The Constitutionality of the *Mineral and Petroleum Resources Development Act* 28 of 2002

by

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ABSTRACT

The *Mineral and Petroleum Resources Development Act* 28 of 2002 (*MPRDA*) is premised on the principle that minerals are part of the natural heritage of all South Africans. Section 3 of the *MPRDA* articulates the core of the new mineral law dispensation. Through the provisions of the said section, new concepts are introduced to the field of mineral law previously governed by the South African common law system of private ownership, based on Roman-Dutch principles.

The study focused on section 3 of the MPRDA and the consequences ensuing from its implementation. Consequently, a historical overview of the development of South African mineral law was followed by an exposition of the development of the constitutional property concept. It was concluded that mineral rights from the previous dispensation constitute property protected by section 25 of the *Constitution*. It was also found that the development encapsulated in the *MPRDA* in respect of the ownership of the country's unsevered minerals, is indicative of the decline of private property. It is substituted by a line of thought which recognises that certain interests 'are held in common' by the nation. This idea is also found in *inter alia* the *National Water Act* 36 of 1998 and the *National Environmental Management Act* 107 of 1998.

This led to the next section of the research where the concept of custodial sovereignty as manifested in the Anglo-American public trust doctrine was studied. It was apparent that the public trust doctrine is a legal construct whereby ownership of certain assets vests in the state, to be administered on behalf of the nation and generations yet to come. The historical survey of the Roman concepts of *res publicae* and *res omnium communes* indicated that although this doctrine is not part of South Africa's common law heritage, principles underlying the doctrine found application in South African law in respect of the seashore. The conclusion was reached that the doctrine has indeed been incorporated

in South African mineral law by the *MPRDA,* constituting a new mineral law regime in the country.

Due to the fact that a new mineral law dispensation was introduced, mineral rights as they existed in the previous mineral law dispensation were annihilated. It was, therefore, necessary to determine whether this annihilation resulted in the expropriation of property. Consequently the content of the concept 'expropriation' was studied in order to determine whether the previously held mineral rights were expropriated. The study indicated that expropriation entails the acquisition of property by the state, but that ample room exists for the development of the concept of constructive expropriation. Based on the information gained on the concept of expropriation, the consequences ensuing from the *MPRDA* for the holders of common law mineral rights and old order rights and the impact of the *MPRDA* on ownership of landowners were analysed. It was indicated that the extent of the deprivation brought about by the *MPRDA* varies between expropriation and the regulation of mining activities. The significance of section 3 of the *MPRDA* for the people of South Africa was analysed and it was found that the newly introduced doctrine can be applied to the advantage of the nation as a whole.

A separate section of the research entailed a limited comparative analysis of Canadian mining law that focused on constitutional jurisdiction over minerals in the Canadian mining regime and the taking of property interests in minerals. It is proposed that the South African expropriation concept should develop along the lines followed in Canadian jurisprudence.

After considering the abovementioned aspects, the final conclusion of the study is that the concepts introduced by and the consequences emanating from the implementation of section 3 of the *MPRDA* are constitutionally justifiable.

Key words: Minerals, mineral rights, property, public rights, *res publicae*, *res omnium communes,* custodial sovereignty, public trust doctrine, deprivation, expropriation, constructive expropriation, acquisition, *cuius est solum*, Canadian mineral law, *Mineral and Petroleum Resources Development Act.*

OPSOMMING

Die *Mineral and Petroleum Resources Development Act* 28 van 2002 (*MPRDA)* is gebaseer op die beginsel dat minerale die natuurlike erfenis is van alle Suid-Afrikaners. Die kern van die nuwe minaalregbedeling word verwoord in artikel 3 van die wet. Deur die bepalings van hierdie artikel word nuwe konsepte in die Suid-Afrikaanse mineraalreg, wat voorheen op privaateiendomsreg in die Romeins-Hollands gemenereg gebaseer is, ingevoer.

Die fokus van hierdie studie het op artikel 3 van die *MPRDA* en die gevolge wat voortvloei uit die implimentering van die artikel, geval. Gevolglik is 'n historiese oorsig oor die ontwikkeling van die mineraalregbedeling in Suid-Afrika gevolg deur 'n uiteensetting van die ontwikkeling van die konstitusionele eiendomsbegrip. Daar is tot die gevolgtrekking gekom dat die mineraalregte uit die vorige bedeling wel as eiendom beskou kan word wat beskerm word deur artikel 25 van die *Grondwet.* Dit is verder bevind dat die ontwikkeling met betrekking tot die eiendomsreg van onontginde minerale hulpbronne soos teweeggebring deur die *MPRDA,* aanduidend is van die verswakking van die konsep van privaat eiendom en verteenwoordigend van die ontwikkeling van die gedagtelyn dat sekere belange gemeenskaplik deur die nasie, as enititeit, gehou word. 'n Gedagte wat ook gevind word in, onder andere, die *Nasionale Waterwet* 36 van 1998 en die *National Environmental Management Act* 107 van 1998.

Vervolgens is die konsep van 'soewereine voogdyskap' soos dit manifesteer in die Anglo-Amerikaanse *public trust doctrine* ondersoek. Dit het uit die navorsing geblyk dat hierdie leerstuk 'n regsfiguur is waardeur eiendomsreg van sekere bates in die staat, as trustee, vestig. Die staat moet hierdie bates uitsluitlik tot voordeel van die nasie en toekomstige generasies bestuur. 'n Historiese oorsig van die Romeinse konsepte *res publicae* en *res omnium communes* het aangetoon dat

alhoewel hierdie leerstuk nie deel is van die Suid-Afrikaanse gemenereg nie, die beginsels onderliggend aan die leerstuk wel toegepas is met betrekking tot eiendomsreg oor die strande van Suid-Afrika. Daar is tot die gevolgtrekking gekom dat die *public trust doctrine* wel deur die bepalings van die *MPRDA* in die Suid-Afrikaanse mineraalreg geïnkorporeer is.

As gevolg van die inkorporering van 'n nuwe mineraalreg bedeling, het mineraalregte soos dit in die vorige bedeling bestaan het tot niet gegaan. Dit was derhalwe noodsaaklik om te bepaal of die uitwissing van hierdie regte neerkom op 'n vergoedingsdraende onteiening. Gevolglik is die inhoud van die begrip 'onteiening' bestudeer. Die studie het aangetoon dat onteiening die vestiging van eiendom in die staat behels maar dat voldoende ruimte bestaan vir die ontwikkeling van 'n leerstuk van konstruktiewe onteiening. Gebaseer op die inligting wat verkry is uit die voorafgaande afdelings van die studie is die gevolge voortvloeiend uit die *MPRDA* soos dit impakteer op die houers van gemeenregtelike mineraalregte en grondeienaars geanaliseer. Daar is bevind dat die omvang van die ontnemings soos dit voorvloei uit die verskillende bepalings van die *MPRDA* wissel tussen onteiening en die regulering van mynbou aktiwiteite. Die implikasie wat die toepassing van die leerstuk vir die 'nasie' van Suid-Afrika inhou, het ook onder die soeklig gekom. Daar is aangetoon dat die leerstuk tot voordeel van die nasie as geheel aanwending kan vind.

