A constitutional analysis of access rights that limit landowners' right to exclude

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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.

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Summary

The right to exclude is portrayed either in a strong-absolute sense or a qualified sense. According to the South African doctrinal notion of ownership, ownership and the right to exclude are exercised and protected insofar as the law permits. The law sometimes grants non-owners access rights to land without the landowner's prior permission or consent and this places substantial limitations on the right to exclude.

The research problem addressed in this dissertation pivots on the relationship between exclusion and access rights. It provides an overview of the theoretical and doctrinal perspectives on the existence of limitations in the form of access rights, deriving from different sources and for different reasons, and considers possible justifications for the limitations.

This dissertation shows that there is a wide range of limitations originating from different sources, with the result that limitations are to be expected and cannot be seen as exceptions. In this regard, the dissertation considers the justification issue from a constitutional perspective to determine whether it is necessary to justify all limitations on the right to exclude. From this perspective, justification for a limitation is not based on normative grounds, but instead focuses on the authority and reason for the limitation and its effect on the affected owner. The point is that limitations on the right to exclude are normal in a legal and constitutional system within which property functions and of which limitations are part. Case law and examples dealing with the conflict between exclusion and access rights indicate that exclusion of non-owners is not always the preferred outcome and that it is not prioritised abstractly. This suggests that the right to exclude is relative and contextual in nature.

Opsomming

Die reg tot uitsluiting word voorgehou as óf absoluut óf gekwalifiseerd. Volgens die Suid-Afrikaanse dogmatiese beskouing van eiendomsreg kan die reg tot uitsluiting uitgeoefen word insoverre die reg dit toelaat. Die reg verleen soms toegangsregte aan nie-eienaars sonder die eienaar se vooraf toestemming, wat ‘n wesenlike beperking op die eienaar se reg plaas.

Die navorsingsprobleem wat in hierdie proefskrif aangespreek word fokus op die verhouding tussen uitsluiting en toegang. Dit verskaf ‘n oorsig van teoretiese en doktrinêre perspektiewe op die bestaan van beperkings in die vorm van toegangsregte, wat ontstaan uit verskillende bronne en vir verskillende redes, en oorweeg moontlike regverdigingsgronde vir die beperkings.

Die proefskrif toon aan dat daar ‘n wye verskeidenheid beperkings uit verskillende bronne ontstaan, met die gevolg dat beperkings verwag moet word en dat dit nie as uitsonderings gesien kan word nie. Die proefskrif oorweeg die regverdigingsvraag vanuit ‘n grondwetlike perspektief om te bepaal of dit nodig is om alle beperkings op die reg om uit te sluit te regverdig. Vanuit hierdie perspektief blyk dit dat regverdiging nie op normatiewe gronde gebaseer is nie, maar eerder fokus die gesag en redes vir ‘n beperking, asook op die effek daarvan op die eienaar. Die punt is dat beperkings op die reg om uit te sluit normaal is in grondwetlike regsisteem waarbinne eiendom funksioneer en waarvan beperkings deel vorm. Regspraak en voorbeelde van die konflik tussen uitsluiting en toegang toon aan dat uitsluiting van nie-eienaars nie altyd die wenslike uitkoms is nie en dat dit nie op ‘n abstrakte wyse geprioritiseer kan word nie. Die reg om uit te sluit is dus relatief en kontekstueel.

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"Hard work is the most universal talent that many people do not bother do discover about themselves" Dr Tapiwa Shumba

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Chapter one:

Introduction

1 1 Introduction to the research problem

Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae) (*Victoria and Alfred Waterfront*)[1] is a South African decision that shows how landowners can be prevented from excluding non-owners from private land. In *Victoria and Alfred Waterfront* the Western Cape High Court considered an application for an order to ban the second and third respondents permanently from entering the commercial premises belonging to the applicants.[2]

The applicants applied for a permanent interdict to prohibit the respondents from entering into and engaging in certain conduct on the premises. The application was based on evidence that the respondents have been misbehaving themselves on the premises over a period of time; interfering, harassing, threatening and assaulting employees and visitors of establishments on the premises.[3] The applicants, as private landowners, relied on their allegedly absolute right to exclude non-owners

[1] 2004 (4) SA 444 (C). See Chapters 3 and 4 below.

[2] The court also briefly considered whether a prohibition against begging on the premises was unconstitutional. Mr De Waal, appearing on behalf of the applicants, sought to amend paragraph 1.2 of the order granted by Davis J by inserting a specific clause prohibiting the respondents from begging at the premises. Even though this application was abandoned, Desai J decided to consider the constitutional validity of prohibiting the respondents from begging. See *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 447-448.

[3] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 447.

from their premises.[4] They argued that the power to exclude others and exercise control over the use of property lies at the core of the entitlements of private ownership, which accrues to a property owner under the common law.[5] Furthermore, the applicants submitted that a property owner is protected against arbitrary deprivation of property rights, including the right to exclude, in terms of section 25 of the Constitution.[6]

The court decided that owners of premises do not have an absolute right of exclusion and refused to grant a permanent interdict.[7] Instead, the court granted an order that prohibited the respondents from behaving in certain specified ways on the premises.[8] The court held that the applicants' right to exclude non-owners from the premises was qualified. In the court's view, the premises had practically become a suburb of Cape Town.[9] Owners of private premises that are open to the public could not exclude, on a permanent basis, members of the public who were causing a nuisance on their premises, unless there is no other way of achieving a lawfully justifiable goal such as protecting employees and customers from nuisance.[10]

In the context of denying an application for an order to prohibit the respondents from begging on the premises, the court referred to the Supreme Court of India decision in *Olga Tellis v Bombay Municipal Corporation AIR*[11] to substantiate the view that the right to life is more than "mere animal existence"; it includes the right to

[4] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 449.

[5] 449.

[6] 449.

[7] 449.

[8] 452.

[9] 449, 451.

[10] 451.

[11] 1986 SC 180.

livelihood.[12] In this part of the decision, the court confirmed that the issue of begging raises a direct tension between a non-property constitutional right, namely the right to life, and property rights, adding that property rights must give way to protection of the right to life.[13] The right to life and human dignity are the most important of all human rights and they must be valued and protected.[14] The court refused to grant a prohibition against entry on the premises because, among other reasons, the respondents required access to the premises for begging purposes.

The second part of the decision in *Victoria and Alfred Waterfront* shows that the right to exclude is limited by the fact that exclusion of the respondents would amount to a limitation of their non-property constitutional right to freedom of movement.[15] The applicants' right to exclude and the respondents' freedom of movement are both limited. The court recognised that the applicants have a right to protect their custom and business interests as well as an interest in the physical integrity and security of their customers.[16] However, effective protection of this right does not justify a blanket exclusion of the respondents. The court had to resolve the conflict between the landowners' right to exclude (property rights under section 25) and non-owners' non-property constitutional rights, namely freedom of movement, in a way that vindicates both rights to the greatest extent possible.[17] The court concluded that this could be

[12] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 448. See also Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 122-123.

[13] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 448.

[14] 448.

[15] 451.

[16] 452.

[17] 452.

achieved by a prohibition of specified unlawful behaviour on the premises rather than a blanket prohibition against access to the premises.[18]

In *Victoria and Alfred Waterfront* the court to some extent followed the reasoning of the US Supreme Court in *PruneYard Shopping Center v Robins*.[19] The Supreme Court had to decide whether state legislation required the owners of PruneYard Shopping Center to allow access to people who want to exercise their right of freedom of speech and petition inside the shopping centre. The majority confirmed that the right to exclude others from property is one of the essential sticks in the bundle comprising ownership. However, the PruneYard Shopping Center owners had failed to show that the exclusion of non-owners was important to the use or economic value of their property. This resulted in the landowners' right to exclude being limited in favour of others' right to exercise free speech and petition rights on privately owned property. In both cases, the respective courts rejected the claim that private owners of premises that are generally open to the public have an absolute right to exclude persons who have been causing a nuisance on their premises. The outcome in both decisions was to uphold a limitation of the right to exclude others so as to secure a non-property constitutional right.

The *Victoria and Alfred Waterfront* case is interesting for a number of reasons. Firstly, the court did not decide the case simply based on the property rights, particularly the right to exclude, of the owners. Instead, the court ruled in favour of the respondents, based on their non-property rights that are protected under the

[18] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 452.

[19] 447 US 74 (1980).

Constitution.[20] In other words, the right to exclude was not upheld absolutely. The court did not abolish the common law right to exclude, but limited its exercise so as to protect non-property constitutional rights of members of the public. Therefore, one might conclude that members of the public have a right of reasonable access to quasi-public premises under certain circumstances and the landowners' right to exclude is limited accordingly.[21]

Secondly, the case involved a clash between the landowners' right to exclude and non-owners' non-property constitutional rights, namely the right to life, human dignity and freedom of movement. The court's decision not to issue a blanket prohibition upon entry and freedom of movement ensured that the respondents have access to the premises for life-supporting activities such as begging, which is encompassed in the right to life. The case thus confirmed the importance of the right to life and human dignity. In view of the court's decision, when there is a direct tension between the right to life and human dignity and the right to exclude, the latter is not absolute. In such instances, the right to exclude must give way to protect the right to life and human dignity, which are regarded as unlimited rights.[22] The right to exclude is thus subject to limitations, even without a balancing process, because the

[20] The court had to consider whether prohibition from entering the premises would offend against the entrenched constitutional provisions guaranteeing the right to life (section 11) and the right of freedom of movement (section 21(1), (3)). See *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 451.

[21] Singer JW *Introduction to property* (2nd ed 2005) 30-32.

[22] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 45, 62; Currie I & De Waal J *The bill of rights handbook* (6th ed 2013) 250-253, 258-259.

non-property constitutional rights to life and dignity are unqualified rights that cannot be balanced against property rights.[23]

A third point of interest is the court's distinction, albeit not explicitly stated, between non-property constitutional rights that are unlimited, such as the right to life and dignity, and those that are subject to limitations and statutory regulations, such as the right to freedom of movement. The difference is relevant because when the right to exclude clashes with unlimited non-property constitutional rights, like life and dignity, the right to exclude must simply give way to secure these rights. On the other hand, when the right to exclude clashes with other regulated non-property constitutional rights like freedom of movement, a balancing approach is usually adopted to determine the most suitable outcome.[24]

The *Victoria and Alfred Waterfront* decision provides a good illustration of some of the issues relating to non-owners' right to be on someone else's land for various purposes and the effect that those rights have on landowners' right to exclude. The decision confirms that the right to exclude is not absolute; instead, it is subject to limitation by law, and in particular by the Constitution. The decision also shows that courts take into account the nature of the property involved in a dispute concerning access rights and exclusion, as well as the circumstances of the relevant parties. This is an indication that context plays a role in considering whether a landowner can in fact exercise his right to exclude. Other relevant considerations include the strength of the right to exclude; statutory or legal recognition of access rights to land;

[23] In the part of the decision dealing with the right to freedom of movement, the court does seem to engage in a balancing process. See Chapters 3 and 5 below.

[24] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 62-63.

when and how the right to exclude is limited; reasons for the limitation; and whether the effect of a limitation is proportionate.

1 2 Outline of the research problem and hypotheses

1 2 1 Outline of the research problem

Different perceptions of the right to exclude as a legal concept and its relevance to the ownership of property appear from academic literature and, most importantly, from court decisions. In decisions of the United States Supreme Court[25] the right to exclude is often expressed by the metaphor that "a man's home is his castle".[26] Singer states that the metaphor suggests a traditional patriarchal image of the family with a single head of household, who is a man in his roles as husband, father, and owner.[27] The metaphor can be understood in line with Blackstone's notion of ownership as "sole and despotic dominion", which represents an absolute conception of the owner's right to exclude.[28] This metaphor theoretically makes the right to exclude the hallmark of privately owned land, suggesting that an owner is in control of the land and, by implication, all who enter or live on it. In the South African context, Cowen also refers to the castle metaphor in the context of a sectional title

[25] An overview of the US academic literature and case law indicates that scholars and judges have made a great attempt to define the meaning of the right to exclude and to determine its nature, content and importance, mainly with regard to the ownership of private property.

[26] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 130; Peñalver EM "Property metaphors and *Kelo v New London*: Two views of the castle" (2006) 74 *Fordham Law Review* 2971-2976 2972; Singer JW "The ownership society and takings of property: Castles, investments, and just obligations" (2006) 30 *Harvard Environmental Law Review* 309-338 314, 317-318.

[27] Singer JW "The ownership society and takings of property: Castles, investments, and just obligations" (2006) 30 *Harvard Environmental Law Review* 309-338 314.

[28] Peñalver EM "Property metaphors and *Kelo v New London*: Two views of the castle" (2006) 74 *Fordham Law Review* 2971-2976 2972.

owner's home, describing this metaphor as something that is strongly individualistic.[29]

The US Supreme Court has stated that the right to exclude is a fundamental element of the constitutional right to private property.[30] In some of the early US Supreme Court decisions, the landowner's right to exclude appears generally to be privileged over non-owners' access rights.[31] Blackstone's conception of property as "sole and despotic dominion" appears to have had a formative influence on this idea of private property, since many American scholars perceive property as an absolute and exclusionary right.[32] A strong focus has thus been placed on exclusion as a core entitlement of ownership in the US literature, resulting in guidelines pertaining to the extent to which an owner can exercise his right to exclude and what the right entails.[33]

In English law, the right to exclude is also perceived to be of the highest order of property.[34] The "gated community" is sometimes used as an example to illustrate the link between the understandings of exclusion at the root of property and

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[29] Cowen D *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 23-24.

[30] In *Kaiser Aetna v United States* 444 US 164 (1979) 176, 180 the court held that the right to exclude is the most essential stick in the bundle of rights. See also *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) 433, 435; *Nollan v California Coastal Commission* 483 US 825 (1987) 832. See further Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 93 (with reference to footnote 180).

[31] *Kaiser Aetna v United States* 444 US 164 (1979); *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982); *Nollan v California Coastal Commission* 483 US 825 (1987).

[32] Blackstone W *Commentaries on the laws of England book II* (5th ed 1773) 2.

[33] In US literature, it is often claimed that the right to exclude is essential to property. See Cohen MR "Property and sovereignty" (1927) 13 *Cornell Law Review* 8-30 12; Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755. See Chapter 2 section 2 2 2 below.

[34] Penner J *The idea of property in law* (1997); Cowan D, Fox O'Mahony L & Cobb N *Great debates in property law* (2012) 8.

everyday lives.[35] The "gate", in both a literal and metaphorical sense, operates as a protective measure against entry by non-owners.[36] In this sense, property is generally understood as a tool of exclusion that the owner can use to prevent non-owners from gaining access to privately owned land.

In South African law, the right to exclude also plays a major role in the way people relate to their land, especially private land. The right to exclude makes it possible for individuals to define themselves as owners by excluding non-owners from their land. Van der Walt argues that the right to exclude is traditionally regarded as one of the strongest entitlements that a landowner possesses.[37] Ownership is said to be exclusive in its nature and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession from anyone who cannot set up a better title to it, to warn him off the property, and have him ejected from it.[38] In the context of the *rei vindicatio*, only the owner has a right to vindicate. This makes the right to exclude the strongest entitlement of ownership. These perceptions of ownership and exclusion suggest that in general, the right to exclude is upheld unless it is limited justifiably.

According to the South African doctrinal notion of ownership, ownership entitles the owner to do with his property as he pleases, unless the right is somehow justifiably restricted by law. However, the *Victoria and Alfred Waterfront* decision and

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[35] Cowan D, Fox O'Mahony L & Cobb N *Great debates in property law* (2012) 10.

[36] 10.

[37] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 296; Van der Walt AJ "Enclosed property and public streets" (2006) 21 *South African Public Law* 3-24 20. See also Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252-307; Cohen FS "Dialogue on private property" (1954) 9 *Rutgers Law Review* 357-387 370.

[38] Maasdorp AFS *Maasdorp's Institutes of South African law volume II: The law of property* (10th ed 1976 edited and revised by Hall CG) 83.

similar examples suggest that the relationship between the right to exclude and access rights to land is in fact more complex. The law sometimes grant non-owners access rights to land for a specific purpose and this right can place substantial limitations on the landowner's right to exclude, thereby rendering the element of exclusivity more relative and contextual than a first impression might suggest.

Limitations of owners' right to exclude may originate in different sources of law, for different reasons. Generally, and leaving consent aside for the moment, such limitations can have any of three origins. Firstly, limitations can originate in the Constitution, resulting in court orders to protect non-owners' non-property constitutional rights, such as the right to life, human dignity and equality. Secondly, limitations often originate in statutory law; legislation enacted to give effect to non-property constitutional rights and legislation not directly enacted to give effect to a non-property constitutional right sometimes impose limitations that prevent the owner from excluding non-owners from his land. Finally, non-consensual access rights are sometimes granted to non-owners on the basis of common law principles. In all these instances, limitations are imposed on the right to exclude by law without the consent of the landowner.

If limitations on the right to exclude derive from different sources, for different reasons, it might be an oversimplification to take the right to exclude as the starting point and view all access rights as exceptions.[39] This might also be an indication that the whole exclusion argument is not just a question of which right is important; the right to exclude or access rights. The *Victoria and Alfred Waterfront* decision

[39] See Chapters 2 and 3 below.

suggests that some access rights might in fact be constitutionally stronger than, and prior to, property or the right to exclude.[40]

Therefore, it is necessary to consider whether limitations deriving from different sources, for different reasons, might relate to the right to exclude in different ways.[41] This would complicate the question whether access rights, and the limitation they place on the landowner's right to exclude, are justified. It therefore becomes necessary to reconsider the justification issue from a constitutional perspective.[42]

The first question that emerges from the constitutional perspective is whether it is necessary, as the absoluteness approach assumes, to justify the existence of all limitations on the right to exclude.[43] If the limitations derive from constitutionally stronger and prior rights, justification might be unnecessary. However, even then, the effect of these limitations will have to be justified, but that is a different question, as appears below.

A deprivation of the right to exclude may result when the law limits the right to exclude or when a court grants (in accordance with the law) access rights to land without the landowner's consent.[44] This could have implications for section 25 of the Constitution,[45] which provides for the protection of property rights. In this regard, the question is whether a deprivation occurs when the law imposes limitations on the right to exclude, for example by granting non-owners access rights to land, with the

[40] See Chapter 3 below.

[41] See Chapters 3 and 5 below.

[42] See Chapter 4 below.

[43] See Chapter 4 below.

[44] For example, a forced transfer may take place when a right of way of necessity is granted by court order or when (in exceptional cases) a court orders a servitude to be registered in favour of the encroacher in encroachment cases. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 346-347.

[45] The Constitution of the Republic of South Africa, 1996.

effect that the landowner is deprived of his right to exclude non-owners from his land; and whether the deprivation complies with the requirements in section 25(1) of the Constitution. Accordingly, the limitation of property brought about by granting access rights to land must be properly authorised and justified to qualify as a constitutionally valid limitation of the landowner's right to exclude.

Access rights that are granted to non-owners by law may constitute a limitation of the landowner's right to exclude. The objective of this study is to do a constitutional analysis of the competing rights of landowners and non-owners, with particular focus on instances where access rights are granted by law to non-owners without the landowner's permission and against his will, so as to determine to what extent the landowner's right to exclude is validly and justifiably limited. Accordingly, the aim is to reconsider the notion of absoluteness and the supposed centrality of the right to exclude from the perspective of a constitutional analysis.

However, to conclude that the right to exclude is not absolute when it is limited by law would be trite because it has long been recognised that lawfully imposed access rights place limitations on property rights.[46] To take the analysis further than this trite conclusion, this dissertation proposes three strategies. Firstly, a theoretical analysis of the issues is introduced to gauge the depth and force of the doctrinal assumption that exclusion is central to property rights.[47] Secondly, the sources and nature of access rights are highlighted in an effort to establish whether some access rights are stronger than others or, conversely, whether the right to exclude is weaker in certain contexts.[48] Finally, a constitutional perspective on exclusion and access is

[46] See Chapter 2 below.

[47] See Chapter 2 below.

[48] See Chapter 3 below.

proposed so as to reduce the impact of the notion of absoluteness in private law doctrine.[49]

1 2 2 Hypotheses

The first hypothesis of this dissertation is that the impression created in doctrinal literature, namely that ownership is absolute and exclusionary, is misleading at best.[50] The right to exclude is portrayed as the core entitlement of ownership, with the effect that an owner of private property can exclude others from his property, apparently without any inherent limitations. It is acknowledged that the right to exclude may in fact be limited, *inter alia* in instances where the law grants non-owners access to privately owned land for specific reasons, without the landowner's prior permission or consent.[51] However, according to the literature such limitations on the right to exclude are constitutionally justified only if there are fundamental normative, pragmatic or otherwise legitimate reasons for them.

The second hypothesis is that the relationship between rule and exception, between exclusion and access rights, is more complex than the literature suggests. If access rights that limit the landowner's right to exclude are in fact constitutionally justified, the right to exclude cannot necessarily be regarded as absolute and access rights might create inherent limitations, at least in some instances. In this case it might appear that property rights are in fact not absolute and that exclusion is not central to property. This hypothesis is particularly relevant in a constitutional perspective, where private property is not the only (or even a dominant) value.

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[49] See Chapter 4 below.

[50] See Chapter 2 below.

[51] See Chapter 3 below.

The third hypothesis is that theoretical, doctrinal and constitutional analysis would indicate that exclusion is neither absolute nor central to property and that access rights imposed by law in fact impose a wide range of limitations on the right to exclude, often for overriding, non-property reasons that are justified by the broader constitutional scheme.[52]

1 3 Overview of chapters

The central questions considered for purposes of this dissertation are: what does the right to exclude entail? How and to what extent do access rights to land granted by law limit the landowner's right to exclude? Are these limitations theoretically, doctrinally, and constitutionally justifiable, and what does justification entail? These questions are addressed in subsequent chapters.

As a point of departure it is necessary to distinguish the different meanings of the notion of absolute ownership and to ascertain how each meaning relates to the right to exclude. Therefore, the discussion in Chapter 2 is informed by theoretical and doctrinal (traditional and pre-constitutional) perceptions of ownership in general and the right to exclude in particular. The goal of Chapter 2 is to analyse and assess theoretical and doctrinal arguments in favour of the idea that ownership and the right to exclude are absolute. To understand the theoretical justifications for limitations imposed on the right to exclude one must firstly look at property theories, particularly the exclusion theory, that support the right to exclude non-owners from land in the strong, absolute sense. These justification theories are considered briefly to cast some light on the role, scope and supposed primacy of the right to exclude. Exclusion theorists view the right to exclude as the essential or core right of

[52] See Chapter 4 below.

ownership that must be strongly upheld and protected. In instances where the right to exclude is inevitably limited, the limitations are regarded as exceptional.

Secondly, it is necessary to consider theoretical arguments that support and/or explain general justificatory grounds for limiting the right to exclude, to ascertain why in some instances, if not all, access rights are enforced against the landowner's will. An analysis of the theoretical justifications in this context provides normative justificatory arguments[53] for limiting the right to exclude, primarily in situations where access rights are granted to non-owners, taking into account the different origins of limitations. These arguments are often advanced by progressive property theorists, who argue against the view that exclusion is the core of property and that non-owners should respect the "gate-keeping function" of property.[54] This perspective, for example, includes the notion that landowners have an obligation, sometimes referred to as "the social-obligation norm", to allow non-owners access over or onto their land. The progressive property theorists' arguments present a qualified view of absolute ownership and the right to exclude. It is important to establish whether access rights are merely exceptions.[55] Chapter 2 therefore also provides an explanation for deviations from exclusion rules, and hence the move towards so-called governance rules, in an attempt to assess the weight of the justifications for

[53] As Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 287 explain, "normative justifications refer to arguments of a broadly normative nature which provide reasons why either private property or access should be taken seriously, or regarded as compelling considerations in practical deliberation".

[54] Such progressive theorists include GS Alexander, EM Peñalver, LS Underkuffler, and JW Singer.

[55] On the one hand Smith HE "Exclusion versus governance: Two strategies for delineating property rights" (2002) 31 *Journal of Legal Studies* 453-487 argues that governance exceptions (for current purposes, access rights) exist at the periphery. On the other hand, Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1888 argues that access rights are not just exceptions that appear at the periphery but rather that they appear at the core of property.

limiting the right to exclude.[56] Different perspectives on governance strategies might be relevant when assessing the general theoretical justifications for limiting the right to exclude.

A brief historical background is necessary to show how ownership, and especially the notion of absolute ownership, relates to the right to exclude. Therefore, it is necessary to consider doctrinal views regarding ownership in South African law. The most accepted definition in South African law is that ownership is the most complete real right a person can have over a thing, allowing him to use it in any way not prohibited by law. In view of this definition, a landowner is allowed to exclude others from his property unless he is prohibited from doing so by law.

The question arises whether a landowner's right to exclude can be said to be protected and upheld strongly, considering that the law may impose limitations in the form of access rights granted to non-owners. The nature and scope of access rights that limit the right to exclude is discussed in Chapter 3, starting out from the premise that if non-owners are allowed by law to have access to privately owned land without the landowner's permission or against his will, it is possible that in these instances the landowner's right to exclude may in fact be limited. This chapter considers examples of limitations that are imposed on the right to exclude. The objective of this chapter is to examine the origins (sources of law) of limitations of the right to

[56] Smith HE "Property is not just a bundle of rights" (2011) 8 *Econ Journal Watch* 279-291 285; Smith HE "Exclusion versus governance: Two strategies for delineating property rights" (2002) 31 *Journal of Legal Studies* 453-487 455 describes governance rules as those that are implemented by making exceptions, for example by way of contracts, servitudes or land-use regulations that open up avenues for non-owners to have rights of access to land. Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1888 1855-1886 has a different interpretation of governance, namely that it refers solely to the relationship between individuals who have a property interest in an asset. Accordingly, his idea is that governance rules regulate ownership's internal relations.

exclude, pertaining to different types of land, in terms of different kinds of access rights (including their purposes), and the effect that those access rights have on the landowner's right to exclude. The purpose of this overview is to show that all limitations on the right to exclude can in fact not be regarded as exceptional, considering the wide range of these limitations as well as their origins, their underlying justifications, their nature and their effects.

The analysis in Chapter 3 shows that there are three origins of limitations of the right to exclude. In the first instance, limitations on the right to exclude are imposed on the basis of direct, non-property constitutional rights. These limitations are considered mainly with reference to case law that highlights the justification for and the extent of the limitations. The case law involves a clash between landowners' right to exclude and non-owners' non-property constitutional rights, namely the right to life, human dignity and equality. This tension is interesting when landowners want to exercise their right to exclude non-owners but are prevented from doing so by law to ensure that non-owners have access to land for life-supporting activities like begging. The central question is whether the exclusion of non-owners is justified in these circumstances. Case law from foreign jurisdictions is analysed to determine how these jurisdictions deal with the clash between the right to exclude and non-property constitutional rights.

In the second instance, limitations are imposed on the basis of legislation implementing state regulation that limits the landowner's right to exclude. Both legislation enacted to give effect to a non-property constitutional right and legislation not specifically enacted to give effect to a constitutional right sometimes create statutory rights that allow non-owners to be on land without the landowner's permission. Foreign legislation is considered in this chapter to identify examples of

statutory access rights that limit the right to exclude for constitutional or policy purposes.

In the third instance, common law principles governing non-consensual access rights place limitations on the right to exclude. An example of non-consensual access rights that is considered in this chapter is the right of way of necessity, which involves the creation of a non-consensual servitude by operation of law. Another example is encroachment, which involves the exercise of the court's discretion to leave an encroachment in place against compensation, instead of granting a removal order in favour of the affected landowner.

In all these instances, it is important to consider justifications for limiting the right to exclude. Therefore, in Chapter 4 I determine whether limitations on the right to exclude are justified. Justification analysis may involve two types of justification. The first type of justification analysis considers the justification for a specific limitation on the landowner's right to exclude. With reference to the first type of the justification analysis I investigate the reasons and authority for the imposition of a specific limitation on the right to exclude. The second type of justification proceeds on the basis of section 25(1) of the Constitution, which determines whether the effect that the limitation has on an individual landowner is justified. It is therefore necessary to consider whether the outcome that results when access rights are granted to non-owners by operation of law amounts to an arbitrary deprivation of the right to exclude in terms of section 25(1) of the Constitution. If the deprivation is not arbitrary, it does not require section 25(1) justification. If the outcome does indeed constitute an arbitrary deprivation, the question is whether the deprivation in a particular instance

can be justified.[57] I also consider whether the deprivation amounts to expropriation that needs to comply with section 25(2) of the Constitution. Accordingly, this part of the chapter undertakes a constitutional analysis of the justifications for limiting the landowner's right to exclude non-owners from land.

In the final chapter I consider the complex relationship between the right to exclude and access rights, and especially whether the right to exclude should be viewed in the strong-absolute sense or a qualified sense. I also propose a solution that reconciles or balances the right to exclude and access rights, to such an extent that both the non-owners' and the individual landowner's interests in land are fairly recognised and protected. I rely on Dyal-Chand's[58] and Van der Walt's[59] notions of sharing and on Singer's[60] idea of property and democracy as guidelines to resolve disputes involving landowners' right to exclude and non-owners' access rights. These ideas may help to clarify some of the uncertainties regarding what the right to exclude entails, taking into account different contexts (constitutional, legislative and common law), different types of land and different kinds of access to land and their purposes. I conclude by emphasising that exclusion is not always the outcome in disputes concerning the right to exclude and access rights and that access rights are not always exceptional. Depending on the particular context, the right to exclude can be stronger or weaker when considered together with access rights to land.

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[57] The Constitutional Court *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)* 2002 (4) SA 768 (CC) paras 46, 57-58 established a new methodology, which proposes that all limitations to property will be regarded as deprivations and tested against the requirements of section 25(1) of the Constitution.

[58] Dyal-Chand R "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723.

[59] Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77.

[60] Singer JW "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335.

1 4 Terminology

At the outset, it is necessary to make certain terminological points. South African, US and English legal sources often refer to exclusion as a right or an entitlement. In the present context of examining what the right to exclude as an entitlement of ownership entails, it is important to distinguish between a right and an entitlement, although the two notions are related. Generally, a landowner is said to have a right to exclude non-owners from his property. It is important to determine in what sense reference is made to exclusion in each particular legal system. Is exclusion a right or an entitlement?

A right can be viewed as an entitlement. An entitlement signifies what the owner may do with his property and gives practical effect to the power of disposition included in private-law rights.[61] The entitlements of ownership determine the extent of the legal relationship that exists between the owner and his property and between the owner and others. For example, saying that a landowner has the entitlement to exclude means that he can prohibit non-owners from entering and using his land without permission or good legal cause.

The term "entitlement" should also be distinguished from what Honoré refers to as the "incidents of ownership" that make up the notion of ownership.[62] Honoré uses the term "incident" to refer to a wide spectrum of entitlements, concomitant rights,

[61] Van der Vyver JD "Ownership in constitutional and international law" 1985 *Acta Juridica* 119-146 133; Mostert H *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) 174.

[62] The words entitlement and incident cannot be used interchangeably. Honoré writes from an English law perspective that was never strongly influenced by pandectism. Unlike English law, South African law was greatly influenced by pandectism.

functions, obligations, and prohibitions.[63] For purposes of this dissertation, the landowner's right to exclude can be understood as an entitlement in that it describes what the landowner may lawfully do with regard to his property. However, the phrase "right to exclude" is used instead of using the phrase "entitlement to exclude". The "right to exclude" is an established term, even though its meaning depends on the context.

The right to exclude concerns the exclusion of non-owners from permanent, temporary or continuous access to pass over or be on private, public or quasi-public land. The nature of the property involved in a particular dispute dealing with the right to exclude and access rights to land is important. Therefore, this dissertation determines the extent of the limitation on the right to exclude with reference to three types of land, namely private, public and quasi-public land. Private land refers to land that is owned by a private person and that is not open to the public, or that is subject to restricted access by non-owners for a specific purpose. In contrast, the term "public land" refers to land that is owned by the government or the state for public use or in any other way that implies either general or restricted public access to it. The term "quasi-public land" refers to publicly used private land. Gray and Gray explain that the term "quasi-public" is widely used, particularly in North America, to denote land that, although nominally subject to private property rights, has been

[63] Honoré argues that the incidents of ownership are those legal rights, duties and other incidents which apply, in the ordinary case, to the person who has the greatest interest in a thing admitted by a mature legal system. See Honoré T *Making law bind: Essays legal and philosophical* (1987) 161. The original version was published as Honoré AM "Ownership" in Guest AG (ed) *Oxford essays in jurisprudence* (1961) 104-147. See also Van der Vyver JD "Expropriation, rights and entitlements and surface support of land" (1988) 105 *South African Law Journal* 1-16 8; Van der Walt AJ "Rights and reforms in property theory – A review of property theories and debates in recent literature: Part III" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 493-526 511.

opened up to a public use zone.[64] In such instances, the land loses its purely private character because of the general invitation of the public to have access to the land and it acquires a public character.[65]

In Chapter 2 I use the term "ownership", which is defined in South African law as the most complete real right a person can have or exercise over a thing insofar as is not prohibited by law. This definition informs the doctrinal view discussed in Chapter 2 where the discussion is focused on the absolutist private law definition of ownership. This dissertation adopts a constitutional perspective, which means that the private law focus on ownership only features in Chapter 2 because it is the focus of doctrinal writing and in case law. Throughout the rest of the dissertation I focus on "property" in the wide sense, which includes ownership and limited real rights, because it is more suitable for constitutional analysis.

The examples and case law that I consider for purposes of this dissertation concern access that a non-owner may or may not have to property that belongs to another and the right of the landowner that he may or may not have to exclude others from his property. In Chapter 3 I analyse how access rights and exclusion pivot on each other. As a starting point, I consider access rights not as an individual right but in the wide sense, to include public access rights. In some cases this may not involve actual individual rights to gain access but rather denotes a limitation of the landowner's right to exclude.

In instances where I discuss limitations on the right to exclude, I use the term "limitation" to refer to instances where the law or legal principle prevents a landowner

[64] Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 57 (with reference to footnote 65).

[65] 57 (with reference to footnote 65).

from exercising his right to exclude. In Chapter 4 I use the term “limitation” in a different, technical constitutional-law sense, referring specifically to an action that constitutes a limitation of a constitutional right. In this sense, a statutory provision that imposes a limitation (in the general sense) on landowners’ right to exclude striking workers from industrial premises does not necessarily constitute a limitation (in the technical, constitutional sense) of the section 25(1) right to property – it would only do so if the deprivation is for some reason arbitrary, since section 25(1) only proscribes arbitrary deprivation of property. I use the term in both senses, depending on the context.

The term “justification” appears in all chapters but with different meanings. In Chapter 4 I specifically discuss justifications for limiting the right to exclude and what justification means in different contexts where the right to exclude is limited. In a general sense, “justification” simply refers to the reason for a limitation. Again, I use the term in both senses, depending on the context.

1 5 Qualifications

This dissertation is confined to an assessment of the limitations imposed on the landowner’s right to exclude by access rights that non-owners may have, based on the operation of law, without the landowner’s permission. Therefore, I consider examples and case law largely limited to land and access to land.

I do not attempt to discuss all the relevant case law or all examples concerning instances in which access rights limit the right to exclude, but only consider a selection of important and relevant cases and examples. The analysis of examples and cases on exclusion in foreign law, in particular US, English and Scots law, is not

intended to cover or represent all cases from or to discuss the context of those jurisdictions; they are simply examples of access rights or limitations. The examples provide a framework within which to assess the different kinds of access rights and limitations, the different purposes for granting them to non-owners, how conflicting interests can be resolved, instances when an owner is entitled to exclude, and whether compensation should be awarded.

In Chapter 2 I consider the Roman-Dutch law notion of ownership, but I do not undertake a comprehensive discussion of the history of doctrinal thinking or of Roman-Dutch law.

This dissertation does not provide an extensive discussion of property theories relating to exclusion. Instead, it refers to specific aspects of specific theories that are relevant for the analysis. Therefore, I do not write complete overviews of the relevant comparative law, history of ownership or property theories.

Chapter two:

Absolute ownership and the right to exclude

2 1 Introduction

The purpose of this chapter is to explore theoretical and doctrinal perspectives on the existence of limitations on ownership and specifically on the right to exclude. Ownership is described as absolute in several distinguishable senses (to indicate different characteristics of ownership) and only some (or just one) of those meanings are significant for the right to exclude.

In South African law ownership is usually described as absolute. The idea of absoluteness can be understood as an indication that ownership is the most complete real right to distinguish it from limited real rights or that ownership is unlimited in principle but only insofar as the law allows. Even in these senses, absoluteness is subject to qualifications. Ownership is not really absolute in either of these senses because on the one hand, it is limited by limited real rights and on the other hand, it is limited by law.

Outlining the contours of the right to exclude and its relation to access rights raises difficult questions about the sphere of property as well as the idea of absolute ownership. The main question is: what does the idea of absolute ownership mean theoretically and doctrinally? The unavoidable question is what the implications of the different meanings of exclusion are. More specifically, the question is whether the idea of absolute ownership implies that the right to exclude is either absolute as well or central to ownership. To determine the meaning of absolute ownership and the right to exclude, a broad overview of the theoretical and doctrinal notions of

ownership and exclusion is therefore essential. It is particularly necessary to explore theoretical arguments, and specifically moral property theories such as Locke's labour theory and Hegel's first occupation theory, to understand the extent to which they support the idea that the right to exclude is a necessary characteristic of property. The impact of these theories has to be assessed in view of the ongoing debate between modern exclusion theorists and progressive property theorists. Finally, it is also necessary to examine the impact of these theories on the South African law doctrine of ownership.

Although it is widely agreed that an owner of private property has at least some right to exclude others from using or interfering with his property, there is disagreement about how central the right to exclude is to the understanding of property.[1] The right to exclude is presumed to be the starting point for deciding property law disputes. A contentious issue is whether ownership and the right to exclude are absolute. The focus of this debate is on the nature of limitations; whether they are inherent in property or whether they are exceptional to the extent that limitations are not easily accepted and, if they are accepted, they have to be proven and justified.

The theoretical literature on exclusion suggests that the notion of absolute ownership and exclusion can be explained in two parts. The first part is the strong version of absoluteness, which favours the protection of the right to exclude. Grounding property in exclusion suggests that ownership and the right to exclude are absolute. The exclusion theorists' arguments on property and exclusion portray a strong view of absolutism in that the landowner can exclude everyone from the property. Limitations on ownership and specifically on the right to exclude are

[1] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 734.

accepted but the limitations are seen as exceptions, which have to be proven and properly justified. This strong version of absolutism does not allow social context or purely legislative will to limit ownership. Ownership or exclusivity can only be limited if there are good normative reasons for doing so.

The second part is the qualified view of absoluteness, which supports the claim that ownership includes a right to exclude but allows for limitations imposed by law. The progressive property theorists' arguments offer a qualified view in that they support a limited property and exclusion right. As a point of departure, the progressive property theorists assume that ownership and the right to exclude are free of limitations, but limitations can be imposed by law or by the landowner and will not be treated as exceptional. It is possible to accept limitations on ownership in general and on exclusion in particular and, although limitations have to be justified, the reasons for the limitations are not expected to be normatively strong. These qualified arguments show that the right to exclude can be subject to significant limitations on pragmatic and contextual grounds.

Arguments about the idea of absolute ownership and exclusion can also be assessed doctrinally. From a doctrinal perspective, the starting point is that ownership is unlimited unless and until the law imposes limitations on it, sometimes on pragmatic and contextual grounds. In the doctrinal perception of ownership that dominates South African legal literature ownership, particularly landownership, is often presented as absolute, exclusive and abstract in nature.[2] Context plays no role

[2] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447; Van der Walt AJ "Roman-Dutch land and environmental land-use control" (1992) 7 *South Africa Public Law* 1-11 4; Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692-699; Van der Merwe CG "Ownership" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 27 (1st

in this perception of ownership because the rights paradigm does not reflect context - rather, it is portrayed as abstract and hierarchical.[3] This paradigm has an effect upon whether and how much ownership (the right to exclude) can be limited or regulated. In essence, any limitation of the right to exclude is exceptional in the rights paradigm. In this way, a non-owner's rights or interests in the property are less likely to be enforced or favoured over the landowner's right to exclude. The rights paradigm creates a presumption in favour of the right to exclude, in that this right trumps lesser competing rights, such as access rights. Hence, the outcome in any property dispute is determined by the strong right to exclude, unless non-owners (with a weaker right) can show why the lesser right (access rights) should prevail and unless the law imposes limitations on the strong right to exclude.

The rights paradigm therefore seems to present the right to exclude as absolute, but the fact that a weaker right could prevail once proven shows that ownership is in fact qualified. In cases involving access rights to privately owned land, the common law does not always allow a landowner to exclude non-owners, because the courts refer to non-owners' access rights as well as the landowner's

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Reissue 2002) 217-355 para 296. In this regard see also Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective* (2004) 637-670 659-660, who state that in the tradition of the *ius commune*, ownership at the beginning of the twenty first century is still viewed as absolute, exclusive and abstract in nature. See also Van der Walt AJ "Developments that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa" (1990) 1 *Stellenbosch Law Review* 26-48 43.

[3] According to Van der Walt, contextual issues such as the general historical, social, economic or political context of the property dispute and the personal circumstances of the parties have no relevance or effect in the rights paradigm. See Van der Walt AJ *Property in the margins* (2009) 27-28.

right to exclude.[4] Therefore, the rights paradigm and the abstract right to exclude do not feature as strongly in case law as they do in the doctrinal literature.

It is often said that the backbone of the South African common-law system is that a private landowner can exclude non-owners from his land.[5] However, property is in fact a fundamentally restricted right, with the result that all entitlements of a particular property holder, particularly the right to exclude, may not necessarily be upheld. The right to exclude may sometimes be protected in terms of the Constitution of the Republic of South Africa, 1996 (Constitution)[6] but a landowner's right to exclude may also be restricted because of the need to protect other rights, some of which may also be embodied in the Constitution.[7] In effect, limitations imposed on the right to exclude show that this right is not absolute and that context does play a role in property disputes in that all relevant circumstances are taken into account in deciding whether a particular limitation is justified.

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[4] In a leading Constitutional Court (CC) decision dealing with an eviction application, the right to exclude was upheld when the court ordered the eviction of non-owners from privately owned land. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC), even though the court recognised the constitutionally protected non-property rights of non-owners, the landowner's rights took precedence. However, in other CC decisions such as *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA 3 (CC) the landowner's right to evict has not been allowed to trump the constitutional rights of non-owners, such as the right to equality and the right to have access to adequate housing.

[5] The common law *rei vindicatio* can be instituted by the owner to reclaim his property from anyone who is unlawfully in possession thereof. See the discussion below in section 2 3 2.

[6] Section 25 of the Constitution of the Republic of South Africa, 1996 protects the owner of property against deprivation of property, except in terms of law of general application and provided that the law should not permit arbitrary deprivation.

[7] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 215; Van der Walt AJ *Property and constitution* (2012) 29.

Accordingly, this chapter reviews property theories that are sometimes relied on to support the idea of absolute ownership and the right to exclude; and theories that qualify both ownership and the right to exclude in view of context. The chapter further reviews the South African law doctrine of ownership that sometimes might or might not support the idea of absolute ownership and the right to exclude.

2 2 The idea of absolute ownership and exclusivity: A theoretical analysis

2 2 1 Moral property theories

Arguments in favour of the idea that ownership is absolute, that the right to exclude is central to ownership, and that limitations of either are exceptional are often bundled with an appeal to certain property theories. The assumption is that support from the theories in question would strengthen the claims in favour of exclusivity. In fact the theories in question sometimes do not provide the necessary support for exclusion arguments. What follows is not a complete discussion of the relevant theories or the theoretical debates about them but a brief overview to indicate how strong or weak the theoretical support is for exclusivity.

The discussion commences with what Van der Walt[8] refers to as moral property theories.[9] Moral property theories can be divided into labour (Locke) and first-occupation (Hegel) theories.[10] These theories are often said to offer historical

[8] Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk DH, Dugard J, De Villers B & Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) 455-501.

[9] The discussion is limited to an analysis of the theories of private property propounded by Hegel and Locke as justifications for the institution of private property.

[10] Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk DH, Dugard J, De Villers B & Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) 455-501 455-456.

support for the claims of the exclusion theory in justifying not only the acquisition and protection of property in general, but also its exclusivity, autonomy and absoluteness.[11] This means that interferences with property should at least be limited to the minimum to allow the owner to exercise his rights freely and to protect the owner's rights and values. The right to exclude is viewed as embodying a host of important interests that promote human values.[12] The values implicated in a private property institution include but are not limited to autonomy, personhood, privacy, liberty, and utility.[13] An important question in this section is whether the moral- and value-based arguments for property indeed support an absolute or a relative but strong right to exclude.

Some natural rights theorists argue that all rights are derived from a conception of property as "self-ownership".[14] Locke is regarded as the first to make the case for private property as a natural right of the individual and it remains the standard justification for private property.[15] Natural rights were held to be natural because of

[11] Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk DH, Dugard J, De Villers B & Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) 455-501 455-456.

[12] According to Singer JW *Introduction to property* (2nd ed 2005) 25 these interests include exclusive possession and quiet enjoyment.

[13] Dagan H *Property: Values and institutions* (2011) 46; Singer JW *Introduction to property* (2nd ed 2005) 25; Freyfogle ET *Bounded people, boundless lands: Envisioning a new land ethic* (1998) 97.

[14] Ryan A *Property* (1987) 61. Barnes R *Property rights and natural resources* (2009) 30 argues that property as a natural right approach starts from the proposition that individuals have certain essential rights that derive from their independence and dignity as individuals, as expressed in terms of rights over self. Such rights arise without the operation of law.

[15] Paul EF *Property rights and eminent domain* (1987) 198; Barnes R *Property rights and natural resources* (2009) 30; Alexander GS & Peñalver EM *An introduction to property theory* (2012) 38-41; Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 38. Locke J *Two treatises of government* (reproduced in Laslett P *Two treatises of government: A critical edition with an introduction and apparatus criticus* 1963) para 27 states:

their historical or moral precedence over legal rights. Locke employed the idea of there being a "state of nature" in which man's natural rights are governed by natural law.[16] Consequently, governments were legitimate insofar as they protected natural rights and illegitimate if they violated them.[17]

Locke's theory provides an effort to define the limits of sovereign power. In terms of Locke's theory the existence of individual property rights is justified on the basis of the labour argument, specifically in order to protect those rights against interference by the sovereign.[18] The US Constitution is a classic example of a property clause that reflects this understanding of Locke's theory, providing constitutional protection for life, liberty and property as the parameters of personal freedom and individuality.[19] In this form, the property clause is part of a specific perception of the social function of property relationships, namely that private

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> "Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property. It being by him removed from the common state nature placed it in, it hath by his labour something annexed to it, that excludes the common right of other men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others"

In this chapter, I do not intend to discuss Locke but rather the claim in secondary literature that his theory supports a strong exclusion thesis. Therefore, I refer to the secondary literature.

[16] Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 38.

[17] Ryan A *Property* (1987) 62.

[18] Freyfogle ET *Bounded people, boundless lands: Envisioning a new land ethic* (1998) 94-95 states that Locke's interpretation of the Bible acknowledges that God originally gave earth to humankind as collective property, yet any individual could seize a piece of land from the common stock and make it his own simply by mixing labour with it. This seems to suggest that before labour was added, the land had no value, and once labour was applied, the tilled land gained value and became private property. On this basis, one gained the right to exclude non-owners from his tilled land.

[19] Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk DH, Dugard J, De Villers B & Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) 455-501 461.

property forms a guaranteed enclave of individual freedom within which the individual is shielded from the threats posed by society.[20]

For Locke, property rights established in a state of nature are both more determinate in their content and less susceptible to political rearrangement once the civil government is formed.[21] The right to exclude has been identified as the most important among the rights established within the state of nature.[22] An exclusive property right is derived from the "mixing-labour" argument for property.[23] The labour argument suggests that when a man mixes his labour with something from the commons, it is by his labour that he acquires something (property), which excludes the common rights of other men.[24] As a result, man acquires claim-rights to the exclusive possession, use and control, and imposition of correlative duties on all others not to interfere with the property that he acquired through his labour.[25] In this regard, the right to exclude others becomes important as emphasis is placed on the individual. From this perspective, Locke is said to have viewed ownership as an exclusive and unlimited right because it is based on individual labour.

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[20] Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk DH, Dugard J, De Villers B & Davis D (eds) *Rights and constitutionalism: The new South African legal order* (1994) 455-501 462.

[21] Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 48.

[22] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 146; Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 38.

[23] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 387-389.

[24] Howe H "Lockean natural rights and the stewardship model of property" (2013) 3 *Property Law Review* 36-50 38; Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 299-300.

[25] Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 297.

