Between Regimentation and Customisation: Systems of Land Burdens and the Numerus Clausus in Property Law

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I. Introduction

One of the first puzzles a student of property law encounters is why property rights are to be fixed in categories, to be “bought off the peg”\(^1\) as it were, or molded in predetermined forms; whilst contracts can much more readily be tailored to the needs of the parties involved. The order of property law is so seductively simple. Its relationships can be so nicely and easily boxed and branded. The core concepts that comprise the discipline, such as ownership and limited or “lesser” rights have a more or less generalized meaning. Likewise, property law is based on no more than a handful of principles, from which derive the solutions to a wide array of problems. This simplicity makes for high levels of certainty, but sacrifices flexibility: when it comes to the creation of rights in property law, whatever private parties may want their arrangements to entail, the law will not bend to the fancies\(^2\) of individuals.

The true appeal of property law, however, is one that reveals itself as a student’s understanding of the subject grows: its appearances are deceiving. Beneath the apparently simple exterior of property law, there is a world alive with diversity, complexity and contradiction. The categories of property rights may seem neat and sorted on the pages of a textbook, but in reality – in practice – there is far more than meets the eye. When one’s study ventures across the borders of one’s home jurisdiction, the complexities and contradictions in it become more acutely noticeable.

This paper is about the *numerus clausus* principle in property law. In terms of it, “only real rights, means of delivery of movables and modes of original acquisition of ownership that fall into one of the recognized categories … will be countenanced by the law”.\(^3\) New types of rights or modes of acquisition or delivery - types falling outside the closed system - will not be recognised. Whatever private parties may want their arrangements to entail, when it comes to property, the law will not bend to the whims, fancies or inconsistencies of individuals. Doctrinally, therefore, only a limited number of constructive modes of delivery\(^4\) and of modes

\(^1\) Merrill TW and Smith HE "Optimal Standardisation in the Law of Property: The Numerus Clausus Principle" 2000 (110) Yale Law Journal 1 at [*].


\(^4\) I.e. symbolic delivery, delivery with the long hand, *constitutum possessorium*, delivery with the short hand and attornment. See further Van der Merwe CG *Sakereg* 2 ed (1989) at 11, 317-328; Van der Merwe CG "Things" in Joubert WA (ed) *Law of South Africa* Vol 27 (2001) at paras 368-374; Badenhorst PJ, Pienaar JM and Mostert H
of original acquisition of ownership exist. Typically also, the burdens that may be placed on property are carefully limited, and the content of these burdens are closely circumscribed.\textsuperscript{5}

The paper limits its focus to the latter: the impact of the \textit{numerus clausus} principle on the ways in which property may be encumbered by the rights of third parties. In this respect, the \textit{numerus clausus} principle is important because it prevents owners from hampering the tradeability of their properties by overburdening them.\textsuperscript{6} The principle thus constitutes a limitation on party autonomy,\textsuperscript{7} and it qualifies freedom of contract.\textsuperscript{8}

\section{A. The Numerus Clausus Principle in Civil Law and Common Law}

The \textit{numerus clausus} principle addresses the apparent need in property law for a “regimentation” of interests, for the sake of legal certainty. Absent a regiment (or closed system) of interests, the law is inherently more flexible, and the options are inherently less certain\textsuperscript{9} if users are allowed to customise arrangements to suit their specific needs. This, however, leads to greater uncertainty as to whether such bespoke arrangements have the force of property law behind them. At stake here is the question whether such arrangements “are good against the world”\textsuperscript{10} or “run with the asset”\textsuperscript{11} and are hence enforceable by and against successors-in-title; or whether enforceability is limited to the parties immediate to the arrangement.

\begin{itemize}
\item German pandectism referred to the limitation of the number of burdens on property as \textit{Typenzwang}, and to the circumscribing of the content of such burdens as \textit{Typenfixierung}. These notions were influential in other civil law jurisdictions. Akkermans B \textit{The Principle of Numerus Clausus in European Property Law} Ius Commune Europaeum (2008) at [*].
\item Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 9-11.
\item Struycken THD \textit{De Numerus Clausus in het Goederenrecht} (2007) at 1.
\item [*]
\item [*]
\end{itemize}

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It is often assumed that the *numerus clausus* principle existed as such in Roman law,\(^{12}\) from which the principles of civil law are derived, but the term itself is relatively new. Roman law acknowledged a limited number of ways to acquire and terminate rights, as well as limitations to the categorisation and content of rights.\(^{13}\) This was so because of the manner in which the Roman system of actions operated. But some commentators\(^ {14}\) have pointed out that it would be false to deduce generally applicable property law principles from this peculiarity of the Roman legal system. *Numerus clausus* as a doctrine of property law is a later creation: not necessarily introduced, but certainly strongly influenced by German pandectism of the nineteenth century and confirmed originally in the codification of German and Dutch private law in the early parts of the twentieth century.

In modern civil law systems, there is an overt acknowledgement of the force of the *Numerus Clausus* principle: Whereas an owner may liberally bestow on others contractual claims to his/her asset, property rights cannot be so freely fashioned and granted others.\(^{15}\) Adherence to the *numerus clausus* principle grows from civil law’s unitary theory of property rights, which generally wants the proprietary claims to an asset all to be concentrated in the hands, preferably, of a single owner. The exceptions to this unitary view of property are limited to a small, strictly defined number: a *numerus clausus*. Rights not conforming to this kind of regimentation are in principle not enforceable.\(^ {16}\)

From a common-law perspective, the angle from which regimentation of property rights is examined, must be different from that of civil law, because of the different responses to feudalism in common law and civil law jurisdictions. In common law, the notion of the *numerus clausus* is referred to as the “rule with no name”\(^ {17}\) or taken to be a “portmanteau

\(^{12}\) Van der Merwe CG *Sakereg* 2 ed (1989) at 10.

\(^{13}\) The *numerus clausus* principle emanated from the limitation, in Roman law, of real actions to protect ownership and servitudes. De Waal M *Numerus Clausus and the Development of New Real Rights in South African Law* (1999) at [*], Van der Merwe CG *Sakereg* 2 ed (1989) at [*], Struycken THD *De Numerus Clausus in het Goederenrecht* (2007) at [*]. The protection was eventually extended to two more categories, namely *emphyteusis* (a form of leasehold) and *superficies* (the right to build). Van der Merwe CG *Sakereg* 2 ed (1989) at 10. The closed list of real protection was discarded with the development of feudalism in medieval times.

\(^{14}\) Struycken THD *De Numerus Clausus in het Goederenrecht* (2007) at 124.


\(^{17}\) Sparkes P "Certainty of Property: Numerus Clausus or the Rule with No Name" 2012 (20) *European Review of Private Law* 769 at 769.
description for a number of related rules” 18 such as those relating to the “catalogue of estates” or “forms of ownership” which form part of any basic university course on property law. 19 As diverse as the descriptions of the principle may be in various common-law jurisdictions of the world, on a generalised level it is “axiomatic in all mature property systems”. 20 The categories in common law may look different, 21 and they may acknowledge divisions in property rights that sit uncomfortably with the civil-law unitary notion of ownership, but the number of property right types that can be created easily is still predetermined, and enforcing a-typical rights is difficult or impossible.

South African law represents a historic mix of common law and civil law, and as such makes for an interesting comparator in studies of the numerus clausus principle. 22 It recognises the numerus clausus principle to some extent, but does not adhere to it as broadly as is the case in modern civil law systems. This renders it difficult to characterize the system with ease as being either “open” (i.e. not adhering to a system of regimentation) or “closed” (i.e. adhering to a system of regimentation). 23 Modern South African law acknowledges the numerus clausus (for the time being still) in respect of constructive modes of delivery. 24 The same is true for modes of original acquisition of ownership. But unlike Roman Law, Roman-Dutch Law and German Pandectism, from which South Africa derives its property law rules, it allows persons to tailor their arrangements in respect of property in ways that often defy classic regimentation schemes, 25 and render the distinction between property rights and contractual rights unclear. The law has ways of dealing with this.

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18 Sparkes P "Certainty of Property: Numerus Clausus or the Rule with No Name" 2012 (20) European Review of Private Law 769 at 769.
24 Van der Merwe CG Sakereg 2 ed (1989) at [*].
25 Van der Merwe CG Sakereg 2 ed (1989) at [*].
B. Direction of Inquiry

Over the past thirty years, the *numerus clausus* has received renewed scholarly interest. Much of the work on this topic seeks to clarify the role of the *numerus clausus* principle in property law (what the principle does for that part of property law that deals with burdening property); or to justify continued reliance on the principle (why the principle still is apposite in modern times); or to expose the ways in which the principle is abrogated (how to get around the principle). The interest in this aspect of property law is quite understandable. “In recent decades, under the pressure of changes in economic organization, information technology, social practices of production and new environmental challenges, we seem to have entered a new moment of creativity in property.”

On the premise that in property law, social and economic changes spur re-conceptualising of the basic building principles of property law, this paper examines modern challenges to and continued justifications for the *numerus clausus* principle in both civil and common law (discussed in section II). It does so with the purpose of demonstrating the value of the South African experience for testing justifications for continued support of the principle (in section III). In the process, it focuses on the emancipation of a particular set of rights – those to minerals – from the category of “lesser” rights under which it had long been made to resort by the judiciary and scholarship.

II. Theoretical concerns and responses

A. Theorising the *numerus clausus* in Common Law

That property rights can be reduced to a short list of types, with each of the rights on the list having a more or less set content, was not an issue which received much attention in Anglo-American literature before the analysis of Rudden a mere three decades ago. His analysis finds a “coyness”, shared by all jurisdictions he examined, to acknowledge new types of


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property rights or to deviate significantly from the known content of rights. Rudden exposes the conflict between this position in law and the governing economic theories of property rights, which have efficiency of use at their core. He explores this conflict by scrutinizing the prevalent reasons for maintaining a numerus clausus of property forms and content: absence of demand, absence of notice, absence of content and “pyramiding” of rights.

Ultimately, Rudden exposes the disconnect between economic explanations of property rights and the legal positions supporting such rights.

