# *DEVELOPMENT OF THE COMMON LAW OF SERVITUDE*[★]

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*This article explores the implications of the Constitution for the development of the common law of servitude. Following from an analysis of two recent servitude cases in which the courts might have developed the law of servitude for doctrinal or policy reasons (the court controversially decided in both cases that development was unnecessary because the desired result could be reached on the basis of the law as it stands), it will be argued that the question whether the common law should apply to a particular dispute at all and whether it should be developed (because its outcome is for some reason unacceptable) are constitutional issues and not purely common-law ones. Both questions have to be answered in view of fundamental constitutional principles such as the supremacy of the Constitution, the single-system-of-law principle enunciated by the Constitutional Court, and the subsidiarity principles developed by that court. Having argued that this holds even in instances where no legislation applies to the dispute, the article distinguishes between situations where the decision to develop the common law follows from direct constitutional obligations and situations where that decision is taken purely on policy or doctrinal grounds. The final section of the article identifies section 25 issues possibly resulting from a decision to develop the common law of servitude and indicates how those issues can be approached in view of the* FNB *methodology for the analysis of section 25 disputes.*

## I INTRODUCTION

In this article I consider the approach and methodology involved in developing the common law of servitude in the post-1994 constitutional context. I am particularly interested in the impression that was created in recent decisions (and academic literature) that the servitude issues that arise in case

★ This article is an extended version of a paper presented at the annual meeting of the South African Property Law Teachers, University of Cape Town, 1–2 November 2012. The article is based on part of the first draft of chapters of A J van der Walt *The Law of Servitudes* (Juta Law, forthcoming in 2014 as part of the series *Juta's Property Law Library*) and in part embodies a further development of the ideas set out in ch 2 para 3.6 of A J van der Walt *Property and Constitution* (2012) 81–91. The article should be read together with A J van der Walt 'The continued relevance of servitude' (2013) 3 *Property Law Review* 3, in which I work out the normative framework within which my ideas about development of the common law should be seen. Thanks to Dr Reghard Brits and Ms Lizette Grobler of the South African Research Chair in Property Law for research assistance and to participants in the SAPLT meeting for stimulating questions. Prof Susan Scott (Unisa) asked the fundamental question: 'But how will it work?' Thanks also to Gustav Muller and Sue-Mari Maass for comments on the first draft.

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‡ The South African Research Chair in Property Law is funded by the Department of Science and Technology, administered by the National Research Foundation and hosted by Stellenbosch University.

law can and should be solved by 'normal' judicial development of the common law and that such development is largely associated with what is perceived as the inherent logic of the common law, supported by what is described as 'proper' historical and comparative research. I am also interested in remarks, primarily emanating from academic comments on case law, that development of the common law must sometimes take place under the guidance of the Constitution to ensure a fair outcome in individual cases.

The relationship between constitutional analysis and development of the common law has been a source of debate and controversy ever since the advent of the new constitutional dispensation in 1994. The provision in s 39(2) of the Constitution of the Republic of South Africa, 1996 that 'when developing the common law . . ., every court . . . must promote the spirit, purport and objects of the Bill of Rights' added fuel to the fire of this debate and, far from bringing clarity and unanimity, stirred up further controversy about the role of the Constitution and of the courts in the development of the common law.[1]

Normally, the development of servitude law is not considered a major source of controversy, even when it is conceded that development of the common law must generally take place in the shadow of the Constitution. Many property lawyers and even constitutional lawyers may therefore have some difficulty in imagining how and why servitude law should attract constitutional analysis at all. Servitude law, some or perhaps most property lawyers would argue, is one of the areas where the common law can simply develop according to the traditional logic of private-law doctrine, without any significant input from constitutional law. In fact, an overview of recent literature suggests that servitude law does not enjoy all that much attention even from property scholars, let alone constitutional law scholars. The only South African book entirely dedicated to servitudes has not been updated since 1973.[2] Of the two major general academic texts on modern South

[1] In reaction to the Constitutional Court's proposition that the courts must develop the common law whenever it deviates from the spirit, purport and objects of the Bill of Rights, Anton Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611 proposed that the role of the spirit, purport and objects of the Bill of Rights in the development of the common law is merely secondary. He describes the role of the spirit, purport and objects of the Bill of Rights in the development of the common law as that of a tiebreaker, a means of 'choosing between ways of developing the common law that are already justified by reasons that have nothing to do with the spirit, purport and objects of the Bill of Rights.' For criticism of Fagan's argument see A J van der Walt *Property and Constitution* (2012) ch 2; Dennis Davis 'How many positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan' (2012) 129 *SALJ* 59. For further exchanges between Fagan and Davis see Anton Fagan 'A straw man, three red herrings, and a closet rule-worshipper — A rejoinder to Davis JP' (2012) 129 *SALJ* 788; Dennis Davis 'The importance of reading — A rebutter to the jurisprudence of Anton Fagan' (2013) 130 *SALJ* 52.

[2] C G Hall & E A Kellaway *Servitudes* 3 ed (1973). The closest contender, C G van der Merwe & M J de Waal *The Law of Servitudes* (1993), originally published as

African property law, Van der Merwe *Sakereg*[3] has the longer and more detailed chapter on servitudes, but the latest edition predates the new constitutional dispensation. Consequently, neither Hall & Kellaway nor Van der Merwe pays any attention to the post-1994 obligation to consider the place and role of all law in a single legal system dominated by the Constitution.[4] The 2006 edition of *Silberberg & Schoeman*[5] does consider the effect of the Constitution on property law in general,[6] but its analysis of servitude law is less extensive than that of Van der Merwe, and its constitutional analysis does not extend to the section on servitude law. The relatively small number of academic journal articles and notes on servitudes published since 2006[7] also suggests that the law of servitudes is not high on the academic research agenda, and more particularly that the new constitutional dispensation has little or no significance in servitude law.[8]

C G van der Merwe & M J de Waal 'Servitudes' in W A Joubert (ed) *The Law of South Africa* vol 24 (1993) (now C G van der Merwe & M J de Waal 'Servitudes' in W A Joubert (founding ed) & J A Faris (planning ed) *The Law of South Africa* vol 24 2 ed, updated by CG van der Merwe (2010)), was republished as the second part (comprising 27 pages) of C G van der Merwe & M J de Waal *The Law of Things and Servitudes* (1993).

[3] C G van der Merwe *Sakereg* 2 ed (1989) ch 11 (93 pages, excluding mineral rights).

[4] See s 2 of the Constitution ('This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'); *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44 ('There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'); and compare A J van der Walt *Property and Constitution* op cit note 1 ch 2. I return to this point below.

[5] P J Badenhorst, J M Pienaar & H Mostert *Silberberg & Schoeman's The Law of Property* 5 ed (2006) ch 14 (21 pages, excluding restrictive conditions and mineral and petroleum resources). Interestingly, less than 20 per cent of the short chapter on servitudes is dedicated to post-1989 case law.

[6] Ibid ch 21, especially 579–83.

[7] 2006 is a more or less random date for the start of such an overview, but it is roughly ten years since the Final Constitution came into operation. It is also the date when the most recent edition of an important academic text on property law was published (Badenhorst, Pienaar & Mostert ibid), which would in principle provide the most recent academic overview of case law; and it is also the date on which the electronic series *Juta's Quarterly Review*, which would in principle reflect the case law since 2006, was first published.

[8] The major domestic law journals published just five dedicated, full-length articles on servitude law since 2006: J C Sonnekus 'Erfdiensbaarhede en die uitoefening daarvan *civilier modo*' (2007) 70 *THRHR* 351; J A Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stellenbosch LR* 231; J L Neels 'Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Uitoefening van 'n saaklike serwituut afhanklik van 'n positiewe dadigheid deur die eienaar of gebruiker van die dienende erf' 2009 *TSAR* 660; J L Neels 'Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 1)' 2010 *TSAR* 73; J L Neels 'Ewigdurende oorsaak. Die

A fair number of cases on servitudes have been reported since 2006, some dealing with issues that are established in doctrine but not often encountered in the law reports, such as the acquisition of a servitude through prescription[9] and the right of way of necessity.[10] Two interesting recent decisions dealt with novel questions that required the respective courts to consider judicial development of the common law.[11] In *Linvestment* the question was whether a specified servitude of right of way can be relocated without the co-operation of the owner of the dominant tenement.[12] In *Kidson* the question was whether the demolition of the specified building results in the termination of a servitude of habitatio.[13] However, even these decisions attracted relatively little academic attention, considering the novelty of the issues and the fact that both at least arguably involved new developments of the common law.[14] As appears from the analysis below, most commentators

*perpetua causa*-vereiste by erfdiensbaarhede: Behoefte van die heersende erf en geskiktheid van die dienende erf (deel 2)' 2010 *TSAR* 331; J C Sonnekus 'Verryking van die eienaar by nie-uitoefening van *habitatio* en versorgingsverpligtinge jeens eie ouer as bewoningsreghebbende' (2010) 21 *Stellenbosch LR* 26. The 2007 Sonnekus article was inspired by case law (*Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCS); *Roeloffze NO v Bothma NO* 2007 (2) SA 257 (C)). Apart from these articles, a number of shorter notes and case notes directly comment on case law: J C Sonnekus 'Mandament van spolie en ongeregistreerde serwitute vir water' 2006 *TSAR* 392 (*Le Riche v PSP Properties CC* 2005 (3) SA 189 (C)); J C Sonnekus 'Persoonlike diensbaarhede en die herregistrasie van 'n gederegistreerde maatskappy as reghebbende op gespanne voet' 2008 *TSAR* 130 (*Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 (4) SA 467 (SCA)); J C Sonnekus 'Bewoningsreg (*habitatio*) — Verval dit weens versteuring (vernietiging) van die bouwerk?' 2009 *TSAR* 450; C G van der Merwe 'Extinction of personal servitude of *habitatio*' (2010) 73 *THRHR* 657; J Scott 'Effect of the destruction of a dwelling on the personal servitude of *habitatio*' (2011) 74 *THRHR* 155 (all on *Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP)).

[9] *Joles Eiendom (Pty) Ltd v Kruger & another* 2007 (5) SA 222 (C); *Kruger v Joles Eiendom (Pty) Ltd & another* 2009 (3) SA 5 (SCA); *Buckland v Manga* [2008] 2 All SA 177 (E); *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA).

[10] *English v C J M Harmse Investments CC* 2007 (3) SA 415 (N); *Aventura Ltd v Jackson NO* 2007 (5) SA 497 (SCA).

[11] As appears from the analysis below, one of the issues in the literature is whether the decisions actually developed the common law or not. However, it seems fair to conclude that both decisions at least required the courts to consider whether development was necessary.

[12] *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA).

