

AJ van der Walt 'The continued relevance of servitude'

Article to be submitted to a law journal for publication

Draft 1: 1 May 2013

21 438 words

49 pages (28 print)

The continued relevance of servitude¹

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1 Introduction

When I announced my intention to write a book on servitudes, colleagues from different theoretical backgrounds responded in roughly the same vein: ‘Given the social and legal problems we are facing, aren’t there more important and challenging topics more deserving of our limited research time and resources?’ This response should not surprise us. On the face of it, at least in South Africa, the law of servitudes is an innocuous-looking backwater of private law, often perceived as the battle ground where rich, white farm owners settle long-standing personal feuds with family members and neighbours. As such, it does not appear to have much relevance or interest for the development of current property law in a volatile context

¹ This article is dedicated to the memory of Robert Feenstra (5 October 1920 – 2 March 2013). It is an extended version of a paper presented as a guest lecture at the University of Luxembourg on 7 May 2013 and as a discussion paper at the annual meeting of the Progressive Property group in New Orleans on 11 May 2013. It was written in the same time and overlaps in part with sections of the first two chapters of AJ van der Walt *The law of servitudes* (Juta Law, forthcoming 2014 in the series *Juta’s Property Law Library*). Thanks to Lizette Grobler and Norman Raphulu of the South African Research Chair in Property Law for excellent research assistance.

² The South African Research Chair in Property Law is funded by the Department of Science and Technology, administered by the National Research Foundation and hosted by Stellenbosch University.

of large-scale social, economic and legal transformation. An overview of recent South African case law³ and academic literature⁴ strengthens the impression that servitude law is a largely settled and uncontroversial area of the common law⁵ that elicits little controversy. With the notable exception of one decision on *habitatio*,⁶ even the novel questions arising from recent case law attracted relatively little academic attention. One explanation for this lack of academic interest might be that the issues in servitude cases, novel though they sometimes are, are uncontroversial

³ A fair number of cases on servitudes has been reported since 2006, some dealing with issues that are known in the academic literature but not often encountered in the law reports, such as acquisition of a servitude through prescription (*Joles Eiendom (Pty) Ltd v Kruger and Another* 2007 (5) SA 222 (C); *Kruger v Joles Eiendom (Pty) Ltd and Another* 2009 (3) SA 5 (SCA); *Buckland v Manga* [2008] 2 All SA 177 (E); *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA)) and the right of way of necessity (*English v C J M Harmse Investments CC* 2007 (3) SA 415 (N); *Aventura Ltd v Jackson NO* 2007 (5) SA 497 (SCA)); others dealing with novel doctrinal questions, such as whether a specified servitude of right of way can be relocated unilaterally (*Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA)) and whether demolition of the building results in termination of a personal servitude of *habitatio* (*Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP)).

⁴ The only modern book dedicated entirely to servitudes in South African law was last updated in 1973: CG Hall & EA Kellaway *Servitudes* 3 ed (1973). Of the two major general academic texts on modern South African property law, CG van der Merwe *Sakereg* 2 ed (1989) has the longer chapter on servitudes (93 pp), but the latest edition is from 1989. The relevant section in the more recent PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) is much shorter (21 pp). Since 2006 (date of the most recent edition of an academic text on property law, PJ Badenhorst *et al* above, and of first publication of the electronic update series *Juta's Quarterly Review*) the major domestic law journals published just five full-length articles on servitude: JC Sonnekus 'Erfdiensbaarhede en die uitoefening daarvan *civillier modo*' (2007) 70 *THRHR* 351-370; JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257; JL Neels 'Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Uitoefening van 'n saaklike serwituut afhanklik van 'n positiewe dadigheid deur die eienaar of gebruiker van die dienende erf' 2009 *TSAR* 660-673; JL Neels 'Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoeftte van die heersende erf en geskiktheid van die dienende erf (deel 1)' 2010 *TSAR* 73-85; JL Neels 'Ewigdurende oorsaak. Die *perpetua causa*-vereiste by erfdiensbaarhede: Behoeftte van die heersende erf en geskiktheid van die dienende erf (deel 2)' 2010 *TSAR* 331-345; JC Sonnekus 'Verryking van die eienaar by nie-uitoefening van *habitatio* en versorgingsverpligtinge jeens eie ouer as bewoningsreghebbende' (2010) 21 *Stell LR* 26-44.

⁵ In South African law the term 'common law' refers mainly to the uncodified Roman-Dutch law that still forms an important part of private law. South African law does include significant elements of English law and it is therefore regarded as a mixed legal system; see R Zimmermann & D Visser 'Introduction: South African law as a mixed legal system' in R Zimmermann & D Visser *Southern cross: Civil law and common law in South Africa* (1996) 1-30.

⁶ The exception is *Kidson v Jimspeed Enterprises CC* 2009 (5) SA 246 (GNP), which attracted three fairly extensive (and in part disagreeing) case notes: JC Sonnekus 'Bewoningsreg (*habitatio*) – Verval dit weens versteuring (vernietiging) van die bouwerk?' 2009 *TSAR* 450-469; CG van der Merwe 'Extinction of personal servitude of *habitatio*' (2010) 73 *THRHR* 657-665; J Scott 'Effect of the destruction of a dwelling on the personal servitude of *habitatio*' (2011) 74 *THRHR* 155-169.

because they can be solved by ‘normal’ application or, at worst, judicial development of the common law.

The general impression that servitude law is uncontroversial in current South African law finds further support in an authoritative legal definition of ‘servitude’ with reference to the Latin *servitus*, from *servire*, ‘to serve’ – the word usefully indicates the way in which one piece of land (servient tenement) characteristically serves the use of another (dominant tenement).⁷ However, a different perspective emerges from the more general definition of ‘servitude’ with reference to the Latin *servus*, for ‘slave’. The *South African concise Oxford English dictionary* defines ‘servitude’ with reference to both meanings:

‘1. The state of being a slave or completely subject to someone more powerful. 2. (South African law) the subjection of property to an easement. Origin Middle English via old French from Latin *servitudo*, from *servus* “slave”.’⁸

In the same vein, the *Shorter Oxford English dictionary* gives five meanings for ‘servitude’, the first four of which relate to the status of slaves, servants, apprentices and persons subjected to forced labour.⁹

⁷ CG van der Merwe *Sakereg* 2 ed (1989) 458 fn 2.

⁸ C Soanes & A Stevenson (eds) *South African concise Oxford English dictionary* 11 rev ed (2006) s v ‘servitude’. HW Fowler & FW Fowler *Concise Oxford dictionary of current English* 8 ed RE Allen (ed) (1990) s v ‘servitude’ provides a similar double meaning: ‘1 slavery. 2 subjection (esp. involuntary); bondage. 3 Law the subjection of property to an easement.’ I assume that CM Rose ‘Servitudes, security, and assent: Some comments on Professors French and Reichman’ (1982) 55 *S Cal LR* 1403-1416 1403 has the same double meaning in mind when she says that ‘[e]ven the name, ‘servitude’, which Professors Reichman and French prefer to use in their excellent articles, has a slight ring of involuntarism’ (referring to SF French ‘Toward a modern law of servitudes: Reweaving the ancient strands’ (1982) 55 *S Cal LR* 1261-1319; U Reichman ‘Toward a unified concept of servitudes’ (1982) 55 *S Cal LR* 1177-1265). Compare B Rudden ‘Economic theory v property law: The *numerus clausus* problem’ in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 250: ‘[When tenurial obligations were abolished by the Massachusetts Body of Liberties of 1641 and the English in 1660] ... the word “servitude” covers both slavery and easements’; GS Alexander ‘Freedom, coercion, and the law of servitudes’ (1988) 78 *Cornell LR* 883-970 889: ‘Indeed the term “servitude” embarrasses a property regime committed to the autonomy of private owners’, citing Rose.

⁹ W Little, HW Fowler & J Coulson, rev & ed by CT Onions *Shorter Oxford English dictionary on historical principles* 3 ed rev by GWS Friedrichsen vol II (1973) s v ‘servitude’.

This double definition is a reminder of the fact that the notion of servitude shares a history, at least etymologically but also socially and politically, with the social institutions of slavery, serfdom and forced labour. Historically, the clearest link between servitude law and the social institution of serfdom is feudal law. Akkermans points out that the drafters of the French Civil Code initially avoided the term 'servitude' for the very reason of its association with feudalism, relenting only later when they realised that it also had an underlying Roman tradition that was unrelated to feudalism.¹⁰ The French law reformers' initial reaction against the term 'servitude' indicates that the historical rejection of feudalism included a strong bias, to be continued in post-feudal property law, against the denial of individual autonomy and liberty represented by personal servitude or serfdom.

Is it therefore possible that the image of modern servitude law as a settled and uncontroversial part of private law is just an illusion, a superficial impression that hides from view another, possibly more complex and contested image of human relationships? Is the image we have of servitude law perhaps a palimpsest, a replacement text written on a previously used manuscript from which the original writing had been scraped off or rubbed out?¹¹ In either case the double meaning of the word 'servitude' seems to offer sufficient reason for having another look at the modern law of servitudes, not because we should expect to find hidden traces of slavery and forced labour but because we should be intrigued by the process of rubbing out one text and replacing it with another. First of all, what was the reason for the metaphorical scarcity of parchment in this particular instance, inspiring our

¹⁰ B Akkermans *The principle of numerus clausus in European property law* (2008) 118.

¹¹ See W Little, HW Fowler & J Coulson, rev & ed by CT Onions *Shorter Oxford English dictionary on historical principles* 3 ed rev by GWS Friedrichsen vol II (1973) s v 'palimpsest': '2. A parchment, etc., which has been written upon twice, the original writing having been rubbed out 1825'.

legal predecessors to erase a pre-existing text from an older, used writing surface before writing down their replacement? Secondly, what was lost by the act of erasing the original, and what gained by the writing down of the replacement? Finally, is it possible that the underlying text was imperfectly rubbed out in places, that faint traces of it still show through the overlay in places and if so, how does it complicate the image we perceive? In what follows I argue that closer inspection of servitude law reveals not one but several layers of overlapping text.

2 The anti-fragmentation narrative

Judging from the modern literature, a significant link between personal servitude and servitudes in property is to be found in the history of the abolition of feudalism.¹²

According to an apparently authoritative version of this history in modern property

¹² The feudal system was abolished from French law by the Decree of the newly elected National Assembly of 11 August 1789 and remaining feudal rights were abolished by the Decree of 17 July 1793; see further B Akkermans *The principle of numerus clausus in European property law* (2008) 68-69, 73-74. Compare S van Erp 'A numerus quasi-clausus of property rights as a constitutive element of future European property law?' in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52 text accompanying fn 6-10; V Sagaert 'Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law' in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 120-122; BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 12. Feudalism was abolished in the Netherlands with the Constitution of the Batavian Republic of 12 June 1798 and, more decisively, with the introduction of the Code Napoleon (Wetboek Napoleon ingerigt voor het Koninkrijk Holland) in 1809 and the French Code Civil in 1811; see WJ Zwolve *Hoofdstukken uit de geschiedenis van het Europese privaatrecht: Inleiding en zakenrecht* (2003) 50. In Germany, the emancipation of serfs began with Schleswig-Holstein in 1780, continuing with Prussia in 1807, followed (and copied) by most other German states from 1815: E Sagarra *A social history of Germany* (1977) 339-344. In England and Wales, serfdom was obsolete by the 16th century: JA Cannon 'Serfdom' in JA Cannon (ed) *The Oxford companion to British history* (2002) 852, but the feudal character of land law persisted until it was abolished by the Law of Property Act 1925 and more recently the Land Registration Act 2002 (repealing the Land Registration Act 1925). In Scotland, serfdom disappeared by the 14th century, although heritable jurisdictions survived until 1747: JA Cannon 'Serfdom' in JA Cannon (ed) *The Oxford companion to British history* (2002) 852. Land law in Scotland retained feudal features that were removed by dedicated legislation, particularly the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, the major part of which came into force on 28 November 2004; see KGC Reid *The abolition of feudal tenure in Scotland* (2003) 6-7; KGC Reid 'Modernising land burdens: The new law in Scotland' in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-108 67-68.

law texts, the abolition of feudalism not only liberated land law from the crippling effects of hopelessly fragmented land rights by restoring the unity and absoluteness of ownership¹³ and the certainty and usefulness of land rights, but also liberated serfs and land users from the social and political oppression of feudal relationships. According to this grand narrative, the historical development of property law should indeed be seen as a process by which an original text (feudalism, which described servitude or serfdom of people in terms of social oppression and exploitation) was deliberately rubbed out and covered by a new text (modern law, which describes servitude of property as part of a system of rights that secure the post-revolutionary ideals of liberty and equality). In social and political terms, this historical development is a move away from serfdom and oppression towards liberty and autonomy. In property law terms, it is a move away from a proliferation of fragmented land rights towards unified and absolute ownership. In this narrative, the anti-fragmentation restrictions that characterise modern property law – and that largely define modern servitude law – are guarantors of liberty and autonomy, modern bulwarks against a slide back into feudalism and oppression.

