A comparative overview of European, US and South African constitutional property law

Bram Akkermans*

A comparative overview of European, US and South African constitutional property law

https://doi.org/10.1515/eplj-2018-0002

1. Introduction

Traditionally, there is a distinction between private law property law and constitutional property law. Private-law property law concerns itself with the relations between two private parties in respect to an object or thing. This area of law has, depending on the type of legal tradition, been in development since Roman times (civil law) or since the battle of Hastings in 1066 (common law). Its principles and doctrine are aimed at facilitating trade between private individuals, the recognition of a limited set of rights with property (third party) effect, and rules on the creation, transfer and destruction of those rights.

Compared to the study of private law property, the study of property as constitutional law is relatively new.[1] It concerns, first and foremost, the relationship between a private party and the State. It concerns state interference with property rights in the form of taking of property (expropriation), but also regulation or control of private property. Especially the latter two aspects can result in fundamental changes into property relations. Moreover, also other constitutional principles, such as the principle of equality, can have effect on private property relations. An example of such could be a discriminatory stipulation in a trust deed, or legacy, resulting in nullity or – better – in a change of the content of the property relation.[2]

1 Although already the US Constitution and the Déclaration des droits de l'homme et du citoyen also deal with property and ownership.

2 See for example Minister of Education and Another v Syfrets Trust Ltd No and Another 2006 (4) SA 205 (C).

***Corresponding author: Bram Akkermans,** associate professor of European Private Law at Maastricht University, the Netherlands and Special Visiting Professor (Tijdschrift voor Privaatrecht (TPR) Rotating Chair) at the KU Leuven in the academic year 2017-2018,
E-Mail: b.akkermans@maastrichtuniversity.nl

Constitutional law thus adds a dimension to property law that is mostly neglected by private-law property lawyers. Textbooks of property law, especially in European countries do not deal or only make mention of the existence of a constitutional dimension.[3] However, increasingly, the effect of constitutional law into the area of property law creates awareness of this dimension.[4] A fine example of this is the Judgment of the European Court of Human Rights in the case *Pye v United Kingdom*, in which the property law rules on prescription, in the form of the English Statute of Limitation, were tested for conformity with Article 1 of the First Protocol to the European Convention on Human Rights.[5] Crucial in this case was the fact that a person could lose ownership of land by non-user by operation of law without receiving any compensation. Although the case was overruled by the Grand Chamber of the Court later, the decision increased awareness of the constitutional dimension for many private law scholars. Other jurisdictions, such as South African law, have dealt with similar challenges for decades now. In South Africa, the Constitution is used to change the nature and content of common law (which is Roman Dutch Law) rules. Especially the principle of equality as well as the protection against expropriation has been exemplary in this respect.[6]

Also in the United States, property law is part of Constitutional Law with the 5th Amendment to the US Constitution establishing the entitlement of life, liberty and property, which cannot be taken without just compensation.[7] The 5th Amend-

3 See for example, Steven Bartels and Aart van Velten, Asser 5 – Eigendom en Beperkte Zakelijke Rechten (Deventer: Kluwer, 2017), n. 2c (one out of 623 paragraphs, stating that although it is true that Dutch law must be in conformity with international obligations, there is no evidence of the direct effect of the ECHR on Dutch property law), Fritz Baur, Jürgen Baur and Rolf Stürner, Sachenrecht, 18th edition, (München: Verlag C.H. Beck, 2009), § 13, rn 13–17, (only mentioning the existence of Article 14 of the German *Grundgesetz*), Laurent Aynès and Philippe Malaurie, Droit des Biens (Paris: LGDJ, 2017), n. 13–14 (one page out of 429 pages mentioning the effect of the European Convention of Human Rights in one paragraph only), and Edward Burn and John Cartwright, Cheshire and Burn's Modern Law of Real Property (Oxford: Oxford University Press, 2017) (cites 4 ECHR cases in the case law registry, but does provide a few pages of analysis (p. 348 *et seq* and 381 *et seq*).

4 See, more recently, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), Björn Hoops, The Legitimate Expectation of Expropriation: A Comparative Law and Governance Analysis by the Example of Third-Party Transfers for Economic Development (Cape Town: Juta Law Publishers, 2017).

5 *Pye v The United Kingdom* (2005) followed by *Pye v The United Kingdom* (2007, GC).

6 See, e.g., Laurens du Plessis, Re-Interpretation of Statutes (Durban: Butterworths, 2002), André van der Walt, 3rd edition, (Cape Town: Juta, 2011).

7 See, e.g., Thomas Merrill, The Landscape of Constitutional Property, 86 Virginia Law Review (2000), p. 886.

ment has been instrumental to the creation of a whole field of study in constitutional property law focusing on takings.[8]

Constitutional law and its influence on the law of property thus deserves a central place in any comparative study on the law of property. However, private-law property scholars, of course with the exception of some, often do not take knowledge of the constitutional dimension. This contribution is a descriptive contribution and seeks to show some of the basic aspects of constitutional property law. Four major examples of constitutional property law have been selected for this: (section 3) Article 1 of the First Protocol to the European Convention on Fundamental Rights and Freedoms, (section 4) the 5th Amendment to the US Constitution, (section 5) Section 25 of the South African Constitution, and (section 6) European Union property law. Also (section 7) indigenous title will be discussed shortly.

2. Constitutional Property Law

Traditionally, private law doctrine deals with entitlements to property. It deals with the available types of property rights and offers operating and interface rules on how these rights are created, acquired, transferred, registered and destroyed. In a modern constitutional state, land and entitlement to land are governed by both private law and public law. Private citizens enjoy public law protection of their entitlement to land, both from interference by the state and interference by others. Moreover, the state traditionally claims certain property for itself, such as minerals and natural oil and gas that is found in the land owned by citizens, or through the protection of monuments and national treasures owned by citizens.[9] In the course of the 20th Century, public law limitations on private property rights have increased. However, from the private law perspective, these are just public law limitations that only deserve mentioning in the discourse of private law doctrine.

A second, also mostly European development, concerns the further integration of national legal systems through the European Union and the Council of Europe. In both these organisations, private law doctrine, which is traditionally

8 See, e.g. Richard Epstein, Takings (Cambridge, MA: Harvard University Press, 1985), Gregory Alexander, The Gobal Debate over Constitutional Property: Lessons for American Takings Jurisprudence (Chicago: University of Chicago Press, 2006).

9 See on this, Bram Akkermans and William Swadling, Property Rights on Immovables and Movables (Land and Goods), in Sjef van Erp and Bram Akkermans (Eds.), Text, Cases and Materials on Property Law (Oxford: Hart Publishing, 2012), p. 226 *et seq*.

aimed at preserving internal coherence, is put under pressure to open up to the influence of other legal systems as well as international and European law. Through international law, therefore, another branch of public law, private law property law is changing face.

However, in other areas of the world, the development of private law has followed a different route. Although English common law is at the basis of many other legal systems in the world, the development of property law has been very different depending on the location.[10] For example, in the United States of America, property law has developed in light of the fourth amendment to the Constitution[11] In US property law, constitutional land law and the protection of property rights of US citizens, has become a distinct field. Other areas of private law focus much more on transactions, such as real-estate law, than on the fundamental values and composition of the law of property.

Another, yet very different example, of the *constitutionalisation*, i.e. the increased influence of public law, can be seen in post-*Apartheid* South Africa. The 1994 constitution has brought about a fundamental change in property law, leading to change and a new, constitutionally driven, South Africa. There, redistribution of land and equality cause tension with the existing property rights and the old South African common law (that consists of unwritten Roman Dutch law and some English common law).[12] The result is a process where South African law is considered as a single legal system, and the finding of a resolution of the tension between existing rights and the process of reform is steered by the Constitution.[13]

There are two aspects, therefore, of constitutional land law that deserve attention. First, there is traditional model of the protection from state interference a constitutional document provides to private citizens. In this context, the state can generally only interfere with private property rights if it is in the general interest and for due compensation of the loss of the property right. In this approach there is a constitutional concept of property rights that deserve protec-

10 Many authors point to the influence of William Blackstone's Commentaries on the Laws of England. See, for a discussion on Blackstone's influence in the United States of America, Carol Rose, Canons of Property Talk, or, Blackstone's Anxiety, 108 Yale Law Journal 601 (1998).

11 The Fourth Amendment to the US Constitution states: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

12 See, on this, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 19.

13 See *Modder East Squatters v Modderklip Boerdry (Pty) Ltd* [2004] 3 SA 169 (SCA) [43] *per* Langa J.

tion (usually named 'possessions' in the English language version of the Treaty) and private law property law is left alone as much as possible.[14] However, even under this very traditional approach there are some influences on private law property law. For examples, individual owners hold a property right that is not only regulated by private law, but also protected by public law. The separation between these two elements have been rather strong throughout the 20th century. However, increasingly, the traditional separation is questioned.[15] In more modern constitutional thinking, constitutional property law takes premise over private law property law in such a way that constitutional principles influence the composition of private law property law.[16] Alternatively, there are those who argue that constitutional principles influence private law, but not to the extent that the content of private law legal relations is affected. This less intrusive approach seeks middle ground between recognising the influence of constitutional law on private law and protecting existing property rights as well as the integrity of private law doctrine.

These three approaches, separation (i), single-system (ii) and constitutional influence (iii) form the different approaches that are taken around the world.[17] The following overview will deal with constitutional land law in Europe under Article 1 First Protocol to the European Convention on Human Rights, which traditionally is dealt with under the first approach, but which in the United Kingdom takes the form of the Human Rights Act 1998, that more adheres to the third approach.[18] The overview will then deal with Articles 25 and 26 of the South African Constitution, which adheres to the second approach, and will end with the Fourth Amendment to the US Constitution, which falls in the third approach as well.