A decade and a half later, Merrill and Smith responded by setting out their view of the relevance of the numerus clausus principle. Arguing from a law-and-economics position, they point out that the problem with the numerus clausus principle is not simply that it amounts to “outmoded” formalism, or as critical legal scholars would argue, that it “perniciously reinforce[es] hierarchical social relations.” It is also not simply – in response to Rudden – a means to distinguish those with good legal advisors who can always manipulate the “menu of options” to achieve their aims, from those less sophisticated whose intentions are more frequently frustrated by the principle. Instead, Merrill and Smith argue, on a cost-benefit analysis, the numerus clausus principle properly applied can strike a balance between the proliferation of property forms, on the one hand, and excessive rigidity on the other.

They make their case for standardization of property forms – what they refer to as a “fixed universe of property rights” by pointing out that proliferation of property rights is problematic because of the uncertainty this creates for any third party that must attempt not to violate the

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rights of others, or who must make prudent choices in acquiring rights of others. They refer to this as the external, “higher measurement” costs on third parties. They acknowledge, however, that “a ‘one size fits all’ system of property rights” may “frustrate the parties’ intentions”, which leads to “more complex combination[s] of the standardized building blocks of property.” This they dub the “frustration costs” of upholding the numerus clausus principle. They use the latter consideration to temper their support of standardization of property forms, by arguing for “optimal” standardization. Optimal standardization, when seen from the perspective of complete freedom to customize relationships, is an attempt to “put a brake on parties’ efforts to proliferate new forms of property rights”. Seen from another perspective, the one ascribing to a rigidity of property forms, optimal standardization is an attempt to permit some positive level of diversification in the recognized forms of property by “grandfathering” in existing forms, and permitting legislative creation of new forms.

Merrill and Smith’s analysis, essentially, is one that pleads for the upholding of a numerus clausus in the description of types of burdens on land. But the plea does not simply represent the typical property lawyer’s “boxing” fetish. At the very least, their argument constitutes a nod to complexities of real life, for which property law has to present a workable matrix.

The analysis of Merrill & Smith has sparked much further debate, both within the law and economics camp and from without. On a costs-benefit analysis, Hansmann and Kraakman claimed, for instance, that the costs highlighted by the analysis do not fully motivate the existence of the principle. They challenge the Merrill/Smith position that property law’s tendency to “box” and “label” has an important communicative function in that it limits the costs of processing information. Hansmann/Kraakman demonstrate that even within systems characterized by strong regimentation, the flexibility within each category, to define the content of the burdens created, means that the problem with information / communication

costs does not disappear. In following this line of argumentation, they aim to refute the Merrill/Smith position on information costs.

Outside of the law-and-economics debate, Dagan criticises the Merrill/Smith position, arguing that the *numerus clausus* principle reflects the values a society associates with property and wants to achieve through property law: “the forms of property should affect outcomes to the extent that they help constitute property institutions that serve important human values”. Singer’s position is similar, in that it views the *numerus clausus* principle as a filter between property and contract. His sentiment relating to the purpose or property law – that it “define[s] a legitimate social order” – goes further than that of Smith who views it as “a platform through which people navigate relations with others with respect to things”. Singer points out that some kinds of arrangements are not compatible with social values. The *numerus clausus* principle allows the state – through legislation – to decide whether to put the full force of property law behind newly established relations. As such the *numerus clausus* principle induces the state to manage the social relations generated by individual arrangements by requiring it to decide whether or not to allow such arrangements to expand the ambit of property law.

It is interesting that analyses such as those of Dagan, Singer and others, although deviating from law and economics based justifications (such as those of Merrill/Smith or Hansmann/Kraakman) in favour of upholding the *numerus clausus* principle, find several

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43 It "sustains the institutions of property as intermediary social constructs through which law interacts with - reflects and shapes - our social values." Dagan H "The Craft of Property" 2003 (91) *California Law Review* 1517 at [*].


46 And see discussion of Struycken THD *De Numerus Clausus in het Goederenrecht* (2007) at [*] below.


reasons to support the existence of the principle. Dagan argues that “[a]llowing people to opt out of many incidents of property law’s existing forms - to tailor their property arrangements in accordance with the way in which they prefer to cast their interpersonal relationships - does not undermine law’s functions of consolidating expectations and expressing ideals for core types of human interaction.” He points out that the common law forms of property cannot be treated as “abstract entities with internally untouchable structure and content”, but that existing property forms cannot be dismissed without more, “because they represent our existing default frameworks of interpersonal interaction.”

What the Anglo-American property theorists’ engagement with the justification for the *numerus clausus* principle demonstrates, is that there is ample justification for it, even in modern society. None support, however, a strict regimentation. They argue for flexibility and dynamism within the parameters of certain categories of property, and for legislative ability to adapt and reshape the types and content of property as the need may arise. These sentiments vary to some extents from those expressed by new voices from the civil law jurisdictions.

### B. Modern scrutiny of the *numerus clausus* principle in Civil Law

There is anything but a dearth of information and analysis of the *numerus clausus* principle in the civil law context. This section will focus only on the most recent scholarly analyses. Two of these quite extensive works come from the Dutch context, where the codified law on property was reshaped quite significantly as recently as 1992, with the coming into force of that part of the new Dutch Civil Code that deals with property. The *numerus clausus* was

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53 Dutch legal thought about the *numerus clausus* was at first influenced largely by French, and later by German doctrine, especially that of Von Savigny. Certainly, by the time the Dutch Civil Code (BW) was revised (in 1992) the principle was firmly established: in modern law, the number of real rights is limited by law. Private persons are not allowed to create new types of real rights. Despite scholarly arguments that the societal need for allowing the *numerus clausus* to be governing doctrine had dissipated by this time, the new Code contains pervasive reference to the principle. Struycken THD *De Numerus Clausus in het Goederenrecht* (2007) at 11-39, 205. For present purposes, the most relevant provision is art 3:81 lid 1 (which states that “[h]e who is entitled to an independent and transferable right can, within the boundaries of that right, create the limited property rights that are mentioned by statute.”) Its counterpart in the old Civil Code, art 584, contained a catalogue of real rights. This is absent from the new Code, but it is undisputed that new categories of real rights can only be created by the legislature. Struycken THD *De Numerus Clausus in het Goederenrecht* (2007) at 14. Added to that, the law contains provisions as to the exact scope and content of specific real rights: Real rights establish a legal relationship with regard to goods. A contract establishes a legal relationship between people. Most European countries know the dichotomy between real rights and personal rights. In the Netherlands a real right follows the object (‘droit de suite’) and takes priority over other younger real rights (‘droit de priorité’, *prior tempore potior iure*) as well as personal rights in general (‘droit de préférence’, for example in case of insolvency). Struycken THD *De Numerus Clausus in het Goederenrecht* (2007) at 14.

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retained as part of the New Civil Code. Another study is undertaken from the German perspective.

Füller, for the German context, and Struyken for the Dutch context, both examine the reasons for the continued support of the principle in civil law. Both are acutely aware of the strong influence that nineteenth century German pandectism had on the introduction of the principle of *numerus clausus* in civil law,\(^{54}\) and its original role in resisting the continuation of feudal property law. For this reason, the clear distinction between property and contract is a historic fact.\(^{55}\)

By discussing the ways in which codified German law acknowledges obligations between property right holders, Füller draws attention,\(^{56}\) however, to the explicit and deliberate links between property law and contract law. He also exposes the unforeseen influences of contract law on property, the *Treuhand* being the example mentioned.\(^{57}\) As a result of these foreseen and unforeseen consequences, the once unified concept of ownership has undergone some measure of diversification, with the addition of apartment ownership (*Wohnungseigentum*), security ownership (*Treuhandeigentum*) and the right to *superficies* (*Erbbaurecht*).\(^{58}\) Füller continues by further discussing how, in respect of lesser rights to property, formerly established delineations (such as those between usufruct and praedial servitude) have become murky.\(^{59}\) In the light of such developments, his question about the continued relevance of both the *Typenzwang* and *Typenfixierung* inherent in the *numerus clausus* is justified. He proposes\(^{60}\) a wholesale reworking of the German law of property and contract in a way that abandons the *numerus clausus* principle in favour of greater integration between property and contract, and which is more attuned to modern, practical needs.

Struycken, on the other hand, is more cautious. His argument is that absent a *numerus clausus* acting as a filter between property and contract law, problems will arise in the context of


\(^{55}\) Akkermans B *The Principle of Numerus Clausus in European Property Law* Ius Commune Europaeum (2008) at [*].


registrability, destruction and execution, as well as seizure of property. According to Struycken, the rationale behind the *numerus clausus* is threefold: First, there is the ethical motivation: the *numerus clausus* serves to protect basic freedoms, by extending the protection of ownership to a limited number of real rights. What is included in the list of acknowledged rights reflects an ethical choice of the legislator about the way of life it is willing to support. Second, there is an economic motivation: the *numerus clausus* serves to increase tradeability of property through standardisation of property rights. Hence the principle provides clear rules on the content of each type and the rights and obligations flowing from it. Finally, the *numerus clausus* is part of a legal technique to increase legal certainty.

The main justifications for retaining a *numerus clausus* in the Dutch system which, like German law, is also frequented by exceptions to the rules put in place by the *numerus clausus* principle lies in acknowledging the primary authority of the legislature to allow such exceptions, and the interests of certainty in property law.

Akkermans’ attentions are on the European context, and the drive towards unification of the property systems. With this in mind, he provides an extensive comparative analysis of the *numerus clausus* principle, demonstrating that differences between the various civil law systems are not principal, but rather a result of differences afforded the primacy of legislation or judicial precedent within the different systems. Akkermans acknowledges that “a system without a rule of *numerus clausus*” in respect of property rights “can be fully functional” despite lowered standards of legal certainty. He further points out that even within the civil law family, which endorses the *numerus clausus* principle generally, there are differences in the types of rights, and the content of those rights that form part of the national lists. Upholding these differences has become difficult in the integrated, twenty-first century

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Europe.\textsuperscript{67} This makes for a new dynamism in property law on the European continent, and justifies scrutinizing the continued significance of the \textit{numerus clausus} principle.\textsuperscript{68} Akkermans eventually, considering the broader international debate on the subject, finds that the principle may be relevant as a filter between property and contract in the European context.\textsuperscript{69} He uses this principle to formulate an “access test”, which entails that when a new relation is created, it must be determined whether (1) it derives from the primary right, and relates to an object capable of being subject to the primary rights; (2) the parties intend to bind their successors in title and have sufficient interest to do so; and (3) the new relation can still be categorized within existing categories of property law, and if not, whether creation of a new category is justified on policy grounds.