In feudal law, property rights were inextricably entwined with legal, political and social obligations which, for the vassals at the bottom of the feudal chain of power and privilege, translated into a debilitating lack of personal autonomy and subjection to potentially ruinous personal obligations.¹⁴ According to the mainstream

¹³ In this context, 'absoluteness' does not refer to the question whether the owner's use entitlements are inherently restricted; ownership (and with it the other real rights) is absolute to the extent that it is enforceable *erga omnes*, which is only possible if ownership is a unitary right.

¹⁴ S van Erp 'A numerus quasi-clausus of property rights as a constitutive element of future European property law?' in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52 text accompanying fn 6, citing RC van Caenegem *An historical introduction to private law* (1992) 20; DM Walker *The Oxford companion to law* (1980) s v 'Feudalism'; JHM van Erp 'Via open normen naar Europees goederenrecht' in SE Bartels & JM Milo (eds) *Open*

version of this history, the abolition of feudalism subsequent to the French Revolution reversed feudal enslavement and replaced the medieval vassal, whose status depended upon class distinctions and seignorial rights and obligations, with the '*citoyen* as a free and equal person bound by the duties of brotherhood and entitled to fundamental rights'.¹⁵ Consequently, so the argument goes, the civil codes that were adopted on the Continent in the wake of the French Revolution secured the new ideals of freedom and equality by embodying them in rights (including fundamental, constitutional rights) that promote individual liberty and autonomy. In property law, post-feudal thinking found its clearest expression in the construction of ownership as a unitary and absolute right and its concomitant distinction from limited real rights, combined with the adoption of a *numerus clausus*, a closed catalogue, of nominate real rights in land.¹⁶ Based on the assumed value of a unitary and absolute right of ownership, the idea of a *numerus clausus* of property rights was to promote legal certainty, predictability and transparency as central values of the post-revolutionary scheme of rights.¹⁷ Sagaert argues that the restrictive function of the *numerus clausus* is especially relevant in servitude law because servitudes are 'the

normen in het goederenrecht (2000) 61-77 67. See further BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 12. V Sagaert 'Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law' in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 120 describes feudalism as a system 'founded in the mixing of obligatory duties and property rights'.

¹⁵ S van Erp 'A numerus quasi-clausus of property rights as a constitutive element of future European property law?' in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52 text accompanying fn 6-9.

¹⁶ See V Sagaert 'Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law' in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 127-132 on the link between the move away from feudal law and the desire to re-establish the unitary, absolute character of ownership in civil law. Compare BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 12-13.

¹⁷ S van Erp 'A numerus quasi-clausus of property rights as a constitutive element of future European property law?' in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52 text accompanying fn 10, 24.

modern translation of feudal burdens.’¹⁸ Apart from the *numerus clausus*, the goal of legal certainty and stability was promoted in servitude law through the related and supporting doctrine of praediality and utility, which restricts servitudes to burdens that rest on one piece of land for the benefit of another piece of land, rather than allowing servitudes that benefit a person in his personal capacity, as the seignorial feudal rights did. The civil-law doctrine of praediality – like the common law doctrine of touch-and-concern – not only restricts servitudes to the category of praedial servitudes but also emphasises utility as the central establishment requirement for praedial servitudes, which means that the creation and existence of a servitude must bring about a clear and lasting benefit for the dominant estate.¹⁹

In terms of this version, the history of the abolition of feudalism can be described as a development that is driven by a choice in favour of absoluteness and unity and against fragmentation of ownership. Absoluteness, thus combined with unity, is primarily concerned with the fact that ownership is not split up between more than one owner, while ‘fragmentation’ refers to situations where ownership is split up. In this sense, ownership is absolute if there is just one kind of ownership and there can be just one owner of any given property object, whereas ownership is fragmented if the legal system recognises more than one kind of ownership that can be held simultaneously by different people.²⁰ In feudal law, *dominium* was

¹⁸ V Sagaert ‘Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law’ in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 127.

¹⁹ BWF Depoorter & F Parisi ‘Fragmentation of property rights: A functional interpretation of the law of servitudes’ (2003) 3 *Global Jurist Frontiers* 1-41 14-16. Of course, saying that a servitude burdens one estate for the benefit of another estate means that the servitude burdens all the successive owners of the servient estate for the benefit of all the successive owners of the dominant estate, regardless of their individual identities.

²⁰ TW Merrill & HE Smith ‘Optimal standardization in the law of property: The numerus clausus principle’ (2000) 110 *Yale LJ* 1-70 51-54 seem to miss this point when they dismiss the ‘anti-fragmentation’ argument rather too easily. They frame their response with reference to MA Heller ‘The

fragmented because more than one person could hold different kinds of ownership of the same property at the same time. In his influential definition Bartolus describes *dominium* as ‘*ius de re corporali perfecte disponendi nisi lege prohibeatur*’,²¹ but he makes it clear that this definition applies to three kinds of *dominium*: ‘*Tria sunt dominia, directum et utile et quasi dominium*’.²² Generally speaking, a so-called functional splitting of ownership implies that one owner holds formal title while the other actually uses and works the property. Of the three kinds of medieval split ownership, *dominium directum* resembles what we would call formal title, while *dominium utile* is closer to what is sometimes described as beneficial ownership.²³ In the feudal version of split ownership, the significant social and political point was that although the beneficial owner was legally called ‘owner’, he worked the land largely for the benefit of the formal owner, the political overlord, who was entitled to various services on the basis of the complex personal, social and political obligations that accompanied beneficial ownership. Although he was described as an owner, some of the use rights that the vassal held and exercised were described in terms that (in

boundaries of private property’ (1999) 108 *Yale LJ* 1163-1223; MA Heller ‘The tragedy of the anticommons: Property in the transition from Marx to markets’ (1998) 111 *Harv LR* 621-688. Arguing that the *numerus clausus* principle does not seem to be effective as an anti-fragmentation device because it tolerates some forms of fragmentation and does not lead to less fragmentation, Merrill & Smith focus on the number of interest holders that are allowed instead of the type of property interest that is tolerated, but the point of the anti-fragmentation argument is that certain types of fragmentation (rather than proliferation of interest holders) must be avoided, since it is a splitting of ownership (rather than just the number of users) that erodes certainty.

²¹ Bartolus de Saxoferrato on *D* 41.2.17.1 n 4.

²² Bartolus de Saxoferrato on *D* 21.2.39.1 n 3.

²³ The 12th century glossators Placentinus, Azo and Accursius used the term *quasi dominium* inconsistently and its content and distinction from *dominium utile* was never clear. Generally speaking it was used for the owner who could rely on the *actio Publiciana* but not on the *rei vindicatio* and, since the *actio Publiciana* was probably no longer available in medieval law, this category lost its relevance. The category received some attention from the French commentators De Révigny and Belleperche and was taken over from them by Bartolus, but its meaning was limited. See generally R Feenstra *Romeinsrechtelijke grondslagen van het Nederlands privaatrecht: Inleidende hoofdstukken* (1984) 45; R Feenstra ‘Action Publicienne et preuve de la propriété, principalement d’après quelques Romanistes du moyen age’ in R Feenstra *Fata iuris Romani* (1974) 119-138.

Roman and modern law) resemble servitudes rather than ownership.²⁴ The feudal split between formal and beneficial ownership, in terms of which a vassal held and exercised a form of ownership but was still in fact subject to often crippling personal and social obligations, was therefore associated with the lack of personal autonomy and social repression that characterised feudal serfdom.

Politically, the most significant result of the abolition of feudalism was not that *dominium* was reunited in a single, unitary and absolute right, but that the unified right of ownership was eventually associated with the actual user of land, the former beneficial owner, while direct ownership translated into political sovereignty rather than property entitlement. Ownership, once functionally split between overlord and vassal, shifted towards the vassal as the services that the vassal had to render to the overlord were gradually converted into money payments, which over time assumed the character of taxes rather than property rights.²⁵ The position of a vassal was thus strengthened in a process of social and political liberation that included the abolition of feudal relationships as well as the creation of a single, unified right of ownership.

²⁴ In *Inleidinge tot de Hollandsche rechts-geleertheid* (1619-1621) F Doring, HFWD Fischer & EM Meijers (eds) (1952) 2.38.5 Grotius discusses *tocht* as the right to use the fruits of another's property, without reducing the substance, noting '*dominium utile*' in the margin. *Tocht* includes usufruct (2.39), *emphyteusis* (2.40) and the *ius feudi* or right of infeudation (2.41). Of these, usufruct and *emphyteusis* are seen either as servitudes or as independent limited real rights in modern civil law, while the right of infeudation no longer exists.

²⁵ In a broader historical context, this process became known as role switching (*rolverwisseling*) or a shift in ownership (*eigendomsverschuiving*), see GCJJ van den Bergh *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* 2 ed (1988) 59-64. The theory of a shift in ownership was introduced by the French legal historian P Viollet *Histoire du droit français* (1905) 668ff and further developed by Dutch legal historians AS de Blécourt *Kort begrip van het oud-vaderlandsch burgerlijk recht* (1939) 261ff and W van Iterson 'Beschouwingen over rolverwisseling of eigendomsverschuiving' in *Verlagen en mededelingen van de vereniging tot uitgave der bronnen van het oud-vaderlands recht* part 13 no 3 (1971) 407-466. In Dutch law the theory was criticised by PWA Immink *Verspreide geschriften* (1967) 35; J van der Linden *De cope: Bijdrage tot de rechtsgeschiedenis van de openlegging der Hollands-Utrechtse laagvlakte* (1956) 366. Van den Bergh 62-63 shows that the most serious criticism is that the theory of a shift in ownership was framed in Roman rather than medieval concepts; the vassal did not become owner through a shift in ownership, he always was owner (*dominus utilis*) – the shift that took place was that his legal position *vis-à-vis* the overlord became stronger. As Van den Bergh points out, this shift in relative power also has to be conceived in social and political and not purely in legal terms.

According to the mainstream version of this history, the abolition of feudalism and the establishment of the new, post-feudal social and legal order therefore involved a number of interlocking and mutually reinforcing shifts: the abolition of the feudal institutions of seignorial domination and personal servitude; the establishment of a new social order based on individual liberty, personal autonomy and equality, backed up by fundamental human rights; and the adoption of a system of property rights that reflects the values of liberty and equality in a closed system of rights that revolve around absolute and unified ownership, are limited in number, restricted to a prescribed content dominated by the value of personal use rather than social or political service, and that can be created, transferred and extinguished only according to certain, established and mandatory rules.

Doctrinally, the most significant result of this development was that ownership, as a unitary and absolute right, was clearly distinguished from other, now regarded as lesser, real rights, which in modern legal doctrine became known as limited real rights (consisting mostly of the categories of servitudes and real security rights).²⁶ Furthermore, ownership was protected against fragmentation that might result from a proliferation of limited real rights, especially rights that effectively split formal title

²⁶ In *Inleiding tot de Hollandsche rechts-geleertheid* (1619-1621) F Dovring, HFWD Fischer & EM Meijers (eds) (1952) 2.33.1 Grotius suggests that only complete ownership (*dominium directum*) should be referred to as *dominium*, while the other forms of ownership (specifically *dominium utile*) should be described merely as rights, based on the greater value of the former. By suggesting that only complete ownership should be referred to as *dominium*, Grotius effectively reserved Bartolus de Saxoferrato's definition of *dominium* (Bartolus de Saxoferrato on *D 41.2.17.1 n 4: 'ius de re corporali perfecte disponendi nisi lege prohibeatur'*) for *volle eigendom* or *dominium plenum* and initiated a process whereby the others developed into what is now known as limited real rights. The detail of this development towards a formal doctrinal distinction between ownership and limited real rights is traced by R Feenstra 'Dominium and ius in re aliena: The origins of a civil law distinction' in P Birks (ed) *New perspectives in the Roman law of property – Essays for Barry Nicholas* (1989) 111-122. For further detail see also R Feenstra 'Der Eigentumsbegriff bei Hugo Grotius im Licht einiger mittelalterlicher und spätscholastischer Quellen' in O Behrends et al (eds) *Festschrift für Franz Wieacker zum 70. Geburtstag* (1978) 209-234; R Feenstra 'Real rights and their classification in the 17th century: The rôle of Heinrich Hahn and Gerhard Feltmann' 1982 *The Juridical Review* 106-120. See further AJ van der Walt 'Unity and pluralism in property theory: a review of property theories and debates in recent literature' 1995 *TSAR* 15-42 18-22; AJ van der Walt 'Marginal notes on powerful(l) legends: critical perspectives on property theory' (1995) 58 *THRHR* 396-420 405-406.

from use of the property.²⁷ The protection of ownership against fragmentation was accomplished by the introduction of a *numerus clausus* of real rights, combined with strict controls over the establishment of limited real rights in land such as servitudes. In the process, the wide range of land rights that were once recognised as forms of feudal ownership were separated out: the formal title of the overlord lost its property associations and retained only its characteristic of political sovereignty; the most valuable of the feudal use rights became recognised as the single remaining form of landownership; and all other, minor and less valuable use rights were reduced to the category of limited real rights. In addition, strict controls were imposed to ensure that the limited use rights should not contribute to a renewed erosion or fragmentation of ownership. In the imposition of and adherence to these anti-fragmentation strategies, political, social and proprietary liberation of the modern, post-revolutionary subject seemed to coincide perfectly.