Locke's labour theory creates the impression that owners should be able to exclude others from the fruits of their labour. Mossoff notes that Locke's labour argument adds the essential element of exclusion to property rights.[26] It is labour that transforms the inclusive claim-rights in the state of nature into exclusive property rights, which is one of the primary rights civil society is formed to protect.[27] To this extent, Locke's labour theory strengthens the rights of the individual in that, once an individual acquires property, he has the right to exclude others from his property.[28] Locke's labour theory justifying private property is also important for promoting personal autonomy in that it creates a sense of personal freedom and individuality. Therefore, allowing the landowner to exclude non-owners from private property ensures that the owner can establish a sphere of personal autonomy and exercise his unique power of personal autonomy.[29]

In the same vein, Hegel's idea of property is said to present the right to exclude as necessary and essential to property.[30] His first occupation theory entails that a thing belongs to the person who happens to be the first in time to take the thing into his possession.[31] Property is an abstract and indeterminate concept, which

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[26] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 388. Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 297 state that an individual acquires private property through his labour and in so doing, he unilaterally deprives all others of the resource he acquires.

[27] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 389.

[28] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 146.

[29] Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 2 *South African Journal on Human Rights* 169-206 179.

[30] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967). I do not intend to undertake an extensive analysis of Hegel, rather I analyse the secondary literature that point to or deny the fact that Hegel's first occupation theory provides a strong justification for exclusion.

[31] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 45.

emanates from an individual's will;[32] a person has a right of putting his will into any and every thing, thereby making it his with the absolute right of appropriation that a person has over all things.[33] A thing lacks form until a person embodies it with human will when he confers a form or concept onto it.[34] The thing only becomes property by virtue of its embodiment with human will or assimilation into one's personhood.[35] As a result, property acquires the character of private property.[36]

Hegel identifies three essential phases of property, namely possession, use and alienation.[37] Each of these phases requires that an individual be entitled to exclude others, at least to some degree.[38] The first stage of the human will is to physically seize the thing into one's possession and in this regard, taking possession signifies the human will.[39] After physical seizure, the second stage is that of giving form to something by creating something out of the seized thing.[40] In this way, the will of an individual is identified in the product of his work.[41] Since an individual's will

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[32] Conklin WE *Hegel's law: The legitimacy of a modern legal order* (2008) 119-120.

[33] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 41. See also Fox O'Mahony L & Sweeney JA "The idea of home in law: Displacement and dispossession" in Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011) 1-11 2.

[34] Conklin WE *Hegel's law: The legitimacy of a modern legal order* (2008) 121.

[35] Conklin WE *Hegel's law: The legitimacy of a modern legal order* (2008) 121; Fox O'Mahony L & Sweeney JA "The idea of home in law: Displacement and dispossession" in Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011) 1-11 2.

[36] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 42.

[37] 46.

[38] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 143.

[39] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 46-47; Knowles D *Routledge philosophy guidebook to Hegel and the philosophy of right* (2002) 130; Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 306.

[40] Knowles D *Routledge philosophy guidebook to Hegel and the philosophy of right* (2002) 131.

[41] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 46.

is used to transform a thing into property, such property belongs in the possession of the individual as the owner. In other words, the thing is assimilated into one's personhood, making the thing his property.

The third stage involves the marking of things with signs.[42] An example of a marking for a private property is a sign saying "No trespassers". According to Hegel, this sign indicates that an owner has put his will into the thing, which symbolises that he is the sole owner and that non-owners should recognise his ownership of the thing.[43] The sign can also be a means of keeping non-owners out of the private property. This provides an individual owner with the exclusionary powers that enables him to exclude others from the property interest and this also suggests that the owner has complete ownership of the property.[44]

Accordingly, the owner is entitled to the use of his property, to the exclusion of others. Hegel explains that the use of a thing satisfies the needs of the owner, since the use reveals the aspect of human will that is displayed in ownership.[45] In this light, the entire use of the thing belongs to the owner and this renders it difficult for another person to be the owner in an abstract sense. According to Hegel, ownership is therefore essentially free and complete.[46]

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[42] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 49; Knowles D *Routledge philosophy guidebook to Hegel and the philosophy of right* (2002) 131.

[43] Hegel GWF *Hegel's philosophy of right* (1952) (translated with notes by Knox TM 1967) 49. See also Knowles D *Routledge philosophy guidebook to Hegel and the philosophy of right* (2002) 131.

[44] Conklin WE *Hegel's law: The legitimacy of a modern legal order* (2008) 123.

[45] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 49. See also Knowles D *Routledge philosophy guidebook to Hegel and the philosophy of right* (2002) 132-133.

[46] Hegel GWF *Hegel's philosophy of right* (1952 translated with notes by Knox TM 1967) 50. See also Knowles D *Routledge philosophy guidebook to Hegel and the philosophy of right* (2002) 133.

Radin relies on Hegel in developing her personhood theory of property.[47] Like Hegel, she focuses on the relationship between property and self-development.[48] The underlying premise of the personhood perspective is that, to achieve proper self-development, a person needs some control over resources in the external environment.[49] For Radin, the necessary assurances of control take the form of property rights and as a result the protection of property should be enhanced to allow for personal development.[50]

[47] Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016. The personhood theory is further elaborated in some of Radin's work see, Radin MJ "Market-inalienability" (1987) 100 *Harvard Law Review* 1849-1937; Radin MJ *Reinterpreting property* (1993); Radin MJ *Contested commodities* (1996). Fox O'Mahony L & Sweeney JA "The idea of home in law: Displacement and dispossession" in Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011) 1-11 3 state that the significance of housing and home for Hegelian self-development and the implication this bears for law and policy, has been mostly developed through Radin's concept of property and personhood.

[48] Although Radin and Hegel share the same insights, Radin has a different understanding of self-development. In terms of Radin's personhood theory, personal property is bound up with an individual's personhood in a constitutive sense in that it is part of the way people constitute themselves as continuing personal entities in the world. Radin rejects Hegel's initial conception of self (person) because Hegel conceives the self as merely an abstract unit of free will, which has no concrete existence until the will confronts the external world. In this regard see Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016 959, 971-972. See also Fox L *Conceptualising home: Theories, laws and policies* (2007) 299-300; Alexander GS & Peñalver EM *An introduction to property theory* (2012) 66.

[49] Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016 957; Clarke A & Kohler P *Property law: Commentary and materials* (2005) 54; Fox L *Conceptualising home: Theories, laws and policies* (2007) 296; Fox O'Mahony L & Sweeney JA "The idea of home in law: Displacement and dispossession" in Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011) 1-11 3. Dagan H "The social responsibility of ownership" (2007) 92 *Cornell Law Review* 1255-1274 1259-1260 discusses the relationship between the justification of control over external resources and their role in constituting personhood.

[50] Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016 957.

The necessity to provide constitutional protection for property in such a sphere of personhood appears from the US Supreme Court decision in *Loretto*.[51] The court's strong emphasis on the physical integrity of the property and the property owner's right to exclude is clearly linked to the will of the property owner.[52] Sharfstein claims that the pure exercise of exclusion rights has fostered personhood in American history.[53] For instance, a private family home is a smaller sphere of property that serves the promotion of personhood.[54] At the core of Radin's theory is the idea that an individual's attachment to particular property, such as a home, may be so strong that the particular property becomes constitutive of personhood.[55] Personhood is a more individualistic justification of private property,[56] which seems to reflect Hegel's idea of an individual's free will embodied in property.

The permanent physical occupation rule applied in *Loretto prima facie* appears to vindicate the owner's personhood interest.[57] However, from a different viewpoint, and in line with Radin's treatment of property, the personhood perspective does not justify the permanent physical occupation rule. Radin treats property owned by businesses as fungible rather than personal,[58] so that even if one assumes that a

[51] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 176.

[52] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 136, citing Peller G "The metaphysics of American law" (1985) 73 *California Law Review* 1151-1290.

[53] Sharfstein DJ "Atrocity, entitlement and personhood in property" (2012) 98 *Virginia Law Review* 635-690 675.

[54] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 411.

[55] Fox O'Mahony L & Sweeney JA "The idea of home in law: Displacement and dispossession" in Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011) 1-11 3, 5.

[56] Dagan H "The social responsibility of ownership" (2007) 92 *Cornell Law Review* 1255-1274 1259.

[57] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 176.

[58] See Alexander GS & Peñalver EM *An introduction to property theory* (2012) 175-176, citing Radin MJ *Reinterpreting property* (1993) 153-155. Radin view personal property as property that is

building is personal property, *de minimis* physical invasions, such as the cable installations at issue in *Loretto*, might not constitute significant intrusions on personal identity.[59] Generally speaking, a closer connection between property and personhood warrants stronger property entitlements that deserves constitutional protection[60] and therefore the right to exclude is at least important when and because it secures personhood.

The moral property theories seem to support the strong view of absoluteness. Ryan observes that Hegel's view of property is that the human will is essentially individual and property therefore essentially private[61] in the sense of excluding others from the property.[62] Another person can use the property but only if the owner decides to alienate his property, thereby disembodying his will.[63] Private property invokes rights against others (non-owners) entailing that, for example, they cannot have access to or use property in which the will of the owner is embodied without the owner's permission.

For Hegel, possession, use and alienation are simultaneously individualistic and relational. Some authors' perspective of Hegel's view on property is that property is needed by everyone for the development of freedom and personality.[64] Hegel does recognise a right to exclude, but because of the relational character

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connected with the proper development and flourishing of persons and fungible property as property that represents interchangeable units of exchange value. See also Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016 960, 986.

[59] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 176.

[60] Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016 986.

[61] Ryan A *Property* (1987) 60.

[62] Conklin WE *Hegel's law: The legitimacy of a modern legal order* (2008) 123.

[63] Hegel GWF *Hegel's philosophy of right* 1952 translated with notes by Knox TM 1967) 52.

[64] Waldron J *The right to private property* (1988) 351; Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 304.

embodied in his property theory, the right to exclude is not absolute; nonetheless, it is essential in depicting the nature and extent of private ownership.[65] At least from one reading of Locke's and Hegel's property theories, the right to exclude others is justified, on a moral basis, because it promotes personhood and personal autonomy. The result is that any limitation of the owner's right to exclude is exceptional and immoral except if the limitation is in accordance with the owner's will. Although these property theories play an important role in the understanding of property, they should not be interpreted as an unqualified endorsement of an absolute right to exclude.

2 2 2 Contemporary exclusion theory

A strong-absolute version of ownership and the right to exclude is integral to a set of more recent exclusion theories. Generally, within the private property system, ownership of a given resource is assessed on the basis of who can exclude others from interfering with the resource without the consent of the owner.[66] Penner's understanding of the right to exclude is expressed in what he refers to as the exclusion thesis, which means that the right to property is a right to exclude others from things that are firmly in the owner's interest to use.[67] According to Penner, an owner has the right to exclude others, and the very idea of property depends on the assumption that others are to be excluded.[68] Epstein argues that the institution of ownership gives people the right to exclude, not because they will invariably exercise it, but so that they can select those individuals to whom they will extend permission

[65] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 143.

[66] Lucy WNR & Barker FR "Justifying property and justifying access" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 287-318 293.

[67] Penner JE *The idea of property in law* (1997) 68-104.

[68] 74.

to enter their property.[69] The right to exclude is enforceable against the world, and permission isolates those individuals who are entitled to use the property subject to any terms and conditions the owner chooses to impose.

Similarly, Merrill argues that by virtue of simply excluding others, a landowner is free to determine the use of his property.[70] The right of a property owner to exclude others is not just one of the most essential sticks in the bundle that is seen as comprising property, but is in fact the "*sine quo non*" of property. He puts it as follows:

> "Give someone the right to exclude others from a valued resource … and you give them property. Deny someone the exclusion right and they do not have property".[71]

The conception of property is grounded in exclusion because, while property owners enjoy various legal rights, the right to exclude is both necessary and sufficient for identifying the existence of property.[72] Merrill advances three arguments in support of the view that the right to exclude others from one's property is both a necessary and sufficient condition of property.[73]

The first argument is a logical one, that is, if one starts with the right to exclude, it is possible to derive most of the other attributes commonly associated with property by adding minor clarifications about the domain of the exclusion right.[74] However, the converse is not true: if one starts with any other attribute of property,

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[69] Epstein RA "Takings, exclusivity and speech: The legacy of *PruneYard v Robins*" (1997) 64 *University of Chicago Law Review* 21-56 36.

[70] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 741.

[71] 730.

[72] 731. See also Dagan H *Property: Values and institutions* (2011) 38-39.

[73] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 740.

[74] 740.

one cannot derive the right to exclude by extending the domain of that other attribute. Rather, the right to exclude has to be added as an additional or independent premise.[75] Mossoff rejects this argument and claims that it is not necessary to start with the right to exclude, but that it is possible to start with other rights.[76]

The second argument in support of the primacy of the right to exclude is historical in nature. Merrill states that there is strong evidence that, with respect to land, the right to exclude is the first right to emerge in primitive property rights systems.[77] Since it appears that the right to exclude was the first to evolve in time, it is more basic to the institution of property than other incidents of property recognised in mature property systems.[78] The examples show that the first step in the evolution of property rights in land was the recognition of the right to exclude and once this right was established, it was possible to add other rights to the bundle.[79]

The third argument refers to existing legal practices in a mature legal system to determine whether the right to exclude is invariably associated with interests identified as property rights.[80] Merrill points out that where the law recognises a right to property, it confers a right to exclude and this cannot be the same with the other incidents of property identified by Honoré.[81]

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[75] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 740.

[76] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 396.

[77] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 745-747.

[78] 747.

[79] 746-747.

[80] 747.

[81] See Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 747-752 for examples in this regard.

Accordingly, Merrill's three arguments for the primacy of the right to exclude support the conclusion that the right to exclude provides the key to the understanding of the nature of property. This does not in any way suggest that the right to exclude must be or should be unqualified; it simply shows that if one has the right to exclude to a certain extent, one has property; if one does not have the right of exclusion, one does not have property.[82] Epstein also argues that it is indeed quite difficult to conceive of property as private if the right to exclude is rejected.[83] The right to exclude in a private property institution is essential because it tends to favour stability and predictability.[84] This argument suggests that rejecting the right to exclude, as a central feature, might bring uncertainty to the principles governing the private property institution.

Exclusion theorists value property's stability over change. Merrill and Smith argue that property institutions employ boundaries, which economise on information costs by delegating most decision making about the exercise of rights to owners.[85] Furthermore, they argue, by establishing boundaries and by granting owners the broad power to control access to property within those boundaries, the institution of private property rewards people who successfully gather information about the most

[82] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 753.

[83] Epstein RA "Takings, exclusivity and speech: The legacy of *PruneYard v Robins*" (1997) 64 *University of Chicago Law Review* 21-56 22. See also Bevier LR "Give and take: Public use as due compensation in *PruneYard*" (1997) 64 *University of Chicago Law Review* 71-82 76.

[84] Baron JB "The contested commitments of property" (2010) 16 *Hastings Law Journal* 917-968 940-952; Lovett JA "Progressive property in action: The land reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 750.

[85] Merrill TW & Smith HE "What happened to property in law and economics?" (2001) 111 *Yale Law Journal* 357-398 389.

productive use for the thing they own.[86] Interestingly, the economic argument for individual ownership is sometimes made with reference to the tragedy of the commons,[87] in that, by protecting the right to exclude, social costs or negative externalities are reduced. Even though negative externalities are reduced, the possibility of non-owners to negotiate access when transaction costs are low indicates a qualified but strong version of the right to exclude.

A utilitarian account of property claims that private property maximises human welfare. Its focus is on welfare maximization in that utility tends to produce benefit, advantage and happiness for the owner of privately owned land.[88] Such an account appears to favour the right to exclude, given that the landowner has a right to his property to the exclusion of others. The utilitarian defence of property in any form is the defence of the legal recognition of ownership as an instrument in promoting the greatest happiness for the largest number of people, and as such it attaches all the incidents of ownership to one person.[89] In this regard, the right to exclude therefore enhances utility.

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[86] Merrill TW & Smith HE "What happened to property in law and economics?" (2001) 111 *Yale Law Journal* 357-398 389. See also Alexander GS & Peñalver EM *An introduction to property theory* (2012) 136.

[87] Ziff B *Principles of property law* (5th ed 2010) 14. See also Demsetz H "Toward a theory of property rights II: The competition between private and collective ownership" in Parisi F & Rowley CK (eds) *The origins of law and economics: Essays by the founding fathers* (2005) 241-262; Hardin G "The tragedy of the commons" (1968) 162 *Science* 1243-1248.

[88] Bentham J "An introduction to the principles of morals and legislation" in Warnock M (ed) *Utilitarianism: John Stuart Mill* (1977) 33-77 34.

[89] Ryan A *Property* (1987) 54.

The economic approach to property is based on the idea that efficiency is a plausible measure of utility.[90] In line with the law and economics argument, the promotion of economic efficiency is usually advanced as a justification for private property.[91] Efficiency is defined in terms of success in satisfying the wants people actually have, and the only test of their having those wants is the choices they make when they are offered them in a marketplace. The efficiency argument founded on economic analysis of law can be described with reference to the Coase theorem.[92] The Coase theorem asserts that where there is a conflict involving property rights, the parties involved can always successfully bargain for an efficient outcome, regardless of the initial allocation of property rights, provided that transaction costs are zero.[93] If parties bargain successfully an efficient outcome can be achieved without government intervention, provided that transaction costs are low. Property rights are therefore awarded to the party who values them the most. By awarding property rights to the party who values them the most, the law makes exchange of rights possible when transaction costs are low.[94] Consequently, state intervention (in the form of enforced access rights) is unnecessary.

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[90] According to Ryan, utilitarianism justifies private ownership and assesses its merits and defects in terms of its efficiency whenever it is an aid to the general happiness. See Ryan A *Property* (1987) 103.

[91] Van der Walt AJ "Un-doing things with words: The colonisation of the public sphere by private-property discourse" 1998 *Acta Juridica* 235-281 244; Miceli TJ "Property" in Backhaus JG (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 247; Ziff B *Principles of property law* (5th ed 2010) 12.

[92] The *Coase theorem* was developed by Coase RH "The problem of social cost" (1960) 3 *The Journal of Law and Economics* 1-44.

[93] See Coase RH "The problem of social cost" (1960) 3 *The Journal of Law and Economics* 1-44; Miceli TJ "Property" in Backhaus JG (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 247.

[94] Cooter R & Ulen T *Law and economics* (4th ed 2003) 98.

Efficiency would be maximized when resources are in the hands of those who would pay most for them. It is only when full liberal ownership is vested in an individual that efficient outcomes are generated.[95] In view of the Coase theorem, the right to exclude lessens the externality problem by concentrating the costs and benefits on landowners, thereby providing them with an incentive to employ their resources efficiently. Accordingly, an unqualified right to exclude is more efficient because it minimizes the information cost of determining rights.[96]

In the absence of transaction costs or if transaction costs are low parties are forced to bargain for an efficient outcome.[97] What this means for ownership (the right to exclude) is that where there is an access claim to land, non-owners can bargain for access without the intervention of the courts or law. In other words, when transaction costs are low, non-owners can acquire access rights if they value those rights.

The conventional economic position provides that the principles governing property will lean towards efficiency and wealth maximization if several features are in place.[98] Firstly, the law should protect exclusivity of ownership, that is, it should enforce ownership rights and ensure that exclusive rights cannot be infringed by anyone else without the landowner's consent.[99] Secondly, the law needs to protect

[95] Barnes R *Property rights and natural resources* (2009) 43.

[96] Smith HE "Self-help and the nature of property" (2005) 1 *Journal of Law, Economics and Policy* 69-108 78.

[97] Coase RH "The problem of social cost" (1960) 3 *The Journal of Law and Economics* 1-44 1-19; Miceli TJ "Property" in Backhaus JG (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 247; Cooter R & Ulen T *Law and economics* (4th ed 2003) 85-89.

[98] Ziff B *Principles of property law* (5th ed 2010) 13.

[99] Ziff B *Principles of property law* (5th ed 2010) 13.

exclusivity of ownership to spur on productivity,[100] for example in cases where the landowner wants to make improvements on his land. In this regard, the economic justification of private property is that maximum productivity is promoted.[101] In addition, allowing the landowner to exercise his right to exclude curbs negative externalities and increases economic efficiency. Posner argues that if a landowner can exclude others from accessing any given area on his land, the landowner will endeavour by cultivation or other improvements to maximise the value of his land.[102]

Rose argues, although not from a law and economics perspective, that the right to exclude makes private property fruitful by enabling owners to capture the full value of their individual investments.[103] Similarly, Epstein argues doctrinally and not from a law and economics angle, that once an owner has the right to exclude, the ability to set the terms and conditions of admission should lead to the optimal use of the resource for all parties involved.[104] Private property rights can therefore also be justified by their ability to promote economic growth.[105]

Epstein suggests two possible ways to view the right to exclude.[106] In its stronger sense, the right to exclude is absolute in that no private party can overcome it unless he procures the consent of the owner. Calabresi and Melamed refer to this

[100] Ziff B *Principles of property law* (5th ed 2010) 13.

[101] Cohen MR "Property and sovereignty" (1927) 13 *Cornell Law Quarterly* 8-30 19.

[102] Posner RA *Economic analysis of law* (8th ed 2011) 40-41.

[103] Rose C "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53 *University of Chicago Law Review* 711-781 711.

[104] Epstein RA "Takings, exclusivity and speech: The legacy of *PruneYard v Robins*" (1997) 64 *University of Chicago Law Review* 21-56 31.

[105] Horwitz MJ "The transformation in the conception of property in American law, 1780-1860" (1973) 40 *University of Chicago Law Review* 248-290 251.

[106] Epstein RA "Takings, exclusivity and speech: The legacy of *PruneYard v Robins*" (1997) 64 *University of Chicago Law Review* 21-56 33.

as a "property rule".[107] Contrary to the stronger view, the right to exclude could be regarded as defeasible upon payment of just compensation. In such cases, the right to exclude is protected only by a "liability rule", such as that the owner of the right can be forced to surrender it to an outsider against payment of compensation.[108] The US Supreme Court has held that permanent deprivation of the right to exclude constitutes a taking of property that must be compensated.[109] In this way, the right to exclude is protected by a "liability rule" when there is a taking of property. Liability rules allow the courts to coerce exchanges in the allocation of rights when the transaction costs are high and bargaining is not possible.[110] The courts dictate the conditions under which relief is granted, by replacing the owner's consent with compensation in the form of a monetary payment.[111] This implies that the US Supreme Court, although not explicitly, applies the exclusion claim that the right to exclude should be upheld in property disputes, if necessary by transforming the property rule into a liability rule. In this context, applying a liability rule suggests that the right to exclude could be overruled or limited where transaction costs are high and a desirable exchange is only to be realised by the forcible or involuntary transfer of property rights. Transforming a property rule to a liability rule in this way, against compensation, undermines the idea that the right to exclude is absolute.

The strong-absolute view of ownership and the right to exclude is further illustrated by Merrill's discussion of three traditions regarding the role of exclusion in

[107] Calabresi G & Melamed DA "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128.

[108] 1089-1128.

[109] *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982). See also Peñalver EM "Property as entrance" (2005) 91 *Virginia Law Review* 1889-1972 1906.

[110] Miceli TJ "Property" in Backhaus JG (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 249.

[111] 249-250.

property, namely "single-variable essentialism"; "multiple-variable essentialism"; and "nominalism".[112] The three traditions distinguish between strong and weaker approaches to absoluteness although Merrill does not argue this point explicitly.

Firstly, the single-variable version of essentialism posits that the right to exclude others is the irreducible core attribute of property.[113] This version is in line with Blackstone's conception of ownership as "sole and despotic dominion". According to this conception, the right to exclude is both a necessary and a sufficient condition of property. Blackstone's conception in a way singles out the right to exclude as the most essential attribute of property. Such a notion has also been expressed in the work of Penner and Harris.[114] Accordingly, property is not merely dependent on different rights and duties, but rather the right to exclude is a necessary, essential characteristic of property.

The single-variable essentialism finds extensive support in the US Supreme Court decisions involving the government's attempts to secure access to private property for a public benefit.[115] In a series of cases,[116] the US Supreme Court sanctified the idea that the right to exclude others is essential to the concept of private property. The characterisation of the right to exclude as essential bears a connotation of absolutism. In US law, the absolute right to exclude is enshrined in

[112] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 735-739.

[113] 734-735.

[114] Penner JE *The idea of property in law* (1997); Harris JW *Property and justice* (1996). Cohen's work regarding the dialogue on the nature of private property considers a number of attributes that are commonly associated with property, but he came to the conclusion that only the right to exclude is invariably connected with all forms of property. See Cohen FS "Dialogue on private property" (1954) 9 *Rutgers Law Review* 357-387.

[115] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 735.

[116] *Kaiser Aetna v United States* 444 US 164 (1979); *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982); *Nollan v California Commission* 483 US 825 (1987).

the common law. The common law rule is that property owners may exclude others at will unless they fit in a small class of businesses with a duty to serve the public or if a civil-rights statute limits their right to exclude.[117] In *Kaiser Aetna v United States*[118] the US Supreme Court first declared the right to exclude a fundamental element of private property. In this case, a private marina was constructed on the island of Oahu, Hawaii and connected to a bay with the permission of the Army Corps Engineers. After the marina was connected to the bay, a dispute arose as to whether the public had to be given access to the marina under a navigational servitude. The Army Corps Engineers claimed that certain improvements to the marina resulted in a navigational servitude, which precluded the pond owners from denying public access to the pond. The court stated that the right to exclude is universally held to be a fundamental element of property and that it is one of the most treasured rights of property. As a result, the right cannot be terminated without just compensation.[119] The court characterised the government's activity as a physical invasion of property for which compensation had to be paid. Perhaps this is the most authoritative decision regarding the position that any physical intrusion in the form of permanent or continuous access to privately owned land violates the landowner's right to exclude.[120]

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[117] Singer JW "Property and equality: Public accommodations and the Constitution in South Africa and the United States" (1997) 12 *South African Public Law* 53-86 63.

[118] 444 US 164 (1979) 179-180. According to Singer JW *Introduction to property* (2nd ed 2005) 24 in the United States (US), the right to exclude is characterised as one of the central sticks in the bundle of rights comprising full ownership.

[119] *Kaiser Aetna v United States* 444 US 164 (1979) 179-180.

[120] Callies DL & Breemer JD "The right to exclude others from private property: A fundamental constitutional right" (2000) 3 *Washington University Journal of Law and Policy* 39-60 40-48; Singer JW *Introduction to property* (2nd ed 2005) 24.

In *Loretto v Teleprompter Manhattan CATV Corp*[121] the court confirmed that the right to exclude is the pinnacle of property rights. The court held that a New York law requiring landlords to allow cable companies to install cables and cable boxes on their buildings constituted a physical invasion. This occurs when the state or someone acting on its authority physically and permanently occupies someone's property.[122] The occupation must be direct and permanent.[123] A regulation like this triggers a *per se* taking irrespective of the slightness of the occupation, the triviality of the effect or whether there are any compelling reasons for the state's action.[124] In *Loretto*, the court held that regardless of the relatively minor intrusion, the government had authorised a permanent physical occupation of Loretto's property and that such a permanent physical occupation is a taking without regard to the public interests that it may serve. This ruling shows that even if property has other elements to it, the right to exclude is the core element.[125]

In *Nollan v California Coastal Commission*[126] the court emphasised the importance of the right to exclude by extending the protection of the right to non-

[121] *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982).

[122] Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 75-76.

[123] 76.

[124] Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 76, 93. In *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419, 427-431 (1982), the court held that such actions are always takings.

[125] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 136 explains that the decision in *Loretto* illustrates the strong emphasis on the right to exclude others from property as an essential stick in the bundle that makes up property. This is because of the fact that a physical and permanent invasion of property was deemed sufficient to constitute a taking of property.

[126] *Nollan v California Coastal Commission* 483 US 825 (1987).

permanent physical invasions. The case involved exactions[127] that authorised the public to enter private land over which the owners had previously had an unlimited right to exclude. The court held that the granting of a building permit that is conditioned on the dedication of a public right of way constituted an unconstitutional taking of private property.[128] The landowners' right to exclude was upheld, without any limitations. The right to exclude is therefore a fundamental aspect of private property, particularly in land.[129] This confirms the common law rule or formalistic approach to property that grants the absolute right to exclude unless it is limited by legislation.[130] In an earlier publication, Singer explains that, according to tradition and current constitutional law, the right to exclude is the most central right associated with property.[131] In *Nollan*, the exaction would have had the effect of restricting the owner's right to exclude the public from her land.[132] The classical conception of property suggests that all owners have rights to exclude non-owners, with only a few exceptions.

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[127] Exactions are concessions that cities extract from landowners who wish to change the use of their land in some way and are required to obtain the city's permission to do so. See Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 80.

[128] *Nollan v California Coastal Commission* 483 US 825 (1987). See also Neiderbach M "Transferable public rights: Reconciling public rights and private property" (1989) 37 *Buffalo Law Review* 899-928 914-915; Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 37.

[129] Callies DL & Breemer JD "The right to exclude others from private property: A fundamental constitutional right" (2000) 3 *Washington University Journal of Law and Policy* 39-60 39-40.

[130] Singer JW "No right to exclude: Public accommodations and private property" (1996) 90 *Northwestern University Law Review* 1286-1478 1301.

[131] Singer JW "Property and social relations: From title to entitlements" (1995) *Metro: Institute for Transnational Legal Research* 1-25 6.

[132] Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 81.

The physical invasion reasoning (*per se* taking) was qualified in *PruneYard Shopping Center v Robins*[133] because of the need to accommodate the right to freedom of speech and petition.[134] The court held that there was no taking when a state law required shopping centre owners to permit members of the public to enter shopping centres for the purpose of distributing leaflets.[135] Although the state-authorised occupation was direct and physical, it was only temporary and as such did not meet the *per se* taking requirements. In *PruneYard*, unlike *Kaiser*, the right to exclude was therefore not prioritised by the court. The owners of PruneYard Shopping Center failed to demonstrate that the right to exclude others is so essential to the use or economic value of their property that the state-authorised limitation of it amounted to a taking. The right to exclude was therefore limited to protect the non-property constitutional rights of the students who were asking people to sign petitions at the shopping centre.[136] The ruling does not prioritise the right to exclude abstractly and shows the interplay between constitutional rights and private property (the right to exclude); the importance of context; the nature of property in which the right to exclude can be exercised; and the qualified nature of the right to exclude.

Secondly, under the multiple-variable version of essentialism, the right to exclude is a necessary but not a sufficient condition of property.[137] This means that the right to exclude is only part of a list comprising of other entitlements of ownership

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[133] 447 US 74 (1980).

[134] Neiderbach M "Transferable public rights: Reconciling public rights and private property" (1989) 37 *Buffalo Law Review* 899-928 906.

[135] Alexander GS *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) 76.

[136] *PruneYard Shopping Center v Robins* 447 US 74 (1980) decision shows that the right to exclude can be subjected to limitations. A more detailed discussion of this case follows in the next chapter (Chapter 3).

[137] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 736.

(such as rights of use, enjoyment, and disposal), which are needed to create a bundle of rights that is sufficient to constitute property.[138] The multiple-variable version can be compared to Honoré's conception of ownership, which identified the standard incidents of ownership that provide the most ample conception of property to be found in a mature legal system.[139] Honoré's idea of property fits in perfectly with the multiple-variable version of essentialism, in that his explanation of property does not single out an essential minimum element; this can only be determined by law in each particular legal system. The multiple-variable version does not regard the right to exclude as the essence of property or as central to the understanding of property. Instead, the right to exclude is seen as just another right that contributes to the make-up of property.

Thirdly, nominalism views property as a purely conventional concept with no fixed meaning.[140] Property is therefore an empty vessel that can be filled by each legal system in accordance with its peculiar values and beliefs. In line with the nominalist view of property, the right to exclude is neither a sufficient nor a necessary condition of property. This means that the right to exclude may be a characteristic commonly associated with property, but its presence is not essential and therefore not a fundamental aspect of property. Merrill concedes that there are other rights associated with property but maintains that the courts in various takings

[138] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 736.

[139] Honoré T *Making law bind: Essays legal and philosophical* (1987) 161.

[140] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 737 states that the nominalist conception can be found in the nineteenth century, although it is basically a product of the Legal Realist movement of the twentieth century. Furthermore, he states that for the Legal Realists, property was not defined by a single right or definitive rights, rather as a "bundle of rights", which has no fixed core or constituent element.

cases have singled out and endorsed the right to exclude as the most essential right in property.[141]

It is one thing to say that the right to exclude is the most essential or core right of property and quite another to say the right to exclude is absolute. None of the justificatory grounds embodied in moral property theories or in the more recent exclusion theory indicates that a landowner has an absolute right to exclude. These theories appear to support a strong but qualified right to exclude. The justifications support exclusionary practices to some extent, but they also allow for access rights, and sometimes they even require or recognise non-owners' access rights.[142] Hence, the same theoretical arguments can justify both landowners' exclusion rights and non-owners' access rights.

2 2 3 Exclusive-use theories

There are some interesting variations on the idea that the right to exclude is the defining feature of property. Exclusive use theorists such as Katz, Mossoff and Claeys embrace the idea that some kind of unifying and robust exclusion right exists at the core of property ownership, but differ with the exclusion theorists on the ground that the central value that property law protects is not so much a formalistic, boundary-based right to exclude, but the exclusive authority of property owners to set agendas about the use to which property can be put.[143]

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[141] Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 735.

[142] Dagan H "The public dimension of private property" (2013) 24 *King's Law Journal* 260-288 284.

[143] In this regard see Lovett JA "Progressive property in action: The land reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 751; Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 375; Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 275; Claeys ER "Property 101: Is property

As opposed to theories that depict the right to exclude as the core of property, the exclusive use theories conceive property as a right to exclusively determine the use to which property is put.[144] The right to exclude means more than the right of physical exclusion from privately owned land. The overarching idea of exclusivity is that the owner holds a monopoly over the rights and entitlements that are recognised as part of ownership of his property.[145] The owner is in a position to make decisions regarding his property that must be respected by non-owners.[146] Katz proposes the "exclusivity model" to describe her own view and understanding of ownership.[147] Her understanding of the structure of ownership in property law is that its central concern is not exclusion of all non-owners from the property, but rather the preservation of the owner's position as the exclusive agenda setter for the property. Ownership is a legal concept with a well-defined structure, which derives from its nature an exclusive right or authority to make decisions about the use of property.[148] Even though ownership is an exclusive right as indicated by the boundary approach, the right to exclude does not describe the essence of ownership.[149] Instead, ownership's defining characteristic is that it is the special authority to set the agenda for a resource - the exclusivity of ownership is just one aspect of ownership's nature as a

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a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650 631; Dagan H *Property: Values and institutions* (2011) 39-40.

[144] Claeys ER "Property 101: Is property a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650 618.

[145] Ziff B *Principles of property law* (5th ed 2010) 6.

[146] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 argues that the exclusivity associated with ownership means the exclusive right to set the agenda as to how property is to be used.

[147] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 275, 278.

[148] 289-293.

[149] 290.

position of agenda-setting authority rather than exclusivity being the essence of ownership.[150] Exclusivity of ownership places landowners in a special position to set the agenda for the property they own and therefore it is wrong to suggest that the owner's right to exclude (gatekeeping function) is the essence of property.[151] Property law protects ownership not by upholding an absolute right to exclude others but by harmonising their interests in the use of the object with the owner's agenda-setting authority.[152]

Similarly, Mossoff claims that, even though the right to exclude is an essential characteristic of property, it is not a fundamental or sufficient element in the concept of property.[153] Instead, the fountainhead of property is possessory rights, namely the rights of acquisition, use, and disposal, and the right to exclude is only a corollary of these three core rights, a secondary or derivate right within the concept of property.[154] This view is contrary to Merrill's view that the right to exclude is the starting point and that all other rights are derived from it. In light of Mossoff's view, it may be possible to start with any other right like the right to use. In this way, the right to exclude can be invoked as a protection mechanism when an owner has already

[150] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 278, 290.

[151] Dagan H *Property: Values and institutions* (2011) 40.

[152] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 278 argues that the law accomplishes this in two ways: Firstly, familiar property law doctrines, such as the rules against perpetuities, easement law and finder's law, carve out a position of authority for owners that is neither derived from nor subordinate to any other's. These and other rules create the institutional structure that permits the owner to function as the supreme agenda setter for the resource. Secondly, property-related tort law protects the owner's exercises of authority by obligating others to act in a way that is consistent with the owner's actual or imputed agenda. See also Dagan H *Property: Values and institutions* (2011) 40.

[153] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 376, 392.

[154] 376, 393.

identified his property entitlements. As Mossoff argues, the right to exclude is therefore only a formal claim.[155] Claeys also disagrees with the exclusion theorists' (Merrill and Smith) idea of reducing ownership to an owner's right to exclude others from his property and instead refers to property as a right to determine exclusively how a thing may be used.[156] An exclusive right to use determination justifies the rights owners have to use the things they own exclusively in a productive way.[157] The particular use of the property, therefore, determines whether non-owners can have access or not because the owner has a more general and exclusive right to choose how to use his land.[158] The exclusive use determination gives conceptual focus to the "exclusion" in a right to exclude. Claeys argues that "exclusion" is not necessary to property; it is only a feature of property.[159] Property exclusion does not exclude non-owners from the thing, but rather from the "dominion or indefinite right of user or disposition" associated with the thing.[160]

The exclusive use theorists' arguments differ descriptively from the exclusion theorists' arguments. The exclusive use theorists show that exclusion is not always about physical exclusion, creating boundaries or a simple keep-off message. Rather, exclusion is an exclusive right to use,[161] or to determine the use of the property[162] or

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[155] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 396.

[156] Claeys ER "Property 101: Is property a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650 631.

[157] 650.

[158] 637.

[159] 633.

[160] 633.

[161] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444.

[162] Claeys ER "Property 101: Is property a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650.

an exclusive right of agenda-setting.[163] A landowner has the power to control and make decisions regarding the use of his property but cannot exclude non-owners. Exclusive-use decision making can be limited by law (regulation) in specific instances, depending on the nature of the property and the identity of the owner. The exclusive use theorists' conception of property suggests that property is a social concept, that is, it plays a role in structuring social relations, which is more or less what the progressive property theorists argue as well. Exclusive-use theory creates the potential for mutual accommodation with regard to the property, whereas exclusion theory merely states a particular outcome, a simple keep-off rule.

In a similar vein, Dagan states that property should not be solely about exclusion or exclusivity and that, at times, inclusion is part of what property is, rather than being external to its core.[164] Dagan is mainly concerned about non-owners' claim to have access to property. One of the examples he uses is the law of public accommodations, which is widely recognised as an important limitation on the right to exclude.[165]

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[163] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315.

[164] Dagan H *Property: Values and institutions* (2011) 48. See also Kelly DB "The right to include" (2014) 63 *Emory Law Journal* 857-924 869. Cohen FS "Dialogue on private property" (1954) 9 *Rutgers Law Review* 357-387 372 points out that property is not just about the ability of the owner to exclude but it also enables the owner to grant permission to non-owners to use his property. Private property presupposes a realm of private freedom: without freedom to bar one man from certain activity and to allow another man to engage in the activity there would not be property. This private freedom enables the owner to grant access to non-owners. Cohen was not an exclusive-use theorist but a realist, who wrote half a century ago and reached a comparable conclusion in the context of the realist theory.

[165] Singer JW "No right to exclude: Public accommodations and private property" (1996) 90 *Northwestern University Law Review* 1283-1497; Sandoval-Strausz AK "Travelers, strangers and Jim Crow: Law, public accommodations and civil rights in America" (2005) 23 *Law and History Review* 53-94.

Dyal-Chand's notion of a forced sharing of property provides a comparable theoretical basis for limiting the right to exclude.[166] Dyal-Chand proposes an interest-outcome approach that focuses on sharing instead of exclusion.[167] The interest-outcome approach is a means of resolving property disputes where more than one legitimate interest exists concerning the use, possession or access to a piece of property.[168] In instances where a dominant tenement owner or an encroacher demonstrates a need to use the property, such need could be answered through the enforcement of sharing by the courts. The common law principles dealing with the enforcement of a right of way of necessity and encroachments appears to be a good example of an enforced common law sharing remedy. The outcome in disputes concerning a right of way of necessity or encroachment[169] also often amounts to compelled sharing instead of exclusion. In this regard, the courts focus on the actual use of the land, the interests of the parties and compensation to construct a sharing remedy.[170] Sharing as a feature of property law ensures mutual accommodation of rights and interests of the parties involved in a particular dispute.

2 2 4 Progressive property theory and exclusivity

There is currently a robust debate about how too much emphasis on the right to exclude overshadows the issue of access rights relating to land. On numerous occasions, scholars have disagreed on whether the right to exclude is the core of

[166] Dyal-Chand R "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723.

[167] 647-723.

[168] 676-683 for a detailed explanation of the interest-outcome approach.

[169] See especially the *Roseveare v Katmer, Katmer v Roseveare and Another* (2010/44337, 2010/41862) [2013] ZAGPJHC 18 (28 February 2013) decision where the court ordered the creation of a non-consensual servitude in favour of the encroacher.

[170] See Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77 27-28.

property. Baron reviews this scholarly debate with reference to two theoretical approaches to property, which she describes as information theory and progressive theory.[171] The information theorists argue that exclusion (the right to exclude) constitutes the core of property,[172] while the progressive theorists argue that human relationships and values constitute the core of property. Other scholars in this debate do not belong to either the information or progressive group, but their arguments are premised on more or less the basic assumptions.[173] The scholarly debate on exclusion focuses on the extent to which the right to exclude can be exercised (or on the centrality of its role in property law) and how this affects fundamental human rights if non-owners are denied access to land.

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[171] See Baron JB "The contested commitments of property" (2010) 16 *Hastings Law Journal* 917-968. The information theorist group is led by Thomas Merrill and Henry Smith, while the progressive scholars are led by Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler. Both groups have made powerful and seemingly irreconcilable claims about the function and normative value of exclusion rules in property law. For further discussion of the debate see Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818; Rosser E "An ambition and transformative potential of progressive property" (2013) 101 *California Law Review* 107-172; Van der Walt "The modest systemic status of property rights" (2014) 1 *Journal of Law, Property and Society* 15-106.

[172] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 746 describes this group as "information or formal exclusion theorists".

[173] In this regard see Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 750-753. Lovett mentions other voices engaged in the exclusion debate, which he describes as reciprocity theorists and exclusive use theorists. Hanoch Dagan and Michael Heller are described as reciprocity theorists (citing Dagan H & Heller MA "The liberal commons" (2001) 110 *Yale Law Journal* 549-623; Dagan H "The social responsibility of ownership" (2007) 92 *Cornell Law Review* 1255-1273; Dagan H "Takings and distributive justice" (1999) 85 *Virginia Law Review* 741-804). Larissa Katz, Adam Mossoff and Eric Claeys are described as the exclusive use theorists (citing Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315; Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-443; Claeys ER "Property 101: Is property a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650; Claeys ER "Virtue and rights in American property law" (2009) 94 *Cornell Law Review* 889-947). See the discussion in section 2 2 3 above.

The information or formal exclusion theorists (hereinafter exclusion theorists) rely on the idea that property revolves around exclusion or exclusivity.[174] These theorists argue that the right to exclude is at the centre of the property system because it consolidates a large number of powers in one property owner, which sends a simple message to non-owners to keep off.[175] Katz argues that exclusion theorists, like Merrill, propose a model of ownership that emphasises the owner's right to exclude non-owners from the property as the central defining feature of ownership.[176] Katz refers to this model as the "boundary or exclusion-based approach" because it focuses on the owner's power to decide who may cross the boundaries of the property. In an exclusion-based (or boundary) approach, ownership is the product of a norm that protects the boundaries around an object so as to exclude the whole world except the owner.[177] It follows that the owner controls access to the attributes of the resource within the boundaries, which are his by virtue of the exclusion of others. The essential feature of the exclusion-based approach is the power to determine who can enter and who must keep out.[178] In effect, ownership has a gatekeeping function in that property law constructs not a wall but

[174] In this regard, see the discussion in section 2 2 2 above.

[175] Baron JB "The contested commitments of property" (2010) 16 *Hastings Law Journal* 917-968 936-940, citing Smith HE "Exclusion and property rules in the law of nuisance" (2004) 90 *Virginia Law Review* 965-1049 984; Smith HE "Property and property rules" (2004) 79 *New York University Law Review* 1719-1798 1754. See also Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 23.

[176] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 275-276.

[177] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 281. See also Claeys ER "Property 101: Is property a thing or a bundle?" (2009) 32 *Seattle University Law Review* 617-650 638 who states that Merrill and Smith construe exclusion to refer to boundaries and the incidents of control and use protected by boundaries.

[178] Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 289.

rather a gate, which an owner may open or shut according to his or her preferences.[179] This metaphor is a reminder that property creates power relationships among people.[180]

Baron asserts that progressive property theorists attempt to ground the system of property on values rather than on transaction costs and externalities of information.[181] Progressive property theorists state that "we must look to the underlying human values that property serves and the social relationships it shapes and reflects".[182] These theorists focus on the role that property and property law play in a free and democratic society, and often remark that property rights can be limited to further the interests of society or to enforce human values.[183] This implies that property is often subject to limitations and obligations to secure these interests and values. Singer, Peñalver, Alexander, Underkuffler and Purdy propose a democratic model of property, which recognises that property serves plural values and that the law should reflect those multiple values.[184] The argument that property serves

[179] Penner J *The idea of property in law* (1997) 74.

[180] Ziff B *Principles of property law* (5th ed 2010) 6-7.

[181] Baron JB "The contested commitments of property" (2010) 16 *Hastings Law Journal* 917-968 924.

[182] Alexander GS, Peñalver EM, Singer JW & Underkuffler LS "A statement of progressive property" (2009) 94 *Cornell Law Review* 743-744 743.

[183] Perhaps such scholarly remarks are informed by the US Supreme Court decision in *State of New Jersey v Shack* 58 NJ 297 (1971). As Dyal-Chand R "Pragmatism and postcolonialism: Protecting non-owners in property law" (2014) 63 *American University Law Review* 1683-1748 1689 puts it: "It is no small wonder that *State v Shack* has achieved iconic status in property law, and particularly among property scholars who identify (or are identified) as progressives." See also Rosser E "An ambition and transformative potential of progressive property" (2013) 101 *California Law Review* 107-172 125, who gives an indication that the *Shack* decision has a bearing on the arguments propounded by the progressive theorists.

[184] Singer JW "Democratic estates: Property law in a free and democratic society" (2009) 94 *Cornell Law Review* 1009-1062 1046-1047, 1054. See also Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160; Alexander GS "Pluralism and property" (2011) 80 *Fordham Law Review* 1017-1052; Underkuffler LS *The idea of property: Its meaning and*

human values has been extended by several theorists in theoretical literature. For example, Alexander states that the pluralistic conception of human flourishing means that property serves multiple values that are incommensurable[185] and that give a person the opportunity to live as fulfilling a life as possible.[186] These values include personal autonomy, individual security, self-development or self-realisation, social welfare, community and sharing, fairness, friendship and love.[187] Dagan also points out that property law reflects a commitment to not just one value but to multiple values.[188] Furthermore, Singer rejects the idea that the right to exclude is the core of property or that property should be defined in terms of exclusion. Property is defined not by reference to a fixed conception but by reference to human values and these values underlying property rights are various and incommensurable.[189] Property rights implicate values such as individual autonomy, liberty, personal security, fairness, economic efficiency, social welfare, social justice and human dignity[190] and

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power (2003); Purdy J "A freedom-promoting approach to property: A renewed tradition for new debates" (2005) 72 *University of Chicago Law Review* 1237-1298.

[185] Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887 1877; Alexander GS "Pluralism and property" (2011) 80 *Fordham Law Review* 1017-1052 1036-1039. See also Dagan H *Property: Values and institution* (2011) 58-62.

[186] Alexander GS "Property's ends: The publicness of private law values" (2014) 99 *Iowa Law Review* 1257-1296 1260.

[187] Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887 1877.

[188] Like Alexander, Dagan also offers a pluralist conception of property, which entails that property is an umbrella for a set of institutions, serving a pluralistic set of liberal values such as autonomy, utility, labour, personhood, community and distributive justice. See Dagan H *Property: Values and institutions* (2011) 69-74. See also Dagan H "Pluralism and perfectionism in private law" (2012) 112 *Columbia Law Review* 1409-1446 1412, 1438-1445; Dagan H "Remedies, rights and properties" (2011) 4 *Journal of Tort Law* 1-29 3 available online at SSRN: <http://ssrn.com/abstract=1718521> (accessed on 02-07-2014).

[189] Singer JW *Entitlement: The paradoxes of property* (2000) 37; Singer JW *The edges of the field: Lessons on the obligations of ownership* (2000) 1-6.

[190] Singer JW *Entitlement: The paradoxes of property* (2000) 20, 31, 63.

accordingly, limitation of the right to exclude by law to advance public access rights to property or occupancy rights of tenants and farmworkers can be justified by underlying human values or moral principles - what Singer calls the reliance interest in property.[191]

The view that property serves human values seeks to justify limiting the right to exclude and to strengthen arguments about the social-obligation norm.[192] Since property serves human values and concerns social relations, landowners have obligations in addition to rights. Alexander has advanced arguments for the social-obligation norm, in light of the commitment to human flourishing.[193] An analysis of the social-obligation norm paves the way to look at further theoretical justifications that highlight the relative nature of the right to exclude and justifications for limiting the right to exclude such as virtue ethics;[194] human flourishing;[195] democratic governance;[196] and public policy.[197]

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[191] Singer JW "The reliance interest in property" (1988) 40 *Stanford Law Review* 611-751 622.