\section*{C. Inferences}

The analysis of Smith\textsuperscript{70} on the economy of concepts in property may be helpful in understanding the links between the debate on the justification for the \textit{numerus clausus} principle in Anglo-American jurisdictions and the debate on the continued relevance of the same principle in the European context. His concern is to find the simplest, and preferably most elegant, way of describing the law. Translated into the context of my inquiry here, the question could be formulated as such: should the \textit{numerus clausus} be upheld as a principle, but leaving the legislature (and courts) enough room for maneuvering within the parameters it sets; or should the principle be replaced by a system of open property law norms, with sufficient checks and balances to avoid the mischiefs against which the \textit{numerus clausus} principle had hitherto guarded.

Whereas there may not be as much uniformity among civil law scholars in dismissing the continued relevance of the principle as there is among Anglo-American lawyers in motivating its retention, there seems to be greater nerve and/or daring among some scholars of civil law to break with the traditions rolled up into the principle. At least some of them look to the

\begin{footnotesize}
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\item\textsuperscript{67} Akkermans B \textit{The Principle of Numerus Clausus in European Property Law} Ius Commune Europaeum (2008) at 487.
\item\textsuperscript{68} Akkermans B \textit{The Principle of Numerus Clausus in European Property Law} Ius Commune Europaeum (2008) at 569 (and see his ch 8, [*]).
\item\textsuperscript{69} Akkermans B \textit{The Principle of Numerus Clausus in European Property Law} Ius Commune Europaeum (2008) at 569.
\item\textsuperscript{70} Smith HE "On the Economy of Concepts in Property" 2012 (160) \textit{University of Pennsylvania Law Review} 2097 at [*].
\end{itemize}
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South African experience for inspiration. This provides impetus to scrutinize the operation of the South African law on this point.

III. The South African experience with(out) the numerus clausus

In South African law, the absence of a numerus clausus in respect of both types and content of real rights means that it will sometimes only be the context that determines the nature of the rights as either real or contractual.\(^{71}\) Overlaps in the content of real and contractual rights, may render it difficult to distinguish between these types. There are various theories explaining the distinction,\(^{72}\) but even with the assistance of these theories, the lack of a numerus clausus renders the distinction itself difficult to make. To resolve the problem, the South African courts have developed a coping mechanism, primarily to deal with disputes about the registrability of particular rights.\(^{73}\) The following section sketches this solution, paying particular attention to the development and eventual emancipation of a particular right – the right to minerals – from the context of \textit{iura in re aliena}.

A. Background

South African property law has famously been described as the “stronghold of civilian jurisprudence”,\(^{74}\) being that part of our Private Law which has been influenced most pervasively and lastingly by the European \textit{ius commune}, and its accompanying legal thought. This was the common body of law and writing about the law, the common legal language and

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\(^{71}\) E.g. If I have the right to park my car on the land of my neighbour, it may be due to an agreement I have with neighbour, in which case it will be enforceable as per the terms of that agreement. If I sell my house, the new owner may not necessarily succeed in reaching the same agreement with my neighbour, and may hence not have the same right to park his car there. My right to park the car, based on the agreement, is personal. But, in other circumstances it may also be a right registered in the favour of my land, as against my neighbour’s land; in which case whoever is the owner of my house at any given point will be entitled to park the car there, and the neighbour will be compelled to tolerate it. My right then is real, because it binds successors-in-title. It can be registered against the title deed to the property burdened thereby.

\(^{72}\) The two theories most often used are the classical theory and the personalist theory. The classical theory focuses on the relationships involved, pointing out that a real right establishes a direct relationship between a person and the property, whereas personal rights establish relationships between one person and another, to do, give or not to do.\(^{[*]}\). The personalist theory focuses on enforceability of the rights, explaining that real rights are enforceable in respect of the property and hence against anyone who interferes with it (i.e. the ‘whole world’); whereas personal rights are enforceable only against the person who is party to the agreement.\(^{[*]}\).

\(^{73}\) A registrability dispute may arise because the Registrar refuses to register a specific condition, or because a particular condition was registered and the parties later contest the validity of such registration.\(^{[*]}\) The South African courts have also had to deal with some disputes about taxability, i.e. when real rights are taxed differently to personal rights, but to a much lesser extent than disputes about registrability.\(^{[*]}\).

the common method of teaching and scholarship that developed from Roman law on the European continent between the twelfth and eighteenth centuries, before formal codification took place in the different European jurisdictions. The reception of principles from this tradition in South Africa can be attributed to the fact that the earliest attempts at colonization were initiated mainly by Dutch tradesmen, in a period which is described as the “Golden Age of Dutch jurisprudence”. Classic Dutch scholarly authorities found their way into South African law almost accidentally. The Dutch authorities were supplemented by classic German, French and Italian legal literature, some of which had considerable practical influence on the development of law.

The lack of a *numerus clausus* of real rights in the South African context may be explained by the fact that the law that was received into the province Holland in the 17th Century, at around the time when the earliest colonization of South Africa was occurring, did not acknowledge a *numerus clausus* of real rights. Instead, it recognised various right forms that...

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78 During the seventeenth century, the Netherlands became the focal point for all strands of the legal tradition shaping the European *ius commune*, like the Italian commentators’ *mos italicus*, which was more practice-oriented; and the “elegant” jurisprudence of the French humanists (the *mos gallicus*). Erasmus HJ "Thoughts on Private Law in a Future South Africa" 1994 (5) Stellenbosch Law Review 105 at 107. It is generally accepted that the law of the province Holland was applied at the settlement of the Cape of Good Hope, although the legitimacy of this application is somewhat contentious. See Van Zyl DH Geskiedenis van die Romeins-Hollandse Reg (1983) at 421 ff, Visagie G *Reopleging en Reg aan die Kaap van 1652 tot 1806 met 'n Bespreking van die Historiese Agtergrond* (1964) University of Cape Town PhD at 25; De Wet JC "Die Resepsie van die Romeins-Hollandse Reg in Suid-Afrika" 1958 (21) Tydskrif vir die Hedendaagse Romeins-Hollandse Reg 84; Pauw P "Die Romeins-Hollandse Reg in Oënskou" 1980 (32) Tydskrif virdie Suid Afrikaanse Reg 32; Zimmerman R "Roman-Dutch Jurisprudence and Its Contribution to European Private Law Symposium: Relationships Among Roman Law, Common Law, and Civil Law" 1992 Tulane LR 1719.

79 These included De Groot, Voet, Van Leeuwen, Huber, Groenewegen, Noodt, Westenberg, Van Zuthphen, Van Zurck, Sande, Schrassert, Schomaker and many more. COMPLETE

80 Most of the employees of the United East-Indian Company stationed at the Cape to man the trading post, were from the Dutch province Holland, and hence relied on the laws familiar to them to settle disputes. Du Plessis JE "The Promises and Pitfalls of Mixed Legal Systems: The South African and Scottish Experiences" 1998 (9) Stellenbosch Law Review 338 at [*]; Erasmus HJ "Thoughts on Private Law in a Future South Africa" 1994 (5) Stellenbosch Law Review 105 at [*]; Van Zyl DH Geskiedenis van die Romeins-Hollandse Reg (1983) at [*].

81 Van Zyl DH Geskiedenis van die Romeins-Hollandse Reg (1983) at [*].

emanated from medieval feudalism. Nevertheless, the South African legal system, conservatively, did not acknowledge the whole array of feudal rights in respect of land. One may speculate about the reasons. A significant consideration must be that there was no need for the complexities of feudalism in the rudimentary system of property rights (especially land rights) that developed haphazardly at the Cape of Good Hope trading post. The society being embryonic, and the tenancies of the Dutch East Indian Company’s employees transient, the problems that a feudalist system had to deal with did not arise.

The society was organized mainly around agriculture, and so the law applicable at the time favoured landowners, in the absence of a strongly centralized colonial authority representing and administering the interests of the state. That said, the law of the time lacked a coherent system of publication of land rights. When formal colonization commenced with the occupation and subsequent annexation of the Cape by the British from 1795 onwards, one of the most important administrative reforms achieved was that of the registration system, through the Cradock Proclamation of 1813, discussed below. With the establishment of a formal land register in 1844, the need for rights to land to be publicized became formalized. It is especially from this time onwards that the legal rules developed to deal with the absence of a numerus clausus of real rights. The rules developed from deeds registries practice, and

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83 Struycken THD De Numerus Clausus in het Goederenrecht (2007) at [*].

84 See in general Harris v Trustee of Buissinne (1840) 2 Menzies 105 at 107; Houtpoort Mining and Estate Syndicate Ltd v Jacobs 1904 TS 105 at 108; Denoon 1943 SALJ 179 at 457, 1944 SALJ 4, 1945 SALJ 458; Reinsma Zakelijke en Persoonlijke Rechten at 21 ff; Jones Conveyancing at 1 ff; Heyl Grondregistrasie at 5 ff; Wessels J The History of the Roman-Dutch Law (1908) at 499; Van der Merwe CG Sakereg 2 ed (1989) at 336-337; Lewis 1981 De Rebus at 20 ff.

85 Badenhorst P, Pienaar J and Mostert H Silberberg and Schoeman's The Law of Property 5 ed (2006) at ch 10 discuss the initial, primitive system of land registration in South Africa which may serve as an example here: it lacked the very basis upon which a solid registration practice could be built, namely the system of linking documents and registers containing a concise summary of the registration history of any particular piece of land, and of a system of numbering of land units. Heyl Grondregistrasie at 13; Jones Conveyancing at 3. It was, furthermore, characterised by sloppy administration and lack of precision and organisation on the part of the authorities. See Denoon 1943 SALJ 184. This contributed to insecurity and uncertainty among the vrijburgers regarding ownership and mortgaging of land, which was aggravated by their own nonchalance towards – or lack of understanding of – the gravity of these documents and the significance of public recording of land transfer and registration. Van der Merwe CG Sakereg 2 ed (1989) at 336; Heyl Grondregistrasie at 12-13.