In 'n afsonderlike afdeling van die studie is die Kanadese mineraalregstelsel ondersoek. Die fokus het geval op die konstitusionele jurisdiksie oor minerale en die onteiening van regte in minerale soos dit in hierdie regstelsel figureer. Die voorstel is gemaak dat die Suid-Afrikaanse onteieningsbegrip ontwikkel aan die hand van die riglyne gestel in die Kanadese reg.

Na die oorweging van al die bovermelde aspekte is die finale gevolgtrekking van hierdie studie dat die konsepte wat in die Suid-

Afrikaanse reg ingevoer is deur die bepalings van artikel 3 van die *MPRDA* en die gevolge voortspruitend daaruit, konstitusioneel houbaar is.

Trefwoorde: Minerale, mineraalregte, eiendom, *res publicae*, *res omnium communes*, soewereine voogdyskap, onteiening, konstruktiewe onteiening, verkryging, ontneming, Kanadese mineraalreg.

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Chapter 1: Introduction[1]

1.1 Problem statement

The *Mineral and Petroleum Resources Development Act* 28 of 2002[2] was assented to by the President of the Republic of South Africa on 3 October 2002 and promulgated on 10 October 2002.[3] The commencement date of the act was 1 May 2004.

The objects of the *MPRDA* are *inter alia* to acknowledge that South Africa's mineral and petroleum resources belong to the nation and to recognize the state as custodian of these resources,[4] whilst seeking to transform the country's mining industry by making it accessible to previously disadvantaged South Africans.[5] Wide ranging social and economic objectives are pursued, but the ecological sustainability of the development of the nation's mineral resources is emphasised.[6] The *MPRDA* impacts on every sphere relating to mining and mineral resources development.

The *MPRDA*, which is premised on the principle that minerals as a natural resource are the common heritage of all South Africans, introduces new concepts to the field of mineral law previously governed by the Roman-Dutch common law system of private ownership. The focus of this study is on the assessment of section 3 of the *MPRDA* and consequences ensuing from its implementation, as the constitutionality of the entire *MPRDA* revolves around the constitutionality of section 3. While it might be argued that one or more specific clauses, if seen in seclusion, might be unconstitutional, the *MPRDA* as a whole will be

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1 Note that any reference in this study to 'he' or 'him' should be read as including 'she' and 'her'.
2 Hereinafter referred to as the *MPRDA*.
3 GG 23922.
4 See section 3(1).
5 See preamble of the *MPRDA*.
6 Du Plessis, Olivier and Pienaar 2002 *SAPR/PL* 435; Ferreira and Harrison 2003 *Mining Werks* http://www.werkmans.co.za [2005/01/27] 1.

unconstitutional if it is found that section 3, or its ensuing consequences, cannot withstand constitutional scrutiny.[7] Section 3 reads:

> 3 (1) Mineral resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans.
> (2) As the custodian of the nation's mineral resources, the state, acting through the Minister may -
> (a) grant, refuse, control, administer and manage prospecting rights, mining rights, mining permits, retention permits and permission to remove and dispose of any minerals; and
> (b) in consultation with the Minister of Finance, determine any fee and consideration payable in terms of this act.
> (3) The Minister must ensure the sustainable development of South Africa's mineral resources within a framework of national environmental policy, norms and standards while promoting economic and social development.

This section articulates the core of the new mineral law dispensation and brings about extreme changes to the South African mineral law system. It introduces new and challenging concepts to the field of South African mineral law. To date, no formal or meticulous attempts have been made to determine the impact of this controversial clause on mineral law although two speculative opinions have been voiced.[8] This thesis does not purport to determine the full impact of this clause on the broad scope of mineral and petroleum law. As is indicated by the research question and objectives of the thesis, the study is principally aimed at determining

7 Badenhorst 2003 *Stell LR* 382 stated that the implication of s 3 of the *MPRDA* can only become apparent once a specific meaning has been attached to the section's provisions.
8 See chapter 7.

the constitutionality of section 3 and is limited to the mineral resources as dealt with by the *MPRDA*.[9]

1.2 Research question

The question that constitutes both the foundation and centre of this study is whether the concepts introduced by and consequences emanating from the implementation of section 3 of the *MPRDA* are constitutionally justifiable.

1.3 Objectives of the study

The primary objective of this thesis is to determine the constitutionality of section 3 of the *MPRDA* because it reflects directly on the constitutionality of the *MPRDA* as a whole. Specifically it is an attempt to examine the nature of the mineral law regime introduced by the *MPRDA* and the effect of the transition from the preceding mineral law dispensation to the present.

In order to achieve this objective, the following secondary objectives are also important:

1) to review the historical development of South African mineral law;
2) to reflect on the development of the constitutional property concept;
3) to examine the concept of custodial sovereignty featuring in the *MPRDA*;
4) to analyse the concept of expropriation as it finds application in the present constitutional dispensation.

A tertiary objective of this study is to compare the newborn South African mineral law system with its Canadian counterpart. This comparison will not entail a thorough legal comparative study. Due to the fact that the

9 As a result of this self-imposed restriction to limit the extent of the study, no aspects relating to petroleum resources will be addressed in this thesis.

Canadian and preceding South African mineral law systems had some similarities to English legal principles in their initial development, it might prove beneficial for the present development in South Africa to understand how the majority of Canadian mineral rights came into the *dominium* of the crown and how the taking of resource interests, specifically property interests in minerals, is dealt with in Canada.

1.4 Relevance of the thesis

No authorative assessments of section 3 of the *MPRDA* exist. Until the courts have interpreted this section, speculations about its true meaning and impact will continue to cause uncertainty in the legal sphere. Due to the fact that section 3 impacts significantly on the interpretation of the *MPRDA* as a whole, the necessity for motivated and substantiated efforts directed towards assessing this clause and the changes brought about by it, is self-evident. This study is not only relevant to people affected by the transition from one mineral law regime to another, but also to the people of South Africa whose claim to the country's mineral resources is acknowledged and confirmed by the *MPRDA* and to the state who has the responsibility of custodianship of the nation's mineral resources.

1.5 Research methodology

The following methods were used to conduct this research:

1. Initially the history and development of South Africa's mineral law were scrutinised to ascertain the historical perspectives and trends impacting on and determining the nature of mineral right holding in preceding mineral law systems of the country.
2. The development of the constitutional property concept was then studied. In order to comprehend the impact of section 3 of the

MPRDA on the holders of old order rights[10] fully it was necessary to determine whether old order rights contained the necessary attributes to obtain constitutional protection under section 25 of the *Constitution*.[11] A study of the constitutional property concept was also necessary in order to reflect on the property theory underlying the concept of public rights being established in property.