[13] *Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP). *Van Rensburg & another v Koekemoer & another* 2011 (1) SA 118 (GSJ) also dealt with habitatio. In *Beetge v Bruwer* [2009] ZAGPPHC 65, habitatio featured tangentially because the alleged right had not been registered and therefore a limited real right that was binding on third parties was never established. The respondent argued that the applicant (a purchaser of the land) was bound by the personal right created between himself and the previous owner by the doctrine of notice, but the court decided on the facts that there was no indication that the new owner was or should have been aware of the previous agreement.

[14] The notable exception is the decision in *Kidson* ibid, which attracted three fairly extensive (and in part disagreeing) case notes: Sonnekus 2009 *TSAR* op cit note 8;

agree that the results reached in the two decisions are welcome and justified, albeit that they disagree about the questions whether these results indeed involved development of the common law and, if it did, about the correct explanation of and justification for the developments. Both decisions and the majority of academic comments create the impression that the novel issues arising from these and other cases can and should be solved by way of 'normal' judicial development of the common law, based on 'proper' historical analysis. A few brief remarks in academic comments on the *Kidson* decision[15] suggest that the decision could have constitutional implications, but neither the courts deciding these two cases nor the academics commenting on them indulged in full-scale constitutional analysis.

In part II of this article I first discuss the two decisions in *Kidson v Jimspeed Enterprises CC*[16] and *Linvestment CC v Hammersley*,[17] together with academic comments, to show that an appeal to 'proper' analysis of historical authority is insufficient, at least in these two cases, to justify the kind of development of the common law that the respective cases arguably required. Thereafter, in part III of the article I consider the role of constitutional analysis in cases involving or requiring development of the common law. In part IV of the article I consider what a full-scale constitutional argument in support of the results in *Kidson* and *Linvestment* might look like.

## II DEVELOPMENT ON THE BASIS OF HISTORICAL AUTHORITY

### *(a) The* Kidson *decision: Introduction*

In *Kidson v Jimspeed Enterprises CC*[18] the Gauteng North High Court had to decide whether destruction of the building previously inhabited by the beneficiary would terminate a servitude of habitatio. The Kidsons sold their farm to Jimspeed but reserved and registered a lifelong right of habitation in favour of Mr Kidson, relating to a home on the farm where they both lived. While the farm was owned by Jimspeed the Kidsons left the home, apparently because of conflict between them and Jimspeed, and thereafter Jimspeed demolished the house. The farm was subsequently sold and at the time of the judgment it was owned by a family trust, which acquired the property uninhabited by the applicants and without the building, but with the servitude still registered against the title deed. Because of personal circumstances the Kidsons wanted to return to the house on the farm, but apart from the fact that the house had been demolished, the current owner denied any

Van der Merwe 2010 *THRHR* op cit note 8; Scott op cit note 8. I discuss the decision and the comments extensively below.

[15] Supra note 13.

[16] Ibid.

[17] Supra note 12.

[18] Supra note 13.

knowledge of the right of habitation and refused them access to the land. The Kidsons, who were pensioners and could not afford other accommodation, sought an order declaring that their right to live on the farm still existed as it was registered against the title deed. The current owner argued that the right of habitation had been terminated, either when the Kidsons left the farm or when Jimspeed demolished the house.

The court decided on the facts that the servitude had neither lapsed as a consequence of prescription,[19] nor was it cancelled by notarial deed[20] or terminated by non-use.[21] The court further decided, on its view of the historical authorities, that the object of a servitude of habitation is the servient land and not the building, and that destruction of the building would therefore not terminate the servitude unless rebuilding had become impossible.[22] For the servitude to lapse the land must be incapable of serving the holder's right; demolition of the building is insufficient.[23] The core finding was therefore that the servitude in this case had not been terminated at any point, that it still existed,[24] and the Kidsons were entitled to rebuild the house. They could not force the new landowner to rebuild or repair the house,[25] but if they restored the building they could occupy it according to the original provisions of the servitude. If they were unwilling or unable to restore the house exactly as it was prior to its demolition, they were entitled to build an alternative structure on the place where the previous structure had stood.[26] The court also decided, more controversially, that the Kidsons were entitled to use the land around the house for a personal orchard or garden.[27]

[19] Because the requirements of the Prescription Act 68 of 1969 had not been fulfilled: *Kidson* ibid para 5.

[20] As provided for in s 68(1) or (2) of the Deeds Registries Act 47 of 1937: see *Kidson* ibid para 5.

[21] Ibid para 5, citing Voet 7.8.8: '[M]ere non-user of the right of dwelling does not automatically lead to the disappearance or lapse of the right.'

[22] Ibid paras 8 and 10, citing Van der Keessel *Praelectiones* 2.37.5, 2.39.14. The court noted that Van der Merwe *Sakereg* op cit note 3 at 535 differs on this point.

[23] Ibid para 10.

[24] Ibid.

[25] Placing such a burden on the owner of the servient tenement would be in conflict with the general principles of servitude, particularly the passivity principle, according to which the owner of the servient land cannot be forced to perform any positive act. See e g Van der Merwe *Sakereg* op cit note 3 at 471.

[26] The new structure need not be immovable; it could for example be a caravan home. However, if statutes or regulations are applicable to structures on that land (presumably whether movable or immovable), the Kidsons would have to abide by them. If they build an immovable structure, it becomes the property of the current landowner, subject to the right of habitatio: see *Kidson* supra note 13 para 15, item 5.

[27] Van der Merwe 2010 *THRHR* op cit note 8 and Scott op cit note 8 point out that this aspect of the decision confuses habitatio with usus, which is a different kind of personal servitude altogether.

In view of the facts the court considered this outcome fair and equitable to both the landowner[28] and the Kidsons. Moreover, the court obviously thought that the basis for this fair and equitable outcome was established historical authority, without any need for development of the common law. The Constitution is never mentioned as a source of authority or inspiration for the decision.

The decision evoked comments from three senior academic commentators, all of whom are widely respected for their knowledge of servitude law and for their ability to engage with the Roman-Dutch authorities.[29] Although the three academics disagree on some of the detail, they agree on the basic principles of habitatio as set out by the court. The most important points of disagreement are whether the object of a servitude of habitation is the land or the building identified for inhabitation and whether the servitude is automatically and irreversibly terminated by law when the building is destroyed. Interestingly, all three commentators are more or less sympathetic to the idea that the Kidsons should have been helped in this case, although they disagree on the correct way to reach that outcome. As appears from the analysis below, the disagreements are largely inspired by conflicting approaches to and reading of the relevant historical sources. Just two of the commentators mention the Constitution in their analyses, but neither of them provides a full constitutional analysis to justify the outcome.

*(b) Academic comments on the* Kidson *decision*

(i) *J C Sonnekus*

Sonnekus agrees with the court that the object of the right of habitation is not the building but the servient land[30] and that destruction of the structure therefore does not terminate the right;[31] accordingly, survival of the servitude depends on the beneficiary's ability to rebuild.[32] He approves of the outcome: the current landowner cannot be held responsible for rebuilding the structure, but he must allow the applicants to rebuild whatever structure would allow them reasonably to exercise their still existing right of habitation.[33] Importantly, Sonnekus agrees with the court that this outcome can be reached on the basis of the common law as the court read it; development of the common law is not required. Interestingly, he adds in passing that the outcome is also in line with the obligations imposed by s 25 (property) and

[28] In *Kidson* supra note 13 paras 11 and 12 the court states that it would be 'inequitable' for the landowner to receive the benefit of the servitude being terminated purely because the building was destroyed, whether by his own actions or by a natural disaster such as a fire, without indicating whether this benefit would be inequitable on private-law or on constitutional grounds. I return to this point below.

[29] Sonnekus 2009 *TSAR* op cit note 8; Van der Merwe 2010 *THRHR* op cit note 8; Scott 2011 *THRHR* op cit note 8.

[30] Sonnekus 2009 *TSAR* op cit note 8 at 454–5.

[31] Ibid at 457.

[32] Ibid.

[33] Ibid at 465.

s 26 (access to housing) of the Constitution, but he does not expand upon this point or engage in a full-scale constitutional analysis of either ss 25 or 26 to support it.[34]

(ii) *C G van der Merwe*

C G van der Merwe is also satisfied with the outcome, but he disagrees in part with the court's line of argument.[35] Like Sonnekus, he agrees with the court that there was insufficient evidence to support a finding that the servitude had been lost through non-use or prescription, adding that the separate question whether a servitude could be lost through implied abandonment, apart from prescription, was not raised and therefore not decided in this case.[36] In the face of evidence to the effect that the Kidsons had been forced from the farm and that they never acquiesced in the destruction of the house, he argues that cancellation of the servitude by notarial deed would be required to support a finding that the servitude had been abandoned.[37] On this point he therefore agrees with the decision, albeit on more specific grounds that had not been articulated in the same detail by the court.

However, as far as destruction of the building is concerned, Van der Merwe[38] disagrees with the court's conclusion (and thus also with Sonnekus and with Scott) that the object of the servitude is the land and not the building.[39] In his (on this point sole dissenting) view, exactly the opposite conclusion finds support in the relevant Roman law texts: the building is the object of the right, provided that the building or space that is specified for the right of habitation is indicated in the servitude-creating agreement by clear and precise cadastral specification.[40] According to Van der Merwe, this conclusion is also supported by the decision in *Kain v Khan*[41] and in deeds registry practice.[42] Van der Merwe's view, based on his reading of the relevant Roman-Dutch sources (predominantly Grotius and Van der Keessel)[43] is therefore that when the servitude is one of habitation and if the object of the servitude (a building or even part of a building) is precisely defined or

[34] Ibid at 464–5.

[35] Van der Merwe 2010 *THRHR* op cit note 8.

[36] Van der Merwe ibid at 658 points out that the rules for extinction of praedial servitudes, including abandonment, also apply to personal servitudes such as habitatio in so far as they are compatible.

[37] Ibid.

[38] Ibid at 659–62.

[39] Van der Merwe supports the court's rejection of the decision in *Salmon v Lamb's Executor and Naidoo* 1906 EDC 351 as it is inapplicable to the facts in *Kidson* supra note 13; see ibid at 658–9.

[40] The relevant texts are *D* 7.4.5.2; *D* 7.4.10.1: see Van der Merwe ibid at 661–2.

[41] 1986 (4) SA 251 (C): see Van der Merwe ibid at 659–60.

[42] Ibid.

[43] The general principle set out by Grotius *Inleiding* 2.37.5, Van der Keessel *Praelectiones* 2.37.5 and Voet 7.4.8 is that a servitude lapses if either the dominant or servient land is destroyed: see Van der Merwe ibid at 660.

described in the servitude grant, the destruction of that object results in termination of the servitude.