14 The term 'possessions' in the ECHR is a unique term that is the result of negotiations by the drafters and should not be equated with the more technical term possession in English law. See, on this, Franky McCarthy., Article one of the first protocol to the European Convention on Human Rights: the evolution of a right in Europe and the United Kingdom (diss. 2010), http://eleanor.lib.gla.ac.uk/record=b2833971.

15 See Gonzalo de Almeida Ribeiro, The Decline of Private Law. A philosophical history of liberal legalism (Cambridge, MA, 2012).

16 This is in particular the case in South African law. See, on this, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 19.

17 See for a similar division Olga Cherednychenko, Fundamental rights and private law: A relation of subordination or complementarity?, 3 Utrecht Law Review 2 (2005), p. 2–3, where my approach of separation is Cherednychenko's complementarity and my approach of of constitutional influence is Cherednychendko's subordination.

18 United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998.

3. Article 1 First Protocol to the European Convention on Human Rights

Article 1 of the First Protocol to the European Convention on Human Rights (ECHR) states that:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Article A1P1 ECHR was not added to the original text of the convention, as the Contracting States could not reach agreement in time for the signing of the Convention, but to the First Protocol in 1952. Although consensus had been reached about the adoption of a provision on the protection of property, the 1948 Universal Declaration of Human Rights mentions ownership as a fundamental right in Article 17, there was a difference of opinion on how far that protection should go.[19] With the end of the second World War, in which many who opposed the regime were expropriated to weaken their position in society, fresh in the memory of the negotiators, it was clear that some protection of property rights would be necessary.[20] The result of this struggle is a not so easy to read article that offers protection of possessions, an ECHR autonomously interpreted term with a very wide scope of protection. The European Commission on Human Rights and later directly the European Court on Human Rights (ECtHR) clarified the meaning of the provision over time.[21] In James and others v The United Kingdom (1986) the Court held:

> '37. In its judgment of 23 September 1982 in the case of Sporrong & Lönnroth, the Court analysed Article 1 as comprising 'three distinct rules': the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the

19 See the Teitgen Rapport, Traveaux Preparatoires to the Convetion, Volume 1, p. 194.

20 See on this, Franky McCarthy, Article one of the first protocol to the European Convention on Human Rights: the evolution of a right in Europe and the United Kingdom (diss. 2010), http://eleanor.lib.gla.ac.uk/record=b2833971.

21 Until 1998, when the 11th Protocol to the ECHR entered into force, citizens would complain to the European Commisson on Human Rights after which the Court could rule on the decision in appeal. From 1998 onwards, citizens can directly approach the European Court of Human Rights with a complaint. See www.echr.coe.int/echr/.

> peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (Series A no. 52, § 61). The Court further observed that, before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable (ibid.). The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.'

Although the rules are not always applied distinctly, these three rules form the basis for the case law of the ECtHR and form the scope of A1P1 ECHR. A state can only interfere with an individual's possession when this is in the general interest. This is not merely a legal, but also a political and economic question. States therefore enjoy a very wide margin of appreciation when it comes to these matters, but does need to offer an explanation for its action.[22] In fact, any interference with a right or freedom enjoyed under the ECHR must pursue a legitimate aim. The Court will use a fair balance test to determine whether or not this is the case.[23]

The crucial aspect, especially from a property law point of view, is what constitutes a possession within the meaning of A1P1. It is clear from the outset that the definition of possession is much wider than the traditional private law scope of property rights. It is also clear that the term possession in A1P1 should be distinguished from the term possession as it is used in English private law.[24] In fact, especially when there are no private law rights, Article 1 can offer protection that would otherwise not exist. This applies to illegal occupants, squatters and people who have wrongly been expropriated of their property rights.[25] In order to constitute a possession under Article 1 an interest needs an economic value and there must be legitimate expectations of the person holding the interest.

Generally, in other words, all interests that represent and economic value are protected under the Convention. This applies, needless to say, to all property rights. The value must, however, be objectively ascertained.[26] In order to assess

22 James and others v United Kingdom (1986), para 46.

23 Beyeler v. Italy (2000), para 111–113.

24 England made this very clear during the negotiations of the treaty, and stated its intention to come to an autonomous definition of possession. See Beyeler v Italy (2001) on this.

25 See, inter alia, Önderyldiz v. Turkey (2005), Holy Monastries v Greece (1994) and Zwierzynski v. Poland (2001).

26 A hobby, for example, does not constitute a possession. See RC, AWA & ORS v The United Kingdom (1998).

whether this is the case, the Court focuses on transferability. When an interest is transferable, it will have an ascertainable value and hence will receive protection. This also applies to future interests, in as far as a claim to such a right already exists.[27] In as far, in other words as there is a legitimate interest to the value. In Prince Hans-Adam II of Liechtenstein v Germany (2001) the Court summarised the criteria as follows:

> '83. The Court recalls that, according to the established case-law of the Convention organs, 'possessions' can be 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (...).'

What is clear is that the Convention does not guarantee the right to acquire possessions, and only protects citizens against interference with their interests.[28] What is also clear is that the scope of Article 1 is wider than the mere protection against the state taking away property interests. Interference with the peaceful enjoyment of property interests falls clearly within the protection offered by Article 1. This does not generally apply to the way in which property interests can be exercised, but when peaceful enjoyment is made impossible, the state must ensure protection of enjoyment.[29]

Most interesting is that in the last decade the Court has started to impose a positive obligation on states to ensure its citizens can enjoy peaceful enjoyment of their property interests and have thus significantly enhanced the effect of Article 1.[30] It now includes positive duties to ensure holders of protected property interests have access to their property and enjoy a minimum level of use of their interest. Moreover, it shows how also the separation approach of A1P1 is moving towards a constitutional influence approach.[31]

---

27 Amburosi v. Italy (2000), para 20.

28 Marckx v. Belgium (1979), para 50.

29 Also known a *de facto* expropriation. See Powell v The United Kingdom (1990), where aircraft noise did not constitute a breach, but see Loizidou v. Turkey (1997) where a Cypriot owner could not reach his house on the Turkish part of Cyprus and received protection under Article A1P1 ECHR.

30 Although the Court has only done this in a limited number of cases, its effects are not to be underestimated. See Öneryldiz v Turkey (2005), Novoseletskiy v Ukraine (2006) and Athanasiou v Greece (2006), Budayeva v Russia (2008).

31 In this respect there is a link to Article 8 ECHR that guarantees the right to family life and that can also impose positive burdens on the state to protect peaceful enjoyment rights.

For most part, however, Article 1 remains a public law protection on a wide variety of property interests, among which are more narrowly defined private law property rights: deprivations of property interests can only be made when these are in the public interest.[32] What action constitutes a deprivation can be a complicated matter and does deserve some attention. A *de jure* deprivation is usually relatively easy to ascertain, as there will be legislation or a legislative or administrative act leading to the deprivation.[33] The Article also protects *de facto* deprivations, which do not have such a formal character, but still have the effect of depriving someone from (enjoyment of) his property interest. There is, however, a fine balance to work with. For example, city planning in Stockholm, Sweden, had the effect that ownership of apartments in a certain area could no longer be transferred because permission for expropriation had been granted, but had not been effected, but did not lead to a deprivation.[34] The Greek navy took away ownership of land, but did not formally transfer the land to the Greek state. There was therefore no formal expropriation as no rights had been transferred to the state, but the Court did hold this was a *de facto* deprivation of property interests.[35]

There is, however, under the third rule, the possibility to protect holders of property interests against state control of their interests. This part of the case law of the Court is less specific and more casuistic than the case law dealing with deprivations. Nevertheless, a famous property law case can shed some light on the meaning of the third rule. In *Pye v The United Kingdom* (2007) the Grand Chamber of the Court ruled on a case dealing with adverse possession (acquisitive prescription), where the defendant had acquired property entitlement to land by using the land and by non-user of the owner for a period more than 12 years.[36] The claimant, who was the former owner, held that his property interest had been deprived by operation of rules on adverse protection and that he was therefore entitled to compensation by the state. The Court held that this was not a deprivation of title to the land, but rather a control of use of land. Similarly, seizure, because of its temporary nature, does affect property rights, but does not deprive

32 Bramelid and Malström v Sweden (1983).
33 But see Jahn v. Germany (2005).
34 Sporrong & Lönnroth v Sweden (1982).
35 Papamichalopoulos and others v Greece (1993).
36 Pye v The United Kingdom (2007, GC).

them. Hence, seizure can lead to also lead to a control of use.[37] The third rule also applies to rules of *emphyteusis*.[38]

When, in other words, the Court has established there is a possession within the meaning of A1P1 ECHR (i) and which rule from Sporrong & Lönnroth v Sweden (1982) has been violated (ii), the Court will see whether there is a legal base for the interference (lawfulness) (iii), a legitimate aim in the general or public interest exists (iv) and whether there is a fair balance between the general interest of society and the fundamental rights of the individual (proportionality, v).

Any violation of rules iii to v will lead to a breach of Article 1 and the Court will go into compensation.

The effect of A1P1 ECHR is therefore not only to protect property rights, but also to form a system of checks on the way in which the state interacts with these. This means respecting existing interests, but also guaranteeing the peaceful enjoyment of these. If necessary, it can mean that a positive duty on the state to ensure this can be held to exist.

Under the separation approach, this area of law is generally considered distinct from private law. However, there are some strong links that cannot be ignored. Especially more recent case law of the European Court of Human Rights, most notably, the Pye v The United Kingdom (2007) case, has created awareness among European property lawyers, that there may be a strong cross-influence.[39] Rules of adverse possession or acquisitive prescription, which are operating rules in any property law system, have a constitutional dimension previously not considered. In fact, the potential destruction of property rights is not generally considered in traditional private law doctrine, which focuses on the acquisition of rights instead.[40] As a result, not so much property rights themselves, but rather the operating and interface rules come under scrutiny by the European Conven-

37 See Handyside v The United Kingdom (1976). This distinction is not without criticism, see R (Mott) v Environment Agency [2010] UKSC 10. See George Gretton, The Protection of Property Rights, in A. Boyle, C. Himsworth and HL MacQueen (Eds.), Human Rights and Scots Law: Comparative Perspectives on the Incorporation of the ECHR (Oxford: Hart Publishing, 2002), p. 275 *et seq*.