3. The concept of the sovereign (state) acting as custodian of certain interests to the benefit of the public as a whole, features strongly in the *MPRDA*. The common law concepts of *res omnium communes* and *res publicae* originating from Roman law and the Anglo-American public trust doctrine were examined and analysed in an effort to determine whether any of these concepts were implemented by the legislature to establish custodial sovereignty over the nation's mineral resources.
4. To assess the impact of the transition from one mineral law system to another, the extent of justifiable infringements of property and property rights under section 25 of the *Constitution* were studied. The primary aim of this part of the research was to determine the content of the concept of expropriation in the constitutional dispensation.
5. The historical development and current state of the Canadian mineral law system was researched and the Canadian concept of expropriation was examined in order to understand how the majority of mineral rights came into the *dominium* of the crown and how the taking of resource interests, specifically property interests in minerals, is dealt with in Canada.
6. After considering the above input, section 3 of the *MPRDA* and the consequences ensuing from its application were assessed.

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10 This term is used in Schedule II of the *MPRDA* that contains the transitional arrangements and refers to rights in relation to minerals that existed in the previous mineral law dispensation.

11 *Constitution of the Republic of South Africa,* 1996 hereafter referred to as the *Constitution*. S 25 is also referred to as the 'property clause'.

7. Based on the abovementioned assessment and the conclusions reached on each of the abovementioned aspects, a final conclusion and recommendations are made.

This study entails an analytical literature study of relevant case law, text books, legislation and scientific contributions published in national and international law journals on the subjects studied in this thesis.

1.6 Format of thesis

The thesis is organised into eight chapters. Chapter 1 provides the background underlying the research question and acquaints the reader with an overview of the thesis.

Chapter 2 reviews the historical development of South African mineral law.

Chapter 3 reflects on the development of the constitutional property concept.

Chapter 4 examines the concept of custodial sovereignty placing particular emphasis on the Roman law principle of *res omnium communes* and the Anglo-American public trust doctrine.

Chapter 5 analyses the concept of expropriation as it finds application in the present constitutional dispensation.

Chapter 6 reviews the historical development of the Canadian mineral law system as well as the Canadian perspective on the concept of expropriation.

Chapter 7 assesses section 3 of the *MPRDA* and the consequences ensuing from its application in light of the perspectives gained in the chapters above.

The eighth and final chapter summarises the conclusions that can be drawn from this research and offers recommendations for future development.

Chapter 2: South African mineral law: a historical perspective

2.1 Introduction

In an effort to determine the constitutionality of section 3 of the *MPRDA* reference to the history and development of South Africa's mineral legislation is unavoidable. Scholars[1] have dealt with the history and development of South Africa's mineral law dispensation in different degrees of comprehensiveness. In the first part of this chapter the writer has relied to a certain extent on research already done as it is not the aim of the study to 're-invent the wheel'. The purpose of the inclusion of an historical overview in this work is twofold and define the parameters of the discussion:[2]

(i) Section 3 of the *MPRDA* incorporates the idea of custodial sovereignty into the South African mineral law.[3] The question whether this idea encapsulates a concept akin to the Anglo-American public trust doctrine[4] is researched expressly in this thesis. It is, therefore, necessary to establish whether traces or a resemblance of this doctrine can be found in any stage of the common law and/or statutory development of the South African mineral law.[5]

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1 For a brief discussion, see *inter alia* Heydenrych *Die Sterilisasie van Mineraalregte* 7, 8; Morton *Acquisition and Registration* 2–10; Linde *Die Invloed van 'n Staatkundig Versnipperde Suider-Afrika* 30-37; Gibbens *Billikheid en die Regsverhouding* 89-94. More comprehensive discussions are found in Kaplan *The Development of the Various Aspects of the Gold Mining Laws in South Africa*; Norton *The Conflict* 1-118; Dale *Historical and Comparative Study* 3-12; Kaplan and Dale *Guide* 22-24; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 329–331; Franklin and Kaplin *Mining and Mineral Laws* 1-73.

2 It is not the purpose of this work to discuss every aspect of mining legislation in detail. Aspects like the conflict of interests between the holder of mineral rights and the surface owner, the duty of support and damage caused by mining operations do not fall within the ambit of this study.

3 See chapter 4 *infra*.

4 See chapter 4 *infra*.

5 Although the development of the public trust doctrine is discussed in chapter 4 *infra*, it is necessary at this stage of the research to determine whether any definite connection can be found between the doctrine and the development that took place in respect of the South African mineral law dispensation.

(ii) The nature and transferability of mineral rights and rights relating to minerals in the pre-2002 era[6] are of importance in this study. They will give a strong indication of whether these rights can be regarded as property and thus afforded constitutional protection[7] and will present a firm guideline against which any possible deprivation caused by section 3 of the *MPRDA* can be measured.[8] In order to assess the impact and consequences of section 3 of the *MPRDA* it is crucial that the nature and transferability of these so-called old order rights are clearly ascertained.

Due to the fact that the term 'mineral right' is not used in the *MPRDA,* the term is exclusively used in this thesis when referring to rights relating to minerals formally acknowledged as 'mineral rights' in South African mineral law. In the common law discussion and the discussion of rights created in the *MPRDA* the phrases 'rights relating to minerals' or 'rights to minerals' are used.

2.2 Common law

In researching the common law roots of the South African mineral law dispensation, it must be kept in mind that the law relating to minerals, as it found application before the implementation of the *MPRDA*, is an indigenous product of South African jurisprudence.[9] The body of mining law that developed in South Africa during the past century must be regarded as a combination of legislation and case law, molded by reference to old authorities into an effective body of legislation. As South African jurisprudence is firmly rooted in Roman law, Roman law is inevitably the starting point of the research.

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6 Although the *MPRDA* commenced in 2004, the act was promulgated in 2002, hence this reference to the period preceding the commencement of the act.
7 See chapter 3 *infra*.
8 See chapter 5 *infra*.
9 Badenhorst *Juridiese Bevoegdheid* (i); Joubert 1959 *THRHR* 27; *Du Preez v Beyers* 1989 1 SA 320 (T) 324F.