[192] Also known as the social function norm of property.

[193] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819.

[194] Peñalver EM "Land virtues" (2009) 94 *Cornell Law Review* 821-888.

[195] Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160; Alexander GS "Pluralism and property" (2011) 80 *Fordham Law Review* 1017-1052; Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887; Alexander GS "Property's ends: The publicness of private law values" (2014) 99 *Iowa Law Review* 1257-1296. See also Freyfogle ET "Private ownership and human flourishing: An exploratory overview" (2013) 24 *Stellenbosch Law Review* 430-454.

[196] Singer JW "Democratic estates: Property law in a free and democratic society" (2009) 94 *Cornell Law Review* 1009-1062; Singer JW "Property law as the infrastructure of democracy" (2011) 1-13 available online at SSRN: <http://ssrn.com/abstract=1832829> (accessed on 02-07-2014); Singer JW "The rule of reason in property law" (2013) 46 *University of California Davis Law Review* 1369-1434.

[197] Singer JW *Introduction to property* (2nd ed 2005) 39.

Property scholars have argued that the social-obligation norm exists in US law. This norm entails that property owners have social responsibilities to others that extend beyond the highly individualized conventional account of property rights.[198] According to Alexander, the social-obligation norm strongly resonates in two categories.[199] The first category consists of cases in which the landowner's entitlements, including the right to exclude, are limited in exchange for monetary compensation, in other words cases in which ownership entitlements are protected by liability rules instead of property rules.[200] In South African law, an example would be encroachment cases, where the remedy for removal that upholds the right to exclude is denied and compensation is awarded instead. Similarly, the courts will sometimes grant a right of way of necessity without the consent of the servient tenement but subject to compensation.[201] The second category deals with cases in which the property owner continues to hold title to his property but loses the right to

[198] In this regard see Dagan H *Property: Values and institutions* (2011); Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819; Purdy J "A freedom-promoting approach to property: A renewed tradition for new debates" (2005) 72 *University of Chicago Law Review* 1237-1298.

[199] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 752.

[200] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 752, citing Calabresi G & Melamed DA "Property rules, liability rules and inalienability: One view of the Cathedral" (1972) 85 *Harvard Law Review* 1089-1128.

[201] With regard to the first category, the examples Alexander mentions in his article points towards something like expropriation. See Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 774-782. The two examples in the South African law context that I mention, namely encroachment and right of way of necessity cases are not examples of expropriation, although the affected landowners are forced to give up their ownership entitlements, such as the right to exclude, against compensation. In South African law, there is no common law authority for expropriation. The authority for expropriation derives exclusively from statutes. In this regard see, Van der Walt AJ *Constitutional property law* (3rd ed 2011) 346, 452-458; Van der Walt AJ & Raphulu TN "The right of way of necessity: A constitutional analysis" (2014) 77 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 468-484 483-484.

use it in some way because of judicial order or legislative regulation.[202] Both these categories highlight instances in which the right to exclude is limited, without explicitly citing something like the social-obligation as the justification for this limitation.

Alexander claims that the social-obligation norm explains and justifies decisions concerning instances when the right to exclude is limited.[203] The social-obligation norm is shaped by the desire to promote the capabilities[204] that are essential to human flourishing, which refers to the idea that individuals should live lives worthy of human dignity.[205] Imposing a set of obligations on landowners or limitations on property interests, such as non-consensual transfers and use restrictions, is a means for promoting human flourishing.[206] The social-obligation norm entails that the landowner must provide the means for others (non-owners or other landowners) to

[202] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 752.

[203] 748.

[204] Capabilities refer to the freedom or power to choose to function in particular ways. See Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 137, citing Nussbaum MC *Women and human development: The capabilities approach* (2000) 87-88.

[205] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 748. See also Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 135 stating that:

> "[A]ny adequate account of human flourishing must stress two characteristics. First, human beings develop the capacities necessary for a well-lived, and distinctly human life only in a society with, indeed, dependent upon, other human beings. To put the point even more directly, living within a particular sort of society, a particular web of social relationships, is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish".

[206] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819 775-791.

flourish if their property bears a sufficient nexus to ensure or to cater for the needs of others.[207]

The idea of the social-obligation norm signifies that property rights should have their share of social responsibility.[208] Mirow points out that the notion of the social-obligation norm contrasts with the idea of absolute ownership and that it has been used to justify limitations on the use of property by its owner, such as in cases of expropriation and the redistribution of property through land reform programmes.[209] Mirow concludes that the social-obligation theory is important because property rights are defined and enshrined in constitutions and civil codes.[210] An analysis of the social obligation theory of ownership assists in determining the justification for limiting the right to exclude; the nature of the concept of ownership;[211] and the appropriate way to reconcile and balance the landowners' with non-owners' interests in land so as to promote human flourishing.

Alexander and Peñalver discuss human capabilities that symbolise well-lived lives, namely life (including subsidiary goods such as health and security); freedom (including identity and self-knowledge); practical reason (involving the capacity of deliberating well about what is good and advantageous for oneself); and affiliation or

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[207] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819 780-782, 795-799, 807-808.

[208] Mirow MC "The social-obligation norm of property: Duguit, Hayem and others" (2010) 22 *Florida Journal of International Law* 191-226 192. See also Alexander GS "Pluralism and property" (2011) 80 *Fordham Law Review* 1017-1052 1022-1023. See also Crawford C "The social function of property and the human capacity to flourish" (2011) 80 *Fordham Law Review* 1089-1134, who argues that the social function of property can be understood as a notion that aims to secure the goal of human flourishing for all citizens within any state.

[209] Mirow MC "The social-obligation norm of property: Duguit, Hayem and others" (2010) 22 *Florida Journal of International Law* 191-226 192.

[210] 226.

[211] Alexander GS "Pluralism and property" (2011) 80 *Fordham Law Review* 1017-1052 1023.

sociality (encompassing subsidiary goods such as social participation, self-respect and friendship).[212] The point they make is that an individual cannot acquire these capabilities on his own; he is dependent on others to flourish.[213] Some degree of state intervention in resource distribution is required so that non-owners can benefit from the property institution.[214] It is possible to argue, as Alexander does,[215] that the South African Constitution extends the idea of a social-obligation norm because of its inclusion of an explicit commitment to land reform (the property clause)[216] and provisions that create a number of positive socio-economic rights.[217] The land reform programmes indicate that private property rights are subject to the social needs of others.[218] Furthermore, he argues that the socio-economic rights provisions show that the landowner's interests coexist with the constitutional entitlements of non-owners to basic needs such as housing.[219] To this extent, for example, the Extension of Security of Tenure Act[220] as well as provisions in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[221] and the Rental Housing Act,[222] are

[212] Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 138. See also Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819 765; Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887 1875.

[213] Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 138.

[214] 147.

[215] Alexander GS *The global debate over constitutional property: Lessons from American takings jurisprudence* (2006) 149.

[216] Section 25 of the Constitution of the Republic of South Africa, 1996.

[217] For example sections 26, 27, 28 and 29 of the Constitution of the Republic of South Africa, 1996. Section 26, the housing provision is of particular importance to this study.

[218] Alexander GS *The global debate over constitutional property: Lessons from American takings jurisprudence* (2006) 161.

[219] 161.

[220] 62 of 1997 (ESTA) gives effect to section 25(6) - legally secure tenure.

[221] 19 of 1998 (PIE) gives effect to section 26(3) – anti-eviction provision.

necessary interventions that support the state's obligation to impose regulatory measures on the landowners' use and control of their land to foster human flourishing. For purposes of this dissertation, one can say that non-owners require a degree of access to private, public or quasi-public property to enhance their capabilities.[223] As a result, limiting the landowner's right to exclude is justified because the landowner contributes to non-owners' human flourishing or the fulfilment of their human capabilities.

In South African law the rights to secure tenure and adequate housing foster a sense of belonging and also advance the rights to life and human dignity. The realisation of these constitutional rights will often place limitations on the right to exclude. In such circumstances, access rights that are backed by the Constitution cannot be seen as exceptional limitations on the right to exclude but as built-in elements of the property system. Regulatory measures that limit the right to exclude to ensure access to land for housing purposes are justified because, in view of the human flourishing idea, housing is needed for people to live in a healthy environment and enjoy their right to life. This reasoning is in line with the social-obligation norm or social function of property, which demands equality, fairness and justice when it comes to access to land. Therefore, the state has legitimate and justifiable grounds for granting access rights on privately owned land against the landowner's will.

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[222] 50 of 1999.

[223] Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 138 state that freedom, practical reason and sociality can meaningfully exist only within a vital matrix of social structures and practices.

Alexander posits that property rights are inherently relational and as such owners owe obligations to others, both owners and non-owners.[224] From this perspective, property rights, including the right to exclude, are deeply informed by the cultural, political and social norms of a given society. For non-owners to flourish they require access to property and this sometimes requires limiting the right to exclude of those who own property so as to ensure that human values of non-owners are guaranteed as well. Excluding others (landowners and non-owners) means that the development of human flourishing is limited. Indeed, limiting the right to exclude by granting access to others who seek access to be on or to pass over private, public or quasi-public land should be viewed as a way of promoting human flourishing. In line with the human flourishing idea, access rights are so fundamental that exclusion of non-owners would have to be justified in instances where the development of human flourishing is dependent on access to land.

Peñalver and Alexander are of the opinion that the social-obligation norm should guide landowners when making decisions that also accommodate non-owners.[225] Recently, Alexander has argued that ownership of governance property[226]

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[224] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 747-748. For other writings on the relational aspect of property see also Peñalver EM "Property as entrance" (2005) 91 *Virginia Law Review* 1889-1972; Underkuffler LS *The idea of property: Its meaning and power* (2003); Singer JW *Entitlement: The paradoxes of property* (2000) 95-139; Singer JW *The edges of the field: Lessons on the obligations of ownership* (2000); Singer JW & Beermann JM "The social origins of property" (1993) 6 *The Canadian Journal of Law and Jurisprudence* 217-248; Nedelsky J "Reconceiving rights as relationship" (1993) 1 *Review of Constitutional Studies* 1-26.

[225] Peñalver EM "Land virtues" (2009) 94 *Cornell Law Review* 821-888; Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820. See also Katz L "The regulative function of property rights" (2011) 8 *Econ Journal Watch* 236-246 243.

[226] Governance property refers to multiple-ownership property that does not have the right to exclude as its central characteristic or most important element. In this regard see Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887 1856, 1887.

contributes to the development of virtues that are necessary for human flourishing.[227] Peñalver defines virtues as "acquired, stable dispositions to engage in certain characteristic modes of behaviour that are conducive to human flourishing".[228] He identifies virtue ethics as a useful normative view for thinking about property and property law.[229] Peñalver argues that the case of *State of New Jersey v Shack*[230] provides an example in which virtue-based obligations sometimes justifiably limit the landowner's power to exclude.[231]

Singer has focused on the landowner's obligations that flow from reliance and social relations.[232] His description of property as "the law of democracy"[233] implies that property law shapes social life and both reflects and promotes fundamental values.[234] Property is all about the social order in that it reflects and enables our conception of what it means to live in a free and democratic society that treats each person with equal concern and respect.[235] In the same vein, Dagan argues that property in its broader sense embodies social values, reflects them and participates in their formation.[236] Dagan accepts that the right to exclude others from property can be limited and that this is justified because property can be or is used to serve

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[227] Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887 1876.

[228] Peñalver EM "Land virtues" (2009) 94 *Cornell Law Review* 821-888 864. See also Alexander GS "Governance property" (2012) 160 *University of Pennsylvania Law Review* 1853-1887 1876.

[229] Peñalver EM "Land virtues" (2009) 94 *Cornell Law Review* 821-888.

[230] *State of New Jersey v Shack* 58 NJ 297 (1971) 369.

[231] Peñalver EM "Land virtues" (2009) 94 *Cornell Law Review* 821-888 883.

[232] Singer JW "The reliance interest in property" (1988) 40 *Stanford Law Review* 611-751.

[233] Singer JW "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335.

[234] 1291.

[235] Singer JW "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335 1299. See also Singer JW "Democratic estates: Property law in a free and democratic society" (2009) 94 *Cornell Law Review* 1009-1062 1010, 1047.

[236] Dagan H "The public dimension of private property" (2013) 24 *King's Law Journal* 260-288 262.

commitments to personhood, desert, aggregate welfare, social responsibility and distributive justice.[237]

Limiting the right to exclude by including non-owners as lessees, or farm workers, is also grounded in the social-obligation norm justificatory arguments. According to Singer, landowners have an obligation to allow non-owners access to their property if they have previously and voluntarily granted access or opened their property to others.[238] In line with this view, in the case of a lease (landlord-tenant situation) or farm owner-farmworker relationship, limiting the right to exclude is justified if the landowner has voluntarily granted access in the form of granting use and occupancy rights to his property to a tenant or farmworker. Singer also refers to *State of New Jersey v Shack*,[239] where the court held that a farm owner could not prevent migrant farmworkers living on his property from receiving visitors in the privacy of their dwellings or interfere with farmworkers' opportunity to live with dignity and to enjoy associations customary among citizens.[240] The farm owner cannot exclude visitors in such cases because when he granted access rights to the farmworkers to be on his private land for accommodation and working purposes, he effectively waived part of his right to exclude their visitors from his property.

In *State of New Jersey v Shack*,[241] the court recognised and upheld the fundamental importance of the right to life and human dignity of the migrant workers at the expense of the landowner's right to exclude. The Supreme Court held that:

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[237] Dagan H "The public dimension of private property" (2013) 24 *King's Law Journal* 260-288 274.

[238] Singer JW "The reliance interest in property" (1988) 40 *Stanford Law Review* 611-751 675. See also Singer JW *Introduction to property* (2nd ed 2005) 39.

[239] *State of New Jersey v Shack* 58 NJ 297 (1971) 369.

[240] 374.

[241] 58 NJ 297 (1971).

> "Property rights serve human values. They are recognised to that end and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity."[242]

Access rights in this case rested on the social needs of the farmworkers and their relative vulnerability, as well as on the landowner's prior consent. Alexander is of the view that the limitation of the right to exclude in *State of New Jersey v Shack* is justified on the basis of the capabilities of life and affiliation, which depend on the landowner's social obligation to contribute to the human flourishing of others.[243] I agree with both Alexander and Singer on this point; looking at the facts of *State of New Jersey v Shack*, the landowner's obligation to permit access does support the capabilities of life and health and advances other non-property constitutional rights.

A similar conclusion can be drawn with regard to the facts of *Nhlabathi and Others v Fick*.[244] Although the case involved legislation,[245] it shows how the right to exclude is limited where the landowner had voluntarily granted access to farmworkers for employment and accommodation purposes. In *Nhlabathi and Others v Fick* the right to exclude was limited by a statutory right to establish a grave, which gives effect to farm occupiers' non-property constitutional rights, namely secure tenure as well as religious and cultural rights.[246]

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[242] *State of New Jersey v Shack* 58 NJ 297 (1971) 372.

[243] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 809.

[244] 2003 (7) BCLR 806 (LCC).

[245] The Extension of Security of Tenure Act 62 of 1997.

[246] See Chapter 3 below for a further discussion of the case.

In certain instances the social-obligation norm also applies to businesses that serve the public. US case law, such as *Uston v Resorts International Hotel, Incorporation*,[247] extended the right of reasonable access to all places open to the public. As a result of the reasonable access rule, property owners who open their property to the public have an obligation not to exclude others. Moreover, their exclusionary rights are limited in public accommodations on the basis of race, colour, religion and national origin.[248]

The social-obligation norm also applies in cases dealing with public access to beaches.[249] The social-obligation norm in cases involving access to and use of privately-owned beaches entails that the landowner is to ensure reasonable access to the beach to the general public as a way of supporting the capabilities of life of others.[250] To this extent, limiting the right to exclude for recreational purposes can be justified by the commitment to further non-owners' ability to flourish. Alexander argues that recreation is a necessity that is an important aspect of the capabilities of life and affiliation. With regard to the capability of life, he suggests that health is the most vital aspect, in that if all persons are provided with reasonable access to basic modes of recreation and relaxation, this would contribute to the goal of living capable lives.[251] With regard to the capability of affiliation or sociability, Alexander writes that

[247] 445 A2d 370 (NJ 1982).

[248] Civil Rights Act of 1964; Fair Housing Act of 1968.

[249] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 806.

[250] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819 804-807 argues that owners of private beaches are obligated to grant access to non-owners for recreational purposes. See also *Matthews v Bay Head Improvement Association* 471 A2d 355 (NJ 1984); *Raleigh Avenue Beach Association v Atlantis Beach Club Inc* 879 A2d 125 (NJ 2005).

[251] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 806.

"affiliation includes the ability to recognise and show concern for other human beings, to engage in various forms of social interaction; and to be able to imagine the situation of another".[252] Affiliation encompasses friendship and social participation, which are important for social relationships.[253] I agree with Alexander's suggestion that recreation is an important aspect of health, which is a key dimension of the capability of life.[254] If provision is made for everyone, both non-owners and landowners, to have reasonable access to beaches for recreation and relaxation, this would in turn contribute to the goal of living lives worth living.

The public trust doctrine, which also supports access rights to beaches, could be said to encompass the social-obligation norm. The doctrine was adopted in California and New Jersey state law as the doctrinal basis for requiring public rights of access to private beaches.[255] In *Matthews v Bay Head Improvement Association* the court reasoned that the public trust doctrine acknowledges that the ownership, dominion and sovereignty over land, which extends to the mean high water mark, is vested in the state in trust for the people.[256] Consequently, the landowner's right to

[252] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 806, citing Nussbaum M "Human rights and human capabilities" (2007) 20 *Harvard Human Rights Journal* 21-24 23.

[253] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 806. See also Rose C "The comedy of the commons: Custom, commerce and inherently public property" (1986) 53 *University of Chicago Law Review* 711-781 779 who argues that recreation can be a socializing and educative influence, which is particularly helpful for democratic values.

[254] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-819 806-807.

[255] *Matthews v Bay Head Improvement Association* 471 A2d 355 (NJ 1984).

[256] *Matthews v Bay Head Improvement Association* 471 A2d 355 (NJ 1984) 369. The court held that the public trust doctrine establishes an easement over "quasi-public lands" for the public to have access to the beach.

exclude is limited for recreational purposes so as to meet the public needs (legitimate interests of non-owners) and to further the general welfare.

The same argument, that recreation is an important aspect of human capabilities, can be used to justify limiting the right to exclude when non-owners use their statutory right to roam on privately owned land. Anderson states that the British government's commitment to improving countryside access is grounded in values such as providing for transportation by foot, enhancing the enjoyment of nature, promoting mental and physical health, facilitating a historical and cultural connection and building a sense of community.[257] Although not arguing from a social-obligation perspective, the values Anderson mentions contribute to the human capabilities of life, health and affiliation. Therefore, the limitation presented by the Countryside and Rights of Way Act[258] is justified because its provisions place strong emphasis on promoting these human capabilities. Roaming rights under the CROW Act and the Land Reform (Scotland) Act[259] also evoke a sense of community among non-owners who share access rights to land.[260] Lovett argues that the provisions of the LRSA incorporate and seek to promote virtues of responsibility, humility as well as mutual regard, and that they also provide more potential for human flourishing.[261] Accordingly, landowners have an obligation to foster the abovementioned capabilities and this obligation requires landowners to allow non-owners to have

[257] Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259 255.

[258] 2000 (UK) (CROW Act).

[259] 2003 (LRSA).

[260] In this regard see Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259 256.

[261] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 778, 817.

access to their land.[262] Court decisions that effectively enforce human capabilities result in limiting the right to exclude while the needs of others, both owners and non-owners, are upheld against the landowner's right to exclude.

According Alexander, property law promotes human capabilities through shaping human relationships of reciprocity and community.[263] The community is necessary to create and foster such social relationships, which enhance norms such as dignity, equality, respect, justice and freedom and not just individual interests.[264] In view of the community argument, limiting the right to exclude in the South African constitutional context when it clashes with non-property constitutional rights is justified because of the need to advance, protect and promote the rights to life, human dignity and equality. These rights are the most fundamental rights in the Constitution, so that allowing non-owners to have access to private, public or quasi-public land ensures the exercise of these rights and other intricately linked rights in the Bill of Rights.

The arguments advanced by the progressive property theorists provide valuable justifications or the basis for justificatory arguments for limiting a landowner's right to exclude by granting non-owners access rights to his property. Of interest to this dissertation is that these theorists to a greater or lesser extent show that the enforcement of property rights, the right to exclude in particular, stops where

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[262] For writings on property rights and obligations, see Peñalver EM "Land virtues" (2009) 94 *Cornell Law Review* 821-888 870; Singer JW "The ownership society and takings of property: Castles, investments, and just obligations" (2006) 30 *Harvard Environmental Law Review* 309-338 314, 328-338.

[263] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 760-773.

[264] Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 139.

there is a need for both non-owners and other landowners to have access rights to be on or to pass over the landowner's land. In this context, although access rights are limitations, they are not described as exceptions. This means that sometimes not the access rights but the exclusion of non-owners must be justified.

2 3 The idea of absolute ownership and exclusivity: A doctrinal analysis

2 3 1 The content of landownership in South African law: General background

It is difficult to describe ownership in a simple definition.[265] Any understanding of ownership is based on historical, philosophical, religious, economic, political and social considerations.[266] In South African law, the definition of ownership most often referred to emanates from court decisions and academic literature, which highlight historical developments and various views regarding the notion of ownership. The current principles of ownership are based on Roman-Dutch law.[267]

Ownership was never defined in Roman law but the institution of ownership existed. However, in early Roman law, there was no precise notion of ownership.[268]

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[265] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 91.

[266] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 91; Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 7-8.

[267] In this chapter, I do not provide a full or comprehensive historical overview of the Roman-Dutch law; instead, I refer to certain sources.

[268] Diósdi G *Ownership in ancient and preclassical Roman law* (1970) 51. Johnston D *Roman law in context* (1999) 53 states that ownership in Roman law was difficult to define and the Romans did not trouble themselves to define it. Borkowski A & Du Plessis P *Textbook on Roman law* (3rd ed 2005) 157 state that there has been speculation about the nature of ownership in Roman law. It seems that the Romans lacked a precise concept of ownership in early law. There was perhaps no need to have a precise concept of ownership because early Roman society was structured in such a way that property disputes would be a rarity. The *paterfamilias* exercised control over the persons and things in his household.

The concept of *dominium* emerged later on while the terminology for ownership was still rather vague in early law.[269] The ownership that Roman law recognised was called *dominium* in classical law.[270] This referred to the relationship of a *dominus* to a *res*. Furthermore, it was a relationship, not a right or a bundle of rights.[271] In Roman law, ownership was not regarded as an absolute or unrestricted right.[272] In other words, *dominium* was never absolute in Roman law.[273] Ownership was limited in various ways,[274] including by public law in the interest of public health and safety. Secondly, an owner could voluntarily limit his right of ownership by giving actual use and enjoyment to others, for instance by usufruct.[275] Thirdly, the power of an owner

[269] Borkowski A & Du Plessis P *Textbook on Roman law* (3rd ed 2005) 157; Diósdi G *Ownership in ancient and preclassical Roman law* (1970) 51.

[270] Prichard AM *Leage's Roman private law: Founded on the Institutes of Gaius and Justinian* (3rd ed 1961) 158; Robinson JJ *Selections from the public and private law of the Romans: With a commentary to serve as an introduction to the subject* (1905) 165.

[271] Prichard AM *Leage's Roman private law: Founded on the Institutes of Gaius and Justinian* (3rd ed 1961) 158.

[272] See Visser DP "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52; Birks P "The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* 1-38; Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 217; Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457; Scott H "Absolute ownership and legal pluralism in Roman law: Two arguments" in Mostert H & Bennet T (eds) *Pluralism and development: Studies in access to property in Africa* (2011) 23-34 24.

[273] Visser DP "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 39, 48 (with reference to footnote 7); Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 217 (with reference to footnote 28).

[274] Thomas PhJ *Introduction to Roman law* (1986) 37.

[275] Another example is that the owner could agree to lease his property to another and so divest himself of the possession (in the sense of physical control) and allow the lessee the use and enjoyment of the property. See Van Warmelo P *An introduction to the principles of Roman civil law* (1976) 78.

over his land was fettered by his neighbours' rights to enjoy their property.[276] These limitations on ownership show that it was by no means absolute.

A similar picture regarding the absoluteness of ownership appears in Roman-Dutch law. Roman-Dutch law was neither characterised by an absolute notion of ownership, nor was it the source of the view of absolute ownership as it might be discernible in South African law, because in most instances ownership was restricted by both private and public law.[277] Roman-Dutch law in this regard developed on the basis of Bartolus' definition of ownership as the right to perfectly dispose over a corporeal object, insofar as is not prohibited by law.[278] Bartolus' definition of ownership appears to create the idea of ownership as an absolute right, but in fact it does not.[279] The fact that his definition ends with the words "… insofar as is not prohibited by law" means that ownership is enjoyed within the boundaries of what the law allows. Arguably, Bartolus' definition is similar to the modern German definition of ownership, namely that "ownership is what the law allows".[280] Bartolus' definition of ownership shows that ownership is not absolute but inherently limited. Bartolus'

[276] Limitations established by law in the interest of neighbours. See Van Warmelo P *An introduction to the principles of Roman civil law* (1976) 78.

[277] Visser DP "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 39, 43, 47.

[278] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 404 (with reference to footnote 38); Van der Walt AJ "Bartolus se omskrywing van *dominium* en die interpretasies daarvan sedert die vyftiende eeu" (1986) 49 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 305-321 305. Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 577-578 states that Bartolus was the first to formulate the definition of ownership in Roman-law tradition during the fourteenth century.

[279] Van der Walt AJ *The law of neighbours* (2010) 43-44.

[280] Van der Walt AJ *Property in the margins* (2009) 33 (with reference to footnote 6) states that the Dutch Civil Code (*BW* 5:1) and the German Civil Code (*BGB* § 903) provide that the owner is free to use the property as he wishes and to the exclusion of everybody, within the limits laid down by law.

definition was adopted by Grotius, who views ownership as the power to make full use of the object for one's own benefit and according to one's own will, to the extent that such use is not prohibited by law.[281] Grotius' definition gives rise to the Roman-Dutch idea that ownership grants the landowner the most comprehensive collection of entitlements, including the right to exclude.[282] However, Grotius' definition, just like Bartolus' definition of ownership, does not describe ownership as an absolute right. The definitions of ownership proposed by Bartolus and Grotius have been influential in Roman-Dutch law and this is reflected in the definition of ownership generally upheld in South African law.[283]

The idea that ownership is absolute is a product of nineteenth century pandectism. Windscheid describes ownership as the power, granted by law and backed up by judicial remedies, to enforce one's will against others.[284] In this context, a real right is a right that allows the beneficiary to enforce her will by determining the actions of everybody else with regard to the object of the right.[285] This definition emphasises the exclusive nature of real rights and distinguishes

[281] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 404.

[282] Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 2 *South African Journal on Human Rights* 169-206 178; Van der Walt AJ *Property in the margins* (2009) 32.

[283] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 91. See also *Johannesburg City Council v Rand Townships Registrar* 1910 TS 1314 1319; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 106-107; *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

[284] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 406, citing Windscheid *Lehrbuch des Pandektenrechts* 1982. See also Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 572.

[285] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 406.

ownership from limited real rights in a particular way. The difference is that ownership gives an owner the power to exclude others and to determine the use of the property, while the beneficiary of a limited real right has the power to exclude others only in regard to certain uses of the object.[286] For example, a lease conveys the right to exclusive possession on the tenant; that is, the right in the tenant to exclude all comers from the property, including the landlord.[287] Windscheid's description of the subjective right presents ownership as largely characterised by the power to exclude, either absolutely or according to the nature of the right. Arguably, a sense of individual power and autonomy is thereby incorporated into the notion of exclusivity, in line with the metaphor "a man's home is his castle". In this regard, it appears that the right to exclude is an essential element of ownership and of all real rights, although it is relative to each kind of right.

Windscheid's definition indicates that the source of the notion of absolute ownership is nineteenth-century pandectism and not Roman-Dutch law.[288] It is due to the pervasive influence of pandectist scholarship that the institution of ownership is generally described and understood as "absolute" in academic literature, where

[286] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 406; Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 573.

[287] Cowan D, Fox O'Mahony L & Cobb N *Great debates in property law* (2012) 88.

[288] In this regard see Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 453-455; Van der Walt AJ "The fragmentation of land rights" (1992) 8 *South African Journal on Human Rights* 431-450 433; Vandevelde KJ "The new property of the nineteenth century: The development of the modern concept of property" (1980) 29 *Buffalo Law Review* 325-368 328; Horwitz MJ "The transformation in the conception of property in American law, 1780-1860" (1973) 40 *University of Chicago Law Review* 248-290 248.

pandectism had most influence.[289] In the pandectist system of rights, ownership is the most complete real right, which allows the owner to enforce his will with regard to all aspects of the control and use of the property.[290]

The South African civil-law[291] concept of ownership has been adopted in the theory of subjective or private-law rights, where it reflects Windscheid's definition of rights and specifically of ownership.[292] The theory of subjective rights is accepted in private-law doctrine, especially during the pre-constitutional era, as a good reflection of the nature of private law rights.[293] In this doctrinal context, ownership is perceived as a stronger and more valuable right than either limited real or personal property rights because it is the most extensive real right, and it is portrayed as absolutely enforceable. Furthermore, ownership is stronger and more valuable than limited real rights because it is the most complete and comprehensive real right from which all

[289] Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 696-697. See also Visser DP "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 46-47.

[290] Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 574.

[291] According to Van der Walt, the nineteenth-century pandectist concept of ownership greatly influenced the traditional civil-law perception of ownership as both ascribe absoluteness and exclusivity to the nature of ownership. See Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 569-570.

[292] Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 2 *South African Journal on Human Rights* 169-206 178; Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 402-410.

[293] See in this regard Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 2 *South African Journal on Human Rights* 169-206 178. See also Van der Walt AJ "Gedagtes oor die herkoms en ontwikkeling van die Suid-Afrikaanse eiendomsbegrip" (1988) 21 *De Jure* 16-35, 17-18; Mostert H *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) 171-176.

other limited real rights are derived.[294] This more or less pandectist notion of absoluteness only affected South African academic literature, but it had no visible effect on case law. Van der Merwe could be regarded as the first academic scholar to establish the foundation of the modern conception of ownership.[295] His definition of ownership as the most complete and extensive private right that a person can have with regard to a corporeal thing is generally accepted in South African law.[296] Van der Merwe's definition is also an indication of the acceptance of the notion of absolute ownership from the nineteenth century pandectists, such as Windscheid, that forms part of the South African common law tradition, at least in academic literature.

In case law, the courts refer to the Roman-Dutch law definition, namely that ownership is the most complete right that allows any use of property insofar as the law does not prohibit it, which is still based on Bartolus' definition. In Roman-Dutch law ownership is neither absolute (unlimited) nor exclusive. The definition used by the South African courts includes the qualification "what the law allows". The case law indicates that ownership is considered absolute only in the sense that it is a more complete right than the limited real rights. This implies that ownership is not regarded as absolute in the sense that a landowner can do what he wants, because

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[294] Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 2 *South African Journal on Human Rights* 169-206 179.

[295] See Van der Merwe CG *Sakereg* (2nd ed 1989) 173 regarding his authoritative definition of ownership. See also Van der Walt AJ "Introduction" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 1-7 1; Mostert H *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) 176.

[296] Van der Merwe CG "Ownership" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 27 (1st Reissue 2002) 217-355 para 295; Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 696-697.

the exercise of ownership rights depends on what the law allows. Accordingly, a landowner's right to exclude is qualified in that he can exercise his right to the extent that it is not prohibited by law. The case law displays a more or less consistent adherence to this non-absolute approach.[297]

In *Johannesburg Municipal Council v Rand Townships Registrar*[298] the court held that Savigny's definition of ownership may be accepted as high authority. Savigny defines *dominium* (ownership) as the unrestricted and exclusive control that a person has over a thing.[299] The court further explained that the owner, although he has full control of the immovable property, also has the power to part with so much of his control as he pleases.[300] The owner may, if he chooses, let his property to another to use the land for a certain period of time against the payment of a certain rent. However, despite the pandectist language the court's decision does not in fact reflect the absolute conception of ownership that would correspond with Savigny's definition. The court referred to Roman-Dutch law, *inter alia*, stating that a lessee could not be ejected by a purchaser on the basis of the *huur gaat voor koop* rule that protects the lessee against eviction before the expiry of the lease.[301] The *huur gaat voor koop* rule does not reflect the notion of absolute ownership that would resemble Savigny's definition. This decision is an exception to the general observation regarding case law in the sense that courts very seldom refer to Savigny (who also

[297] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 7 argues that the pandectist view of ownership as an absolute, individualistic and unrestricted right was erroneously accepted in South African case law as the legacy of Roman and Roman-Dutch law.

[298] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TS 1314 1319.

[299] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TS 1314 1319. See also Lewis C "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 241; Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 7.

[300] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TS 1314 1319.

[301] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TS 1314 1320.

was not a pandectist), although in this respect his definition looks similar to the pandectists' notion of ownership. The courts usually refer to the Roman-Dutch law notion of ownership.

Savigny's view of ownership contradicts Bartolus' notion of ownership, and it is also impractical in modern-day conditions. Pienaar explains that ownership of immovable property is generally limited in four ways, namely by the limited real rights of others to the property; by the personal rights of others against the owner of the property regarding the use, control, alienation, vindication and encumbering of the property; by legislation and public-law limitations in respect of regulatory measures that are of general interest to the state and the general public; and by limitations on the exercise of entitlements by owners and occupiers in accordance with the social function of the law in the interest of the community.[302] This suggests that Savigny's definition of ownership cannot be accepted as a good reflection of South African law.

In *Chetty v Naidoo*[303] the court, instead of giving a full definition of ownership, focused on just one of the entitlements of ownership, namely the right of exclusive possession, which means that the owner has a right to vindicate his property from anyone who does not have a right of possession. This decision might appear as if it contradicts the general observation about case law because it focuses on exclusive possession. The fact is that *Chetty v Naidoo* deals with the *rei vindicatio*, and it is therefore natural to consider that one entitlement as the primary focus. The decision does not suggest that the right to exclude or to vindicate is absolute.

[302] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 28.

[303] *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

In *Gien v Gien*[304] the court held that ownership is the most complete real right that a person may have in respect of a thing, within the confines of the law.[305] This definition indicates that the scope and content of ownership are qualified or restricted by what the law allows, in line with Bartolus' notion of ownership.

Ownership is also defined in case law as the sum total of all real rights that a person can possibly have to and over corporeal property.[306] However, the most widely accepted definition in South African case law is that ownership is the real right that potentially confers the most complete or comprehensive control over property, subject to what the law allows.[307] Despite different views on the definition of ownership, it appears that the definition adopted in *Gien v Gien*[308] remains the most influential in South African common law. This definition says nothing about absoluteness or even exclusivity; it merely highlights the difference between ownership and possession or the limited real rights.

The views of the courts, as expressed in case law,[309] regarding the definition of ownership emphasise the owner's complete or comprehensive control over property insofar as the law does not prohibit. As a point of departure, ownership can be

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[304] *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

[305] 1120.

[306] Maasdorp AFS *Maasdorp's Institutes of South African law volume II: The law of property* (10th ed 1976 edited and revised by Hall CG) 27.

[307] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 91, citing Bartolus on *D* 41.2.17 n1 and Grotius 2.22.1. See also Van der Walt AJ "The fragmentation of land rights" (1992) 8 *South African Journal on Human Rights* 431-450 434; Scott S "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stellenbosch Law Review* 351-377 352.

[308] *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

[309] *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TS 1314 1319; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

regarded as absolute only to the extent that it is a complete real right, subject to limitations.

2 3 2 The notion of absolute ownership

Absoluteness is a characteristic[310] mainly ascribed to landownership in South African law, probably under the influence of nineteenth century pandectism.[311] This section considers the different meanings or aspects of absoluteness and how each aspect relates to the exclusivity of ownership.

Firstly, ownership is said to be absolute in the sense that it is the most complete real right, which distinguishes it from limited real rights. As appeared from section 2 3 1 above, this is a typically Roman-Dutch view of ownership. Referring to ownership as a complete real right denotes its fullness in the sense that only ownership includes all the entitlements of ownership, whereas a holder of a limited real right or personal right only has a limited entitlement to use someone else's property temporarily.[312] This meaning of absoluteness is described by Cowen as

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[310] A characteristic is a doctrinal notion, which is different from an entitlement. An entitlement indicates what an owner can or cannot do with his property.

[311] Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 694; Van der Merwe CG "Ownership" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 27 (1st Reissue 2002) 217-355 para 297 (with reference to footnote 7); Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 3-4; Scott H "Absolute ownership and legal pluralism in Roman law: Two arguments" in Mostert H & Bennet T (eds) *Pluralism and development: Studies in access to property in Africa* (2011) 23-34 23-24.

[312] Van der Walt AJ *Property in the margins* (2009) 32; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 92; *Gien v Gien* 1979 (2) SA 1113 (T) 1120.

plena in re potestas.[313] In principle, the notion of absoluteness in this sense refers to completeness in the sense that the owner holds all entitlements that have not been suspended or transferred to someone else. There is nothing in this definition that contradicts or undermines the fact that the law may restrict the exercise of ownership in the interests of neighbouring owners and the general public.[314]

Furthermore, the notion of ownership as the most complete right indicates that the owner has all entitlements unless he limits it himself by transferring certain entitlements to a non-owner. The owner can transfer some of his entitlements freely without his ownership of property being terminated. For example, upon transfer of a limited use right a servient owner loses some aspect of the right to exclude but this does not mean that the dominant owner acquires the right to exclude because both owners can use the servitude area (for example the road).[315] At this point, neither the servient owner nor the dominant owner has an absolute right to exclude. This is already an indication that the right to exclude is an entitlement and not a characteristic of ownership, in that it shows what the servient or dominant owner can do with the property. This aspect of absoluteness does not necessarily imply a strong version of exclusivity, since the existence of the servitude limits the powers of the servient owner to exercise his right to exclude. Ownership is not absolute

[313] Cowen D *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 8-9. See also Van der Walt AJ "Introduction" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 1-7 2.

[314] Cowen D *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 67.

[315] In *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 22 the court ordered that the first and second applicant (servient tenement owners) are entitled to be provided with a remote device to the security gate erected at the entrance of the servitude area by the owner of the dominant tenement (servitude holder). This is an indication that a servitude holder does not have exclusive use of or access to the burdened servient land.

because the owner has the most extensive collection of entitlements. Rather, ownership is absolute only to the extent that it is the most complete real right, to distinguish it from limited real rights. Accordingly, exclusion is not in any way absolute because, as an entitlement of ownership, it does not distinguish ownership from limited real rights since the right to exclude others could either be suspended or transferred to the holders of limited real rights or personal rights, while other entitlements may well be more important than exclusion in a given case.

Secondly, ownership is sometimes said to be absolute in the sense that the property is held by an individual owner to the exclusion of others.[316] This is also referred to as the characteristic of individuality. The individuality of ownership means that there is only one kind of ownership and that ownership is not fragmented.[317] This suggests that, apart from co-ownership (undivided ownership that is jointly held by co-owners), only one person can own property and the owner's right is enforceable against the whole world.[318] Van der Walt claims that this individualistic character of ownership underlies the strong protection afforded to an owner, in terms of which the owner can vindicate his property from anyone who is in possession of it

[316] Van der Vyver JD "Ownership in constitutional and international law" 1985 *Acta Juridica* 119-146 134 identifies exclusivity in the sense of the power of disposition that allows an owner to exclude the competing title of any other person to the same object. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 175; Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447.

[317] Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 214; Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 4.

[318] Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 214; Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 4.

without being able to prove a valid legal cause for his possession.[319] The individuality of ownership sets out the position of the owner regarding his property against other legal subjects and also indicates the exclusive nature of the right that an owner holds. This aspect presents a different meaning of absoluteness from the previous one and it places more emphasis on exclusivity, but it does not necessarily imply a strong version of exclusivity. This aspect simply shows that only one person can hold the right to exclude all others from the use and exploitation of property at a given time, but it does not describe the extent to which the right to exclude can be exercised by the landowner. It therefore does not imply that exclusivity is absolute or even strong.

Thirdly, ownership is said to be absolute in that it is perceived as an abstract right to indicate that ownership is always more than the sum total of its constituent entitlements and that it is not exhausted or eroded by the temporary granting of limited real rights or by the temporary imposition of restrictions.[320] This means that ownership is a totality of rights, contrary to the bundle of rights approach. By implication, when limitations are imposed on the owner, they are only temporary. Ownership resumes its fundamental completeness as soon as the limitations fall

[319] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447.

[320] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447; Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 582. See also Mostert H *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) 179-180.

away.[321] In the same sense, ownership is also perceived as an indivisible[322] and therefore a non-fragmented right.

This perception of absoluteness of ownership as an abstract right relates to the "elasticity of ownership".[323] Some authors also refer to the elasticity of ownership as its residuary character.[324] Importantly, the elasticity of ownership embraces the idea that when rights in property that are held by persons other than the owner are terminated, for instance when a servitude terminates, those rights automatically revert back to the owner.[325] Cowen uses an analogy or image of a "rubber ball" to explain the idea of the elasticity of ownership:

> "Ownership is like a rubber ball in that no matter how much it might be compressed, it automatically expands again and recovers or attracts back the various subtractions, or *iura in re aliena*, once these come to an end."[326]

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[321] Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589 575. See also Dannenbring R *Roman private law* 1968 92 (translation of Kaser M *Römisches Privatrecht* 6th ed 1960).

[322] Van der Walt AJ "The future of common law landownership" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 21-35 31.

[323] Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 76; Lewis C "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 257.

[324] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 93; Mostert H *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) 180.

[325] Lewis C "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 257. See also Van der Walt AJ "Property rights and hierarchies of power: An evaluation of land reform policy in South Africa" (1999) 64 *Koers* 259-294 268; Van der Merwe CG "Ownership" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 27 (1st Reissue 2002) 217-355 para 296.

[326] Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 76.

In other words, regardless of limitations imposed on property, the owner will retain the residual right. In South African law, some authors claim that the elasticity of ownership renders it absolute and thus distinguishes it from all other rights that the owner may have in property.[327] Contrary to this claim, Honoré depicts elasticity as a mere incident of ownership, which forms part of his list of standard incidents of ownership.[328] The notions of abstractness, elasticity or residual and indivisible character of ownership appear to have the same effect, that is, as soon as a limitation falls away ownership resumes its natural completeness. Van der Walt[329] observes that Van der Merwe[330] ascribes the characteristics of elasticity and abstractness to the definition of ownership in that, even if it is limited, it remains absolute in principle and renders all limitations exceptional.

The abstractness of ownership is an aspect of absoluteness that has some implications for exclusivity. If ownership (property rights) is seen as something that is necessarily more than the sum total of all its constituent entitlements, ownership is not looked at in view of the context in which it appears or is exercised. Ownership, as a right, is determined abstractly and statically. Since context does not play a role, the exclusivity of ownership, like all the entitlements, is exercised and protected regardless of context, with the result that the right to exclude assumes the abstract and context-free character sometimes associated with its supposed absoluteness.

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[327] Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 75, 77; Lewis C "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 257.

[328] Honoré T *Making law bind: Essays legal and philosophical* (1987) 175-179.

[329] Van der Walt AJ "Introduction" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 1-7 1-2.

[330] Van der Merwe CG *Sakereg* (2nd ed 1989) 175-176.

Fourthly, ownership is said to be absolute in the sense that it is unlimited in principle, allowing the owner to do with his property as he likes, even though it might be subject to temporary restrictions.[331] Van der Walt argues that this perception of ownership, which has dominated South African legal doctrine, is often equated with private individual ownership of property in a free market environment.[332] Private landownership in a free market endows the owner with entitlements that are unrestricted in principle, but may allow for the existence of restrictions.[333] This

[331] Van der Walt AJ "The future of common law landownership" in Van der Walt AJ (ed) *Land reform and the future of landownership in South Africa* (1991) 21-35 31; Van der Walt AJ "Roman-Dutch and environmental land-use control" (1992) *South African Public Law* 1-11 4; Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447; Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 2 *South African Journal on Human Rights* 169-206 178-179; Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-289. See also Visser DP "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 39 (with reference to footnote 7); Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 3; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 91-92; Scott S "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stellenbosch Law Review* 351-377 376; Van der Merwe D "Property in mixed legal systems: South Africa" in Van Maanen GE & Van der Walt AJ (eds) *Property law on the threshold of the 21st century* (1996) 355-388 364-365.

[332] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 446.

[333] This is generally accepted as a correct perception of ownership because it has its roots in Roman and Roman-Dutch Law, which forms the backbone of South African law. See Visser DP "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52; Birks P "The Roman law concept of dominium and the idea of absolute ownership" 1985 *Acta Juridica* 1-38; Van der Walt AJ & Kleyn DG "Duplex dominium: The history and significance of the concept of divided ownership" in Visser DP (ed) *Essays on the history of law* (1989) 213-260 213-214; Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 4-5.

indicates that an owner is free to do what he pleases with his property, unless his right is restricted by legislation or by consent.[334]

It is not contentious to say that ownership confers on a landowner the right to do with his property as he pleases, within the confines of the law. Limitations (and in this case, access rights of others imposed or protected by law) are seen as temporary restrictions on a right that is in principle exclusive.[335] As a point of departure, the presumption is always in favour of exclusion and one has to prove that it is limited. Underkuffler and Singer refer to this aspect as the "presumptive power of ownership".[336] However, this statement can have two very different meanings.

The starting point of the South African law of ownership is that ownership is the most complete right, which is presumed to be free from limitations imposed by law or by the owner's consent. The presumptive power requires limitations on ownership to be proven, but as soon as one proves the existence of a limitation on ownership, the right exists and is protected only within the confines of that limitation.

By contrast, the strong versions of exclusion theory hold that property or ownership can be limited only in exceptional cases, which means that every limitation must not only be proved but justified on normative grounds. In this view, ownership should be allowed to operate freely and with the minimum of state

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[334] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 446-447; Van der Walt AJ *Property in the margins* (2009) 33.

[335] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 3-4; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 170-171. See also Singer JW *Entitlement: The paradoxes of property* (2000) 3.

[336] Underkuffler LS *The idea of property: Its meaning and power* (2003) 65-70; Singer JW *Entitlements: The paradoxes of property* (2000) 3. See also Van der Walt AJ *Property in the margins* (2009) 39, 59.

interference.[337] Limitations should be imposed only when they are strictly justified, and only on a temporary basis, which leaves ownership unrestricted in principle. This aspect of absoluteness of ownership implies exclusivity in that the landowner has absolute discretion to exclude anyone from his property, unless a specific limitation on that right was either granted by the owner or is justified by overriding normative considerations. In the absence of such justification, limitations imposed by the law can in principle be attacked on the basis of invalidity. This is perhaps the one understanding of absoluteness that really implies exclusivity, and where the hierarchical supremacy of ownership as an absolute right grants the landowner an absolute right to exclude anybody who cannot prove a valid and enforceable access or occupation right.[338]

However, this is not the understanding of absoluteness that appears from South African law. The common law *rei vindicatio* is the principal remedy by which ownership is protected.[339] The *rei vindicatio* entitles a landowner to recover property from any person who has possession of it. To succeed, the owner is required to prove that he is the owner of the property; that the property is in the possession of the defendant; and that the property is still in existence and clearly identifiable.[340] If a

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[337] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446-457 447; Van der Walt AJ "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 569-589. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 169-170.

[338] Van der Walt AJ *Property in the margins* (2009) 34.

[339] Van der Walt AJ "Ownership and eviction: Constitutional rights in private law" (2005) 9 *Edinburg Law Review* 32-64 42.

[340] *Chetty v Naidoo* 1974 (3) SA 13 (A); Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 243-244; Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 343; Van der Walt AJ "Housing rights in the intersection between expropriation and eviction law" in Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011) 55-100 55 (with reference to footnote 3).

landowner can fulfil these requirements he would normally be entitled to an eviction order. The moment the landowner fulfils the requirements, he acquires the right to recover his property. The only common law defence available to the defendant is to allege and prove a valid right of occupation, for example the existence of some right to possess arising from a lease agreement or from law.[341] An unlawful occupier, who has no valid right of occupation, cannot prove such a defence and the landowner's property rights takes precedence. The remedy is also used in holding over cases, where the legal basis for the occupation had lapsed or where a lease agreement had been cancelled and an occupier refuses to leave,[342] in other words where occupation was once lawful but became unlawful.