For present purposes, the most interesting implication of adopting a closed system of real rights was the imposition of strict controls over the creation of

²⁷ The fear of splitting ownership, even just conceptually, is still alive in modern legal doctrine. CG van der Merwe *Sakereg* 2 ed (1989) 458 argues that the explanation according to which a servitude is a detachment of some aspects or parts of the ownership of one property and transferring them to another person or attaching them to the ownership of another piece of land is unsatisfactory because it assumes that ownership consists of a divisible bundle of rights. Van der Merwe's rejection of this explanation of a servitude as *pars dominii* is inspired by the fact that it reflects a fragmented view of ownership rather than the unitary, anti-fragmentation approach that he favours. The better explanation, in Van der Merwe's view, is that the owner who grants a servitude (or any limited real right) does not transfer some of his rights (entitlements) to the beneficiary but merely agrees to a suspension of some of his entitlements. MJ de Waal 'Servitudes' in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 786; MJ de Waal 'Servitudes' in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 569 describes early examples of the *pars dominii* explanation of servitudes in Roman and Roman-Dutch law as 'unsophisticated', even though the notion that a servitude is a *pars dominii* was in fact common in Roman texts (e.g. *Inst* 2.4.4; *D* 7.1.4) and used by Roman-Dutch authors (Grotius *Inleidinge tot de Hollandsche rechts-geleertheid* (1619-1621) F Doving, HFWD Fischer & EM Meijers (eds) (1952) 2.33.1; Van der Keessel *Praelectiones* 2.33.5; Voet *Commentarius ad Pandectas* 7.1.1). Interestingly, though, modern Dutch, Belgian and French law seem to have less of a problem with the idea of limited real rights as *partes dominii*; see e.g. B Akkermans *The principle of numerus clausus in European property law* (2008) ??? on the notion of **démembrement**.

servitudes in land, consisting of rules that relate to the recognition of a fixed number of types of servitudes; the requirements for establishing servitudes; the strict interpretation of servitude-creating agreements; the regulation of the relationship between the servitude holder and the owner of the servient property; and a prohibition against servitudes that impose positive obligations on the servient landowner. A side-effect of these controls is an enduring tension at the heart of servitude law between freedom of contract, which is an embodiment of individual autonomy; and preservation of the unity and absoluteness of ownership, which is an embodiment of legal certainty and security of title.²⁸ Ever since the abolition of feudalism this tension has shaped the doctrinal debate about common law doctrines such as ‘touch and concern’ and the civil law principles of praediality, utility and *numerus clausus*, all of which supposedly have been designed to safeguard the absolute and unitary character of post-feudal land law by curtailing the freedom of private parties freely to conceive and create new land use arrangements.²⁹ Caught up in this tension is the dilemma of explaining how the protection of (social and political) liberty and autonomy through anti-fragmentation devices can result in restrictions upon individual (contractual) liberty and autonomy.

The mainstream version of this history is quite compelling. It reveals that the interpretation and application of servitude principles and the doctrinal development of servitude law should take into account the deeply embedded tension between the liberty-enhancing freedom to create servitudes and certainty-enhancing restrictions

²⁸ V Sagaert ‘Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law’ in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 127.

²⁹ BWF Depoorter & F Parisi ‘Fragmentation of property rights: A functional interpretation of the law of servitudes’ (2003) 3 *Global Jurist Frontiers* 1-41 3. See further V Sagaert ‘Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law’ in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 120.

on the creation of servitudes. This perspective is doctrinally extremely significant, since it explains the purpose of important legal biases in servitude law: against the creation of new categories of servitude;³⁰ against servitudes that seem to serve the whimsical benefit of one person rather than the use of the dominant land;³¹ and against servitudes that impose positive burdens on the servient land.³² It also directs courts in establishing a fair balance between the principles that the dominant owner must be allowed to do everything that is reasonably necessary for proper exercise of the servitude and that she must exercise the servitude in a way that will cause the least possible inconvenience to the servient owner (*civilliter*).³³ Finally, it gives a useful indication of the manner in which the courts should balance the freedom of contract against the certainty of land use arrangements. Seen in this perspective, the history of the abolition of feudalism provides a crucial historical backdrop for the policy decisions that supposedly render current doctrinal choices in servitude law relatively simple and uncontroversial. The apparent tranquillity and predictability of

³⁰ BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 4 describe this as a bias in favour of nominate servitudes, *i e* a limited number of previously fixed categories of servitudes that fit into the *numerus clausus* of real rights.

³¹ This is what B Rudden 'Economic theory v property law: The *numerus clausus* problem' in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 243 refers to as 'fancies', which are 'for contract but not for property'. Rudden uses the term 'fancy', which he borrows from the decision in *Keppel v Bailey* (1834) 2 My & K 517 535, to indicate all interests excluded from the *numerus clausus* of real rights. The general requirement that distinguishes admissible servitude interests from 'fancies' is usually described as predality (including utility, *utilitas*), which means that the servitude must serve the use of the dominant land, by all its successive owners, on a relatively durable basis. The crucial Roman text is *D 8.1.8.pr* (a servitude cannot be created to the effect that a man shall be at liberty to pluck apples, or to walk about, or to dine on another man's land; translation based on CH Monro *Translation of the Digest of Justinian* (1909)).

³² The general passivity principle is that servitudes do not impose a positive burden on the owner of the servient land but merely allows the servitude holder to do something or to prevent a certain use of the servient land (*servitus in faciendo consistere nequit*). The crucial Roman text is *D 8.1.15.1* (it is not of the nature of a servitude that a man should have to do anything; for instance, remove shrubs so as to afford a more pleasing view, or with the same object, paint something on his own land, but only that he should submit to something being done or abstain from doing something; translation based on CH Monro *Translation of the Digest of Justinian* (1909)).

³³ See *e g* PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 331, with references to authority in South African case law.

modern servitude law and the ostensible absence of conflict and contestation are dogmatic products (the modern surface text) of the anti-fragmentation impulse that has directed the development of servitude law ever since the abolition of feudalism (the erased original text). Crucially, these features of modern servitude law have to be seen against the supposed historical backdrop that illuminates their liberty- and autonomy-enhancing function.

Compelling as it is, the anti-fragmentation argument, based on its version of the history of the abolition of feudalism, is neither unequivocal nor uncontested. For one thing, not everyone buys the historical narrative on which this argument is based, according to which the abolition of feudalism and the ensuing promotion of the post-revolutionary ideals of liberty and equality seamlessly results, via the construction of anti-fragmentation strategies such as the *numerus clausus* and restrictions on the creation of servitudes, in the settled and uncontested status of modern servitude law.³⁴ Some commentators question the historical argument on which this narrative rests. Noting that one possible reason for the development of the *numerus clausus* principle in modern law is said to be the ‘pyramiding’ of increasing land burdens or so-called superinfeudation, Rudden³⁵ points out that historically, the problem with subinfeudation was not with the existence of layers of services that could be claimed from the owner in possession, but the fact that the worth for the lords paramount of the feudal incidents was measured not by the value of the land

³⁴ TW Merrill & HE Smith ‘Optimal standardization in the law of property: The *numerus clausus* principle’ (2000) 110 *Yale LJ* 1-70 51-54 miss the historical aspect of the anti-fragmentation argument, reading it purely as a doctrinal issue in response to the anticommons argument of MA Heller ‘The boundaries of private property’ (1999) 108 *Yale LJ* 1163-1223; MA Heller ‘The tragedy of the anticommons: Property in the transition from Marx to markets’ (1998) 111 *Harv LR* 621-688.

³⁵ B Rudden ‘Economic theory v property law: The *numerus clausus* problem’ in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 248. At 249 Rudden questions the assumption that it is in the social interest that land should not be burdened unnecessarily and that the *numerus clausus* is therefore necessarily a good thing.

but by the value of the services due from mesne tenants. If a fragmented system that allows wider access to property interests has some value, the problems arising from subinfeudation could be solved by creating the possibility of *ex post* judicial cancellation, or else it could simply be left to the market. In other words, creating a unified and absolute ownership and a *numerus clausus* of real rights is neither the only nor necessarily the most obvious way to solve the problems created by feudal fragmentation. On a slightly different level, Sagaert notes that the *numerus clausus* principle was not adopted as a general doctrine in post-revolutionary French civil law,³⁶ although a nominate-type restriction³⁶ was recognised with regard to servitudes because they are ‘the modern translation of feudal burdens’.³⁷ Although it is true that restrictions on the creation of servitudes were adopted in French law subsequent to the abolition of feudalism, it appears to be an overstatement to claim that post-feudal law adopted the *numerus clausus* principle as a general dogmatic principle. The anti-fragmentation explanation of the *numerus clausus* principle and of other strategies that restrict the creation of real rights like servitudes arguably portrays both feudal and modern law too simplistically, as if feudal law consisted of nothing but a quagmire of impenetrably fragmented land rights causing oppression and social

³⁶ V Sagaert ‘Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law’ in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 121ff, 127. Sagaert shows that some academic commentators accept the *numerus clausus* principle as a general doctrine of French law, but both the structure of the Code Civil and case law suggest that exceptions have always been recognised. B Rudden ‘Economic theory v property law: The *numerus clausus* problem’ in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 243 also indicates that French law is not explicit in adopting the *numerus clausus* principle as a general doctrine; TW Merrill & HE Smith ‘Optimal standardization in the law of property: The *numerus clausus* principle’ (2000) 110 *Yale LJ* 1-70 5 fn 8 mention that it is recognised as a general principle but that there is debate about the question whether it is a substantive principle implied by CC art 543 or created through strict formalities for the enforcement of property rights.

³⁷ V Sagaert ‘Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law’ in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 126ff shows that the restriction of party autonomy by a kind of *numerus clausus* principle does apply to two areas in French and Belgian law, namely the strict requirements for creation of servitudes and the exclusivity of ownership.

inequality, while modern law is characterised purely by uncontested and unified land rights that promote individual autonomy and freedom.

These critiques undermine the coherence and thus weaken the rhetorical force of the anti-fragmentation narrative. Although it must surely be true that there are some historical and doctrinal links between the abolition of feudal law and the adoption of various anti-fragmentation strategies such as the *numerus clausus*, the predality doctrine and the passivity principle in modern law, the neat causal line that the mainstream narrative draws from the French Revolution through the abolition of feudalism to the adoption of anti-fragmentation strategies such as the *numerus clausus* principle, the promotion of individual liberty and autonomy and the apparent simplicity of modern servitude law appears to be an overstatement.³⁸

As will appear from some of the sources alluded to in the following sections below, the anti-fragmentation narrative is largely the product of 19th century legal doctrine. Instead of the neat, linear history that is portrayed in this narrative, the post-revolutionary doctrinal development of both the *numerus clausus* principle and of servitude law in general has been complex. The decision to overwrite the ancient text of feudal land rights with a modern replacement seems to have been inspired at least partly by the desire to record an ideological justification of the liberal preference for a property system revolving around a unitary and absolute ownership, resulting in

³⁸ B Rudden 'Economic theory v property law: The *numerus clausus* problem' in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 249-250 construes a different historical narrative that focuses on the history of ideas rather than on a particular version of the political and social history: Rudden argues that Hegel described the abolition of feudalism and all tenurial obligations as a positive step towards freedom of the will because the many obligations that feudal law imposed on landholders without their consent was perceived as wicked by the middle of the 17th century. According to Rudden, the line of thinking that resulted in this conclusion was based on the philosophies of Kant and Austin. Property rights are good against all and a universal obligation that binds all can be imposed by a general norm of the legal system but not by an individual will. A norm that binds all must be negative in content and thus the correlative of a real right cannot require positive action and affirmative burdens are impossible.

a partially rubbed out and partially skewed representation of both the original and the process of development.