2.2.1 Roman law

Viljoen[10] indicates that the phrase 'mineral right' was unknown to Roman jurists. Minerals were regarded as fruits[11] of the land.[12] However, it is clear that the ancient systems, which include Roman law, did have a developed system of mining rights seen as a part of the law of land tenure and ownership.[13] At first glance it appears that the non-existence of a separate, individual mineral law dispensation was rooted primarily in the application of the *cuius est solum eius et usque ad coelum et ad inferos* maxim.[14] However, it is pointed out by Dale that the *cuius est solum* maxim does not have its roots in any early Roman text, but was imported into the law by the Glossators.[15]

What follows is a brief discussion of information extracted from applicable and available sources, focusing on the extent of mining activities within a specific time phrase and the concepts of ownership, possession and holdership (*detentio*) as it influenced or even dictated the notion that minerals were regarded as fruits of the land.[16] As the

10 Viljoen *Rights and Duties* 4.

11 *Fructus.*

12 Morton *Acquisition and Registration* 1; Kaser *Römisches Privatrecht* 93; Viljoen *Rights and Duties* 6-9; De Boer *De Winning van Delfstoffen* 54. It is interesting to note that it seems that a difference of opinion regarding the defining of minerals as fruits exists to some extent. In D 23.3.32 Pomponius clearly does not regard ore extracted from a quarry as fruits. However, Julianus mentions specifically in D 50.16.77 that proceeds of a quarry should be regarded as fruits. This view is supported by Paulus's view as we find it in D 24.3.8 where it is explicitly stated that stone quarried from a stone quarry is regarded as fruit. See also D 17.2.83 and D 24.3.7.13-14.

13 Dale *Historical and Comparative Study* 15, 16.

14 See eg Crook *Law and Life* 161, who states that the principle -

> ownership of what lay beneath the surface of private land went with ownership of the land on the 'vertical principal'

was especially important for minerals even during the pre-classical period. See Pienaar 1986 *THRHR* 216-227 for a discussion of this maxim.

15 Dale *Historical and Comparative Study* 78. Franklin and Kaplin *Mining and Mineral Laws* 4 indicate that this maxim is ascribed to Accursius, a thirteenth century Italian commentator.

16 This thesis does not focus on the development of ownership, possession or *detentio* but the *de facto* state of affairs regarding mineral rights in a specific era. As these concepts directly influenced the view relating to minerals, the writer relies mainly on research done by Van der Walt *Houerskap* on the development of ownership and *detentio* to indicate the influence of the 'ownership concept of the era' on the way in which minerals were dealt with.

connection between the concepts of ownership, possession and holdership and the non-existence of a separate right relating to minerals is of importance to this study, the content of this discussion is structured according to Van der Walt's classification[17] of the different periods of Roman legal history.

2.2.1.1 Early Roman law up to 250 BC

Classical literary texts constitute the main sources for information regarding the mining activities of the early Roman Empire.[18] From these texts it is clear that Italy did not have vast mineral reserves and that the mining activities in Italy nearly ceased to exist when mineral rich provinces came under the Empire's realm.

The concepts of ownership, possession and holdership were not defined in early Roman law.[19] Academics agree that there was no private ownership of land in early Rome.[20] This indicates that the land used for mining in early civilizations was state controlled public land.[21] Minerals were merely regarded as fruits of such land becauses the principle of lateral or horizontal division of *dominium* was not known to or applied in early Roman times.[22] It was, therefore, merely necessary to regulate the mining process[23] as no other discernable right to the minerals existed - apples from an apple tree and stone from a quarry! The perception that

17 Van der Walt *Houerskap* 17–119. According to Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 14, 15 the periods can also be discerned as follows - the Monarchy 753 – 509 BC, the Republic 509 – 27 BC, the Principate 27 BC – 284 AD, the Dominate 284 AD – 527 AD.

18 De Boer *De Winning van Delfstoffen* 2.

19 Van der Walt *Houerskap* 1.

20 Van der Walt *Houerskap* 1-17, indicates that the term possession was used during the period up to 250 BC to indicate the actual use of a *res*. This development was necessitated in order to protect the use of *inter alia* state land by individuals against interference from third parties and strengthened the view that no title to private property could be held by an individual during this period. Land was owned by and land use was regulated by the authority. He does, however, indicate (on 32) that users of land classified as *ager publicus* were defined as *domini* of this land after 111 BC. See also Thomas *Textbook* 130.

21 Dale *Historical and Comparative Study* 5-9. See also De Boer *De Winning van Delfstoffen* 4.

22 Dale *Historical and Comparative Study* 4.

23 De Boer *De Winning van Delfstoffen* 3.

minerals were the fruits of the land laid the first foundation for the non-existence of a separate, individual mineral law dispensation in early Roman law.

2.2.1.2 Pre-Classical Roman law (250 BC –27 BC)

Various forms of ownership were known during the pre-classical and classical periods.[24] No Roman definition of ownership existed but the available sources indicate that Roman ownership was far from bestowing unlimited powers on its holder.[25] The most important kind of ownership during the pre-classical period was the *dominium ex iure Quiritium.*[26] This form of ownership was reserved for Roman citizens and non-Romans if they were in possession of *ius commercii.*[27] It could grant ownership with regard to movables and Italic land only and was protected with the *rei vindicatio.*[28] Praetorian ownership[29] stood alongside quiritary ownership and was protected with the *actio Pauliana.*[30] It was possible for both these forms of ownership to vest in different people with regard to the same object.[31]

Public ownership existed alongside these forms of private ownership. All things belonging to the Roman state were called *res publicae.*[32] The *cives Romani* were regarded as joint owners of the common property.[33] Things in public use like state mines,[34] streets, public places and theatres are examples of *res publicae.*[35] It is interesting to note that

24 Van der Walt *Houerskap* 31-62; Schulz *Classical Roman Law* 339; Thomas *Textbook* 133.
25 Schultz *Classical Roman Law* 338; Kaser *Römisches Privatrecht* 107-111.
26 Van der Walt *Houerskap* 33.
27 Schultz *Classical Roman Law* 339.
28 Kaser *Römisches Privatrecht* 107; Van der Walt *Houerskap* 37.
29 Also referred to as bonitary ownership- Schultz *Classical Roman Law* 340; Van der Walt *Houerskap* 38.
30 Van der Walt *Houerskap* 38.
31 Van der Walt *Houerskap* 36.
32 See par 4.2 *infra*.
33 Schultz *Classical Roman Law* 89.
34 Thomas, Van der Merwe and Stoop *Historiese Grondslae* 157.
35 Van Zyl *Geskiedenis en Beginsels* 122.