However, Van der Merwe agrees with the court (and with the other commentators) that this conclusion on the basis of the Roman-Dutch authorities would sometimes (including the *Kidson* case) result in unjustifiably harsh and unfair outcomes. He therefore argues, from a normative point of view, that a servitude of habitation should not be terminated by accidental or malicious destruction of the building. He agrees that an equitable outcome would be to allow the Kidsons to rebuild the house and continue (or resume) living there. However, unlike the court and Sonnekus, Van der Merwe thinks that the common law does not allow for such an outcome and therefore it needs to be developed. To make an equitable result possible, Van der Merwe relies on an exception to the general Roman-Dutch principle that destruction of a clearly identified structure terminates the servitude. According to this exception in the local law of Haarlem,[44] a servitude of habitation revived automatically if the building was rebuilt. The Haarlem exception existed in local customary law (as opposed to the Roman-based law of the province of Holland) and applied to urban servitudes only, but Van der Merwe argues that it could be the basis for development of a general fairness exception for all servitudes of habitation in modern South African law.[45]

(iii) *J Scott*

Scott agrees with the court and Sonnekus (and disagrees with Van der Merwe) that the object of the servitude of habitatio is the land and not the building, even when the building to which the servitude pertains is clearly identified.[46] However, he points out (with Van der Merwe and against Sonnekus) that the Van der Keessel texts cited by the court, as well as other authorities,[47] support the conclusion that the servitude is terminated when the structure is destroyed. In his view, the real issue in Roman-Dutch law, namely whether the servitude would revive when the building is rebuilt, was not decided in *Kidson* because the court proceeded on the assumption that the servitude was never terminated.[48] Scott therefore concludes that as the common law stands, the servitude was terminated by demolition of the building. An equitable solution that might allow for continued existence of the right of habitation would require development of the common law.

[44] The exception is discussed by Van der Keessel *Praelectiones* 2.39.14: see Van der Merwe ibid.

[45] Van der Merwe ibid at 665 makes clear that he regards this as an equitable exception that should apply, in addition to urban land, to all habitation servitudes.

[46] Scott op cit note 8 at 160.

[47] Scott ibid at 162 argues that Voet 7.4.10, Van der Keesel *Praelectiones* 2.39.14, Huber *Hedendaegse Rechtsgeleertheyt* 2.40.14 and especially Grotius *Inleiding* 2.39.14 all point strongly towards the conclusion that destruction of the building must inevitably terminate a servitude of habitation.

[48] Ibid at 163.

Scott does not disagree with the court and the other commentators on the need for an equitable solution, but he does not think that the common law as it stands allows for continued exercise of the servitude. He also rejects Van der Merwe's proposal that the unfair results of the general rule could be rectified with recognition of a fairness exception based on the local law of Haarlem, because the exception referred to in the law of Haarlem was local law that does not form part of the sources of South African law.[49] Scott points out that an equitable solution might in fact have been available in terms of the common law, namely that the servitude was terminated by demolition of the building but might revive upon rebuilding, but the court precluded reliance upon this common law solution because it refused to accept that the servitude had indeed been terminated.[50] In fact, the court preferred, in what Scott describes as a 'conscience-soothing . . . "fuzzy" kind of way', to help the applicants by finding, in conflict with the Roman-Dutch authorities, that the servitude was never terminated. This, Scott argues, is the heart of the matter. If the Roman-Dutch authorities point to a result that we find unacceptable on fairness grounds, the solution is not to find an equitable result that soothes our conscience but relies on fuzzy reasoning, but to determine whether the principles of Roman-Dutch law can be developed so as to find an equitable result in accordance with the Constitution. The decision in *Kidson* was probably an effort to develop the common law in accordance with s 39(2) and s 173 of the Constitution, especially in view of the housing right in s 26,[51] but in Scott's opinion this development of the common-law needs to take place on the basis of a proper reading of the common-law authorities.[52] Scott does not engage in a full-scale constitutional analysis to show how this kind of development could be done, but he refers to the *Linvestment* decision[53] as an example of how properly justified development of the common law could proceed. The *Linvestment* court rejected the unfair outcome that rigid application of the common-law principles would have in that case; in Scott's view development of the common law always has to start with a proper reading of the common-law authorities, followed by the conclusion that rigid application of the applicable principle would lead to an unfair result and rejection of the principle.

[49] Ibid at 161, citing *Discount Bank v Dawes* (1829) 1 Menz 38; *Salmon v Lamb's Executor and Naidoo* supra note 39 at 371. Scott (at 161) refers to Van der Merwe's view (in 2010 *THRHR* op cit note 8 at 665) and points out that Van der Merwe does not consider the authority of the source uponwhich he relies.

[50] Scott ibid at 163.

[51] Ibid at 168. Scott does not explain why the court might have considered it necessary to develop the common law in view of constitutional requirements at all, seeing that the court concluded that the common law (in the court's reading) already provides for an acceptable outcome.

[52] Ibid at 164.

[53] *Linvestment CC v Hammersley* supra note 12. For a full discussion of this decision and the issues surrounding it see Leigh-Ann Kiewitz *Relocation of a Specified Servitude of Right of Way* (unpublished LLM thesis, Stellenbosch University, 2010).

(iv) *Conclusions*

None of the three academic commentators is unhappy with the result in the *Kidson* decision, but they raise at least three justifications for this outcome. Like the court, Sonnekus proposes a reading of the authorities that would imply that the servitude was never terminated and that the beneficiaries could rebuild the structure. According to this approach development of the common law was not required because a fair outcome was possible on the basis of the common law principles. Van der Merwe and Scott read the authorities differently and conclude (albeit for different reasons) that a servitude of habitation is in fact terminated when the structure is demolished. On the basis of this conclusion, both propose a development of the common law that would justify the equitable outcome in this case. Van der Merwe argues in favour of an equitable development of the common law in the form of an exception in local law, while Scott argues that an equitable development is possible in view of other common-law authorities (not considered by the court) to the effect that rebuilding of the structure revives the servitude.

For purposes of the rest of my argument in this article I assume, for the sake of argument, that Scott is correct as far as the Roman-Dutch authorities are concerned; that a servitude of habitation is indeed terminated when the relevant structure is destroyed; and that the common law does not provide any alternative solution for hard cases. With Scott and Van der Merwe I therefore assume that an equitable outcome in the *Kidson* case requires development of the common law. In the rest of this section I investigate Scott's suggestion that the *Linvestment* decision might provide an example of the correct approach according to which the common law can be developed, on the basis of proper analysis of the historical authorities, to allow for equitable outcomes in cases where inflexible application of the common law leads to unfair results.

*(c) The* Linvestment *decision*

In *Linvestment CC v Hammersley*[54] the Supreme Court of Appeal had to decide whether to abandon the common-law principle, established in 1920 in *Gardens Estate Ltd v Lewis*,[55] that a specified servitude of right of way can only be relocated on the basis of mutual consent between the dominant and servient owners. Voet,[56] the most cited Roman-Dutch authority on this point, states that if the chosen route for a general praedial servitude is or becomes burdensome for the servient owner, the servient owner can suggest an alternative route that is equally convenient for the dominant tenement, but does not indicate whether this also applies in the case of specified servitudes. In *Gardens Estate*, the Appellate Division held that a specified servitude can only be relocated by mutual consent and that the possibility for

[54] Supra note 12. For my discussion of this decision and the issues surrounding it I rely quite extensively on Kiewitz ibid.

[55] 1920 AD 144 at 150.

[56] Voet 8.3.8.

relocation mentioned by Voet applies only to general servitudes. In *Linvestment*, the Supreme Court of Appeal overturned this decision, holding that there were sufficient reasons for departing from the *Gardens Estate* position.[57] Amongst other reasons,[58] the Supreme Court of Appeal relied on a historical argument for its departure from the *Gardens Estate* position,[59] deciding that *Gardens Estate* was founded on the incorrect premise that Voet properly reflects the position in Roman-Dutch law,[60] while a draft Civil Code prepared by Kemper in 1816 indicates that it was indeed possible for the servient owner to have even a specified servitude of right of way relocated unilaterally. According to the Supreme Court of Appeal, the Kemper draft was an authoritative statement of mature Roman-Dutch law as it should have been applied in *Gardens Estate* and consequently it could be relied on as authority for departure from the earlier decision.[61]

However, the court's reliance on the Kemper draft is at least controversial on historical grounds. The 1816 Kemper draft did not form part of the received Roman-Dutch law at the Cape, which is traditionally defined as the laws of Holland as they were in force during Dutch colonisation of the Cape between 1652 and 1795.[62] The claim that the Kemper draft arguably reflects a later and more mature stage of development of Roman-Dutch law than that which was articulated by Voet does not add anything, since the Roman-Dutch law that was received at the Cape was not the mature law as it existed prior to the Dutch codification but the law as it was brought to the Cape and developed there until the final decade of the 18th century. Furthermore, the 1816 Kemper draft did not ever form part of modern codified Dutch law either; the final Kemper draft of 1820 was rejected and the Dutch *Burgerlijk Wetboek* of 1838 was eventually modelled on the Code Civil.[63]

My point is not that the Kemper draft could not be used to support the argument that South African law should move away from the position in

[57] *Linvestment CC v Hammersley* supra note 12 para 13.

[58] The court also relied on policy argument and on comparative analysis. For present purposes I do not consider those grounds for the development, although I return to the policy argument below. See further Kiewitz op cit note 53 chs 3 (comparative) and 5 (policy).

[59] In one sense, the decision strictly speaking does not develop the common law but relies on a different reading of the common-law position, based on consideration of different common law authorities. In this respect the decision resembles the decision in *Kidson* supra note 13 or the approach of Sonnekus rather than that of Van der Merwe or Scott.

[60] *Linvestment CC v Hammersley* supra note 12 paras 22–3.

[61] Ibid para 24.

[62] Kiewitz op cit note 53 at 43–6, citing H R Hahlo & Ellison Kahn *The South African Legal System and its Background* (1968) 567; Eduard Fagan 'Roman-Dutch law in its South African historical context' in Reinhard Zimmerman & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 33 at 39.

[63] Kiewitz ibid, citing Hahlo & Kahn ibid at 564 and J van Kan 'Het Burgerlijk Wetboek en de Code Civil' in P Scholten & E M Meijers (eds) *Gedenkboek Burgerlijk Wetboek 1838–1938* (1938) 243.

*Garden Estates* so as to allow unilateral relocation of a specified servitude of right of way. A case for such a development of the common law can be made on the basis of the comparative and policy considerations the court refers to,[64] and the Kemper draft possibly lends further credence to it. However, on its own the historical argument is unconvincing because of its very pretence (but formal lack) of historical authority.

*(d) The historical argument for development reconsidered*

From the brief analysis above it appears that the decision in *Linvestment* does not in fact provide us with what Scott sees in the decision, namely an example of how the development of the common law should proceed on the basis of proper historical analysis. First, the decision does not intend to justify development of the common law, but prefers instead a different reading of the common law, based on different sources of the common law. Secondly, the source that the court relies on for this alternative reading of the common law proves to be at least controversial. The end result is that the decision in *Linvestment* in fact resembles exactly the shortcomings for which Scott criticises the decision in *Kidson*, namely that it relies on a questionable historical analysis to justify the conclusion that the common law does not require development.