86 After the onset of colonisation in South Africa, land was initially issued on a “loan place” (leenplaats) grant system to released employees (or so-called vrijburgers) of the Vereenigde Oost-Indische Compagnie. The records of the earliest transfers and grants are confusing and not chronologically ordered, since the register was only officially introduced in 1714, and had to be backdated. Jones Conveyancing at 4. Heyl Grondregistrasie at 6-11 provides an overview of the procedure followed. See also Denoon 1943 SALJ 179-184, 1945 SALJ 458-461; Reinsma Zakelijke en Persoonlijke Rechten at 22-23; Jones Conveyancing at 3; Van der Merwe CG Sakereg 2 ed (1989) at 338.
judicial responses thereto, and hence the issue of categorization and typification of real rights in South Africa relate exclusively to the land context.

B. The peculiar case of rights to minerals

The evolution of the law’s treatment of rights to minerals is a particularly telling example of how the demands of social and economic change shaped the law around the recognition of new types of property rights in South Africa. A brief and very generalized historical account must suffice to introduce the topic.

If any disputes about mineral resources occurred during the period of informal Dutch colonization of the Cape (1652 to 1795), the record thereof is untraceable. The economy was linked to the trading post established at the Cape. It seems that what little guidance might have been necessary as regards minerals, would have relied on the position in Roman law as interpreted in the Netherlands at the time. Roman-Dutch law lacking specific provisions in respect of natural resources, the subsurface and everything in it was subject to and regulated by private property law. The rule *cuius est solum eius est usque ad coelum et ad inferos* applied, and confirmed the landowner’s rights and entitlements to what lay beneath the land’s surface. The unitary Roman-Dutch law conception of landownership did not allow horizontal layering of property.

By the time Great Britain occupied and annexed the Cape of Good Hope (from 1795 onwards), and a period of more formal, organized colonization commenced, Roman-Dutch

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92 Hahlo HR and Kahn E *The Union of South Africa* (1960) at 762.
law was already established.\textsuperscript{93} It proceeded to form the basis of South African common law,\textsuperscript{94} but came to be influenced increasingly by English Common Law from 1806 onwards,\textsuperscript{95} because of administrative and law reforms.\textsuperscript{96} This affected the understanding and treatment of certain legal concepts and positions, also those concerning minerals. An example of note is the Cradock Proclamation of 1813, which reserved rights to Crown minerals (such as precious stones, gold and silver) to the state upon the grant of land.\textsuperscript{97} Controversial at the time for other, unrelated reasons,\textsuperscript{98} the Cradock proclamation’s\textsuperscript{99} reservation of mineral rights in respect of precious stones, gold and silver to the Crown, upon the grant of land,\textsuperscript{100} supported the idea that mineral rights did not have to follow the destiny of the land and could exist independently from the ownership of the land in which they were found. This aspect of the proclamation remained unimportant in the first fifty years after it came into force, as significant mineral deposits were as yet undiscovered.


\textsuperscript{94} It was not replaced by the law of the British conqueror. The British allowed the Roman-Dutch law established at the Cape between 1652 and 1795 to continue as the law of the land in terms of the rule enunciated by Lord Mansfield in \textit{Campbell v Hall} 1774 1774 (1) 1045 (Comp), 98 ER 1045 at 1047. In terms of this precedent, laws of a conquered territory continued in force until they were expressly altered by the conqueror.


\textsuperscript{97} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 553, with reference to Sir John Cradock’s Proclamation on Conversion of Loan Places to Quitrent Tenure 1813 (06.08.1813).

\textsuperscript{98} Land held under the existing loan place system had to be resurveyed and the grants reissued. This innovation met with resentment from especially the farmers affected by it. It was one of the causes of the Great Trek, because it introduced an annual quitrent of 250 rixdollars, which was much higher than the rent for these loan places under the Dutch colonial regime. Jones \textit{Conveyancing} 5. Nevertheless, the Cradock Proclamation constitutes an important milestone in the development of the present South African registration system. It introduced cadastral survey as the basis of the present registration system. Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 336.

\textsuperscript{99} Section 4, Proclamation on Conversion of Loan Places to Quitrent Tenure 1813 (06.08.1813).

\textsuperscript{100} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 553; Hahlo HR and Kahn E \textit{The Union of South Africa} (1960) at 576; Dale MO "South Africa: Development of a New Mineral Policy" 1997 (23) Resources Policy 15 at 16.

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Settler farmers (commonly from Dutch origin, and referred to as Boers)\textsuperscript{101} at the Cape rejected the imperial extension of British authority in Southern Africa\textsuperscript{102} and the concomitant regulatory impositions on their property. They responded by organising an exodus (the ‘Great Trek’) from the eastern frontier region northwards and eastwards.\textsuperscript{103} The independent (Boer) republics established in the process\textsuperscript{104} bitterly resisted Great Britain’s attempts to re-establish dominance over the areas inhabited by these settlers.\textsuperscript{105} By that time valuable deposits of diamonds and gold had already been discovered,\textsuperscript{106} and this discovery played an important role in Great Britain’s motivation to maintain control over the entire Southern African territory. This period ended around 1902, with the capitulation of the Boers at the end of the Anglo-Boer War.\textsuperscript{107}

When significant deposits of precious stones and metals were discovered, the existing legal rules governing use of the subsurface were geared to serve the largely agricultural society of the time.\textsuperscript{108} The law consisted of no more than a few standard Roman-Dutch principles of property law, supplemented in some parts by British colonial policy, such as was embodied in the Cradock Proclamation.\textsuperscript{109} These rules proved insufficient as soon as large-scale exploration for minerals commenced. Save where they were reserved for the Crown, mineral


\textsuperscript{102} The political history of this era is succinctly summarised Meredith M Diamonds, Gold and War: The Making of South Africa (2007/2008) at 2–10.


\textsuperscript{104} The Orange Free State and the Zuid-Afrikaansche Republiek (ZAR) in the Transvaal area.

\textsuperscript{105} Compare Feinstein CH An Economic History of South Africa: Conquest, Discrimination and Development (2005) at 2.

\textsuperscript{106} The most crucial discovery was an accidental one, by the boy Erasmus Jacobs who was noticed by a visiting neighbour when playing with an interesting looking "glittering" white pebble that he picked up on the banks of the Orange River. The pebble turned out to be the “Eureka” diamond. The even more spectacular “Star of South Africa” was found soon afterwards, in XXX, and gold was discovered on the Witwatersrand not much later, in XXX. Meredith M Diamonds, Gold and War: The Making of South Africa (2007/2008) at 16. Anonymous Hopetown available at http://www.heritage.org.za/karoo/hope.htm, accessed on 14 January 2012, 16.

\textsuperscript{107} Van der Merwe CG Sakereg 2 ed (1989) at 553, with reference to Proclamation on Conversion of Loan Places to Quitrent Tenure 1813 (06.08.1813).
rights generally formed part of the rights of the landowner,\textsuperscript{110} emanating from the entitlement to use and enjoy the land, its attachments and subsurface.

Individual landowners could mostly, however, not afford undertaking costly prospecting and mining operations themselves.\textsuperscript{111} The rapidly developing mining industry necessitated some urgent changes to the way in which proprietary relations were organized under law. The practice soon developed to sever\textsuperscript{112} the rights to minerals from the ownership of the land on which the minerals were situated,\textsuperscript{113} and record them separately in the Deeds Registry.\textsuperscript{114} Inadvertently, this practice of ‘severance’ would shape the South African law’s response to the creation of new types of rights more generally.

‘Severance’ at first was accepted into South African law through Deeds Registry practices, and endorsed by legislation from 1881 onwards.\textsuperscript{115} Some historical justification for the practice existed: severance of mineral rights from landownership was a notion known since medieval times, under the influence of Paulus de Castro.\textsuperscript{116} Severance of the mineral rights

\begin{itemize}
\item \textsuperscript{110} Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy 2010 (1) SA 104 (GNP) at para 7.
\item \textsuperscript{111} Van der Merwe CG Sakereg 2 ed (1989) at 553.
\item \textsuperscript{112} Severance of the mineral rights from landownership could be achieved in several ways: The landowner could reserve the mineral rights against the title deed of the land, upon transferring the land to another, registering the reservation in the Deeds Registry, alongside the transfer of the land. The landowner could also register a notarial deed of cession in respect of the mineral rights, transferring these to a new holder, whilst retaining the ownership of the land. When dividing property held by co-owners, the mineral rights could be excluded from the partition transfers and retained in undivided shares under separate certificates of mineral rights. Thus the land and mineral rights could be held under different titles. A landowner could also obtain a separate certificate of rights to the minerals in respect of the land, which meant that the owner would be title to the land separately from title to the minerals. An expropriation or a statutory vesting of the mineral rights could also occur without a concomitant loss of landownership. In such cases a deed of cession could be registered in the Deeds Registry. Likewise, where land was expropriated, a certificate of rights to minerals had to be obtained simultaneously with lodgement of the deed of transfer. Badenhorst PJ, Mostert H and Dendy M "Minerals and Petroleum" in Joubert WA (ed) LAWSA Vol 18 2 ed (2007) at para 40. Also described in Mostert H Mineral Law: Principles and Policies in Perspective (2012) at 10.
\item \textsuperscript{113} Mostert H Mineral Law: Principles and Policies in Perspective (2012) at 10.
\item \textsuperscript{114} Pearce; Ferreira Deep. See the discussion in Van der Merwe CG Sakereg 2 ed (1989) at [*].
\item \textsuperscript{115} Article 363, Resolution of the Volksraad of the ZAR, 1881 (08.11.1881), resolved that no sale of mineral rights would be lawful unless the deed of sale had been registered in the deeds registries office. Viljoen HP and Bosman PH A Guide to Mining Rights in South Africa (1979) at 9. The practice of severing the mineral rights from the land became entrenched through further provisions in 1883 and 1909, which required cession and other transactions in respect of mineral rights to be registered in the Deeds Registry. Section 14, Law 7 of 1883; ss 30 and 32, Registration of Deeds and Titles Act 25 of 1909 (T). See e.g. the account in Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others 1996 (4) SA 499 (A) at 509C.
\end{itemize}
from the landownership enabled third parties to become holders of the mineral rights.\textsuperscript{117} By following registration procedures,\textsuperscript{118} holders could have their rights to minerals recognised, separately from and alongside those of landowners.\textsuperscript{119}

The notion of severance created new relationships in respect of land containing minerals. It introduced mineral rights holders as interested parties in all treatment of and dealings with minerals. It required that the relationship between the mineral right holder and the landowner had to be clarified. What made this difficult, was the fact the severed mineral rights defied categorisation along established lines. This is discussed further below.