Roman public law, and not private law, applied to *res publicae.*[36] *Res publicae* are to be distinguished from *res omnium communes*, the latter including the air, rain, flowing water of rivers, the sea and its shores all equally available to all people.[37] At this point it is important to note that neither land as a commodity, nor minerals regarded as the fruits of land, were classified as *res omnium communes* by any of the consulted sources. Although some land was regarded as *res publicae,*[38] land was regarded as a commodity susceptible to the known form of ownership, be it *dominium ex iure Quiritium* or *in bonis esse.*[39]

An ordinary person could not have *dominium* over provincial land[40] unless the land was received according to *ius Italicum,*[41] as it was regarded as state-owned – *res publicae.* Since the late Republic such land was subject to a ground-rent payable to the state. However, the occupier received a right of possession an entitlement comparable to ownership.[42] The land or right in the land could even be transferred by way of the *iuris gentium.*[43]

Very little information can be found referring to the regulation of mining operations during this period. Although the majority of authority that can be found indicates that mining was only done on public land,[44] Crook[45] states that some important mining areas were privately owned during Cicero's reign in the late Republic. Unfortunately virtually no documented record of this can be found.[46] However, it can be deduced

36 Schultz *Classical Roman Law* 89.
37 Thomas, Van der Merwe and Stoop *Historiese Grondslae* 157; Van Zyl *Geskiedenis en Beginsels* 122. See chapter 4 *infra* for a discussion of the principle.
38 Thomas, Van der Merwe and Stoop *Historiese Grondslae* 157; Van Zyl *Geskiedenis en Beginsels* 122.
39 The importance of this state of affairs will become clearer once the public trust doctrine is discussed in chapter 4 *infra.*
40 Thomas *Textbook* 135; Kaser *Römisches Privatrecht* 107.
41 Schultz *Classical Roman Law* 341.
42 Kaser *Römisches Privatrecht* 107.
43 Thomas *Textbook* 135.
44 Dale *Historical and Comparative Study* 5; Kaser *Römisches Privatrecht* 108.
45 Crook *Law and Life* 161.
46 Crook *Law and Life* 161.

from the text found in *Dig* 18.1.77 that stone-quarries were susceptible to the existing view of private ownership as early as 50 BC.

De Boer[47] indicates that although mining activities took place under the flag of the Roman state, the mines were exploited with the help of the *publicani*:

> Deze verenigden sich in machtige corporaties, zgn. *societates publicanorum*...Dit waren de ondernemers die openbare werken op zich namen, en staatsactiviteiten pachten, als de inning van belastingen en de explotatie van rivieren, havens, landerijen, mijnen(!) enz.[48]
> *[They united themselves in strong corporations known as* societas publicanorum *... They undertook public works and state activities like tax collection and the exploitation/ development of rivers, harbours, fields, mines ect.]*

From the text found in *Dig* 50.16.17.1. it is clear that the *fiscus* benefited from these activities. Mining activities were regulated by the Roman state who prescribed *inter alia* the number of men that could be used for labour on these mines and the quantity of ore that could be extracted.

Although indications are found that mining activities were carried out in this time frame, it is clear that it was regulated and taxed by the state. It is inevitable that no clear individualised mineral law dispensation emerged during this era as the ownership concept was not completely individualised and mining activities were mainly conducted on state land.

2.2.1.3 Classical law (27 BC – 250 AD)

During this period a clear distinction developed between ownership, possession and limited real rights.[49] The accepted restrictions on ownership that emanated were responsible for and echoed by the development that took place with regard to the juristic nature of rights

47 De Boer *De Winning van Delfstoffen* 4, 9.
48 De Boer *De Winning van Delfstoffen* 4. D 39.4.15 supports the view that the right to exploit minerals was allocated by imperial decree to certain individuals.
49 Kaser *Römisches Privatrecht* 106, 107.

relating to minerals during this period. Dale[50] indicates that developments with regard to rights in minerals were guided by the general principles of landownership. In the Roman provinces the land was state owned, most of it taken as booty, and accordingly it was the state that had the right to mine or grant rights to mine to third parties. On the other hand there is evidence of a senatorial prohibition on mining in Italy during this period[51] and during the Principate a separate right or concession to mine could only be obtained in respect of public land.[52] This restriction must be seen against the political and economic background of the time. During this time the emperors had to have absolute control over the sources of mining as they had to preserve the huge standing army needed to uphold the Roman Empire.[53]

The major sources of information on mining on public land are two bronze tablets found in the mines of Aljustrel, Portugal in 1876 and 1906 respectively, containing the *Lex Metalli Vipascensis* and the *Lex Metallis Dicta*.[54] These *leges* are attributed to Hadrian who reigned from 117-138 AD.[55] The principles that can be inferred from the regulations contained in these two laws are that the state's ownership could be restricted in favour of a discoverer or occupier of a mine provided that royalties were paid to the state. The right to mine was, however, forfeited if the mining was interrupted for a conceivable period of time.[56]

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50 Dale *Historical and Comparative Study* 5–9; De Boer *De Winning van Delfstoffen* 13-19, 27-31.

51 Crook *Law and Life* 161; De Boer *De Winning van Delfstoffen* 2.

52 One must take note, however, that the text contained in D 23.5.18 indicates that a right to extract marble did exist with regards to private land. See also D 18.1.77.

53 Norton *The Conflict* 9. De Boer *De Winning van Delfstoffen* 136 states that he does not interpret the available sources to indicate "dat de Romeinse staat als zodanig aanspraak zal hebben gemaak op delfstoffen en de winning ervan ... wel had de staat veel mijnen in bezit." – *[that the Roman state would claim the minerals or the right to exploit them ... however, the state possessed many mines].*

54 Norton *The Conflict* 14; Dale *Historical and Comparative Study* 5; Gibbens *Billikheid en die Regsverhouding* 52, 53; Crook *Law and Life* 161.

55 De Boer *De Winning van Delfstoffen* 11; Dale *Historical and Comparative Study* 6. Dale does indicate, however, that there are historians who attribute the first of the *leges* to Flavian. That would place the *lex* as early as 450 BC.

56 Kaser *Römisches Privatrecht* 108.

The mining rights created by these two laws were transferable and heritable.[57] Dale summarises:[58]

> The State retained a residuary ownership over the land and over the right to mine itself, simply granting to the holder of the mining right a right *abutendi*, such that he did not have to restore the land intact.

The right to mine can be seen as a restriction on the ownership of public land.[59] It must be kept in mind that without the benefit of modern day technology, mining was greatly restricted to areas where the ore was near the surface. An extensive system of opencasts or pitting made agriculture impossible[60] and the owner of the land held nothing but the bare *dominium*. The tendency to restrict landownership in favour of the mining industry was later extended to private land.[61]

2.2.1.4 Post Classical Roman law (250 AD –1100 AD)

Dale[62] indicates that mining operations were allowed on private land from the last stages of the Principate,[63] continuing to the Dominate and Justinian's reign.[64] This is corroborated by both Norton[65] and Gibbens[66] who found that the old authorities indicated that mining on land in private hands was authorised by imperial decree during the era of the

57 Dale *Historical and Comparative Study* 9.
58 Dale *Historical and Comparative Study* 7.
59 Dale *Historical and Comparative Study* 9 refers to this restriction as a "type of right of occupation". Linde *Die Invloed van 'n Staatkundig Versnipperde Suider-Afrika* 32 equates it to usufruct and Gibbens *Billikheid en die Regsverhouding* 52 indicates that it was *emphyteusis* or *ius perpetuum*. De Boer *De Winning van Delfstoffen* uses the phrase "verpacht" whenever he refers to the right through which the *publicani* acquired the right to exploit mines, this word in itself contains the concept of a restriction on ownership.
60 Davies *Roman Mines in Europe* 2 as referred to by Norton *The Conflict* 13.
61 Dale *Historical and Comparative Study* 8; De Boer *De Winning van Delfstoffen* 81.
62 Dale *Historical and Comparative Study* 9; Bonfante *Grondbeginselen* 335.
63 According to Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* 14, this period can be allocated to the years 27 BC-284 AD.
64 This submission is supported by the authority found inter alia in D 10.3.19; D 17.2.83 and D 24.3.8.
65 Norton *The Conflict* 12.
66 Gibbens *Billikheid en die Regsverhouding* 52, 53.