3 The efficient land-use narrative

The function of anti-fragmentation devices such as the *numerus clausus* and establishment restrictions on the creation of servitudes is the subject of a second grand narrative that differs from the first one in two important respects. Firstly, the second narrative abandons the historical pretensions of the first – instead of describing anti-fragmentation strategies in the context of the abolition of feudal law and the promotion of individual liberty and autonomy, this narrative focuses more directly on the utilitarian goal of ensuring or promoting efficient land use. Secondly, as a result of this change of focus the second narrative is not simply a defence of anti-fragmentation devices – instead, the effective land-use argument is sometimes used to argue for the abolition of these restrictive devices, and sometimes for a qualified and flexible adaptation of some of them. This narrative appears in both doctrinal and economic analyses of servitude law.

The efficient land-use narrative always features against the backdrop of changed and changing circumstances that render the continued existence of some servitudal burdens inefficient. The unlimited duration of servitudes and the effect of changing circumstances on the efficient use of land are therefore central to the narrative. Sagaert³⁹ indicates that, insofar as the *numerus clausus* is a recognised general doctrine in French and Belgian law, it has recently come under increasing

³⁹ V Sagaert 'Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law' in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 123-124.

pressure and the system of property rights seems to be ‘opening up again’ in certain respects, even as far as the creation of new servitudes is concerned, in response to changed circumstances. This observation simultaneously qualifies the historical validity of the anti-fragmentation narrative and indicates the direction of the second, efficient land-use narrative. Recent legal developments in both common law and civil law jurisdictions suggest that new categories of servitudes can be created, sometimes even though they impose positive obligations on the servient landowner,⁴⁰ either of which would be anathema in terms of a strict understanding of

⁴⁰ B Akkermans *The principle of numerus clausus in European property law* (2008) provides a useful overview of examples from several jurisdictions, including France, the Netherlands, Germany, English law and South Africa. Compare further generally the contributions to S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006), reviewing new developments in Dutch, German, Austrian, French, Belgian, Scots, English, and US law. See also B Rudden ‘Economic theory v. property law: The *numerus clausus* problem’ in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 245: the restriction on positive obligations has been avoided by case law in US common law, by legislation in Israel and Louisiana, and by statute for local authorities in England. On the equitable covenants recognised in English law in the wake of the decision in *Tulk v Moxhay* (1848) 2 Ph 774, 41 ER 1143; see further B McFarlane ‘*Tulk v Moxhay* (1848)’ in C Mitchell & P Mitchell (eds) *Landmark cases in equity* (2012) 203-233. However, as B McFarlane ‘The *numerus clausus* principle and covenants relating to land’ in S Bright (ed) *Modern studies in property law* vol 6 (2010) 307-327 322 argues, ‘[t]he basic principle underlying the *numerus clausus*, that a new duty or liability should not be imposed on X simply because of the conduct of others, is therefore of particular prominence when considering positive covenants,’ adding that the acquisition of such a duty ‘may ... carry a whiff of feudalism and the “domination potential” such a system involves’. McFarlane refers to E Cooke ‘To restate or not to restate: Old wine, new wineskins, old covenants, new ideas’ [2009] *Conv* 448-473 460, who lists several devices by which contracting parties can react to the refusal to recognise positive freehold covenants as property rights, adding that the question whether the benefits of allowing such a device to impose a liability on a successive purchaser could outweigh the disadvantages must be the ultimate test of the English Law Commission’s proposal that certain forms of positive covenant could count as legal property rights in land (referring to The Law Commission LAW CON No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf Part 5). An example in Dutch law is the possibility to create a *quasi*-property right, in the form of a qualitative duty, outside the *numerus clausus* (BW 6:252); see B Akkermans ‘The new Dutch Civil Code: The borderline between property and contract’ in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 163-183 172-175. In German law, positive duties can be imposed in the form of a real burden (*Reallast*, BGB §§ 1105ff) or a limited personal servitude (*beschränkte persönliche Dientsbarkeit*, BGB §§ 1090ff). See further M Wolf ‘Marketability contra freedom of parties in the law of land burdens’ in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 11-20. In Scots law, which abolished the remnants of feudal landholdings with the Abolition of Feudal Tenure etc (Scotland) Act 2000 sec 1, the Title Conditions (Scotland) Act 2003 sec 9 makes it possible for parties to create a real burden that imposes a positive obligation; see K Reid ‘Modernising land burdens: The new law in Scotland’ in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79. On Australian law see B Edgeworth ‘The *numerus clausus* principle in contemporary Australian property law’ (2006) 32 *Monash U LR* 387-419. For a comparison of Scots law and the state law of Louisiana see JA Lovett

the *numerus clausus* principle and the notion of ownership as a unitary and absolute right.⁴¹ The efficient land-use narrative therefore generally emphasises the fact that some servitudal burdens become inefficient – or preclude efficient use of the burdened land – because of changed circumstances and suggests ways in which strict anti-fragmentation strategies, such as *numerus clausus* and establishment requirements (predality, utility, touch-and-control) that preclude the creation of new categories of servitudes, can be applied or amended to allow for greater flexibility. The efficient land-use argument usually holds that restrictive strategies serve a legitimate function in modern law, even if they are not premised upon the historical anti-fragmentation narrative in the narrow sense of preventing a revival of feudal land relations. Proponents of this view argue that problems with changed circumstances are caused by overly strict adherence to the restrictive measures and that it is inflexibility that has a negative effect on the efficient use of land.⁴² On the basis of

'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257.

⁴¹ In South African law, which does not recognise a *numerus clausus*, the creation of new categories of servitude is easier. CG van der Merwe *Sakereg* 2 ed (1989) 501 mentions restrictive covenants and restrictive conditions as a unique, new category of praedial servitude that has developed in South African law. Whether restrictive conditions can be described as praedial servitudes or even as personal servitudes is a contested issue; J van Wyk *Planning law* 2 ed (2012) 313-316 lists reasons why they cannot be 'pure' servitudes'. Van der Merwe at 506-507 also lists as new categories of personal servitudes the *servitutes irregulares*, which have the same content as a praedial servitude but is set up as a personal servitude, *i e* in favour of a specific person only; restrictive conditions that are set up as personal servitudes; and specific new personal servitudes that do not fit the pattern of the classic categories, such as a servitude to trade on the servient land, a servitude to lay cables and pipes over or under the servient land, and a servitude to chop wood on the servient land. In *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA) the Supreme Court of Appeal recognised the right to name a sports stadium as a personal servitude. JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584-585 identify as new praedial servitudes that have been or may soon be recognised in modern South African law the right to open windows over the servient land; a servitude to fetch balls; and possibly a servitude to restrict new kinds of nuisance caused by the use of neighbouring land. CG van der Merwe & JM Pienaar 'The law of property (including real security)' 2008 ASSAL 965-1057 1029-1030 refer to the possibility to establish a praedial servitude of storage or of a parking bay, as was apparently decided in *Body Corporate of the Sectional Title Scheme Seascapes v Ford and Others* 2009 (1) SA 252 (SCA) para 11. For the creation of new servitudes in other jurisdictions see references in the next fn below.

⁴² V Sagaert 'Party autonomy in French and Belgian law. The interconnection between substantive property law and private international law' in R Westrik & J van der Weide (eds) *Party autonomy in international law* (2011) 119-141 123-124. B Rudden 'Economic theory v property law: The *numerus*

changed circumstances they therefore usually argue, in one form or another, for a flexible approach that would retain the beneficial features of the anti-fragmentation strategies while allowing for some deviation where necessary. The point of departure is that some restrictive strategy like a relatively closed catalogue of limited real rights or servitudes is both desirable and possible in modern law, without sacrificing flexibility.

The first line of argument that follows the general logic of this efficient land-use narrative is largely doctrinal in nature. It holds that restrictive strategies like *numerus clausus* are flexible enough, doctrinally speaking, to accommodate changed circumstances and the needs of modern society, while still preventing an unhealthy proliferation of real burdens on land.⁴³ It is characteristic of this version of

clausus problem' in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 245 is unconvinced by the argument that the *numerus clausus* is adopted so widely because it is necessary; he notes that the closed list of servitudes has especially been under strain of late. At 249 Rudden questions the statement, as a self-evident truth, that it is in the social interest that land should not be burdened unnecessarily and that the *numerus clausus* is therefore a good thing. K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 64-65 refers to the decisions in *Nicolson v Melvill* 91708 Mor 14516; *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 to illustrate the developments that made strict adherence to the Roman categories and to the *numerus clausus* impracticable. See further JA Lovett, 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 233-236.

⁴³ Examples of arguments of this nature include CM Rose 'Servitudes, security, and assent: Some comments on Professors French and Reichman' (1982) 55 *S Cal LR* 1403-1416 (the doctrinal distinction between different categories of servitudes, easements and covenants serves a useful purpose); B Akkermans *The principle of numerus clausus in European property law* (2008) 550-563 (arguing for a possible model for a European property law based on *numerus clausus* as a constitutive element of a flexible, limited open system of property relations); THD Struycken *De numerus clausus in het goederenrecht* (2007) 796 (arguing that *numerus clausus* should be retained as a rule of property law in a system that leaves limited room for party autonomy concerning the creation of real rights); JT Füller *Eigenständiges Sachenrecht?* (2006) 567 (arguing for a reform in German property law that would maintain the distinction between property and personal rights and the consequences for third-party protection while loosening the strict separation of property law and the law of obligations); S van Erp 'A numerus quasi-clausus of property rights as a constitutive element of future European property law?' in K Boele-Woelki, CH Brants & GJW Steenhoff (eds) *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof mr EH Hondius* (2003) 39-52 (arguing that while *numerus clausus* plays an important role in a legal system, a too rigid rule would inhibit innovation); V Sagaert 'Het goederenrecht als open systeem van verbintenissen? Poging tot een nieuwe kwalificatie van de vermogensrechten' (2005) 42 *Tijdschrift voor Privaatrecht* 983-1086 (arguing in favour of what he describes as a neo-personalist approach to property rights that treats property rights as obligations against third parties, with the result that the restrictive effect of *numerus clausus* and similar strategies applies to some but not all

the efficient land-use argument that the anti-fragmentation purpose of the restrictive measures is retained, while flexibility is ensured through amendments or qualifications of the traditional rules and principles. As far as the codified civil law systems are concerned, Akkermans argues that, although parties are often allowed to create new limited real rights, modern law still conforms to the anti-fragmentation principle to the extent that new real rights are always created in a way that ensures that these rights are different from and less than ownership. In this way, the unitary character of ownership is maintained even when new real rights are recognised.⁴⁴ Furthermore, regardless of whether they adhere to the *numerus clausus*, modern civil law systems will, even when they do allow the creation of new categories of limited real rights, tend to leave the creation of those rights to the legislature or, to a lesser extent, the courts, but generally they do not allow contracting parties freely to create new property rights that have third-party effect.⁴⁵

patrimonial rights, leaving some room for party autonomy and innovation without abandoning the protective function of some restrictions on party autonomy). Akkermans (2008) 458-473 provides a useful overview of these and other related arguments.

⁴⁴ B Akkermans *The principle of numerus clausus in European property law* (2008) lists several examples of such newly created limited real rights, e.g. the *fiducie* in French law (at 158-159); the *dingliche Vorkaufsrecht*, the *Anwartschaftsrecht* and the *Reallast* in German law (at 214-224); and the qualitative duty and chain clauses in Dutch law (at 311-315). At 116, 165 (French law); 175-177, 191, 245 (German law); 259, 261 (Dutch law), Akkermans shows how each system guards the unitary character of ownership by doctrinally assimilating what may appear as new forms of ownership, such as new categories of co-ownership, apartment ownership and security ownership, into the overarching category of one, single kind of ownership; see e.g. at 99-116 (French law: apartment ownership, security ownership); 181-191 (German law: apartment ownership, *Treuhand* ownership, security ownership); 263-269 (Dutch law: security ownership). Experience in South African law confirms this observation: great care was taken to doctrinally assimilate the sectional title ownership introduced by the Sectional Titles Act 66 of 1971 (replaced by the Sectional Titles Act 95 of 1986) into the 'normal' unitary notion of ownership. The conclusion of this doctrinal debate was that the Act created a new composite *res*, the sectional title unit, which consists of individual ownership of a section in the building and an undivided share in the common parts of the scheme. See e.g. PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 442-443.