By 1911, the practice of severance had become firmly established,\textsuperscript{120} and it was subsequently confirmed in case law,\textsuperscript{121} probably under the influence of similar principles in English law.\textsuperscript{122} It was entrenched further by legislation,\textsuperscript{123} but not before it had a significant impact on the development of an open system of property rights.

**C. Diminution: from practice to the rule of subtraction and beyond**

In South African law the Registrar of Deeds fulfills a quasi-judicial function.\textsuperscript{124} This office in particular has to decide whether or not to register rights, upon the question whether such rights are real in nature.\textsuperscript{125} The South African law on the Deeds Registry mandates only the registration of real rights to land. In terms of section 3(1) of the current Deeds Registries Act\textsuperscript{126} the Registrar of Deeds has the duty to register specific categories of real rights,\textsuperscript{127} as

\textsuperscript{117} Agri South Africa (GNP) at para 7.

\textsuperscript{118} These procedures entailed either a special reservation of mineral rights against the title deed of the relevant land or the cession of rights by the landowner to the new holder of mineral rights. Endorsed later in section 70(1) and (2), Deeds Registries Act 47 of 1937 (now repealed). Hahlo HR and Kahn E The Union of South Africa (1960) at 761.

\textsuperscript{119} Hahlo HR and Kahn E The Union of South Africa (1960) at 761; Agri South Africa GNP at para 7.

\textsuperscript{120} Viljoen HP and Bosman PH A Guide to Mining Rights in South Africa (1979) at 10.

\textsuperscript{121} Taylor and Claridge v Van Jaarsveld and Nellmapius 1885-1888 (2) SAR TS 137 at 141; McDonald v Versfeld 1885-1888 (2) SAR TS 234 at 236; Pearce v Olivier and Others and Noyce 1889-1890 (3) SAR TS 79 at 81.

\textsuperscript{122} Viljoen HP and Bosman PH A Guide to Mining Rights in South Africa (1979) at 10.

\textsuperscript{123} See section 70(1), Deeds Registries Act 47 of 1937. This section was repealed by section 53 of the Mining Titles Registration Amendment Act 24 of 2003 (as amended by the Minerals and Energy Laws Amendment Act 11 of 2005).

\textsuperscript{124} COMPLETE

\textsuperscript{125} COMPLETE

\textsuperscript{126} 47 of 1937.
well as any real right not specifically mentioned in subsection (1). In terms of section 63(1) of the Deeds Registries Act personal rights may, subject to a few exceptions not be registered.

In deciding whether to register specific rights, registrars receive guidance from the traditional Roman Law categories of real rights in classifying types of real rights, but because of the absence of a *numerus clausus* they are not limited to these categories. Moreover, many of the typical features of real rights seem to be unhelpful in practice when rights need to be classified. The registration practice that developed in the wake of severance of mineral rights from landownership is illustrative.

In the early cases, such as *Ferreira Deep* the registration of mineral rights for being real rights were endorsed, because in the eyes of the Registrar they constituted a “diminution of ownership,” and the courts did not take issue with this view. It was acknowledged that deeds registry practice was to register these rights. As the needs of South African society became more complex, so did its demands on the registration system. Freedom of contract

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127 Namely, rights as embodied in the following deeds: (a) grants or leases of land by the government (s 3(1)(c)); (b) deeds of transfer (s 3(1)(d)); (c) mortgage bonds and cessions thereof (s 3(1)(e) and (f)); (d) notarial bonds and cessions thereof (s 3(1)(j)); (e) grants or leases of mineral rights by the government (s 3(1)(l)); (f) notarial cessions, leases or sub-lease of mineral rights (s 3(1)(m)); (g) personal and praedial servitudes (s 3(1)(o)); (h) notarial leases, sub-leases and cessions of leases of land (s 3(1)(p)); (i) deeds of transfer of initial ownership (s 3(1)(q)); and (j) notarial prospecting contracts (s 3(1)(q)).

128 S 102 of the Deeds Registries Act gives a circular definition of a real right as “including any right which becomes a real right upon registration”, which definition is of no assistance in determining whether a right is real or not (Badenhorst and Coetser 1991 De Jure 377).

129 S 3(1)(r). See *Cape Explosive Works Ltd v Denel* (Pty) Ltd 2001 (3) SA 569 (SCA) 578C-D.

130 The Deeds Registries Act does not provide a definition of a “personal right”. S 63(1) also prohibits the registration of a “condition which does not restrict the right of ownership”, which could perhaps serve as a definition of a personal right. Conversely, a “condition which does restrict the right of ownership” could be regarded as a better definition of a limited real right.


132 Van der Merwe CG *Sakereg* 2 ed (1989) at 65-69; Van der Merwe CG and De Waal MJ *The Law of Things and Servitudes* (1993) at par 3;


134 Van der Vyver in *Huldigingsbundel vir WA Joubert* at 245 goes so far as to declare the common law distinction between a real right and a personal right obsolete in this regard; contra Van der Walt 1992 *THRHR* 201. See Van Warmelo 1959 *Acta Juridica* 98; Reinsma *Zakenlijke en Persoonlijke rechten* 196; Lewis 1988 *SALJ* 614; Boraine *Registreerbaarheid van Regte* 132-133 for various suggestions to formulate an alternative test or principles to ascertain the registrability of a right in the deeds registry. See also Van der Walt 1992 *THRHR* 193 ff.

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and testation resulted in peculiar arrangements in respect of property, arrangements that the parties to it wished to have registered to ensure their posterity. As a result, South African courts often had to consider whether rights with regard to someone else's land, created in a will or contract were real for purposes of their recordation in the Deeds Registry. These inquiries can be particularly problematic when the object of the rights so created is payment of monies. It is this kind of case that very often needs to be adjudicated. Accordingly, most of the cases in which the South African response to the absence of a *numerus clausus* of real rights were formulated hence involved questions about the registrability of rights to land. In some of the cases, however, it was the taxability of the particular land rights which provided the impetus for development of rules.

The approach that crystallised over time is two-pronged. For one, rights to land created in wills or contracts can only be real if they were meant to have third party effect: the testator or contracting parties must intend for successors in title to be bound by their arrangements. Further, the courts relied on the rhetoric of cases\(^{137}\) such as *Ferreira Deep*, asking whether the arrangements created resulted in a diminution of ownership: a “subtraction from the *dominium*”.\(^{138}\)

*Ex parte Geldenhuys*,\(^ {139}\) the *locus classicus* on the distinction between real and personal rights, arose precisely because the Registrar hesitated to register peculiar arrangements

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137 Earlier formulations e.g. in *Consistory of Steytlerville v Bosman* 1893 (10) SC 67; *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd.* 1930 AD 169 relied on existing registration practices sanctioned by usage in the Transvaal.

138 See eg *Hollins v Registrar of Deeds* 1904 TS 603 605; *Ex parte Geldenhuys* 1926 OPD 155 162 164; *Schwedhelm v Hauman* 1947 (1) SA 127 (E) 135; *Ex parte Pierce* 1950 (3) SA 628 (O) 636D; *Fine Wool Products of South Africa Ltd v Director of Valuations* 1950 (4) SA 490 (E) 499A; *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 (1) SA 600 (O) 605D-E 606C-D 610G; *Hotel De Aar v Jonordan Investments (Pty) Ltd* 1972 (2) SA 400 (A) 405D; *Lorentz v Melle* 1978 (3) SA 1044 (T) 1050E; *Kain v Khan* 1986 (4) SA 251 (C) 257; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C); *Erlax Properties (Pty) Ltd v Registrar of Deeds* 1992 (1) SA 879 (A) (discussed by Van Wyk 1993 THRHR 136) – see 20.4.3 for a discussion of this case; *Felix v Nortier* [1996] 3 All SA 143 (SE) 148g-1 153d-e; *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 (2) SA 419 (T) 434B 435B; *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) 578D-E; [2001] 3 All SA 321 (SCA) 328b-c; *Nkosi v Bührmann* 2002 (1) SA 372 (SCA) 384J 387H-I 388E 389A.

139 1926 OPD 155. In *Geldenhuys* the question was about the registrability of certain provisions from a will, in terms of which the testator made a bequest to all his children, stipulating that the family farm had to be divided amongst them when the eldest child came of age. To determine the particular piece of land that each sibling would get, the division had to occur by the drawing of lots. The testator indicated that the drawer of the lot connected to the parcel containing the homestead had to pay a sum of money to the others. The question before the courts was about the registrability of this condition. The relevant issue was that the land was to be divided in a particular way, and at a particular time. This interfered with the co-owners’ ability to divide the land when they wanted and agreed. The court indicated that these prescriptions in the will constituted an obligation upon the
created in a will, involving among others the obligation on one of the heirs to pay money to
the others. In resolving the issue, the court used the language of diminution to ask whether the
arrangements created resulted in a “subtraction of the dominium”. The Court explained: 140

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 a right in personam, and it cannot as a rule be registered.

To determine whether a newly created right is real and therefore registrable, the correlative
obligation created by the right must be examined. If it is an obligation resting upon the
landowner because he is the landowner, i.e. if it “burdens” (or “runs with”) 141 the land, then
the right is real and thus registrable. If the obligation rests upon the landowner in a personal
capacity (i.e. does not burden the landowner because of the fact of landownership) then the
right is personal and thus generally not registrable.