38 Inze v Austria (1987)

39 See Milo, J.M. (2007). Pye in de Grote Kamer te Straatsburg: Adverse possession en privaatrecht naar de constitutionele marge van nationale autonomie. Nederlands Tijdschrift voor Burgerlijk Recht, 2007, p. 368 *et seq*., Bram Akkermans, Michael Milo and Vincent Sagaert, Chapter 10 – Harmonisation, in Sjef van Erp and Bram Akkermans (Eds.), Text, Cases and Materials on Property Law (Oxford: Hart Publishing, 2012), p. 1105 *et seq*.

40 Renewed attention to the loss of property rights can be found in Bram Akkermans, William Swadling and Lars van Vliet, Destruction in Sjef van Erp and Bram Akkermans (Eds.), Text, Cases and Materials on Property Law (Oxford: Hart Publishing, 2012), p. 911 *et seq*.

tion on Human Rights. This does not only concern a correctional mechanism, but increasingly means influence on every area of national law as well. Illustrative of this is a statement of the Court in relation to the reform of pension schemes:

> '53. Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that Article 1 of Protocol No. 1 does not include a right to acquire property. It places no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (...).'[41]

With a uniform and autonomous concept of possessions under A1P1 there is no reason to assume this statement would be different for any other rules of national law. European constitutional property law, therefore, directly challenges the property law order in any legal system member to the Convention, regardless of its origin in civil law, Nordic law, common law or mixed legal systems.[42] Under the approach of separation, mostly taken in regard to the Convention, and especially Article 1, considering its potential very wide scope and the political sensitivity of dealing with ownership and other property rights, Contracting States keep enjoying a very wide margin of appreciation when dealing with private property interests. The European Court of Human rights will only check the conformity of a national decision for conformity with the framework of the Convention.

3.1. HRA 1998 – Article 1 First Protocol in a different setting

Although Article 1 of the First Protocol to the European Convention on Human Rights was dealt with in the previous section, the Human Rights Act 1998, the Act of the UK Parliament with which the European Convention was awarded direct effect in the United Kingdom legal order, changed the nature of the United Kingdom's commitments. Although the UK had been a founding member of the Council of Europe and signatory of the European Convention on Human Rights on

41 Stec v The United Kingdom (2005). Article 14 ECHR concerns non-discrimination.

42 In 2018 there are 47 Member Countries. See www.coe.int. Of course, the nature and content of the property right at stake remains an issue for national law to define. However, the national definition must be made within the context of European Constitutional Property Law as provided by the A1P1. See on this tension Emma Lees, Registration Make-Believe and Forgery – Swift 1st v Chief Land Registrar, 131 Law Quarterly Review (2015), p. 515 *et seq*.

8 March 1951, the Human Rights Act 1998 gives 'further effect' to the rights contained in the Convention in the UK legal order. It does so by creating a remedy for breach of a Convention right, without the need to go to the European Court of Human Rights.[43] As a dualist country, international obligations, such as Treaties, do not take direct effect in the UK legal order. Therefore, in order to achieve such results additional national legislation is necessary.[44]

The Act entered into force on 2 October 2000 and changed part of the nature of English law. Section 3 of the act requires courts to read primary and subordinate legislation in such a manner that they become compatible with the Convention.[45] In its interpretation the courts are expected to go well beyond the rather strict rules of interpretation of legislation they normally apply. The limit of this wide interpretation power is when such an interpretation would conflict with legislative intent of the measure under scrutiny. If this happens the court may make a non-binding declaration of incompatibility under Section 4, which will have political rather than legal effects.[46]

The Human Rights Act 1998 (HRA 1998) creates a duty for every 'public authority' to act in conformity with the Convention rights.[47] This also means that courts and tribunals are part of 'public authority' and must therefore uphold the Convention's rights in any case.[48] This has led some authors to argue that the HRA 1998, even though it does not explicitly state has 'horizontal effect' as courts must enforce the Convention's rights in any dispute, even between two private parties.[49]

With this method, the courts, whether acting on legislation, on common law or in equity, have additional duties and powers. Hence, the separation approach that is followed by other countries, can no longer stand. Since 2000 there is, in

43 Section 7 HRA.

44 Peter Malanczuk, Akehurst's Modern Introduction to International Law 7th edition (London: Harper Collins, 1997), p. 45

45 Section 3 HRA 1998 states: '(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

46 Section 10, for instance, allows the government to change legislation on the basis of a section 4 declaration.

47 Section 6(1) HRA 1998

48 Section 6(3)(a) HRA 1998.

49 See Keven Gray, Land Law and Human Rights, in Louise Tee (Ed), Land Law. Issues, Debates, Policy (London: Willan, 2013), p. 211–215, Jean Howell, Land Law and Human Rights, [1999] Conv 286, Jean Howell, The Human Rights Act 1998: the 'Horizontal Effect' on Land Law, in Elisabeth Cooke (Ed.) Modern Studies in Property Law (Vol 1): Property 2000 (Hart Publishing: Oxford, 2001), p. 149.

the United Kingdom – not without controversy – a constitutional influence model, meaning that national law in whatever form, is now directly influenced by the European Convention on Human Rights.[50]

This influence includes Article 1 of the First Protocol to the European Convention on Human Rights. Of course, even prior to the HRA 1998, the United Kingdom was bound to protect property interests. However, the entry into force of the HRA 1998 now offers a much more direct control of the state's powers over individual right holders.[51] The English experience with the Convention through the HRA 1998, is particularly illustrative in respect to the 'control of use' aspect Article A1P1 ECHR. In modern society, there is no such thing as an absolute entitlement to property.[52] Limitations are bound to exist, whether in the form of state-entitlement to minerals, gas or oil, or in the form of environmental protection standards, public planning or protection of monuments. Moreover, the state has powers to achieve these objectives and, although it should respect individual property rights, it should not always be automatically be held to pay compensation for alterations to the individual use of property by individuals. However, when such control over the use of private property becomes disproportional, the protection of Article 1 and the duty for compensation will kick in.[53]

The balance between regulation of property and deprivation of property is therefore difficult to make. It can only be done on a case by case base and, as the Court made clear in the Sporrong and Lönnroth case mentioned in the previous section, the Court can only look for a *de facto* deprivation.[54] If that is the case, compensation should be awarded. After all, the regulation of a property interest leading to a *de facto* deprivation of part or all of the property interest results in a

50 See Kevin Gray, Land Law and Human Rights, in Louise Tee (Ed), Land Law. Issues, Debates, Policy (London: Willan, 2013), p. 211–213, but also *R v Lyons* [2003] 1 AC 976 [13], per Lord Bingham who states that already prior to the HRA 1998 there was considerable influence on both lawmakers and the judiciary. On several occasions, the United Kingdom Government has issued remarks on the status of the HRA 1998. These include the 2005 election campaign of the Conservative Party, and statements made by PM David Camaron to this effect. See, inter alia, http://news.bbc.co.uk/2/hi/uk_news/politics/5114102.stm.

51 The existence of the HRA 1998 even changes the nature of the common law to some extent. It is certainly to be taken into account when further dealing with the common law and development of the law and equity by the courts. See Hunter v Canary Walf Ltd [1997] AC 655 at 714A per Lord Cooke of Thorndon. See also Aston Cantlow and Wilmcote with Billesley PCC v Wallbank [2001] 3 All ER 393 at 404j-405a.

52 See Banér v Sweden (1989) at 140.

53 See, to the same effect, Kevin Gray, Land Law and Human Rights, in Louise Tee (Ed), Land Law. Issues, Debates, Policy (London: Willan, 2013), note 74.

54 Sporrong & Lönnroth v Sweden (1982).

loss of value of the holder of the interest. It is this loss of value, that the property protection under the Convention and the HRA 1998 will compensate.[55] The ECtHR has, however, refused to rule out that a control of use cannot lead to compensation.[56] It is especially the fair balance test of the court that remains the crucial factor in deciding questions of compensation.[57] The overarching objective of the property protection offered by Article 1 is to ensure standard of the peaceful enjoyment of possessions. When this standard is breached, for example by forcing the surrender of a landowner's exclusive hunting rights, compensation is in order as well.[58]

The HRA 1998 thus changes the nature of English law to some degree. Even though also previously English courts held that private property could only be affected in the public interest, the Convention adds a completely different layer of protection to this.[59] It means that now potentially any area of English law, whether this is statute or common law, is affected in such a way that the standards developed by the European Court of Human Rights must be taken into consideration. With that, including the potential (indirect) horizontal effect of the Convention's rights, the separation between human rights and property law cannot easily be made anymore.[60] In fact, the HRA 1998 strengthens the influence of the Convention in such a way that the United Kingdom can now be held to adhere to the constitutional influence approach set out above.

The United Kingdom is not the only country that now adheres to the influence model set out above. Also in Germany there is a tradition of subordination of

55 See Kevin Gray, Land Law and Human Rights, in Louise Tee (Ed), Land Law. Issues, Debates, Policy (London: Willan, 2013), note 88.

56 Banér v Sweden (1989), Chassagnou v France (2000)

57 See, on this, Björn Hoops, The Legitimate Expectation of Expropriation: A Comparative Law and Governance Analysis by the Example of Third-Party Transfers for Economic Development (Cape Town: Juta Law Publishers, 2017).

58 Chassagnou v France (2000)

59 See, e.g., Prest v Secretary of State for Wales (1982) 81 LGR 193. For a discussion on the effect of the ECHR on English law see Amy Goymour, Proprietary Claims and Human Rights – A 'Reservoir of Entitlement'?, 65 Cambridge Law Journal 3 (2006), p. 696 *et seq*.