From a legal-theoretical perspective, the problem with both *Kidson* and *Linvestment* can be explained with reference to the courts' approach to what legal historical analysis can do. In the language of the American Realist and Critical Legal Studies scholars, historical sources are often too indeterminate to justify a new development in response to changed circumstances. What historical sources can do in the face of changed circumstances is to indicate that a departure from the established position is possible because historical positions are often only justified in the conditions in which they originally developed. This debunking approach[65] fits the indeterminate nature of historical authority[66] better than the foundational approach, according to which we should rely on (what often turns out to be problematic) historical sources when we want to depart from established positions. On its own, historical analysis is seldom likely to provide sufficient authority for development of the common law in view of changed circumstances. This is arguably even more true in the constitutional era, where the reasons for change and development often involve rejection of certain historical processes. Without arguing for wholesale adoption of the critical historical approach, I would

[64] Kiewitz op cit note 53 provides further support for this development, including further comparative support in ch 3 and policy arguments (including an extensive Law and Economics analysis) in ch 5.

[65] In support of this view G C J J van den Bergh *Geleerd Recht: Een Geschiedenis van de Europese Rechtswetenschap in Vogelvlucht* 3 ed (1994) iv cites Oliver Wendell Holmes, who said that history is the means by which we measure the power of the past to impose on us traditions that no longer serve their original purpose. The passage appears in O W Holmes 'The path of the law' (1997) 110 *Harvard LR* 991 at 1000.

[66] See R W Gordon 'Critical legal histories' (1984) 36 *Stanford LR* 57.

argue that we can learn from it that the strong suit of historical analysis is probably to identify the limits of our established common law positions, whereafter we have to find other — policy, but possibly also constitutional — reasons for departing from those positions and for the direction of development we select. In my view, as appears from the analysis below, proper historical analysis is crucial in determining the common-law position and it may in some instances suggest possible alternatives for further development, but it will seldom be sufficient on its own to justify and direct development of the common law in view of changed circumstances.

For purposes of the remainder of this article I work, for the sake of argument, on the hypothesis that *Kidson* was decided on an erroneous reading of the common law and that the common-law principle is in fact as Scott describes it, namely that a servitude of habitation is terminated when the building to which it pertains is destroyed. For the same reason I work on the assumption that *Linvestment* was also decided on the basis of an erroneous reading of the common law and that the common-law principle is in fact the way that it was formulated in *Gardens Estate*, namely that the common law does not provide for unilateral relocation of a specified servitude of right of way. At the same time, I assume that there are strong policy, justice or other reasons for developing the common law in both instances, so as to allow a continuation of a servitude of habitation in certain cases despite the demolition of the specified building, and to allow unilateral relocation of a specified servitude of right of way in certain circumstances despite opposition from one of the parties involved. These working hypotheses allow me to explore the value of different approaches that support and facilitate these developments of the common law of servitude.

In the rest of the article I attempt to rectify what I perceive as a shortcoming in these decisions and in the academic comments on them, namely the absence of constitutional analysis that could both justify and structure the argument in favour of (or against) development of the common law. The purpose of the first part of the analysis was to indicate that development of the common law can often not be justified simply on the basis of historical authority, because of controversy about the status or interpretation of the historical authorities. In my view, one of the implications of the new constitutional dispensation is that the justification and the structuring of the process of developing the common law must necessarily come from constitutional law rather than purely from doctrinal or historical reasoning. I therefore attempt to provide an outline of the kind of constitutional analysis that could provide the justification for and the structure of an argument in favour of (or against) development of the common law. In doing so I also argue that at least some of the confusion surrounding the two decisions discussed here results from failure to distinguish between the two cases and between the very different reasons for developing the common law in each of them. In the next part I first set out the constitutional framework within which development of the common law should, in my view, be considered and take place. In the final part I suggest a methodology

according to which the process of deciding upon and implementing a development of the common law could proceed.

## III DEVELOPMENT OF THE COMMON LAW IN THE CONSTITUTIONAL CONTEXT

### *(a) Introduction*

If traditional historical or doctrinal analysis does not provide satisfactory answers to new questions, as appears from the analysis of *Kidson* and *Linvestment* above, other considerations must play a part in justifying the development of the common law that might be required. Sometimes the historical authorities might direct our attention to alternative possibilities, as Scott has indicated with reference to *Kidson*.[67] Comparative sources traditionally play a similar role in the development of the common law. In some cases, economic and other policy considerations play a comparable role in deciding to develop the common law, just as equity or fairness might be an important factor in other cases.

I do not wish to discuss these potential sources of authority or inspiration for development of the common law in detail here, apart from noting two points from the conclusions of the previous section. First, historical authorities, foreign law, policy considerations and normative principles can only justify a particular development of the common law to the extent that the particular kind of analysis has been done properly and thoroughly, according to its own requirements and traditions.[68] To that extent I agree with Scott's criticism of *Kidson*. Secondly, however, even when we apply our minds and do historical, comparative or policy analysis 'properly', such analysis (and hence the grounds that we put forward for a particular development of the common law) will often remain controversial. It is only in the rarest cases that even 'properly' done historical, comparative or policy analysis would provide us with simple, uncontroversial solutions to any given dispute.

In the South African context, commentators seem to agree that constitutional analysis has a role to play in developing the common law. However, as Scott indicates, constitutional analysis should not be triggered by (or restricted to) a vague sense that the result of common-law adjudication would be unfair. Furthermore, constitutional analysis cannot mean simply checking whether a development we favour would be in conflict with a random constitutional provision, nor does it involve vaguely justifying some fairness-related argument in favour of a particular outcome. In order to derive constitutional inspiration for or assistance in the development of the common law, we need to do proper constitutional analysis, just like we have to do proper historical or comparative or policy analysis to justify whatever conclusions we derive from those sources. To date, constitutional analysis is

[67] Scott op cit note 8 at 163.

[68] In the final pages of his note, Scott ibid also criticises the *Kidson* judgment for inadequate comparative analysis.

not all that common in property law and particularly in servitude law. To a certain extent this is therefore uncharted territory. The purpose of this article is to establish whether there are some signposts that can direct us in developing the common law of servitude in a fitting and proper manner.

In an area of law like servitude, where the law consists mostly of uncodified common law, tradition prescribes that adjudication of any dispute must start off by determining what the common-law position on a given point is. I agree with Scott that a serious effort to determine the common-law position is always necessary as a starting point because even when we eventually decide to develop the common law, the fairness of the outcome cannot be justified by superficial or inaccurate historical work. Development of the common law has to rely on proper, skilful analysis of the common-law sources at the outset, because it makes no sense to develop — in other words change — the common law unless we have determined what the common-law situation is and concluded that the common-law position is inadequate for purposes of the dispute at hand. In *Kidson*, that requirement would have been fulfilled once it was decided, as Van der Merwe and Scott argue, that the servitude of habitation was terminated when the house was destroyed; an outcome that nobody found acceptable. In *Linvestment*, the crucial point would have been the conclusion, based on historical analysis, that a specified servitude of right of way could not be relocated unilaterally; once again an outcome that was unacceptable. Once historical analysis indicates an outcome that appears undesirable for policy (*Linvestment*) or fairness (*Kidson*) reasons, the next step is to determine whether the common law can and should be developed to produce a more acceptable outcome. Technically, the courts avoided this problem in both *Kidson* and *Linvestment* by deciding that development of the common law was unnecessary because the common law already allowed for the outcome they wanted; the analysis in the previous section suggests that the historical authority forwarded in either decision was insufficient to support that conclusion. Scott would apparently have preferred a methodology in terms of which it is concluded that the common law is unsatisfactory and has to be developed, whereafter the Constitution could play a role in deciding upon the direction of development, but he does not specify how the second part of the analysis should proceed. I suggest below that part of the problem in comparing the *Linvestment* and *Kidson* decisions is the failure to distinguish clearly between them, particularly as far as the constitutional reasons for undertaking development of the common law in each of them are concerned. My argument boils down to the following three points: the decision *that* the common law needs development must start with proper analysis of the common-law position; the decision *whether* to develop the common law must be taken on the basis of proper constitutional analysis, although policy and other considerations can play a role; and the decision *how* to develop the common law must again start with proper constitutional analysis, although historical, comparative and policy considerations can play a role.

*(b) The constitutional framework*

In my view,[69] the starting point for any case that involves the common law must be constitutional provisions like s 173 (the high courts have the inherent power to develop the common law) and s 39(2) (when interpreting legislation or developing the common law the courts must promote the spirit, purport and objects of the Bill of Rights). I argue above that development of the common law should start with accurate determination of the common-law position, based on proper historical analysis, followed by a decision (which could be based on historical, comparative, policy and other reasons) that the outcome that is indicated by the common law as it stands is unacceptable. But in fact constitutional analysis is required even earlier, namely when deciding whether the common law should be consulted at all in finding a solution to a particular dispute. The reason for this perhaps startling statement is that in the constitutional democracy established by the 1996 Constitution, legal analysis of any kind, including interpretation of legislation and development of the common law in terms of section 39(2), has to take as its point of departure the supremacy of the Constitution,[70] combined with the single-system-of-law principle enunciated by the Constitutional Court in the *Pharmaceutical Manufacturers* decision.[71] According to these two principles, the law of servitudes is part of the single system of South African law, which is shaped by the Constitution as the supreme law, which derives its force from the Constitution, and which is subject to constitutional control. Within that framework, the first step in analysing or solving any legal dispute of any kind would always be a constitutional one, namely to determine the relationship between and the relative authority of various sources of law that might apply to the matter, such as a particular constitutional provision, legislation and the common law.[72] In this area, much more work needs to be done by private law specialists, but in my view legal analysis should always start at this point, which is very much a constitutional framework issue because it involves the supremacy of the Constitution, respect for the democratic legislature, and the constitutional obligation to promote transformation. In this perspective the Constitution is not a remote

[69] Some of my thinking on this issue was worked out in A J van der Walt *Property and Constitution* op cit note 1. In the remainder of this article I rely on that work.

[70] Section 2 of the Constitution: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Compare Van der Walt *Property and Constitution* op cit note 1 ch 2.

[71] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* supra note 4 para 44: 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control': compare Van der Walt ibid.

[72] For obvious reasons I do not consider other sources such as customary law or international law here in the context of servitude law, but in a given case they could just as well also form part of the mix.

source of general sound judgment against which decisions to develop (or not to develop) the common law are vaguely tested to ensure that they remain within the ballpark of constitutional legitimacy. Concomitantly, decisions to develop (or not to develop) the common law are not taken on the basis of (hopefully sound) technical legal analysis (whether of the historical, comparative or policy kind), finally to be subjected to a vague process of constitutional quality control. Instead, both the Constitution and the Constitutional Court prescribe a single, integrated process within which the single legal system is developed according to relatively clear constitutional principles. To aid and structure this process, the Constitutional Court has enunciated certain principles to ensure that the integrated process of constitutionally inspired legal development starts off with the selection, on the basis of constitutional principles, of the applicable source of law. This applies even in servitude cases, when the source of law seems to be quite obvious.