In this context, the common law *rei vindicatio* plays a major role in characterising the power of ownership.[343] The case of *Chetty v Naidoo*[344] is a classic example. The court held that the owner was entitled to exclusive possession of property,[345] an entitlement which arises from ownership or is inherent in ownership. In the common-law tradition, an eviction application by a private landowner using the

[341] Van der Merwe CG "Ownership" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 27 (1st Reissue 2002) 217-355 para 382; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 245; Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 343.

[342] For an example, see *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) concerning two cases of holding over. In *Ndlovu v Ngcobo*, an eviction application arose after the lease had been terminated and the tenant refused to vacate the property, and in *Bekker v Jika* an eviction was sought on the basis that the respondents had refused to vacate land after a sale in execution. See also Van der Walt AJ "Ownership and eviction: Constitutional rights in private law" (2005) 9 *Edinburg Law Review* 32-64 40-45; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 248 (with reference to footnote 67), 249.

[343] Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 343 argues that the power of property rights in the case of the pre-constitutional common law is reflected in the *rei vindicatio* remedy.

[344] *Chetty v Naidoo* 1974 (3) SA 13 (A).

[345] *Chetty v Naidoo* 1974 (3) SA 13 (A) 20.

rei vindicatio tends to focus on the landowner's right to exclusive possession. The remedy shows the centrality, strength and essentiality of the right to exclude. The landowner is in a position to exercise his right to exclude non-owners from possessing a part or all of his property. Ownership in this light can be regarded as absolute and exclusive.[346]

The common law *rei vindicatio* might appear to reflect the strong-absolute view of ownership and exclusion in that in an eviction case, the owner must simply prove that he is the owner of property held by the defendant. In fact, however, the *rei vindicatio* only forms the starting point of a process guided by the power of presumption. The protection afforded by the *rei vindicatio* is based on the assumption that the owner is entitled to exclusive possession of his property in the absence of a valid defence.[347] In the event that the defendant proves a valid right of occupation that is enforceable against the owner, the landowner is not entitled to possession. More specifically, the landowner is sometimes prevented from evicting or excluding the defendant from his land on the basis of a valid defence deriving from either the landowner's consent or legislation, mere proof of which will establish a conclusive block against recovery of possession. In this sense, the requirements for the *rei vindicatio* do not include a normative justification for the existence of the limitation; the mere existence of the valid defence prevents the landowner from exercising his exclusionary powers. Accordingly, limitations on the right to exclude are possible and normal within the evidentiary structure of the presumption that ownership is unlimited.

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[346] Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) unpublished LLD dissertation University of South Africa 128, 132.

[347] Van der Walt AJ *Property in the margins* (2009) 58.

2 4 Conclusion

Ownership is often regarded as absolute in several senses, the most significant being that ownership is unrestricted in principle. Consequently, the right to exclude would also be absolute. The aim of this chapter was to review the theoretical and doctrinal justifications for such an absolutist view of the right to exclude. The chapter highlights a number of theoretical considerations that point away from such a strong view of the landowner's right to exclude. Firstly, the case for building an exclusivist theory on the basis of moral property theory seems to be weak. Secondly, even though modern exclusion theorists view ownership and exclusion as absolute in the strong sense, they accept the necessity for limitations. The general approach among the exclusion theorists seems to be to start with upholding the right to exclude. If limitations are inevitable, they are regarded as exceptional, which means they have to be both proven and justified, and sometimes compensation has to be paid for them as well. Thirdly, the exclusive use and progressive property theorists view limitations on exclusion not as exceptions but as inherent elements of the property system. Ownership and the right to exclude are in fact limited by law, just as they are sometimes limited by the landowner himself when he grants rights to non-owners.

South African case law suggests that ownership and the right to exclude are exercised and protected insofar as the law permits. The starting point is Bartolus' definition of ownership as the most complete right to dispose over a thing, insofar as the law does not prohibit. This means that limitations exist as a matter of course. The law imposes limitations on ownership, including the right to exclude, and in that case the owner's right extend only as far as the law permits. This was also the general tenor of Roman-Dutch law and it is the position adopted in case law. Insofar as ownership is described as absolute, it means that ownership is the most

comprehensive real right or that it is presumed to be free of limitations, not that it is normatively unlimited. The normative decision to impose a limitation on ownership is therefore one to be considered by the owner himself when granting rights to others, or by the legislature when adopting regulatory laws, but it is not a ground on which the existence of limitations could be attacked in court.

The focus of the limitation and justification debate should therefore move to legislation and common law that regulates the exercise of ownership. Justification does not require normative grounds for every limitation, because ownership is not a pre-social, pre-legal or pre-constitutional right. There are various factors that justify limiting ownership and the landowner's right to exclude others, including social, economic and political factors. These factors present normative grounds for the limitations that are imposed on the right to exclude. Cowen argues that ownership carries a social responsibility or social obligation and should comply with the social needs of the day.[348] Lewis takes Cowen's argument further, indicating that the South African law of land ownership has already been transformed by social, economic, and political forces and that it can no longer be consistent with the traditional Grotian-pandectist concept of ownership as an absolute right.[349] The progressive property theorists consider the social context that indicates why property should in

[348] Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 70-73.

[349] Lewis C "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 260. See also Cowen DV *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984); Van der Walt AJ "The fragmentation of land rights" (1992) 8 *South African Journal on Human Rights* 431-450. Van der Walt AJ "Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law" (2002) 18 *South African Journal on Human Rights* 372-420; Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-289 provides an analysis of the nature of ownership in South African law with regard to case law and legislation that have led to the erosion of the traditional concept of ownership.

fact be subject to limitations. These theorists accept that property rights are subject to regulatory state interference and limitation to promote the fulfilment of certain important human values.[350] From a theoretical point of view, the limitation of the right to exclude is justified by the need to fulfil both owners' and non-owners' constitutional and socio-economic obligations and rights. The role of the Constitution in explicating normative grounds for limitations on ownership is therefore of central significance.

The notion of property as an absolute right to exclude is problematic because it does not take into account the social context. Progressive property theory and the doctrinal analysis of ownership in South African law indicate that the right to exclude is in fact subject to a wide range of limitations, which makes it difficult to conceive the right as absolute and the limitations as exceptional. The limitations are inherent in the property system. In reality, the right to exclude as an entitlement of ownership is limited by law. It is therefore necessary to consider the circumstances and the ways in which the landowner's right to exclude is limited.

[350] See section 2 2 4 above.

Chapter three:

Access rights that limit the right to exclude

3 1 Introduction

The right to exclude is limited extensively, both at common law and by statutory control measures or constitutional provisions, allowing non-owners to have access to land for various purposes. At common law, at least in principle, the right to exclude is strongly protected to the extent that any limitation on the right to exclude has to be proved. However, the idea that these limitations are exceptional is just a general perception, not really an accurate description of the position in law.[1] Both at common law and in the constitutional setting, limitations on the right to exclude are inherent to the property system.[2] According to Van der Walt, property is a limited, circumscribed right that is recognised and protected within a property system that is inherently and inevitably a regulated system.[3] Many limitations on the right to exclude are inherent to the property system, they are granted by law, against the landowner's will and without his consent.

Property as an institution is circumscribed by limitations aimed at easing the tension between the right to exclude and the rules, rights and values favouring non-owners' access rights to land. Several courts that had to assess the presumptive

[1] Wilkinson JH "The dual lives of rights: The rhetoric and practice of rights in America" (2010) 98 *California Law Review* 277-326 290 notes that Blackstone knew that claims of absolutism were overstatements. Furthermore, he notes that Blackstone spent five hundred pages describing various situations in which property rights properly yield to community interests. Other scholars also acknowledge that the owner's right to exclude is not absolute. See Alexander GS & Peñalver EM *An introduction to property theory* (2012) 143.

[2] See the discussion in Chapter 2 above.

[3] Van der Walt AJ *Property and constitution* (2012) 29.

power to exclude have realised the importance of enforcing access rights to land for the benefit of the public.[4] According to Gray and Gray, the (English) common law tradition has generally accepted that the estate owner enjoys an absolute right to determine precisely who may enter or remain on his land.[5] However, there is support for the view that arbitrary powers of exclusion are qualified by the fundamental principles of human freedom and dignity.[6] Many common law jurisdictions have seen a move away from an arbitrary exclusion rule towards a reasonable access rule in terms of which non-owners can be excluded only on grounds that are objectively reasonable.[7] For instance, in *Uston v Resorts International Hotel Incorporation*,[8] the Supreme Court of New Jersey confirmed the doctrine of reasonable access and ruled that an owner of quasi-public premises is no longer entitled to the common law right to unreasonably exclude others.

An increasing recognition of access rights to land (private, public or quasi-public) has become a notable development in property law. Courts are moving away

[4] For example see the decisions of *State of New Jersey v Shack* 58 NJ 297 (1971) 305; *Marsh v Alabama* 326 US 501 (1946) 506; *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 (SC); *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

[5] Gray K & Gray SF "The idea of property in land" in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 37. See also *Semayne's Case* 77 ER 194 (1604), which established the principle that a homeowner has a right to defend his premises against intrusion. This case introduced the metaphor "every man's house is his castle".

[6] Gray K & Gray SF "The idea of property in land" in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 38. See also Gray K "Equitable property" (1994) 47 *Current Legal Problems* 157-214 172-181.

[7] Gray K & Gray SF "The idea of property in land" in Bright S & Dewar J (eds) *Land law: Themes and perspectives* (1998) 15-51 38; Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 55-57. The doctrine of reasonable access is applied in countries such as United States of America, United Kingdom, and Scotland.

[8] 445 A2d 370 (NJ 1982) 373. See also Gray K "Property in thin air" (1991) 50 *Cambridge Law Journal* 252-307 291.

from the traditional default position by allowing access rights against the landowner's right to exclude.[9] However, an expansion of access rights over privately owned land could give rise to major challenges, particularly given that a private landowner is presumed to have the right to exclude others from his land.[10]

Lovett states that it is practically possible for a modern, democratic nation committed to the rule of law, the protection of private property and an open market, if it wants, to create a property regime that largely replaces the *ex ante* presumption in favour of the right to exclude with an equally robust, but rebuttable, *ex ante* presumption in favour of access.[11] American property law places a high value on the right to exclude as a core principle of private ownership, whereas Scots law has a completely different approach.[12] The LRSA shows that the landowner's right to exclude is in fact subject to limitations in the form of a statutory right to roam. Lovett's recognition of the possibility of providing stronger and general access rights to non-owners provides a useful framework for the arguments developed in this chapter.

Taking into consideration growing awareness of access rights to property, a pertinent question is to establish where access rights originate. What is the range of

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[9] For example see *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 (SC); *New Jersey Coalition Against the War in the Middle East v J.M.B Realty Corp* 650 A.2d 761 (NJ 1994); *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

[10] A greater part of this study focuses mainly on access rights to be on or to move over privately owned land. However, it is also important to consider, albeit not extensively, access to public or quasi-public land.

[11] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818.

[12] The approach stems from the enactment of general public recreational access rights encompassed in the Land Reform (Scotland) Act 2003 (LRSA). See Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 740-741.

limitations that are imposed on the right to exclude in form of access rights? How and to what extent do access rights limit the landowner's right to exclude? In this chapter, I describe different access rights that limit the right to exclude, taking into account where, when and for what activities these access rights can be exercised. The purpose of the chapter is to identify sources of law that grant non-owners access rights to privately owned land (and also to public or quasi-public land), to identify the content and purpose of those access rights, and to ascertain the impact that those access rights may have on the landowner's right to exclude.

Property is not only concerned with the right to exclude but also with other rights to have access to property belonging to another person - the right to be included.[13] Access to property can take place either with or without the landowner's permission or consent.[14] When non-owners gain access to property with the consent of the owner, the landowner is exercising his right to determine the access of others to his property. To be more precise, access without the owner's consent concerns a non-owner's right to be included and access with his consent concerns the landowner's right to allow non-owners to have access to his land.[15] For the purposes of this chapter, access rights are either granted by law (non-consensual) or are consensual.

Non-owners' access rights result from competing claims to use, possess or enjoy property. There are a number of circumstances in which a non-owner can have access to property owned by another. I explain these circumstances with reference

[13] Ellickson RC "Two cheers for the bundle of sticks metaphor, three cheers for Merrill and Smith" (2011) 8 *Econ Journal Watch* 215-222 218-220; Dagan H *Property: Values and institutions* (2011) 38.
[14] Kelly DB "The right to include" (2014) 63 *Emory Law Journal* 857-924 866.
[15] 866.

to the origin of access rights and the nature and use of the property involved.[16] Firstly, access rights to be on or to pass over any kind of land, whether it is private, public or quasi-public, can flow directly from non-property constitutional rights such as life, dignity and equality. In this context, I consider situations where conflicting claims to the use of property involve access to privately owned land with restricted access to specific people, such as farm workers, who already have access to it for specific purposes but want to exercise their non-property constitutional rights. Some of the cases in this category also involve access claims to quasi-public land such as public accommodations for purposes of exercising the rights in question.

Secondly, access rights can be derived from statutory provisions giving effect to constitutional rights such as secure tenure, housing, labour rights (strikes and pickets), freedom of movement and freedom of speech; or from legislation that provides statutory access rights but is not directly aimed at giving effect to a constitutional right. As appears from the discussion of the case law in section 3 3 below, the conflict in this category mostly deals with the clash between the landowners' right to exclude and access rights to quasi-public places like shopping malls and privately-owned places where non-owners cannot freely have access. The conflict usually involves a landowner who wants to exclude or evict non-owners who want to use his land for purposes that move outside of his permission to enter, such as to exercise the right to freedom of movement, freedom of speech, demonstrate and picket or exercise religious and cultural rights. The ability to exercise these

[16] For purposes of the distinction between different sources of limitations I rely on the distinction set out in Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106. Since my aim is to structure my overview of the large volume of the limitations that involve access (Chapter 3) in a way that will allow me to assess the differences between categories of justification (Chapter 4), it is not necessary at this point to reconsider this distinction critically.

freedoms and rights depends on whether non-owners have access to various places where these rights can be exercised.

Thirdly, access rights can stem from common law principles that limit the right to exclude, on a non-consensual basis. In this category I consider conflicts arising from non-consensual servitudes (the right of way of necessity) and encroachments, where common law principles limit the right to exclude. These conflicts mostly involve private land.

The right to exclude applies and can be discussed in different contexts and the basis and extent of the exclusionary rule depends on the nature of the property involved. The extent of access rights differs depending on whether the property is privately owned land not open to the public (private home) or whether it is privately owned land not open to the public but with restricted access; privately owned land open to the public for commercial or other specified purposes (quasi-public premises, such as shopping malls); and whether it is publicly owned land open to the public, either generally or with restricted access (public premises, such as pavements, public parks or government airports).[17]

Generally, the owner of a private home has a legal right to exclude others from his property. In a private home, the scope for non-owners acquiring or exercising access rights is limited, and the exclusionary power is mostly unchallengeable.[18] The

[17] Singer JW *Introduction to property* (2nd ed 2005) 27.

[18] In *Golden Gateway Center v Golden Gateway Tenants Association* 26 Cal 4th 1013 (2001) 1022, the court pointed out that the free speech clause in the California Constitution did not protect the right of a tenants association to distribute its newsletter in a privately owned apartment complex against the objections of the landlord. The court reasoned that the exclusionary character of a private apartment complex made it significantly different from places that voluntarily open their doors to the public. See also Golinger J "Shopping in the marketplace of ideas: Why *Fashion Valley Mall* means

private homeowner is in a position to determine who may have access to his property because it is not open to the public.[19] Because of the need for individual privacy, it seems reasonable to protect the right to exclude others when a private home is concerned.[20] Protecting the right to exclude in a private home is easier to justify because a relatively high degree of privacy is closely related to and important for human flourishing, which is associated with personal development.[21] The privacy of a landowner can also be used as a strong claim to justify exclusivity in the context of the family home.[22] In line with the conception of ownership in South African law, a private homeowner is presumed to have the right to exclude others. Even so, the right to exclude in a private home is subject to limitations, although it is strong.[23] However, the point is that a private homeowner's exclusionary right is relatively stronger than the exclusionary right in public or quasi-public places, since there are fewer justified reasons to regulate access to a private home.

The right to exclude becomes weaker in the case of privately owned land that is open to the public, either generally or in a more restricted sense. In this instance, the

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Target and Trader Joe's are the new town squares" (2009) 39 *Golden Gate University Law Review* 261-289 269-270.

[19] Singer JW *Introduction to property* (2nd ed 2005) 27; Alexander GS & Peñalver EM *An introduction to property theory* (2012) 130-131.

[20] Van der Walt AJ "Un-doing things with words: The colonisation of the public sphere by private-property discourse" 1998 *Acta Juridica* 235-281 246-247.

[21] Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 396-420 411; Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957-1016.

[22] Van der Walt AJ "Un-doing things with words: The colonisation of the public sphere by private-property discourse" 1998 *Acta Juridica* 235-281 244.

[23] Singer JW *Introduction to property* (2nd ed 2005) 27 argues that although the right to exclude in a private home is stronger, it is nevertheless subject to limitations. Alexander GS & Peñalver EM *An introduction to property theory* (2012) 131 argues that a private homeowner does not have an absolute right to exclude others from entering or having access to his property.

right to exclude is challengeable – the private property owner loses the higher degree of exclusionary power normally associated with purely private property, such as a home.[24] For example, the right to exclude others from businesses that are open to the public (quasi-public) is not as broad as in a private home, even though the property is also privately owned.[25] The landowner's right to exclude is already qualified because the landowner voluntarily opened his property to the public to use for designated purposes, and this imposes a duty on him to give access to and serve the public.[26] In some instances, the relativity of the right to exclude from premises that are open to the public may be underscored by laws that prohibit discrimination.

Exclusion of non-owners from some public (state-owned) property premises is generally restricted, as the public is usually permitted to enter public premises for its public benefit. However, not all state-owned or public property is available for public use and access. American courts draw a distinction between two kinds of state-owned property, namely public forums (state-owned property that has been open to the public by tradition or designation, such as parks and streets or sidewalks) and non-public forums (state-owned property to which the general public does not ordinarily have access).[27] A third kind of state-owned property is property that is open to the public but with restricted access for certain limited purposes. Depending

[24] Opperwall SG "Shopping for a public forum: *Pruneyard Shopping Center v Robins*, publicly used private property and constitutionally protected speech" (1981) 21 *Santa Clara Law Review* 801-844 812; Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 90.

[25] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 131.

[26] As reflected in the sections below, the right to exclude in cases of businesses open to the public is limited by non-property constitutional rights or regulatory laws.

[27] Moon R *The constitutional protection of freedom of expression* (2000) 148.

on the kind of property, the state may impose reasonable time, place and manner restrictions on access rights, if these regulations serve an important state interest.[28]

Although ownership embraces the right to exclude non-owners from property, the significance and force of the right depends on the type of land involved. It is therefore significant to distinguish between different categories of land. Furthermore, exclusion of non-owners from land is often based on the behaviour of non-owners[29] and on the nature, use and function of the land.[30]

In this chapter I adopt a constitutional perspective and consider the limitations on the right to exclude with reference to their origins. The conclusion in Chapter 2 shows that the normative question whether to limit ownership is taken before the dispute arises. This implies that a normative question is not taken in all access disputes because the question has already been considered by the legislature. It is therefore important in this chapter to consider access rights that limit the right to exclude according to their origins to determine the nature of a specific limitation. The

[28] The public has a right to enter public forums for expressive activities such as exercising the right to freedom of speech and general restrictions, such as an absolute prohibition of a particular type of expression, will be upheld only if they are narrowly tailored to accomplish a compelling governmental interest and leave open alternative channels of communication. See Moon R *The constitutional protection of freedom of expression* (2000) 148; *United States v Grace* 461 US 171 (1983) 176-178. In *International Society for Krishna Consciousness v Lee* 505 US 672 (1992), the US Supreme Court held that an airport terminal operated by a public authority is a non-public forum that could be closed to all except those who have legitimate business there.

[29] Pfeffer RE "Losing control: Regulating situational crime prevention in mass private space" (2006) 59 *Oklahoma Law Review* 759-808 769-770. See also *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

[30] Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 90 state that there may in fact be a spectrum of differing intensities of exclusory power extending from the purely private zone through a group of quasi-public premises towards a category of genuinely public property.

origin can therefore have a bearing on how strong the normative reason for the limitation is, and also on how strong the limitation itself is compared to the right to exclude. In this chapter I discuss different categories of limitations such as limitations deriving directly from non-property constitutional rights; limitations imposed by legislation (giving effect to a non-property constitutional right, and not directly giving effect to a non-property constitutional right); and limitations imposed by common law.

This chapter considers limitations on the right to exclude primarily in the South African context, with some references to comparable examples from other legal systems. United States (US) public accommodations laws that, regulate non-owners' access rights to privately owned land, together with rights and freedoms protected under the United States Constitution, represent a significant limit on the right to exclude. Problems concerning access rights that impose limitations on the landowner's right to exclude are also found in English, Scots, and Canadian law. In this chapter, I consider examples from these legal systems with the aim of identifying additional examples of access rights to land. The chapter does not attempt to cover any foreign jurisdiction in full or discuss all the case law concerning instances in which access rights limit the right to exclude, but only considers a selection of important and relevant cases.[31]

3 2 Limitations deriving directly from non-property constitutional rights

Excluding non-owners from private or quasi-public property can sometimes limit their potential to exercise their constitutionally protected non-property rights. If a landowner voluntarily opens his property to the public for some benefit to himself, he

[31] Most of the cases discussed in this chapter have been central to the exclusion and access rights debate of the progressive scholars.

simultaneously adopts responsibility to respect the public's constitutionally guaranteed non-property rights as far as these relate to access to his property.[32] Consequently, the Constitution may impose limitations on the property owner's right to exclude. This causes a potential conflict between property and non-property rights that are enshrined in the Constitution.

Non-property constitutional rights such as the right to life, human dignity and equality are generally not subject to democratic deliberation, regulation and limitation.[33] The main issue is whether landowners can exclude others from their property in the process of exercising their property rights when non-owners use the land to exercise their non-property constitutional rights.

In jurisdictions that have a constitution as their supreme law, rights to private property, in particular the right to exclude, cannot be regarded as unqualified rights.[34] The right to exclude is restricted by substantial limitations to protect non-property rights embodied in the Constitution. The limitations originate directly from non-property constitutional rights, as appears from case law.[35] Some decisions demonstrate a significant interest in favour of non-owners' access rights to land

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[32] Golinger J "Shopping in the marketplace of ideas: Why *Fashion Valley Mall* means Target and Trader Joe's are the new town squares" (2009) 39 *Golden Gate University Law Review* 261-289 286.

[33] In this regard, I am indebted to Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 45.

[34] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 215; Van der Walt AJ *Property and Constitution* (2012) 29.

[35] *Fourways Mall (Pty) Ltd and Another v South African Commercial Catering and Allied Workers Union and Another* 1999 (3) SA 752 (W); *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Growthpoint Properties Ltd v South African Commercial Catering and Allied Workers Union and Others* (2010) 31 ILJ 2539 (KZD). See also *Hattingh and Others v Juta* (CCT 50/12) [2013] ZACC 5 (14 March 2013), where the landowner's rights were balanced with the occupier's right to family life.

based on the right to life, dignity and equality, in conflict with the landowner's right to exclude.[36] Courts treat the right to exclude as a non-absolute, restricted right that is justifiably and inevitably limited by non-property constitutional rights.

The right to equality is slightly different from the right to life and dignity because its recognition and protection often takes place in a regulatory framework. Although the limitation of the right to exclude originates directly from the relevant provision in the South African Constitution,[37] in the same way as with the right to life and dignity, the equality limitation is ultimately embodied in legislation. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[38] regulates the right to equality to the extent that the limitation of the right to exclude is not imposed directly by the constitutional provision but by the legislation. PEPUDA gives effect to a constitutional right (equality and non-discrimination) in the same way that public accommodations laws in the US regulate the right to non-discrimination. However, the right to equality remains unqualified just like the right to life and dignity to the extent that PEPUDA regulates its enforcement but does not subject it to statutory or regulatory delineation. The right to life, dignity and equality illustrate the same point, that the right to exclude is not absolute but can be limited by law to secure non-property constitutional rights.

In the case of *State of New Jersey v Shack*[39] the US Supreme Court recognised that the right to life and dignity of migrant farmworkers would be limited if private farm owners are allowed to exercise their right to exclude without restrictions.

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[36] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 46.

[37] Section 9 of the Constitution of the Republic of South Africa, 1996 (equality).

[38] Act 4 of 2000.

[39] 58 NJ 297 (1971).

The case concerned two defendants (an attorney and a health service worker) who entered privately owned land to assist migrant farmworkers, who were employed and housed on the property, with information on governmental health care and legal services. The land was private property with restricted access, accessible to a restricted group of people only, namely the migrant farmworkers who had been granted limited access for specific purposes.[40] The case deals with the access rights of the defendants and not of the migrant workers, since the latter already had access to be on the land. The farm owner sought to exercise his exclusionary powers by demanding that the defendants leave his property. Upon refusal to leave the land, the defendants were convicted for trespass. However, on appeal, the New Jersey Supreme Court held that there was no breach of the right to exclude and that trespass had not occurred. The court held that the farm owner's property right, the right to exclude, was not absolute and had to be accommodated with the interests of others (defendants). The court further held that the farm owner's title to land does not include dominion over farmworkers whom the owner allows to work and live on his farm.[41]

State of New Jersey v Shack highlights the fact that fundamental human rights cannot be limited to protect and uphold property rights.[42] The defendants' access to the privately owned land, for visiting purposes, was significant to the migrant farmworkers' wellbeing and to secure and support their non-property constitutional

[40] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 52.

[41] *State of New Jersey v Shack* 58 NJ 297 (1971) 303.

[42] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 808; Alexander GS & Peñalver EM "Properties of community" (2009) 10 *Theoretical Inquiries in Law* 127-160 149-154.

rights to life, dignity and equality.[43] The court stressed the importance of human dignity when it overruled the landowner's attempt to deny access to the visitors of migrant workers. The Supreme Court held that:

> "The employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties."[44]

The ruling in *State of New Jersey v Shack* to grant the defendants access to land was essential to afford the migrant farmworkers the opportunity to meet their human needs, including interacting with the defendants to be informed of basic life-supporting services.[45] *State of New Jersey v Shack* confirmed that an owner must expect to find the absoluteness of his property rights curtailed by the organs of state for the promotion of the best interests of others for whom these organs also operate as protective agencies. In *Folgueras v Hassle*[46] the court concurred with the decision in *State of New Jersey v Shack*, concluding that:

> "The property rights of the camp owner do not include the right to deny access to his camp to guests or persons working for any government or private agency whose primary objective is the health, welfare or dignity of the migrant workers as human beings."

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[43] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 52.

[44] *State of New Jersey v Shack* 58 NJ 297 (1971) 308.

[45] *State of New Jersey v Shack* 58 NJ 297 (1971) 303-304 the court pointed out that migrant farm workers are a rootless and isolated community and are often unaware of the opportunities that exist for them to meet their needs.

[46] 331 F Supp 615 (1971) 624. See also Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 67.

Both *State of New Jersey v Shack* and *Folgueras v Hassle* concerned access to privately owned land for purposes of offering government services to migrant workers. The courts considered whether the owner of a migrant labour camp can deny access to visitors or government representatives seeking access to the labour camp to see migrant workers. In both cases, the courts held that the owner may not deny such access to his property. Exclusion of the visitors does not only impact on their constitutional rights and freedoms, but would also infringe upon the migrant workers' constitutional rights to life, dignity, religion and association as well as their tenancy rights.

Concerning the right to life (or a livelihood), the Supreme Court of India held in *Olga Tellis v Bombay Municipal Corporation* (*Tellis*)[47] that the right to life is one of the fundamental constitutional rights that cannot be waived. The case concerned the forcible eviction of pavement and slum dwellers in the city of Bombay in India. According to the Supreme Court, eviction or exclusion of the pavement and slum dwellers would amount to a violation of their right to livelihood.[48]

The *Tellis* decision was cited in the South African case of *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* (*Victoria and Alfred Waterfront*),[49] in which the court confirmed that the right to exclude can be limited in instances where the right to life depends on reasonable access to land. The case involved access to

[47] (1986) SC 180 para 32. See also *Tellis and Others v Bombay Municipal Corporation and Others* [1987] LRC (Const) 351.

[48] The right is guaranteed by Article 21 of the Constitution of India 1949, which provides that no person shall be deprived of his life except according to procedure established by law. See *Olga Tellis v Bombay Municipal Corporation* (1986) SC 180 para 32. See also Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 123 for a brief discussion of the case.

[49] 2004 (4) SA 444 (C).

a quasi-public place for a purpose, namely begging, that was not the purpose the owner had in mind when he opened his property to the public. The court ruled against the landowners, stating that:

> "The issue of begging frequently raises a direct tension between the right to life and property rights. In that event, the property rights must give way to some extent. The rights to life and dignity are the most important of all human rights. By committing ourselves to a society founded on the recognition of human rights we are required to value those rights above all others."[50]

Exclusion of non-owners in this case would amount to a violation of the constitutional right to life, which may be negatively affected if non-owners are prohibited from begging (which is regarded as a source of their livelihood). The court held that the right to life encompasses more than "mere animal existence", since it includes the right to a livelihood.[51]

The cases discussed above indicate that the right to exclude is directly and justifiably limited by constitutional provisions to ensure that non-property constitutional rights are secured when the exercise of those rights depend on access to land.[52] Regardless of whether the property is private land with restricted access to a specific group of people or whether a quasi-public space, the result was the same, namely that the right to exclude was limited to protect constitutional rights, such as the right to life and dignity, which cannot be qualified.

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[50] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 448-451.

[51] Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 122 mentions that the right to life has been interpreted to incorporate the basic necessities of life such as adequate nutrition, clothing, reading facilities; the right to a livelihood; the right to shelter; the right to health care; and the right to education.

[52] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 55.

A similar conclusion follows from cases involving a clash between the landowner's right to exclude and the right to equality of non-owners who want access to land but are excluded on grounds relating to their race, disability, gender or any other ground that may result in an unfair discrimination.[53] For example, non-owners have a right under the US public accommodations laws to access public accommodations for particular services offered in those places, free from discrimination. Public accommodations consist of individual private establishments that are open to and serve the public, such as restaurants, inns, gas stations and places of entertainment.[54] The Civil Rights Act confers jurisdiction upon the courts to provide injunctive relief against discrimination in places of public accommodation, stating that all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities and privileges of any place of public accommodation, without discrimination or segregation on the grounds of race, colour, religion or national origin.[55] The Act provides the public with a right of reasonable access to all businesses and facilities that are open to the public.[56]

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[53] See section 9(3) of the Constitution of the Republic of South Africa, 1996.

[54] These establishments are regulated under Title II of the Civil Rights Act of 1964. See also Singer JW "No right to exclude: Public accommodations and private property" (1996) 90 *Northwestern University Law Review* 1283-1497 1288; Singer JW *Introduction to property* (2nd ed 2005) 31.

[55] See section 201(a) of the Civil Rights Act of 1964.

[56] In *Uston v Resorts International Hotel Incorporation* 445 A2d 370 (NJ 1982) 373-375 the court held that the common law no longer entitles the owner of a quasi-public premise to arbitrarily exclude anyone for any reason. The court emphasised that the landowner has a duty not to act in an arbitrary or discriminatory manner towards persons who enter premises that the landowner has opened up for general public access for his own economic reasons. According to Singer JW *Introduction to property* (2nd ed 2005) 26, apart from access rights under the public accommodations laws, other access rights include the power of the police to trespass when in hot pursuit of suspects; the rights of neighbours who have mistakenly occupied or improved property belonging to another; situations where the non-owner has exceeded the scope of the landowner's permission, such as holdover tenants who stay beyond the end of the lease term; and rights that non-owners may have to enter private property in

The 1990 Americans with Disabilities Act expanded the concept of public accommodations to include educational institutions, doctors' and lawyers' offices, retail stores, barber shops and funeral parlours.[57] Public accommodations laws protect non-owners' rights to enter establishments that are open to the public without invidious discrimination.[58] Singer states that access rights to private property that is open to the public under the public accommodations laws is the most significant limitation on the right to exclude.[59]

South African law does not have specific public accommodations laws that regulate access to places that serve the public.[60] However, general anti-discrimination legislation was enacted to give effect to the constitutional right to equality, with the comparable result of prohibiting exclusion from privately owned land that is open to the public on the basis of unfair discrimination.[61] PEPUDA[62] makes provision for a general prohibition against unfair discrimination and prevention

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furtherance of their personal or property interests. The other access rights mentioned here also exist in South African law and they are discussed in this chapter and the rest of the dissertation, only in light of the South African context.

[57] See also Singer JW *Introduction to property* (2nd ed 2005) 32.

[58] Singer JW *Introduction to property* (2nd ed 2005) 26, 30. See also in this regard Van der Walt AJ *Constitutional property law* (3rd ed 2011) 299-301; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 432-443; Singer JW "Property and equality: Public accommodations and the Constitution in South Africa and the United States" (1997) 12 *South African Public Law* 53-86; Singer JW "No right to exclude: Public accommodations and private property" (1996) 90 *Northwestern University Law Review* 1283-1497.

[59] Singer JW *Introduction to property* (2nd ed 2005) 26.

[60] Given that the US has public accommodations laws that grant non-owners access rights to private property that is open to the public, it was necessary to consider examples of instances where access rights limit the landowner's right to exclude. Identifying examples of access rights under US public accommodations laws makes an interesting case for comparison.

[61] See the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

[62] Sections 7, 8 and 9 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

of exclusion of persons on the grounds of race, gender and disability, respectively. PEPUDA differs in its setup from the US public accommodations laws but the effect is similar. The most striking difference between PEPUDA and US public accommodations laws is that firstly, PEPUDA provides for a general prohibition and prevention of unfair discrimination by either the state or any private person.[63] Secondly, PEPUDA applies to all types of land, including private property that is not open to the public,[64] whereas the Civil Rights Act does not apply to a private club or other establishments that are in fact not open to the public, except to the extent that the facilities of such establishments are made available to the customers or patrons.[65] It might appear that the Civil Rights Act qualifies the right to equality insofar as it opens room for institutions that are outside the scope of the Act to engage in exclusionary practices on their premises. Despite the differences, PEPUDA and US public accommodations laws have a similar effect on the right to exclude. These laws place limitations on the landowners' right to exclude non-owners from private or quasi-public land, to promote equality and prevent unfair discrimination. The idea is that the exclusion of non-owners in these contexts will infringe or undermine a fundamental, unqualified right to equality. Under these laws, landowners are likely to bear the burden of justifying their actions when they want to exclude non-owners because the promotion of equality and prevention of unfair discrimination is, in such instances, dependent on access to land.

[63] See chapter 2 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[64] See the schedule (in terms of section 29) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which provides an illustrative list of unfair practices in certain sectors, including housing, accommodation, land and property.

[65] See section 201(e) of the Civil Rights Act of 1964.

The examples discussed above show when and how far the right to exclude is limited to secure non-property constitutional rights.[66] Although life, dignity and equality are unqualified constitutional rights, this does not imply that people who want to exercise these rights have free access to privately owned land or quasi-public land. These rights are not limited by law or regulation but they do not grant non-owners free access to property belonging to another person either.[67] A landowner cannot exercise his right to exclude when it affects non-owners whose rights to life, dignity and equality depend on reasonable access to the land, and to that extent the right to exclude as an entitlement of ownership is limited by conflicting non-property constitutional rights.[68] Furthermore, when these rights are in conflict with the right to exclude, it is assumed that they cannot be weighed or balanced with the right to exclude to determine the appropriate outcome, since balancing or any qualification would undermine the fundamental status of these non-property constitutional rights. Cases involving the clash between the landowner's right to exclude and the right to life, dignity and equality therefore suggest that courts ought not to allow the right to exclude to automatically trump these non-property constitutional rights.[69]

However, the trumping effect of the non-property constitutional rights discussed above is limited to a reasonably clearly demarcated set of circumstances, where the landowner's right to exclude will have to give way. As the cases indicate, this effect is limited to instances where the property is either generally or specifically open to

[66] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 51.

[67] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 46.

[68] Singer JW *Introduction to property* (2nd ed 2005) 26.

[69] Currie I & De Waal J *The bill of rights handbook* (6th ed 2013) 388.

access by the affected group of non-owners in the first place, and where their continued access to or use of the land is vital to the exercise of their other constitutional rights. Furthermore, the result does not leave the landowner at the mercy of the non-owners in question. A landowner can impose time, place and manner restrictions that are necessary and reasonable in a particular context.

3 3 Limitations imposed by legislation

3 3 1 Legislation giving effect to a non-property constitutional right

The cases in the previous section deal with non-property constitutional rights, namely life, dignity and equality that directly limit property rights. In this section I consider cases that involve access to quasi-public spaces such as shopping malls, and cases that involve access to and use of privately owned land with restricted access.

The access rights involved here relate to non-property constitutional rights like freedom of speech, strike and picket and freedom of movement. Unlike the right to life, dignity and equality, these rights are subject to limitation and regulation in the same way as property rights (the right to exclude). In that sense, the right to freedom of movement, freedom of speech, strike and picket can be weighed up against property when the two sets of rights conflict. The question is whether the exercise of these rights is compatible with the normal use of the particular place. The examples that deal with this kind of use of quasi-public land show that, the right to exclude is sometimes statutorily limited or regulated to allow exercise of the non-property rights. The first set of examples deals with the exercise of the right to freedom of speech on quasi-public land.

One of the core elements of freedom of speech is the right to speak in public places such as public parks and shopping malls. Public places offer members of the public a forum to exercise their free speech rights.[70] However, when public places are privately owned the owners sometimes regulate behaviour in these places by enforcing the right to exclude. Accordingly, members of the public who may want to engage in speech activities in these places require the consent of the owner.

The First Amendment to the United States Constitution provides a basis for the protection of freedoms concerning religion, expression, assembly and the right to petition in American society.[71] In cases involving the right to exclude non-owners from private property and non-owners' competing rights that are entrenched in the Constitution, the US Supreme Court has made it clear that the Constitution in its First Amendment protection of the freedoms of religion, speech, press and assembly does not guarantee general access rights to private property, such as a shopping mall.[72] An exception to this basic rule is that individual states are free to extend greater protection to their citizens' rights under their state constitutions.[73] This exception was

[70] Mulligan J "Finding a forum in the simulated city: Mega malls, gated towns and the promise of *Pruneyard*" (2004) 13 *Cornell Journal of Law and Public Policy* 533-562 535.

[71] The First Amendment to the United States Constitution (1791) states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances."

[72] *Hudgens v National Labor Relations Board* 424 US 507 (1976) 519-520; *Lloyd Corp Ltd v Tanner* 407 US 551 (1972) 569-570. See also Opperwall SG "Shopping for a public forum: *Pruneyard Shopping Center v Robins*, publicly used private property and constitutionally protected speech" (1981) 21 *Santa Clara Law Review* 801-844 802; Alexander MC "Attention, shoppers: The First Amendment in the modern shopping mall" (1999) 41 *Arizona Law Review* 1-48 1, 18; Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 80.

[73] Alexander MC "Attention, shoppers: The First Amendment in the modern shopping mall" (1999) 41 *Arizona Law Review* 1-48 18. Golinger J "Shopping in the marketplace of ideas: Why *Fashion Valley*

first examined in *Marsh v Alabama*,[74] in which the Supreme Court addressed the question whether First Amendment free speech guarantee extends to privately owned property. In *Lloyd Corp Ltd v Tanner*[75] it was suggested that there may also be a First Amendment right of access to private property where all other adequate alternative avenues for speech are barred. Private property (such as the private company town in *Marsh v Alabama*[76] and the shopping mall in *Lloyd Corp Ltd v Tanner* and similar cases) is deemed a public space when it effectively replaces the local downtown, which is the primary place for the public to exercise their freedoms and rights.[77] Privately owned shopping malls and company towns acquire a public

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Mall means Target and Trader Joe's are the new town squares" (2009) 39 *Golden Gate University Law Review* 261-289 262.

[74] 326 US 501 (1946). See also Opperwall SG "Shopping for a public forum: *Pruneyard Shopping Center v Robins*, publicly used private property and constitutionally protected speech" (1981) 21 *Santa Clara Law Review* 801-844 805; Okula SJ "Towards rendering New York's free speech clause redundant: *Shad Alliance v Smith Haven Mall*" (1986) 60 *St John's Law Review* 799-812 801 (with reference to footnote 8); Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 80.

[75] 407 US 551 (1972) 567, 569. However, in *Lloyd Corp Ltd v Tanner* access was denied because there were other alternatives for the exercise of speech and as long as these alternatives existed, the Constitution did not permit an incursion into a mall owner's private property rights. Such alternatives would include the availability of public sidewalks, parks and streets adjacent to the store or shopping complex from which the demonstrators can make their viewpoints known. See also Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 80 (with reference to footnote 22).

[76] 326 US 501 (1946) 513 defines a company town as an area occupied by numerous houses, connected by pathways, which are either fenced or not as the private owners may choose. Generally, a company town can be explained in the sense that the whole town belongs to a private company, with all residential and other facilities included.

[77] Mulligan J "Finding a forum in the simulated city: Mega malls, gated towns and the promise of *Pruneyard*" (2004) 13 *Cornell Journal of Law and Public Policy* 533-562 536-539 states that shopping centres have largely replaced the traditional business block in American downtowns as a marketplace and community centre. In *New Jersey Coalition Against the War in the Middle East v J.M.B Realty Corp* 650 A2d 757 (1994) 774 the court also recognised the total transformation of private property to the mirror image of a downtown business district.

function in these conditions, and therefore expressive activity in those spaces must be allowed.[78] The US Supreme Court has recognised a speech right in places, such as shopping malls, that are privately owned but that are functionally equivalent to a public place. This functional equivalent doctrine was born out of the decision in *Marsh v Alabama*.[79] This decision laid the foundation for developing the notion that, under certain circumstances, the use and nature of private property may subject it to the public's freedom to exercise constitutionally protected expression rights.[80] However, time, place and manner restrictions can be applied by a landowner only if it is reasonable to do so.

Marsh v Alabama involved a privately owned company that prevented a member of the Jehovah's Witnesses from distributing religious literature on the sidewalks of a company town. The private company required members of the public to seek prior written consent to solicit. The owners of the private company argued that they had the right to exclude others. The court had to consider the content of private ownership in the context of freedoms such as freedom of religion, speech and assembly that are guaranteed by the First Amendment of the United States Constitution.[81] The court confirmed that owners generally have the right to exclude non-owners from their property. However, ownership does not always mean absolute

[78] Alexander MC "Attention, shoppers: The First Amendment in the modern shopping mall" (1999) 41 *Arizona Law Review* 1-48 47.

[79] *Marsh v Alabama* 326 US 501 (1946) 506-508. See also Mulligan J "Finding a forum in the simulated city: Mega malls, gated towns and the promise of *Pruneyard*" (2004) 13 *Cornell Journal of Law and Public Policy* 533-562 542.

[80] Opperwall SG "Shopping for a public forum: *Pruneyard Shopping Center v Robins*, publicly used private property and constitutionally protected speech" (1981) 21 *Santa Clara Law Review* 801-844 806.

[81] *Marsh v Alabama* 326 US 501 (1946) 509.

dominion.[82] The court rejected the owners of the private company's contention that they have a right to exclude and held that their right to exclude had been diminished because of the public's invitation to gain access to the property. The First Amendment protects the right to hand out leaflets on public streets, sidewalks and in public places, albeit subject to reasonable time, place and manner restrictions.[83] On the facts of this case, a private company that held legal title to the entire town and that had established a community with streets, homes and business, which is open to the general public, was prohibited from preventing individuals from distributing literature on the sidewalks of the town on similar grounds.[84] The private company had no authority to govern the community in such a way that it restricts the citizens' fundamental liberties. The private company had become a state actor because it was the functional equivalent of a municipality or a typical American town.[85] The court emphasised that if a private owner, for his benefit, opens up his property for use by the general public, his property becomes confined by the statutory and constitutional rights of members of the public who use the property.[86] *Marsh v Alabama* highlights

[82] *Marsh v Alabama* 326 US 501 (1946) 506, 509. See also Schiff EF "Right to picket on quasi-public property" (1968) 25 *Washington and Lee Law Review* 53-59 56-57.

[83] *Marsh v Alabama* 326 US 501 (1946) 504. See also *First Unitarian Church of Salt Lake City v Salt Lake City Corporation* 308 F3d 1114 (10th Cir 2002).

[84] *Marsh v Alabama* 326 US 501 (1946) 506. See Moon R "Access to public and private property under freedom of expression" (1988) 20 *Ottawa Law Review* 339-375 358; Singer JW *Introduction to property* (2nd ed 2005) 78.

[85] *Marsh v Alabama* 326 US 501 (1946) 507-509. See also Opperwall SG "Shopping for a public forum: *Pruneyard Shopping Center v Robins*, publicly used private property and constitutionally protected speech" (1981) 21 *Santa Clara Law Review* 801-844 807.

[86] *Marsh v Alabama* 326 US (1946) 505-506. See also Batchis W "Free speech in the suburban and exurban frontier: Shopping malls, subdivisions, new urbanism and the First Amendment" (2012) 21 *Southern California Interdisciplinary Law Journal* 301-358 317.

the court's recognition that the right of free speech occupies a preferred position as against the competing rights of a private property owner.[87]

This move away from the strong view of the exclusionary powers of private owners is continued in *PruneYard Shopping Center v Robins*,[88] which dealt with questions concerning First Amendment rights (free speech) on privately owned property that is generally open to the public. The *PruneYard* case concerned students who were ejected from a shopping mall for distributing anti-Zionist literature. The question before the court was whether the owner of a shopping centre has the right to exclude a group of students from distributing leaflets and soliciting petition signatures on the premises of the shopping centre. The California Supreme Court found that the California state Constitution protects speech and petitioning that is reasonably exercised on private property.[89] Furthermore, it held that the shopping mall had taken on the character of a public forum and that its owner could therefore not limit free speech in it. The landowner could therefore not exclude the students. The US Supreme Court upheld the California Supreme Court's decision. The court acknowledged that one of the essential sticks in the bundle of property rights is the right to exclude others but ruled that the landowner's right to exclude can be

[87] Schiff EF "Right to picket on quasi-public property" (1968) 25 *Washington and Lee Law Review* 53-59 56.

[88] 447 US 77 (1980).

[89] Article 1, section 2(a) of the California Constitution (1849) provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for abuse of this right and that a law may not restrain or abridge liberty of speech or press. In *Pruneyard* the court ruled that the California Constitution broadly proclaims speech rights; therefore shopping centres that are open to the public can provide an essential forum for exercising speech rights. See *Robins v Pruneyard Shopping Center* 592 P2d 341 (1979) 347. See also Golinger J "Shopping in the marketplace of ideas: Why *Fashion Valley Mall* means Target and Trader Joe's are the new town squares" (2009) 39 *Golden Gate University Law Review* 261-289 262-263.

regulated or altered by the state.[90] Accordingly, in view of the strong protection for free speech in the state Constitution, the students' interest in exercising their right to free speech outweighed the desire of private property owners to exclude them from their property.

In *New Jersey Coalition Against the War in the Middle East v JMB Realty Corp*, the court adopted a standard to determine when private property has been sufficiently devoted to public uses to trigger constitutional obligations not to abridge individual freedom of speech.[91] This standard, the court explained, takes into account the normal use of the property, the extent and nature of the invitation to the public to use it, and the purpose of the expressional activity in relation to both its private and public use.[92] The New Jersey Supreme Court ruled that owners of a shopping centre could not exclude persons handing out literature on their private property but could impose reasonable restrictions. Accordingly, the Supreme Court upheld access rights to the shopping mall on the principle that the constitutional right of free speech cannot be determined by title to property alone. According to the Supreme Court's ruling, the state Constitution conferred a right of speech in privately

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[90] *PruneYard Shopping Center v Robins* 447 US 77 (1980) 82. It is important to note that the ruling in *PruneYard*, which came shortly after *Kaiser Aetna v United States* 444 US 164 (1979), contradicts the precedent set in *Kaiser Aetna*, namely that the right to exclude is one of the most essential sticks in the bundle of rights that are commonly characterised as property and that a government order of public access to a privately owned marina constituted a taking. In this regard see Epstein RA "Takings, exclusivity and speech: The legacy of *PruneYard v Robins*" (1997) 64 *University of Chicago Law Review* 21-56 22, who notes that the normal rules of private law treat the right to exclude as an indispensable element of property.

[91] 650 A2d 757 (NJ 1994). See also *Wood v State* 2003 WL 1955433 (Fla Cir Ct 2003) in which the court held that the Florida State Constitution prohibits a private owner of a quasi-public place from using state trespass laws to exclude peaceful political activity.