⁴⁵ As far as servitudes are concerned, care is also taken to ensure that the potentially negative effect of new categories of servitudes or servitudes that impose positive obligations is restricted. For examples of devices to restrict the effect of servitudes that impose positive obligations see e.g. K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 72ff; The Law Commission LAW CON No 327: *Making land work: Easements, covenants and profits à prendre* (2011)

Modern legal systems promote the efficient use of land through a flexible approach to the *numerus clausus* in different ways,⁴⁶ but the outlines of the narrative are most clearly visible in Scots law, where both stability and greater flexibility were entrenched as part of a large-scale overhaul of property law.⁴⁷ The Scottish solution was to retain the *numerus clausus* for the category of servitudes, which is restricted to classic Roman use rights that allow the dominant owner some limited use of the property; while not adhering to any kind of *numerus clausus* for the category of real burdens, which could be either positive (placing an obligation on the servient owner to do something) or negative (placing an obligation on the servient owner not to do something).⁴⁸ Even in the case of servitudes, the *numerus clausus* is retained only

http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf para 5.44. For South African law, which does not recognise a *numerus clausus*, see fn 40 above.

⁴⁶ For examples see M Wolf 'Marketability contra freedom of parties in the law of land burdens' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 11-20 17-19 (German law); V Sagaert 'The fragmented system of land burdens in French and Belgian law' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 31-52 47-51 (French and Belgian law); S French 'The American Restatement of servitudes law: Reforming doctrine shifting from ex ante to ex post controls on the risks posed by servitudes' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 109-116 (US law); W Swadling 'Land burdens – An English perspective' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 117-135 133-135 (English law). See further JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 242-255 (US, Scots and Louisiana state law).

⁴⁷ K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 63-66 sketches the situation in Scots law prior to the reforms. See further JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 236-240.

⁴⁸ For a brief explanation see K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 70-71. Reid explains that real burdens could previously only be created by registration, whereas servitudes did not have to be registered. Restrictions that prevented the creation of new kinds of servitude and the imposition of positive obligations could be avoided by using real burdens instead of servitudes. Under the new law introduced by the Title Conditions (Scotland) Act 2003 both servitudes and real burdens have to be registered and the two categories are distinguished by providing that servitudes relate only to classic limited use rights, whereas real burdens impose either a positive obligation to do something or a negative obligation not to do something on the servient owner. On Scots land burdens see also WM Gordon & MJ de Waal 'Servitudes and real burdens' in R Zimmermann, D Visser & E Reid (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 735-757; JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257.

for servitudes created by prescription.⁴⁹ To address unwanted effects of greater flexibility, the legislation that reformed Scots law introduced restraints, some of which prevent land burdens from being created *ex ante* and others that restrict the effect of existing burdens or provide for their termination *ex post*. Reid explains these restraints with reference to three governing principles that underlie them. Firstly, a burden should be enforceable by a person only if non-enforcement would cause material injury to that person's property. Secondly, all burdens should be reviewable by a court and, if appropriate, capable of being varied or discharged. Thirdly, burdens should have a limited life; in particular, burdens older than 100 years should be presumptively discharged.⁵⁰ Reid argues that the embodiment of these three principles in the new Scots law attempts 'to strike a balance between the need for negative burdens and the risk of their abuse.'⁵¹ The shift of emphasis that is proposed in the American Restatement is comparable to the development in Scots law,⁵² but in US law the support for such a shift away from traditional restrictions and towards flexibility is not unanimous.⁵³

⁴⁹ K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 71.

⁵⁰ K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 73-79 discusses the principles and their embodiment in the Title Conditions (Scotland) Act 2003. Reid at 78-79 points out that sunset clauses for servitudes exist elsewhere, pointing out that the flexible Scots option does not simply terminate servitudes or real burdens after a fixed time but allows for them to be presumptively discharged, subject to a judicial ruling to the contrary, after 100 years. CM Rose 'Servitudes, security, and assent: Some comments on Professors French and Reichman' (1982) 55 *S Cal LR* 1403-1416 1413-1414 prefers restricting servitudes to the expected lifetime of the development they serve, allowing the parties to choose a time limit *ex ante* and the courts to judge its suitability *ex post*.

⁵¹ K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 79. The reason why Reid mentions negative burdens specifically is because he argues at 72 that negative burdens, more than other land burdens, 'raise the question of what kinds of obligation should be admitted by property law to bind successive owners of land'.

⁵² American Law Institute *Restatement of the Law (3rd), Property (Servitudes)* (2000) § 3.1 is said to move from *ex ante* to *ex post* restraint. See S French 'The American Restatement of servitudes law: Reforming doctrine shifting from *ex ante* to *ex post* controls on the risks posed by servitudes' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 109-116; BWF

In jurisdictions where a more conservative approach is followed, the balance generally remains tipped in the favour of restrictions and flexibility is introduced on a more modest scale, but the general outlines of the efficient land-use narrative are nevertheless discernible. Lovett⁵⁴ describes how the state law of Louisiana for the sake of greater flexibility allows property owners to establish, by contractual agreement, land use restrictions and affirmative obligations that bind future owners, and also how the law imposes limits on those arrangements.⁵⁵ The arguments that support greater flexibility are that the law should allow termination or amendment of aging land burdens and obligations; that the law should allow variation of existing land burdens for the sake of better town planning; and that permanent, inflexible land

Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 31; K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 72-73.

⁵³ Responding to SF French 'Toward a modern law of servitudes: Reweaving the ancient strands' (1982) 55 *S Cal LR* 1261-1322; U Reichman 'Toward a unified concept of servitudes' (1982) 55 *S Cal LR* 1177-1265, Rose argues for retaining the restrictive requirements because their benefits could not be wholly replaced or fulfilled by either registration or *ex post* remedies, but she proposes that servitudes should be subject to a time limit. See CM Rose 'Servitudes, security, and assent: Some comments on Professors French and Reichman' (1982) 55 *S Cal LR* 1403-1416 1404. At 1405 Rose explains that the old doctrine did not collapse the distinction between three categories of easements, equitable servitudes and covenants for a reason; the reason largely corresponds with the explanation of K Reid 'Modernising land burdens: The new law in Scotland' in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens?* (2006) 63-79 70-71 for the (continued but amended and updated) distinction between servitudes and land burdens in Scots law. At 1411-1412 Rose argues that servitudes are property interests, which means that the holdout situation created by changed circumstances is legitimate and not a conclusive reason for abolition or amendment. At 1413 she argues that willingness to change the content or to terminate servitudes because of changed circumstances could signal that property arrangements are less valuable today than before. At 1413-1414 Rose indicates that she prefers placing time limits on servitudes to restrict problems caused by changed circumstances; she would restrict servitudes to the expected lifetime of the development they serve, allowing the parties to choose a time limit initially and leaving it to the courts to judge that limit *ex post*.

⁵⁴ JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 231, 240-242. In Louisiana, disaggregation of ownership through covenants was allowed since *Queensborough Land Co v Cazeaux* 1915 67 So 641, resulting in the development of a set of building restrictions that included both use limitations and affirmative obligations.

⁵⁵ JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 240-242.

burdens create restraints on alienability and produce inefficiency in land markets.⁵⁶ The counterarguments in favour of control over flexibility reforms are that notice and registration can overcome the problem of lack of choice; and that allowing *ex post* variation or termination of real rights and a move towards liability rules could cause uncertainty and even amount to private exercise of the power of eminent domain.⁵⁷ In the result, Lovett, concludes, the law of Louisiana is characterised by strict *ex ante* limits and weak *ex post* controls, although most courts nevertheless recognise some form of *ex post* control if there are exceptional circumstances present, especially in the form of changed circumstances that prevent a condition from serving its purpose.⁵⁸

In a similar vein, Edgeworth shows that Australian courts adopt the *numerus clausus* as a fundamental policy of property law; although there are signs that the courts are willing to accommodate new land usages and changed conditions in the existing doctrinal framework, progress has been cautious and slow and the result is that the *numerus clausus* influences, but does not necessarily determine doctrine.⁵⁹ Relaxing the effect of the *numerus clausus* and allowing greater flexibility was the result of the social need to develop property mechanisms to protect the character of property and to safeguard the integrity of neighbourhoods,⁶⁰ just like restrictions on the effects of the new developments resulted from the need to restrict the market

⁵⁶ JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 242-243.

⁵⁷ JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 244-245.

⁵⁸ JA Lovett 'Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis' (2008) 19 *Stell LR* 231-257 245-252.

⁵⁹ B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 393-394 explains that the English decision in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143 rejected *numerus clausus* outright, later decisions restricted its impact.

⁶⁰ B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 398.

power of property entrepreneurs who exploited the newly developed, more flexible equitable theory.⁶¹ Edgeworth argues that there will always be a need for an optimal number of interests for which property law is the legitimate gatekeeper and therefore there are sound reasons for a reasonably conservative approach, according to which novel property interests that are recognised are close in form to those already on the list; changes in the *numerus clausus* are incremental; and some kind of public benefit test is imposed before recognising a new interest.⁶² However, Edgeworth argues that the pervasiveness of effective and easily accessible land registers 'renders these rules somewhat obsolete and economically retrograde':⁶³ case law shows that where the precise details of newly created land rights were or could easily have been reflected in the register, recognising new property rights would not necessarily harm third parties or constrain the productive use of the land. In Edgeworth's view, property law is unduly rigid and the possibility of recognising new rights should be kept open. However, new rights must be registered and should preferably (but not exclusively) be created by way of legislation.⁶⁴

South African law provides further examples of a system that restricts the creation of new land rights but allows some flexibility on a doctrinal level. Most South African authors agree that the *numerus clausus* principle is not a general doctrine of modern South African property law⁶⁵ but, interestingly, South African servitude law

⁶¹ B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 399.

⁶² B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 406.

⁶³ B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 406.

⁶⁴ B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 418-419.

⁶⁵ See e.g. CG van der Merwe *Sakereg* 2 ed (1989) 11, 468 (citing *Van der Merwe v Wiese* 1948 (4) SA 8 (C) 30; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1051A); CG van der Merwe & MJ de

nevertheless protects landownership against a proliferation of undesirable real burdens. In the absence of a general *numerus clausus* doctrine or principle, South African law promotes this goal by way of a registration requirement that applies to all real rights in land⁶⁶ and the subtraction from the *dominium* test that the courts have developed to identify real rights in land that can be registered.⁶⁷ As far as South African law is concerned, this registration requirement and judicial test (and, in the case of servitudes, the utility requirement) create a doctrinal framework within which some flexibility in the creation and establishment of limited real rights is possible, although the general tendency is to restrict the creation of new limited real rights. De Waal⁶⁸ accordingly argues that the flexibility of not having a strict *numerus clausus* allows landowners, within certain limits, to conceive and construct servitudes according to the requirements of the use that they make of the dominant land. Theoretically, De Waal argues, the approach is flexible enough that it could allow a

Waal 'Servitudes' in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) paras 545, 580; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584-585; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The law of property* 5 ed (2006) 326; MJ de Waal 'Servitudes' in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 788; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (1989) 14-15.

⁶⁶ The Deeds Registries Act 47 of 1937 requires registration of all real rights in land.

⁶⁷ Sec 63(1) of the Deeds Registries Act 47 of 1937 prohibits registration of personal rights in land. The courts developed the so-called subtraction from the *dominium* test to distinguish between (often identical-looking) personal and real rights in land. The test was developed on the basis of sec 63(1) of the Act, which prohibits the registration of personal rights or conditions that do not 'restrict the exercise of any right of ownership in respect of immovable property'. Consequently, a servitude or any other limited real right may only be registered (and thus created) if it restricts the exercise of the right of ownership in land; in other words, if it amounts to a subtraction from the servient landowner's *dominium*. The test is associated with the direction-giving decision in *Ex parte Geldenhuys* 1926 OPD 155 164, where the court said that 'one has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right *in personam*, and it cannot as a rule be registered'; it is most clearly set out in *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1049 B-D, 1052C-F, 1055E-G. B Akkermans *The principle of numerus clausus in European property law* (2008) 473-482 argues that the registration requirement and test ensure that the absence of a *numerus clausus* principle does not result in a proliferation of new real burdens.