60 Under the current state of the law, however, the effect is not horizontal. There is considerable attention to the indirect horizontal effect of the Convention. See, Gavin Phillipson, The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper, 62 Modern Law Review 6 (2003), p. 824 *et seq*., House of Commons, Joint Committee on Human Rights, 7th Annual Report (2003–2004) (Available at https://publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3907.htm), para 86 *et seq*., Olga Cherednychenko, Fundamental Rights and Private Law: A relationship of subordination or complementarity, 3 Utrecht Law Review 2 (2005), p. 2–3, Eleni Frantziou, The Horizontal Effect of the Charter of Fundamental Rights of the European Union: Rediscovering the Reasons for Horizontality, 21 European Law Journal 5 (2015), p. 657 *et seq*.

private law the to fundamental rights from the Basic Law (*Grundgesetz*)[61] Also there, law must be developed as well as be interpreted in the light of the Basic Law, in terms of land law in the context of Article 14 of the German Basic Law that deals with the concept of ownership (*Eigentum*).[62] The constitutional concept of property from Article 14 of the Basic Law is wider than the private law concept of ownership dealt with in the German Civil Code (§ 903 BGB, see below), and although related, they do exist separately from each other. The constitutional dimension, in other words, leaves ample room for the private law property law to develop.[63]

4. 5th Amendment to the Constitution of the United States

The other classic provision dealing with constitutional protection of ownership is the fifth amendment to the Constitution of the United States of America. This is the famous takings-clause and it states:

> 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due
> process of law; nor shall private property be taken for public use, without just compensation.'

61 See, *inter alia*, BVerfGE 58, 300 (*Nassauskiesung*), André van der Walt, Van der Walt, AJ 'The constitutional property clause: Striking a balance between guarantee and limitation' in McLean, J (ed) *Property and the constitution* (Oxford: Hart Publishing, 1999), p. 121 *et seq*., Gregory Alexander, The Social-Obligation Norm in American Property Law, 94 Cornell Law Review (2009), p. 97 *et seq*., André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 124–130.

62 See K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, Band III.1 Allgemeine Lehren der Grundrechte (1988), n 1473 *et seq*.

63 See, on this, André van der Walt, Van der Walt, AJ 'The constitutional property clause: Striking a balance between guarantee and limitation' in McLean, J (ed) *Property and the constitution* (Oxford: Hart Publishing, 1999), p. 151–153, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012).

The land law aspect of the Fifth Amendment, and the actual takings-clause concerns the last sentences of the Amendment. The sentence before that refers to the Due Process Clause and is more a matter of procedural than substantive property law. A similar phrasing is also found in the Fourteenth Amendment. Of course, the Due Process clause also puts limitations on the state, for example when taking taxes, as this is generally held to be a deprivation of property, but this exists rather in the duty to organise hearings and to make fair law.[64] Through the Fourteenth Amendment, which is addressed to the States, the states are also bound by the Takings Clause.[65]

The US Constitution, like the European Convention on Human Rights does not create property rights itself. Where the ECHR relies on national law of the contracting states, the US Constitution relies on state law and common law for this.[66] That is not to state, however, that state law and common law exist in complete isolation from the Constitution. To the contrary, like with the ECHR, the fifth amendment and the due process clauses influence the content of state and common law.

The Fifth Amendment is closely related to the concept of Eminent Domain, which is the power of the State (Federal and State level) to take property. The power of Eminent Domain is presumed in US constitutional law, and the Fifth Amendment offers protection for private citizens in respect to the exercise of Eminent Domain.[67] The area of law dealing with these aspects of property law is known as regulatory takings.[68] This concerns traditional cases of expropriation (condemnation in US legal terminology), but especially those instances where Federal or State regulation affects the private property rights of individuals. A good example of this is offered by the case of *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency*[69], in which the Supreme Court dealt with the

64 Such as, e.g. Browning v. Hooper, 269 U.S. 396, 46 S. Ct. 141, 70 L. Ed. 330 (1926).

65 Thomas Merrill, The Landscape of Constitutional Property, 86 Virginia Law Review (2000), p. 886. See San Diego Gas & Electric Co. v. City of Sand Diego, 450 U.S. 621, at 623 n 1, Penn Cent. Transp. Co v. New York City, 438 U.S. 104, 122 (1978).

66 M. Caitlin Sochacki, Conneticut Journal of International Law, p. 459. E.g. Phillips v Wash. Legal Found., 524 U.S. 156, 167 (1998), Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

67 United States v. Carmack, 329 (1946) U.S. 230-241–2, stating that the Fifth Amendment is 'a tacid recognition of a pre-existing power'. See, on this, Gregory Alexander and Eduardo Penalver, An Introduction to Property Theory (Cambridge: Cambridge University Press, 2012), p. 156.

68 See Mark Fenster, The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights, 9 Journal of Constitutional Law (2007), p. 669, Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), Chapter 14.

69 535 US 302 (2002), note 144. Gregory Alexander and Eduardo Peñaler, Introduction to Property Theory (Cambridge: Cambridge University Press, 2012), p. 88.

question whether a (prolonged) building moratorium to study the environmental effects of construction around Lake Tahoe to preserve its unique ecological environment and blue color, constituted a taking in the meaning of the 5th Amendment.[70]

The history of the takings case law of the US Supreme Court is complicated, with the Court moving between approaches.[71] This is especially so because of the symbolic value of land. Under a pure libertarian viewpoint, the right to property (of land) is a pre-political right, meaning once that exists before there is a government or a constitution to deal with this.[72] State or government interference is therefore controversial for some.[73] For others, regulatory takings are a means of redistribution of wealth to achieve equality and justice.[74] The Supreme Court, of course in different compositions over the last century, has moved between approaches, but has never decided on a systematic all-encompassing framework to decide takings cases.

Generally, there are two approaches. First, there are cases that constitute a taking and hence need to be dealt with under the Fifth Amendment. These cases are known as categorical or *per se* takings cases.[75] Second, there are the cases that might be considered unconstitutional takings, but for which a balancing test must decide whether or not this is the case.[76]

Generally, American authors distinguish four distinct periods (pre 1922, 1922–1978, 1978–2005 and post 2005) when dealing with takings cases. Because of its

70 See, on this case Gregory Alexander, Constitutionalizing Property: Two Experiences, Two Dilemmas in, Janet McLean (ed.) Property and Constitutions, (Oxford: Hart Publishing, 1999), p. 88 *et seq*.

71 See for an overview, Gregory Alexander, Constitutionalizing Property: Two Experiences, Two Dilemmas in, Janet McLean (ed.) Property and Constitutions, (Oxford: Hart Publishing, 1999) p. 88 *et seq*.

72 A strong foundation of this view can be found in John Lockes work. See, John Locke, Two Treatises of Government, ed. Mark Goldie, Everyman's Library (1993), 138. See on this Michael Sandell, Justice. Whats the right thing to do (London: Penguin Books Ltd, 2009) p. 58 *et seq*.

73 The most famous example of this is Richard Epstein, Takings. Private Property and the Power of Eminent Domain (Harvard: Harvard University Press, 1985).

74 See, on this, Gregory Alexander, Constitutionalizing Property: Two Experiences, Two Dilemmas in, Janet McLean (ed.) Property and Constitutions, (Oxford: Hart Publishing, 1999) p. 88, Jeremy Paul, The Hidden Structure of Takings Law, 64 Cal. L. Rev. 1393 (1991).

75 See, Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 676.

76 See Penn Central Transportation Co. v. New York City, 438 US 104 (1978), see Mark Fenster, The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights, 9 Journal of Constitutional Law (2007), p. 679.

doctrinal structure and lack of overarching rules, the rule of precedent remains of great importance in this area.[77] Cases therefore need to be considered in the context of the framework of existing decisions.

Originally, the US Supreme Court took a very literal reading of the Fifth Amendment, where a taking would be found when the Federal or State Government exercised its power of eminent domain.[78] The review of the Court would focus on whether or not such taking had been for the public use and if compensation had been provided. From 1922 onwards, when the Court made its decision in *Pennsylvania Coal Co. v Mahon,* a case that concerned a prohibition of previously existing rights to mine for coal underneath a residential area. In a still debated opinion Justice Holmes reasoned that regulations that deprive owners of the value of their property are as harmful as an outright taking of property by the state.[79] With that, takings became the limitation of the exercise of Federal and State power. A regulation of property rights that goes 'too far' will therefore be held unconstitutional.[80]

In its search for this limit the Court followed a more procedural approach until Justice Brennan delivered the majority opinion in Penn Central Transportation Co v City of New York.[81] The Penn Central case concerned a local prohibition to build on top of the Penn Central train station and the possible interference of this prohibition with existing property rights. The Court, recognising it needed to clarify takings case law, distinguishes three factors that help decide whether or not a certain regulation of property rights constitutes a taking under the Fifth Amendment: (1) the 'economic impact of the regulation on the claimant'; (2) the extent to which the regulation has 'interfered with distinct investment-backed expectations'; and (3) the 'character of the government action'.[82] The test is therefore a balancing test in which the individual property rights is weighted against the Federal or State action.

The Penn State test is therefore to be applied to all cases, with a few exceptions. Where the Court has held there is a *per se* taking, there is no need for

77 See Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), 678.

78 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), 678.