The “subtraction from the dominium test” is founded on the reasoning that a limited real right
diminishes the owner’s ownership (dominium) over the property in that it either confers on its
holder certain entitlements inherent in the universal right of ownership; or prevents the owner
in one way or another from exercising the right of ownership. 142 A limited real right must
hence amount to a “diminution” of, or a “subtraction from” the owner’s dominium over the
thing to which the limited real right relates.

The peculiarity of Geldenhuys was that the court ordered registration of two rights. The one
was obviously real: a testator, in bequeathing his land to his children, had placed limits on
how and when they could divide their inheritance: by drawing lots once the eldest came of
age. The court did not find it difficult to class the rights sprouting from this part of the bequest
as real and registrable. The bequest limited the co-ownership entitlements of the beneficiaries,
in that they were unable to claim division as and when they pleased. But the court also
ordered the registration of another right, one that is typically regarded as personal, because it

landowners in that capacity, hence it amounted to a subtraction from dominium. From this bequest real and
registrable rights arose.

140 1926 OPD 155 162. See also Schwedhelm v Hauman 1947 (1) SA 127 (E) 135; Nel v Commissioner for
Inland Revenue 1960 (1) SA 227 (A) 155 233A.

141 Fine Wool Products of South Africa Ltd v Director of Valuations 1950 (4) SA 490 (E) 509.

142 For a discussion of the development and various formulations of the subtraction from the dominium test, see

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involves a performance: as part of the bequest, the testator wanted the child who was allocated the part of the land with the homestead on it to pay the others a once-off sum of money. The right to claim payment typically involves a personal obligation on another to perform by making such payment. The court did not deny the nature of the arrangement as personal, but allowed registration thereof, because it was “intimately connected” to the other part of the bequest, which was obviously real and registrable.

The position on determining whether a right is real was thus worked out in the practical context of registrability. One exception to the rule that only real rights in respect of land are to be registered is permitted: where a personal right is “intimately connected” to another, real and therefore registrable right, the personal right may be registered along with the real right. The court made it clear that a personal right registered by way of this exception remains personal; the registration does not change the nature of the right. Registering a personal right because it is “intimately connected” to another, patently real and registrable right is one way of giving effect to the wishes of a testator or contracting parties without compromising on principle or certainty.

The approach in Geldenhuys, which confirmed older deeds registry practices, were translated into legislation when the Deeds Registries Act was revised in 1947. Now it is included in section 63(1) of that Act. The law on the registrability of rights allows personal rights that are closely connected to other, registrable real rights, to be registered against the title deeds.

The subtraction from dominium test by itself is not sufficient as an indication as to the nature and effect of the rights created by idiosyncratic arrangements pertaining to land, made in wills or contracts. Often the difference between the limitation imposed by a limited real right upon an owner’s right of ownership, and that imposed by a contractual right “is one of degree only”. However, the object a contractual right restricting an owner’s dominium is still a performance, which cannot be claimed from successors in title. This is different from the object of the limited real right, which is the property itself. To ensure proper consideration of this aspect, the South African courts also attend to the intention of the parties in making their

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145 Badenhorst PJ, Pienaar JM and Mostert H Silberberg and Schoeman's The Law of Property 5 ed (2006) at [*].
arrangements: the correlative obligation must be purposed to have third party effect, i.e. to be binding not only on the present owner of the property, but also on successors in title. It goes without saying that the arrangement must be capable of having this effect.

An intention for successors in title to be bound may be established by an examination of the constituting documents. A clear statement to this effect is helpful, but need not be the only indication of the intention to create third party effect for the obligation. In the more Supreme Court of Appeal case of Cape Explosive Works v Denel, which concerned a use limitation in that the sale of land was made subject to the provision that it could only be used for manufacturing armament it was the focus on the intention question that was decisive. In terms of the original contract, impossibility of performance gave the seller the right of repurchase. The entire provision was registered, but erroneously not brought forward in subsequent transfers. The court had to consider whether the omitted rights were nevertheless still binding. This raised the issue of whether they were real or personal in nature. The court considered the two aspects of the condition, the use limitation and the right of repurchase, to be a single burden on the property. A use limitation is so obviously a limitation of the ownership that it is unnecessary to devote much analysis to it; and by treating the right of repurchase as an element of the use limitation – and really that element that gives effect to the use limitation – the court avoided the difficulty of having to explain why a right of repurchase, that would otherwise be obviously personal in nature, was given the go-ahead for registration in the first instance.

In reading the two provisions as a single arrangement, the court in Cape Explosive Works placed much emphasis on the intention of the drafters to give the arrangement third-party

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146 See eg Ex parte Geldenhuys 1926 OPD 155 164; Fine Wool Products of South Africa Ltd v Director of Valuations 1950 (4) SA 490 (E); Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds 1953 (1) SA 600 (O) 605E 609H; Nel v Commissioner for Inland Revenue 1960 (1) SA 227 (A) 233A; Erlax Properties (Pty) Ltd v Registrar of Deeds 1992 (1) SA 879 (A) 885B; Provisional Trustees, Alan Doggett Family Trust v Karakondis 1992 (1) SA 33 (A) 38A-B; Denel (Pty) Ltd v Cape Explosive Works Ltd 1999 (2) SA 419 (T) 434A. To determine whether this is indeed the case, one would of course have to inquire into the intention of the parties as it appears from eg a preceding contract, or the intention of a testator as it appears from his or her will – see eg Lorentz v Melle 1978 (3) SA 1044 (T) 1050E-H. At 1050H Nestadt J correctly points out that the intention of the parties is, however, not the sole criterion. “If a contractual right is of such a nature that it is incapable of constituting a servitude then obviously the intention of the parties (as expressed) to do so is irrelevant.” See Denel (Pty) Ltd v Cape Explosive Works Ltd 1999 (2) SA 419 (T) 434I-J.


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effect. If it was with the aim to bind successors in title, this is an indication to treat the right as real and registrable. Intention to bind successors in title as a characteristic of a real, registrable right is an element considered already in earlier case law. Together with the subtraction from dominium test, intention to bind successors in title has become part of a two-pronged inquiry into the registrability of rights.

D. Difficulties with the South African test and responses thereto

The examples of Geldenhuys and Denel make a strong case for allowing a legal system the flexibility that would support individual autonomy in ways not possible when a *numerus clausus* determines the parameters within which rights may be created. There are two points to be considered, however: (1) Despite its clear formulation, the “subtraction from the dominium” test became prone to varying interpretations in different provincial divisions of the High Court. (2) With reference to mineral rights specifically, past judicial treatment of these rights have been labeled recently, by the Constitutional Court as “potentially misleading”. At the heart of both these matters is the concern that lack of clarity may compromise certainty in the legal system.

1. Subsequent applications of the Subtraction from Dominium Test

Since the *subtraction of the dominium* test was formulated by the court in *Ex parte Geldenhuys*, courts have applied it often, but sometimes with different interpretations and varying results. This complicates an understanding of the applicable rules. Two cases that exemplify the varying interpretations are *Lorentz v Melle* and *Pearly Beach v Registrar of Deeds*.

*Lorentz v Melle* concerned a condition that was registered (already) against a title deed when the particular land was subdivided some thirty years earlier. At stake was a provision, included upon subdivision of land, that the owners of both pieces after subdivision, as well as their successors in title, would be entitled to share the net profits if a township was to be developed on either of the pieces. A declaratory order was sought on the nature of the registered

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149 AgriSA CC at para [38].
151 1978 (3) SA 1044 (T).
152 1990 (4) SA 614 (C).
153 1978 (3) SA 1044 (T).
obligation, as the successor in title of one of the parties to the original arrangement did not wish to be bound by it. The Transvaal division of the Supreme Court acknowledged that the profits clause actually amounted to a subtraction from the dominium, but this was not enough. The Court held that a real right was not established, reasoning that “the conditional obligation to pay attaches of necessity not to the land (which is not burdened) but merely to the owner thereof.” Applying the subtraction from the dominium test here, the Court restricted its application to arrangements which burdened “the enjoyment of the land in the physical sense”. Though lauded widely for its outcome, scholars regard this decision as a restrictive interpretation of the subtraction from dominium test. Some have used this case to point to the “essential unreliability of the 'subtraction from the dominium' test in properly identifying a right as real.”

At the opposite pole is the decision in *Pearly Beach v Registrar of Deeds*. The dispute was with the Registrar of Deeds, who refused to register a condition of sale that obliged the purchaser of the land “and/or its successors in title” to pay to a third party a defined percentage of any consideration received, should the property in future be expropriated or sold to an authority who is empowered to expropriate, or should mineral rights be granted in respect of it. The Registrar’s argument was that the condition did not prevent the right of the owner or successors in title to grant mineral rights or to sell the land; there was merely an obligation to pay a share in the proceeds of such grant, sale or expropriation. Holding that the *ius disponendi* is an entitlement of ownership, and that a limitation thereof, in the sense that the owner is precluded from obtaining the full fruits of the disposition, may be regarded

154 1047H 1053C-D.
155 It was argued that a praedial servitude was created (1048D-G).
156 complete
157 1052E-F, 1049C.
158 1052F.
159 In *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 (2) SA 419 (T) at 435H Hartzenberg J accepted this narrow test as a useful concept.
160 See, for example, HJ Delport and NJJ Olivier Sakereg *Vonnisbundel* (2nd ed) Juta and Co., Cape Town (1985) at 542; Van der Merwe CG *Sakereg* 2 ed (1989) at 76ff.
161 COMPLETE.
163 1990 (4) SA 614 (C).
164 615E-F.
165 615F.
as a restriction of ownership,\textsuperscript{166} the Cape division of the Supreme Court granted the application for registration. It was satisfied that the condition limited the entitlement of disposal of the owner and that it was binding upon successive owners and not terminable at will.\textsuperscript{167} The decision was criticised from various quarters and for various reasons,\textsuperscript{168} and subsequent cases displayed a preference for the approach of the Lorentz court.\textsuperscript{169}

Apart from further revealing the uncertainty inhabiting even the South African judiciary’s best attempts to address the lack of a \textit{numerus clausus} of real rights, the problem demonstrated by \textit{Pearly Beach} is how virtually limitless autonomy may hamper the

\textsuperscript{166} 617I. The court relied on the decisions in \textit{Ex parte Pierce} 1950 (3) SA 628 (O); \textit{CIR v Estate Hobson} 1933 CPD 386; \textit{NG Kerk, Aberdeen v Land & Agricultural Bank of SA} 1934 2 PH M36 and \textit{Barclays Western Bank Ltd v Comfy Hotels Ltd} 1980 (4) SA 174 (E).