[92] *New Jersey Coalition Against the War in the Middle East v J.M.B Realty Corp* 650 A2d 757 (NJ 1994) 761.

owned regional shopping centres because these centres had essentially assumed the role of a new downtown business district.[93]

The reasonable access rule also applies to public property such as a school. When considering whether access should be granted to state property, the courts consider whether or not the particular property is a public forum.[94] *Perry Education Association v Perry Local Educators' Association*[95] concerned a public school system that granted one labour union access to the teachers' mailboxes while denying similar access to a rival union. The rival union contended that its First Amendment rights had been violated, asserting that the mailboxes were a public forum. The court held that an individual has a right under the First Amendment to reasonable access for the purpose of communication.[96] Such expressive activity can take place in parks, streets and other places where by tradition, or by state designation, the public has a general access right.[97] The Supreme Court further held that the powers of the state to limit expressive activity in such places are greatly limited. Nevertheless, the state may restrict access to any property which is not a public forum, provided the restriction is reasonable, taking into consideration the time, place and manner of the expressive activity.[98] However, the rival union could

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[93] *New Jersey Coalition Against the War in the Middle East v J.M.B Realty Corp* 650 A2d 757 (NJ 1994) 761.

[94] Moon R "Access to public and private property under freedom of expression" (1988) 20 *Ottawa Law Review* 339-375 345; Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 79 (with reference to footnote 18). See also Jakab P "Public forum analysis after *Perry Education Association v Perry Local Educator's Association*: A conceptual approach to claims of First Amendment access to publicly owned property" (1986) 54 *Fordham Law Review* 545-562.

[95] 460 US 37 (1983).

[96] *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983) 45.

[97] 45.

[98] 45-46.

not have access to the mailboxes, since the mailboxes were not a public forum.[99] The *Perry* case shows that owners of public property also hold exclusionary rights that can be exercised when it is reasonable to do so. Furthermore, the case shows that public access to public property for speech purposes, although protected by the First Amendment, can be limited.[100]

The reasonable access rule also applies to public property owned by government, such as an airport. In *Committee for the Commonwealth of Canada v Canada*[101] the Supreme Court of Canada ruled that access could not be arbitrarily denied in respect of a government-owned airport terminal concourse. The court viewed an airport terminal as bearing the earmark of a public arena or a contemporary crossroads that is a modern equivalent of the streets.[102] The court confirmed that an absolute prohibition on political communication in the public areas of government-owned airports was therefore contrary to the freedom of expression.[103] Furthermore, the court held that such prohibition constitutes a limitation of free speech and the state cannot rely on its ownership rights (the right to exclude) to impose a blanket ban on political speech on its premises. The public spaces in the airport were owned for the benefit of the public and reasonable access to such a public place could not be denied. The court applied the provision for reasonable access and prohibited the owners from exercising their exclusionary powers.

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[99] *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983) 53.

[100] Jakab P "Public forum analysis after *Perry Education Association v Perry Local Educator's Association*: A conceptual approach to claims of First Amendment access to publicly owned property" (1986) 54 *Fordham Law Review* 545-562 545 (with reference to footnote 1).

[101] [1991] 1 SCR 139 (SC) 141-142.

[102] *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 (SC) 142.

[103] Freedom of expression is guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms 1982.

The cases concerning free speech suggest that owners of large shopping malls that are open to the public are not permitted to exercise their exclusionary powers in a manner that overreach the fundamental rights of non-owners.[104] Even in publicly state owned property, access to such property may only be prohibited when it is reasonable. The right to freedom of speech may be reasonably limited, but it cannot be prohibited on property that is the equivalent of a public forum or on public property. Freedom of speech is guaranteed on private property that is generally open to the public and on public property that serves the purpose of a public forum. In these instances, access for freedom of speech purposes is axiomatic if the exercise of free speech is compatible with the use of the property and subject to reasonable time, place and manner restrictions imposed by the owner.

The second set of examples of cases involves the exercise of the right to strike and picket on quasi-public spaces and seem to make the same point. Private property that is open to the public makes it possible for the public to use the property for various purposes, which might include the right of labour unions or striking workers to engage in peaceful picketing[105] and also for the public to engage in public demonstrations. The opening up of property to the general public transforms the nature of that property from purely private to quasi-public, and such a transformation has a bearing on the competing use rights of property owners and the public. The question to consider here is whether, when and how the property owner or the public can exercise their respective rights on the property.

[104] Gray K & Gray SF "Civil rights, civil wrongs and quasi-public space" (1999) 4 *European Human Rights Law Review* 46-102 77-78.

[105] It is important to note that workers have an additional opportunity to picket on private property that is not open to the public but where they work.

In *Growthpoint Properties Ltd v South African Commercial Catering and Allied Workers Union and Others*[106] the court considered a clash between the property rights of owners and the constitutional right of strikers to freedom of expression, to bargain collectively and to picket and demonstrate peacefully. The striking workers were picketing and demonstrating loudly in a privately owned shopping mall, in so doing allegedly disturbing and intimidating members of the public and disrupting normal business operations.[107] Growthpoint alleged that the noise made by the strikers constituted a nuisance and a violation of its constitutional right to property.[108] The court stated that the dispute required balancing the conflicting rights to strike and picket on the one hand and other constitutional rights such as property, a healthy environment and free trade on the other hand. Because South African law does not recognise a hierarchy of rights, such a balancing requires the limiting of each right, since no right is absolute.[109] The court therefore did not grant an order precluding picketing or demonstrations in the mall but ordered the strikers to lower the noise so that they would not interfere with the property rights of Growthpoint.[110] The court ruled in favour of the strikers by allowing them to have access to the shopping mall for purposes of picketing and demonstrating in a manner prescribed

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[106] (2010) 31 ILJ 2539 (KZD) paras 55-60.

[107] *Growthpoint Properties Ltd v South African Commercial Catering and Allied Workers Union and Others* (2010) 31 ILJ 2539 (KZD) para 5.

[108] Paras 7, 11, 15.

[109] *Growthpoint Properties Ltd v South African Commercial Catering and Allied Workers Union and Others* (2010) 31 ILJ 2539 (KZD) paras 34, 57. In *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23 the Constitutional Court clearly stated that different interests in land should not be adjudicated in an abstract and hierarchical manner but rather the different interests should be balanced and reconciled in a just manner, taking into account the historical and constitutional context.

[110] *Growthpoint Properties Ltd v South African Commercial Catering and Allied Workers Union and Others* (2010) 31 ILJ 2539 (KZD) paras 60-61.

by the Labour Relations Act 66 of 1995. The outcome of the decision is that both the owner's right to exclude the strikers from the mall and workers' right to strike and picket have to be exercised in a manner that accommodates the other, since both rights are subject to regulation.

In US law, the National Labor Relations Act (NLRA)[111] protects the rights of employees to form unions and engage in collective bargaining. The employer is prohibited from interfering with these rights.[112] This statute has been interpreted to protect free speech rights of employees and non-employees who seek to communicate with workers at their work site for the purpose of persuading employees to join a union, to go on strike, or to engage in other labour practices protected under the NLRA.[113] *Hudgens v National Labor Relations Board*[114] illustrates this point. The case concerned a mall owner who had threatened to press trespassing charges against employees who were picketing at their employer's store located in the private shopping centre. The Supreme Court considered whether the respective rights and liabilities of the parties are to be decided under the criteria of the NLRA alone, or under the First Amendment standard, or under a combination of the two.[115] The court concluded that the NLRA might statutorily limit an employer's right to exclude if the purpose of this intrusion was to exercise rights to organise workers into unions or engage in other collective actions protected by federal labour

[111] Section 7 of the National Labor Relations Act of 1935.

[112] Section 8 of the National Labor Relations Act of 1935.

[113] Singer JW *Introduction to property* (2nd ed 2005) 85.

[114] 424 US 507 (1976) 512.

[115] *Hudgens v National Labor Relations Board* 424 US 507 (1976) 512.

laws.[116] Even though the court acknowledged that the exercise of speech rights on private property may in some cases be protected by state law, the warehouse employees did not have a First Amendment right to enter a shopping centre to strike.[117] Nevertheless, in *National Labor Relations Board v Calkins*[118] the court ruled that a union's right to picket trumps the owner's right to exclude under the California Constitution.

In *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza Inc*,[119] the owners of a shopping centre also sought to exclude picketers (union members) from their property. The union members picketed in the parking lot, at the entrance and exit of the shopping centre. The US Supreme Court, relying on the judgement in *Marsh v Alabama*, decided that non-owners have access to a large shopping centre for purposes of expressive freedom.[120] The US Supreme Court held that a shopping centre that was freely accessible and open to the public was the functional equivalent of a downtown business district for First Amendment purposes.[121] Furthermore, the court held that the private owner of a store located in the shopping plaza could not exclude peaceful picketing by non-employees who were protesting the store owner's refusal to hire union labour. The court reasoned that, unlike an

[116] 424 US 507 (1976) 521. See also *NLRB v Babcock & Wilcox Co* 351 US 105 (1956), in which the Supreme Court ruled that the NLRA imposed some limitations on an employer's right to exclude non-employee union organisers from its property.

[117] *Hudgens v National Labor Relations Board* 424 US 507 (1976) 520-521.

[118] 187 F3d 1080 (9th Cir.1999).

[119] 391 US 308 (1968).

[120] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza Inc* 391 US 308 (1968) 319-320.

[121] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza Inc* 391 US 308 (1968) 319-320. See also Opperwall SG "Shopping for a public forum: *Pruneyard Shopping Center v Robins*, publicly used private property and constitutionally protected speech" (1981) 21 *Santa Clara Law Review* 801-844 808.

individual's home (which is not ordinarily open to the public), operating a space where the public was permitted to freely gather entailed no privacy interest, and as a result there was no blanket right to exclude, and therefore access should be granted for the purpose of exercising First Amendment rights.[122] With reference to *Marsh v Alabama*, the court held that ownership is not absolute, for when an owner opens up his property for use by the public his private property rights are circumscribed by the public's statutory and constitutional rights.[123] The shopping centre, although privately owned, was open to the public and therefore members of the public could not be excluded; the owners had lost some of their power to exclude others.

The third example provides a similar explanation of the second part of the South African *Victoria and Alfred Waterfront*[124] decision, where the court dealt with the tension between property rights and non-owners' right to freedom of movement. The court did not enforce the landowners' right to permanently exclude non-owners who had been creating a nuisance on private premises that are generally open to the public. The right to exclude was qualified in several respects. The court distinguished the large waterfront shopping complex in this case from ordinary restaurants or shopping malls, noting that the location, size and composition of the privately owned shopping complex rendered it for all practical purposes a suburb of Cape Town, to which members of the public had a general invitation to visit.[125] The right to freedom

[122] *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza Inc* 391 US 308 (1968) 324. See also Forkosch M "Picketing in shopping centers" (1969) 26 *Washington and Lee Law Review* 250-270 256.

[123] *Marsh v Alabama* 326 US 501 (1946) 506; *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza Inc* 391 US 308 (1968) 325.

[124] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

[125] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 451.

of movement applies to large shopping malls and other quasi-public spaces that function as public spaces, although this right cannot be exercised in ordinary restaurants or shops because access in such places is limited. On this basis, the court pointed out that the landowners did not have an absolute right to exclude and as a result non-owners were not prohibited from entering the quasi-public premises; only specific conduct can be prohibited on the premises. The nature and function of the property limited or at least qualified the landowner's right to exclude.

A blanket refusal of access to the quasi-public premises in *Victoria and Alfred Waterfront* was likely to constitute a significant restriction on the right to freedom of movement. Access to the quasi-public premises in this case was important for non-owners to realise their constitutional rights. What becomes clear from the case is that with regard to certain types of property, landowners of quasi-public premises do not have an unqualified right to exclude others. To some degree, the landowner's right to exclude is limited on the basis of the constitutional protection and enforcement of the right to freedom of movement on quasi-public premises. In appropriate instances, an owner is prevented from denying access to non-owners who seek to exercise their freedom of movement on his premises. The exercise of the right to freedom of movement also impacts on the right to life and dignity. Therefore, exclusion of the public resulting in the interference with their exercise of free movement amounts to a derogation of fundamental human rights and freedoms. The right to exclude should therefore give way to the right to freedom of movement and other fundamental rights like the right to life, particularly where the type of property involved is such that access to it is necessary for the realisation of these rights.

The fourth set of examples are slightly different from the cases discussed above (which deal with access to quasi-public property) because it concerns access

to and use of privately owned land, including cases where no consent was granted for initial access and cases where consent was granted. Legislative limitation of the right to exclude can result from anti-eviction legislation, which protects the interests of occupiers against unfair or unlawful eviction, for example by virtue of the Extension of Security of Tenure Act (ESTA)[126] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).[127] These acts set out stringent procedures that a landowner has to follow prior to or when evicting occupiers from his private land. Both acts have a similar effect, namely that they limit the landowner's right to exclude to prevent unjustified evictions of non-owners from either rural or urban privately owned land.

However, PIE differs from ESTA because it regulates unlawful occupation of land and consequently its measures do not create access rights because by definition non-owners who are in unlawful occupation of land do not have rights.[128] Rather, PIE protects unlawful occupiers against arbitrary eviction. ESTA creates access rights and cases where it is applied concern access claims to privately owned land with restricted access that is granted to a small, specific category of people for use and occupancy purposes. The access to or use of land granted by ESTA to non-owners may sometimes involve a permanent, physical invasion of the private land.[129] The right to exclude is in these cases limited by statutory provisions that provide a broad category of access rights to non-owners residing on privately

[126] Act 62 of 1997.

[127] Act 19 of 1998.

[128] In terms of section 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 an unlawful occupier is a person who occupies land or a building without the express or tacit consent of the owner or person in charge or without another right in law to occupy.

[129] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 74.

owned land. PIE places the same kind of limitation on the right to exclude but the limitation is not based on access rights; instead, PIE impose limitations on the right to exclude on the basis of anti-eviction policy.[130]

As was mentioned in Chapter 2, in private law the landowner's right to exclude assumes a strong position in the rights paradigm. Under the common law, the landowner can (in addition to asserting any other of his ownership rights) enforce his right to exclude by evicting unwanted occupiers with the *rei vindicatio*.[131] Given that the right to exclude is strong, courts normally do not have a general discretion to deny the landowner's application for an eviction order once the basic requirements have been meet.[132] However, in recent times the courts have dismissed actions based on the *rei vindicatio* in certain instances. The Constitution, in particular section 26(3), which provides that no one may be evicted from their home without a court order and only after all relevant circumstances have been considered, and PIE[133] have amended the availability of the *rei vindicatio* with regard to the protection of immovable property used mainly for residential purposes.

Section 26 of the Constitution, together with PIE, requires specific eviction procedures that have to be complied with by a landowner before evicting people

[130] Section 26(3) of the Constitution of the Republic of South Africa, 1996.

[131] Van der Walt AJ *Property in the margins* (2009) 58.

[132] 54.

[133] PIE is an example of legislation that expressly grants the courts the discretion to refuse an application for an eviction order on the basis of all the relevant circumstances of the occupiers. Section 2 of PIE states that the Act applies to the eviction of unlawful occupiers in respect of all land in South Africa. Section 4 of PIE requires that, before granting an eviction order, a court must be of the opinion that "it is just and equitable to do so, after all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women". See also Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 272.

from his land. Section 4(7) of PIE outlines specific circumstances that have to be considered before the eviction order is granted. The procedure set out in PIE protects unlawful occupiers by affording them proper judicial oversight in an eviction process, intended to give effect to section 26(3) of the Constitution. The effect is that PIE, read with section 26(3), delays the eviction until it has been determined that it is just and equitable to evict the unlawful occupiers.[134] Consideration of all the relevant circumstances, namely the general historical, social and economic context as well as the personal circumstances of the occupier, before an eviction order can be granted, overrides the abstract application of the common law *rei vindicatio*.[135] This is so because the eviction order is not based purely on proof of the common law requirements that the applicant is the owner and the occupier is in possession, but on all relevant circumstances.[136] Arguably, consideration of all relevant circumstances amounts to a balancing process in which the landowner's rights are weighed against the interests of the occupiers. These anti-eviction measures significantly qualify the landowner's right to exclude because, in this context, exclusion is dependent on the discretion of the courts to decide whether or not to grant an eviction order after all the relevant circumstances have been considered. Eviction of unlawful occupiers is possible, but the decision to evict is case-specific and context-sensitive. Therefore, the landowner's right to vindicate is restricted by the Constitution and statutory regulation that protects occupiers against arbitrary or unfair eviction. This is a clear instance where the landowner's right to exclude is

[134] *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) para 17. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 250.

[135] Van der Walt AJ *Property in the margins* (2009) 43-44.

[136] In *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) the court held that an eviction cannot be granted without considering the personal and socio-economic circumstances of the occupiers. In instances where there are compelling circumstances or factors, the eviction should not be granted.

limited by virtue of legislation aimed at achieving constitutionally prescribed outcomes in terms of specifically promulgated legislation.

In *Port Elizabeth Municipality v Various Occupiers*[137] the court held that, in light of section 26(3) of the Constitution and PIE, the courts should be reluctant to grant eviction orders against unlawful occupiers unless the eviction order will be just and equitable under the circumstances of each case. Van der Walt argues that the judgment diminishes the landowner's entitlement to exclude or evict unlawful occupiers from his private land, since the eviction procedure prescribed by the anti-eviction laws is expensive and time-consuming.[138] In this instance, the landowner is forced to allow unlawful occupiers to continue residing on his land against his will, at least until the statutory requirements have been complied with.

Because of the requirements in PIE and section 26(3) of the Constitution, it is uncertain when exactly an owner can succeed with the *rei vindicatio*. Some authors have argued that the *rei vindicatio* is still available to protect ownership of business premises, since PIE is not applicable to such premises but only to property used for residential purposes.[139] In this regard, the landowner can still employ the *rei vindicatio* in so far as PIE is not applicable, to either business or residential premises.

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[137] 2005 (1) SA 217 (CC) paras 21-22.

[138] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 278.

[139] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 254. Mostert H & Pope A (eds) *The principles of the law of property in South Africa* (2010) 217 argue that the *rei vindicatio* applies to evictions from land or property only when it is being used for business, trade or industrial purposes, or when the defendant does not fit the definition of "unlawful occupier" or "occupier" under PIE or ESTA. See also *Ellis v Viljoen* 2001 (4) SA 795 (C); Pope A "Eviction and the protection of property rights: A case study of *Ellis v Viljoen*" (2002) 119 *South Africa Law Journal* 709-720; Pienaar JM *Land reform* (2014) 690.

ESTA applies to lawful occupiers of rural land and it regulates the relationship between the owner and lawful occupiers. ESTA provides access rights to occupiers who reside on privately owned land and who had consent or another right in law to do so.[140] ESTA generally applies to instances where a landowner grants access to non-owners on the basis of an employment contract that is linked to housing. For example, a farm owner can grant access rights to farmworkers, entailing the provision of housing that allows farmworkers to be on the farm for purposes of working and housing. The farmworkers occupy land of which they are not registered owners but holders of a personal right, protected by the land reform legislation applying to lawful occupiers.[141] The issue of exclusion is triggered when the employment contract is terminated and the farm owner seeks to evict the farmworker.

ESTA provides for instances when non-owners are allowed to have continued access to the land against the landowner's will, namely when the employment contract is terminated. In that case, ESTA regulates the termination of the permission to occupy and protects the farmworkers against arbitrary eviction, to give effect to the right to secure tenure.[142] The constitutional provision places an obligation on the state to improve security of tenure by way of appropriate legislation so that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable

[140] See section 1 of the Extension of Security of Tenure Act 62 of 1997.

[141] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 663; Dhliwayo P *Tenure security in relation to farmland* (2012) unpublished LLM thesis Stellenbosch University 113.

[142] Section 25(6) read with section 25(9) of the Constitution of the Republic of South Africa, 1996.

redress.[143] ESTA seeks to strengthen and secure weak and vulnerable interests in land and this provides permanent or temporary security of tenure for lawful occupiers and their families, who occupy land for residential purposes.[144] The content of the tenure rights includes the right to use the specific parcel of land, to reside on the land, and to have access to services.[145] The access rights created under ESTA are enforceable against the landowner as well as his successors in title. Termination of the rights can only occur when there are valid grounds, and under fair and reasonable circumstances.

Section 8(2) of ESTA creates a link between employment and the right of residence of occupiers employed on farmland. In some instances ESTA requires farm owners to continue providing housing to farmworkers even when their employment has been terminated.[146] The impact of ESTA is that if the person sought to be evicted falls within the definition of "occupier", the statutory eviction procedures under ESTA must be followed. This is to ensure that farmworkers are not evicted from the farm without proper procedural protection.[147] Therefore, even if the farm owner wants to exercise his right to exclude by evicting farmworkers, he is obliged to follow the eviction procedure, which can be expensive and time consuming and

[143] Section 25(6) of the Constitution of the Republic of South Africa, 1996.

[144] Dhliwayo P *Tenure security in relation to farmland* (2012) unpublished LLM thesis Stellenbosch University for a detailed discussion of farm workers' tenure security.

[145] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 663.

[146] Wegerif M, Russel B & Grundling I *Still searching for security: The reality of farm dwellers evictions in South Africa* (2005) 85.

[147] Sections 8-13 of the Extension of Security of Tenure Act 62 of 1997 set out a long and complex procedural process that should be followed by farm owners to effect legal evictions from farms. See also Pienaar JM *Land reform* (2014) 400-406 for a detailed discussion on the regulation of eviction.

might delay the eviction process.[148] The eviction procedure entitles the farmworkers to have access to the farm for housing purposes while waiting for the eviction to be finalised. In other words, the anti-eviction measures protects farmworkers and also enable them to continue in occupation until the occupancy rights are terminated on lawful grounds in accordance with the requirements of ESTA.[149] This limits the extent to which a farm owner can exert control over farmworkers who live on his land, thereby limiting the right to exclude.

Apart from regulatory eviction procedures, the limitation on the landowner's right to exclude is demonstrated by decisions concerning limited use of and access to agricultural land. For example, apart from stabilising their lawful occupation of the land, ESTA also provides other access rights to non-owners, based on limited permission to use the land, that prevent the landowner from exercising his right to exclude, for example in the context of burial rights.[150] In the case of *Nhlabathi and Others v Fick*[151] the landowner argued that section 6(2)(dA) of ESTA was unconstitutional because it infringes upon section 25 of the Constitution.[152] ESTA was amended in 2001 to include burial rights in favour of occupiers of agricultural

[148] Van der Merwe CG (with Pope A) "Ownership" in Du Bois F (ed) *Wille's Principles of South African law* (9th ed 2007) 469-556 549.

[149] Van der Walt AJ *Property in the margins* (2009) 127.

[150] In this regard, see section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997, which provides that a farm labourer can bury his or her deceased family member, who at the time of death was residing on the land on which the occupier is residing, in accordance with their religion or cultural beliefs, provided an established practice in respect of the land exist in terms of which farm labourers were in the past allowed to bury their deceased family members on the farm in line with their belief or custom.

[151] 2003 (7) BCLR 806 (LCC) para 20. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 285-286, 297-299.

[152] The burial right constitutes a deprivation of some incidents of ownership, including the landowner's right to exclude.

land.[153] Prior to the amendment, the courts refused to grant burial rights because they were different in nature to other rights in ESTA, which did not impact on the land physically.[154] As a result of the amendment, occupiers of private farmland were granted the right to bury their deceased family members on the farm where they lived and worked, even without prior permission and against the will of the landowner, provided they meet the requirements stipulated in ESTA.[155] The burial right should be in accordance with religion or cultural beliefs if an established practice existed in respect of land.[156] An "established practice" denotes a practice in terms of which the owners or persons in charge routinely gave permission to people residing on land to bury deceased family members on that land in accordance with their religion or cultural belief.[157] ESTA now places the landowner in a situation where he is not able to refuse burial on his land as long as an established practice exists.[158] To this end, burial rights impose a permanent physical intrusion on the

[153] Section 6(2) of ESTA was amended to include burial rights in section 6(2)(dA) and 6(5).

[154] *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC) para 16; *Nkosi and Another v Bührmann* 2002 (1) SA 372 (SCA) para 51, which concerned the refusal of the farm owner to grant occupiers' burial rights. See also Mahomed A *Understanding land tenure law: Commentary and legislation* (2009) 55-58. Pienaar JM *Land reform* (2014) 418-419 explains that burial rights were deemed to be different because they constituted a servitude, embodying a limited real right, which would have an impact on the landowner's ownership rights and would also impact on the land permanently.

[155] Pienaar JM *Land reform* (2014) 418-423.

[156] *Dlamini and Another v Joosten and Others* 2006 (3) SA 342 (SCA) para 1. See also Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-630 635; Pienaar JM *Land reform* (2014) 419.

[157] Section 1(1) of the Extension of Security of Tenure Act 62 of 1997. In *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC) para 36-37 the court held that an established practice does not relate to a particular family but that the practice had to have been established in respect of land. See also Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-630 653; Pienaar JM *Land reform* (2014) 419.

[158] Section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997.

land. Some of the case law that dealt with the occupiers' burial rights emphasised that granting such a right to occupiers amounts to an inroad into the landowner's entitlements.[159] The right to exclude is statutorily limited by burial rights provided under ESTA to secure the religious and cultural rights in line with the constitutional obligation. The *Nhlabathi* decision therefore shows how legislature can limit property rights for purposes of promoting constitutionally recognised non-property rights.[160]

3 3 2 Legislation not directly giving effect to a non-property constitutional right

In some instances, the right to exclude is subject to statutory qualification that derives from legislation not directly aimed at giving effect to non-property constitutional rights. The legislation in this category allow non-owners to have access to or use privately owned land without the landowner's permission or consent. For this discussion it is necessary to consider examples from foreign law together with South African examples. English, Welsh and Scots law provide, in different forms, for a statutory right to roam[161] on privately owned land designated for recreational

[159] *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC); *Nkosi and Another v Bührmann* 2002 (1) SA 372 (SCA). See also Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-630; Pienaar JM *Land reform* (2014) 418-422.

[160] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 74.

[161] A right to roam mainly refers to the right to wander across open land that is privately owned. Although a detailed analysis of Scandinavian public access rights falls outside the scope of this study, it is interesting to note that this right to roam has been in existence for a long period of time in Scandinavian countries such as Sweden, Norway, Finland and Denmark. For example in Swedish law the "allemansrätt" meaning "everyman's right" gives anyone in Sweden, whether local or a tourist, the right to roam almost everywhere they would like. See Anonymous "The right of public access" available online at <http://www.naturvardsverket.se/en/Enjoying-nature/The-Right-of-Public-Access/> (accessed on 04-06-2014). Katz L "Exclusion and exclusivity in property law" (2008) 58 *University of Toronto Law Journal* 275-315 298-299 asserts that the principle of "allemansrätt" ensures that anyone

purposes.[162] These statutes were enacted specifically to grant access rights to non-owners and other neighbouring owners, to pass over or to be on privately owned land. The right to roam is not recognised in South African law and therefore it is necessary to consider other jurisdictions to identify examples of access rights that originate from and are protected by law. The discussion on legislation here is not an attempt to introduce new access rights but is to outline and explain instances in which statutory access rights place limitations on the right to exclude.

(a) A landowner's right to exclude non-owners from his land is limited by a broad category of statutory provisions that grant regulatory access to state authorities on private land. These include but are not limited to search, seizure and forfeiture powers. For example, the Income Tax Act[163] and the Value Added Tax Act[164] provide that a judge may issue a warrant authorising an officer to enter and search any premises.[165] The search is to be conducted, on someone's premises, without prior

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can use rural land for recreational purposes, so long as these uses are not inconsistent with the uses to which the owner has decided to put the land. Robertson HG "Public access to private land for walking: Environmental and individual responsibility as rationale for limiting the right to exclude" (2011) 23 *Georgetown International Environmental Law Review* 211-262 215-240 notes that Scandinavian countries have a historic and cultural commitment of public rights of access to private land (countryside) for all people, for purposes of open-air recreation. Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 776 (with reference to footnote 203) states that several of the core principles in the Land Reform (Scotland) Act 2003 already exist in most of the Scandinavian countries.

[162] The Countryside and Rights of Way Act 2000 (CROW Act) and the Land Reform (Scotland) Act 2003 (LRSA), respectively.

[163] Section 74D of the Income Tax Act 58 of 1962.

[164] Section 57D of the Value Added Tax Act 89 of 1991.

[165] See section 57D(1)(a)(i) of the Value Added Tax Act 89 of 1991; Section 74D(1)(a)(i) of the Income Tax Act 58 of 1962. *Deutschmann NO and Others v Commissioner for the South African Revenue Service; Shelton v Commissioner for the South African Revenue Service* 2000 (2) SA 106

notice and at any time to obtain any information, documents or things as evidence of non-compliance or offence committed in relation to which the warrant is being issued.[166] The landowner does not have the power to deny an officer who is acting on this kind of authority access to his premises. In such instances, the landowner cannot exercise his right to exclude.

Furthermore, the Investigation of Serious Economic Offences Act[167] authorises the Director to enter any premises for the purposes of an inquiry at any reasonable time and without prior notice.[168] In terms of this provision the landowner's consent is not required for the Director to have access to his premises. This implies that the landowner cannot exclude anyone acting in terms of this provision. Limitations of the right to exclude are also authorised by the Criminal Procedure Act,[169] which authorise entry upon premises to obtain any article required in evidence; to any person who is lawfully in charge of any premises and reasonably suspects that stock or produce has been placed on the premises; and to allow the police to prevent any offence in connection with state security, respectively.[170]

(E) 113 was decided on the basis of these two sections. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 313-314.

[166] See section 57D(1)(a)(ii) of the Value Added Tax Act 89 of 1991; Section 74D(1)(a)(ii) of the Income Tax Act 58 of 1962.

[167] Section 6 of the Investigation of Serious Economic Offences Act 117 of 1991.

[168] *Park-Ross and Another v The Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C) 167. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 233.

[169] Sections 21, 24 and 25 of the Criminal Procedure Act 51 of 1977.

[170] *Minister of Safety and Security and Another v Van der Merwe and Others* [2011] 1 All SA 260 (SCA) para 12 states that the authority that is conferred by a warrant to conduct a search and then to seize what is found, makes material inroads upon rights that have always been protected at common law, such as the rights to privacy, property and personal integrity. See also *Polonyfis v Minister of Police and Others* (64/10) [2011] ZASCA 26 (18 March 2011) para 9.

Those provisions in the Prevention of Organised Crime Act[171] that authorise criminal and civil forfeiture of property that has been used to commit an offence[172] also impose limitations on the right to exclude. Forfeiture concerns state action which results in the loss of property to the state, without the consent or co-operation of the owner, because the property was involved in some way in committing a crime.[173] Civil forfeiture is enforced (without criminal prosecution or conviction) against innocent third parties who hold or own property, regardless of their involvement or knowledge of the crime.[174] Both civil and criminal forfeiture constitute a significant limitation of property rights, in that the property, as a result of the forfeiture order, is forfeited to the state.[175]

(b) The right to exclude is also limited by statutory provisions that regulate the use of land in the area of private law. The Sectional Titles Act[176] allows a private body (the body corporate of a sectional title scheme) to impose rules that limit sectional title owners' property rights. The sectional title owners' right to exclude is subject to and limited by the regulations and rules in the Act. In terms of the Act[177] the members of a sectional title community are bound by the registered rules of the sectional title

[171] See chapter 6 of the Prevention of Organised Crime Act 121 of 1998.

[172] On the distinction between civil and criminal forfeiture, see Van der Walt AJ *Constitutional property law* (3rd ed 2011) 319-320.

[173] Van der Walt AJ "Civil forfeiture of instrumentalities and proceeds of crime and the constitutional property clause" (2000) 16 *South African Journal on Human Rights* 1-45 2.

[174] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 319-320.

[175] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 322. See also section 56 of the Prevention of Organised Crime Act 121 of 1998.

[176] Act 95 of 1986.

[177] Section 35 of the Sectional Titles Act 95 of 1986.

scheme. According to Pienaar,[178] these rules are not based on contract but are prescribed by legislation. In other words, the rules are enforced on members against their will and without their consent. Some of the rules limit a sectional title owner from exercising his right to exclude. For example, a sectional title owner has a duty to permit any person authorised in writing by the body corporate to enter his section or exclusive use area, at all reasonable hours and on notice, for purposes of inspecting it, maintaining, repairing or renewing pipes, wires, cables and ducts in the section.[179]

In addition, the Act provides for several implied servitudes in favour of and against each section. These servitudes include a reciprocal servitude for the passage or provision of certain services through pipes, wires, cables and ducts.[180] This implied servitude confers on the body corporate the right to have access to each section and the exclusive use areas, to effect maintenance, repairs or renewal of any part of the building or any pipes, wires, cables or ducts in the building.[181] Pienaar argues that the right of access granted to outsiders in terms of the statutory provision is a deviation from the common law principle that an owner has exclusive right to use and enjoy his property, which includes his right to privacy and control of access to his property.[182] The limitation on the right to exclude arises as a result of the implied servitude, created against the will of a sectional title owner in favour of each section in terms of legislation.

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[178] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 41.

[179] Section 44(1)(a) of the Sectional Titles Act 95 of 1986. See also section 13(1)(a) of the Sectional Titles Scheme Management Act 8 of 2011.

[180] See section 28(1)(a)(ii) in favour of a section and section 28(1)(b)(ii) against each section. See also Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 239-240.

[181] Section 28(2)(b) and section 44 (1)(a) of the Sectional Titles Act 95 of 1986.

[182] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 235 (with reference to footnote 7).

(c) A limitation on the right to exclude also appears in legislation governing and regulating access rights in English law. A first category refers to legislation granting access rights in the form of a right to roam to non-owners (the public). The statutory right to roam granted to non-owners is recognised as a limitation of the private landowner's right to exclude.[183] According to Anderson,[184] the right to roam refers to broad access rights that allow the public to wander freely over private meadows or other uncultivated private lands. The right to roam in England and Wales[185] gives legislative force to an entitlement that was not recognised under common law, namely self-determining pedestrian access to privately owned open land.[186] The relevant legislation was enacted to meet the demand for legally recognised access rights that had been lost as a result of the enclosure movement.[187] The CROW Act

[183] Van der Walt AJ *Property in the margins* (2009) 193-195; Robertson HG "Public access to private land for walking: Environmental and individual responsibility as rationale for limiting the right to exclude" (2011) 23 *Georgetown International Environmental Law Review* 211-262 213.

[184] Anderson JL "Britain's right to roam: Redefining the landowner's bundle of sticks" (2007) 19 *Georgetown International Environmental Law Review* 375-436 380.

[185] The right is regulated by the Countryside and Rights of Way Act 2000 (CROW Act).

[186] Gray K & Gray SF *Land law* (6th ed 2009) 533; Gray K & Gray SF *Elements of land law* (5th ed 2009) 1372-1376. See also Gray K "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and Environment* 45-65 49-52; Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 766; Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259; Anderson JL "Britain's right to roam: Redefining the landowner's bundle of sticks" (2007) 19 *Georgetown International Environmental Law Review* 375-436.

[187] Gray K "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and Environment* 45-65 49 notes that there was once a "golden age" that recognised some generalised access rights to privately held land. Furthermore, in medieval times, some form of a right to roam over open uncultivated land was acceptable. However, any entitlement of this kind of access was gradually extinguished from the 16th century onwards by the enclosure movement. See also Anderson JL "Britain's right to roam: Redefining the landowner's bundle of sticks" (2007) 19 *Georgetown International Environmental Law Review* 375-436 383-389, who discusses the impact of enclosure on access rights and indicates failure of the common law to recognise a more general right to roam. See

grants any person the right to enter and remain on any land for the purposes of open-air recreation, but within strict limitations.[188] Notably, the right of access provided by the Act is for open-air recreation. The Act limits the reach of access rights to five specific categories of land, namely mapped open country; mountain land; coastal land; registered common land; and dedicated land, which is designated specifically for access.[189] Access rights are limited to access on foot.[190] The Act has increased non-owners' access to privately owned land and in doing so statutorily limited landowners' right to exclude non-owners from their land. Furthermore, the Act changed the law's approach to the rights of landowners and in particular landowners' right to exclude.[191] This change came as a result of the guarantee of public access to designated private lands prescribed by the Act.

A right to roam is also recognised in Scotland. Scots law provides far-reaching access rights to non-owners[192] and creates access rights that are much wider in scope than those established by the CROW Act in respect of general access rights

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also Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 767-770; Sawers B "The right to exclude from unimproved land" (2011) 83 *Temple Law Review* 665-696 684.

[188] Section 2 of the Countryside and Rights of Way Act 2000. See also Gray K & Gray SF *Land law* (6th ed 2009) 533.

[189] Section 1(1)-(2), 16 of the Countryside and Rights of Way Act 2000.

[190] Section 2(1)(b) of the Countryside and Rights of Way Act 2000.

[191] Robertson HG "Public access to private land for walking: Environmental and individual responsibility as rationale for limiting the right to exclude" (2011) 23 *Georgetown International Environmental Law Review* 211-262 213, citing *R (Ashbrook) v East Sussex County Council* [2002] EWCA Civ 1701 (20 November 2002) para 48, where one judge stated that the rights conferred by the CROW Act wrought a sea change in the law's approach to the rights of members of the public to reasonable enjoyment of the countryside, even when the countryside is privately owned.

[192] The rights are enforced through the Land Reform (Scotland) Act 2003 (LRSA). See Carey Miller DL "Public access to private land in Scotland" (2012) 15 *Potchefstroom Electronic Law Journal* 119-147; Gray K & Gray SF *Land law* (6th ed 2009) 534; Van der Walt AJ *Property in the margins* (2009) 194.

to privately owned land. Prior to the enactment of the LRSA, Scots common law granted members of the public limited access rights over private land in the form of public rights of way.[193] These common law rights of way were difficult to establish at Scots common law because their utility and occurrence were always circumscribed by several doctrinal considerations.[194] This is one aspect that led Scots law to introduce a broad statutory right of responsible access. The LRSA was enacted to provide reasonable access rights to land for recreation and passage. The LRSA establishes and confers on everyone statutory access rights over, on and below the surface of the land, for some limited time and for specified purposes.[195] Importantly, these access rights are subject to manner restrictions in that the exercise of the access right is presumed to be responsible if it does not cause unreasonable interference with the rights of others.[196] The access right may not be exercised with the use of a car or motorbike.[197] These access rights include the right to be on land, that is, to go onto and remain on any part of the land and a right to cross land.[198] The right to be on land extends to certain purposes only. The first is for recreational

[193] Lovett JA "The right to exclude meets the right of responsible access: Scotland's bold experiment in public access legislation" (2012) 26 *Probate and Property* 52-56 53.

[194] Lovett JA "The right to exclude meets the right of responsible access: Scotland's bold experiment in public access legislation" (2012) 26 *Probate and Property* 52-56 53; Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 753-759. See also Gray K "Pedestrian democracy and the geography of hope" (2010) 1 *Journal of Human Rights and Environment* 45-65 50, citing *Earl of Breadalbane v Livingston* (1790) M 4999, as affirmed (1791) 3 Pat 221; *Dyce v Lady James Hay* (1852) 1 Macq 305 312-315, which highlights that Scots law did not traditionally recognise unconsented rights of recreational access to another's land.

[195] See the Preamble and Sections 1(1)-(7) of the Land Reform (Scotland) Act 2003.

[196] Guthrie T "Access rights" in Rennie R (ed) *The promised land: Property law reform* (2008) 125-146 134, 137. See also section 2(2) of the Land Reform (Scotland) Act 2003.

[197] Gretton GL & Steven AJM *Property, trusts and succession* (2nd ed 2013) 241-256 242-243. See also Combe MM "Access to land and landownership" (2010) 14 *Edinburgh Law Review* 106-113 106.

[198] Section 1 of the Land Reform (Scotland) Act 2003.

purposes.[199] Although recreational purposes is not further defined in the LRSA, the *Scottish Outdoor Access Code*[200] that was introduced under the legislation gives examples such as sightseeing; family and social activities, such as walks, picnics and kite flying; horse riding; mountaineering and wild camping as recreational activities. The second specified purpose is carrying on a relevant educational activity. This is defined as being concerned with furthering understanding of the natural or cultural heritage.[201] According to the *Scottish Outdoor Access Code*, the LRSA allows access rights to be exercised by a leader and his students on a trip to learn about wildlife, landscapes or geological features.[202] The third purpose extends to activities carried out commercially or for profit, that is, activities carried out by the general public for recreational purposes, for educational activities or for crossing land.[203]

The right to cross land is not restricted in terms of purpose.[204] The right to cross land is defined as going on to land, passing over it, and then leaving it for the purpose of getting from one place outside the land to another place.[205] This access

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[199] Section 1(3) of the Land Reform (Scotland) Act 2003.

[200] Scottish Natural Heritage *Scottish Outdoor Access Code* (2005) para 2.7 available online at <http://www.outdooraccess-scotland.com/> (accessed on 05-05-2014). See also *Tuley v Highland Council* [2009] CSIH 31A; 2009 S.L.T 616 concerning an attempt to exclude one of the recreational activities, namely horse riding from a particular path.

[201] Sections 1(3)(b), (5)(a)-(b) of the Land Reform (Scotland) Act 2003.

[202] Scottish Natural Heritage *Scottish Outdoor Access Code* (2005) para 2.8 available online at <http://www.outdooraccess-scotland.com/> (accessed on 05-05-2014).

[203] Scottish Natural Heritage *Scottish Outdoor Access Code* (2005) para 2.9 available online at <http://www.outdooraccess-scotland.com/> (accessed on 05-05-2014). See also Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 786.

[204] Guthrie T "Access rights" in Rennie R (ed) *The promised land: Property law reform* (2008) 125-146 133.

[205] Sections 1(2)(b), (4)(b) of the Land Reform (Scotland) Act 2003.

right could encompass activities like taking a short cut across someone's land to get to work, school or a bus stop.[206] Basically, the access right conferred by the LRSA enables non-owners to go into, pass over and remain on privately owned land for recreational, educational or commercial purposes, without a landowner's prior consent.[207] The strong presumption in favour of access rights introduced by the LRSA is startling, given the exclusionary powers held by landowners under the common law. The LRSA also imposes a duty on the landowners to use and manage their land in a responsible way.[208] This provision invokes the presumption of responsible land management, which includes not interfering with the access rights of any person exercising or seeking to exercise the access rights.[209]

The LRSA prohibits landowners from taking action aimed at preventing or deterring the exercise of access rights. This means that landowners are prevented from exercising their right to exclude non-owners from their land. The local authority has a wide-ranging regulatory role under the Act to ensure that the public has reasonable access to land.[210] Arguably, the LRSA redefines the right to exclude in Scots law by allowing a far broader range of access activities on privately owned

[206] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 786; Guthrie T "Access rights" in Rennie R (ed) *The promised land: Property law reform* (2008) 125-146 133.

[207] Combe MM "Access rights: A letter from America" (2012) 16 *Edinburgh Law Review* 110-113 110.

[208] Section 3(1)-(2) of the Land Reform (Scotland) Act 2003.

[209] Section 11 of the Land Reform (Scotland) Act 2003. See also Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 789; *Tuley v Highland Council* [2009] CSIH 31A; (2009) SLT 616 619-620.

[210] Section 13 of the Land Reform (Scotland) Act 2003.

land. As Lovett puts it, the presumptive power to exclude is replaced by the presumption in favour of responsible statutory access rights.[211]

The right to roam in England and Wales and in Scotland is a recent statutory innovation, which shows the state's willingness to expand public access rights. The introduction of general indefeasible public access rights under the CROW Act and the LRSA represents a step on the road towards changing the general view that the right to exclude is the core of property.

The public recreation aspect of access rights is also recognised in US law and it looks similar to the Scottish and English right to roam, although it is not recognised in legislation but in something like the public trust doctrine.[212] According to the public trust doctrine, navigable waters, tidal wetlands, beds of navigable waters, and the wet sand portion of beaches are held by the sovereign in trust for use by the public in connection with commerce, navigation, and fishing.[213] In cases where the state transfers such property to private owners, the property remains encumbered by the public trust.[214] The effect is that the landowner's right to exclude the public is limited to protect public access.

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[211] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 742.

[212] Regarding the public trust doctrine see generally Alexander GS & Peñalver EM *An introduction to property theory* (2012) 134; Blumm MC "The public trust doctrine and private property: The accommodation principle" (2010) 27 *Pace Environmental Law Review* 649-668; Van der Schyff E "Unpacking the public trust doctrine: A journey into foreign territory" (2010) 13 *Potchefstroom Electronic Law Journal* 122-159; Byrne PJ "The public trust doctrine, legislation and green property: A future convergence?" (2012) 45 *University of California Davis Law Review* 915-930; Frank RM "The public trust doctrine: Assessing its recent past and charting its future" (2012) 45 *University of California Davis Law Review* 665-692.

[213] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 134 (with reference to footnote 10).

[214] Alexander GS & Peñalver EM *An introduction to property theory* (2012) 134.

The public trust doctrine particularly provides for public access to beaches for recreational purposes. Public access to privately owned beaches was historically limited,[215] the public only being allowed to access land between the mean high and low tide lines (wet-sand areas) for purposes of fishing.[216] The courts have in recent years added the aspect of recreation as one of the purposes for public access to the beach.[217] The expansion of public beach access relates to privately owned dry sand portions of the beach *via* the public trust doctrine.[218]

More strikingly, the courts in New Jersey have resolved issues of beach access in a way that expands public access at the expense of the landowner's right to exclude. In *Matthews v Bay Head Improvement Association*[219] the court held that a private non-profit entity, which owned or leased most of the beachfront lots in Bay Head, did not have an unlimited right to exclude members of the public from the dry sand portion of its beach. Furthermore, the court ruled that the public must be given reasonable access to the foreshore (wet-sand area) and a suitable area for recreation on the dry sand.[220] This judgement came about as a result of the fact that

[215] Alexander GS "Ownership and obligations: The human flourishing theory of property" (2013) 43 *Hong Kong Law Journal* 451-462 459.

[216] Alexander GS "Ownership and obligations: The human flourishing theory of property" (2013) 43 *Hong Kong Law Journal* 451-462 459. See also Rose C "The comedy of the commons: Custom, commerce and inherent public property" (1986) 53 *University of Chicago Law Review* 711-781 713.

[217] See Alexander GS "Ownership and obligations: The human flourishing theory of property" (2013) 43 *Hong Kong Law Journal* 451-462 459, citing *Neptune City v Borough of Avon-by-the-Sea* 294 A2d 47 (NJ 1972); *Thornton v Hay* 462 P2d 671 (Ore 1969); *Hixon v Public Service Commission* 146 NW2d 577 (Wis 1966).

[218] Singer JW *Introduction to property* (2nd ed 2005) 86-87; Alexander GS "Ownership and obligations: The human flourishing theory of property" (2013) 43 *Hong Kong Law Journal* 451-462 459.

[219] 471 A2d 355 (NJ 1984).

[220] *Matthews v Bay Head Improvement Association* 471 A2d 355 (NJ 1984) 366.

Bay Head Improvement Association was a quasi-public entity.[221] The court reasoned that where an organisation is quasi-public, its power to exclude must be reasonably and lawfully exercised in furtherance of the public welfare related to its public characteristics.[222] In these instances, the landowner's property rights, particularly the right to exclude, must give way.

In the subsequent judgement of *Raleigh Avenue Beach Association v Atlantis Beach Club*[223] the court expanded the scope of public access to a private beach, ruling that the owner of the beach property had a duty to keep the dry sand area open to the public. The court further held that a private beach club that was not a quasi-public entity was required under the reasonable access norm established in *Matthews v Bay Head Improvement Association* to provide members of the public with reasonable access to the beach across its dry sand area.[224] The *Raleigh Avenue Beach Association* decision that entitles the public to have access to a privately owned beach has a significant restrictive impact on the landowner's right to

[221] In *Matthews v Bay Head Improvement Association* 471 A2d 355 (NJ 1984) 358 the court stated that the ownership, dominion and sovereignty over land covered by tidal waters, which extend to the mean high water mark, is vested in the state in trust for the people. Furthermore, ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body. See Singer JW *Introduction to property* (2nd ed 2005) 88; Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 803; Alexander GS "Ownership and obligations: The human flourishing theory of property" (2013) 43 *Hong Kong Law Journal* 451-462 460.

[222] *Matthews v Bay Head Improvement Association* 471 A2d 355 (NJ 1984) 366.

[223] 879 A2d 112 (NJ 2005).

[224] *Raleigh Avenue Beach Association v Atlantis Beach Club Inc* 879 A2d 125 (NJ 2005). See also Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 803; Alexander GS "Ownership and obligations: The human flourishing theory of property" (2013) 43 *Hong Kong Law Journal* 451-462 459-460; Rosser E "An ambition and transformative potential of progressive property" (2013) 101 *California Law Review* 107-172 152-153.

exclude.[225] Although the ruling in *Raleigh Avenue Beach Association* preserves the owner's right to exclude, the decision importantly favours public access to the private beach for recreational purposes.

In South African law, public access to the beach for recreational purposes is regulated by legislation, which is mostly relevant to coastal zone management.[226] The legal nature of the coast as public land has been recognised since Roman law, where the sea and sea-shore were classified as *res omnium communes*, meaning that the area was open to the enjoyment of all and could not be subjected to private appropriation.[227] This notion was modified in Roman-Dutch law, which classified the sea and sea-shore as *res publicae*, meaning that the area was owned by the authorities but as custodian for the use and enjoyment of the people.[228]

The National Environmental Management: Integrated Coastal Management Act 24 of 2008[229] provides that the ownership of coastal property, which encompasses

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[225] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 803 argues that *Raleigh Avenue Beach Association's* symbolic impact on the right to exclude is that it muddies the seemingly crystalline traditional rule that a private owner of the dry-sand portion of the beach may exclude others.