79 Pennsylvania Coal Co v Mahon 260 U.S. 393 (1922), at 414.

80 See, on this, Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), 678, p. 683–684.

81 Penn Central Transportation Co. v. City of New York 438 U.S. 103 (1978).

82 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), 678, p. 687–688, 438 U.S. 103 (1978) at 124. For a discussion of each of these three factors see p. 688–691.

the balancing test and a taking will be deemed to have taken place.[83] This concerns cases of (i) permanent physical invasions of property, (ii) deprivation of certain core property rights, (iii) deprivation of all economically viable use, (iv) interference with vested rights, and (v) exactions that prohibit certain types of development unless the owner meets certain specified conditions.[84]

Over the years the Supreme Court has dealt with each of these factors providing further insights into how these criteria must be applied.[85] A good example of this is the already mentioned Lake Tahoe case that concerns the viable economic use factor.[86] There, there was a 32-month moratorium on all construction to investigate environmental concerns to preserve the unique clarity and colour of Lake Tahoe. The court refused to see the case as a categorical (*per se*) taking of property, and stated a balance should be made between the unique environmental concerns (i.e., the public use criterium) and the value of the economic use of the land by the landowners.[87]

A famous development in US regulatory takings case law came in 2005 with the highly controversial decision in *Kelo v. City of New London*.[88] In this case the City of New London (Connecticut) sought to redevelop a riverfront area. Pfizer, the pharmaceutical company had committed to build a global research facility there, and the City wanted to support the arrival of the facility that would generate jobs and benefit the local economy. However, the whole area was to be developed and run by private companies. The question before the court therefore focused on the public use requirement and whether or not the power or Eminent Domain could be used to eventually suit a private purpose.[89] The Court affirmed earlier decisions and thereby confirmed the legality of the taking, leading to public outrage, and even legislative changes in most States that restricted municipal

83 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 692.

84 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 692–722.

85 See Mark Fenster, The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights, 9 Journal of Constitutional Law (2007), p. 673–676.

86 Tahoe-Sierra Preservation Council Inc. v Tahoe Regional Planning Agency 535 US 302 (2002).

87 See, on this case, also Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 718.

88 545 US 469 (2005). See, extensively on this case and on expropriation in the private interest Björn Hoops, Björn Hoops, The Legitimate Expectation of Expropriation: A Comparative Law and Governance Analysis by the Example of Third-Party Transfers for Economic Development (Cape Town: Juta Law Publishers, 2017), p. 302 *et seq*.

89 Mark Fenster, The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights, 9 Journal of Constitutional Law (2007), p. 686–687.

powers to take property for economic development purposes.[90] Public use, as the purpose for which a government body condemns a property right, or issues legislation that affects these, remains for the executive branch of government to fill in.

The 2005 cases, of which *Kelo* seems the most significant, is held to have brought a change to the careful and procedural oriented approach of the Supreme Court.[91] The case-by-case approach of the Supreme Court remains, and the decision to condemn property or to interfere with property rights remains for the (local) government, but under scrutiny. The Court will generally review such decisions and will use the Penn State balancing test to decide whether or not such taking is unconstitutional. The specific circumstances of the case and the law of the State where the case originates, of course, remains of great importance. When such taking occurs, holders of property rights are entitled to a just compensation – which generally means a market value price.[92]

5. Article 25 South African Constitution

The Republic of South Africa provides a special case of constitutional land law. With the fall of the *Apartheid* regime in the 1990s, land became a crucial element in the reform process towards a equality and justice.[93] At first, the debate centred

90 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 746. See, for example, Bejamin Barros, Nothing "Errant" About It: The Berman and Midkiff Conference Notes and How the Supreme Court Got to Kelo with Its Eyes Wide Open, Widener University Law School Legal Studies Research Paper 08–30, Ilya Somin, Controlling the Grasping Hand: Economic Development Takings after Kelo, 15 Supreme Court Economic Review (2007), p. 183–271. Elisabeth Sperow, The Kelo Legacy: Political Accountability, Not Legislation, Is The Cure, 3 McGeorge L. Rev. 405, overview on 418–422. For an overview of Kelo's impact see http://www.scotusblog.com/2006/06/kelo-developments-one-year-after/.

91 See also Lingle v Chevron USA Inc. 544 US 528 (2005), San Remo Hotel, LP v City & County of San Francisco 545 US 232 (2005), see, on these Mark Fenster, p. 676–691.

92 See, on just compensation, Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 748–750.

93 T. Marcus, Land reform – Considering national, class and gender issues (1990) 6 South African Journal on Human Rights, 178–194, Z. Skweyiya, Towards a solution to the land question in post-apartheid South Africa: Problems and models (1990) 6 South African Journal on Human Rights 195–214, A. Sachs, Rights to the land: A fresh look at the property question, in A. Sachs, Protecting human rights in a new South Africa (1990), 103–138, A.J. van der Walt, Towards the development of post-apartheid land law: An exploratory survey' (1990) 23 De Jure, p. 1–45, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 1 and 2 and the sources mentioned there.

on the question whether the right to property should be included in the newly created Bill of Rights.[94] The opponents of inclusion feared too much interference with existing property rights, proponents argued that a strong constitutional context was needed.[95] With the Interim Constitution of 1993, the debate shifted to how to deal with reform and especially to what extent the Interim Constitution could affect existing property entitlements.[96] The final version of the Constitution (in 1996) provides a substantive section on property in its Bill of Rights:

> **Section 25. Property**
> 1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> 2) Property may be expropriated only in terms of law of general application
> a. for a public purpose or in the public interest; and
> b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> 3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including
> a. the current use of the property;
> b. the history of the acquisition and use of the property;
> c. the market value of the property;
> d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> e. the purpose of the expropriation.
> 4) For the purposes of this section
> a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
> b. property is not limited to land. (...)

The Constitutional Court has provided a roadmap for development in which existing rights and necessary reform, such as Section 4 of Section 25, the right to housing under Article 26, but also access to land, wealth and natural resources,

94 André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 1–2.

95 J. Nedelsky, Should property be constituionalised? A relational and comparative approach' in G.E. van Maanen and A.J. van der Walt, Property on the Threshold of the 21st Century (Antwerp: Intersentia, 1996) p. 417, C.H. Lewis, The right to private property in a new political dispensation in South Africa (1992) 8 South African Journal on Human Rights 398–430. See also Van der Walt, p. 2, note 2.

96 M. Chackalson, The property clause: Section 28 of the Constitution (1994) 10 South African Journal of Human Rights, p. 131–139, André van der Walt, Constitutional Property Clauses (The Hague: Kluwer Law International, 1999), p. 320–332. André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 3.

are balanced. In *Port Elizabeth Municipality v Various Occupiers* the Court explained:

> '23. In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.'[97]

The universality of the protection of ownership, shows from section 25 of the Constitution and although its definition is wider, land remains the most important source of protection. Section 25 now takes the supreme position in the South African legal order, which offers legislation, the South African common law and customary law as other sources of law. Traditionally, (existing) property rights are protected by the common law, and land reform is introduced by legislation. There is therefore inherent tension between the courts, who protect and develop the common law, and the legislature, that enacts legislation.[98]

For a while, therefore, there was fear that the next step would be a fight between the judiciary, corresponding to the conservative side of the debate mentioned above and the legislature, corresponding to the progressive side of the debate mentioned above. The Constitutional Court, however, was very clear about this matter. In Pharmaceutical Manufacturers it held that:

> 'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law derives its force from the Constitution and is subject to constitutional control.'[99]

This single system theory, in combination with the balancing test from *Port Elizabeth Municipality* guides the future development of South African land law. When courts are therefore confronted with a conflict between the need for reform and existing property rights, the constitution must provide an ans-

97 Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) at 23 per Sachs J.

98 André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 19–21.

99 Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa 2000 2 SA 674 (CC), at 44 per Chaskalson P.

wer.[100] That court must then, in conformity with Section 39(2) of the Constitution interpret legislation or develop the common law or customary law while promoting the spirit, purport and objects of the Bill of Rights.

With that unique composition as a single system South Africa takes a special place among the constitutional property law systems as legislation, past and future, common law, and customary law are to be interpreted in the light of the constitutional protection offered by, most importantly, Section 25.[101] Where there is special legislation that deals with a certain constitutionally guaranteed right, this legislation will take precedence over the Constitution or the common law.[102] Where legislation does not specifically deal with a matter, the South African common law remains in force.

The need to define property in the South African context therefore arose. In the common law, property law is the law of things, and the definition of property is as such therefore unknown.[103] In the Roman-Dutch law of South Africa, which forms the basis of the South African common law, objects of property rights are generally restricted to tangible objects such as movables (goods) and immovables (land).[104] The scope of the constitutional reach is understandably larger, as also signified by Section 25(4)(b) of the Constitution.[105]

Existing private-law property rights, that have been acquired before the new Constitutional order, can be subject to new regulation. Best examples of this are offered by water and mineral regulations that affect land owners, but also regula-

100 See the statement of Sachs J. in Port Elisabeth para 23 cited above. André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 21–22.

101 Other sections of the Constitution also offer protection such as section 26 on the right to housing and section 9 on equality on the basis of which private legal relations may be changed by courts. This is what André van der Walt has called the development algorithm of post-*apartheid* South Africa. See André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 23–24, 126.

102 But the legislation itself can be constitutionally challenged for being unconstitutional as well as failing to achieve the objective set out by the Constitution. See, André van der Walt, Normative pluralism and anarchy: Reflections on the 2007 term, 1 *Constitutional Court Review* (2008), p. 100–106, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 35–36.

103 See for example CG van der Merwe and MJ de Waal, The law of things and servitudes (Durban: Butterworths, 1993). See on this, André van der Walt, Constitutional Property Clauses (The Hague: Kluwer Law International, 1999), p. 351–353.

104 See P.J. Badenhorst, JM Pienaar and H. Mosterd, Silderberg & Schoeman's The law of property (5th edition, 2006), 2–3.