\textsuperscript{167} 617H-618A and E.

\textsuperscript{168} Bobbert 1991 \textit{Conveyancing Bulletin} 8 states that the obligation to pay an amount of money results in a personal right. Sonnekus 1991 TSAR 173 ff and Sonnekus and Neels \textit{Sakereg Vonnisbundel} 103 115 submit that the right in question was in fact a personal right as it had performance and not a \textit{res} as its object. They also argue that the subtraction from \textit{dominium} test as applied by the courts is not a guarantee that a right will correctly be classified as real or personal. Badenhorst and Coetser 1991 \textit{De Jure} 385 also indicate that the right to payment of consideration is a personal right and not an entitlement of ownership. They feel that this case adds to the confusion created by the courts in their application of the subtraction from \textit{dominium} test and ask for a re-examination of the relevant legislation in this respect (388 ff; see fn 81 above for further references on this issue). Van der Merwe 1990 \textit{Annual Survey} 206 argues that the authorities relied upon by the court are not sufficient to warrant registration of the right embodied in the condition. He points out that \textit{Ex parte Pierce} above was concerned with what is in effect a mineral right. Since mineral rights are well recognised, this case does not warrant the extension as envisaged by the court. Although the Appellate Division in \textit{Nel v CIR} 1960 (1) SA 227 (A) discussed the \textit{Hobson} case above in which it was decided that an obligation on the transfeere of land and his successors in title to pay an annuity was registrable as a real right, it expressly left open for later decision by the Appellate Division whether an annuity out of the proceeds of the land was registrable. The decision in \textit{Barclays Western Bank Ltd v Comfy Hotels} above that a stipulation in a mortgage bond that entitled the mortgagee to receive rents and fruits of the property created a real right in the property was handed down \textit{in limine} and without a comprehensive review of relevant cases. He submits that the court did not place enough emphasis on the reasoning in \textit{Lorentz v Melle} 1978 (3) SA 1044 (T) in which the court found that a monetary obligation on the owner of land to pay half of the profits made from a township development on the land to his brother did not constitute a burden on the property, since it did not restrict the right of the owner to the enjoyment of the land in the physical sense – the court was clearly not willing to extend registrability to this kind of right. He further states that the subtraction from \textit{dominium} test does not provide clear answers to the question of registrability of a new kind of right but suggests that the proliferation of real rights may seriously handicap future commercial dealings in land. Van der Walt 1990 \textit{THRHR} 203, however, submits that the decision seems acceptable in that the court indicated that the parties clearly intended to create a real right that would burden the land itself, and its finding that the obligation was a limitation upon the owner’s \textit{ius disponendi}. He argues further: “The test is whether the obligation can be regarded as a burden upon the land itself, in the sense that it limits the ownership of the land directly, and not only the present owner in his personal capacity. In practical terms that would mean that monetary obligations can constitute real rights only if they relate to the produce or fruits of the land itself . . . It may well be argued that the money payment in question was supposed to come from the land itself and its produce” (1992 \textit{THRHR} 203).

\textsuperscript{169} \textit{Pearly Beach Trust v Registrar of Deeds} was not followed in \textit{Denel (Pty) Ltd v Cape Explosive Works Ltd} 1999 (2) SA 419 (T) 437E because it was found to be irreconcilable with \textit{Lorentz v Melle}. Hartzenberg J regarded \textit{Lorentz} as correct and binding upon him. 437E-F. Hartzenberg J pointed out that the rights in question in \textit{Pearly Beach} were personal obligations of the owner of the property because “[t]here was no restriction in the physical sense of the owner’s ‘right’ to deal with the property.”
negotiability of land, and diminish its value. Van der Merwe\textsuperscript{170} pointed out that investors are less likely to be interested in property if there are countless restrictions registered against it, especially where such restrictions involve payment of money. Van der Walt\textsuperscript{171} pointed out, however, that where the money derives directly from the fruits of the property, the obligation to pay is not too far removed from the use and disposal itself, and can be regarded as real.

The judicial inconsistency in applying the subtraction test is not particularly widespread. Pearly Beach may easily be explained as a negative outlier. But it demonstrates the indeterminacy of the South African approach to the classification of rights to land as real or contractual. One way of addressing the problem of indeterminacy of the two-pronged test may be by reassessing the role that the law of servitudes could play in identifying burdens that run with the land. The passivity rule may be used to demonstrate this.

According to the passivity rule, applicable to praedial servitudes specifically, a praedial servitude cannot place a positive obligation upon the person (landowner) burdened by it. The landowner can be expected to tolerate the inroads upon her property; but not to do something actively to help the servitude holder to benefit from the right. This principle has long been applied in South African law. In \textit{Schwedhelm v Haumann}\textsuperscript{172} the court had to consider whether a disputed condition in a title deed obliging one land owner to maintain certain equipment on the neighbouring land, and to lead water onto it under some circumstances, was binding on successors-in-title. Lewis J set out the common law position succinctly, by pointing out that

“with the exception of the servitudes \textit{oneros ferendi} and \textit{altius tollendi}, a servitude cannot cast upon the owner of the servient tenement an obligation actively to do something.”

Applying this rule, the Court found that the fact that this condition was already registered against the title deed, did not have any impact on the nature of the rights created by it. The Court pointed out that where a condition involves rights and obligations, but is “inconsistent with the fundamental character of a servitude as known to our law” it simply does not create a real right.

\textsuperscript{170} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at [*].
\textsuperscript{171} Casebook p 9 refers to a case comment – find
\textsuperscript{172} COMPLETE

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In the South African context, where the *numerus clausus* in respect of categories of real rights is not acknowledged, this statement is significant. It confirms that the known categories of real rights are still relevant to determine the applicable rules. When it comes to real rights in respect of land – specifically those that resemble praedial servitudes – an obligation to do something more than tolerate an inroad on the bearer’s autonomy will preclude it from constituting a real right. Aside the case of *Pearly Beach* only, this analysis would align with the outcomes of those cases in which the character of rights and obligations had to be established in order to determine its registrability.

2. **Emancipation of the right to minerals**

The role that the mineral resource context of South Africa had played initially, to shape the context in which the nature of rights analysis occurred, was discussed above. What remains is to recount the aftermath of the severance mechanism.

The consequence of juridical severance was that mineral rights did not have to follow the destiny of the land. The rights to the minerals no longer functioned as derivative rights. Curiously, however, South African law continued dealing with these severed rights to minerals as though they were connected to the landownership, by treating them as limited real rights in respect of land. The terminology used to explain them was the terminology of servitudes, despite the extraordinary dogmatic somersaults this required.

By way of explanation: Mineral rights were indubitably real in nature. It was also a given that severed mineral rights existed separately from landownership. Scholars and courts acknowledged that the notion of severance deviated entirely from the conventional common-law principles relating to landownership. However, neither the courts nor scholars were willing to conceive of the mineral right as a separate form of title. Within the framework of the Roman-Dutch law of property, it was simply unheard of to acknowledge the possibility of

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173 Hahlo HR and Kahn E *The Union of South Africa* (1960) at 761; *Agri South Africa* GNP at para 7.
176 *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (A) at 509H;
178 Van der Merwe CG *Sakereg* 2 ed (1989) at 171, 553.

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horizontal layering of different kinds of property titles as espoused by English law. So the courts were unwilling to develop the concept of mineral rights other than by drawing an analogy with personal servitudes.

The superficial similarities between personal servitudes and mineral rights served to motivate the analogy. A mineral right enabled its holders to enter the property relating to their rights and to search for minerals there. If any minerals were found, they could be removed, subject to the relevant statutory provisions. To this extent, the right resembled that of a typical usufruct. The mineral right holder could also choose whether or not to exercise the right and could exclude others from doing so.

Here the similarities between the mineral right and the usufruct ended. The law of servitudes provides that a servitude lapses when it is acquired by the servient landowner. The same did not apply to mineral rights. Where mineral rights were not separated from the ownership of the land, they vested in the owner of the surface. However, if mineral rights were separated from the ownership of land, they were held under a separate title, even if both the mineral rights and surface rights vested in one person. The holder of a certificate of mineral rights automatically had a mineral right in respect of a portion of land, regardless of succession in title to the land. Because of severance, mineral rights did not have to follow the juridical

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179 Coronation Collieries v Malan 1911 TPD 577 at 591.
180 Taylor and Claridge v Van Jaarsveld and Nellmapius 1885-1888 (2) SAR TS 137 at 141; McDonald v Versfeld 1885-1888 (2) SAR TS 234 at 236; Pearce v Olivier and Others and Noyce 1889-1890 (3) SAR TS 79 at 81; Lazarus and Jackson v Wessels, Oliver and the Coronation Freehold Estates, Town and Mines Ltd 1903 TS 499 (T) at 510.
182 Van der Merwe CG Sakereg 2 ed (1989) at 559. See also the in-depth comparison at 560-561. Van Vuren and Others v Registrar of Deeds 1907 TS 289 at 294; Rocher v Registrar of Deeds 1911 TPD 311 at 316; Ex Parte Pierce 1950 (3) SA 628 (O) at 634; Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd 1983 (1) SA 263 (A) at 274. Le Roux v Loewenthal 1905 TS 742 at 745; Van Vuren and Others v Registrar of Deeds 1907 TS 289 at 295 and 316; Nolte v Johannesburg Consolidated Investment Co Ltd Respondent 1943 AD 295 at 315; South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd 1961 (2) SA 467 (A) at 481. The landowner remained owner of the minerals for as long as they were not extracted. Hahlo HR and Kahn E The Union of South Africa (1960) at 763.
destiny of the land: they could be alienated separately from the land;\textsuperscript{188} they were freely transferable and inheritable, and need not have been exercised salva rei substantia. Unlike other servitudes, mineral rights were also divisible.\textsuperscript{189}