Dominate.[67] The details of these regulations are not important for the purposes of this study. However, the philosophy of the law of mining that emanated from these regulations is of the utmost importance:

> These texts clearly shows that the philosophy of the law of mining was that the industry as such should be encouraged, and to this end permission was granted by the State for freedom of working under private property; in this way the exploitation of the mineral wealth of the empire was promoted to the benefit of the State (which received royalties), and private enterprises, while at the same time the landowner received an equitable return as well. [68]

Dale[69] and Gibbens[70] attribute the extension of mining rights to private land to the fact that public interest took precedence over individual interest from the time of Marcus Aurelius. Kaser[71] explains that these restrictions, motivated by the idea of the precedence of the common weal over the interest of the individual, were considerably increased during the post-classical period.[72] In order to protect and ensure the "absolutist welfare state" private *dominium* could be restricted by *inter alia* granting mining rights over private land to third parties.[73] These rights were permanent, hereditary and transferable in any way and expressed in the "phraseology used for owners and perpetual lessees".[74]

The right to mine was described by using the terms *loca publica* and *fundi patrimoniales*.[75] The use of these phrases indicates a synonymy with the stability and permanency of *dominium*.[76] Levy[77] is of the opinion that the underlying principle regulating the relation between the landowner and the operator of the mine on the land was not *ius in re*

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67 De Boer *De Winning van Delfstoffen* 98.
68 Dale *Historical and Comparative Study* 10.
69 Dale *Historical and Comparative Study* 10.
70 Gibbens *Billikheid en die Regsverhouding* 53, 54.
71 Kaser *Römisches Privatrecht* 108.
72 This is corroborated by Levy *West Roman Vulgar Law* 112–114.
73 Gibbens *Billikheid en die Regsverhouding* 53, 54; Kaser *Römisches Privatrecht* 108; De Boer *De Winning van Delfstoffen* 136.
74 Levy *West Roman Vulgar Law* 114.
75 Gibbens *Billikheid en die Regsverhouding* 55.
76 Gibbens *Billikheid en die Regsverhouding* 55.
77 Levy *West Roman Vulgar Law* 114.

aliena but that of a double ownership, distinguished only by its functions.[78] It must be borne in mind that these descriptions were used during the post-classical era and once again it is indicatory of the concept of ownership as it was prevalent during that era. Van der Walt[79] indicates that the property concept changed radically during the period of vulgar law:

> Die eiendomsbegrip ondergaan in die vulgêre reg ingrypende veranderings, en daarmee saam word die hele Sakereg beïnvloed. Die invloed van die verandering is geleë in die omskepping van die eiendomsbegrip in 'n 'oewerlose' begrip, wat nie so duidelik van **possessio** of die regte wat vandag as **beperkte saaklike regte** bekend is, onderskei word as wat in die klassieke reg die geval was nie.
> [*The concept of ownership underwent drastic changes during the vulgar law influencing the entire law of property. The influence of the change lies therein that the concept of ownership was changed into a limitless concept that was not as clearly distinguishable from* possession *or the rights that are known today as limited real rights as it was in the classical period.*]

If Van der Walt's view of the ownership concept of the time is taken into consideration, it is understandable that any defined right in property could be seen as separate ownership during this era.

Justinian strove to return to the precisely defined concept of ownership of the classical law and cleared up the confusion created during the preceding post-classical vulgar law.[80] Dale[81] confirms that Justinian permitted mining freedom subject to the payment of compensation to the owner.

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78 Dale *Historical and Comparative Study* 11 indicates that the South African viewpoint is that the Roman law is embodied in the *cuius est solum* maxim, and therefore rights in minerals constitute *iura in re aliena* rather than a separate form of ownership.

79 Van der Walt *Houerskap* 91.

80 Kaser *Römisches Privatrecht* 107. See, however, Van der Walt *Houerskap* 111 where he opines that Justinian did not succeed fully in reverting to the classical law.

81 Dale *Historical and Comparative Study* 11.

The fact that minerals were regarded as fruits of the land had two important implications. Minerals only became legally independent after separation[82] and only those who had a right to the fruits of the land could mine the land with the object of becoming owner of the minerals.[83] Mining was state regulated but the interests of both the miner and the landowner were sought to be protected.[84] De Boer[85] concludes his discussion of Roman mining law by stating:

> Een scheiding tussen de eigendom van de bovengrond en die van de ondergrond valt nergens in het Romeinse recht te bespeuren. Deze sullen we pas tegenkomen bij de middeleeuwse jurist Paulus de Castro.
> *[A division between ownership of the surface of land and layers of soil underneath is not to be found in Roman law. The concept was only introduced by Paulus de Castro, a jurist from the Middle Ages.]*

2.2.1.5 Middle Age law

De Boer[86] states that very little is known about the Middle Ages mining law.[87] During the Middle Ages land and the rights attached thereto vested in the landlords.[88] It was during this period that the maxims *cuius est solum eius et usque ad coelum et ad inferos* and *cuius est solum*

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82 Kaser *Römisches Privatrecht* 93; Thomas *Textbook* 176.

83 Gibbens *Billikheid en die Regsverhouding* 50. Although the pre-2002 mineral law dispensation was not premised on the principle that minerals are regarded as fruits of the land, the principle of 'legal independency after separation' was applied. A person who was not the owner of the land could be the holder of mineral rights in respect of the land but ownership in the minerals themselves could only be obtained once the minerals were separated from the earth and appropriated by the holder of the right. See also *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A) 510J–511 A, 534G-H; Joubert 1959 *THRHR* 27, 28; Badenhorst 1989 *De Jure* 379-391; Badenhorst 1995 *TSAR* 570, 573–576; Badenhorst 1998 *Stell LR* 143, 147- 150; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 332. The position under the current mineral law will be dealt with later.