In a series of decisions the Constitutional Court has set out and applied two principles according to which we should decide which of a competing set of potential legal sources (constitutional provisions; legislation; the common law) should apply to a given legal dispute.[73] 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.[74] For present purposes I ignore this principle because it concerns the status of legislation, which is not relevant to the area of servitude this article deals with.[75] The second principle is more directly relevant to

[73] The subsidiarity principles and their implications for property law in general are worked out in more detail in Van der Walt ibid. See further A J van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 term' (2008) 1 *Constitutional Court Review* 77ff.

[74] *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) paras 51–2; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 39–40; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) paras 59 (Skweyiya J) and 69 (Ngcobo J). The principle has since then been confirmed in *Walele v City of Cape Town & others* 2008 (6) SA 129 (CC) paras 29–30; *Nokotyana & others v Ekurhuleni Metropolitan Municipality & others* 2010 (4) BCLR 312 (CC) paras 47–9. See Van der Walt 2008 *Constitutional Court Review* op cit note 73 at 100–3; Van der Walt *Property and Constitution* op cit note 1 ch 2 section 3.1. The proviso to this first principle states that although a litigant who avers that a right protected by the Constitution has been infringed may not rely on the constitutional provision to protect the right, she may rely directly on the constitutional provision when she attacks the legislation for being unconstitutional or inadequate in protecting the right: *South African National Defence Union v Minister of Defence* supra para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign & another as* Amici Curiae*)* 2006 (2) SA 311 (CC) para 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC) para 15. See Van der Walt 2008 *Constitutional Court Review* op cit at 101, 104 and 115; Van der Walt *Property and Constitution* op cit ch 2 section 3.1.

[75] This broad statement needs qualification. When a direct appeal to a constitutional provision is called for in a servitude case, the relevant constitutional provision

servitude law: 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 right.[76] When there is no legislation to trigger this second principle, a litigant can rely directly on either the common law or an applicable constitutional provision.[77] For present purposes,[78] neither *Kidson* nor *Linvestment* involved legislation of any kind; the applicable legal principles in both instances are therefore the common law and whatever constitutional provisions may be relevant. In such cases, analysis and development of the common law can clearly not be restricted to the common law — instead, on the basis of the supremacy of the Constitution and the single-system-of-law principle the issue in these cases is to consider the application of the common-law principles in view of the relevant constitutional provisions.[79]

(e g the right to equality and non-discrimination in s 9) may have been given effect in legislation (in this case the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000). According to the first subsidiarity principle the litigant then has to appeal to the legislation and not the constitutional provision. In what follows I assume this qualification and do not repeat it.

[76] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25; *Minister of Health NO v New Clicks South Africa (Pty) Ltd* supra note 74 para 96; *Chirwa v Transnet Ltd* supra note 74 para 23; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 37; *Walele v City of Cape Town* supra note 74 para 15. See Van der Walt 2008 *Constitutional Court Review* op cit note 73 at 103–5; Van der Walt *Property and Constitution* op cit note 1 ch 2 section 3.1.

[77] One could infer a proviso to the second principle to the effect that a litigant who avers that a right protected by the Constitution has been infringed may rely on the common law instead of legislation in so far as the legislation was not intended to cover that particular aspect of the common law; or in fact does not cover that particular aspect of the common law; and in so far as the common law is not in conflict with the constitutional provision or with the scheme introduced by the legislation; or can be interpreted or developed to that effect. Furthermore, even when this proviso applies the common law can presumably only be relied on, in a case where there is applicable legislation that was otherwise enacted to give effect to a right in the Bill of Rights, when and in so far as the common law fits in with the broad scheme established by the legislation and does not conflict with that broad legislative scheme or with relevant constitutional provisions (s 39(3)). See Van der Walt 2008 *Constitutional Court Review* op cit note 73 at 115–6; Van der Walt *Property and Constitution* op cit note 1 ch 2 section 3.1.

[78] There are interpretation and application difficulties with these principles that would take the current discussion too far off course — for example how to deal with pre-1994 legislation that cannot be said to have been enacted to give effect to the Bill of Rights, or technical legislation that cannot be related to the Bill of Rights in any meaningful sense. I deal more fully with these issues in *Property and Constitution* op cit note 1 ch 2 sections 3.2–3.5. For criticism of the subsidiarity argument see Karl Klare 'Legal subsidiarity and constitutional rights: A reply to A J van der Walt' (2008) 1 *Constitutional Court Review* 129. I respond to some of these criticisms in *Property and Constitution* op cit note 1 ch 2 section 4.

[79] See Van der Walt *Property and Constitution* op cit note 1 ch 2 section 3.6.

In the absence of applicable legislation, the analysis in cases like *Kidson* and *Linvestment* can indeed start off with analysis of the common-law authorities to determine the common-law position. However, in the constitutional dispensation this is a conclusion based on constitutional analysis, in terms of the subsidiarity principles, and not a starting point. Analysis of the common-law sources is therefore based on the conclusion of constitutional analysis.

As I indicated earlier, I proceed here on the assumption that the common-law position, established on the basis of proper historical analysis, is that the common law does not provide for unilateral relocation of a specified servitude of right of way (*Linvestment*) and that a servitude of habitation is automatically terminated by law when the structure that forms the object of the right is destroyed (*Kidson*). In the constitutional context this determination of the common-law position leads to the next question, namely whether the outcome predicated on the common-law position is acceptable. This stage of the analysis requires further constitutional analysis. Once the common-law position has been established, the decision whether the common law can be applied as it stands or whether it might require development cannot be reached purely on the basis of common-law doctrine or policy considerations. As Scott pointed out with reference to *Kidson*, this is a decision that needs to be made on the basis of constitutional argument and not because of some vague sense of unfairness. Moreover, the decision cannot be based purely on whether the common law result satisfies the doctrinal coherence or the logic of the common law; it must be informed by constitutional provisions and considerations in every particular set of facts and disputes. In short, deciding that the common-law position falls short of requirements and that it needs to be developed is a constitutional decision that should be taken on the basis of a properly followed constitutional methodology.

In my view, having established what the common-law position is and what its effect would be in the case at hand, the first question is whether this outcome is directly or indirectly in conflict with any particular constitutional provision. In the absence of applicable legislation, the single-system-of-law principle and the supremacy of the Constitution imply that the constitutional legitimacy of the outcome indicated by the common law must be established as a first step. Furthermore, referring to the constitutional provisions is possible in the context of *Kidson* and *Linvestment* because it has already been established that there is no applicable legislation and the first subsidiarity principle therefore does not prevent direct recourse to constitutional provisions. Most significantly, this insight points to an important difference between the two cases: the reasons for the decision to develop the common law in *Kidson* and in *Linvestment* are very different. This is not an insight that would readily appear from purely common-law analysis, even when it is augmented by proper comparative and policy analysis.

*(c) Distinguishing between* Linvestment *and* Kidson

In *Linvestment*, determination of the common-law position indicated (as I assume for the sake of argument) that the common law does not allow for the

unilateral relocation of a specified servitude of right of way. The *Linvestment* decision can be read as a judicial argument to the effect that development of the common law is necessary because a desirable outcome, namely allowing unilateral relocation of such a servitude, is not allowed by rigid application of the common law. In this instance, the decision to develop the common law so that unilateral (but judicially controlled) relocation of a specified servitude of right of way is possible is triggered by the desire, based on policy grounds and supported by evidence from foreign law, to render servitude law more flexible in a modern economy. The policy reasons for effecting this development seem convincing and the comparative arguments lend further support to them.

However, strictly speaking this utilitarian argument in favour of the development of the common law in *Linvestment* should not be the starting point. According to the constitutional framework explained earlier, the first question should have been whether there are any constitutional arguments either in favour for or against the desired development. As it happens, there is no provision in the Bill of Rights that directly or indirectly requires this development; the desire to develop the common law is purely utilitarian. However, there is no obvious constitutional reason that prohibits developing the common law in the proposed way either. Leaving the common law as it was set out in *Gardens Estate* as it stands or developing it for the sake of greater flexibility does not have direct implications for non-utilitarian, democratic constitutional rights like equality, human dignity or freedom of movement.[80] The starting point for developing the common law in *Linvestment* may therefore be policy considerations according to which the outcome prescribed by the common-law principle is for some economic or utilitarian reason unacceptable or suboptimal. There are no constitutional reasons why the (admittedly inefficient) outcome prescribed by the common law has to be changed by development of the common law, but neither are there constitutional reasons why the common law should not be developed for efficiency reasons.

Development of the common law for policy or efficiency reasons is neither constitutionally required nor constitutionally prohibited in the *Linvestment* case and it is therefore permissible to develop the common law for purely utilitarian reasons. The role of the Constitution is consequently to ensure, during a further stage of the analysis, that the changed outcome brought

[80] I am aware that there is no formal hierarchy of fundamental rights in the South African Constitution. However, in A J van der Walt 'The continued relevance of servitude' (2013) 3 *Property Law Review* 3 I argue that s 25 analysis should probably in most cases only feature in the final stage of the constitutional argument, when the effects of a development of the common law on property rights are assessed, and not in the early stage when the desirability of the development is considered, seeing that utilitarian (policy) considerations in favour or against the development will already reflect the interests of property holders at that point. At the early stage, the focus should therefore probably fall on non-utilitarian rights that serve a democratic or liberty-enhancing purpose, such as equality and human dignity. I therefore leave constitutional arguments based on s 25 out of consideration at this stage.

about by development of the common law does not infringe upon constitutional rights. During the next stage of analysis, the constitutional focus is not the rights of the servient landowner who wanted the servitude relocated (her interests were promoted by the policy considerations that inspired the development of the common law), but the rights of the servitude beneficiary who might be affected detrimentally by involuntary loss or transfer of rights brought about by the development of the common law.

By way of summary, constitutional analysis should therefore have featured in different ways during successive stages of the *Linvestment* case: (a) in the first phase, constitutional analysis should ensure that the subsidiarity principles do not kick in (because there is no applicable legislation); which allows application of the common law and a direct appeal to constitutional rights; (b) in the second phase, constitutional analysis should ensure that development of the common law (that might be desired for policy or fairness reasons) is neither required nor prohibited by any constitutional provision; and (c) in the third phase, s 25 analysis should ensure that the property right of the servitude beneficiary is not unconstitutionally infringed by the outcome resulting from development of the common law, namely allowing unilateral relocation of the servitude against her will.

