WHAT IS PROPERTY?

Now that we have considered the various pre-legal theories of property distribution, we should consider what, legally speaking, property actually is.

At the outset, you should put out of your mind the idea of property as a "thing" or a set of "things". While it is true that of property law is as branch of the law of "things", concentrating on the "thing" itself can be misleading. Property law is actually about the relationship between persons and things. In order words, it is about how we describe the interests people hold in things – and the extent to which those interests are granted legal protection. South African law is made up of a number of different sources – each emphasising a different account of the relationship between persons and things.

The Common Law

Dominium, Real Rights and Personal Rights

Prior to the adoption of the Constitution, "property", in the strict sense, simply referred to those interests recognised and protected by the common law. "Property", in the strict sense, was a "real" interest or "right" in a thing. At the very heart of the idea of property, was the concept of "dominium".

The concept of "dominium" connotes an unfettered interest in a thing. It comes from the Latin "*dominus*" or "master". Complete dominium in a thing is total power over it - to do with or use a thing as one wishes. It is no accident that the concept of "dominium" comes from the Romans, who were very good at going out and establishing control or "dominium" over things (usually by conquest of other lands

and the people in them). It is a fair assumption that with the establishment of Roman rule came a transformation of the way in which conquered societies understood property. The concept of “dominium” as control was hardwired into the way Roman law treated property (even where that property was a person).

The idea of a propertied interest being a level of control over a thing is replicated in our common law. The common law is essentially a hierarchy of control. At the top sits the perfect “real” right of ownership: complete control over a thing. The further down the hierarchy one goes, the weaker or more limited one’s control becomes. But so long as the form of control remains attached directly to the thing – as long as it is a derivative of “dominium” over the thing – it remains a “real” right.

This idea, that property rights and interests really consist in levels of legally recognised control or dominance over things, is embodied in our earliest authorities. For example, in **Ex Parte Geldenhuys 1926 OPD 155 at 164**, De Villiers JP, relying on earlier authority to this effect, defined a real interest or right in property as something which constitutes a “*subtraction from the dominium*” over a thing. In that case, the right concerned was a right to claim that land owned in undivided shares be subdivided under certain conditions.

On one level then, we can say that the common law defines property as a legally recognised interest which entitles a person to a level of control over a thing. If this kind of interest bears directly on the property itself, then it is a “real” right.

It is also accepted that the common law of property is concerned, to some limited extent, with “personal” rights, which do not themselves constitute a direct interest in property (or a subtraction from dominium over it). “Personal” rights create obligations

binding on other people. They are relevant to property law when they are rights against other people requiring them to deal in a certain way with property, or are otherwise concerned with property transactions. This, too, is recognised in **Ex Parte Geldenhuys**.

This distinction, between real and personal rights in property, is fundamental to the common law. We will return to it, and to the law developed in **Ex Parte Geldenhuys**, in later lectures.

At present, however, you need only remember the conceptual core of the common law – *dominium*, title or control over a thing.

Customary Law

Customary law rights differ markedly from common law rights. Instead of the idea of *dominium*, or control, customary land law emphasises the idea of *use*. This can be seen most clearly and conveniently from the Interim Protection of Informal Land Rights Act 31 of 1996 ("IPILRA"). IPILRA was enacted, in the main, to provide temporary statutory recognition to customary law interests in land until customary land law could be codified in a permanent statute. That statute has yet to be passed (an initial attempt, in the form of the Communal Land Rights Act, 2004 was recently struck down by the Constitutional Court). Entitlements arising out of customary law are recognised as "informal" rights to land -

(iii) "informal right to land" means-
- **(a) the use of, occupation of, or access to land in terms of-**
  - **(i) any tribal, customary or indigenous law or practice Of a tribe;**
  - **(ii) the custom, usage or administrative practice in a particular area or community . . ."**

Section 2 of IPILRA provides that a holder of an informal land right cannot be deprived of it unless they consent, are expropriated or the deprivation is permitted by the "custom or usage of a community". Even in the case of a "customary" deprivation, compensation is payable.