105 See for a discussion André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 113–122.

tion on land owners on selecting tenants.[106] Land owners who are affected by the new constitutional order and who previously discriminated on the grounds of race can no longer do so and cannot, as this restriction is very much justified, claim compensation for loss of property rights.[107]

In other situations, however, expropriations of property do lead to compensation under Section 25. Section 25 operates on a distinction between deprivation and expropriation. Deprivation, governed by section 25(1) is a lawful taking of the state in terms of a law of general application, in the public interest and without arbitrary application, which will not lead to compensation. Expropriation, governed by section 26(2) is a lawful taking of property, also not arbitrary, which does lead to a need for compensation.[108]

6. EU Economic Constitutional Law

The European Union (EU) is a special *sui generis* supranational international organisation.[109] Member States (originally 6, currently 28) have transferred sovereign powers to the EU level, that can legislate for the entire European Union.[110] In the EU there is an internal market in which there is freedom of movement of goods, persons, services and capital.[111]

Member States of the EU adhere to a social market economy (article 3 TEU) and seek to remove trade restrictions between these systems as much as possible. The Court of Justice of the European Union (CJEU)[112] has been the primary motor driving the development of these freedoms. In *Procureur du Roi v. Dassonville* the

106 See, *inter alia*, Water Services Act 108 (1997), National Water Act 36 (1998), Mineral and Petroleum Resources Development Act 28 (2002), The Promotion of Equality and Prevention of Unfair Discrimination Act 4 (2000). See, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 125.

107 This will be considered as a non arbitrary deprivation of property. See André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 125.

108 See, André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012) p. 121 *et seq* (deprivation), p. 179 *et seq* (expropriation), André van der Walt, Constitutional Property Clauses (The Hague: Kluwer Law International, 1999), p. 335–336.

109 See, on the history of the EU, Paul Craig and Grainne de Burca, EU Law. Text, Cases and Materials (Oxford: Oxford University Press, 2015), p. 1 *et seq*.

110 And beyond that as most EU legislation (see Article 234 TFEU) is also applicable in the European Economic Area (EEA) which includes Iceland, Norway and Liechtenstein. Also Switzerland regularly voluntarily adopts EU legislation.

111 See, on these four freedoms, Catherine Barnard, The Substantive Law of the EU (Oxford: Oxford University Press, 2016).

112 Also referred to as the European Court of Justice (ECJ).

CJEU developped a formula that serves as the basis for the Court's case law. It stated that:

> 'All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community [now intra-Union] trade are to be considered as measures having an effect equivalent to quantitative restrictions.'[113]

The term quantitative restrictions refers to measures of national law that relate to the free movement of goods, such as product standards, or labelling requirements, under Article 34 of the Treaty on the Functioning of the European Union (TFEU). These apply *mutatis mutandis* to the other freedoms as well.[114] The requirements on the application of EU internal market law to these matters has been further developed by the courts in respect to all freedoms. The decisive criterion is whether a measure of national law – which is EU terminology for any national legislative act or decision – hinders access to the market of a certain member state.[115]

When the CJEU finds a measure of national law in violation of EU law, the member state in question may offer grounds for justification, such as public policy and what are known as imperative requirements (such as consumer protection or internal coherence of the system).[116] These grounds will then be tested on proportionality, in which the court will assess whether this is the appropriate measure to achieve the aim pursued (necessity) and whether this type of measure is the best from an internal market perspective (suitability).[117]

Property law, especially land law, is sometimes held to be outside of the competences of the EU. Article 345 TFEU states that 'The Treaties shall not prejudice the rules of the Member States governing the system of ownership'. However, research shows that the meaning of this article is to be found in the area of EU Competition (anti-trust) law, rather than in the law of property.[118] The CJEU

113 Case 8/74, Procureur du Roi v Benoît and Gustave Dassonville [1974] ECR p 837.

114 On the effect of the free movement of goods in EU law on the law of property see Bram Akkermans and Eveline Ramaekers, Free Movement of Goods and Property Law, European Law Journal (2013), p. 237 *et seq*.

115 On market access as a criterion see Case C-110/05, Commission v Italy, [2009] ECR I-519.

116 Catherine Barnard, The Substantive Law of the EU (Oxford: Oxford University Press, 2016), p.145 *et seq*.

117 Case 261/81, Rau [1982] ECR 3961, para 12, Catherine Barnard, The Substantive Law of the EU (Oxford: Oxford University Press, 2016), p. 177 *et seq*.

118 Bram Akkermans and Eveline Ramaekers, Article 345 TFEU (Ex. Article 295 EC Treaty). It's Meanings and Interpretations, European Law Journal (2011), p. 292 *et seq*. See also, for a slightly different view, Fernando Losado Fraga *et al*, Property and European Integration: Dimensions of

seems to agree with this interpretation.[119] In fact, land and land ownership is of great importance in the EU arena. New member states often experience difficulties in this respect as their legal system traditionally prevents foreign ownership of land.[120] In the negotiations on the accession to land they often make arrangements to postpone the effects of the internal market on land ownership for a transition period. Some member states, such as Malta and Cyprus, restrict acquisition of land by foreigners due to their unique geographical circumstances.[121] Other member states, old and new, are fully subject to the Union *acquis* (formerly *acquis communautaire, i.e.* the body of law -legislation and case law- that has been achieved until the present state). This means that the four freedoms as well as EU competition law can have an effect on the national law of property of the Member States.[122]

In respect to land the freedom of movement of persons, services and capital is of increasing importance. This is perhaps best illustrated with the opinion of AG Geelhoed in the case *Reisch*. This case concerns the acquisition of land in Austria where acquisition of ownership, or better, registration of title in the land registry, was made conditional on making a declaration of first residence to the local administrative court. The CJEU deals with the question of conformity of these rules to the free movement of capital. AG Geelhoed states on the circumstances:

Article 345 TFEU, Tidskrift utgiven av Juridiska Föreningen i Finland 2012, pp. 148 *et seq*, available through https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012983.

119 See Case 182/83 Robert Fearon and Company Ltd v The Irish Land Commission [1984] ECR 3677, and Case C-367/98 Commission v Portugal [2002] ECR I-4731, Case C-483/99 Commission v France [2002] ECR I-4781, Case C-503/99 Commission v Belgium [2002] ECR I-4809 ('Golden Share Cases').

120 For example, Article 25(2) of the Polish Act of 12 November 1965 on Private International Law, amended by Act of 20 February 2004 on the amendments to the Act on the Acquisition of Immovable Property by Foreign persons, Article 13 of the Bulgarian Investment Encouragement Act, Article 1(1) of the Hungarian Act of 24 March 1920 on the Acquisition of Immovable property by Foreign persons.

121 See Report on the results of the negotiations on the accession of Cyprus, Malta, Hungary, Poland, the Slovak Republic, Latvia, Estonia, Lithuania, the Czech Republic and Slovenia to the European Union, prepared by the European Commission's departments, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/archives/pdf/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/negotiations_report_to_ep_en.pdf, p. 10, leading to Protocol No 6 and Protocol No 10 to the Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union AA (2003) final.

122 See, on this thesis in particular, Bram Akkermans, Property Law and the Internal Market, in Sjef van Erp, Arthur Salomons and Bram Akkermans (Eds.) The Future of European Property Law (München: Sellier European Law Publishers, 2012), p. 201 *et seq*.

> '31. A private individual acquiring a secondary residence may do so, firstly, with the aim of occupying it himself for part of the year. Activities relating to the free movement of persons will then be in issue: (the right of) residence in another Member State. Although secondary residences are usually occupied for only a limited period of the year, such occupancy none the less has something permanent about it. Furthermore, the occupancy of a secondary residence is relevant to the freedom to provide services. (...) The use of a secondary residence is bound to be accompanied by services provided for its private owner, for example, services connected with the residence itself, such as repairs, and services relating to tourist activities. Secondly, the private individual may not himself use the secondary residence he has acquired, but let it to others. He can then be regarded as a provider of services within the meaning of Article 50 EC. In a third, very common variant the secondary residence is intended for the owner's use for part of the year and is otherwise let to others. Fourthly, the immovable property may be acquired primarily as an investment or for speculative reasons. In such cases the emphasis is not on its use as a secondary residence but on the expected increase in the value of the land. The free movement of capital is then at issue....
> 35. Finally, regardless of how land is used, the legislation in all cases affects the free movement of payments and capital. It concerns payment and capital transactions connected with the financing of the acquisition. In this context it affects both the actual investment in immovable property and the financing of that investment. I would point out that these effects are not intended by the legislation, but they none the less occur.'

In other words, the applicability of the free movement of persons, services and capital to property law seems to flow almost naturally from the TFEU treaty. This is further illustrated by Article 50 TFEU which explicitly mentions the acquisition of land as an ancillary power under the freedom of establishment (free movement of persons). The Article states:

> '1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.
> 2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: (...)
> (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2)'.[123]

EU citizens deserve equal treatment to citizens in the host member state they wish to acquire property in. This is not a controversial statement and most property law systems operate on this basis. The private international law rule of *lex rei sitae* (sometimes also referred to as *lex situs*) determines that the national law applies

123 See on this analysis in particular Eveline Ramaekers, European Union Property Law (Antwerp: Intersentia, 2013), p. 83 *et seq*.

to those objects situated in the territory of the member state.[124] However, in an internal market context sometimes such application can still lead to (indirect) discrimination. In the case Reisch for example, requiring prior authorisation constituted a breach of the free movement of capital. In the case of Möllendorf, acquisition of land was prevented because one of the transferees had been placed on an anti-terrorism blacklist which required freezing of all his assets.[125]

Most recently, the Court has dealt with rules relating to preservation of flemish property in the area of Flanders (Dutch speaking part of Belgium) near to Brussels (mostly French and English speaking). The local law provided that access to social housing and acquisition of certain parts of land were restricted to those with a 'sufficient' connection to the land.[126] The case is significant for two reasons. First, it concerns the application of EU to acquisition of land, but also, second, it concerns a purely internal situation. The latter means that there is no external cross-border element to the case and hence EU internal market law generally does not apply. However, in this respect the Court, under implicit reference to the *Dassonville* case mentioned above, states:

> '34 It is common ground that the applicants in the main proceedings are Belgian nationals and that all aspects of the main proceedings are confined within one Member State. However, it is by no means inconceivable that individuals or undertakings established in Member States other than the Kingdom of Belgium have been or are interested in purchasing or leasing immovable property located in the target communes and are thus affected by the provisions of the Flemish Decree in question (see, to that effect, Case C–470/11 *Garkalns* [2012] ECR I-0000, paragraph 21 and the case-law cited).