In *Kidson* the situation is very different. The first phase analysis looks the same and has the same outcome as in the *Linvestment* case, namely that there is no applicable legislation, that the subsidiarity principles do not kick in, and that reference to the common law and a direct appeal to constitutional rights are therefore allowed. The difference between the two cases appears in the second phase. If we assume that the servitude was terminated by demolition of the house, rigid application of the common law would result in the Kidsons being deprived of their right to live on the farm. This outcome is directly in conflict with the s 26(1) right of *access to* housing, in the sense that the Kidsons would be deprived of the possibility that they had, in terms of the registered servitude of habitation, to return to the house on the farm. Rigid application of the common-law principle would therefore in this case have s 26 implications and therefore development of the common law *has to be considered* in terms of s 39(2) — in this instance, development of the common law is required by a constitutional rights provision. This constitutional conclusion, namely that the effect of rigid application of the common-law principle must be assessed in view of relevant constitutional provisions and that its apparent conflict with s 26(1) necessitates constitutional analysis, is in my view (and I suggest that Scott would agree) more satisfactory than the general and vague sense of unease that seemingly inspired the approach in *Kidson*. Moreover, it distinguishes the case from the *Linvestment* example in the sense that development of the common law is in this instance obligatory because the outcome prescribed by the common law as it stands directly offends against a constitutional right.

This initial assessment of the outcome indicated by the common-law principle merely indicates that constitutional analysis is necessary to decide whether (and how) the common law needs to be developed. At this point,

consideration of s 26(1) therefore merely underlines the necessity for constitutional analysis as part of the decision to develop the common law. The constitutional analysis in the second phase might involve not only s 26 but also other constitutional provisions, as well as other non-contitutional sources such as policy or foreign law. Developing the common law and allowing the Kidsons to rebuild and return to the house on the farm might in turn have a negative effect on the property rights of the current owner of the servient land, which would require a s 25 analysis in the third phase, to determine whether the servient owner's property rights have been infringed in an unconstitutional manner. In contrast with *Linvestment*, constitutional analysis should therefore feature in all three phases of the decision.

Apart from the fact that the constitutional outcome is different in this case because development of the common law is constitutionally required, the starting point, nature and direction of the constitutional analysis would be different as well. Development of the common law is inevitable in view of the potential effect that enforcement of the common law might have on s 26 rights, while development of the common law to satisfy the s 26 requirements may have further s 25 implications. After the initial phase in which the sources were identified, further constitutional analysis is unavoidable in terms of both s 26 (second phase) and s 25 (third phase). Section 26 analysis in the second phase would focus on the servitude holder's rights, while s 25 analysis in the third phase would focus on the effect that development of the common law might have on the property rights of the servient owner. The s 26 part of the analysis, focusing on the rights of the servitude holder, would indicate whether development of the common law is indeed required and what it might have to involve (phase two); the s 25 part would ensure that the development that is introduced does not infringe upon the rights of the servient owner (phase three).

This part of the article indicates that constitutional analysis should feature throughout any dispute, even when it involves what looks like a purely private servitude question based on the common law. In the next section I sketch out the possible progress of servitude cases that involve development of the common law.

## IV CONSTITUTIONAL ANALYSIS

### *(a) Introduction*

As I indicate in the preceding part of this article, adjudication of any legal dispute should in the constitutional dispensation start of with determining the applicable sources of law, according to the subsidiarity principles that the Constitutional Court had enunciated in view of constitutional provisions. In the case of servitude disputes, this step would mostly involve establishing whether there is any applicable legislation that falls under the subsidiarity principles. Given the scarcity of servitude legislation the result would more often than not be that there is no applicable legislation and that the dispute

can be adjudicated in terms of the common law of servitude, with the possibility of a direct resort to constitutional provisions in certain instances.[81]

As appears from the analysis above, the initial conclusion that the common law is the applicable source of law is followed by historical analysis to determine the common-law position. Once that position has been established, the next step is to decide whether the outcome prescribed by application of the common-law principle is acceptable. Constitutional assessment of the outcome prescribed by the common law as it stands is necessary even when there are strong non-constitutional reasons, such as policy or other fairness arguments, for or against development of the common law. This decision will often be informed by policy and other utilitarian considerations, but in the constitutional dispensation the primary question is whether the outcome is in conflict with non-utilitarian, democratic constitutional provisions. This is so because constitutional arguments for or against development of the common law would, in view of the supremacy of the Constitution, probably trump any utilitarian, non-constitutional considerations that might exist. This could involve any number of constitutional rights provisions like s 9 (equality and non-discrimination) or s 10 (human dignity). As soon as there is an indication that a rights provision in the Bill of Rights might be compromised, this would indicate that a particular development of the common law is either constitutionally required or prohibited, depending on the situation. Doing so has the added advantage that it distinguishes between cases where the decision to develop the common law results from doctrinal or policy considerations (like *Linvestment*) and instances (like *Kidson*) where development of the common law is a direct constitutional obligation, regardless of doctrinal or policy arguments for or against development.

Constitutional reasons for or against development should therefore be considered as a first step. For purposes of the two decisions discussed here (*Kidson* and *Linvestment*) it has already been established that s 26 is the most relevant provision and therefore I focus on s 26.[82]

[81] See note 75 above.

[82] For present purposes I will not indulge in a full s 26 analysis; as a rule it will only rarely become relevant to the development of servitude law. This point requires further analysis and argument, but probably ex lege termination of any of the personal servitudes of habitation will raise more or less the same s 26 issues in cases like *Kidson*. Section 26 analysis would probably come into the picture when the outcome prescribed by a common law principle of servitude law is in direct conflict with s 26 rights to the extent that it either deprives someone of their existing access to housing or allows for arbitrary eviction from someone's home. When s 26 does become relevant, there is a sizeable case law and literature (mostly in the area of socio-economic rights rather than property) to assist development of an argument in support of development of the common law that would prevent infringements of the s 26(1) right of access to adequate housing or the s 26(3) right not to be deprived of one's home arbitrarily. See e g Sandra Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) ch 6; Gustav Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (LLD dissertation, Stellenbosch University, 2011) 75–93 and sources cited there. The aspect of the

*(b) Section 26*

It appears from the analysis above that the development in *Linvestment* is based purely on utilitarian grounds; there is no constitutional provision that either requires or prohibits such a development, but there are strong policy reasons for it. Having established the absence of constitutional and the strength of other reasons for the development, the court could therefore proceed directly to implementation of the development it has in mind. That would bypass the constitutional analysis that is at stake here, namely to determine whether a constitutional provision requires the development and what it should entail.

In *Kidson* the enforcement of the common-law principle, namely the ex lege termination of the servitude upon destruction of the building, allows the landowner to resist the rebuilding of the building and the continuation of the habitation right. This outcome is prima facie in conflict with the negative obligation imposed by the right of access to housing in s 26(1) because it implies that the former holder of the right of habitation would lose her existing access to housing. Since this outcome is prima facie in conflict with the negative obligation in s 26(1) it requires further analysis to establish whether the apparent limitation of the s 26(1) right could be justified or rectified. According to the emerging jurisprudence on this point, this analysis assumes the form of a weighing up of the access to housing interests of the affected persons and the property rights of the landowner to establish what the effect on the former inhabitant would be if the right is terminated, and what the effect on the landowner would be if it is not terminated, in both cases taking into consideration the historical, social and individual context. Additionally, infringements against access to housing rights and legal rules that bring about homelessness always also involve the s 10 right to human dignity.[83]

s 26(1) right that would most often be relevant to this kind of property issue is the so-called negative obligation embodied in s 26, which refers to the obligation (potentially affecting both the state and private individuals) not to deprive a person of the access to housing that he or she currently enjoys. This issue therefore comes up as soon as the enforcement of a common law rule involves someone losing their current home. Muller ibid works out the detail of the negative obligation implied in s 26 at 93–9 and refers to the most important sources.

[83] See Liebenberg op cit note 82 ch 6; Muller op cit note 82 at 75–93 and sources cited there. The most important cases cited by Muller are *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) paras 23 and 83; *Jaftha v Schoeman & others; Van Rooyen v Stoltz & others* 2005 (2) SA 140 (CC) para 29; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 12, 15, 18 and 41–2; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & others* 2008 (3) SA 208 (CC) para 16; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 75, 119, 173, 218, 231, 329 and 406; *Machele & others v Mailula & others* 2010 (2) SA 257 (CC) para 29. See also Arthur Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *SAJHR* 193; Albie Sachs 'The judicial enforcement of socio-economic rights' (2003) 56 *Current Legal Problems* 579; and Sandra Lieben-

Of particular importance for property law is the leading judgment on s 26, *Port Elizabeth Municipality v Various Occupiers*, where the Constitutional Court sets out its perspective on the balancing of property (s 25) and housing (s 26) interests, explaining that 'the judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved' but 'to balance out and reconcile the opposed claims in as just a manner as possible'.[84] The protection enjoyed by a particular individual right or interest is determined in a specific context, varying with the respective weight of two considerations, namely how important upholding the established right is for the individual holder and how important regulating and limiting that right is for the public interest in exercising a legitimate state function such as preventing homelessness. The *Port Elizabeth Municipality* decision indicates that the s 26(1) access to housing interest of even unlawful occupiers, who enjoy no rights in terms of the common law, is relevant to the weighing up process involved in s 26 analysis. On the continuum that represents the tension between the interests of the parties, the rights of landowners will sometimes trump the access to housing interests of others, while the opposite may occur under particular conditions. Importantly, the decision indicates that the weighing up of interests cannot take place in the customary hierarchy of private-law rights, where it is abstractly determined that stronger rights always trump weaker rights and all rights always trump no-rights. Instead, a contextual assessment of all rights and interests is required in view of the contextual and legislative matrix within which housing rights and obligations are regulated under the guidance of s 26 and the rest of the Bill of Rights.

In a case like *Kidson*, a s 26(1) analysis will therefore involve weighing the property interest of the landowner against the access to housing interest of the Kidsons, taking into account all the relevant contextual factors. In this regard, the relevant factors might include the fact that a development of the common law that would make a servitude of habitation survive demolition of the structure would generally not have a huge impact on the servient landowner because of the limited lifespan of personal servitudes; the limited effect that a servitude of habitation usually has on the right of the landowner, especially given the principles of servitude;[85] the fact that servitudes of habitation are often reserved upon sale and transfer of the land, indicating a strong bond between the right holder and the servient land; and the importance of the servitude for the right holder's access to housing and the effect that termination would have on her in the individual case.[86] Against

berg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1.

[84] Supra note 83 para 23; see the text below.

[85] Principles such as passivity and exercise of the servitude civiliter modo are relevant here; see Van der Merwe *Sakereg* op cit note 3 at 466–7.

