes of Article 1 ECHR and therefore property for the purposes of Article 46 of the Moldovan Constitution. The term "possession" is interpreted broadly by the ECHR and includes claims as well as legitimate expectations of acquiring property rights. The autonomous meaning doctrine also applies to the interpretation of possessions and allows the ECHR to look beyond the domestic law definition of property of the relevant member state. This prevents member states from thwarting the protection of Article 1 ECHR by legislating interests as not being property. The ECHR's approach to determining which interests are worthy of constitutional protection appears to begin from a constitutional perspective. It does not rely on a private law notion as a point of departure and then expand from there as it becomes necessary. This is evident from the application of the autonomous meaning doctrine, which allows the ECHR to ignore any domestic law notion of property and independently determine if a particular interest is a possession for purposes of Article 1 ECHR. This broad, constitutional approach to the interpretation of "possessions" allows for intangible interests to be more easily recognised and protected as property.

Both German and US law have a wide constitutional notion of property that begins with the private law concept but then, in the case of German law, goes beyond it. The constitutional notion of property in these two jurisdictions includes most well-known and recognised rights and interests in property, both real and personal, regarding both tangible things and intangibles. US law appears to end up in the same place as German law to the extent that a wide definition of property is recognised for constitutional protection, with roughly similar categories of non-property interests excluded in both systems, such as a person's general wealth or mere expectations. The German and US law approach therefore differs from that of the ECHR, because both systems begin with a private law notion of property and then, in the case of German law, goes further by developing a wider constitutional interpretation of property.

The South African Constitutional Court's approach of interpreting property widely and incrementally adding interests to the concept of property is similar

<sup>91</sup> *Flemming v Nestor* 363 US 603 (1960); *Board of Regents v Roth* 408 US 564 (1972); *Town of Castle Rock, Colorado v Gonzales* 545 US 748 (2005). See further *Goldberg v Kelly* 397 US 254 (1970). In this case the Supreme Court was willing to accept that social security payments are worthy of protection as far as the Due Process Clause of the property guarantee was concerned, but not for purposes of the Takings Clause: Van der Walt *Constitutional Property Clauses* 442; Van der Walt *Constitutional Property Law* 135.

<sup>92</sup> Van der Walt *Constitutional Property Law* 123.

to the German, ECHR and US law approach to the interpretation of the concept of property. The construction the South African Constitutional Court uses is probably the most similar to German law even if not explicitly followed. In other words, the private law, narrow notion is used as the starting point and incrementally a wider constitutional notion is developed by courts. The Constitutional Court has acknowledged that the private law notion of property, while useful, cannot be the only consideration when determining if a particular interest should be protected as property under section 25 of the Constitution.

The similarity between the jurisdictions discussed in this article is that each interprets the notion of property for constitutional purposes very broadly and they each arrive at a very broad notion of property despite having different points of departure. It is this broad constitutional notion of property that allows for the recognition of interests, particularly intangible interests, as constitutional property that would perhaps not have been regarded as property under the private law, narrower notion of property. However, not just any intangible interest will necessarily be regarded as property. For example, German and US law require that rights seeking recognition must vest in the one attempting to claim them and must not be a mere expectancy of a right or benefit. Similarly, Article 1 ECHR protects claims and the legitimate expectation of acquiring property rights. It does not protect any and all expectations, only those that are regarded as legitimate within the meaning of the ECHR's case law. In South Africa, the incremental approach to expanding the notion of constitutional property means that each particular intangible interest will first be examined and the Constitutional Court will determine if the particular intangible interest should be regarded as constitutional property.

If something similar to the Moldovan case discussed above were to come before the *BVerfG* or the US Supreme Court, we think the outcome would perhaps be similar to that reached by the Moldovan Constitutional Court, namely that the expectation is legitimate, and it would therefore be protected as constitutional property because both German and US law protect legitimate expectations as constitutional property. In the South African context, the outcome would perhaps also be the recognition and protection, based on the Constitutional Court's incremental approach to the expansion of the definition of constitutional property in South African constitutional property law and its wide interpretation of the concept of property for constitutional purposes.

## SUMMARY

This article investigates how the question of recognising intangible interests as constitutional property is approached in the constitutional property law regimes of Moldova, Germany, the European Court of Human Rights ("ECHR"), the United States of America ("US") and South Africa. It is also investigated whether Moldova and South Africa, being examples of relatively young constitutional democracies, follow an approach to the recognition of intangible interests as constitutional property that is perhaps similar to that of the established constitutional democracies of Germany and the US. This article concludes that each of the jurisdictions investigated do allow for the recognition of intangible interests as constitutional property, despite their diverging approaches to this question. The Constitutional Court of Moldova follows the approach of the ECHR regarding the recognition of intangible interests as constitutional property. The Constitutional Court of South Africa uses an approach that is doctrinally similar to that of German constitutional property law, though German law is not specifically followed.