84 Dale *Historical and Comparative Study* 11.

85 De Boer *De Winning van Delfstoffen* 137.

86 De Boer *De Winning van Delfstoffen* 139.

87 De Boer *De Winning van Delfstoffen* 146-152 indicates that two theories exist regarding the extent of the regalia's right to mines. One is that the landlords, as representatives of the King, had the sole right to exploit mines. The other is that they merely had a right to claim a percentage of the production.

88 Morton *Acquisition and Registration* 3; Linde *Die Invloed van 'n Staatkundig Versnipperde Suider-Afrika* 32. Van der Walt *Houerskap* vn 42 on 134 indicates that the Feudal era lasted from 1000 AD – 1581.

eius est usque ad caelum were imported into the law by the Glossators.[89] The principle that land extended up to the heavens and down to the depths of the earth precluded horizontal division of ownership.[90] It followed logically that minerals, as an integral part of the land were regarded as property of the landowner. As will be seen later in this work, the former South African view of mineral rights was embodied in these maxims.[91]

2.2.1.6 Conclusion

The two views that existed during the Roman period relating to minerals were:

(i) Minerals were regarded as fruits of the land.

(ii) Minerals were regarded as part of the land through the working of the *cuius est solum* maxim.[92]

Although the underlying idea of these principles differed substantially, their effect on the development and view of mineral rights was the same. It prevented the development and acknowledgement of a system of horizontal division of land.[93] Economical and political needs dictated the initial restriction of mining to public land and later necessitated the restriction on private land in favour of certain mining operations. Mining operations were strictly regulated and the system endeavoured to protect the state, the miner and the landowner.

An independent chapter in this thesis deals with the origin and development of the public trust doctrine.[94] However, no trace of this doctrine can be found in the Roman law with regard to the development

89 Dale *Historical and Comparative Study* 78.
90 Morton *Acquisition and Registration* 9.
91 See par 2.4 *infra.*
92 See Pienaar 1989 *THRHR* 216-227 for a discussion of this maxim.
93 However, Hahlo 1955 *SALJ* 408 and Cowen 1973 *CILSA* 1 indicate that some Roman law scholars are of the opinion that Roman law knew separate ownership of horizontal portions of buildings. The concept of "duplex *dominium*" or "divided ownership" is also adressed by Van der Walt and Kleyn *Duplex Dominium* 213-260.
94 See chapter 4 *infra.*

of any right to minerals. If a connection is to be made, the nearest link that can be found is the fact that mining operations were initially restricted to state owned land, therefore to public land.[95] At this stage it can be stated that no evidence can be found in the history relating to the development of rights to minerals or mining that minerals were included in the original cluster of natural resources deemed to be protected for the benefit of the general public. It was not regarded as *res publicae* or *res omnium communes.*[96]

It is clear that the perception that minerals grow under the soil influenced and even dictated the idea that minerals were regarded as fruits of the land. One can only speculate what influence it would have had on the development of mineral law had the true nature of minerals been known during this era.

2.3 Roman-Dutch law

When Roman law was received in the State of Holland there was not much mining activity, with the effect that scant attention was given to minerals and rights to minerals.[97] Under the Roman–Dutch civil law metals and minerals belonged to the landowner.[98] A differentiation was made between *renascentia* and *non-renascentia* minerals.[99] Voet 1.8.13[100] discussed the concept that the *dominium* of the minerals vested in the registered owner of the land:

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95 Van der Walt *Houerskap* 55 and Thomas *Textbook* 136 indicate that Diocletian and Justinian abolished the distinction between Italic land and provincial land with the effect that private ownership - the existing notion of private ownership - could be established on land previously classified as *res publicae*.

96 This might be due to the fact that the knowledge of minerals was so inadequate that the theory of the growth and replenishment of ore was commonplace with jurists.

97 Norton *The Conflict* 15; Linde *Die Invloed van 'n Staatkundig Versnipperde Suider-Afrika 33.*

98 Voet 41.1.13 quoted in *Minister of Agriculture v Dundee Coal Co Ltd* 26 (1905) NLR 263 on 265.

99 Voet *Commentarius ad Pandectas* 7.1.24; Carey Miller *Acquisition and Protection* 58. According to Gibbens *Billikheid en die Regsverhouding* 64 *renascentia* minerals were regarded as fruits of the land.

100 Gane's translation vol 1 162-163. The original text reads as follows:

> [I]t happens ... frequently that a thing by nature movable is held as immovable, being taken to be a part and an accessory of an immovable thing ... metals and stones, sand and clay, the whole contents of mines of metals or quarries of stone and so forth ... are included in immovables as being part of estates. But all these, when they have been dug up or out ... cease to be parts of the ground and so are to be accounted for the future among movables. They then no longer follow the law of the ground or house, nor when the estate is sold do they belong to the purchaser, even though they are not found to have been expressly excepted.

An indication of the separation of rights relating to minerals from the *dominium* of the land is also found in the Roman-Dutch law.[101] Once rights can be separated, their transferability is implied. Voet[102] mentions rights to " inkomsten van ... Mijnen" *[revenue ... from mines]* as an example of real rights which detract from the *dominium* of the land in question, thereby answering the question to the juristic nature of these rights during this time. It can be stated in conclusion that minerals were regarded to be part of the land before their separation from the land but became independent legal objects after separation.

2.4 Pre-2002 South African mineral law dispensation[103]

The intricacy of early South African mineral law is illustrated by this quotation from *The Mining Laws of the British Empire*:[104]

> *Nec minus fubinde fit, ut quae res natura mobilis est, pro immobili habeatur, dum rei immobilis pars et accessio esse creditur ... metalla lapidesque et arena et creta et quicquid est in fodinis metallicis ant lapicindinis et cetera ... immobilibus accensentur, ut partes praediorum: quae omnia, ubi ruta seu eruta et caesa fuerint, uti definunt fundi partes esse, ita in posterum mobilibus annumeranda sunt; nec amplius fundi domusve jura sequuntur, nec praedio vendito ad emtorem pertinent, licet nominatim excepta non inveniantur.*

101 Dale *Historical and Comparative Study* 75.

102 Voet 1.8.23, as translated by Kertsman (Hollandsch Rechtsgeleerd Woordenboek p 579) quoted in *Ex parte Pierce* 1950 3 SA 628 (O) 635.

103 It has already been stated that it is not the purpose of this thesis to give a thorough historical overview of the development of the South African mineral law. Certain main aspects will be highlighted. For an in depth discussion of historical development in South African mineral law see Dale *Historical and Comparative Study* 72–247.

> There is a further difficulty induced by the fact that on the one hand until the Union was effected there were several Supreme Courts all administering the Roman-Dutch law in South Africa and as a consequence there was a tendency [for] the different South African colonies to drift apart by reason of contradictory decisions,[105] while on the other hand each of the various parts of the Union has a special and elaborate code of statute law relating to mining which codes are by no means the same in detail and differ on occasion in principle.