[86] In this regard it is noteworthy that the rights of the elderly and the negative effect on them of eviction from their home is taken particularly seriously by the courts when considering the significance of availability of alternative accommodation in view of s 26; see Muller op cit note 82 at 288–91.

that might weigh any evidence that the servient landowner might present regarding the negative effect that upholding the servitude would have on her, for instance in negatively affecting a business operation or her own housing rights or privacy. In *Kidson*, the fact that the house had been demolished and that the Kidsons were not living there when the current owner bought the land might weigh in the landowner's favour, although the existence of a servitude is obviously not dependent upon the servient landowner's knowledge of the existence of the servitude. On the other hand, the Kidsons' age and personal circumstances and the context in which they initially left the farm might favour upholding the servitude. If the outcome of the analysis indicates that application of the common law principle results in an infringement of s 26 rights, the court would have to decide whether that infringement is justified in terms of s 36.[87]

For present purposes, the outcome of the s 26 analysis in a case like *Kidson* would be to determine whether a development of the common law is indeed required and, if so, what the development should involve. If a rigid application of the common-law principle would result in someone losing his or her right of access to housing and becoming homeless, and if that limitation of the affected person's s 26(1) right cannot be justified in terms of section 36, the common law has to be developed to avoid that outcome. In *Kidson* the court and the academic commentators thought that there was good reason to assist the Kidsons, although they favoured different solutions. This decision will depend on the facts and context of each individual case and is therefore difficult to discuss abstractly,[88] but I assume that most courts would, having done s 26 analysis, conclude that a limitation of s 26 rights implied by strict application of the common-law principle regarding termination of a right of habitation through demolition of the structure is not justified and that it is necessary to develop the common law so as to allow for a more flexible outcome in hard cases.

Once it has been decided that development of the common law is necessary there are various alternatives. The outcome of the common law could be changed by making new legislation or amending existing legislation, but for present purposes I am more interested in judicial development of the common law by amending the existing principle or adopting a different principle. Strictly speaking, *Kidson* does not provide us with an example of such a development because the court accepted that the common law authorised the outcome it wanted. Van der Merwe's proposal of recogn-

[87] I do not go into the detail of justification analysis here. This form of analysis is very case specific and the reasonableness aproach followed by the courts might imply that s 36 can add or change very little to what has been decided under s 26: see Liebenberg op cit note 82 at 94–7.

[88] It is conceivable in a particular set of facts that the servitude holder would not be deprived of his or her access to housing if the servitude is terminated. An example might be if he or she also has another house and uses the servitude property just for holiday accommodation, or not at all, while rebuilding of the house and resumption of the right of habitation might cause a heavy burden on the servient owner.

ising a hitherto unknown exception to the rule from a non-authoritative source is an example of what such a development of the common law might entail: although the local law of Haarlem upon which Van der Merwe relies does not form part of the South African Roman-Dutch sources, there is no reason why such an extraneous source could not have convincing authority for adoption of a new or amended rule. Scott's solution — development by way of adopting a different rule according to which the servitude could revive when the structure is rebuilt — might even be stronger authority for the desired development. Another possibility might be to create, through judicial action, a new rule or an exception to the existing rule on the basis of subsequent statutory development in other Roman-Germanic based legal systems. As far as judicial development is concerned, most courts would probably favour a flexible development that would allow for exceptions to the common-law rule in some cases without abandoning it completely. For the same reason I assume that application of the exception adopted by way of development should require exercise of the judicial discretion.

In either case, if the common law is developed judicially to avoid conflict with s 26, the relevant development might involve an infringement of the servient landowner's s 25 rights, which would then require s 25 analysis during the third phase. The same applies to a development that was undertaken on purely utilitarian grounds, as in *Linvestment*; the development that the court decided on favours the servient owner and might affect the dominant owner's property rights.

*(c) Section 25: The starting point*

If s 25 analysis is indicated, the question is whether there was an interference with property that might be in conflict with s 25. As is indicated above, such an indication might appear from the policy decision to allow unilateral relocation of a specified right of way (*Linvestment*), because the relocation might affect the dominant owner's property interest in the servitude; or it might appear from the constitutional decision to amend the common-law principle according to which demolition of a structure terminates a right of habitation (*Kidson*), with the result that the servient owner's property right is affected.

According to the methodology for deciding s 25 disputes that was laid down in the *FNB* decision,[89] s 25 analysis should proceed on the basis of seven questions, which are as follows:[90] (a) Is there a protected property interest involved? (b) If there was property, was there a deprivation of that

[89] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) ('the *FNB* case'). For a general discussion see A J van der Walt *Constitutional Property Law* 3 ed (2011) 194ff.

[90] The clearest explanation of the seven steps is that of Theunis Roux 'Property' in Stu Woolman, Theunis Roux & Michael Bishop (eds) *Constitutional Law of South Africa* vol 3 2 ed (Original Service 2003) 46-2 to 46-5, and 46-9 to 46-11.

property? (c) If there was a deprivation, was the deprivation arbitrary? (d) If the deprivation was arbitrary, can it be justified in terms of section 36(1)? (If the arbitrary deprivation cannot be justified, it is unconstitutional and that ends the constitutional inquiry.) (e) If the deprivation was not arbitrary or if it could be justified in terms of s 36(1), does it also constitute expropriation? (f) If the deprivation does constitute expropriation, does it comply with the requirements in s 25(2)? (f) If the expropriation does not comply with the s 25(2) requirements, can it be justified in terms of s 36(1)? If the expropriation does not comply and cannot be justified, it is unconstitutional.

According to this methodology, the first questions are whether there was a protected property interest involved[91] and whether there was a deprivation of that property. In the *FNB* decision[92] the Constitutional Court indicated that 'deprivation' is a wide category of interferences with property that includes but extends beyond the narrower category of expropriation.[93] The major constitutional property cases to date dealt with statutory deprivations and therefore it has remained somewhat difficult to identify and describe accurately the property interest and the deprivation involved in a particular dispute where the applicable legal principles derive purely from the common law. I find it helpful to frame this question about the starting point in common law cases in the terminology of Law and Economics, by resorting to the language of initial allocation and forced transfer of entitlements. As far as servitude law is concerned, this means translating any given dispute in terms of the question whether the enforcement (or non-enforcement) of any given servitude principle or rule involves a forced transfer of a particular entitlement. Obvious examples are common-law principles that prescribe compulsory, unilateral creation, or alteration, or transfer, or termination of a servitude, either by way of judicial order (e g creation of a servitude of right of way of necessity through acquisitive prescription) or ex lege (e g termination

[91] The definition of 'property' for purposes of s 25 is a broad topic, especially insofar as common law property interests are concerned. See Van der Walt *Constitutional Property Law* op cit note 89 ch 3.7 and 3.8. I will not enter upon that issue here, except to note that it is clear that constitutional property extends beyond corporeal things and real rights.

[92] The *FNB* case supra note 89. For a general discussion see Van der Walt *Constitutional Property Law* ibid at 194ff.

[93] The *FNB* case ibid para 57; Van der Walt *Constitutional Property Law* ibid at 204. The wide definition of deprivation was apparently narrowed down in *Mkontwana v Nelson Mandela Metropolitan Municipality & another; Bissett & others v Buffalo City Municipality & others; Transfer Rights Action Campaign & others v MEC for Local Government & Housing in the Province of Gauteng & others* 2005 (1) SA 530 (CC) para 32, apparently followed in *Reflect-All 1025 CC & others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government & another* 2009 (6) SA 391 (CC) para 36 and *Offit Enterprises (Pty) Ltd & another v Coega Development Corporation (Pty) Ltd & others* 2011 (1) SA 293 (CC) para 39. The resulting confusion is significant but not all that relevant for present purposes and therefore I ignore it and proceed on the basis of the original *FNB* definition. See Van der Walt *Constitutional Property Law* ibid at 204–9 for a broad discussion.

of a personal servitude upon death of the beneficiary). Framing common-law property disputes, including servitude disputes, in this manner makes it easier to identify and describe the property involved and the source and nature of the deprivation. Both *Kidson* and *Linvestment* involved forced transfer of property rights to the extent that the development of the common law principles involved requires ex lege, non-consensual extension (*Kidson*) or amendment (*Linvestment*) of existing servitude entitlements. A decision to leave the common law as it stands will sometimes involve a forced transfer of rights (e g acquisitive prescription) in any event and sometimes not (e g if the decision in *Linvestment* was not to change the rule). However, a decision to develop the common law will always involve a forced transfer of rights in the sense that the original allocation sanctioned by the standing common law is changed.

*(d) Section 25: The property and deprivation issues*

The s 25 argument might run as follows for the *Kidson* decision. If the common-law principle determines that a servitude of habitation is terminated ex lege when the building is demolished, the common law regarding a servitude of habitation assigns the initial entitlement to the servitude holder in terms of the contract that created the servitude and subsequent registration. However, upon demolition of the structure the common law assigns the initial entitlement to the landowner, whose right is then assumed free of the servitude burden. One could also argue that the common law brings about a forced transfer of entitlement from the servitude holder to the landowner upon the occurrence of a certain event (demolition of the structure). On the basis of the preceding s 26 analysis we already established that such an assignment or transfer might be unconstitutional in certain circumstances and that the common law therefore needs to be developed to allow for it not to be enforced, at least under certain circumstances. The need to develop the common law therefore comes up as a result of s 26 analysis that proved that the common-law principle was inadequate, at least in certain instances where the hardship it causes is unjustifiable in view of s 26.

If the common law is developed so that the common-law principle can be applied flexibly, and if the holder of the servitude is allowed in a particular instance to rebuild the house and resume the right of habitation, we can say that another forced transfer of property takes place. In the *Kidson* set of facts we could say that the flexible application of the newly developed common-law principle results in property (disposal over the right of habitation) being transferred back from the servient landowner (where the common law allocated it upon demolition) to the servitude holder. In the common law the property interest in question could be described as the servient owner's right, in terms of the general common-law principle, to have the servitude terminated ex lege upon demolition of the house and to have her right of ownership resume its original unburdened state. The deprivation that takes place as a result of the forced transfer that follows from development of that principle can be described as the imposition of an ex lege real burden on the

servient land, in the form of continuation of the servitude, under circumstances where it would otherwise have terminated. In terms of the *FNB* decision, the forced transfer (through development of the common law) of this property interest from the servient landowner to the servitude holder constitutes a deprivation of property that needs to comply with s 25.

In *Linvestment*, the common-law principle determines that it is not possible unilaterally to relocate a specified servitude of right of way. In this case the common-law principle as it stands does not bring about a unilateral, forced transfer of entitlements; it merely assigns the entitlement where the origin of the servitude located it, namely in mutual agreement. In this case the analysis starts off with the need, identified on the basis of policy considerations, to change or develop the common-law principle so as to make it possible to relocate a specified servitude of right of way under certain circumstances, even when the dominant owner refuses to co-operate. Having identified the need to develop the common law, the constitutional inquiry focuses on the question whether the proposed change will comply with the relevant constitutional requirements. If the proposed development of the common law is the starting point, the affected property interest can be described as the dominant landowner's right to use the specified right of way as it was originally specified and registered and to refuse to have that right relocated without consensus. Similarly, the deprivation can be described as the loss, through unilateral judicial relocation of the servitude, of the dominant owner's right not to have the servitude amended without her consent. A forced transfer of the property interest involved from the sphere of mutual consent into the hands of the servient landowner qualifies as a deprivation of property that needs to comply with the s 25 requirements.