IPILRA is a crass and clumsy attempt to codify a vast range of different customs and practices in relation to land in South Africa. We will discuss customary land law in more detail later in the course.

At present, however, notice that the work done by "dominium" and "control" in the common law, is taken over by ideas of "use" and "community". One does not "own" land at customary law, one uses it according to practices established by a local community. Under IPILRA, one's right to it is dependent on, and revocable by, a broader community of people with customary interests.

Statute

Property rights are also, on occasion, created by statute. For example, there are a series of more exotic statutory entitlements which have been created to give effect to Constitutional rights.

The Extension of Security of Tenure Act 62 of 1997 ("ESTA") protects rights of occupation for people who live on land belonging to another person outside proclaimed townships (Section 2 (1)) who at any time after 4 February 1997 had consent to reside on that land (Section 1). "Consent" can take many forms, including tacit consent. A person residing on property belonging to another in terms of ESTA for more than a year is presumed to do so with knowledge of the owner or person in charge (section 3 (5)).

An occupier in terms of ESTA has the right to remain on land unless the right is terminated in a manner that is "just and equitable" (section 8 (1)). Where an occupier is over 60 and has resided on the land for more than 10 years, they have a virtually permanent right to remain on the land, unless they commit a particularly serious act of nuisance or seriously breach an agreement in terms of which they occupy the land.

The **Prevention of Illegal Eviction from, and Unlawful Occupation of Land, Act 19 of 1998** ("PIE") also creates statutory rights. An "unlawful occupier" – i.e. an occupier who lives on another person's land without their consent any other right in law may nonetheless remain on the land if to evict them would not be "just and equitable". It was recognised by the Constitutional Court in **City of Johannesburg v Blue Moonlight Properties [2011] ZACC 31** that this constituted a deprivation of common law ownership rights, but one which nevertheless was authorised by statute and the Constitution (see paras 34 to 38).

The Constitution

The property rights set out above spring from fundamentally different sources – but they are all part of the study of property law.

There is yet another angle. "Property" is also a range of interests which are protected by section 25 of the Constitution. Property for the purposes of the Constitution is a broad and open-ended concept. It encompasses all of the rights set out above. It will be defined and expanded case by case as the courts consider what sort of interests fall within the protection of the property clause.

We will soon be looking at the property clause in some detail, but in ***First National Bank of SA t/a Wesbank v Commissioner, SARS*** **2002 (4) SA 768 (CC)** the Constitutional Court said that it was "practically impossible" to embark upon a comprehensive definition of "property" (but it did hold that ownership of a corporeal moveable must lie "at the very heart" of the constitutional definition of property (para 51)).

The Constitutional protection of property opens up a range of other possibilities for what might count as legally protected property. In this respect, Andre van der Walt discusses a range of possibilities, which go beyond those set out above. These are -

1. **The "easy" cases**

These examples are based on the ordinarily accepted common law rights. They include:

- Real rights in land including permanent attachments to it;
- Real rights to corporeal (tangible) moveable property.

2. **Intangible property**

- Personal rights in land (contractual rights to use land – e.g. a lease – although some people consider leases to be limited real rights)
- Personal rights in moveable property (a lease of a car or the right to use a car in terms of an instalment sale agreement, even though ownership has not passed).

- Rights in immaterial property (copyright, patents, trademarks, confidential commercial information etc).
- Commercial rights based on contract – debts, claims, shares in a company.

3. The "New" Property

- Welfare claims against the state not based on contract (pensions, benefits, medical benefits, subsidies) – but only where these are acquired through one's own efforts and are not gratuitous.
- Licences, permits, quotes issued by the state - where they have some ascertainable value and where the right is vested.
- Other rights against the state based on legislation (land and water use rights etc.).

See Van der Walt, Constitutional Property Law