[226] Glazewski J *Environmental law in South Africa* (2nd ed 2005) 297-301.

[227] 307.

[228] Glazewski J *Environmental law in South Africa* (2nd ed 2005) 307. See also Van der Merwe CG *Sakereg* (2nd ed 1989) 32-34; *South African Shore Angling Association and Another v Minister of Environmental Affairs* 2002 (5) SA 511 (SE) 11. In *Consolidated Diamond Mines of South West Africa Ltd v Administrator, South West Africa and Another* 1958 (4) SA 572 (A) the court held that the public has certain simple rights to the foreshore such as to go on it, to bath and to fish and any substantial interference with these rights would be a wrongful act. In *Anderson and Murison v Colonial Government* 1891 (8) SC 293 296 the court stated that the government is in one sense the custodian of the sea-shore, on behalf of the public.

[229] See section 11(1). The Sea-Shore Act 21 of 1935 vests ownership of the sea-shore in the State President. The Act regulates the accessibility of the sea and sea-shore for the use and enjoyment of the public. However, the Act is outdated and not in conformity with the National Environmental Management Act 107 of 1998. See Couzens EWF "Sea and sea-shore" in Joubert WA & Faris JA

the sea-shore, vests in the citizens of the Republic and the state must hold coastal public property in trust on behalf of the citizens of the Republic. According to the Act, every natural person has reasonable access to coastal public property and is entitled to use and enjoy it, provided such use does not adversely affect the rights of members of the public to use and enjoy the coastal public property; does not hinder the state in the performance of its duty to protect the environment and does not cause an adverse effect.[230] However, the Act does not prevent prohibitions or restrictions on access to and use of any part of the coastal public property which is or forms part of a protected area; to protect the environment; in the interest of the whole community; in the interest of national security or in the national interest.[231] The Minister of Environmental Affairs and Tourism may declare any state-owned land as coastal public property, *inter alia* to improve public access to the sea-shore.[232] In addition, each municipality whose area includes coastal public property must make a by-law that designates strips of land as coastal access land to secure public access

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(eds) *The law of South Africa* volume 24 (2nd ed 2010) 107-200 para 141; Glazewski J *Environmental law in South Africa* (2nd ed 2005) 307, 309. Kidd M *Environmental law* (2nd ed 2011) 229 argues that the coastal zone is ecologically sensitive and therefore ought to be subject to special land-use controls. The National Environmental Management: Integrated Coastal Management Act 24 of 2008 now regulates the coastal zone and the Sea-Shore Act only applies to provinces to which it has been assigned.

[230] See section 13(1)(a)-(b) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[231] See section 13(2) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[232] See sections 7, 8(1)(a) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 for the composition and extension of coastal public property. See also Couzens EWF "Sea and sea-shore" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 24 (2nd ed 2010) 107-200 para 151.

to that land.[233] The coastal access land is subject to a public access servitude in favour of the local municipality where the land is situated and in terms of which members of the public may use that land to gain access to coastal public property.[234]

The question that arises when dealing with recreational activities relates to the public's legal right of access to the sea-shore over private property.[235] In principle, the public has access rights to the sea-shore but there are instances where the public is denied access by private land owners whose land abuts the high-water mark and who assert private property rights to prevent people from traversing their land.[236] The provision of coastal access land will undoubtedly affect private land and limit the landowner's right to exclude. The Act prescribes factors that the municipalities have to take into account when designating the access areas, including the importance of not restricting the rights of landowners unreasonably.[237] Accordingly, the legislation provides the public with reasonable access to the sea-shore and it also regulates where the public can have access, what kind of access is required and by whom.

(d) A second category of legislation recognises access rights to land when a landowner who wants to carry out work on his property requires him or his workers to gain access to a neighbour's land for that purpose. In English common law, anyone

[233] See section 18(1) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[234] See section 18(2) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[235] Glazewski J *Environmental law in South Africa* (2nd ed 2005) 301.

[236] 316.

[237] Section 29 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008. See also Kidd M *Environmental law* (2nd ed 2011) 231.

who wished to enter a neighbour's land for the purpose of carrying out work on his land required the consent of the neighbouring owner.[238] This position has been significantly changed by legislation that grants access to neighbouring landowners. The Access to Neighbouring Land Act 1992 (UK) empowers the relevant courts to grant the owner of dominant land access to the servient land for the purpose of carrying out work, without the consent of the owner of the servient land.[239] The access order granted by the court permits the exercise of access rights only for the purpose of facilitating certain types of work on the dominant land for a limited period of time.[240] The Act only allows compulsory access in respect of work that is reasonably necessary for the preservation of the dominant land.[241] For example, the court may grant an access order that allows the owner of the dominant land to carry out works, which include the maintenance, repair or renewal of any part of a building or other structure that is situated on the dominant land, to preserve it.[242]

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[238] Grattan S "Proprietarian conceptions of statutory access rights" in Cooke E (ed) *Modern studies in property law* volume 2 (2003) 353-374 353. See also *Entick v Carrington* (1765) 19 Howell's State Trials 1029, 1066 95 ER 807, in which the court ruled that the law holds the property of every man so sacred that no man can set his foot in his neighbour's house without his permission.

[239] Section 3(1), (2) and (7) of the Access to Neighbouring Land Act 1992 (UK). See also Grattan S "Proprietarian conceptions of statutory access rights" in Cooke E (ed) *Modern studies in property law* volume 2 (2003) 353-374 353; Gray K & Gray SF "The rhetoric of realty" in Getzler J (ed) *Rationalizing property, equity and trusts: Essays in honour of Edward Burn* (2003) 204-280 260.

[240] See section 2(1) of the Access to Neighbouring Land Act 1992 (UK); Grattan S "Proprietarian conceptions of statutory access rights" in Cooke E (ed) *Modern studies in property law* volume 2 (2003) 353-374 354.

[241] Sections 3(1), (2), (7) of the Access to Neighbouring Land Act 1992 (UK) provide that an access order authorises the applicant to bring onto and leave on the servient land such materials, plant and equipment as are reasonably necessary for carrying out the work. The owner of the servient land is required to allow the applicant access to the servient land in accordance with the court order, see sections 3(1) and 4(1) of the Access to Neighbouring Land Act 1992 (UK).

[242] See section 1(4)(a) of the Access to Neighbouring Land Act 1992 (UK).

Furthermore, the Party Wall etc Act 1996 (UK) confers upon a building owner, his servants, agents, workmen and surveyors the right to enter and remain on land, during usual working hours, for purposes of executing works in pursuance of the Act.[243] The Act relates to works which a neighbouring landowner may desire to carry out where an adjoining wall (party wall) with a neighbour's property might be affected. For example, if a landowner wants to alter the structure of the adjoining wall, he is required in terms of the Act to serve a notice to an adjoining landowner.[244] If the adjoining landowner does not consent, the building landowner is allowed by the Act to build the wall but only at his own expense.[245] The general effect of the legislation permitting access rights for work purposes in English law is that landowners are required to allow other people (workers or owners of neighbouring land) onto their private land for reasons specified in the statutes. This imposes a limitation on their right to exclude.

3 4 Limitations imposed by common law

Sometimes an efficient exploitation of one's land requires that a landowner in one way or another be allowed to have access to his neighbour's land in a situation where it is for some reason impossible to get permission or consent. This creates a conflict of interests between the affected landowner who might want to exclude others from engaging in any activity on his land and the neighbouring landowner who might want access to the land in question for specific purposes. This section focuses

[243] Sections 1(4)-(7), 2(1)-(2) of the Party Wall etc Act 1996 (UK) provide certain rights to a building owner, in the absence of a court order and without the adjoining landowner's consent, subject only to the giving of notice. In this regard see Gray K & Gray SF "The rhetoric of realty" in Getzler J (ed) *Rationalizing property, equity and trusts: Essays in honour of Edward Burn* (2003) 204-280 260.

[244] See section 1(2) of the Party Wall etc Act 1996 (UK).

[245] See Section 1(4) of the Party Wall etc Act 1996 (UK).

on two examples. The first is the right of way of necessity, which is not dependent on the consent of the affected owner but is acquired by way of a court order.[246] A right of way of necessity constitutes a limitation on the ownership of neighbouring land. The second example involves encroachment, when a neighbour encroaches on another's land without his consent and the court orders that the encroachment be left in place, sometimes against payment of compensation.[247] Both examples illustrate instances where common law principles limit a landowner's right to exclude by granting an access right to a non-owner without the landowner's consent.

The Roman-Dutch principles regarding the way of necessity are still applicable in South African law.[248] A right of way of necessity is a right that an owner of inaccessible property has, in the absence of a consensual right of servitude, to pass over the property of adjoining owners to the nearest public road.[249] A way of

[246] For a comprehensive discussion on the right of way of necessity see Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University; Van der Walt AJ & Raphulu TN "The right of way of necessity: A constitutional analysis" (2014) 77 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 468-484. See also Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1365.

[247] The discussion on encroachments does not include a historical analysis. For a detailed discussion on encroachments see Van der Walt AJ *The law of neighbours* (2010) 132-203; Temmers Z *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University.

[248] A historical analysis is not included in this discussion. See Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University Chapter 2 for a detailed discussion on the right of way of necessity and its origins. Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1366-1367 mentions that earlier Roman law also recognised the right of way of necessity for the public over private property if, for example, *via publica* became impassable on account of flooding or in cases where an enclosed plot of land had the potential of remaining undeveloped. See also Southwood MD *The compulsory acquisition of rights* (2000) 95.

[249] *Carter v Driemeyer and Another* (1913) 34 NPD 1 3. See also Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77 20.

necessity is classified as a praedial servitude.[250] A praedial servitude constitutes a burden imposed on one piece of land (servient tenement) in favour of another piece of land (dominant tenement).[251] If it is for some reason impossible to reach agreement between the landowners to create or establish a right of way for the landlocked property to gain access to the public road, the courts can grant a servitude of way of necessity over a specified servient tenement and along a specified route.[252]

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[250] Southwood MD *The compulsory acquisition of rights* (2000) 96. There are two types of way of necessity recognised in South African law, namely a permanent way of necessity (*jus viae plenum*) and one granted on sufferance (*jus viae precario*). The main difference between these two types of way of necessity is that reasonable compensation is required to be paid for a permanent right of way and no compensation is required if a way of necessity is on sufferance because the landowner grants his permission for the use of the right of way, mostly in an emergency only. See Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1375-1376; Southwood MD *The compulsory acquisition of rights* (2000) 102, 110-111; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 328-330. Since this study mainly focuses on instances in which access rights to privately owned land are granted without the landowner's permission, it is not necessary to consider the way of necessity on sufferance. The focus is on the permanent way of necessity. The South African position that compensation is required for a permanent right of way of necessity was established in *Wilhelm v Norton* 1935 EDL 143 176 and confirmed in *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 676A-D. See also Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77 24.

[251] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 323. See also Southwood MD *The compulsory acquisition of rights* (2000) 105.

[252] This means that the right of way of necessity is established by a court order in the absence of consent from the servient tenement owner. In this regard see Van der Merwe CG "Servitudes and other real rights" in Du Bois F (ed) *Wille's Principles of South African law* (9th ed 2007) 591-629 598-599; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 328-330; Van der Merwe CG & De Waal MJ "Servitudes" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 24 (2nd ed 2010) para 560; Van der Walt AJ *The law of neighbours* (2010) 192. Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1375. At 1372 Van der Merwe explains that a right of way of necessity is established once the exact location of the right is fixed. See also Southwood MD *The compulsory acquisition of rights* (2000) 95, who states that the right of way of necessity is recognised by law in certain circumstances, namely when the owner (in most cases a

South African law does not allow a person to claim a way of necessity if he himself has created the situation of necessity.[253] In *Van Rensburg v Coetzee*[254] the court held that a claim for a right of way of necessity arises when a piece of land is geographically isolated and has no access, or if access is available but inadequate with the effect that its owner "has no reasonably sufficient access to the public road for himself and his servants to enable him, if he is a farmer, to carry on his farming operations".[255] Apart from agricultural reasons, access is also granted to accommodate the needs of landlocked residential and commercial property.[256]

A permanent right of way affords the dominant tenement the use and enjoyment of a full right of way, on a continuous basis, over the servient land.[257] The content of a way of necessity is determined with reference to the width of the road, the frequency of use, and the type of traffic that will make use of the road,[258] based

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servient owner) refuses to allow the owner of the other land (dominant owner) a right of way over his land.

[253] Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1392; Van der Merwe CG & De Waal MJ "Servitudes" in Joubert WA & Faris JA (eds) *The law of South Africa* volume 24 (2nd ed 2010) 455-510 para 561; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 329. See also *Bekker v Van Wyk* 1956 (3) SA 13 (T) 14.

[254] *Van Rensburg v Coetzee* 1979 (2) SA 655 (A).

[255] *Van Rensburg v Coetzee* 1979 (2) SA 655 (A) 671A-C, citing *Lentz v Mullin* 1921 EDL 268 270 and the judgment of the court a quo *Van Rensburg v Coetzee* 1977 (3) SA 130 (T) 134C. See also Southwood MD *The compulsory acquisition of rights* (2000) 100.

[256] Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1412-1413.

[257] Southwood MD *The compulsory acquisition of rights* (2000) 102.

[258] Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1390, citing *SA Yster en Staal Industriële Korporasie Bpk v Van der Merwe* 1984 (3) SA 706 (A).

on the economic needs of the enclosed land.[259] Accordingly, if farming operations are conducted on the enclosed land, the way of necessity should provide an entry and exit for agricultural implements and machinery, trucks, and other motor vehicles.[260]

Before the court grants a way of necessity neither the dominant nor the servient owner's rights are affected.[261] A right of way of necessity binds the surrounding properties as of right at the moment the property becomes landlocked. However, once it is established, this right of way can only be enforced by a court order, against a specific neighbouring property. The court order extends to all other persons who visit the owner of the dominant tenement in the normal course of events.[262] The affected landowner is bound by the court order and has to tolerate the use of part of his land for access to the public road.[263] The effect is that the servient owner's right to exclude as well as his right to free and unburdened ownership is limited.[264]

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[259] *Sanders NO & Another v Edwards NO & Others* 2003 (5) SA 8 (C). In light of the decision in *Sanders*, Van der Merwe CG and Pienaar JM "Law of property (including real security)" 2003 *Annual Survey of South African Law* 376-428 415 argue that the court's decision represents the modern trend with regard to ways of necessity that relaxes the strict requirement that the land must be completely landlocked, in favour of the principle that ways of necessity can be granted to improve the economic exploitation of land in general. See also Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1412-1413.

[260] *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 671E.

[261] Southwood MD *The compulsory acquisition of rights* (2000) 115.

[262] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 328.

[263] Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1372.

[264] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 453; Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1364-1365, 1372.

Compensation is therefore required to soften the effect of any loss suffered by the servient owner.

Another example of limitations originating *ex lege* from common law principles in the area of neighbour law is the case where a building encroaches on another's property without his consent.[265] Generally speaking, encroachment concerns the unlawful intrusion of material objects, into, onto or over the land of the neighbour, for example a building erected wholly or substantially on a neighbour's land.[266] In general, this wrong is regarded as a disturbance of possession that requires a remedy.[267] The remedy that the South African common law allows in such a case is for an affected landowner to approach the courts for an order of removal of the encroaching structure on his land.[268] Removal of the encroaching structure is the

[265] There are two recognised forms of encroachment, namely building works and overhanging branches and intruding roots of trees. Both forms result in a permanent physical invasion of the neighbouring land when the encroachment violates the boundary line demarcating the two properties, and thereby encroaches on the land of another. This dissertation focuses only on instances where building encroachments are left in place by court order. See Van der Walt AJ *The law of neighbours* (2010) 132. See also Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 121.

[266] Milton JRL "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 145, 234; Van der Merwe CG *Sakereg* (2nd ed 1989) 201-203; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 121-127.

[267] Milton JRL "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 234.

[268] Van der Merwe CG *Sakereg* (2nd ed 1989) 202; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg & Schoeman's The law of property* (5th ed 2006) 121-127; Milton JRL "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 237; Van der Merwe CG & Cilliers JB "The 'year and a day rule' in South African law: Do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 587-593 588; Van der Walt AJ "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *South African Law Journal* 592-628 592; Boggenpoel ZT "The discretion of courts in encroachment disputes [discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)]" (2012) 23 *Stellenbosch Law Review* 252-264 255. See also *Pike v Hamilton, Ross & Co* (1855) 2 Searle 191 196, 198, 200; *Van Boom v Visser* (1904) 21 SC 360 361; *Stark v Broomberg* (1904) 14 CTR 135 137.

default remedy for encroachments and it also acts as a declaration of the affected landowner's rights.[269] Van der Merwe points out that the remedy is a mandatory interdict (injunctive relief) to enable the removal of the encroachment so that an owner can continue enjoying the full and undisturbed use of his property.[270] The purpose of the remedy of removal is to restore the *status quo ante*.[271] The right of an owner to demand removal would, in principle, seem to be absolute for he is vindicating the freedom of his property from unlawful interference.[272] The right to insist on the removal of the encroachment is consistent with the concept of ownership as the most extensive real right which a person can have in respect of an object, whether movable or immovable.[273] Accordingly, the basis of the remedy of removal is that the landowner can exercise his ownership rights free of any interference.[274]

The problem occurs in cases when the court exercises its discretion in favour of leaving the encroachment in place instead of removal, thereby denying the affected

[269] *Pike v Hamilton, Ross & Co* (1855) 2 Searle 191. See subsequent cases *Van Boom v Visser* (1904) 21 SC 360; *Stark v Broomberg* (1904) 14 CTR 135 137.

[270] Van der Merwe CG *Sakereg* (2nd ed 1989) 201-201; Van der Walt AJ *The law of neighbours* (2010) 133. The encroachment has a direct physical impact on the affected landowner's undisturbed and full enjoyment of his land. This is because the encroacher is not exercising his ownership entitlements but is interfering with the neighbouring landowner's entitlement of use and enjoyment. With regard to the effects of the permanent physical intrusion posed by an encroachment, see *Boss Foods CC v Ingo Rehders Properties and Another* [2014] ZAGPJHC 236 (26 May 2014) para 39.

[271] Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 466.

[272] Milton JRL "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-269 241.

[273] Van der Merwe CG & Cilliers JB "The 'year and a day rule' in South African law: Do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 587-593 588.

[274] Van der Walt AJ *The law of neighbours* (2010) 133, citing Van der Merwe CG *Sakereg* (2nd ed 1989) 201-202; Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 455.

landowner's right to demand removal. What has crystallised in a number of fairly recent cases is that courts are not shy to exercise their discretion to award compensation in place of removal.[275] The discretion of the court is wide and equitable and depends on the circumstances in the particular case. The court will usually take the extent and nature of the encroachment into consideration, for example, the size of the encroachment to determine whether removal or compensation would be the appropriate remedy.[276]

[275] *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C). In this case, the plaintiff sought an order precluding the defendant from removing the encroachment that covered 80 percent of his property. It was questioned whether removal should be ordered in favour of the defendant or whether the court should exercise its discretion in favour of the plaintiff, leaving the encroachment in place. The court decided in favour of the plaintiff and denied the order for removal of the encroachment. See also *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 21. In *Roseveare v Katmer, Katmer v Roseveare and Another* (2010/44337, 2010/41862) [2013] ZAGPJHC 18 (28 February 2013) para 15 the court confirmed that courts generally have a discretion in encroachment cases to award compensation instead of the removal of the encroaching structure. See also Van der Walt AJ *The law of neighbours* (2010) 161; Boggenpoel ZT "The discretion of courts in encroachment disputes [discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)]" (2012) 23 *Stellenbosch Law Review* 252-264 255; Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 455, 465; Boggenpoel ZT "Property" 2014 (1) *Juta's Quarterly Review of South African Law* para 2 2 2. In most encroachment cases, the courts do not explain the implications of its decision to award compensation in place of removal – on the ownership of the affected land. See in this regard *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130. See also Van der Walt AJ "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *South African Law Journal* 592-628 596. It is questionable whether courts can order transfer of the encroached-upon land in addition to compensation. See Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313-326.

[276] Boggenpoel ZT "The discretion of courts in encroachment disputes [discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)" (2012) 23 *Stellenbosch Law Review* 252-264. See also *Boss Foods CC v Ingo Rehders Properties and Another* [2014] ZAGPJHC 236 (26 May 2014).

In instances where the default remedy is not applied strictly, the affected landowner is left with no choice but to accept the continued existence of the encroachment, even if it is large and significant.[277] In the process, the court's decision to leave the encroachment in place and award compensation may prevent the landowner from enforcing his right to exclude.[278] This constitutes a deviation from the long-standing common law remedy of removal of the encroaching structure.[279]

There are three kinds of losses that can result from an encroachment when the courts decide to leave it intact. The encroachment results in a permanent loss of use and enjoyment of a portion of the affected landowner's property[280] if the affected landowner is forced to accept the existence of the encroaching structure, sometimes in exchange for compensation.[281] In some instances, the courts have actually

[277] In *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O), the court stated that it would be willing to exercise its discretion in favour of damages instead of removal. Similarly, in *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 26-28, the court exercised its discretion to deny removal and left the encroachment in place. See also *Boss Foods CC v Ingo Rehders Properties and Another* [2014] ZAGPJHC 236 (26 May 2014); *Fedgroup Participation Bond Managers (Pty) Limited vs Trustee of the Capital Property Trust Collective Investment Scheme in Property* (unreported, 10 December 2013: GJ case no 41882/12). See Boggenpoel ZT "Property" 2014 (1) *Juta's Quarterly Review of South African Law* para 2 2 2 for a detailed discussion of the *Fedgroup* case.

[278] Van der Walt AJ *Property in the margins* (2009) 171; Van der Walt AJ *The law of neighbours* (2010) 139-194.

[279] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 17-31; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 [22 April 2010] para 21. See also Van der Walt AJ "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *South African Law Journal* 592-628 592-600.

[280] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 218 (C). See also Van der Walt AJ "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *South African Law Journal* 592-628 622.

[281] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Lombard v Fischer* [2003] 1 All SA 698 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 218 (C). See also Temmers Z *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation

purported to create a servitude in favour of the encroacher to explain what happens when the encroachment is not removed.[282] Another outcome that could result from an encroachment is that a court explicitly orders that the encroached-upon land be transferred to the encroaching neighbour.[283] The landowner's right to exclude is significantly limited regardless of whether the order is simply to leave the encroachment in place; a servitude is created; or transfer of the encroached-upon land is ordered.[284] This results in an effective or actual transfer of the land or other

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Stellenbosch University 144-145; Van der Walt AJ *The law of neighbours* (2010) 195-202; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 453-454.

[282] Recently in *Roseveare v Katmer, Katmer v Roseveare and Another* (2010/44337, 2010/41862) [2013] ZAGPJHC 18 (28 February 2013) the court dealt with a dispute between neighbours concerning an encroaching boundary wall between two neighbours. The boundary wall encroachment resulted in a portion of the plaintiff's land being incorporated as part of the defendant's land. The court ordered the plaintiff (affected landowner) to register a servitude in favour of the defendant (encroacher) in respect of the remaining area of the encroachment. It is unclear whether the court has the authority to make such an order and what the constitutional implications are. See Boggenpoel ZT "Property" 2013 (1) *Juta's Quarterly Review of South African Law* para 2 3 1. Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 469 argues that the *Roseveare* judgement does not entirely clarify the basis on which the court assumes the power to additionally order that a servitude be created to preserve the existing situation (that is in a case where the encroachment remains intact). An important aspect to note is that the servitude in this case is created by court order against the will of the affected landowner and without his consent. The possibility of creating such a servitude in encroachment cases did not exist under the common law. See *Roseveare v Katmer, Katmer v Roseveare and Another* (2010/44337, 2010/41862) [2013] ZAGPJHC 18 (28 February 2013) paras 8, 22. See also Boggenpoel ZT "Property" 2013 (1) *Juta's Quarterly Review of South African Law* para 2 3 1; Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 469, 479.

[283] Van der Walt AJ *The law of neighbours* (2010) 196; Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313-326 314. See also *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010) para 9.

[284] In this regard see Boggenpoel ZT "The discretion of courts in encroachment disputes [discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)"

entitlements of ownership like use, the right to exclude and the right of disposal with regard to the particular portion of land.[285]

3 5 Conclusion

The constitutional perspective adopted in this chapter had an influence on the decision to focus on the different origins of limitations. This chapter shows that the Constitution, legislation and common law principles that grant access and use rights to non-owners, for various purposes, impose limitations on the right to exclude. This observation is in line with the developments in literature concerning situations in which access to land is upheld at the expense of a landowner's right to exclude.[286] An overview of the limitations on the right to exclude indicates that limitations with different origins work in different ways. The origins of the limitations show the purpose for the limitation, the nature of the limitation and how it is implemented.

(2012) 23 *Stellenbosch Law Review* 252-264 259; Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 456.

[285] The creation of a servitude and the instances in which the court orders transfer of property has far-reaching implications because a forced transfer of property rights occurs and this needs to comply with section 25 of the Constitution. An interesting question is whether the effect the encroachment has on the landowner's right to exclude where a court transfers ownership rights or entitlements from the affected landowner, against his will, to the encroacher, can be justified and whether it can pass constitutional muster. This is discussed in Chapter 4 below.

[286] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820 746-748; Dagan H "The social responsibility of ownership" (2007) 92 *Cornell Law Review* 1255-1274 1255-1256; Singer JW "Democratic estates: Property Law in a free and democratic society" (2009) 94 *Cornell Law Review* 1009-1062 1048; Singer JW "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335; Alexander GS "Property's ends: The publicness of private law values" (2014) 99 *Iowa Law Review* 1257-1296. These sources and many others in this regard are discussed in the preceding chapter (Chapter 2 section 2 2 4), which looks at theoretical justifications for limiting the landowner's right to exclude.

If the limitation originates from the Constitution, the reason for the limitation is the Constitution. This means that if the limitation results from protecting non-property constitutional rights such as life, equality and dignity, the limitation is stronger than the right to exclude because it is constitutional and the right to exclude is not. The specific constitutional right precedes the right to exclude and thus limitations on the latter are inherent in the constitutional system. The limitation takes on a very specific meaning, which indicates that the right to undermine someone else's right to life, dignity and equality was not included in the notion of ownership and is not part of the right to exclude. Courts are inclined to secure non-property constitutional rights like life, human dignity and equality at the cost of the landowner's right to exclude because those rights are by nature unqualified. Therefore, in cases where access to land is essential to the protection of these constitutional rights, they are upheld. The constitutional limitations are different in that resolving a conflict between the right to exclude and one of the non-property constitutional rights does not involve balancing, because those rights cannot be limited or qualified.[287] The equality cases belong to the legislative category because PEPUDA and public accommodations laws place statutory limitations on the right to exclude.

If the limitation originates in legislation, the purpose of the limitation appears from the legislation in question. Often the legislation goes further than that; it shows how to do the balancing and how to resolve the conflict. When the right to exclude clashes with a constitutionally and statutorily protected right such as free speech or movement, it is the legislation that implements limitations on the right to exclude and that shows why and how it is limited. The conflict is resolved by balancing the two

[287] The reason for the limitation in these cases comes from the Constitution. In Chapter 4 I argue that the section 25(1) analysis is not relevant in these cases.

conflicting rights in accordance with the legislation. In such cases, there is no overriding of the right to exclude; instead, it is limited in a specific way by balancing it against a statutory right. The conflicting rights are both subject to limitation and regulation and they can therefore be balanced against each other in a way that accommodates both rights. Therefore, it is never a question purely of overriding the right to exclude but of accommodating the conflicting rights.

Limitations originating in common law are similar to statutory ones except that the reasons for them are not just policy in a broad sense but also balance of convenience. Limiting the right to exclude on a balance of convenience does not appear from the statutory examples, but that is the justification for the common law example of encroachment. If there is a dispute, the common law shows how to do the balancing and how to resolve the conflict. The common law examples involve overriding the right to exclude; usually, the affected landowner is awarded compensation. In statutory cases, compensation is sometimes awarded but it is the exception rather than the rule. For example, when the right to freedom of speech that is regulated by legislation clashes with the right to exclude, it is never the case that the owner whose right is limited is paid compensation, but instead, both rights are upheld. The legislation, and sometimes the landowner, imposes time, place and manner restrictions that determine when and how the right to exclude is limited. Contrary to the common law examples, the conflicting rights are therefore mutually accommodated and balanced. The common law limitations are different because they usually involve weighing of the competing interests to determine the suitable outcome, and if the landowner's right is limited compensation is often payable.

To conclude, analysis of the different origins of limitations imposed on the right to exclude confirms that ownership functions not only within a legal system but also

in a constitutional system that includes limitations. Therefore, justification for the limitation does not entail justifying the existence of the limitation but rather regulating the implementation and effect of the limitation.

Chapter four:

Justifications

4 1 Introduction

The questions in this chapter are: what are the justifications for limiting the right to exclude by affording access rights to non-owners? Are these limitations constitutionally justifiable? Must the limitations caused by access rights be justified in all cases? These questions do not only entail whether there are sufficient reasons to justify non-owners' access rights but also whether there are legitimate reasons to justify why landowners should carry such a burden. The broader question concerns the justifications for granting non-owners access rights to land, without the landowner's permission or prior consent.

Conclusions from preceding chapters suggest that the right to exclude is after all not so central to property law and hence some limitations are not difficult to justify.[1] I established in Chapter 2 that the strong view of absoluteness requires normative justifications for the existence of these limitations, whereas the qualified view of absoluteness does not necessarily require such a strong normative justification. Justification on normative grounds is based on the assumption that ownership is in principle unlimited, that is, it is pre-social and pre-constitutional. As appears in Chapter 2, this assumption is theoretically and doctrinally weak. Therefore, one can assume that property rights are in principle limited and contextual in the sense that they function within a legal system of which limitations are an

[1] In both Chapters 2 and 3 I established that the right to exclude is not absolute and that it is subject to limitations.

inherent part. The sources of the various limitations, for example the Constitution, statutes and common law, have already been established in Chapter 3. At the end of Chapter 3 I established that property rights are also part of a constitutional system. What remains to be considered is whether the limitations discussed in Chapter 3 are justifiable in the constitutional setting.

In the constitutional perspective, it is not necessary to consider justification on normative grounds. Instead, two other types of justification are discussed in this chapter, arguing from the assumption that ownership is not in principle unlimited. The two types of justification that are relevant in the constitutional context involve the authority of a specific limitation and the section 25(1)[2] justification for the effect that a specific limitation has on specific owners. Section 25(1)-type justification is only relevant if there is a constitutional property clause, as is the case in South African law.[3]

The first type of justification discussed in this chapter entails that there must be authority and a statutory or policy reason for imposing a specific limitation on the landowner's right to exclude. The justificatory grounds that usually justify limitations on the right to exclude in this sense include direct obligations arising from non-

[2] Section 25 (1) of the Constitution of the Republic of South Africa, 1996.

[3] In the absence of a property clause this process might adopt a different form, such as constitutional review. The South African property clause provides that "no one may be deprived of property except in terms of the law of general application, and no law may permit arbitrary deprivation of property". Section 25(1)-(3) of the Constitution guarantees the protection of existing property rights against unconstitutional interference, while section 25(5)-(9) provides a guarantee of state action to promote land and other related reforms. Section 25(4) is an interpretative provision that applies to both sections 25(1)-(3) and 25(5)-(9). The property clause also embodies a commitment to land reform. The result is that property rights (including the right to exclude) are subject to regulatory restrictions, in the form of legislation, to carry out the necessary reforms. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 12-16.

property constitutional rights; legislation giving effect to non-property constitutional rights; legislation that does not give effect to non-property constitutional rights; and common law principles applying to non-consensual access rights. The right to exclude is limited for particular purposes, such as furthering public policy or advancing land reform. The justification for the limitation of the right to exclude in these cases is often a matter of how well it serves these specific purposes. Secondly, for a specific limitation, in a particular case, the section 25(1)-type justification may also be necessary. In addition to the law of general application requirement section 25(1) justification adopts the form of the non-arbitrariness requirement. The non-arbitrariness requirement in section 25(1) is a proportionality-based test that ensures that the effects of a particular limitation are justified in the sense that they are not unjustifiably unfair or disproportionate. Limitations emanating directly from a constitutional provision, without intervening legislation, might not require the section 25(1) justification, or proportionality justification, at least not always,[4] because the rights to life, dignity and equality cannot be balanced against the right to exclude.

Accordingly, the discussion of the justifications for limiting the right to exclude in this chapter does not focus on the reasons for granting non-owners access rights, but rather on the authority for and the effects of limiting the landowner's right to exclude. These justifications are analysed from a constitutional perspective.

[4] See the discussion below in section 4 2 1.

4 2 Justification for a specific limitation

4 2 1 Non-property constitutional rights

From the point of view adopted in Chapter 2, the right to exclude others may or may not be central to the notion of ownership, but it is not absolute and it can be assumed that property is limited in principle. Limitations therefore always are possible, the remaining question being only how they are imposed and what their effects are. In a constitutional context, particularly the South African context, non-property constitutional rights such as the right to life, human dignity and equality are so fundamental that their protection sometimes requires limiting the right to exclude.[5] The right to exclude sometimes clashes with non-property constitutional rights of non-owners who need access to property to exercise their constitutional rights such as the right to life, dignity and equality. When there is a clash between the right to exclude and one of these rights, the courts tend to uphold the non-property constitutional rights. The case law dealing with the clash between the landowner's right to exclude and non-property constitutional rights indicates that where the protection of rights like life, equality and dignity depends on access to land, the right to exclude is limited accordingly.[6]

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[5] In the German law context Grimm D "Dignity in a legal context and as an absolute right" in McCrudden C (ed) *Understanding human dignity* (2013) 381-391 387-388 explains that dignity is regarded as an absolute right and that every infringement of it is a violation.

[6] Arguing from a German law perspective, Grimm D "Dignity in a legal context and as an absolute right" in McCrudden C (ed) *Understanding human dignity* (2013) 381-391 388 states that dignity as an absolute right always trumps and no limitation can be justified if it is at stake. The argument that Fox O'Mahony makes in her work on property outsiders and displacement through eviction especially of vulnerable people (old age people), provides further theoretical support for the argument that I make in this dissertation regarding non-property constitutional rights such as right to life, dignity and equality. Although her work is not based on the South African Constitution, her argument is more or less the same that there are stronger constitutional rights that should override the right to exclude. See Fox O'Mahony L & Sweeney JA "The idea of home in law: Displacement and dispossession" in

The purpose of justification in this context is to determine the authority for limiting the right to exclude so as to secure non-property constitutional rights of non-owners with regard to the land. These rights are not generally subject to democratic deliberation, regulation and/or limitation[7] and therefore the justificatory process does not involve a proportionality-type balancing of the conflicting rights.[8] The justification in these cases involves the determination of reasons whether the right to exclude is indeed limited to secure and protect non-property constitutional rights, and whether there is valid authority for the limitation. The authority is usually constitutional.

The decision in *State of New Jersey v Shack*[9] confirms that the right to exclude is limited on constitutional grounds if the exclusion of non-owners from privately owned land would result in an interference with fundamental non-property constitutional rights such as life and dignity. Van der Walt explains that the court in *State of New Jersey v Shack* treated the conflict between the landowner's right to exclude and migrant farmworkers' right to life and dignity as a matter of determining where the limits of the right to exclude have to be drawn to secure the constitutional right to life and dignity.[10] The court did not balance the conflicting rights against each other, but secured the right to life and dignity by accepting that the right to exclude is qualified and determining where the limits of exclusion have to be drawn to ensure

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Fox O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011); Fox O'Mahony L *Home equity and ageing owners: Between risk and regulation* (2012); Fox O'Mahony L "Property outsiders and the hidden politics of doctrinalism" (2014) 62 *Current Legal Problems* 409-445.

[7] See Chapter 3, section 3 2 above. See also Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 45.

[8] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 51, 61.

[9] 58 NJ 297 (1971).

[10] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 55.

that the right to life and dignity is protected.[11] The decision highlights the fact that limiting the right to exclude is constitutionally justified because of the need to protect and uphold the right to life and dignity of migrant farmworkers.[12]

The constitutional protection of fundamental rights also justified the limitation of the right to exclude in *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner of the Western Cape and Others*,[13] where the court dismissed the argument that the landowners have a right to exclude that needs to be protected. In South African law, fundamental rights are not ranked hierarchically, but the Constitutional Court has established that the right to life and dignity are the most important human rights and the source of all other rights in the Bill of Rights.[14] The *Victoria and Alfred Waterfront* decision strengthens the argument that when the right to exclude clashes with a fundamental right such as the right to life, the question is not a justification for limiting the right to exclude, but instead for the view that property is inherently limited and that the right to exclude is relative. A fundamental right such as the right to life justifiably imposes limitations on the landowner's right to exclude non-owners from the premises, which practically form a suburb of Cape

[11] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 55.

[12] See also *Folgueras v Hassle* 331 F Supp 615 (1971) 624-632.

[13] [2004] 1 All SA 579 (C) 448. Alexander GS *The global debate over constitutional property: Lessons from American takings jurisprudence* (2006) 11-12 states that "the South African Constitution recognises duties as well as rights and stresses as its core value human dignity rather than individual liberty." He adds that the Constitution recognises specifically enumerated social and economic rights as positive constitutional rights.

[14] *S v Makwanyane* 1995 (3) SA 391 (CC) paras 144, 146, 214, 217. Currie I & De Waal J *The bill of rights handbook* (6th ed 2013) 250-253, 258-259 argue that the right to life and dignity are unqualified and are given stronger protection than other rights. See also Woolman S "Dignity" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* volume 3 (2nd ed OS 2005) ch 36 1-75 19-24; Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 49.

Town. The right to life includes the right to a livelihood and, in this case, the right to beg for a living. To ratify a blanket entry prohibition against the affected persons would interfere with their source of livelihood and would impact on their right to life. The court referred to *Olga Tellis v Bombay Municipal Corporation*,[15] where the Supreme Court of India held that the right to life, which encompasses the right to a livelihood, is a fundamental constitutional right that cannot be waived.[16] The exclusion of the pavement and slum dwellers would have amounted to a deprivation of their means of a livelihood and consequently their right to life. Since the right to life must be protected without qualification, the right to exclude had to give way.

The right to equality also places a limitation on the right to exclude that requires justification. The limitation emanates from a constitutional provision and is also embodied in legislation, which makes the right to equality slightly different from the right to life and dignity, although it remains unqualified. Public accommodations laws[17] were enacted in the US to protect the public against exclusion from public accommodations on the grounds of race.[18] These public accommodations laws limit the landowner's right to exclude, but the limitations are justified because they secure and promote the right to non-discrimination. In South African law PEPUDA has similar effects. PEPUDA was enacted to give effect to section 9 of the Constitution (the equality provision). PEPUDA reflects the goal of a democratic and constitutional society, where landowners are prevented from excluding non-owners on the grounds of race, gender and disability. PEPUDA and public accommodations laws limit the

[15] (1986) SC 180 para 32. See also *Tellis and Others v Bombay Municipal Corporation and Others* [1987] LRC (Const) 351.

[16] The right to life is entrenched in article 21 of the Constitution of India 1949.

[17] Such as the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.

[18] Singer JW *Introduction to property* (2nd ed 2005) 45-86.

landowner's right to exclude to protect and promote public interests as well as to ensure equal treatment of all persons.

The point in this section is that when the right to exclude clashes with non-property constitutional rights such as rights to life, dignity and equality, the exercise of the right to exclude is limited insofar as it is necessary to secure and protect these constitutional rights. In such cases, it is not expected that the non-property constitutional rights should be limited to accommodate the right to exclude because these rights are unqualified. In addition, it is impossible to limit the right to life, dignity and equality without undermining them. Therefore, a proportionality-based justification will not apply in these cases because the non-property constitutional rights cannot be weighed against the right to exclude.[19]

Justification in this context does not involve justifying the existence of limitations. This section assumes that limitations are in general justified if there is a reason for them and their effect is proportionate. The reason for the limitation is the non-property constitutional rights, and the authority for the limitation is the Constitution. With regard to the equality cases, the authority for the limitation is the legislation specifically enacted to give effect to the right to equality. If the effect of the limitation is an issue, section 25 of the Constitution or other proportionality tests may follow, but usually not required because preventing a landowner from discriminating does not result in loss of a valuable property entitlement. The intervening legislation means that one has to at least consider the section 25(1)-type justification because the legislation needs to be properly introduced and implemented.

[19] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 51.

4 2 2 Legislation directly giving effect to a non-property constitutional right

This section examines the justificatory grounds that are usually considered when the landowner's right to exclude is limited when it clashes with legislatively-enforced, constitutionally protected non-property rights. The legislation limits the right to exclude so as to protect constitutional rights such as the right to freedom of speech, strike and picket, freedom of movement, and secure tenure. These non-property constitutional rights limit the right to exclude, but since they are subject to democratic deliberation, regulation and limitation[20] with the result that conflicts between the right to exclude and these rights can usually be resolved by limiting both rights and looking for a suitable accommodation from both sides.[21] The justification for limitations arising from these statutory regulatory measures is fairly easy to establish insofar as they are implemented to promote the public interest, and in some instances to implement certain constitutional imperatives. Statutory rights are not judicially balanced with the right to exclude because such balancing of rights has usually already been done by the legislature when drafting the statutes. The point is therefore usually to establish the desired balance with reference to the goals and requirements set out in the legislation.

US case law that deals with expressive activities in quasi-public places such as a shopping mall indicates that the exercise of freedom of expression rights (speech and petitioning)[22] can sometimes not be prohibited but can reasonably be limited in a

[20] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 62.

[21] For example see the decisions of *Marsh v Alabama* 326 US 501 (1946) 506; *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 (SC); *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

[22] The First Amendment to the United States Constitution (1791).

way that ensures the exercise of the right of free speech in quasi-public places and upholds the owner's right to exclude.[23] This implies that freedom of expression rights are subject to both statutory regulation and conduct rules imposed by the landowner. In *PruneYard Shopping Center v Robins*,[24] the landowner's right to exclude was limited because the owner had invited the public onto his property and non-owners can exercise their freedom of expression rights in quasi-public premises. In *Growthpoint Properties Ltd v South African Commercial Catering and Allied Workers Union and Others*,[25] the court also adopted a balancing approach in solving the conflict between the constitutional rights to strike and picket and the landowner's property rights. The Labour Relations Act 66 of 1995 (LRA) gives effect to labour rights such as the right to picket[26] and strike[27] entrenched in the Constitution, providing that employers may not unreasonably withhold permission to picket on their premises.[28] Since neither right is absolute, the court ordered the strikers to reduce the level of the noise and the landowners to tolerate the picketing. The decision relies on balancing language but the result does not reflect judicial balancing in the sense of the court weighing up of one constitutional right (right to strike or picket) against the other (property).[29] The balancing process entails determining whether the limitation imposed by the legislation is proportionate, taking into account that the desired balancing has already been done by the legislature

[23] See *Marsh v Alabama* 326 US 501 (1946); *PruneYard Shopping Center v Robins* 447 US 77 (1980); *New Jersey Coalition Against the War in the Middle East v J.M.B Realty Corp* 650 A2d 757 (NJ 1994). See also Chapter 3 above for a detailed discussion of these cases.

[24] 447 US 77 (1980).

[25] (2010) 31 ILJ 2539 (KZD).

[26] Section 17 of the Constitution of the Republic of South Africa, 1996.

[27] Section 23(2)(c) of the Constitution of the Republic of South Africa, 1996.

[28] Currie I & De Waal J *The bill of rights handbook* (6th ed 2013) 389.

[29] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 77.

when the LRA was drafted.[30] Therefore, as long as the strikers' actions are in line with the Act, they are acting within their rights even though their actions involve a limitation of the owner's right to exclude. The fact that the legislature has already struck the balance in the legislation means that it has decided on what would be allowable when pickets or strikes occur on private land. The outcome in a dispute between the right to strike or picket and the landowner's property right is based on the balance already achieved in the LRA, which entails that both rights can be exercised in a way that accommodates the other. As a result of the balancing process already achieved in the legislation and the fact that the limitation of the right to exclude is authorised by such legislation, the right to exclude is justifiably limited.

A similar result appears in the cases where the right to exclude clashes with the right to freedom of movement. The *Victoria and Alfred Waterfront* case highlights the fact that the affected persons' right to freedom of movement requires limiting the right to exclude because permanent exclusion of the respondents from the premises would clash with their constitutional right to freedom of movement.[31] Unlike the right to life, the right to freedom of movement is limited and consequently the tension between the right to exclude and freedom of movement should be resolved "in a manner which permits the rights of both parties to be vindicated to the greatest extent possible".[32] In the court's view, the landowners could prohibit certain unlawful behaviour on their land, but they could not place a blanket entry prohibition on the

[30] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 77.

[31] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 451.

[32] 452.

affected persons.[33] The protection of the right to free movement prohibits landowners from simply excluding the affected persons.

The limitation of the right to exclude is slightly different in cases dealing with private land and legislation that imposes limitations on the landowner's right to exclude. Legislation such as PIE provides protective measures against unlawful evictions under section 26(3) of the Constitution. In *Port Elizabeth Municipality v Various Occupiers*[34] the Constitutional Court stated that under the Constitution, the protection of property as an individual right is not absolute but subject to societal considerations. Section 26(3) of the Constitution and land reform laws are meant to redress past injustices and also to prevent evictions from recurring.[35] In light of the South African history of land dispossessions and the practice of excluding people from certain privately owned places, land reform and anti-eviction laws were enacted to regulate landowners' rights in land to give effect to the constitutional rights of non-owners.[36] The overall effect of the statutory provisions (such as in PIE) is that the landowners' traditionally strong common law right to evict (or exclude) is limited.[37] The justification for this limitation on the right to exclude comes from the constitutional goal of the relevant legislation.

In this regard, excluding people from privately owned land would in some cases be contrary to a specific constitutional provision. Land reform and anti-eviction laws

[33] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C) 452.

[34] 2005 (1) SA 217 (CC) para 16.

[35] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 19.

[36] Section 25 of the Constitution of the Republic of South Africa, 1996 also contains provisions regarding land reform.

[37] Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land- reform legislation" 2002 *Tydskrif vir die Suid-Afrikaanse Reg* 254-289 288.

should therefore be interpreted and applied in line with the constitutional imperative to prevent arbitrary evictions. *Port Elizabeth Municipality v Various Occupiers*[38] emphasised that when dealing with constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of human dignity, equality and freedom. The specific constitutional right that was at stake in this case is section 26.[39] Liebenberg argues that the significance of the *Port Elizabeth Municipality v Various Occupiers* decision lies in its insistence that unlawful occupiers (who enjoyed minimal rights under the previous legislative and common law regime) are now the bearers of constitutional rights, especially housing rights in section 26 of the Constitution.[40] The housing clause (section 26 of the Constitution) confers on unlawful occupiers interrelated procedural and substantive protections in the context of legal steps that have to be followed to evict these occupiers from their homes.[41] The section 26 housing right can be balanced with the property rights (the right to exclude) to decide the outcome of a particular dispute.[42] The court referred to other constitutional rights, namely human dignity, equality and freedom, because they might function as a support for the housing right. Nevertheless, these rights do not justify the limitation imposed on the right to exclude. Instead, the justification derives from legislation such as PIE that gives effect to section 26. Accordingly, non-owners' use and occupation of privately owned land is secured by limiting the landowner's right to exclude as far as it is necessary and reasonable to do so.

[38] 2005 (1) SA 217 (CC) para 15.

[39] Section 26 of the Constitution of the Republic of South Africa, 1996 – housing right.

[40] Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 277.

[41] 277.

[42] It should be noted that the balancing process does not apply to dignity and equality rights. This is another factor to support the argument that reference to the right to dignity or equality in eviction cases does not justify the limitation imposed on the landowner's right to exclude.

Section 6(2)(dA) of ESTA, which permits occupiers to bury deceased family members on private land without the owner's permission, was enacted to fulfil a constitutional mandate to ensure that occupiers can exercise their religious and cultural beliefs, which form an important part of their security of tenure.[43] *Nhlabathi and Others v Fick* (*Nhlabathi*)[44] highlights the extent to which legislation limits property rights to promote constitutionally protected non-property rights. The court did not simply uphold the landowner's right to exclude but took into account the rights of the occupiers as prescribed in ESTA and the Constitution and ruled against the landowner, upholding the transformative obligations embodied in the Constitution. At the same time, the court did not simply override the landowner's right to exclude because the right to a burial is only confirmed after considering the rights of the landowner and those of the occupiers. Section 6(2)(dA) of ESTA requires that the competing rights of the landowner and of the occupier must be considered when determining whether the right to appropriate a grave should be granted and if an established practice to do so had existed in the past. The court explained that the establishment of a grave would in most instances constitute a minor intrusion on the landowner's right to exclude and in such instances, it is justified to protect occupiers' religious and cultural rights.[45]

The fact that legislation purports to give effect to a constitutional right,[46] triggers the subsidiarity principles as they are described by Van der Walt. These principles

[43] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 31. See also Van der Walt AJ "Property, social justice and citizenship: Property law in post-apartheid South Africa" (2008) 19 *Stellenbosch Law Review* 325-346 343.