⁶⁸ MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (1989), see e.g. 106-108 (Roman law), 118-120 (Roman-Dutch law), 171-201 (modern South African law).

landowner to do something that was patently not possible in Roman law⁶⁹ and that is directly in conflict with the anti-fragmentation impulse of a strict *numerus clausus*: a landowner who has built and established a hotel business on her land could, in terms of the flexible approach, contract with a neighbouring landowner for the right of her hotel guests to stroll and picnic along the shore of a dam on the neighbouring land, and also to register that right as a praedial servitude in favour of the dominant property, as long as the servitude-creating contract is phrased correctly and provided the dominant land is indeed developed and appointed as a hotel business whose guests would require and benefit from the rights in question.⁷⁰ In terms of anti-

⁶⁹ The efficient land-use argument is not entirely new. There are indications that deviations from what seems like an inflexible servitude regime were already possible in Roman law, which not only adhered to a *numerus clausus* but tied the kind of servitudes that could exist and their content strictly into the framework of normal use of the dominant land according to its natural characteristics: see e.g. MJ de Waal 'Servitudes' in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 590; MJ de Waal 'Servitudes' in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 810; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (1989) 101, citing *D 8.1.8.pr*, which indicates that a praedial servitude had to serve the use and benefit the dominant land and not the whims of a particular owner of that land at a particular time. See further CG van der Merwe 'Die nutsvereiste by erfdiensbaarhede' in DJ Joubert (ed) *Petere fontes: LC Steyn gedenk bundel* (1980) 163-176 165-170. However, despite this apparently extremely narrow approach, Roman law seems to have allowed a relaxation of the rules in the urban context, with the result that new urban servitudes were recognised and the actual use of the dominant land (as opposed to its natural characteristics) was taken into account in interpreting the utility requirement: De Waal (1989) 106, referring to servitudes that secured access to natural light; the right to let water drip on neighbouring land; to rest beams in the wall of a neighbouring house; to overhang neighbouring land; and to secure an existing view over neighbouring land. Some of these new urban servitudes merely made more enjoyable use of the dominant land possible, thereby expanding the utility requirement to include aesthetic considerations: De Waal (1989) 106-107, referring specifically to the servitudes that secured a view over the neighbouring property; access to natural light; and the right to rest beams for a promenading balcony in the wall of the neighbouring house. Consequently, what was formerly a strictly utilitarian agricultural servitude, such as the right to draw water from the servient land, could also be used to draw water for merely pleasurable and aesthetic purposes on urban land, such as drawing water for a fish pond or a fountain: De Waal (1989) 107, referring to *D 8.1.8.pr* (a rural servitude cannot be acquired purely for the right to stroll on another person's land) and *D 8.5.8.1* (an urban servitude could be acquired to rest beams in another person's house that support a promenading balcony).

⁷⁰ The example MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (1989) 171ff uses is from *D 8.1.8.pr*: a servitude cannot be created to the effect that a man shall be at liberty to pluck apples, or to walk about, or to dine on another man's land (translation based on CH Monro *Translation of the Digest of Justinian* (1909)). De Waal argues that modern courts rely on the physical development and appointment of the land, according to its economic use, instead of purely on the natural characteristics of the land: MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (1989) 171-201. A particularly instructive South African decision in this regard is *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400 (A), where

fragmentation doctrine, this right is a ‘fancy’ that belongs in contract but not in property;⁷¹ allowing it to be registered as a praedial servitude could be seen as an example of flexible application of the anti-fragmentation principle. Apart from this (somewhat hypothetical) example, there are further signs of flexibility in South African servitude law. Generally speaking, the possibilities for wholesale judicial amendment or removal of servitude-like real burdens on land is traditionally largely restricted to restrictive conditions, although a practice does exist by which the courts can amend or remove restrictive covenants on the basis of proof of permission from all the affected parties.⁷² In a recent case the High Court was willing to unilaterally amend the conditions of a servitude of right of way against the will of the dominant owner, but the order was subject to narrow qualifications that are intended to protect the interests of the non-participating party.⁷³ It is unclear whether a general relaxation of the established principles is possible in view of this decision.

The examples above indicate how both common law and civil law jurisdictions in varying degrees adhere to restrictive anti-fragmentation principles and rules, while

the physical development and appointment of the dominant property as a hotel business was decisive.

⁷¹ B Rudden ‘Economic theory v property law: The *numerus clausus* problem’ in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 243 borrows the term ‘fancy’ from the decision in *Keppel v Bailey* (1834) 2 My & K 517 535 to indicate all interests excluded from the *numerus clausus* of real rights. In *numerus clausus* literature ‘fancies’ have become the prime example of whimsical land interests that do not belong in property.

⁷² Restrictive conditions can be modified or removed by court order in terms of legislation. The South African courts have no inherent jurisdiction to remove restrictive conditions from title deeds; a practice does exist to remove restrictive covenants and conditions on the basis of application to court, supported by proof of the permission of all affected parties. In terms of several laws, administrative officers are empowered to remove or amend certain specified restrictive conditions in title deeds of land: The Removal of Restrictions Act 84 of 1967; the State Land Disposal Act 48 of 1961; the Subdivision of Agricultural Land Act 70 of 1970; the South African National Roads Agency Limited and National Roads Act 7 of 1998; the National Building Regulations and Building Standards Act 103 of 1977; the Development Facilitation Act 67 of 1995; the Less Formal Townships Development Act 113 of 1991; the Advertising on Roads and Ribbon Development Act 21 of 1940; the Transformation of Certain Rural Areas Act 94 of 1998; as well as provincial legislation. See generally PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* 5 ed (2006) 354-356; J van Wyk *Planning law* 2 ed (2012) 329-352.

⁷³ *Investment CC v Hammersley* 2008 (3) SA 283 (SCA).

attempting to accommodate a measure of flexibility that would allow for changed circumstances that render the rigid enforcement of existing land burdens inefficient or that preclude efficient use of the affected land. Generally speaking, the new measures that are introduced to increase flexibility include both allowing the creation of new categories of servitudes, even when they impose positive obligations, and *ex post* controls that make it possible to review outdated land burdens and restrict the potential damage resulting from greater flexibility.

The second line of arguments that rely on the efficient land-use narrative assess the merit of restrictive strategies like *numerus clausus* in the context of mostly economic considerations, as opposed to the largely doctrinal focus of the arguments discussed above.⁷⁴ The economic arguments also proceed from the premise that the efficient use of land is the prime objective, but instead of doctrinal analysis they offer economic arguments for the removal of restrictions on the creation and transfer of servitudes and for *ex post* controls over the problems that might result from relaxation of restrictive strategies. Rudden indicates the direction of the economic argument when he questions the assumption, as a self-evident truth, that it is in the social interest that land should not be burdened unnecessarily and that the *numerus clausus* is therefore a good thing.⁷⁵ One response to that question

⁷⁴ See B Rudden 'Economic theory v property law: The *numerus clausus* problem' in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 252; MA Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets' (1998) 111 *Harv LR* 621-688; TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70; H Hansmann & R Kraakman 'Property, contract and verification: The *numerus clausus* problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420; BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41; F Parisi, N Schulz & BWF Depoorter 'Duality in property: Commons and anticommons' (2005) 25 *Int Rev Law & Econ* 578-591. For a useful overview and criticism of the economic arguments see B Akkermans *The principle of numerus clausus in European property law* (2008) 440-453.

⁷⁵ B Rudden 'Economic theory v property law: The *numerus clausus* problem' in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 249. See further B Akkermans *The principle of numerus clausus in European property law* (2008) 441-442.

is Heller's argument that a proliferation of land burdens can create an anticommons⁷⁶ (potentially resulting in underuse of a valuable resource)⁷⁷ and that restrictive strategies like the *numerus clausus* are justified insofar as they are intended to counter the anticommons effect of a proliferation of land burdens.⁷⁸ A tragedy of the anticommons occurs when too many owners have the right to exclude and nobody has an effective use privilege (the property becomes overly fragmented), with the result that the property is underused.⁷⁹ Heller argues that the only remedy for such a tragedy of the anticommons is to collect the fragmented and dispersed use rights into usable private property bundles, which could be a slow and difficult process because of the high transaction and strategic costs involved.⁸⁰

Subsequent publications acknowledge the anticommons problem identified by Heller and the potential effect that it has on the value of property interests, agreeing

⁷⁶ MA Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets' (1998) 111 *Harv LR* 621-688 623 fn 7 suggests that the term anticommons 'appears to have been coined' by FI Michelman 'Ethics, economics and the law of property' in JR Pennock & JW Chapman (eds) *NOMOS XXIV: Ethics, economics, and the law* (1982) 3-40 6, but Michelman never uses the term anticommons. Heller at 667 states that Michelman introduces 'the equivalent of the term'. BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 19 fn 62 also cite Michelman as the origin of the concept. However, Heller 667 in fact seems to get the connection with Michelman from RC Ellickson 'Property in land' (1993) 102 *Yale LJ* 1315-1400 1322 fn 22, who uses the term with reference to Michelman.

⁷⁷ MA Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets' (1998) 111 *Harv LR* 621-688 explains that a commons exist when multiple owners each has the privilege to use a given resource and no-one has the right to exclude another; when too many owners hold use privileges a potential result is overuse of the resource, causing a tragedy of the commons. By contrast, an anticommons exists when multiple owners have the right to exclude others from a resource and no-one has an effective privilege of use. The tragedy of the commons was classically described by G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243-1248. See the previous fn above on the origin of the notion of the anticommons.

⁷⁸ See MA Heller 'The boundaries of private property' (1999) 108 *Yale LJ* 1163-1223; MA Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets' (1998) 111 *Harv LR* 621-688. Heller (1998) 111 *Harv LR* 621-688 664-665 mentions that in US law, 'numerous restraints limit an individual's capacity to break up property bundles too much'. See further B Akkermans *The principle of numerus clausus in European property law* (2008) 442-445.

⁷⁹ MA Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets' (1998) 111 *Harv LR* 621-688 refers to examples resulting from imperfectly defined property rights created by transitional governments in both post-socialist and developed market economies.

⁸⁰ MA Heller 'The tragedy of the anticommons: Property in the transition from Marx to markets' (1998) 111 *Harv LR* 621-688.

that this might explain the traditional move in many jurisdictions to restrict the creation of new property rights, but they also point out that the anticommons problem does not seem to have a major or lasting effect on the forms of fragmented property that property law in fact recognises. Recent publications therefore assess the economics of fragmentation differently.

Depoorter and Parisi start off by describing the potential social cost of excessive fragmentation of property in terms of Heller's concept of the tragedy of the anticommons: if resources are independently controlled by numerous individuals the tendency would be towards underuse and overpricing.⁸¹ Because burdens imposed by servitudes can run in perpetuity, transaction costs can make it difficult to 'rebundle' the right of use effectively. The transaction and strategic costs that reunification of fragmented rights requires are asymmetrically higher than the practically zero costs required for the original fragmentation, which means that the Coase theorem does not apply. Positive action is therefore required to reaggregate the fragmented rights.⁸² Depoorter and Parisi argue that there is a functional (economic) explanation for the existence of strategies to counter the fragmentation of land: traditional 'benchmark doctrines' that are intended to limit excessive or dysfunctional fragmentation of property rights, such as the touch-and-concern doctrine of common law and the civil law principles of predality and the *numerus clausus*, 'can be explained as an attempt to minimize the transaction and strategic

⁸¹ BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 19-20, describing the anticommons effect as a positive externality resulting from the right to exclude, which is embedded in the control that every owner exercises over the use of the common resource, without capturing the external effects of their individual actions. Underuse results from an excessive level of exclusion. See further F Parisi, N Schulz & BWF Depoorter 'Duality in property: Commons and anticommons' (2005) 25 *Int Rev Law & Econ* 578-591; N Schulz, F Parisi & B Depoorter 'Fragmentation in property: Towards a general model' (2002) 158 *J Inst & Theor Econ* 594-613.

⁸² BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 20.

costs resulting from dysfunctional property arrangements'.⁸³ However, the traditional *ex ante* strategies of preventing fragmentation are becoming increasingly more unsuitable and *ex post* strategies of correction are more suitable to the dynamic economy of the 21st century.⁸⁴ Consequently, both common law and civil law jurisdictions are gradually shifting away from 'an *ex ante* approach of preventing the creation of atypical property arrangements ... to an *ex post* approach of remedial protection from such arrangements'.⁸⁵

Noting that the *numerus clausus* is strikingly absent from law-and-economics analysis, despite the fact that it represents an important qualification of the freedom of contract which, in economic analysis, promotes the efficient allocation of resources, Merrill and Smith⁸⁶ explain the *numerus clausus* in the context of what they describe as 'optimal standardization in the law of property'. In their view, neither the anti-fragmentation and anticommons argument nor any of the other 'casual criticisms' of the *numerus clausus*⁸⁷ confronts what Merrill and Smith consider the

⁸³ BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 3, summarising the result of the analysis at 3-17 (overview of restrictive strategies in common and civil law), 18-23 (a functional explanation of the economics of fragmentation and the law of entropy). See further F Parisi 'Entropy in property' (2002) 50 *Am J Com L* 595-632.

⁸⁴ BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 36-37.

⁸⁵ BWF Depoorter & F Parisi 'Fragmentation of property rights: A functional interpretation of the law of servitudes' (2003) 3 *Global Jurist Frontiers* 1-41 3, summarising the result of the analysis at 23-35 (describing the shift from *ex ante* to *ex post* strategies in common and civil law), 35-38 (explaining that the *ex ante* strategies are increasingly unsuitable and that the *ex post* strategies seek to accommodate new property needs while minimizing the risk of perpetuating fragmentation).