It can therefore be concluded that development of the common law in both *Kidson* and *Linvestment* involved forced transfers of property interests that can be described as deprivations of property. Both cases therefore answer the initial two questions in the *FNB* methodology in the affirmative. The next, and according to all indications most significant, question in each case is whether the deprivation in question was arbitrary.

*(e) Section 25: Arbitrariness*

The major question in s 25 analysis is whether the deprivation is arbitrary.[94] In *FNB* the Constitutional Court explains that a deprivation is arbitrary in

[94] The methodological analysis of the seven steps in the *FNB* decision simply focuses on the arbitrariness issue and therefore does not mention the preceding question, also based on s 25(1), whether the deprivation was properly authorised by law of general application. In the servitude cases we are dealing with this question should not cause any major issues since the relevant deprivations would always be authorised by the common law, which is regarded as law of general application for purposes of s 25: Van der Walt *Constitutional Property Law* op cit note 89 at 234 and sources cited there.

terms of s 25(1) if it is procedurally unfair[95] or, substantively, if there is insufficient reason for it, judging from a complexity of contextual relationships.[96] In *FNB* the court identifies the relationship between the means employed and the ends sought to be achieved; the relationship between the affected property holder and the property; the connection between the affected property holder and the reason for the deprivation; the extent of the deprivation; and the nature of the affected property as factors to be considered in this respect.

In *Kidson*, s 25 analysis would therefore consider the relationship between the Kidsons and the reason for the deprivation (protecting the access to housing rights of especially vulnerable persons); the relationship between the Kidsons and the servitude (a right they reserved for themselves when selling the land, which they have never willingly abandoned or given up, and which now seems to be their only access to housing); the nature of the property (the landowner's right to enjoy unburdened, full ownership when a servitude is extinguised ex lege); and the extent of the deprivation (the landowner's ownership continues to be burdened by a servitude that will end in a reasonable short time and that probably does not impose an extensive limitation on it). The analysis would also consider the relationship between the ends sought to be achieved by the original common-law principle (protecting the landowner's right of ownership and promoting legal certainty) and the means employed to promote those ends (ex lege terminating the servitude upon destruction of the building). With regard to the latter factor it needs to be kept in mind that the more or less reflex tendency of the common law to uphold the interests of the owner above any other right in the same property is part of what might be described as the traditional hierarchical approach to the legal force of competing property interests; according to *Port Elizabeth Municipality*[97] it is now incumbent on courts not to follow this doctrinal reflex but to judge property disputes more contextually in view of all the circumstances and the relevant constitutional provisions.

According to the *FNB* decision, this complexity of relationships has to be considered, in the context of all the relevant circumstances, to decide

[95] The *FNB* case supra note 89 para 100. Neither the *FNB* decision nor subsequent decisions following it explain what procedural arbitrariness entails. In earlier publications I have argued that this category can logically only refer to deprivation brought about directly by legislation and not involving any administrative action: see Van der Walt *Constitutional Property Law* op cit note 89 at 264–70; A J van der Walt 'Procedurally arbitrary deprivation of property' (2012) 23 *Stellenbosch LR* 88. Assuming the correctness of that observation I conclude that the category does not apply to deprivations brought about by the common law and thus ignore it for present purposes.

[96] The *FNB* case para 100; see further Van der Walt *Constitutional Property Law* op cit note 89 at 245–64 and sources cited there.

[97] *Port Elizabeth Municipality v Various Occupiers* supra note 83 para 23. See the previous part of this article above.

whether there is sufficient reason for the deprivation, in other words for the forced transfer of property (in the form of the right to own land unburdened by a servitude) from the landowner to the Kidsons (who acquire the right of continued enjoyment of the servitude, which in turn again burdens the land). The question is whether there is sufficient reason, judging on the basis of the constitutional provisions involved, the historical and social context and all other circumstances, to take the right to own land free of a servitude from the owner and transfer that right to the Kidsons in the form of continuation of the servitude even after demolition of the house, allowing them to rebuild the house and continue living there according to the original conditions of the servitude. Contextual factors that might add texture to this analysis include the restricted lifetime of personal servitudes, the age of the Kidsons and the length of time for which upholding their servitude would presumably still burden the landowner's right, the circumstances under which they were initially forced from the farm and under which the house was destroyed, their chances of finding alternative accommodation, and other relevant considerations. Considered together, these indicators would probably justify the conclusion that the deprivation of the servient owner's right to own the land free of the servitude was justified by the reasons for continuing the servitude and that it was therefore not arbitrary, especially if the amendment of the common-law principle is brought about by way of flexible exception that is applied only when a court decides that it is justified in the circumstances of a particular case. This conclusion finds some support in the general agreement that it would have been harsh and unfair to leave the Kidsons homeless under the circumstances. However, a conclusion in favour of the development of the common law implied by the decision in *Kidson* requires a full and proper s 25 analysis that includes consideration and weighing up of the factors enumerated above; a vague sense of dissatisfaction with the effect of strict enforcement of the common-law principle is just as unsatisfactory as a reading that would seem to make the desired result possible without development of the common law, despite what appears to be strong contrary indications from the common law sources. In the end result, the proper explanation of *Kidson* seems to be (1) application of the common law is justified because the subsidiarity principles do not kick in; (2) analysis of the common law suggests that strict enforcement of the common-law principle would lead to a result that is in direct conflict with an explicit constitutional obligation, which means that development of the common law must be investigated; (3) development of the common law to avoid the unconstitutional result seems to be possible in the form of development of an exception to the general principle on the basis of other, related common-law principles; (4) this development of the common law brings about a deprivation of the landowner's property for purposes of s 25(1), but the deprivation is not necessarily arbitrary, depending on the outcome of the judical weighing of competing interests that is required by the *FNB* judgment.

In *Linvestment*, the deprivation involves taking away the dominant owner's right to veto relocation of the right of way. To decide whether there is

sufficient reason for that deprivation the court considers the same set of factors and relationships that are set out above. In this case, the policy reasons for bringing about the development that would allow relocation would be weighed against the impact that the deprivation might have on the affected dominant owner. Probably the most significant factor would be the fact that the relocation, as it was foreseen in the judicial development of the common law applied in *Linvestment*, can only take place upon application by the servient owner and ordered by the court, having considered all the relevant circumstances. That in itself should preclude any possibility of the deprivation being arbitrary, since a judicial decision based on the exercise of a valid judicial discretion in view of all the circumstances should by definition not be arbitrary as that term was defined in *FNB*.[98] The decision in *Linvestment*, and especially the way in which the court ensured that the relocation is only allowed if it causes no material hardship or loss for the dominant owner but protects a significant interest of the servient owner, underlines the logical force of this conclusion. The result is therefore again that the deprivation brought about by the development of the common law in *Linvestment* is not arbitrary.

*(f) Relevance of ss 36(1) (justification) and 25(2) (expropriation)*

In terms of the *FNB* methodology, once it has been decided that there was an arbitrary deprivation of protected property, the next step is to determine whether the deprivation could be justified in terms of s 36(1). However, it is highly unlikely that a deprivation that has been found to be arbitrary could be justified in terms of s 36 and therefore I would suggest that this step is irrelevant for property disputes, especially if the issue is development of the common law.[99]

Furthermore, I would also suggest that the rest of the *FNB* steps involving expropriation are always irrelevant for property cases involving the application or development of common-law principles. Gildenhuys (writing prior to the *FNB* decision) has suggested that some forced transfers brought about by the common law might amount to expropriation,[100] but there is no common-law authority for expropriation in South African law[101] and hence the expropriation part of the *FNB* test is redundant for deprivations brought about by common law principles. If a deprivation brought about by a common-law principle is not arbitrary that is the end of the matter; there is no need to ask whether it could be an expropriation.

[98] I do not argue the point here but would suggest, quite generally, that any deprivation brought about by a development of the common law that involves a forced transfer of rights flowing from the exercise of a judicial discretion should not be arbitrary in terms of s 25(1) and the *FNB* test.

[99] The argument is purely based on logic; see Van der Walt *Constitutional Property Law* op cit note 89 at 77, with other sources cited there.

[100] Antonie Gildenhuys *Onteieningsreg* 2 ed (2001) 56–7.

[101] See Van der Walt *Constitutional Property Law* op cit note 89 at 346 and 453 for references to authority.

*(g) Section 25: Conclusion*

If the s 25(1) analysis of forced transfers brought about by development of the common law terminates with the arbitrariness test, deprivations of this kind will logically speaking always be either not arbitrary and therefore constitutionally unassailable or they will be substantively arbitrary, not justifiable and thus unconstitutional. In cases where the deprivation is arbitrary and therefore unconstitutional, the next step is to determine the correct remedy, which will sometimes involve a decision as to whether the common law can and should be developed differently, perhaps more radically by way of legislation, so as to ensure either avoidance of the arbitrary result or compensation in some form.

## V CONCLUSION

Most commentators would probably agree that the outcomes in *Linvestment* and *Kidson* were justified and fair. Not all commentators agree that those outcomes were made possible by the development of the common law, but those who do agree would probably also agree that the developments in question were necessary and justified. As the analysis of academic comments on *Kidson* indicates, there nevertheless remains a measure of discomfort and dissatisfaction about the reasoning that surrounds this decision. This article is intended to show that the discomfort and dissatisfaction are caused by lack of a proper normative framework within which decisions about development of the common law can be taken. The main point put forward in the article is that such a normative framework is not only necessary, but that it is inevitably constitutional in nature. The article is meant to show that a constitutionally inspired normative framework makes it easier to decide on a principled basis when, why and how development of the common law should take place, even in seemingly innocuous and purely private areas of the common law such as the law of servitudes. The role of the Constitution in this regard is threefold: constitutional principles should first indicate whether the common law is indeed the applicable source of law for a particular problem; secondly, having determined that the common law is the applicable source of law and having established what the common-law position is, constitutional analysis should indicate whether there are constitutional provisions that either require or proscribe a particular development of the common law as it stands; and thirdly, having developed the common law on constitutional or other, utilitarian grounds, further constitutional analysis should indicate whether the development in question causes limitations of property rights that require section 25 scrutiny. A point that is relied on but not argued extensively in this article is that a s 25 analysis mostly features in the third of these stages, whereas general constitutional provisions dominate the first, and Bill of Rights provisions that secure non-utilitarian democratic constitutional rights like equality feature in the second.