The feature of mineral rights that disclosed its most uncomfortable fit within the context of servitude law, however, related to the dogmatic heresies their classification brought on.\textsuperscript{190} For instance, a severed mineral right could be the object of a usufruct,\textsuperscript{191} thus assuming the role of an incorporeal thing. Some scholars made the point that acknowledging a right as the object of a further right (i.e. a thing) is illogical.\textsuperscript{192} They argued that it is jurisprudentially impossible, for instance, to lease or encumber a right of usufruct.\textsuperscript{193} In respect of minerals, however, they had to concede that other rights could be granted over mineral rights,\textsuperscript{194} prospecting and mining rights in respect of mineral rights being the prime example.\textsuperscript{195} Moreover, South African scholars for the longest time denied that incorporeality could be the feature of a property object.\textsuperscript{196} Nevertheless, they were compelled to deal with the fact of incorporeality when classifying property objects, not least because of the possibilities created in the mineral context.\textsuperscript{197} This, in turn, begot more difficulties in classifying the property as either movable or immovable.\textsuperscript{198}

On the basis of the extraordinary attributes of mineral rights, a couple of scholars advocated the recognition of mineral rights as a separate and independent class of ownership rights, removed from the servitude context,\textsuperscript{199} to no avail. This was unfortunate. Conceiving of mineral title as a particular kind of ownership over a valuable resource would well have been

\textsuperscript{188} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 561; \textit{Webb v Beaver Investments (Pty) Ltd & Another} 1954 (1) SA 13 (T) at 25A.

\textsuperscript{189} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 562.

\textsuperscript{190} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at at 21-22 discusses this issue and then indicates that certain exceptions should be acknowledged, most notably in the context of mineral rights. See also his further comments at 561.

\textsuperscript{191} E.g. as in \textit{Ex Parte Eloff} 1953 (1) SA 617 (T).

\textsuperscript{192} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 21.

\textsuperscript{193} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 513–514.


\textsuperscript{195} \textit{Du Preez v Beyers en Andere} 1989 (1) SA 320 (T) at 324F-G; Badenhorst PJ "Exodus of 'Mineral Rights' from South African Mineral Law" 2004 (22) \textit{Journal of Energy and Natural Resources Law} 218 218 at 222.

\textsuperscript{196} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at [where the classification of property into corporeal and incorporeal are discussed.]

\textsuperscript{197} Van der Merwe CG \textit{Sakereg} 2 ed (1989) at [where the classification of property into corporeal and incorporeal are discussed.]


\textsuperscript{199} Viljoen HP and Bosman PH \textit{A Guide to Mining Rights in South Africa} (1979) at 20.
possible, given that South African law did not have to navigate the constraints that adherence to the *numerus clausus* principle in as far as it applies to real rights would have entailed.\(^{200}\)

Instead, when called upon to theorise the nature of the rights, early in the twentieth century however, the South African courts were hesitant to depart from conventional civil-law based analyses, and opted for a description of these rights as “quasi-personal” servitudes.\(^{201}\) Scholarship never accepted this classification, opting for an explanation of the rights as “*sui generis*”.\(^{202}\) The disagreement was never really resolved. Interestingly, however, what dispute there was about the nature and form of the mineral right, was focused on explaining it *from within* the parameters of the *ius in re aliena*, rather than the *ius in re propria*.\(^{203}\)

In doing so, these analyses disclosed the weakness of their purely private-law approach to the conceptualisation of mineral rights. This approach in all of a century did not manage to explain the notion of mineral rights satisfactorily. One may speculate that the reasons for this inability lie, first, in the unwillingness of South African lawyers to contemplate that ownership (title) may take more than one form; and secondly, in the fact that mineral title always had a distinctly public-law dimension, which was pointedly ignored in those contexts where the nature of the right was discussed.\(^{204}\) It is only in the recent matter between Agri South Africa (an organization lobbying for the interests of commercial farmers) and the Minister of Minerals and Energy where our judiciary had an opportunity to consider the importance of the fact that mineral rights always had a distinct public-law dimension. This aspect of mineral rights is exposed elsewhere,\(^{205}\) and for the sake of brevity will not be examined here. What must be mentioned, however, is the outcome of the *Agri South Africa* case.

The Constitutional Court’s decision on the nature of mineral rights point is unfortunate in that it simply acknowledged that the history of South African mineral rights is complicated and


\(^{205}\) Mostert in Zilman et al Energy Underground.
confusing, and unceremoniously broke with traditional conceptions of the right to minerals\textsuperscript{206} without any formal analysis of the matter. However, the Constitutional Court’s endorsement of the idea that the right to minerals is not classifiable in the context of the \textit{ius in re aliena}, but instead constitutes a special form of ownership, confirms the flexibility inherent in a system not adhering to the \textit{numerus clausus} principle where it relates to classing and types of real rights.

E. Implications

The preceding sections have demonstrated that South African law builds upon historically recognised categories of real rights, but does not regard itself bound to such regimentation. Instead, it allows for customization of rights, both in terms of types and content, as and when the need arises. The Deeds Registries Act recognises the various categories of rights and the extensions thereof. Its provisions on registrability of real rights ensures adherence to the principle of publicity. The provision in the Deeds Registries Act is general, not limiting registrations to those types of rights which are obviously falling into one of the historical categories. Consequently, a testator or contracting parties can in principle establish new, hitherto unrecognized, and even unorthodox rights in respect of land\textsuperscript{207} – rights that would suit their purposes perfectly – without waiting for the legislature to anticipate their needs and provide for them in law. The South African system hence affords parties a great measure of autonomy in respect of the creation of real rights. The concomitantly elevated risk that the boundaries between property and contract may be blurred, that positions in law may not be sufficiently clear, and that the tradeability of land may be hampered by excessive burdening of land, are addressed by the mechanism developed to distinguish between real and contractual rights for purposes of their recordation in the Deeds Registry.

The judicial two-pronged test entails that intention to bind successors-in-title needs to be established, and that the correlative obligation to the right created must amount to a “\textit{subtraction from the dominium}.” These two aspects operate in tandem: the one does not exclude the other, and both are equally important.\textsuperscript{208}

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  \item \textsuperscript{206} AgriSA CC [39]
  \item \textsuperscript{207} The position is the same for both movable and immovable things, but it is especially in relation to land that the creation of new types of rights have been developed. Van der Merwe CG \textit{Sakereg} 2 ed (1989) at 70.
  \item \textsuperscript{208} It does not matter which of the questions is asked first. Both questions need to be answered. Sometimes the answer to one of the questions is so obvious, that a judge would barely have to say anything about it. Sometimes
\end{itemize}

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South African law uses the extended list of types of real rights as it was known in Roman-Dutch law to inform categorisation. But apart from the traditional Roman Law categories of rights (ownership; servitudes; real security rights; emphyteusis and superficies), the following are acknowledged as real without much controversy: long leases to land, notarial leases, and rights in respect of apartment ownership created by statute. Within the categories of limited real rights (iura in re aliena) the absence of a numerus clausus leaves much room for manoeuvring. In respect of praedial servitudes, for instance, some “typically South African” rights have been developed, e.g. trekpad and uitspan. Moreover, the closed list of personal servitudes prevalent in Roman law (ususfructus, fructus, usus, and habitatio) have been opened with the acknowledgement of so-called “irregular” servitudes, i.e. those that resemble praedial servitudes, and which burdens successors in title, but where the benefit is vested in a particular person only. This complicates the categorisation of real rights, a concern which is regarded as academic rather than practical.

From the available case law on the topic, the rejection of the principle of numerus clausus in as far as it pertains to real rights is a cautious rejection, in terms of which a small number of real rights are acknowledged, and the extension of the categories of rights is made subject to strict requirements.

Over the past century or so, South African courts had been less keen to entertain the notion that ownership, as the only ius in re propria acknowledged in the scheme of civil property law, is variable and fragmentable. The South African mineral rights discourse serves as a prime example. It seems, however, that the transformative impetus behind the land reform programme and the redefinition of the legal system under a supreme Constitution, tasked to promote transformation, rings in a new era for questions about the diversification or fragmentation of the ownership concept as well.

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211 Van der Merwe CG Sakereg 2 ed (1989) at 69.

212 Van der Merwe CG Sakereg 2 ed (1989) at 11, 56ff.
IV. Conclusion: Between stability and flexibility

In most analyses of the *numerus clausus* phenomenon, the central conflict is one between stability and flexibility in law. Closed categories or systems ensure high levels of certainty in dealings with property. In open systems, “the law is inherently more flexible, and the options inherently less certain”, and users can customise arrangements to suit their specific needs. The inherent tension between certainty and flexibility renders it difficult to adapt the law to modern conditions, and challenges some of the very foundational principles of property law. This is clearly illustrated with reference to the jurisdictional idiosyncracies of real rights recognition.

The South African system was presented here as an alternative response to the concerns raised in both common law and civil law jurisdictions about the continued relevance of the *numerus clausus* principle. South African law is not completely defiant on the *numerus clausus* principle, but when it comes to the recognition of new rights to property, South African law deviates from its civil-law parent jurisdictions by not subscribing to a closed list of rights. It hence affords greater measures of autonomy to individuals, and renders the system more flexible than jurisdictions subscribing to a *numerus clausus* of property rights can afford. The absence of a *numerus clausus* of real rights leads, however, to greater indeterminacy as to the registrability of customised arrangements as real rights.

On the South African example, allowing a legal system the flexibility that would support individual autonomy seems to be possible and workable. But even here some restrictions are needed. Unbridled autonomy and the blurring of the boundaries between property and contract which would result from it is certainly not supported by the South African position. The flexibility afforded the creators of rights in the South African context is tempered by the judicial mechanism applied in the context of registrability issues: the two-pronged test of “subtraction from the dominium” plus intention to bind successors in title. The absence of a

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216 Mostert – Inaugural.
217 Van der Merwe CG *Sakereg* 2 ed (1989) at 11-13
*numerus clausus* is dealt with further by a conservative interpretation of (especially) the “subtraction from the dominium” test.
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