⁸⁶ TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70 5-6. Compare TW Merrill & HE Smith 'The property / contract interface' (2001) 101 *Colum LR* 773-852 and see further B Akkermans *The principle of numerus clausus in European property law* (2008) 445-448.

⁸⁷ TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70 8, referring to critics who regard the *numerus clausus* as outmoded formalism; as 'perniciously reinforcing hierarchical social relations' that reflects a 'feudal vision of property relationships designed to channel (force?) people into pre-set social relationships' (referring to the CLS-inspired critique of J Williams in CJ Berger & J Williams *Property: Land ownership and use* 4 ed (1997) 213-214; J Williams 'The rhetoric of property' (1998) 83 *Iowa LR* 277-329); as a trap for

essential questions, namely what the costs and benefits of standardization of property forms are; to what extent the government should supply standardization instead of leaving it to owners' incentives and; if the government has a role to play in standardization, what the appropriate division of labour between courts and legislatures should be.⁸⁸ Observing that courts in practice 'routinely abide by the principle' of *numerus clausus*, although courts sometimes 'waver when faced with a direct challenge to the *numerus clausus*, and flirt with the notion that property forms should be subject to modification by contract',⁸⁹ Merrill and Smith conclude that the existence of standardization strategies is justified because of the *in rem* nature of property rights, to the extent that standardization reduces the measurement costs of persons who create or transfer property rights.⁹⁰ In their view, reforms to the system should preferably occur through legislation rather than through 'judicial entrepreneurship' since legislative rulemaking reduces the costs to third parties of measuring the legal dimensions of property rights, thereby reinforcing the information-cost rationale for the justification of standardization.⁹¹

the unwary and poorly endowed property acquirer; and as the source of outdated standardization of forms 'associated with the *ancien régime*. Some of these criticisms are conflicted to the extent that the *numerus clausus* is supposed to counter feudal property relations of the *ancien régime*, at least in the account of the anti-fragmentation story described earlier.

⁸⁸ TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70 8.

⁸⁹ TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70 8, summarising the results of the analysis at 9-24.

⁹⁰ TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70 8, summarising the results of the analysis at 24-42. B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 403-404 argues that the mere existence of a register does not solve the problem with social cost that Merrill & Smith have identified, because there are different kinds of register and they are not all equally effective in reducing information costs.

⁹¹ TW Merrill & HE Smith 'Optimal standardization in the law of property: The *numerus clausus* principle' (2000) 110 *Yale LJ* 1-70 9, summarising the result of the analysis at 58-68.

Hansmann and Kraakman⁹² argue that restrictions on the creation of property rights that deviate from established property forms should not be seen as optimal standardization of property rights (as Merrill and Smith argue), but as verification rules. Crucial to their understanding of the function of *numerus clausus*, Hansmann and Kraakman distinguish between property rights and contractual rights⁹³ on the basis that property rights 'run with the object'.⁹⁴ In their view, the law limits the introduction of new property rights not by standardizing well-defined property forms, but by regulating the type and degree of notice required to establish different types of property right. Property law employs a variety of verification rules that set out the conditions under which a given right in a given asset will 'run with the asset', allowing parties to verify the existence and vesting of property rights.⁹⁵ The *numerus clausus* indicates the law's willingness to recognise certain property rights ('forms of ownership') that run with the object. In the Hansmann-Kraakman version, property law addresses the problem of fragmentation through verification, presuming that all property rights in a given asset are unified in a single owner, unless partitioning of

⁹² H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 379-380. See further B Akkermans *The principle of numerus clausus in European property law* (2008) 448-450.

⁹³ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 analyse the distinction between property rights and contract rights at 378-379.

⁹⁴ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 374, 378-379. Hansmann & Kraakman at 379 explains that their definition entails that a property right can be enforced against all successive acquirors of the asset. This distinguishes their definition from the seemingly similar definition of TW Merrill & HE Smith 'Optimal standardization in the law of property: The numerus clausus principle' (2000) 110 *Yale LJ* 1-70 32; TW Merrill & HE Smith 'The property / contract interface' (2001) 101 *Colum LR* 773-852 780, 783-789, where enforcement *erga omnes* focuses on the right to exclude everyone else from the object, rather than on the enforcement of the obligations associated with the right against successors in title; see Hansmann & Kraakman at 409.

⁹⁵ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 374, 382-385. Hansmann & Kraakman explain the role of registration in the verification process at 393-395. On the significance of notice in the *numerus clausus* debate see further B Rudden 'Economic theory v property law: The *numerus clausus* problem' in J Eekelaar & J Bell (eds) *Oxford essays in jurisprudence – Third series* (1987) 237-263 246-248.

different rights in the asset is established through adequate notice to persons whom it might affect.⁹⁶ Assuming that the benefit of partitioning is generally low and the cost of verification of fragmented rights generally high, Hansmann and Kraakman explain anti-fragmentation restrictions as 'property law necessarily [taking] an unaccommodating approach to all but a few basic categories of partial property rights'.⁹⁷ However, that does not mean that new property rights cannot be created; it is a question of choosing among property regimes that assign verification rules to specific types of property right and that make it either easy or difficult to establish the right.⁹⁸ This choice of a property rights regime must be made socially and cannot be left to individual actors to negotiate (*i e* to the market).⁹⁹ The *numerus clausus* is therefore the balancing point between the costs of introducing a new (or extending an existing) verification rule and the benefit of recognising a new property right (which requires a new or extended verification rule).¹⁰⁰

It should not really come as a surprise that changing circumstances would raise challenges to the continued legitimacy and enforcement of certain servitudinal burdens, especially in the context of the free market economy. As the survey above indicates, those challenges involve three interrelated questions: Firstly, is it still

⁹⁶ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 374. B Edgeworth 'The *numerus clausus* principle in contemporary Australian property law' (2006) 32 *Monash Univ LR* 387-419 403-404 argues that the mere existence of a register does not solve the problem with social cost that Merrill & Smith have identified, because there are different kinds of register and they are not all equally effective in reducing information costs.

⁹⁷ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 375.

⁹⁸ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 395-398 propose an efficiency calculus that takes into account user costs, nonuser costs and system costs.

⁹⁹ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 402.

¹⁰⁰ H Hansmann & R Kraakman 'Property, contract and verification: The numerus clausus problem and the divisibility of rights' (2002) 31 *J Leg Studies* 373-420 419.

necessary to have *ex ante* restrictions (*numerus clausus*; requirements that ensure the predality of servitudes; restrictions on positive obligations) on the creation of servitudal burdens, and is it justifiable to introduce greater flexibility through opening up the possibility of creating new categories of servitude (including positive burdens)? Secondly, is it necessary to introduce *ex post* corrective measures (to amend or terminate servitudes) to address flexibility problems created by changed conditions, obsolete servitudal burdens, and new burdens created under a more flexible regime? Thirdly, if *ex post* remedial measures are employed, should they be legislative or judicial in nature? All three questions, as well as the various responses to them, are analysed in the context of ensuring efficient land use.

The overview above indicates that the efficient land-use narrative is much stronger than the anti-fragmentation narrative, largely because it abandons all historical pretensions and simply focuses on what it perceives as the overarching value in servitude law, namely efficient land use. Despite small variations and differences, both the doctrinal and the economic versions of this narrative point roughly in the same direction: in view of changed circumstances and the needs of the modern economy, both the (partial) retention and the relaxation of traditional restrictive strategies are justified insofar as they improve the conditions for more efficient use of land. Insofar as complete freedom to create new contractual burdens that will run with the land and bind successive owners might result in inefficient fragmentation that increases transaction costs and thereby inhibits the growth of an efficient market in realty, *ex ante* restrictive measures are justified. However, additional *ex post* strategies should be adopted both to relax the grip of obsolete land burdens and to allow for control over possible excesses resulting from abuse or imprudent use of the newly flexible regime. Commentators seem to agree widely that

new developments should be introduced largely by legislation rather than ‘judicial entrepreneurship’, again so as to contain transaction costs.

At first blush the efficient land-use narrative seems to be a world removed from the anti-fragmentation narrative. Having abandoned the historical pretension of the anti-fragmentation narrative, the focus is placed on what appears to be hard evidence from legal doctrine and economic analysis. Moreover, outside of the historical context of anti-feudalism the efficient land-use narrative can ignore the spectres of personal servitude and serfdom and focus purely on servitudes in property. Consequently, it seems to have a firmer grip on reality and it makes a stronger appeal to common sense. It offers concrete, practical questions that can be considered and debated with reference to the exigencies of the real world: how do we accommodate changed circumstances in a more flexible system, without losing too much stability and certainty? Here, it seems, there is no question of a palimpsest – there is just one text; what appears on the surface is all there is, namely functional, utilitarian analysis of the best solution to a practical problem.

4 Layers of liberty

However, appearances are misleading. Through the surface of utilitarian analysis that seems to distinguish the efficient land-use narrative from the distorted historical perspective of the anti-fragmentation narrative it is still possible, despite the patches where previous texts had been rubbed out and overwritten, to discern overlapping layers where the two overlap and merge. One key to the link between the two narratives is reconsidering the notion of servitude, together with its synonyms and – especially – its antonyms. The overview above indicates that there might not be

much value in further exploring the direct links between servitudes in land and personal servitude, serfdom or slavery – despite the undeniable if somewhat murky historical overlaps, the chances of identifying instances where the modern law of servitudes in land still upholds or embodies personal serfdom or slavery are slim. An indirect link via the antonyms of personal servitude in the sense of serfdom is more promising: the opposite of personal servitude is freedom, liberty. And that, liberty, is what both the anti-fragmentation and the efficient land–use narratives are about.

The key is in the difference between the two narrative treatments of liberty. The rhetorical strength of the anti-fragmentation narrative is its focus on the causal link between the French Revolution, the abolition of feudalism and the embodiment of individual liberty and autonomy in rights, including fundamental constitutional rights. In this perspective, liberty is constitutional in nature, associated with social and political liberty from the oppressive social relations of feudalism. However, the weakness of the anti-fragmentation narrative is its inability to establish a historical link between the abolition of feudalism, the promotion of social and political liberty and the move towards absolute and unitary ownership. In the anti-fragmentation sources, this link is tenuous at best, which is perhaps understandable in view of the fact that in property law, on the private law level where the modern-day servitude debates are situated, the real focus is no longer on social and political liberty but on economic liberty.¹⁰¹ In feudal social relations, political power and economic power

¹⁰¹ The significant differences of the two liberties, and their different historical roots, are indicated by GCJJ van den Bergh *Eigendom: Grepen uit de geschiedenis van een omstreden begrip* 2 ed (1988) 52; for a more extensive analysis see JWG van der Walt 'The critique of subjectivism and its implications for property law – Towards a deconstructive republican theory of property' in GE van Maanen & AJ van der Walt *Property law on the threshold of the 21st century* (1996) 115-159 115-120. Van der Walt at 116 argues that 'the private law understanding of property as an embodiment of economic liberty is largely a reflection of the nineteenth century convergence between classical economic thought and classical legal thought in the civil law countries of the European continent, especially that of Germany.'

were united and although the acquisition of individual property rights were still closely associated with the exercise of political power in early modern thinking, the political understanding of property had been replaced by a purely economic or privatist understanding by the time of the American revolution.¹⁰² In the economic understanding of property, liberty is closely associated with the desire of the wealthy to resist the need for redistribution in the face of changed social circumstances.

Gray and Gray¹⁰³ demonstrate the point very clearly in the context of the anti-fragmentation rules and principles that form the focus of both narratives. As they point out, the *numerus clausus* imposes restrictions on the proliferation of proprietary rights in land to prevent the cluttering of land with 'long-term burdens of an idiosyncratic or anti-social nature', thus facilitating commerce in realty by reducing the transaction costs. In their view, the heightened interest in security of title that is evident from anti-fragmentation rules and from controls over relaxation of those rules underlines 'the need both to consolidate the concept of title and to sharpen up the effects of one-off title dealings between strangers'. The outcome, Gray and Gray argue, culminates in the Land Registration Act 2002, which 'nudges registered titles ever closer towards a concept of *dominium*' on the understanding that 'the crisper the title, the easier the trade, and the safer the owner'.¹⁰⁴ Economic liberty requires clean, crisp title and security of title; by extension, when flexibility is necessary it also requires clarity and certainty about burdens and restrictions placed upon title.

¹⁰² JWG van der Walt 'The critique of subjectivism and its implications for property law – Towards a deconstructive republican theory of property' in GE van Maanen & AJ van der Walt *Property law on the threshold of the 21st century* (1996) 115-159 118-119, citing EV Mensch 'The colonial origins of liberal property rights' (1982) 31 *Buffalo LR* 635-660 648; J Nedelsky *Private property and the limits of American constitutionalism* (1990) 67ff.