[44] 2003 (7) BCLR 806 (LCC).

[45] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 30.

[46] The Labour Relations Act 66 of 1995 (enacted to give effect to section 17 – picketing and section 23 - striking), the Extension of Security of Tenure Act 62 of 1997 (enacted to give effect to section

establish guidelines that identify the source of law that primarily governs litigation about an alleged infringement of rights.[47] The aim of the subsidiarity principles is "to ensure Constitution-focused application, interpretation and development of legislation and the common law, in line with the one-system-of-law-principle established by the Constitutional Court".[48] According to the first principle, a litigant who avers that a right protected by the Constitution has been infringed must rely on legislation specifically enacted to protect that right and may not rely on the constitutional provision directly when bringing action to protect the right.[49] According to the second principle, a litigant who avers that a right protected by the Constitution has been infringed must rely on legislation specifically enacted to protect that right and may not rely on the common law directly when bringing action to protect the

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25(6) - tenure security), and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (enacted to give effect to section 26(3) – anti-eviction provision).

[47] For a detailed discussion of the subsidiarity principles, see Van der Walt AJ "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128; Van der Walt AJ *Property and constitution* (2012) 35-91.

[48] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 19-24, 68. See also Pienaar JM *Land reform* (2014) 187. 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 the Constitutional Court clearly stated that:

> "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."

See further Michelman F "The rule of law, legality and the supremacy of the Constitution" in Woolman S *et al* (eds) *Constitutional law of South Africa* volume 1 (2nd ed OS 2003) ch 11 1-44 34-39; Davis DM & Klare K "Transformative constitutionalism and the common and customary law" (2010) 26 *South African Journal on Human Rights* 403-509 430.

[49] The first principle was established in the case of *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) and has since been confirmed in *MEC for Education; KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC); *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC); *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC); *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 (4) BCLR 312 (CC). See also Van der Walt AJ "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 100- 103; Van der Walt AJ *Property and constitution* (2012) 36-37.

right.[50] When the right to exclude clashes with non-property constitutional rights that are specifically protected in specifically enacted legislation; the matter should be decided on the basis of the legislation in question, rather than directly on the basis of the constitutional right or on the basis of common law.[51] This means that in cases where there is a clash between the right to exclude (which is a common law right) and a non-property constitutional right, the dispute has to be decided on the basis of legislation that regulates the limitation on exclusion to give effect to a the constitutional right. The starting point for adjudication of a dispute about the right to exclude and non-property constitutional rights should not be the common law right to exclude but the protection of the non-property constitutional right in accordance with the legislation enacted to give effect to that right.

The nature of the justification in this section is not to justify the existence of limitations on the right to exclude (property is assumed to be limited in principle), but to establish whether there is a valid reason and authority for a specific limitation. The reason for the limitation is the constitutional right involved in a particular dispute, and the authority is the legislation enacted to give effect to it. Justification here is a question of whether the limitation of the right to exclude advances the constitutional purpose as set out in the legislation. The examples considered in this section show that the law that imposes limitations on the right to exclude is valid and it seeks to

[50] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC); *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC); *Walele v City of Cape Town and Others* 2008 6 SA 129 (CC). See also Van der Walt AJ "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *Constitutional Court Review* 77-128 103-105; Van der Walt AJ *Property and constitution* (2012) 38-39.

[51] Van der Walt AJ *Property and constitution* (2012) 40-43.

give effect to a constitutional right. Secondly, the justification involves ensuring that the effects of the limitation are proportionate as foreseen in the legislation.[52]

4 2 3 Legislation not directly giving effect to a non-property constitutional right

Some statutory regulatory measures that were not specifically enacted to give effect to any constitutionally protected right nevertheless limit the landowner's right to exclude others from privately owned land. Justification in this context involves determining the reasons and authority for the limitation of the right to exclude. Legislation imposing limitations on the right to exclude determines the limits of and the extent of the limitation to ensure a reasonable balancing of the conflicting rights. In some instances actual access rights are created, subject to reasonable exercise requirements that involve mutual accommodation of the landowner's property rights (the right to exclude) and non-owners' right to be on the land.

The landowner's right to exclude is limited when a judge issues a search warrant that authorises an officer to enter and search any premises, without the landowner's prior permission in the process of conducting an investigation.[53] The right to exclude in these instances is limited by the regulatory exercise of the police power.[54] In terms of the police-power principle, any regulatory action involving a limitation of the landowners' right to exclude is justified if it is specifically aimed at

[52] The second justification involve the section 25(1) analysis discussed in section 4 3 below.

[53] See Chapter 3, section 3 3 2 above.

[54] According to Van der Walt AJ *Constitutional property law* (3rd ed 2011) 214-215, the police-power principle means that the state is authorised to regulate the use, enjoyment and exploitation of private property (existing property interests) even when such regulation involves limiting the property owner's entitlements and even when it causes loss. The regulation in terms of the police-power principle should be imposed generally and for a public purpose.

protecting and promoting public health and safety interests.[55] The limitation on the right to exclude non-owners from privately owned land emanating from statutory powers of search, seizure and forfeiture of property[56] is justified by a legitimate public purpose, namely the protection of public health and safety.[57]

Statutory limitation of ownership (including the right to exclude) by the joint exercise of entitlements by sectional owners regarding the common property as well as by the rules enforced by the body corporate is authorised by the common interests of the sectional title owners as a whole.[58] Limitation of a sectional owner's right to exclude forms an inherent part of sectional ownership of a sectional title scheme, justified in the interest of the sectional title community.[59]

Statutory access rights that limit the right to exclude others from privately owned land can also be justified by the notion of a proper social order. Grattan bases the justification for granting access rights through legislation,[60] on a proprietarian vision of property rights.[61] As Alexander puts it, the concept of property as propriety conceives of property as the material foundation for creating and maintaining a

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[55] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 228, 312.

[56] See the Value Added Tax Act 89 of 1991; Income Tax Act 58 of 1962; Investigation of Serious Economic Offences Act 117 of 1991; Criminal Procedure Act 51 of 1977; Prevention of Organised Crime Act 121 of 1998.

[57] Similarly, in US law lawful searches are justified as they are necessary for the legitimate exercise of public authorities to serve the public welfare or a public purpose. See Singer JW *Introduction to property* (2nd ed 2005) 39; Van der Walt AJ *Constitutional property law* (3rd ed 2011) 226.

[58] See the Sectional Titles Act 95 of 1986; the Sectional Titles Scheme Management Act 8 of 2011. See also Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 27.

[59] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 46.

[60] Such as the Access to Neighbouring Land Act 1992 (UK) and arguably the Party Wall etc Act 1996 (UK).

[61] Grattan S "Proprietarian conceptions of statutory access rights" in Cooke E (ed) *Modern studies in property law* volume 2 (2003) 353-374 364.

proper social order, which is the private basis for the public good.[62] The justification arising from the proprietarian vision of property envisions the subordination of individual preferences to a substantive vision of a proper social order. The social ordering that is envisioned is one of a harmonious relationship between neighbours, where one neighbour subordinates his own interests to that of the other.[63] In this regard, limiting the right to exclude by legislation[64] is justified because it promotes and secures a proper social order. A vision of a proper social order is consistent with the notion of the social-obligation norm of ownership.[65]

Access rights in the form of a right to roam can be justified in a similar way.[66] The CROW Act can be seen as restoring public access rights that were taken away by the enclosure movement,[67] requiring a balancing of the property rights of landowners and non-owners' access rights. Since the public access rights are exercised by non-owners within strict limitations, it can be argued that the CROW Act embodies the desired balance between competing interests in land. This means that, as long as the right to roam is limited to certain places and times and if non-owners act within the prescribed limitations, the landowners' rights are preserved and

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[62] Alexander GS *Commodity and propriety: Competing visions of property in American legal thought 1776-1970* (1997) 1. See also Grattan S "Proprietarian conceptions of statutory access rights" in Cooke E (ed) *Modern studies in property law* volume 2 (2003) 353-374 355.

[63] Grattan S "Proprietarian conceptions of statutory access rights" in Cooke E (ed) *Modern studies in property law* volume 2 (2003) 353-374 364.

[64] Access to Neighbouring Land Act 1992.

[65] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745-820.

[66] As I mentioned in Chapter 3, section 3 3 2, the CROW Act was enacted to meet the publics' demand for greater access rights that they had lost because of the enclosure movement. I established in Chapter 3 that the CROW Act is a notable limitation on the right to exclude.

[67] Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259 253.

balanced with access rights. Therefore, the statutory right to roam provided in the CROW Act is justified because it supports the exercise of lost but regained public access rights, which reflect society's needs and values. The limitation of the right to exclude is justified with reference to historical and social considerations.

Similarly, the LRSA balances competing interests in land by imposing a duty on landowners to use and manage their land in a way that is responsible. Landowners are presumed to be acting responsibly if they do not cause unreasonable interference with the access rights of any person seeking to exercise them.[68] In the same vein, non-owners are presumed to be taking reasonable access, when such access gives landowners reasonable measures of privacy and undisturbed enjoyment around their homes. The LRSA balances the presumption of reasonable land management and reasonable access taking to the extent that the landowner cannot deter non-owners from exercising their access rights.[69] The limitation of the right to exclude by the provisions of the LRSA is justifiable because the provisions foster a potentially transformative property regime that is based on the relationship between landowner and non-owners, grounded on the principles of reciprocity and mutual respect.[70] Furthermore, the provisions safeguard the landowners' privacy and also protect their legitimate land management interests.

Justification in this context is therefore not about justifying the existence of limitations because property is limited in principle. Instead, justification means there is reason for a specific limitation on the right to exclude, and authority for it in the

[68] Section 3(2) of the LRSA. See also Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 789.

[69] Section 14 of the LRSA prohibits a landowner from preventing access rights.

[70] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 778.

form of legislation. The legislation, for example the CROW Act and LRSA set out the procedure to ensure that the effect of the limitation is not disproportionate.

4 2 4 Common law rights

The common law principles regarding the right of way of necessity and encroachment illustrate how the common law, for policy reasons, allows non-owners to have access to land, in so doing limiting the affected landowner's right to exclude. The justification in both cases involves policy considerations, namely economic efficiency (in right of way of necessity cases) and balance of convenience (in encroachment cases).[71] In each case, the justification involves a balancing of the conflicting interests. The approach of the courts in right of way of necessity cases is to balance the policy considerations and the landowner's property right to determine whether or not to grant a right of way of necessity. In these instances, it is a question of whether the impact on the landowner weighs heavier than the policy considerations. In other words, it is the public policy considerations and the rights of the owner of the servient tenement that are balanced, the question being whether policy considerations require the courts to enforce a right of way of necessity on land against the landowner's consent. In encroachment cases the courts weigh the rights of the affected landowner and the encroacher against each other to decide the balance of convenience. I do not seek to give a detailed discussion of all the justifications for a court order granting a right of way of necessity or for allowing an

[71] The justification is different in these cases because the right of way of necessity is a property limitation and therefore it requires a property type justification. Whereas encroachment is a delict issue and the justification is based on delict and not property.

encroachment to remain in place.[72] Rather, I discuss only those justifications based on policy considerations that further the argument that the limitations on the right to exclude on the basis of non-consensual access rights are justifiable.

Scholars and court decisions have propounded various factors that justify limiting the right to exclude by granting a right of way of necessity over a servient tenement. Case law shows that a right of way of necessity is granted on the basis of public policy to promote efficiency and utility benefits in the use of valuable land.[73] This is confirmed by the academic literature. Hayden argues that the doctrine of the way of necessity is based on public policy in favour of the efficient utilisation of land

[72] See Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University; Van der Walt AJ & Raphulu TN "The right of way of necessity: A constitutional analysis" (2014) 77 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 468-484 and Temmers Z *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University for an in-depth analysis of the right of way of necessity and encroachments, respectively.

[73] In *Saner v Inanda Road Board* (1892) 13 NLR 225 the court confirmed and granted the way of necessity for the optimal exploitation of the land. In *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) 671E the court stated that a right of way of necessity must assist the owner of the dominant tenement (if he is a farmer), to continue with viable farming operations and also for transporting farm produce. In *Naudé v Ecoman Investments en Andere* 1994 (2) SA 95 (T) the court granted the owner of the dominant tenement a right of way of necessity over the neighbouring farm to serve as an access road to a public holiday resort, despite the change in the use of land. In *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) the court granted a right of way of necessity to ensure successful farming operations. In *Jackson v Aventura Ltd* [2005] 2 All SA 518 (C) the court granted a right of way of necessity in favour of the dominant tenement owner for purposes of constructing a road that would provide access to their landlocked land. Even though the *court a quo* had granted a right of way of necessity on the basis of practical need, this decision was later set aside by the Supreme Court of Appeal in *Aventura Ltd v Jackson NO and Others* 2007 (5) SA 497 (SCA) 500 in which the Court ruled that the necessity for a right of way had not been established by the owners of the dominant tenement. See also Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University Chapter 3, section 3 2 for a detailed discussion on why the right of way of necessity is necessary. See also Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1382-1383.

in the case of landlocked property.[74] Van der Merwe states that "public policy dictates that valuable land, located in a desirable and strategic area, should not be taken out of use and commerce".[75] According to Southwood, the reason for granting a way of necessity is that public policy does not allow land to be sterilised by insufficient access.[76] In the absence of an agreement between a servient tenement owner and a dominant tenement owner, courts step in to grant a right of way of necessity on the basis of public policy[77] related to social and economic goals and the economic exploitation of land.[78] Raphulu concludes that efficient use of land does

[74] Hayden TC "Way of necessity – *Hanock v Henderson*" (1965) 25 *Maryland Law Review* 254-259 258. See also Southwood MD *The compulsory acquisition of rights* (2000) 99 who states that the right of way of necessity has its genesis in public policy.

[75] Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1369.

[76] Southwood MD *The compulsory acquisition of rights* (2000) 99. It should be noted that similar policy reasons are advanced both when a right of way of necessity and the unilateral relocation of a specified right of way are granted by a court order. In this regard see Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University 81; Kiewitz L *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 107. See also *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 35.

[77] Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University Chapter 3, section 3 3 for a detailed discussion on public policy and the right of way of necessity.

[78] Van der Merwe CG & Pienaar JM "Law of property (including real security)" 2003 *Annual Survey of South African Law* 376-428 415 state that the granting of a way of necessity by a court order in *Sanders NO and Another v Edwards NO and Others* 2003 (5) SA 8 (C) represents the modern trend with regard to ways of necessity that relaxes the strict requirement that land must be completely landlocked, in favour of the principle that ways of necessity can be granted to improve the economic exploitation (productiveness) of land in general. In this regard see Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1412-1413. Southwood MD *The compulsory acquisition of rights* (2000) 106, citing *Wilhelm v Norton* 1935 EDL 143 152 and *Maree v Raad van Kuratore vir Nasionale Parke* 1964 (3) SA 727 (O) 730 states that the decision to grant and enforce a right of way of necessity on the basis of public policy makes it possible to make economic use of otherwise inaccessible land, which would be rendered useless without the right of way.

not only benefit the private land owner but also benefits society.[79] Society as a whole benefits from the efficient use of landlocked land because, among other things, the efficient use of the land raises productivity and creates employment.[80]

The justification for limitations imposed on the right to exclude in encroachment cases is different because the policy considerations are largely based on the balance of convenience. In encroachment cases, the courts' exercise of their discretion to leave an encroaching structure in place, even where the encroachment is significant, is mainly based on pragmatic considerations of equity and fairness.[81] Temmers argues that the courts reject an absolute right to demand removal of the encroachment for pragmatic and policy reasons.[82] The courts' discretion to leave a building encroachment intact is determined on the circumstances of each case. The circumstances that the court relied on to leave the encroachment intact in *Rand*

[79] Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University Chapter 3, section 3 3.

[80] Van der Merwe CG "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363-1413 1412-1413 argues that the rationale for granting a right of way of necessity is to foster public utility of tracts of land and to protect the social needs of society.

[81] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 138; *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) para 34; *Roseveare v Katmer, Katmer v Roseveare and Another* (2010/44337, 2010/41862) [2013] ZAGPJHC 18 (28 February 2013) para 21. See also Temmers Z *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 5, 93; Boggenpoel ZT "The discretion of courts in encroachment disputes [discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)]" (2012) 23 *Stellenbosch Law Review* 252-264 257; Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313-326 314; Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 465.

[82] Temmers Z *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 109.

Waterraad v Bothma en 'n Ander (Rand Waterraad)[83] were mainly based on the affected landowner's delay in bringing the application: the time period between becoming aware of the encroachment and filing the complaint for its removal shows that the affected landowner did not suffer any significant harm.[84] The court also relied on the principles of reasonableness and fairness to both parties.[85] The loss that the affected landowner would suffer if the encroachment is left intact was less than the loss that would be suffered by the encroacher if the encroachment was ordered to be removed.[86] This indicates that the courts weigh the affected landowner's interests against the interests of the encroacher to determine the balance of convenience. In *Trustees, Brian Lackey Trust v Annandale* (*Brian Lackey Trust*)[87] the court also reasoned that the encroaching owner would suffer prejudice should demolition of the encroaching structure be ordered, which would far outweigh the prejudice suffered by the affected landowner should demolition be denied. The court considered the cost of demolition, the cost of rebuilding the house and the inconvenience due to the lengthy delay before completion, as compared to the prejudice potentially suffered by the plaintiff. The court took into account the fact that the defendant had effectively lost all use and enjoyment of the property, but found that unlike the plaintiff, the defendant would be fully compensated for his loss if compensation was awarded. The court came to the conclusion that compensation would be appropriate in the circumstances. Similarly, in *Roseveare v Katmer, Katmer*

[83] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

[84] 138-139.

[85] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 133. See also Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 461.

[86] *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 139.

[87] *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

v Roseveare and Another (*Roseveare*)[88] the court exercised its wide and general discretion to award compensation instead of removal of the encroachment with reference to the size of the encroachment, which was insignificant.

Property is limited in principle and therefore the justification in this context is not for the existence of limitations. In both the right of way of necessity and encroachment cases, there is reason for limiting the right to exclude, namely policy in the form of economic efficiency and balance of convenience. The authority of the limitation is the common law and it can be assumed that the common law is in line with the Constitution, section 39 and thus it is legitimate and valid.

4 3 Justification for the effect of limitations on owners

4 3 1 Introduction

In section 4 2 above, I discuss the justification for limitations on the right to exclude, taking into account that property is limited in principle and that the existence of limitations is therefore to be expected. In instances where the landowner is prevented from excluding others on the basis of non-property constitutional rights, legislation or common law, the constitutional provision, legislation or the common law principle in question will generally provide the reason for the specific limitation and the necessary authority for imposing it on property rights. In this section, I consider the constitutional justification for the effects that the limitations might have on a specific landowner.

This justification process usually takes place in terms of section 25(1), which aims to test the validity and the proportionality of limitations. Hence, the section 25(1)

[88] (2010/44337, 2010/41862) [2013] ZAGPJHC 18 (28 February 2013) para 15.

test looks at access rights from the landowner's perspective, and the question is usually whether the imposition on his right to exclude is valid and proportionate. When the law limits a landowner's right to exclude non-owners, the result is a deprivation of the landowner's right to exclude.

The first question that needs to be dealt with in this section is whether the deprivation caused by the limitation imposed on the right to exclude complies with section 25(1) of the Constitution. The second question is whether the deprivation could also constitute expropriation of the landowner's property in line with section 25(2) of the Constitution.

4 3 2 The structure of section 25

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*)[89] the Constitutional Court held that the purpose of section 25 of the Constitution is to strike a proportionate balance between the protection of private property rights and the promotion of the public interest; section 25 therefore serves both a protective and reformative purpose.[90] Broadly speaking, section 25 (1) to (3) guarantees the protection of existing property rights against unconstitutional interference and section 25 (5) to (9) is aimed at legitimatising and promoting land and other related reforms.[91] As a result, the property clause has to be regarded as a

[89] *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 para 50. See also Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 3 (2nd ed OS 2003) ch 46 1-37 3.

[90] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 13.

[91] Section 25(1) deals with deprivation, section 25 (2) and (3) with expropriation, section 25(4) with interpretation and sections 25 (5) to (9) with land and other related reforms. There is an inherent

constitutional effort at balancing the individual and the public interest in a constitutional manner.[92] The biggest challenge is the seemingly contradictory relationship between the protection of existing property rights and land reform as well as other related reform initiatives.[93] To avoid the tension between the provisions in section 25, the property clause must be interpreted and applied with regard to the historical and constitutional context.[94]

Generally, the constitutional protection of property differs from private-law protection of property. The purpose of the constitutional property clause is not to guarantee and insulate existing property interests (the landowner's right to exclude) but to establish and maintain a balance between, on the one hand, the individual's (landowner's) vested rights and, on the other hand, the public interest in the

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tension in the property clause between protecting existing rights and the reform of property interests. These seemingly contradictory provisions are interpreted purposively to ensure that both the protective and the reformative purposes of section 25 are respected, protected and promoted. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 12-16.

[92] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 20-21 argues that the property clause was drafted in such a way as to legitimatise land reform and to ensure that the constitutional protection of existing rights should not exclude or frustrate land reforms. See also Van der Walt AJ "Striving for the better interpretation: A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854-878 866. Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 521 state that the South African property clause serves a dual purpose, which is to secure existing rights on the one hand and promote social transformation on the other.

[93] Section 25(1)-(3) and section 25(5)-(9). Van der Walt AJ *Constitutional property law* (3rd ed 2011) 22 explains that it is both necessary and possible to read the provisions in section 25 "as a coherent whole that embodies a creative tension within itself, without being self-conflicting or contradictory." It is necessary to interpret section 25 purposively as a "coherent whole, within its historical and constitutional context" to avoid a conflicting approach. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 14ff.

[94] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 16; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

regulation of property.[95] This implies that individual interests are subject to controls, regulations, restrictions, levies, deprivations, and changes that promote or protect legitimate public interests.[96] The presence of regulation sometimes has serious and negative effects on property owners but compensation is not generally given for these kinds of infringements.[97] Accordingly, the overall effect of section 25 is that the protection of property as an individual right is not absolute but subject to limitations imposed on the strength of societal considerations, which may include the necessity for granting non-owners access rights to land.[98]

The decision in *Port Elizabeth Municipality v Various Occupiers* underscores the fact that the protection of existing private law-based relations to property is not the primary purpose of section 25.[99] Instead, this section is aimed at achieving social transformation, in accordance with constitutional values such as human dignity, equality and freedom.[100] In light of section 25, the government is under an obligation to pursue land and other reforms, some of which involve limitations on the landowner's right to exclude. The constitutional property clause accommodates and authorises transformative and regulatory measures in the property regime that will have an impact on the landowner's right to exclude. It is therefore necessary to

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[95] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 91.

[96] 91.

[97] 91.

[98] *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 para 49-50; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 16; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 33. See also Van der Walt AJ "Constitutional property law" (2009) 3 *Juta's Quarterly Review of South African Law* para 2.2.

[99] 2005 (1) SA 217 (CC) paras 16-17; Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5th ed 2006) 581.

[100] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 15-16.

ascertain whether these limitations of the right to exclude are in compliance with the requirements of section 25(1). The Constitutional Court outlined a methodology for this process in its *FNB* decision.

4 3 3 The FNB methodology

The *FNB* decision prescribed a methodology, which proposes that all limitations of property rights will be regarded as deprivations and tested against the requirements of section 25(1) of the Constitution. The methodology entails a seven-stage inquiry that is set out as follows:

> "(a) Does that which is taken away from [the property holder] by the operation of the law in question] amount to 'property' for purposes of section 25?
>
> (b) [If yes,] Has there been a deprivation of such property [by the organ of state involved]?
>
> (c) If there has, is such deprivation consistent with the provisions of section 25(1)?
>
> (d) If not, is such deprivation justified under section 36 of the Constitution?
>
> (e) If it is, does it amount to expropriation for purpose of section 25(2)?
>
> (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
>
> (g) If not, is the expropriation justified under section 36?"[101]

The first question is whether there was an arbitrary deprivation of property. The enquiry begins with three threshold questions, namely whether the applicant is a beneficiary entitled to protection under section 25; whether the affected interest is

[101] Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 3 (2nd ed OS 2003) ch 46 1-37 3 list these steps in accordance with the questions formulated 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* 2002 (4) SA 768 (CC) para 46.

property; and whether the property interest was infringed.[102] If there was an arbitrary deprivation of property, the second question is whether that deprivation is justifiable under section 36(1). If the arbitrary deprivation is not justifiable, the deprivation is unconstitutional and the matter ends there. If the deprivation complies with section 25(1) requirements or is arbitrary but reasonable and justifiable under section 36(1), the next question is whether the deprivation amounts to an expropriation. If the deprivation amounts to expropriation, it must comply with section 25 (2) and (3). If it complies with section 25 (2) and (3), the expropriation is legitimate and valid. However, if the deprivation amounts to expropriation and does not satisfy section 25 (2) and (3) requirements, the expropriation could be justified under section 36(1). If the expropriation is justified, it is valid but if it cannot be justified, it is invalid.

Any property dispute based on section 25 would generally proceed according to the *FNB* methodology. In this section, I look at the different instances in which the right to exclude is limited, taking into consideration the steps set out in the *FNB* decision, to determine whether the limitations are valid in terms of section 25. The methodology introduced in *FNB* proposes that all limitations of property will be regarded as deprivation and tested against the requirements of section 25(1) first before the next question, whether a particular limitation also constitutes expropriation in line with section 25(2). For this reason, I first focus on the non-arbitrariness test (section 25(1)) and thereafter (if necessary) I consider section 25(2) pertaining to expropriation.

[102] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 75. Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 3 (2nd ed OS 2003) ch 46 1-37 2-5 indicates that these questions are likely to be "sucked into" the arbitrariness test, namely whether the deprivation is arbitrary.

In the subsequent sections, I first explain how the limitation of the right to exclude amounts to a deprivation.[103] Secondly, I investigate whether the limitation of the right to exclude (the deprivation in question) satisfies the requirements of section 25(1), namely the law of general application[104] and the non-arbitrariness test.[105] In the final section, I explain why the deprivation of the right to exclude probably does not, in the South African context, amount to an expropriation that needs to satisfy section 25 (2) and (3) requirements.[106]

Thus far, the dissertation has referred to the phrase "limitation of the landowner's right to exclude" to denote the fact that the right is restricted by the measure in question. In section 25 the phrase "limitation of property" has a different, much more technical meaning in that not every deprivation amounts to a limitation in this sense, but only deprivation that does not comply with the requirements in section 25(1) (that is, arbitrary deprivation). The meaning of the phrase "limitation of the landowner's right to exclude" is therefore closer to deprivation in section 25(1). The deprivation needs justification when it is arbitrary or disproportionate.

4 3 4 Deprivation: section 25(1)

The *FNB* decision attached a broad interpretation to the term "deprivation", describing it as "any interference with the use, enjoyment or exploitation of private property".[107] This broad interpretation denotes that deprivation encompasses all

[103] See section 4 3 4 below.

[104] See section 4 3 5 below.

[105] See sections 4 3 5 and 4 3 6 below.

[106] See section 4 3 7 below.

[107] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 57.

state interferences with property, while expropriation is a narrower sub-category of deprivation.[108] In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* (*Mkontwana*) the Constitutional Court apparently restricted the interpretation of deprivation by stating that the question whether there has been a deprivation depends on the extent of the interference.[109] According to the court, a substantial interference that goes beyond the normal restrictions on property in an open and democratic society would amount to deprivation.[110] In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* (*Reflect-All*)[111] and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* (*Offit*)[112] the Constitutional Court, although not expressly, seems to have followed the wider *FNB* approach rather than the narrow *Mkontwana* approach to the definition of deprivation.[113] It can be assumed, in view of the *FNB* approach, that a

[108] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 57. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 203-204.

[109] 2005 (1) SA 530 (CC) para 32.

[110] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; 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. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 203-204. Van der Walt AJ "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *South African Law Journal* 75-89 criticises the definition of deprivation in *Mkontwana*.

[111] 2009 (6) SA 391 (CC).

[112] 2011 (1) SA 293 (CC).

[113] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 206-209.

deprivation should include all but the legally irrelevant *de minimis* interferences with property.[114] A valid deprivation therefore entails any properly authorised and fairly imposed regulatory limitation on the use, enjoyment, exploitation or disposal of property, to protect and promote public health and safety or in pursuit of other legitimate public purposes, without compensation.[115]

Most of the instances where the right to exclude is limited by operation of law discussed in Chapter 3 constitute deprivations of the landowner's right to exclude in this sense. An exception is the cases discussed in Chapter 3 where the right to exclude is limited directly by a non-property constitutional right such as life or dignity, without the mediation of implementing legislation. In those cases the right to exclude is restricted constitutionally and directly, resulting in an *ex ante* truncated right that never included the ability or entitlement to effect the relevant exclusion, because no principle or entitlement can exist that directly contradicts a constitutional right or provision. The limitation of the right to exclude in these cases is *ex ante* and therefore no deprivation in the sense of section 25(1) takes place.

Those instances where the right to exclude is limited by a non-property constitutional right such as equality, on the basis of dedicated legislation, do bring about a deprivation of property in the sense of section 25(1). The legislation involved, such as PEPUDA and US public accommodations laws, determine the limits imposed on the right to exclude to protect the right to equality and non-discrimination. This statutory deprivation is subject to section 25(1) analysis.

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[114] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 209 argues that as a definitional matter, the approach in the *FNB* decision must be followed and any interference must be subject to the logical qualification of the *de minimis* principle.

[115] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 212.

All other legislation[116] that gives effect to non-property constitutional rights like freedom of speech, the right to strike and picket, freedom of movement or secure tenure limit the landowner's right to exclude in a similar way. Legislation[117] that is not directly intended to give effect to a particular constitutional right but that pursues some other valid and legitimate statutory goal also limit the landowner's right to exclude in a similar way. These laws prescribe regulatory measures that set out how and in what instances the right to exclude is limited for different purposes. The limitations that result from these laws qualify as deprivations of the right to exclude.

In the third instance, the common law principles regarding non-consensual access to another person's land limit the right to exclude. When a court order enforces a right of way of necessity, without the consent of the owner of the servient tenement, and when a court decides to leave an encroachment intact against payment of compensation, these two outcomes amount to a forced transfer of some of the landowner's property rights, in particular the right to exclude as far as it concerns the relevant portion of the land. When these limitations are enforced in terms of the common law the result is once again a limitation of the right to exclude that qualifies as a deprivation of the right to exclude.

In all instances where the right to exclude is limited without the consent of the landowner and against his will, the result is a deprivation of property in the form of

[116] For example the Labour Relations Act 66 of 1995; the National Labor Relations Act of 1935 (USA); the Extension of Security of Tenure Act 62 of 1997; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[117] Such as the Value Added Tax Act 89 of 1991; Income Tax Act 58 of 1962; Investigation of Serious Economic Offences Act 117 of 1991; Criminal Procedure Act 51 of 1977; Prevention of Organised Crime Act 121 of 1998; Sectional Titles Act 95 of 1986; Sectional Titles Scheme Management Act 8 of 2011; Countryside and Rights of Way Act 2000 (UK); Land Reform (Scotland) Act 2003; Access to Neighbouring Land Act 1992 (UK); Party Wall etc Act 1996 (UK).

the right to exclude. The next question is whether the limitation constitutes arbitrary deprivation of the landowner's right to exclude non-owners from his property.

4 3 5 The section 25(1) analysis

Section 25(1) is the point of departure for determining whether a limitation of the right to exclude might be the object of a constitutional property challenge. In terms of section 25(1), a deprivation must first of all be in terms of law of general application and secondly the law may not permit arbitrary deprivation of property. This implies that even when the deprivation is authorised by law of general application, namely legislation or the common law, it would be unconstitutional if it does not comply with the non-arbitrariness[118] requirement in section 25(1).

The first requirement in terms of section 25(1) insists that a deprivation must be authorised by "law of general application" for it to be valid. The first enquiry in terms of this requirement should be whether the deprivation is authorised by a law that is formally valid, in the sense that it was properly enacted and promulgated.[119] Section 25(1) refers to "law of general application" as opposed to "a law of general application" to ensure that the regulatory deprivation of property may also be authorised by rules of common and customary law.[120] The authorising law must be generally and equally applicable to ensure equal treatment.[121] Accordingly, a law that provides for deprivation and singles out a particular individual or group of individuals

[118] The non-arbitrariness test is explained below.

[119] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 232, citing Woolman S & Botha H "Limitation" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 2 (2nd ed OS 2006) ch 34 1-136 51-52.

[120] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 234.

[121] 232.

in a discriminatory fashion will not comply with the law of general application requirement.[122]

The fact that section 25(1) requires "law of general application" implies that the deprivation enquiry in any constitutional property dispute should not focus on state, administrative, judicial or private action that effected the deprivation.[123] The validity of a deprivation depends on law that authorises the particular action.[124]

It is generally accepted that law of general application includes legislation, regulations, principles of common law, and rules of court.[125] As was explained in Chapter 3 above, the relevant limitations of the owner's right to exclude, and therefore the law of general application is, depending on the context, either legislation or common law. These sources of law provide regulatory measures and principles that prevent the landowner from exercising his right to exclude.

Some legislation provides regulatory measures that limit the right to exclude so as to protect and enforce non-owners' non-property constitutional rights, while other statutes do so in pursuit of other legitimate statutory, regulatory or policy aims and objectives. The common law principles that regulate the creation and enforcement of a right of way of necessity constitute law of general application.[126] Similarly, in

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[122] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 233.

[123] 235.

[124] 235.

[125] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 232-237; Woolman S & Botha H "Limitation" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 2 (2nd ed OS 2006) ch 34 1-136 51-53; Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 3 (2nd ed OS 2003) ch 46 1-37 21.

[126] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 234; Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University Chapter 4, section 4 3 4.

encroachment cases the law of general application is the common law.[127] The common law, as developed in case law, provides that in certain instances a court may enforce a right of way of necessity or may deviate from the default remedy of removal and instead award compensation in encroachment cases.[128] Therefore, legislation or common law that limits the right to exclude constitutes law of general application for purposes of section 25(1). The authorising law in a particular case validates the limitation imposed on the right to exclude.

The second requirement is that the relevant law of general application may not permit arbitrary deprivation of property.[129] There are two criteria, in terms of *FNB*, that determine whether a deprivation is arbitrary.[130] A deprivation of property will be arbitrary if there is insufficient reason for the deprivation (substantive arbitrariness) or if the deprivation is procedurally unfair (procedural arbitrariness).[131] In *FNB* the court specifically focused on the substantive arbitrariness requirement and did not

[127] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) 876, 915; *S v Thebus* 2003 (6) SA 505 (CC) paras 64-65 provide authority that the common law qualify as law of general application. See also *Boss Foods CC v Ingo Rehders Properties and Another* [2014] ZAGPJHC 236 (26 May 2014); Boggenpoel ZT "The discretion of courts in encroachment disputes [discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)]" (2012) 23 *Stellenbosch Law Review* 252-264 260.

[128] With regard to encroachments, see *Boss Foods CC v Ingo Rehders Properties and Another* [2014] ZAGPJHC 236 (26 May 2014) para 57. In *Boss Foods*, the court pointed out that the common law is the law of general application and the current common law position that allows for the discretion to leave the encroachment against compensation is in compliance with section 25(1) of the Constitution. See also Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313-326 321.

[129] Section 25(1) of the Constitution of the Republic of South Africa, 1996.

[130] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[131] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245.

extensively discuss the test for procedural arbitrariness.[132] In *Mkontwana* and *Reflect-All* the court merely described procedural fairness as a flexible concept that can be determined with reference to all the circumstances.[133] However, in *National Credit Regulator v Opperman* (*Opperman*)[134] the court explained that a deprivation of property that is effected in terms of legislation will be procedurally arbitrary if a court adjudicates a dispute and makes an order without being allowed to exercise a discretion that takes into account what is just and equitable in the particular case.[135] Therefore, a deprivation of the landowner's right to exclude would be procedurally unfair if the law of general application in a particular case does not provide the court with a discretion based on justice and equity. The question of procedural arbitrariness would probably not arise in cases where the right to exclude others from private land is limited by a court order based on the common law. The court deciding whether to limit the right according to common law principles would take into account all the relevant factors that would exclude procedural arbitrariness. However, when the deprivation results from a court order based on legislation will depend on the question whether the legislation leaves the court the necessary discretionary space, as the *Opperman* decision shows.

In terms of the second criterion of the non-arbitrariness requirement, a deprivation is arbitrary and in conflict with section 25(1) of the Constitution if the law

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[132] Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88-94 88.

[133] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; 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 65; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 40-47.

[134] 2013 (2) SA 1 (CC).

[135] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 69.

in question (in terms of which the deprivation is effected) does not provide sufficient reason for the deprivation.[136] In *FNB* the Constitutional Court described how "sufficient reason" is to be established, namely that there must be an evaluation of the relationship between the deprivation in question and the purpose of the law in question.[137] To achieve this, the court explained that "a complexity of relationships has to be considered".[138] These include the relationship between the purpose for the deprivation and the person whose property is affected by the deprivation;[139] the relationship between the purpose of the deprivation, and the nature of the property; and the extent of the deprivation.[140] In other words, there must be a sufficient *nexus* between the deprivation in question (the means employed) and the reasons for the deprivation (the ends sought to be achieved).[141] With regard to the extent of the deprivation, the court held that the purpose of the deprivation must be more compelling when the deprivation in question concerns ownership of immovable property and corporeal movable property rather than when it concerns a lesser property right, and when all rather than just some of the entitlements of ownership are embraced by the deprivation.[142] In addition, the court held that the substantive

[136] *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.

[137] Para 100(a).

[138] Para 100(b).

[139] Para 100(c).

[140] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100(d). See also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 49.

[141] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100(a). See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 245.

[142] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100 (e), (f).

arbitrariness test is contextual. The arbitrariness test may vary between mere rationality and something closer to the proportionality test in section 36(1) of the Constitution.[143] Accordingly, establishing "sufficient reason" is context-based.[144] In each particular case, depending on the nature of the property and the extent of the deprivation, a court has the discretion whether to apply a thin or a thick test.[145]

According to these guidelines, the non-arbitrariness test for law that deprives a landowner of the right to exclude should generally speaking not be extremely strict because it concerns just one entitlement of ownership (exclusivity), but at the same time the test should not be meaningless either because it concerns ownership of land.

The first element of the non-arbitrariness provision ensures that regulatory deprivation is rationally connected to some legitimate government purpose.[146] The second element is that any law that authorises the deprivation must establish sufficient reason for the deprivation.[147] In this sense, the deprivation should not only be rationally linked to a legitimate government purpose, but should also be justified in the sense of establishing a proportionate balance between means and ends.[148]

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[143] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100(g). See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 246.

[144] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank Minister of Finance* 2002 (4) SA 768 (CC) para 100(h).

[145] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 246.

[146] 237.

[147] 238.

[148] 238.

4 3 6 Application of the substantive non-arbitrariness test

The law that limits the owner's right to exclude may not allow a deprivation that is arbitrary. In terms of the *FNB* decision, a deprivation would be arbitrary if there is insufficient reason for it. The first leg of the non-arbitrariness test questions whether there is sufficient reason for the limitation. The second leg involves making an assessment based on proportionality on an individual level. In this regard, courts should engage in a "nuanced and context-sensitive" form of balancing when determining the impact of a particular deprivation.[149]

As indicated in section 4 3 2 above, the constitutional property clause aims to advance the public interest in relation to property.[150] In *Reflect-All* the Constitutional Court held that property rights are determined and afforded by law and can be limited to facilitate the achievement of important social purposes.[151] Therefore, the legitimacy of the deprivation of the right to exclude must be considered in view of what the property clause seeks to achieve.

In cases where direct non-property constitutional rights limit the right to exclude, the section 25(1) justification is only relevant in the equality cases because of the presence of legislation. PEPUDA and US public accommodations laws were enacted to give effect to the right to equality and to guard against discriminatory exclusion from land. The equality cases are subject to section 25(1) scrutiny. The

[149] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 30-31; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 104; *S v Manamela and Another* (*Director-General of Justice Intervening*) 2000 (3) SA 1 (CC) para 32.

[150] The requirement that the deprivation in question must be for a public purpose or in the public interest is not stated explicitly in section 25(1). This requirement is arguably implicit in the provision. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 225.

[151] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government, and Another* 2009 (6) SA 391 (CC) para 33.

public purpose sought to be achieved by these laws will *prima facie* constitute a valid and legitimate reason for the deprivation of the right to exclude. The legislation does not have a disproportionate effect because it applies generally. In this context, it is likely that a rationality-type approach would be sufficient to justify the deprivation of the right to exclude. Accordingly, the deprivation of the right to exclude that will result from securing the right to equality through specifically enacted legislation, in a particular instance, will generally not be arbitrary. The need to protect and promote the achievement of fundamental human rights and important constitutional imperatives provides sufficient ground to justify the deprivation in terms of section 25(1).

Other non-property constitutional rights like freedom of movement, freedom of speech, right to strike and picket, and secure tenure are slightly different from the right to equality because they can be balanced against property rights. When dealing with legislation aimed at giving effect to these rights, the first question is whether the reason for the limitation provides sufficient justification for the deprivation. The Labour Relations Act 66 of 1995 is an example of legislation that limits the right to exclude for the sake of giving effect to constitutionally protected labour rights. Depending on the circumstances of each case, like in *Growthpoint*, the deprivation should not be arbitrary if the legislation already has a built-in mechanism that reasonably balances the competing rights. A deprivation might be arbitrary if a court order goes beyond what is stipulated for in the Act or if the legislation does not allow room for judicial discretion.

In *Victoria and Alfred Waterfront* the court recognised the tension between property rights of landowners, in particular the right to exclude, and the affected persons' freedom of movement. The court did not apply the *FNB* methodology to

ascertain whether the limitation of the landowner's right to exclude amounts to a deprivation and whether the deprivation complies with the non-arbitrariness requirement of section 25(1). In the context of the *Victoria and Alfred Waterfront* case it need to be established whether the reason(s) for the court's order to only prohibit certain unlawful behaviour rather than a blanket entry prohibition would be sufficient under the circumstances to justify the deprivation in question. According to the *FNB* decision, the relationship between the means employed and the ends sought to be achieved must be assessed. In *Victoria and Alfred Waterfront* the means employed to protect the right of free movement in quasi-public places is not to allow a blanket exclusion of the affected persons from the premises. The reason why the court made this order was to protect the right of freedom of movement. The purpose of the deprivation of the landowner's right to exclude is to ensure that the right to freedom of movement is not compromised. Furthermore, the nature of the property and the circumstances are relevant factors to consider. The premises in this case is quasi-public in nature because it is generally used for a purpose that is open to the public. Members of the public are invited to visit the premises whether they intend to conduct business there or not. The court took into account the location, size and composition of the premises and held that it was for all practical purposes a suburb of Cape Town and should be distinguished from an ordinary shop or restaurant.[152] The factors in *FNB* suggest that the court might take into account less invasive means to achieve the intended outcome before considering invasive measures. In *Victoria and Alfred Waterfront* the court stated that a prohibition of

[152] Access to and right of admission to places of public accommodation like shops and restaurants is more limited. Public accommodations laws or PEPUDA might prevent shops and restaurants owners from excluding non-owners if the exclusion is based on discriminatory grounds. The right of freedom of movement does not apply in these places because shops and restaurants owners can impose blanket entry prohibitions provided they are not discriminatory.

unlawful behaviour instead of a blanket entry prohibition would optimise the landowners' property right (the right to exclude) and non-owners' freedom of movement on the premises. The court's ruling allows landowners an effective way of exercising reasonable control over unlawful behaviour on the premises and reflects the fact that only one entitlement of ownership is affected by the deprivation, namely the right to exclude. This suggests that ownership is not totally taken away from the landowners; they can impose reasonable entry, use and conduct regulations on the premises. Since the deprivation affects only one entitlement of ownership and since the public purpose involved is significant, namely to protect and promote the right to freedom of movement, the deprivation is not arbitrary.

A similar conclusion can be reached when regarding the Extension of Security of Tenure Act 62 of 1997 (ESTA) provisions that limit the landowner's right to exclude. The reason for the deprivation can be inferred from the objectives of the Act, to give effect to section 25(6) of the Constitution by promoting and protecting occupiers' non-property rights. ESTA has a legitimate government function to further the public interest in the tenure reform programme. In *Nhlabathi and Others v Fick*[153] the court came to the conclusion that even if section 6(2)(dA) of ESTA is in conflict with section 25 of the Constitution, it does not constitute an arbitrary appropriation of a grave.[154] The following grounds were considered by the court as an indication that depriving the landowner of some of his ownership entitlements is justified: the right does not cause a major intrusion on the landowner's property rights; the right is subject to balancing with the landowner's property rights and may sometimes be subordinate to them; the right exists only where there is an established past practice

[153] 2003 (7) BCLR 806 (LCC) para 35.

[154] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) paras 33-35.

with regard to gravesites; and the right will enable occupiers to comply with religious or cultural beliefs that form an important part of their security of tenure.[155] Furthermore, taking into consideration the significance of the religious or cultural beliefs of many occupiers regarding the burial of family members, the constitutional mandate to provide occupiers with legally secure tenure would in most cases be sufficient to justify the deprivation of some of the entitlements of ownership, in particular the right to exclude.[156] Accordingly, a limitation imposed on the right to exclude even in circumstances that cause permanent or physical invasion of private land (such as the appropriation of a gravesite) can be constitutionally justified, as meant in section 36, if the limitation serves a legitimate, specific land reform purpose.[157] In this case, the deprivation of the right to exclude is justified in fulfilment of the statutory recognition of the occupiers' security of tenure in accordance with the constitutional mandate.

The purpose of PIE is to give effect to the anti-eviction provision in section 26(3) of the Constitution. Unlike ESTA, PIE does not protect existing access rights or create new ones but its anti-eviction regulatory measures limit the landowner's right to exclude. The decision in *Port Elizabeth Municipality v Various Occupiers*[158] gave an indication that statutory regulatory measures like PIE are meant to prevent arbitrary evictions. This means that in land reform legislation that includes anti-eviction regulation, the deprivation of the landowner's right to exclude will be justified

[155] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) paras 32-35.

[156] *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 31. See also Van der Walt AJ "Property, social justice and citizenship: Property law in post-apartheid South Africa" (2008) 19 *Stellenbosch Law Review* 325-346 343; Van der Walt AJ *Property in the margins* (2009) 198.

[157] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 298.

[158] 2005 (1) SA 217 (CC).

by the constitutional anti-eviction imperative[159] and the general transformative vision of the Constitution. Anti-eviction regulation should satisfy the requirement for proportionality when it affects all landowners more or less equally in that, for example, all landowners are subject to the same costly and time-consuming eviction procedures prescribed by PIE.[160] However, eviction cases will often require something closer to full proportionality review, for example when anti-eviction measures practically deprive an individual landowner or a small group of landowners completely of the possibility of obtaining an eviction order in instances where such an order would normally have been granted.[161] A good illustration on this point is *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* (*Modderklip*).[162] In *Modderklip* the landowner was prevented from executing an eviction order against unlawful occupiers because of the sheer number of people involved and their personal circumstances.[163] The deprivation brought about by the practical impossibility of evicting the unlawful occupiers might be arbitrary in the absence of compensation. According to the court an award of constitutional compensation was the most appropriate remedy.[164] Arguably, the compensation was awarded to avoid unfair or disproportionate effects on the individual landowner.[165] The compensation award might only work when the delay in

[159] Section 26(3) of the Constitution of the Republic of South Africa, 1996.

[160] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 278.

[161] 278.

[162] 2005 (5) SA 3 (CC). In *Modderklip* the Constitutional Court upheld the constitutional and statutory right of unlawful occupiers of land not to be evicted before alternative accommodation is provided.

[163] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* 2005 (5) SA 3 (CC) paras 47-48.

[164] Paras 55-59.

[165] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 278; Van der Walt AJ "The state's duty to protect property owners v the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *South African Journal on Human Rights* 144-161.

evicting the unlawful occupiers is overly long but temporary; if it is permanent and therefore effectively impossible to evict, the deprivation might be arbitrary and cannot be saved by a constitutional compensation award.[166]

With regard to deprivations that result from legislation not directly giving effect to constitutional rights, it is important to establish whether there is sufficient reason for the provision that limits the right to exclude to determine the impact it has on the landowner. In cases where the landowner's right to exclude is limited by search, seizure and forfeiture of property in terms of an authorising law,[167] the deprivation is a result of the regulatory exercise of the state's police power with the aim to achieve one of its core functions, namely public health and safety. The legitimacy of the deprivation must be evaluated in view of this purpose. Generally, legislation that provides statutory access rights for purposes of search, seizure and forfeiture of property has a legitimate regulatory purpose that is sufficient to justify the deprivation of property rights, the right to exclude in particular.[168] However, in most cases it may still be relevant to consider the deprivation on a higher of level scrutiny to assess the fairness of the deprivation on an individual basis.[169]

The management rules of sectional title schemes that are prescribed and enforced by legislation[170] may in some cases cause a deprivation of the right to exclude. Generally, deprivation of the right to exclude would be constitutionally

[166] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 278-279.