The potential market-access-preventing effect is therefore sufficient for the CJEU to answer the matter and to apply EU internal market law in its full force. The result is a violation of EU by the Flemish government.

Moreover, there is also secondary EU law -i.e. legislation – that has an effect on land. There are four instruments that deserve a short discussion. First, there is the Regulation on the law applicable to cross-border succession and creating a European Certificate of Succession.[127] The Succession Regulation is the result of a

124 On Lex Rei Sitae see Bram Akkermans and Eveline Ramaekers, Lex Rei Sitae, in Bram Akkermans and Eveline Ramaekers (Eds.), Property Law Perspectives (Antwerp: Intersentia, 2012), p. 123 *et seq*.

125 Case C-117/06, Möllendorf and Möllendorf-Niehuus [2007] ECR I-8361.

126 See Joined Cases C-197/11 and C-203/11, Eric Libert and others v Flemish Government and others [2013] ECR-288.

127 Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforce-

long process in which the EU is slowly moving into the area of private international law. The result is, however, more than a mere conflicts of law regulation. It creates a European regime to deal with international succession cases in which a single legal system, by default or by conditional choice, applies to the entire estate. Hence, land located in other member states will fall under the scope of the Regulation. Even though the Regulation states it does not affect the property law systems of the member states, there are still some consequences that can be considered. For example, the result of foreign applicable law can be the need to recognise – and possibly transform – a foreign property right or the application of a different division of property entitlements under a trust relation. Member States may prevent the application of the Regulation by transforming foreign property rights into national law equivalents (Article 34) or by invoking public policy (*ordre public*, Article 39).[128]

Second there is the Directive on Unfair Commercial Practices (UCP).[129] This Directive explicitly includes land in its scope of application and hence any advertising or marketing in relation to land can be subject to the Directive, whose consequences can go very far.[130] Until now there is no case law of the European Court of Justice in relation to land under the UCP Directive.

Third, there is the Directive on Unfair Terms in Consumer Contracts.[131] This Directive is part of the EU's consumer *acquis*, the body of EU law that seeks to protect consumers and also applies to land. As a result any consumer purchase of

ment of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. See on these instruments, Bram Akkermans, Michael Milo and Vincent Sagaert, Chapter 10. Harmonisation, in Sjef van Erp and Bram Akkermans (Eds.), Text, Cases and Materials on Property Law (Ius Commune Casebooks for the Common Law of Europe; Volume 8; Oxford: Hart Publishing, 2012), p. 1053, Eveline Ramaekers, European Union Property Law (Antwerp: Intersentia, 2013), p. 137 *et seq*, Peter Sparkes, European Land Law (Oxford: Hart Publishing, 2007).

128 See on this Bram Akkermans, The European Development of European Union Property Law, in Christine Godt (Ed). Hanse Law School in Perspective – Legal Teaching and Cross Border Research after Lisbon (The Hague, Kluwer, 2011), 39, Andrea Bonomi and Patrick Wautelet, le droit européen des successions. Commentaire du Réglement (UE) n 650/2012 du 4 juillet 2012, 2nd edition (Brussels: Bruyland, 2016).

129 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

130 Case C-304/08 Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v. Plus Warenhandelsgesellshaft mbH [2010] ECR-12.

131 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

land in which standard terms are included that are unfair, are subject to control, and with that potential avoidance, of the Directive.[132]

Fourth, the final example is provided by the Doorstep Selling Directive.[133] This Directive explicitly excludes the application to the acquisition of land or the provision of immovable property security rights.[134] However, in a series of German cases the CJEU managed to apply the the Directive to property law indirectly using the EU principle of effectiveness (*effet utile*). This principle brings the obligations of Member States to provide the most efficient and effective application of EU law in their national legal orders. The cases concern linked contracts relating to investment in land with borrowed money guaranteed by a property security right. The transaction therefore concerned a contract of sale, a contract of acquisition of land and a contract for the providing of a property security right on the land.[135] The contracts had been sold in a door to door setting and because of (un)fortunate circumstances, the consumers had not been notified of the existence of their right of withdrawal from the contract under the Directive. The CJEU held the Directive applied to the contract of sale, but not to the other two contracts. However, in later case the Court held that the principle of effectiveness brings with it that national courts must provide effective application of EU law and hence withdrawing from the contract of sale should have effects on the contract of transfer and security.[136]

The rules of EU law that govern the EU's internal market are rules of European Economic Constitutional Law and have a significant effect on the property law of the member states. This 'negative' integration means that national legislatures

132 See, on this, Eveline Ramaekers, European Union Property Law (Antwerp: Intersentia, 2013), p. 155–156.

133 Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, now part of the Consumer Rights Directive 2011/83/EU.

134 See Bram Akkermans, The Role of the (D)CFR in the Making of European Property Law, in Vincent Sagaert, Evelyne Terryn and Matthias Storme (Eds.), The Draft Common Frame of Reference (DCFR): A National and Comparative Perspective (Antwerp: Intersentia, 2011), p. 263 *et seq*.

135 Case C-481/99 Heiniger v Bayerische Hypo- und Vereinsbank AG [2001] ECR I-9945, Case C-350/03 Elisabeth and Wolfgang Schulte v. Deutsche Bausparkasse Badenia [2005] ECR I-9215 and Case C-229/04 Crailsheimer Volksbank [2005] ECR I-9273. See Bram Akkermans, The European Development of European Union Property Law, in Christine Godt (Ed). Hanse Law School in Perspective – Legal Teaching and Cross Border Research after Lisbon (The Hague, Kluwer, 2011), p. 39 *et seq*., Eveline Ramaekers, European Union Property Law (Antwerp: Intersentia, 2013), p. 156–157.

136 See Case C-350/03 Elisabeth and Wolfgang Schulte v. Deutsche Bausparkasse Badenia [2005] ECR I-9215, Eveline Ramaekers, European Property Law (Antwerp: Intersentia, 2013), p. 156.

are bound by the context of the European economic constitutional order when they legislate.[137] Second, the EU also enjoys legislative power itself in the area of property law, as shown by, for instance, the Succession Regulation that was already discussed, but also by pending initiatives on matrimonial property law (Rome III and IV), Euro-mortgage and matters of circulation of authentic instruments.[138]

Finally, the powers of the EU go beyond the economic level. Since the Treaty of Nice in 2002, there is a Charter of Fundamental Rights. Previously non-binding, since the Treaty of Lisbon in 2009, the Charter is part of the binding parts of the EU Treaties.[139] In close cooperation with the European Convention on Human Rights (ECHR) discussed above, the EU Charter offers a similar catalogue of fundamental rights to protect citizens against EU (instead of state) interference. Article 17 of the Charter contains a provision similar to Article 1 of the First Protocol to the ECHR:

> Article 17. Right to property
>
> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
>
> 2. Intellectual property shall be protected.

There have not been many cases dealing with article 17 of the Charter, but the CJEU has stated it does not consider the right to property as an absolute right and limitations must be accepted.[140] The general interest requirement is interpreted in

137 See, on this, Case 182/83 Robert Fearon and Company Ltd v The Irish Land Commission [1984] ECR 3677, and Case C-367/98 Commission v Portugal [2002] ECR I-4731, Case C-483/99 Commission v France [2002] ECR I-4781, Case C-503/99 Commission v Belgium [2002] ECR I-4809 ('Golden Share Cases').

138 See Sjef van Erp and Bram Akkermans, Public or Private Harmonisation of the EU Mortgage Market, Zeitschrift für Europäisches Privatrecht (ZEuP) (2013), p. 43 *et seq*, Bram Akkermans, Michael Milo and Vincent Sagaert, Chapter 10. Harmonisation, in Sjef van Erp and Bram Akkermans (Eds.), Text, Cases and Materials on Property Law (Ius Commune Casebooks for the Common Law of Europe; Volume 8; Oxford: Hart Publishing, 2012), p. 1047.

139 On the development of the EU Charter on Fundamental Rights see Paul Craig and Grainne de Burca, EU Law. Text, Cases and Materials (Oxford: Oxford University Press, 2015), Chapter 11.

140 See, most notably, Case C-544/10 Deutsches Weintor e.G. v Land Rheinland-Pfalz [2012] not yet reported, para 54, Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, para 65, 68.

the light of the interest of the European Union and is tested for proportionality. The right to property, as a right recognised by the ECHR, is itself a general principle of EU law and hence is to be actively protected by the EU and its member states.[141] So even when under national law the right to property would not be protected, EU member states could still be confronted with the obligation to protect property rights, including intellectual property rights, as a principle of EU law.

7. Indigenous or Native Title

A final aspect of constitutional property law concerns the recognition of indigenous title. Indigenous, or native title, refers to the recognition of property rights of native population that occupied land prior to colonisation or taking of the land by western legal systems. These includes native-Americans in the United States of America, Aboriginals in Australia and tribes such as the Richtersveld Community in South Africa. Increasingly, there is pressure on the recognition of rights of these original occupiers of land, to provide fair and just entitlement, but also as a means of redistributive justice.

The subject of indigenous title is controversial and highly complicated as it generally means a recognition of a status in property law that is not awarded by the general system of private law. Alternatively, it brings the application of the system of property law to a historical situation resulting of loss of rights of current property right holders, with complex questions of compensation for the deprivation, or expropriation, of land.

Since the mid-1990s there has been a public pressure on the recognition of some property status for groups of indigenous people. The conflict with property rights recognised by the existing system of private law is obvious. Solutions are therefore not necessarily found in the expropriation of the current property right holders for the benefit of the indigenous people claiming their rights, but rather in the recognition of a different form of property and possibly compensation for the loss of land in the past.