¹⁰³ K Gray & SF Gray 'The rhetoric of realty' in J Getzler (ed) *Rationalizing property, equity and trusts: Essays in honour of Edward Burn* (2003) 204-280 212-214.

¹⁰⁴ K Gray & SF Gray 'The rhetoric of realty' in J Getzler (ed) *Rationalizing property, equity and trusts: Essays in honour of Edward Burn* (2003) 204-280 247.

The apparent disjunction between the two narratives is therefore to be explained with reference to the almost invisible but significant rhetorical shift from social and political to economic liberty. As soon as property discourse moved away from social and political liberty and focused purely on economic liberty,¹⁰⁵ interest in notions of personal servitude, serfdom or oppression fades away, which is why the historical part of the anti-fragmentation narrative appears so unconvincing and uninteresting to property lawyers. Subsequently, all attention is focused on economic liberty, which only makes sense in the context of a market economy where political interference is excluded or restricted to the bare minimum. Hence the apparent interest and common sense appeal of the efficient land-use narrative. The greater appeal of the efficient land-use narrative can only be understood against the background of the extent to which it came into existence through the partial rubbing out and over-writing of the social and political aspects of the anti-fragmentation narrative.

In the end, though, both narratives are about the same thing, the same aspect of servitude law, namely choice. The anti-fragmentation arguments are about limiting individual choice, contractual freedom, in an effort to restrict random fragmentation of land rights and the resulting inefficiencies that that might bring about. The efficient-land use arguments are about balancing the choice, contractual freedom, of contracting parties who want to create new rights or servitudinal burdens that would bind successive owners and the choice, the freedom of decision making in land use, of successive owners and later generations. The debate about *ex post* controls is

¹⁰⁵ JWG van der Walt 'The critique of subjectivism and its implications for property law – Towards a deconstructive republican theory of property' in GE van Maanen & AJ van der Walt *Property law on the threshold of the 21st century* (1996) 115-159 118-119-120 argues that all property discourse finally and inexorably had moved in this direction by the time of the American revolution.

about preserving the possibility of choice of landowners who find themselves fettered by burdens imposed on their land without their consent, in another time and under different circumstances. In the end, the entire servitude discourse is about finding a justifiable balance between the freedom of choice of current landowners to impose burdens on their land and the freedom of choice of successive landowners who have to live with those burdens that they did not choose. Liberty, therefore, as the freedom to choose for or against land burdens that restrict the absoluteness of ownership.

This preliminary conclusion does not simplify matters. Alexander argues that casting the debate about land burdens and the absoluteness of ownership in the form of a dichotomy between individual choice and collective coercion ‘ultimately undermines the very political vision to which it purports to commit, the liberal vision of human empowerment.’ Assuming ‘both the possibility and the desirability of classifying every aspect of the legal apparatus for adjusting conflicting land-use preferences as either choice-maximizing or choice-inhibiting’, he argues, setting up the debate about *numerus clausus*, restrictive strategies such as touch-and-concern or predality and the desirability of *ex post* controls as a stark conflict between mutually exclusive, radically alternative approaches, undermines the very possibility of choice and liberty because in fact there are elements of both choice and coercion on either side of this false dichotomy.¹⁰⁶ For example, assuming that servitude law generally enhances individual freedom of choice and hence to prefer servitudes over zoning as a way of accommodating conflicting land-uses, or to present homeowners’ associations as (models for) cities in which the constitution consists of servitudes fails to acknowledge the coercion that is inherent in servitude-based town planning

¹⁰⁶ GS Alexander ‘Freedom, coercion, and the law of servitudes’ (1988) 78 *Cornell LR* 883-970 884.

regimes or homeowners' associations.¹⁰⁷ Moreover, this false dichotomy fails to uncover the instability of essentialist doctrinal debate based on an assumption that a certain position is choice-enhancing, while in fact there is both choice and coercion on both sides of the debate.¹⁰⁸ In the end, Alexander argues,¹⁰⁹ '[t]he easy availability of the notions of free choice and coercion in the arguments [about the touch-and-concern doctrine] establishes as an impossible dream the vision of a purely private, uncoercive regime of servitude law.' Alexander proposes a similarly structured argument regarding the debate about changed conditions and the availability of *ex post* strategies to escape the long-term effects of obsolete servitudinal burdens. On the one hand, liberal thinking responds positively towards the doctrine of changed conditions because, in terms of liberal thinking, changed conditions change the preferences of the self, which favours ascribing *ex post* collective interference to individual preference.¹¹⁰ However, this move turns individual volition on its head by imputing a collective preference to interfere with individual preference, resulting in collective coercion that denies the autonomy of the self. However, obsolescence does in fact cause choicelessness, a bilateral monopoly in which both

¹⁰⁷ GS Alexander 'Freedom, coercion, and the law of servitudes' (1988) 78 *Cornell LR* 883-970 886-887, referring to the preferences expressed by R Ellickson 'Alternatives to zoning: Covenants, nuisance rules, and fines as land-use controls' (1973) 40 *Univ Chicago LR* 681-781; W Fischel *The economics of zoning laws* (1985) 164; R Ellickson 'Cities and homeowners associations' (1982) 130 *Univ Pa LR* 1519-1580; R Epstein 'Covenants and constitutions' (1988) 73 *Cornell LR* 906-927.

¹⁰⁸ GS Alexander 'Freedom, coercion, and the law of servitudes' (1988) 78 *Cornell LR* 883-970 890-892, referring to U Reichman 'Toward a unified concept of servitudes' (1982) 55 *S Cal LR* 1177-1265 1233, who defends the touch-and-concern doctrine as a filtering device that protects individual autonomy against dead-hand, feudal-type private legislation similar to feudal serfdom; and R Epstein 'Notice and freedom of contract in the law of servitudes' (1982) 55 *S Cal LR* 1353-1368 1359-1360, who argues in exactly the opposite direction, that the touch-and-concern requirement denies the original contracting parties the freedom of contract in favour of the interests of future third parties, who by definition have no proprietary claim to the property in question.

¹⁰⁹ GS Alexander 'Freedom, coercion, and the law of servitudes' (1988) 78 *Cornell LR* 883-970 897. Alexander prefers to retain touch-and-concern as a discretionary norm that protects purchasers who have behaved foolishly and to prevent promisors and their heirs from behaving opportunistically.

¹¹⁰ GS Alexander 'Freedom, coercion, and the law of servitudes' (1988) 78 *Cornell LR* 883-970 898-899, referring to SE Sterk 'Foresight and the law of servitudes' (1988) 73 *Cornell LR* 956-970 958; R Posner *Economic analysis of the law* 2 ed (1977) 390.

sides appear to have free choice but are in fact subject to coercion. External force, in the form of a possibility for legal intervention, may allow them to do what they lack the power to do, namely to terminate or modify an obsolete servitudal burden.¹¹¹

The discussion of developments in servitude law should therefore not be set up in terms of a false dichotomy between individual choice and collective coercion; both individual choice and legal rules hold elements of choice and of coercion. Furthermore, one may add, an apparent lack of contestation and debate should not be taken as a sign that a particular legal system has settled matters by finding a perfect balance between choice and coercion. The seemingly settled state of South African servitude law should therefore raise the question why the obvious, radical subjects of debate and conflict about the development of servitude law have not pervaded current South African law. The answer that is suggested by the overview above is that the lack of contestation is caused by a false sense of equilibrium, based on a pervasive ideological and doctrinal agreement that the current state of the law optimally balances the overriding value of a unified, absolute and secure right of ownership with sufficient flexibility to ensure efficient land use. In the terminology of Merrill and Smith, the consensus seems to be that South African servitude law has reached 'optimal standardization'.

In the face of that strong sense of security and stability, I would propose that the development of South African servitude law should start off with questions rather than answers. A few obvious questions are the following; there are certainly many others that also need to be asked. As a first question, with a nod towards the anti-fragmentation narrative and the fear of a return to split ownership: What is embodied

¹¹¹ GS Alexander 'Freedom, coercion, and the law of servitudes' (1988) 78 *Cornell LR* 883-970 899.

and protected in servitudes that work? Just superficially, splitting ownership and use rights does not have to be a negative process, especially if it can create more users with secure rights and thus open up access to land. The problem with feudal land law was not simply that land use rights were split up between a formal and a beneficial owner, but that feudal rights did not liberate the persons who worked the land from social and political (or economic) oppression; instead, it tied them to the land by ties of personal, social and political obligation. Secure use rights can liberate personal autonomy and economic value for non-owners, even when they are separated from ownership. In the context of servitudes, it is perhaps necessary as an initial step to distinguish more carefully between different kinds of servitude and what they do. Some servitudes enable the proper use of land and enhance its utility, in the classic sense of utility (servitudes that secure access to roads, water *etc*). In a certain perspective, these servitudes have an almost public character in the sense that they open up land that is closed off from amenities and resources that should be accessible. Other servitudes that secure something like personal residential or housing interests (servitudes of usufruct, use, habitation) also have a public element to them in the sense that they could raise housing or environmental issues in the constitutional sphere. Thirdly, servitudes with a strong urban or spatial planning function (restrictive covenants and conditions) also have a public aspect, which often shows in the fact that there is stronger public law control over them. Should one conclude that there is something special about servitudes that protect or secure protected basic human rights such as housing, and does that extent to servitudes that secure access to natural resources or environmental rights?¹¹² In the fourth

¹¹² K Gray & SF Gray 'The rhetoric of realty' in J Getzler (ed) *Rationalizing property, equity and trusts: Essays in honour of Edward Burn* (2003) 204-280 265ff argue that there are signs of the development

place, some servitudes secure efficient economic benefit and exploitation of land (servitudes that allow the use or collection of products from the servient land, e.g. servitudes that secure a right to trade on the servient land, or in restraint of trade, or to restrict the use of the servient land). These servitudes have a stronger economic focus than the previous groups. Remarkably, this superficial survey indicates that many servitudes display a strong public character that renders them unsuitable for a purely efficiency-type analysis that looks mostly at individual choice. Simultaneously, the real issue with servitudes might not be fragmentation of ownership but commercialisation of property rights, which raises the question whether the development of servitude law is supposed to facilitate, for the sake of land exploitation by entrepreneurs, the economic aggregation of land parcels free from burdens.

A second question might involve the nature of problems with servitude rights that cause or initiate the kind of debates surveyed earlier, especially in foreign law. From the examples discussed in the literature, one might conclude that one problem area is redundant servitudes, where changed conditions have rendered existing land burdens obsolete and unworkable in an absolute sense. In this case, the main topic is the creation of amendment and termination procedures (prescription through non-use, statutory and judicial termination). A second problem area that superficially looks similar but in fact is very different from the first is servitudes that have become unbearable burdens through changed conditions (changed conditions mean that the servitude is ineffective or that it makes use of the servient land inefficient). The main question is again whether statutory and judicial amendment and termination

of a general norm of reciprocity in areas of property law where property involves dealings with fellow citizens, and specify environmental rights as one such area.

procedures should be available, but in this case the justification for and perhaps even the nature of those procedures might be different, given the economic rather than absolute nature of the desire to amend or terminate. A third problem is even more strongly economic: the need for economic development of land that is subject to servitudal burdens. It is mainly in this area that the economic arguments concerning high transaction costs, strategic behaviour, holdouts, and anticommons surface, when developers want to reassemble the diverse use rights that might exist on a collection of contiguous land parcels that are being assembled for development. Again, the existence and nature of and the justification for *ex post* methods to terminate those burdens are determined by the economic nature of the desire to terminate them. A fourth and final problem that emerges from the literature is the need to create, on the basis of contract, either new categories of servitude or servitudal conditions (such as positive obligations) that for some reason conflict with traditional restrictions. In this case, the main issue seems to be whether doctrine is flexible enough to allow for the exceptions that deserve recognition or whether either statutory or judicial innovation is called for and justified.

A question that does not often surface in servitude literature and that arguably deserves attention is the constitutional issue: if the regulation of servitude burdens moves towards *ex post* control, in the form of either statutory or judicial ability to terminate or amend existing servitudes on the basis of changed circumstances, each change that amounts to a unilateral amendment or termination of an existing servitude right is arguably a forced transfer of property that requires constitutional justification. In many cases, possibly all the cases of unilateral amendment or termination on the basis of doctrinal developments, justification might not be difficult, but extensive statutory amendments or innovative judicial activism in this area might

well create a few interesting constitutional property questions. It bears mentioning that both the legislature and the judiciary in various jurisdictions have proved their willingness to use the power of eminent domain (or the judicial power to find that a regulatory action was a regulatory taking) in favour of entrepreneurial development of land; should we expect a similar process in servitude law to free land from economically unwanted burdens?