[167] See for example section 57D(1)(a)(i) of the Value Added Tax Act 89 of 1991; Section 74D(1)(a)(i) of the Income Tax Act 58 of 1962; section 6 of the Investigation of Serious Economic Offences Act 117 of 1991; sections 21, 24 and 25 of the Criminal Procedure Act 51 of 1977; chapter 6 of the Prevention of Organised Crime Act 121 of 1998.

[168] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 311-312.

[169] 228.

[170] Sectional Titles Act 95 of 1986; Sectional Titles Schemes Management Act 8 of 2011.

permissible when the management rules are imposed in the interest of the property community and when the rules comply with the requirements of the arbitrariness test.[171]

A similar conclusion can be reached with reference to the legislation from foreign jurisdictions that grant non-owners and other landowners access rights to land. Although the legislation in question[172] deprives the landowner of his right to exclude, the deprivation, if tested against the requirements of section 25(1) of the South African Constitution, might not be arbitrary because the right to roam legislation was enacted for historical and social reasons aimed at restoring access rights to land. The legislation also attempts to eliminate arbitrary effects by making provision for reasonable access rights that are to be exercised within strict limits, in part set out in statutory regulations and in part determined by the landowner. Arguably, the two acts have a built-in mechanism that guards against disproportionate effects. However, an arbitrary deprivation might ensue if non-owners are allowed to exercise their right to roam in a way that goes beyond the limits of the legislation and in the process interfere with the landowner's privacy, use and enjoyment of property as well as his land management interests. The application of the non-arbitrariness test in beach access cases would not be different from the right to roam cases, with the result that the deprivation might not be arbitrary in these cases. Similarly, the deprivation arising from the access to neighbouring land legislation[173] might not be arbitrary insofar as it provides sufficient justification for the

[171] Pienaar GJ *Sectional titles and other fragmented property schemes* (2010) 47.

[172] Countryside and Rights of Way Act 2000 (CROW Act) (UK); Land Reform (Scotland) Act 2003 LRSA).

[173] Access to Neighbouring Land Act 1992 (UK); Party Wall etc Act 1996 (UK).

deprivation, namely for public interest considerations and to promote a proper social order, and provides mechanisms to prevent or minimise unfair outcomes.

Limitations of the right to exclude based on common law principles are mainly justified by policy considerations. The outcome of a court order to enforce a right of way of necessity and to leave the encroachment in place qualifies as a deprivation for section 25(1) purposes and it is necessary to consider whether there are sufficient reasons to prevent the deprivation from being arbitrary. In view of the case law concerning the policy considerations in cases involving a right of way of necessity,[174] it is unlikely that a court order enforcing a right way of necessity would cause an arbitrary deprivation of the right to exclude. The common law principles relating to the right of way of necessity seek to connect a piece of landlocked land to the public road to ensure the efficient utilisation of land and also because of practical need.[175] These policy considerations usually constitute sufficient reason to justify a deprivation. Generally, a grant of a right of way of necessity is justified when the dominant tenement owner proves necessity, when a right of way does not impose extensive burdens on the servient land that destroy all his ownership rights, and when the dominant tenement owner pays just compensation. Moreover, Raphulu argues that the intervention of the courts, acting with the authority of the common law, is the most appropriate mechanism to solve the problem of landlocked land in cases where a dominant owner cannot acquire an ordinary servitude of way by contract.[176] The court exercises a discretion to either grant a right of way of necessity or not, taking into account all the relevant factors, the context and effect that the

[174] See section 4 3 2 above.

[175] See section 4 3 2 above.

[176] Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University 123.

discretion will have on the one party or the other one. The deprivation resulting from the granting of a right of way of necessity should comply with the requirements of the non-arbitrariness test if the servitude is granted by a court order after considering and applying common law requirements regarding the right of way of necessity.[177] So if the court follows the requirements and apply them properly, the outcome in a particular case should not be arbitrary because the court's discretion ensures proportionality although it might affect the property owner. The possibility of arbitrariness is further diminished if compensation is granted to the servient tenement owner.

In the context of encroachment, the question is whether the reason for awarding compensation instead of removal is sufficient in the circumstances to justify the deprivation of the right to exclude. Boggenpoel argues that the substantive arbitrariness requirement must be complied with by considering whether there is sufficient reason for the institutional shift from the common law remedy of removal to an award of compensation.[178] The case law shows that the shift away from the common law remedy aims to ensure a more just and equitable outcome in suitable cases. Therefore, the justification for limiting the right to exclude centres on considerations of pragmatism, policy and individual justice, which may well be sufficient to cause a deviation from the common law remedy that protects the landowner's right to exclude. In *Boss Foods CC v Ingo Rehders Properties and Another*[179] the court held that the weighing of the relevant factors by a court will

[177] Raphulu TN *Right of way of necessity: A constitutional analysis* (2013) unpublished LLM thesis Stellenbosch University 125.

[178] Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313-326 321.

[179] [2014] ZAGPJHC 236 (26 May 2014) para 57.

serve as the mode of protection against arbitrary deprivation of property. Boggenpoel explains that the exercise of the court's discretion in terms of the common law to either favour demolition or compensation ensures that the deprivation will not *per se* result in arbitrary deprivation of property.[180] However, this conclusion does not apply if a court decides to leave the encroachment intact and further orders the affected landowner to register a servitude in favour of the encroacher, because such an order might not comply with the requirements of section 25(1). Unlike the servitude of right of way of necessity, which is also created against the will of a landowner and is authorised by the common law, the servitude created by court order in *Roseveare* does not have a clear source of authority in the common law, which could be problematic on a constitutional level.[181] The deprivation resulting from the court's order to register a servitude in encroachment cases is likely to be unlawful on the basis that it is not clear that the common law authorises such an order.[182] Boggenpoel adds that the deprivation may also be unconstitutional because it does not comply with the arbitrariness requirement in section 25(1)[183] because in *Roseveare* the court does not provide a clear or specific, separate justification for the creation of a servitude in favour of the encroacher.[184]

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[180] Boggenpoel ZT "Property" 2014 (1) *Juta's Quarterly Review of South African Law* para 2 2 1 for a detailed discussion of the *Boss Foods* decision.

[181] Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 472-473.

[182] For a detailed discussion on this point, see Boggenpoel ZT "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 475.

[183] 476.

[184] 477.

4 3 7 Expropriation: Section 25(2)

Generally, both deprivation and expropriation involve some kind of state interference with property. However, deprivation does not have to involve a state acquisition of property and is usually not subject to compensation, while expropriation involves state acquisition of the property that requires compensation.[185] Expropriation is usually defined in contrast with deprivation, which is seen as a less intrusive limitation of property that generally occurs when the state regulates the use and enjoyment of property in the interest of the public, and compensation is not generally required.[186] According to the *FNB* test, the question whether deprivation of property amounts to an expropriation must be considered once it is determined that the deprivation is not arbitrary or can be justified in terms of section 36(1).

Having established that a particular deprivation of the right to exclude complies with section 25(1) of the Constitution, it is necessary to consider whether it amounts to expropriation. Section 25(2) provides three requirements for a valid expropriation, namely that expropriation of property must take place in terms of law of general application, be for a public purpose or in the public interest and be subject to compensation. Section 25(3) further specifies that compensation must be just and equitable and sets out certain factors that could be considered in determining the amount. In view of the *FNB* methodology the law of general application issue is likely to be dealt with conclusively during the deprivation analysis stage and as a result, it will not be necessary to raise it again if the issue should proceed to the expropriation analysis stage.[187] If the section 25(2) law of general application requirement should come up, the issues should be similar to those that apply in the case of section

[185] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 191-196.

[186] 335.

[187] 452-453.

25(1),[188] even though the law of general application for expropriation (section 25(2)) differs from the section 25(1) law of general application in two ways. Firstly, common law does not feature as law of general application in expropriation cases because there is no common law authority for expropriation in South African law.[189] Secondly, in the expropriation context the authorising law has to authorise a very particular kind of state action, namely expropriation of private property for a public purpose or in the public interest.[190] This means that expropriation rests on the basis of legislation that authorises a specific kind of state action to serve a particular public purpose or interest.

In US law, limitations imposed on the right to exclude have sometimes been treated as takings[191] for specific reasons that are worth mentioning.[192] The US

[188] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 453.

[189] See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 346, 453-454, citing Gildenhuys A *Onteieningsreg* (2nd ed 2001) 93. All expropriations are effected in terms of legislation, most notably the Expropriation Act 63 of 1975. The common law principles applicable in the context of non-consensual access rights (the right of way of necessity and encroachment cases) effect a forced transfer of property rights that result in limiting the landowner's right to exclude, but this cannot be characterised as expropriation. The outcome in the right of way of necessity and encroachment cases cannot be described as expropriation because of the absence of legislation to authorise expropriation in both cases. The common law principles in the right of way of necessity and encroachment cases are intended to harmonise conflicting interest in private land other than to serve a public purpose or the public interest through the compulsory acquisition of property. See Roux T "Property" in Cheadle MH, Davis DM & Haysom NRL (eds) *South African constitutional law: The Bill of Rights* (2002) 429-472 458 (with reference to footnote 144), (left out of the current Roux T & Davis D "Property" in Cheadle MH, Davis DM & Haysom NRL (eds) *South African constitutional law: The Bill of Rights* (2nd ed 2010) ch 20); Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* volume 3 (2nd ed OS 2003) ch 46 1-37 33. Roux states that as far as South African law is concerned, expropriation is a state action always carried out in terms of statutory authorisation. See also Van der Walt AJ *Constitutional property law* (3rd ed 2011) 453-454.

[190] Van der Walt AJ *Constitutional property law* (3rd ed 2011) 454.

[191] The US Constitution refers to expropriation as a "taking" of property. See Van der Walt AJ *Constitutional property law* (3rd ed 2011) 336-337.

courts' takings decisions suggest that at least some governmental interferences with the landowner's right to exclude are likely to be treated as takings.[193] In *Kaiser Aetna v United States*[194] the US Supreme Court held that requiring public access that limits the right to exclude would amount to a taking of property without compensation in violation of the Fifth Amendment. Furthermore, the court held that the right to exclude, which is seen as a universally held fundamental element of property rights, falls within the category of interests that the government cannot take without compensation.[195] The *Kaiser Aetna* decision was later applied in other cases dealing with the landowner's right to exclude. For instance, in *Loretto v Teleprompter Manhattan CATV*[196] the Supreme Court held that property owners could not be required, without compensation, to allow cable companies to install wires and cable boxes on their building. The court held that any permanent physical invasion, even if it causes the smallest infringement of the landowner's right to exclude, triggers a *per se* taking, which merits compensation.[197] In *Nollan v California Coastal*

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[192] The US Constitution has two clauses that protect property against illegitimate government interferences. The Fourteenth Amendment to the US Constitution, under the due process clause, provides that "no person shall … be deprived of life, liberty, or property without the due process of law". Additionally, the takings clause provides that "… nor shall private property be taken for public use, without just compensation". See the Fifth Amendment to the US Constitution. See also Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 375; Merrill TW "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 731.

[193] Merrill TW "The landscape of constitutional property" (2000) 86 *Virginia Law Review* 885-1000 973.

[194] 444 US 164 (1979).

[195] *Kaiser Aetna v United States* 444 US 164 (1979) 179-180.

[196] *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) 433.

[197] *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) 434-436. See also Alexander GS *The global debate over constitutional property: Lessons from American takings jurisprudence* (2006) 93.

Commission[198] the Supreme Court ruled that a landowner could not be expected to allow a public right of way over his land, as a condition for obtaining a building permit, without payment of compensation. In *Dolan v City of Tigard*[199] the court found that a complete abrogation of the right to exclude with respect to a portion of land is a taking, even though the portion in question is relatively trivial. These cases indicate that the courts did not engage in a balancing of the interests of landowners and non-owners, even though a balancing test would have benefited the public considering that, in some cases, there was only a slight intrusion on the right to exclude.[200]

However, the decision in *PruneYard Shopping Center v Robins*[201] suggests otherwise. The court in this case held that the limitation of the right to exclude a particular category of customers from a shopping centre was not a taking.[202] The court upheld a state constitutional requirement that owners of shopping centres who have already invited the general public to their property should permit individuals to exercise speech and petition rights. The court viewed the temporary invasion of property as being more of a regulation of use of property than a taking. This is because the owner of the shopping centre was free to adopt and enforce regulations regarding the time, place and manner in which the activities of the petitioners would be permissible. Seen in this light, the exercise of free speech and petition rights in the shopping centre did not amount to an unconstitutional limitation of the right to exclude.

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[198] 483 US 825 (1987) 831.

[199] *Dolan v City of Tigard* 512 US 374 (1994) 393. See also *Nollan v California Coastal Commission* 483 US 825 (1987) 831.

[200] Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259 251-251.

[201] 447 US 77 (1980).

[202] *PruneYard Shopping Center v Robins* 447 US 77 (1980).

US courts might react similarly (in the sense that any permanent physical invasion is seen as a *per se* taking) to South African cases dealing with some limitations of the landowner's right to exclude. For example, in the *Nhlabathi*[203] case a US court would probably have awarded compensation for a forced transfer of property that resulted in depriving the landowner of his property for the sake of land reform objectives. The *Nhlabathi* decision suggests that expropriation without compensation is possible and justifiable in certain circumstances but the court did not decide whether the section in question did in fact amount to an expropriation.[204] However, the circumstances of the *Nhlabathi* case led the court to decide that the enforcement of section 6(2)(dA) of ESTA does not constitute a major intrusion on the landowner's property rights. The court decided that the provision in question was not unconstitutional (in the sense that it did not authorise an arbitrary deprivation) and that the statutory obligation imposed on the landowner to allow the appropriation of a gravesite on his land without compensation was reasonable and justifiable in line with section 36 of the Constitution.[205]

Similarly, the US courts would possibly award compensation in cases involving the CROW Act and LRSA in terms of the Fifth Amendment takings grounds.[206] The

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[203] *Nhlabathi and Others v Fick* [2003] All SA 323 (LCC).

[204] Section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997. See Van der Walt AJ *Constitutional property law* (3rd 2011) 507; Pienaar JM *Land reform* (2014) 422.

[205] See Pienaar J & Mostert H "The balance between burial rights and landownership in South Africa: Issues of content, nature and constitutionality" (2005) 122 *South African Law Journal* 633-660 645-659 for a detailed discussion of the constitutional issues raised in the *Nhlabathi* case. See also Pienaar JM *Land reform* (2014) 423.

[206] Lovett JA "Progressive property in action: The Land Reform (Scotland) Act 2003" (2011) 89 *Nebraska Law Review* 739-818 815 discusses the possible reaction of the American courts to the LRSA. See also Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259 246 with regard to the reception of the CROW Act in the US.

two acts permit the right to roam on privately owned land, which presents a significant deprivation of the landowner's right to exclude, but without making provision for compensation when such deprivation occurs.[207] However, both acts establish a fair balance between public access rights and the landowner's property rights, which balance effectively renders the acts constitutionally compliant. In light of section 25 of the Constitution of South Africa, the courts would most likely react differently and not consider the limitation of the right to exclude as a taking of property (or an expropriation).

In conclusion, it should be noted that in the specific context of the South African property clause it may well never be necessary to raise the expropriation issue or to proceed to the section 25(2) stage of the *FNB* analysis unless the deprivation in question (limiting the owner's right to exclude) specifically arises from legislation (since there is no common law authority for expropriation in South African law) that explicitly or at least clearly and implicitly authorises expropriation of the affected rights, for a public purpose or in the public interest, against compensation.

4 4 Conclusion

In Chapter 2 I discuss one type of justification, namely theoretical and doctrinal justifications for limiting a landowner's right to exclude on a normative basis, departing from the assumption that ownership is unlimited in principle and that every limitation requires such justification. That chapter shows that the foundations for this assumption are weak. The aim of this chapter is to consider justificatory arguments

[207] Anderson JL "Countryside access and environmental protection: An American view of Britain's right to roam" (2007) 9 *Environmental Law Review* 241-259 246. See also Van der Walt AJ *Property in the margins* (2009) 194-195.

of a different kind, assuming that ownership is not unlimited in principle, namely justification for a specific limitation and section 25(1) justification for the effect that the limitation has on a specific landowner. This chapter established that the justifications for limiting the right to exclude depend on whether the limitation is imposed directly by a non-property constitutional right; by legislation giving effect to a non-property constitutional right; by legislation not specifically giving effect to a non-property constitutional right; or by common law principles.

Constitutional limitations on the right to exclude others from private, public or quasi-public land generally protect non-property constitutional rights like life, dignity and equality. These non-property constitutional rights are generally unlimited and not subject to regulation, which implies that when these rights are in conflict with a property right (which is subject to limitation) the issue is not whether the limitation on the right to exclude is justifiable or whether exclusion is at all allowed and justifiable but that the right to exclude must simply give way to a direct constitutional right. At least for life and dignity this is a direct constitutional limitation that brings about an *ex ante* truncated property right and there is no deprivation in terms of section 25(1) or limitation in terms of section 36(1) that requires any justification. It results from the supremacy of the Constitution over any law or entitlement that conflicts with these rights.

When courts deal with the conflict between the right to exclude and other non-property constitutional rights such as freedom of speech, freedom of movement, right to strike and picket and secure tenure, competing interests are weighed to determine which outcome would be the most appropriate in a particular case. The above mentioned rights are enforced and regulated by legislation. Legislation giving effect to a non-property constitutional right and legislation not specifically giving effect to a

constitutional right can limit the right to exclude. In certain instances the balancing of interests already prescribed by the legislature when drafting legislation enacted to give effect to the constitutional right in question, assists the courts in the weighing process. Protection of the constitutionally and statutorily protected non-property rights, as well as other policy grounds and objectives, justifies the limitation placed on the right to exclude.

The nature of justification here assumes that property rights are limited in principle and that legitimate limitations may be expected. The justification process considers whether there are reasons for the limitation and whether there is authority for a specific limitation in a specific case. The legislation in question in a specific case is the authority for the limitation and it shows why the right to exclude should be limited, usually it is for a valid reason.

Justification for a specific limitation also features in the private law (common law) context where the right to exclude is limited for policy reasons. The right to exclude is limited when a right of way of necessity is enforced by a court order or when a court exercises its discretion in favour of leaving an encroachment in place. In these instances the courts weigh the interests of the affected landowner and the encroacher (in encroachment cases) and the interests of the servient tenement owner against public policy (in the right of way of necessity cases) to determine the appropriate outcome. In doing so, the courts limit the right to exclude on policy reasons such as the efficient use of land or on the basis of a balance of prejudice. This means that in property disputes the protection of the right to exclude is not a default outcome. Rather, after the consideration of all relevant factors in a particular case, the courts may limit the right to exclude if it is necessary and justifiable.

Insofar as the limitations on the right to exclude are justified on the basis of authority and reason for the limitation, it becomes necessary to look at section 25 to ascertain whether the effect of the limitations are constitutionally valid and legitimate. The section 25(1) analysis, questions whether the limitations imposed on the right to exclude comply with section 25(1) of the Constitution. In instances where the law imposes limitations on the right to exclude, the outcome is a deprivation of the right to exclude.[208] The deprivation is authorised by law of general application for a valid public purpose. The important part of the section 25(1) analysis is to determine whether the deprivation of the right to exclude has a non-arbitrary effect on individual landowners. The extent of the deprivation is case-sensitive. If there is a rational connection between the means employed and the ends sought by the deprivation, which guards against disproportionate effects, the deprivation that results from limiting the right to exclude is mostly going to be justifiable and would generally amount to non-arbitrary deprivation. In other words, the deprivation of the right to exclude complies with section 25(1) of the Constitution.

[208] The deprivation outcome does not apply in cases involving a direct clash between the right to exclude and non-property constitutional rights such as right to life and dignity, with the exception of the right to equality because it is regulated by legislation. See sections 4 2 1 and 4 3 4 above.

Chapter 5:

Conclusion

5 1 Introduction

The aim of this dissertation is to consider, from a constitutional perspective, the absoluteness assumption and the centrality of the right to exclude. An overview of the research problem in the introductory chapter indicates the complex relationship between the right to exclude and access rights.[1] The right to exclude is commonly perceived as the core entitlement of ownership that should be protected and strongly upheld unless it is limited justifiably. Sometimes the right to exclude is limited when it clashes with non-property constitutional or statutory rights to protect these rights, and when their enforcement is dependent on access to land. This raises significant questions relating to the role, scope and the supposed primacy of the right to exclude, when and how it is limited by law, and whether the limitation is theoretically, doctrinally and constitutionally justifiable.

The underlying assumption throughout this dissertation is that it is misleading to regard ownership and exclusion as absolute rights. The notion of absolute ownership can be understood in different ways. Ownership can be seen as absolute in the sense that it is the most complete real right; as an abstract right; as an individual right; and as an unlimited right in principle, although subject to limitations. Viewing ownership as absolute in the abstract sense means that the right to exclude is not limited by considerations of justice or context. Absoluteness in the sense that ownership is unlimited in principle although it is subject to limitation is often

[1] See Chapter 1 above.

understood to mean that the right to exclude is unlimited, except in exceptional cases where limitations are normatively justified. However, case law, doctrine and theory associated with these meanings do not support the view that the right to exclude is absolute in the strong sense. I assumed in Chapter 1 that access rights imposed by law in fact limit the right to exclude, and that these limitations are often constitutionally justified.

This dissertation therefore considered the theoretical and doctrinal perspectives on the existence and nature of limitations on the right to exclude; access rights that in fact limit the right to exclude; and the justification for those limitations in a constitutional context.[2] Therefore, it is necessary to conclude this dissertation with a discussion regarding the complexity of the relationship between exclusion and access rights to determine whether the research question was answered and to reflect on the relative nature of the right to exclude. This conclusion also explores some of the implications of considering different origins of limitations and different types of justification for limiting the right to exclude

5 2 Conclusions: The relative nature of the right to exclude

5 2 1 The idea of absolute ownership and exclusivity

Chapter 2 offers an overview of theoretical and doctrinal perspectives on limitations that are imposed on the right to exclude. The point of departure was that the right to exclude can be viewed in a strong-absolute sense. The chapter highlights a number of theoretical considerations that do not support such a strong view of the right to exclude. Firstly, moral property theories do not provide theoretical support for such a strong notion of absolute ownership and exclusion that requires a moral justification

[2] See Chapters 2, 3 and 4 above.

whenever any limitation is imposed on the right to exclude. This is because moral property theorists such as Locke and Hegel do not discuss the issue of absoluteness directly and the different readings of both theories (labour and first occupation) make it controversial to support a strong, absolute view of the right to exclude.[3] Secondly, modern property theory does not provide support for the strong notion of absolute ownership and exclusion either. Proponents of a strong exclusion theory tend to view property through the lens of the right to exclude. Exclusion theorists therefore treat limitations on ownership as exceptional, arguing that as a point of departure, the right to exclude should be upheld and protected. Exclusion is seen as a simple keep-off message. However, even when exclusion theorists see the right to exclude as the most important, core, or essential property entitlement, that does not mean that it is unlimited. The right to exclude can be limited, even if the limitations are viewed as exceptional. The only outcome of this view is that any limitation must be proved specifically; requires special justification; and might require compensation.[4] In fact, modern exclusion theorists describe the right to exclude as relative and accept limitations for pragmatic reasons such as efficiency.[5] Thirdly, there are theoretical views that support a limited or qualified right to exclude. Exclusive use and progressive property theorists agree that a landowner is presumed to have a right that is free of limitations, but add that there is always a possibility that limitations could be imposed, and these limitations are not seen as exceptional in the sense that they are almost impossible.[6] Some theories accept that limitations on the right to

[3] In this regard, see Chapter 2 section 2 2 1 above.

[4] See Chapter 2 section 2 2 2 above.

[5] See Merrill and Smith, Chapter 2 section 2 2 2 above.

[6] See Chapter 2 sections 2 2 3 and 2 2 4 above, with reference to the perspectives of exclusive use theorists such as Katz, Mossoff, and Claeys; and progressive property theorists such as Alexander, Peñalver, Underkuffler, and Singer.

exclude are not only possible but normal and relatively common.[7] Progressive property theorists take into account the fundamental human values and interests of non-owners, and they do not simply prioritise the protection of the right to exclude. Limitations on the right to exclude are therefore accepted readily, sometimes even without compensation.

Exclusion, exclusive use and progressive property theorists acknowledge the existence of limitations on property and on the right of exclusion in particular but they have different views on the nature of the limitations. The exclusion theorists view limitations as exceptions to the absolute-exclusion rule, while the exclusive use and progressive property theorists view limitations as inherent to the property system.[8] On the whole it cannot be said that property theory offers strong or unanimous support for an approach that treats the right to exclude as an absolute entitlement, even when it is regarded as a core or essential property right.

In Chapter 2 I further explained that the definition of ownership in modern South African law has been influenced by pandectism in academic literature, where it is often said that ownership is absolute in the sense that limitations are exceptional.[9] This notion of ownership appears to support a strong view of absoluteness. However, pandectism did not have such a strong effect in South African case law. Courts normally adopt the pragmatic Roman-Dutch law notion that ownership is the most complete real right that an owner can have with regard to property, but this right can only be exercised within the limits of the law.[10] The word “absolute” is seldom used directly by the courts, except in a very specific context. When the

[7] For a detailed discussion on these theories, see Chapter 2 section 2 2 4 above.

[8] See in this regard Chapter 2 sections 2 2 2, 2 2 3 and 2 2 4 above.

[9] See Chapter 2 section 2 3 1 above.

[10] See Chapter 2 section 2 3 2 above.

courts use the word “absolute”, they mostly refer to the Roman-Dutch law notion that ownership is either the most complete real right, distinguishing it from limited real rights, or absolute in Bartolus’ sense that an owner can use his property in any way that is not specifically prohibited by law. Accordingly, South African case law seems to convey either that the owner holds the most comprehensive collection of entitlements or that the evidentiary starting point is the presumption that ownership is free of limitations, which have to be proved. The evidentiary starting point denotes that mere proof of the existence of a limitation is required and not justification for the limitation in a normative sense. This does not convey the theoretical idea of absoluteness in the strong sense, and in fact comes closer to the exclusion arguments of exclusive use and progressive property theorists. Furthermore, the brief historical background on ownership shows that the South African legal doctrine does not in fact support a strong argument in favour of absolute exclusivity.[11]

Consequently, ownership and the right to exclude allow for the existence of limitations as a matter of course. The owner cannot do with his property as he deems fit or exercise his right to exclude outside of the limits imposed by law. The limitations imposed by law on the right to exclude are regarded as presumptively secondary, but they are not seen as normatively exceptional. Therefore, absolute ownership does not mean that the right to exclude can be exercised without limitations or that ownership is unlimited prior to law or outside of the legal system. At most, the initial presumption is against limitations until they are proven.

Consequently, it is not important to determine whether limitations are inherent in ownership. The point is rather whether limitations on ownership are inherent in the legal system in which it functions. The conclusion in Chapter 2 points out that the

[11] Regarding the brief historical background on ownership, see Chapter 2 section 2 3 1 above.

theoretical and doctrinal perspectives on the limitation of the right to exclude point towards a notion of ownership that functions within a legal system, which includes property and of which limitations are an inherent part.[12] Furthermore, theoretical and doctrinal views show that justification for limitations has a specific meaning. In particular, justification does not require normative grounds for the existence of every limitation, because ownership and the right to exclude are not regarded as pre-social, pre-legal or pre-constitutional rights. The limitations are not imposed on pre-law rights; the right to exclude is limited within the legal system, and therefore the normative question whether to limit it is taken (during the constitution- or statute-writing process) before a particular dispute arises.

5 2 2 Limitations

The limits and content of property are determined by law and hence the strong notion of absolute ownership and absolute exclusivity has no place in the constitutional setting. The conclusion in Chapter 3 confirms that ownership functions within a legal system and also in a constitutional system.[13] The legal and constitutional system includes limitations on the right to exclude, and the source of those limitations (constitutional, statutory or common law) has an influence on the authority for and effect of the limitations. The different origins of limitations imposed on the right to exclude indicate the purpose and nature of those limitations. The origins also reflect the normative reasons for the limitations and the strength of the limitations as compared to the right to exclude.

[12] See Chapter 2 section 2 4 above.

[13] See Chapter 3 section 3 5 above.

Chapter 3 shows that limitations directly originating from the Constitution function within specific circumstances and are normally stronger because they embody constitutional obligations. Consequently, conflicts between the right to exclude and these limitations are not resolved by way of balancing. The right to exclude must give way when it clashes with unqualified non-property constitutional rights such as life, dignity and equality to ensure that these rights are secured and protected.[14] However, this does not imply that non-owners have free access to land, because these non-property constitutional rights do not grant or create a general right of access to land. The point is that a landowner cannot deny access to his land if non-owners depend on reasonable access to that land for purposes of exercising their non-property constitutional rights.[15]

If limitations originate from legislation or the common law, the relevant legislation or common law principles will show how to resolve conflicts and balance out the competing rights. Non-property constitutional rights like freedom of speech, freedom of movement, the right to strike and picket and to secure tenure, which are subject to regulation and limitation by law, are balanced out against property in accordance with the legislation that gives effect to those constitutional rights. The fact that neither the right to exclude nor the non-property constitutional rights are absolute and that both are regulated and limited in terms of legislation makes it possible to regulate potential conflicts between the competing rights by predetermining how conflicts are to be adjudicated.[16] Since both sets of competing rights are subject to regulation, balancing or another form of mutual accommodation

[14] See Chapter 3 section 3 2 above.

[15] See in this regard Chapter 3 sections 3 2 and 3 5 above.

[16] Van der Walt AJ "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15-106 70. See the discussion in Chapter 3 section 3 3 above.

is usually prescribed by the relevant legislation. Therefore, limitations originating from legislation do not override the right to exclude; limitations are imposed by balancing the right to exclude against a non-property constitutional right or a statutory right, in a way that accommodates both rights. The legislation or the landowner can usually impose reasonable time, place and manner restrictions on non-owners wishing to have access to the land. This implies that both sets of competing rights are upheld and therefore the affected landowner is usually not awarded compensation.[17] The common law examples are different in this respect because the right of way of necessity and encroachment examples show that the competing interests are weighed against each other, whereafter one party wins and the affected landowner, whose right to exclude is limited, is awarded compensation for the loss suffered.[18]

Normally, access rights to land involve a limitation of the right to exclude, but not all limitations create or imply access rights. Some limitations on the right to exclude involve only access rights, for example the right to roam and access to the beach cases. These cases involve legislation that explicitly creates access rights that limit the landowner's right to exclude.[19] The legislation stipulates when and how access rights should be exercised and determines the extent of the limitation imposed on the right to exclude.[20] Other cases also involve access and denying access but they do not involve access rights in the technical legal sense, meaning

[17] In this regard, see Chapter 3 sections 3 3 and 3 5 above.

[18] On the common law examples, see Chapter 3 sections 3 4 and 3 5 above.

[19] See Chapter 3 section 3 3 2, with reference to legislation regulating the right to roam such as the Countryside and Rights of Way Act 2000 and the Land Reform (Scotland) Act 2003, and legislation regulating beach access in the South African context such as the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

[20] See Chapter 3 section 3 3 2 above.

that non-owners do not have a right to claim access to land. For example, in *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)*[21] it was decided that the landowners cannot deny others access to their land, but that does not mean that the respondents have acquired rights to gain access to the land in the technical sense. The Constitution, PEPUDA[22] and public accommodations laws do not grant or create access rights, but they limit the landowner's right to exclude non-owners in that a landowner cannot deny others access to the land when the exercise of their constitutionally and statutorily protected rights depends on such access.[23] In other instances, limitations on exclusion imply that access and use rights are directly or indirectly granted by a court order, based on common law principles, for example in the right of way of necessity and encroachment cases.[24] Other cases are clearly not about access rights or any kind of rights at all. In some circumstances, an owner of private land may be prevented from excluding non-owners from his land or from evicting them once they have gained access for residential purposes.[25] If the non-owner is an unlawful occupier, the limitation on the right to exclude is regulated by legislation, specifically the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). In principle, PIE is not aimed at creating access rights or any right at all because it is focused on regulating eviction of unlawful occupiers of land. However, PIE may in practice involve accommodation or land being made available to unlawful occupiers, albeit temporarily.[26] The result is

[21] 2004 (4) SA 444 (C).

[22] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

[23] See Chapter 3 section 3 2 above.

[24] See Chapter 3 section 3 4 above.

[25] See Chapter 3 section 3 3 1 above.

[26] Pienaar JM *Land reform* (2014) 338.

that PIE limits the landowner's right to exclude to prevent unlawful eviction, but it does not specifically create or grant access rights.

Taking into account the expansion of limitations on the right to exclude, for various purposes, in South African law and other jurisdictions (US, Scots, and English law), the limitations imposed on the right to exclude indicate that the right is relative rather than absolute. Limitations on the right to exclude are expected and cannot be seen as exceptions that need to be proven and justified on normative grounds, because some limitations are imposed directly by non-property constitutional rights, by legislation, and by common law. Further indications to the same effect include the fact that the range of the limitations is so wide; and that the origin or part of the origin of limitations on exclusion from quasi-public places and privately owned places is consent. The range of access rights that limit the right to exclude shows that limitations are normal and common in a legal and constitutional system.

5 2 3 Justifications

Limitations on the right to exclude can generally be justified in terms of existing constitutional and property doctrine. South African case law reflects the notion that ownership functions within a legal and constitutional system of which limitations are an inherent part.[27] Therefore, justification for the limitation of the right to exclude on normative grounds is not necessary because ownership is not an unlimited right in a pre-constitutional setting. Therefore, one can assume that property rights are in principle limited and contextual. From a constitutional perspective, limitations are from the beginning part of the system within which property functions. Consequently,

[27] See Chapters 2 and 3 above.

justification refers to justifying the authority and reasons for and effect of a specific limitation imposed on the right to exclude, instead of justifying the very existence of a limitation.

In this sense, I consider two types of justification in Chapter 4. The first is authority and the ground for a limitation, which involve the validity and legitimacy of the limitation. The second is the section 25(1) justification, which involves the effect of the limitation on a specific owner, examining (apart from authority for the limitation) whether the effect is proportionate. I discuss these two types of justification separately but there is an overlap between them as far as the authority for the limitation is concerned. This is as a result of the South African property clause, section 25, that includes both authority and proportionality requirements. Not every legal system has a constitutional property clause that contains both requirements and not every legal system with a property clause combines the two requirements like section 25(1) does. As a consequence, I discuss the authority and legitimacy issue twice in the South African context.[28]

In Chapter 4 I establish that justifications for the limitation vary depending on whether the landowner is prevented from excluding others on the basis of non-property constitutional rights; legislation that was enacted to give effect to non-property constitutional rights; legislation that was not directly enacted to give effect to non-property constitutional rights; or the common law.

The Constitution imposes constitutional obligations that require the protection and promotion of non-property constitutional rights like life, dignity and equality. These rights are unqualified, which suggests that the right to exclude is limited in principle to allow for the protection of these non-property constitutional rights. If the

[28] For a detailed discussion on the justification issue, see Chapter 4 sections 4 2 and 4 3 above.

constitutional obligation necessarily implies limitation of the right to exclude, the limitation is justified by the Constitution. As a result, it is unnecessary to inquire whether the limitations imposed on the right to exclude can be justified on other grounds other than the Constitution. Rather, the right to exclude (property) must give way so that these rights are secured in line with the constitutional mandate.[29]

The right to equality functions on the same constitutional level as the right to life and dignity, but the presence of legislation regulating equality implies that these rights should be treated differently. The right to exclude is limited if it results in discriminatory practices or if it affects the right to equality. In principle the same argument applies in the right to life and dignity cases; the right to exclude is limited if it affects these non-property constitutional rights. However, in equality cases the limitations imposed on the right to exclude do not originate directly from the Constitution but from the legislation enacted to give effect to the constitutional right to equality. Therefore, legislation such as the US public accommodations laws and PEPUDA,[30] which regulates its application, and not the Constitution, justify equality limitations on the right to exclude.[31] In equality cases, it is therefore necessary to determine the authority and reason for the limitation and whether the effect of the limitation is proportionate (section 25(1) justification).[32] Since there is no legislation giving effect to the right to life and dignity, only the constitutional authority for the limitation is applicable, and therefore there is no need for section 25(1) analysis.[33] The different treatment of the life and dignity cases and equality cases in the

[29] See Chapter 4 section 4 2 1 above.

[30] The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) does not define or qualify the right to equality; instead it only regulates its application.

[31] In this regard, see Chapter 4 section 4 2 1 above.

[32] See Chapter 4 sections 4 2 1 and 4 3 above.

[33] See Chapter 4 sections 4 3 4 and 4 4 above.

justification process casts some light on the overlap concerning authority in both types of justification.

Legislation usually limits the right to exclude for a specific statutory goal that justifies preventing a landowner from excluding non-owners who want to gain access or from excluding persons whom the landowner had voluntarily given access to. If the legislation was enacted to give effect to a non-property constitutional right, the reason for the limitation is the protection of that particular constitutional right; if the legislation was not specifically intended to give effect to a non-property constitutional right, the reason for the limitation would normally be indicated in the legislation in question. In both instances, the authority for the limitation is the legislation that sets out its purpose and prescribes the procedure to ensure proportionate outcomes. Statutory examples that are discussed in this chapter show that there usually is a reason and authority for specific limitations imposed on the right to exclude.[34]

The common law examples show that the authority for limiting the right to exclude is the common law. The reason for the limitation is based on policy, but there are different kinds of policy, namely economic efficiency (in right of way of necessity cases)[35] and balance of convenience (in encroachment cases).[36] These policy considerations justify limitations placed on the right to exclude. An award of compensation to the affected landowner in the right of way of necessity and encroachment cases has a significant role in determining whether the limitation is justifiable. In both cases, compensation is paid for the right that was forcibly

[34] See Chapter 4 sections 4 2 2 and 4 2 3 above.

[35] See Chapter 4 section 4 2 4 above for a discussion of the policy considerations in the right of way of necessity cases.

[36] For a discussion of the policy considerations in encroachment cases see Chapter 4 section 4 2 4 above.

transferred and acquired.[37] The effect of compensation in both cases is to equalise the burden for the landowner's right to exclude that was limited, either because of a balance of convenience (in encroachment cases), or for economic efficiency reasons (in the case of the right of way of necessity).[38]

Assuming that property is limited in principle, limiting the right to exclude is firstly justified on the basis of authority and reason (grounds for validity). However, it is also necessary to justify the effect that the limitation might have on a specific landowner. A landowner is deprived of the right to exclude when the law imposes limitations on the right (except in constitutional cases dealing with the right to life and dignity, where there is no intervening legislation and the right to exclude is limited directly by the Constitution, bringing about an *ex ante* truncated right). In cases where the limitation amounts to a deprivation of property, the deprivation must be authorised by law of general application for a valid purpose. The case by case non-arbitrariness test ensures that the deprivation effected by the limitation of the right to exclude is not arbitrary to comply with section 25(1) requirements. The section 25(1)-type justification is a proportionality-type justification that ensures that the effects of a specific limitation, on the affected owner, are not disproportionate. In this sense, the effects of limiting the landowner's right to exclude are justified in that they are not unjustifiably harsh or unfair.

In view of the Constitution, legislation and common law, the right to exclude in the strong-absolute sense is not supported by theory, doctrine or case law. In fact, the right to exclude is relative and its limitation in this regard cannot be seen as mere exceptions that require strong normative justification. The right to exclude is qualified

[37] Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77 42.

[38] See Chapter 3 sections 3 4 and 3 5 above.

in general on pragmatic and contextual grounds. The constitutional perspective adopted in this dissertation indicates that property rights are in principle limited and that they function within a legal and constitutional system that includes limitations. Limitations are therefore viewed in a constitutional context, and not with a focus on individual rights. Accordingly, the nature of justification entails that the authority for and effects of limiting the landowner's right to exclude are to be considered in a constitutional system, which does not require normative justificatory grounds for a specific limitation.

5 3 Concluding remarks

An assessment of the right to exclude and its relation to access rights to land raises questions about the idea of absolute ownership and exclusion. The central argument of this dissertation is that the right to exclude is in principle limited, with the result that limitations in the form of access rights are to be expected and often justifiable. Theoretical and doctrinal literature does not support a strong, absolute exclusion right that requires normative justificatory grounds whenever a limitation is imposed on the right. In that sense, property rights are limited and contextual insofar as they function within a legal and constitutional system that includes limitations. Limitations on the right to exclude originate from different sources that identify the purpose and nature of the limitation. This dissertation has redefined the notion of justifications for limiting the right to exclude: assuming that property rights are not in principle unlimited, justification does not involve normative reasons for the existence of every limitation but rather means that the authority and grounds for the limitation and the effect of the limitation on a specific owner must be established in the constitutional context.

The content of the landowner's right to exclude is defined or shaped by the nature of the property involved and the origin of a specific limitation. The right to exclude can be enforced strictly in a private home, but its enforcement on public or quasi-public land is often limited. When an owner opens his property to the public for his own benefit, his property rights become circumscribed. Although the property is privately owned, a general or unrestricted invitation to access land for public use causes the land to lose its purely private nature and it acquires a public character. Consequently, an owner of private property that is open to the public cannot deny access to his property to non-owners who want to exercise their constitutionally and statutorily protected rights. The cases discussed in this regard establish that private ownership and its exclusionary powers cannot be used to define or limit public access to quasi-public places for social, commercial or recreational purposes. These cases also suggest that limitations on the right to exclude are not exceptional, because access is granted on the basis of implied consent from the owner. However, the constitutional obligations imposed by non-property constitutional rights are more important than consent.

It is a misconception to regard the right to exclude as an absolute right, considering the complex relationship between the right to exclude and authorised access to property. Instead, property should be considered in a constitutional system that recognises competing rights, and of which limitations are to be expected. Many property law rules govern the relationship between owners and non-owners and thus property rules cannot be viewed or analysed purely in terms of exclusion. In the South African law context, property law has changed considerably in line with the Constitution. Consequently, property rights cannot only be perceived in terms of its exclusionary element, since it involves a constitutionally required balance between

the interests of both owners and non-owners. Accordingly, the institution of property should be re-evaluated in light of the current needs and changing circumstances of society.

The complex relationship between the right to exclude and access rights indicates that the way forward is not to focus solely on exclusion. Rosser criticises the progressive property theorists (who argue that property is about more than just exclusion) for not being radical enough and not focusing their attention on broader issues of acquisition and distribution of property.[39] The progressive property theorists emphasise underlying human values that should limit the right to exclude but treat acquisition and distribution of property as secondary to rules involving use rights.[40] An approach that also pays more attention to acquisition and distribution would consider the problematic origins of property law and the exclusionary effect of ownership rights related to acquisition and inequality.[41] Mossoff (an exclusive-use theorist) argues that acquisition, use and disposal represent a conceptual unity that together serve to give full meaning to the concept of property.[42] Having considered a wide range of access rights to land, the point is that focusing on exclusion necessarily masks important contextual factors, which are important for revisiting acquisition and distribution, and broader access to land issues.

Exclusion and access rights are both legitimate interests in land. Perhaps more emphasis should also be put on the social function of property rather than focusing on exclusion. Furthermore, perhaps Dyal-Chand's and Van der Walt's notion of

[39] Rosser E "An ambition and transformative potential of progressive property" (2013) 101 *California Law Review* 107-172 109, 111.

[40] 111.

[41] 111.

[42] Mossoff A "What is property? Putting the pieces back together" (2003) 45 *Arizona Law Review* 371-444 376.

sharing as an alternative remedial (reconciling) option can influence the outcome of disputes involving exclusion and access.[43] The examples of access rights discussed in this dissertation involve situations where the law, namely the Constitution, legislation and common law, justifies some kind of enforced sharing of property against the landowner's will. The common law principles pertaining to the right of way of necessity is a good illustration of a forced sharing outcome.[44] The requirement to prove necessity makes it possible to create a sharing outcome. If the court applies the requirements strictly and if enforcing a right of way of necessity does not cause disproportionate effects on the servient tenement owner, it can be argued that the outcome complies with the Constitution. The Constitution and legislation also makes it possible to create forced sharing based on constitutional reasons or on specified statutory goals in instances where the right to exclude clashes with non-property constitutional rights, statutory rights protected in dedicated legislation, or legislation not directly giving effect to a constitutional right.[45]

The model of enforced sharing furthermore promotes outcomes that do not focus solely on exclusion but on actual use of the land and the interests of the parties involved, to ensure that competing interests are fairly accommodated.[46] In other words, the model creates a middle space for courts to think about property through the lens of sharing rather than the lens of exclusivity.[47]

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[43] Dyal-Chand R "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723; Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77.

[44] Van der Walt and Dyal-Chand, see the discussion in Chapter 2 section 2 2 3 above.

[45] Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77.

[46] Dyal-Chand R "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723.

[47] Dyal-Chand R "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 680. See also Van der Walt AJ "Sharing servitudes" 2016 (Forthcoming) 1-77.

As is evident thus far, court decisions in statutory and common law cases often result in limiting the landowner's right to exclude, after a balancing process that ensures mutual accommodation, in a way that resembles a sharing remedy. The work of Singer offers alternative perspectives on the role that democracy plays in property law to ensure sharing outcomes that do not violate fundamental values. Singer describes property as "the law of democracy" to indicate that property rights are defined and limited by the requirements of living together in a democratic society that is characterised by fundamental values of liberty, equality and democracy.[48] In this context, property shapes social relations and should therefore be regulated by law to ensure that democracy is upheld and that freedom and equality are promoted.

This dissertation argues that the right to exclude functions within a legal and constitutional system that determines whether to allow or deny landowners the right to control access to their land. In instances where the exclusion of non-owners would be inconsistent with the norms governing a democratic society, the right to exclude should be limited to embrace democratic values. In light of Singer's idea of property as the law of democracy, limitations cannot be viewed as exceptions; they are central to the property law system. Focusing on exclusion detracts attention from the norms and values that enable people to live together in a democratic society. Considering the cases and examples that I discuss in this dissertation, this means that sometimes a solution to a particular conflict depends on a sharing remedy that reconciles, balances, or accommodates competing rights.

[48] Singer JW "Property as the law of democracy" (2014) 63 *Duke Law Journal* 1287-1335.

To conclude, it is perhaps appropriate to once again reflect briefly on the *Victoria and Alfred Waterfront* decision.[49] The decision shows that the right to exclude is not prioritised abstractly and that exclusion of non-owners is not always a preferred outcome.[50] The landowner's right to exclude is limited when it concerns a quasi-public space or even private property (with restricted access), if access to the land is reasonably necessary to secure important non-property constitutional rights. Upholding the right to exclude absolutely and abstractly may in practice derogate from fundamental human rights. The court refused to grant a blanket prohibition against entry so as to protect the respondents' right to life, dignity and freedom of movement. The resulting limitation on the landowners' right to exclude is a result of protecting a non-property constitutional right, namely life and dignity. The discussion in previous chapters indicates that the right to life and dignity cannot be balanced against the right to exclude because they are fundamental constitutional rights and the constitutional obligation to uphold them is stronger than the right to exclude. This has implications for constitutional analysis in that there is no need for section 25(1) analysis in these cases. In the part of the *Victoria and Alfred Waterfront* decision dealing with the right to freedom of movement the court seems to engage in a balancing process to determine the appropriate outcome that would optimise the respondents' freedom of movement without necessarily causing disproportionate effects for the landowners. However, the balancing process does not involve balancing the constitutional right to freedom of movement and the right to exclude, but rather a weighing of different factors to determine whether the effects of the limitation would be proportionate in the specific case. In this context and because of

[49] *Victoria and Alfred Waterfront (Pty) Ltd and Another v Police Commissioner, Western Cape and Others (Legal Resources Centre as Amicus Curiae)* 2004 (4) SA 444 (C).

[50] See Chapter 3 section 3 3 1 above.

the applicability of mediating legislation, the section 25(1) analysis is applicable to test whether the limitation complies with the Constitution. The *Victoria and Alfred Waterfront* decision shows that different sources of law impose limitations on the right to exclude, for different reasons, and that the limitations consequently require different kinds of justification. The decision also indicates the importance of context and the qualified nature of the right to exclude.

In conclusion, courts tend to make *ex post*, contextualised decisions about the relative needs and interests of landowners and non-owners, with the result that landowners' right to exclude is limited, when the exercise of fundamental constitutional rights, statutory rights or common law rights depends on access to land. Therefore, depending on the context of the dispute, the right to exclude is sometimes limited to allow non-owners to have access to land belonging to others, so as to protect their rights. Furthermore, depending on the nature of the property (whether it is private, public or quasi-public), landowners' right to exclude is often justifiably limited in a constitutional system.

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