In the United States, for example, land can be held in fee simple (see below under 3) and be reserved from Federal law, or can be held in a special form (trust status). Reserved land means that the title to the land was reserved in the transfer

141 See joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, para 65 *et seq*.

of land to the federal level.[142] Trust status concerns tribal title and is divided into three parts.[143] Original indian title (or aboriginal title) refers to land that was originally possessed by a tribe or a tribal member, but is not recognised by federal law or federal statue, recognised title, which is a title recognised by a treaty between the Indian tribe and the US, or by stature, and restricted trust allotments, which is property held by individual members of a tribe.[144]

Moreover, even when the land is then partly awarded to a Indian tribe, the control of the land is still an issue as others may hold statutory or common law rights to the same land as well.[145] As the title does not confer exclusive possession, it is possible that native title is recognised on a public space, as well as become in conflict with other property rights, such as mining rights or developing rights.[146]

Similarly in Australia, which is a former English colony, struggles have arisen to deal with native title. In 1889 the Privy Council held that Australian territory was *terra nullius* and hence no previous rights existed.[147] When this would have been the case, the common law foresees a doctrine of aboriginal title, which recognises entitlement to land of the population prior to colonisation.[148] The doctrine remained confirmed, especially in relation to aboriginals living on the land prior to the English occupation.[149] As public pressure increased the High Court of Australia delivered two decisions in the Mabo dispute.[150] The case concerned members of the Meriam people, who refused to

142 And hence the origin of the term reservation, see Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 757–758.

143 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 758–759.

144 Joseph Singer *et al*, Property Law: Rules, Policies and Practices, 7th edition (The Hague: Wolters Kluwer, 2012), p. 758, 759–763 (original title), 763–764 (restricted title), 764–766 (individual title).

145 See, for example, on sacred lands, Marcia Yablon, Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land, 113 Yale Law Journal (2004) 1623.

146 Marcia Yablon, Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religeous Claims on Public Land, 113 Yale Law Journal (2004) 1623–1627.

147 Cooper v Stuart [1889] 1 Legge 39 (NSWESC), at 45 per lord Watson.

148 See, Joseph Singer, Well Settled?: The increasing weight of history in American Indian land claims, 28 Geogria Law Review 481 (1993), p. 482 *et seq.*, Sean Brennan, Native Title and the 'Acquisition of Property' under the Australian Constitution, 28 Melbourne University Law Review 28 (2004).

149 Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141 (NTSC), at 244 per Blackburn J.

150 See Robert French and Patricia Lane, The Common Law of Native Title in Australia, Oxford University Commonwealth Law Journal (2002), 15, p. 16–21.

accept rights granted to them under Queensland legislation.[151] In its first Mabo (no 1) decision the High Court held that refusing native title, if existing, would be discriminatory.[152] Whether or not native title existed for the Meriam people was the subject of the High Court's decision in Mabo (no 2). In that case the High Court overruled the case confirming the *res nullius* doctrine and recognised native title for the Meriam people.[153] With that decision the English colonisation of Australia did not destroy rights prior held by Aboriginal or other indigenous tribes and their title will be recognised by the common law of Australia.[154] This title is communal in character and cannot be held by individual members, cannot be bought or sold, but can be transferred to another group under traditional law and custom.[155]

Other groups can therefore attempt to have their native title recognised. For that they must show a continuing connection with the land and rights and interests in the land under traditional law and custom, as well as to continue to observe laws and customs which define ownership of the rights.[156]

In South Africa the Constitution is the supreme law of the land. Under the single system theory as introduced by the South African Constitutional Court in *Port Elisabeth Municipality* (see above) also customary law receives its right of existence from the Constitution. The landmark decision of *Alexkor Limited, The Government of the Republic of South Africa v The Richtersveld Community and Others* is illustrative in this respect.[157] The case concerned a mining company (Alexkor Ltd.) wanted to mine for diamonds in the Richtersveld area -on land that it owned- to which the inhabitants claimed native title. The Richtersveld Community had claimed the restitution of land under the Restitution of Land Rights Act 22 of 1994, which had been refused.

The Supreme Court of Appeal, that dealt with the case before the Constitutional Court did, held that the Richtersveld Community had held the land in exclusive possession prior to the British annexation in 1847, and that these

151 The case concerns the Queensland Amendment Act 1982.

152 Discriminatory under the Racial Discrimination Act 1975. Mabo v Queensland (No 1) (1989) 166 CLR 186 (HCA) 218.

153 Mabo v Queensland (No 2) (1992) 175 CLR 1 (HCA).

154 Robert French and Patricia Lane, The Common Law of Native Title in Australia, Oxford University Commonwealth Law Journal (2002), 15, p. 23.

155 Mabo v Queensland (No 2) (1992) 175 CLR 1 (HCA), at 52–60 per Brennan J.

156 Mabo v Queensland (No 2) (1992) 175 CLR 1 (HCA), at 59 per Brannen J., Robert French and Patricia Lane, The Common Law of Native Title in Australia, Oxford University Commonwealth Law Journal (2002), 15, p. 23.

157 Alexkor Ltd., The Government of the Republic of South Africa v The Richtersveld Community and others [2003] ZACC 18 (CC), 2004 (5) SA 460 (CC).

constituted a 'customary law interest' as defined under the Restitution of Land Act 22 of 1994.[158] It did not, as the Supreme Court of Appeal stated resemble common law ownership, but rather is a right on its own to be determined by customary law.[159] Under reference to a Privy Council decision in Oyeka and Others v Adele, the Constitutional Court held that the native title survived the British annexation.[160] As a result, the Richtersveld Community had been wrongfully and discriminatorily removed from the land under the *apartheid* regime and was entitled to a restitution of land and therefore native title to the land under the Restitution of Land Act 22 of 1994.[161]

8. Conclusion

To deal with property law – especially relating to land – in the 21st century is therefore dealing with the intersection between public and private law. In the form of constitutional law, i.e. the organisational scheme of any state, private property rights are enshrined as well as protected against state influence.[162] A constitutional property law clause generally comprises three parts: it creates or recognises a fundamental property right (i), it creates or recognises the possibility for the state to take that property right for purposes of public use (ii), and it creates a general duty for the state to offer compensation in such case (iii).[163]

158 Richtersveld Community and Others v Alexkor Ltd and Another 2003 (6) BCLR 583 (SCA), at 111. Alexkor v Richtersveld Community and Others [2003] (5) SA 460 (CC) at 9.

159 Alexkor v Richtersveld Community and Others [2003] (5) SA 460 (CC) at 48–52.

160 Oyekan and Others v Adele [1957] 2 ALL ER 785, Alexkor v Richtersveld Community and Others [2003] (5) SA 460 (CC) at 69.

161 Alexkor v Richtersveld Community and Others [2003] (5) SA 460 (CC) at 97–101. On 17 April 2007 a settlement was reached between the Richtersveld Community, Alexkor Ltd. and the South African Government that reinstated ownership of the land in the Richtersveld Community, provided for compensation for the diamonds previously extracted from the land and the creation of a joint venture mining operation for the future. See http://www.dfa.gov.za/docs/2007/cabinet0808.html.

162 There remains a strong debate on whether property rights, the right of ownership most notably, is a pre-social right and hence not created by a legal system but a pre-existing right. See on this Richard Epstein, Private Property and the Power of Eminent Domain (Harvard: Harvard University Press, 1985) (defending a libertarian view of property rights as natural rights) and André van der Walt, Property and Constitution (Pretoria: Pretoria University Press, 2012), p. 19 (describing the South African view that property is not a pre-social right but a right created and limited by the Constitution).

163 See on this, Gregory Alexander The global debate over constitutional property: Lessons for American takings jurisprudence (Chicago: University of Chicago Press, 2006), p. 6–7.

In some jurisdictions the field of constitutional property law does not go beyond the public law discussion of state interference with property rights. However, in some jurisdictions, the constitution provides a context that must be taken into account when dealing with private law property rights. Finally, there are some jurisdictions in which the legal systems is a single system and hence the constitution provides guidance and limitations on the development of future property law as well as the treatment of currently existing property rights. Especially under the second (influence) and third model (single system), private law property law cannot be considered without setting the constitutional context first. Increasingly, as this contribution sought to show, this approach is gaining ground amongst property lawyers.[164] Moreover, in some areas, most notably in the European Union, the influence of EU law breaks traditional boundaries between these three models. EU law has direct effect and takes precedence over national law. Hence, although at a national level constitutional influence may be rejected, through the workings of EU law, the effect of the EU economic constitutional law becomes rather direct.[165] Moreover, as a principle of EU law, certainly combined with the principle of sincere cooperation of Article 4(3) TEU, Member States must ensure active and effective protection.

Increasingly, the effect of the constitutional order is such that, although significant differences exist – not so much in relation to the type of interest that is protected, but rather in how and when protection is necessary – the constitutional dimension of property law (especially in relation to land) must be considered in combination with private law property law to get a full overview.[166] All property lawyers, including those that write the private law handbooks referred to in the introduction to this contribution, should take notice of this.[167]

Acknowledgement: The author wishes to thank ms. Viivi Varakas for her research assistance and the anonymous reviewer for excellent and constructive comments and feedback on an earlier version of this contribution.

164 See, recently, for example, Björn Hoops, The Legitimate Expectation of Expropriation: A Comparative Law and Governance Analysis by the Example of Third-Party Transfers for Economic Development (Cape Town: Juta Law Publishers, 2017).

165 See, for an analysis of this in the single system model Bram Akkermans, EU Constitutional Property Law: Searching for Foundations for the Allocation of Regulatory Competences, in Bram Akkermans *et al* (Eds.), Who Does What? On the allocation of regulatory competences in European private law (Antwerp: Intersentia, 2015), p. 177 *et seq*.

166 See on this, Gregory Alexander The global debate over constitutional property: Lessons for American takings jurisprudence (Chicago: University of Chicago Press, 2006) 139.

167 See the references mentioned in note 4 as a representative sample.