To establish the nature and transferability of mineral rights before 2002 and the possible incorporation of principles relating to the public trust doctrine in the former South African mineral law dispensation, the discussion will focus on:

(i) General principles developed and applied before the commencement of the *MPRDA*.
(ii) Legislation applicable until 1991.
(ii) The *Minerals Act* 50 of 1991.

2.4.1 General principles[106]

Stone[107] explains that three modes of tenure existed in the Cape Colony until the year 1812, namely freehold, loan occupation and quit-rent tenure. The first grant of freehold was made on 22 June 1657. The nature of freehold was that of true ownership, the owner having full *dominium* of the land.[108] As such the *dominium* of the land encompassed the surface of the land and all the minerals in it.[109] An example of the application of the common law *cuius est solum* maxim

104 Stone *Mining Laws* 1.
105 *Mtembu v Webster* (1904) 21 SC 323 at 346.
106 For a thorough exposition of the general principles see Badenhorst 2001 *Obiter* 120-126; Badenhorst 2003 *Stell LR* 384-396.
107 Stone *Mining Laws* 2.
108 *Pitch and Bhyat v Union Government* (1912) AD 719 at 734.
109 *Neebe v Registrar of Mining Rights* (1902) TS 65 at 85; *Rocher v Registrar of Deeds* (1911) TPD 311.

and a description of the nature of freehold is found in the Natal case of *Acol Syndicate v Ashby*:[110]

> We know that in an out and out sale of a freehold in land without reservations, according to the maxim, all above and under the soil goes to the purchaser ...

Stone[111] indicates that the first instance of a loan occupation occurred in 1654. He explains that the title of the occupier was of the most precarious nature as the holder had no right to alienate without consent and the occupation could be terminated without notice at any time after the expiration of a year. In terms of a proclamation of 1813 all these holdings were exchanged for perpetual quit-rent holdings.[112] De Villiers CJ states in *De Villiers v Cape Divisional Council*[113] that perpetual quit-rent grants became more numerous than any other grant after 1813. Perpetual quit-rent holdings were also known as *erfpacht.*[114] After referring to case law,[115] Stone[116] concludes that it appears that the question whether the holder of an *erfpacht* possessed the rights to the minerals depended apart from statute, on the nature of the original grant which could vest in the grantee rights to minerals. *Prima facie* the *erfpacht* holder was an *emphyteuta* and as such did not have the rights to minerals. However, if the *erfpacht* holder once had the right to minerals he could not be required, unless by express legislative act, to accept a title in place of his original title which excluded or lessened his right to minerals.

This brief discussion of land tenure in early South African history indicates that the development of the mineral law dispensation initially

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110 *Acol Syndicate v Ashby* (1889) 10 NLR 181 at 183.
111 Stone *Mining Laws* 2.
112 Sir John Cradock's *Proclamation on Conversion of Loan Places to Quitrent Tenure* dated 6th August 1813.
113 *De Villiers v Cape Divisional Council* (1874) 5 BUCH at 58.
114 Stone *Mining Laws* 4.
115 *Webb v Wright* (1883) 8 AC 324; *Webb v Giddy* (1878) 3 AC 908 at 929, 930; *Vos v Colonial Government* (1802) 14 NLR 206; *Divisional Council of the Cape Division v De Villiers* (1877) 2 AC 567; *Kimberley Divisional Council v London and S.A. Exploration Co Ltd* (1885) 2 BUCH AC 84.
116 Stone *Mining Laws* 6.

accorded to the principles drawn from Roman-Dutch common law. Nevertheless, due to unique South African conditions and needs and a better understanding of minerals themselves,[117] innovative development took place, advanced by the ingenuity of South African judges[118] and a series of mining legislation.[119] It was necessary to adapt the Roman-Dutch law towards the needs of a modern legal system which had to serve a vibrant mining industry.[120] As a result the *cuis est solum* maxim was not, as far as the development of mineral rights is concerned, rigidly applied in South Africa. This is illustrated in *Odendaal v Registrar of Deeds, Natal*[121] where the court, discussing a reservation of mineral rights to the state, quoted Wessels:[122]

> The fear that the benefit resulting to the whole community from the development of the mineral resources might be curtailed if the owner had the exclusive right to the minerals led the legislature of the Transvaal and Rhodesia to modify the principle *Cuius est solum* ...

Stone[123] explains that the adaptation of the common law by statute and case law was a method to create mining rights exercisable under a system of license and control. These rights were not dependent on the possession of full rights of ownership in the land worked but had to be reconciled with the concurrent ownership rights of others.

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117 Wessels J remarked in *Master v African Mines Corporation Ltd* (1907) TS 925 at 930, 931:

> It may have been very well to allow the usufructuary to dig for minerals in days when they were supposed to renew themselves within a century and when the extraction was a slow process; but nowadays, when by the use of high explosives and efficient drills, the minerals an be extracted in a short time, it does not seem desirable that the usufructuary should leave the real owner an exhausted farm.

118 Badenhorst 1990 *TSAR* 239.

119 See par 2.4.2 *infra* for a brief discussion of mining legislation.

120 Dale *Historical and Comparative Study* 73; De Villiers CJ remarked in *Henderson v Hanekom* (1903) 20 SC 513 at 519:

> However anxious the Court may be to maintain the Roman-Dutch Law in all its integrity, there must, in the ordinary course, be a progressive development of the Law keeping pace with modern requirements. In no department of Law has this development been more marked than in the practice relating to leases, especially of mineral rights.

121 *Odendaal v Registrar of Deeds, Natal* 1939 NLR 327 at 344.

122 Wessels *History of Roman-Dutch Law* 486.

123 Stone *Mining Laws* 4.

The mere fact that the application of the *cuius est solum* maxim has been relaxed to allow persons other than the owner of a certain piece of land an interest in the right to minerals contained in the full *dominium* of the land, did not mean that the maxim was of no consequence to South African mineral law. Dale[124] examined some of the results of its application in the pre-2002 mineral law dispensation. In summary it can be stated that the following principles evolved from the application of the maxim:

(i) until minerals were extracted from the earth it was not capable of separate ownership even though the right to minerals or the right to mine vested in a person other than the landowner;

(ii) once minerals had been separated, they formed the subject of separate ownership, and became movables;

(iii) rights to seams of minerals, and consequently the horizontal division of land, was not recognised;

(iv) the following of lodes was not recognised in South African law;[125]

(v) although the application of the maxim did not give rise to the unlimited exercise of rights of ownership by the landowner and many limitations to the maxim were found due to the severance of mining rights from the pool of rights contained in the full *dominium*, the owner's interests were nonetheless retained in some form or another.[126]

Because no separate ownership of minerals prior to severance from the soil was acknowledged in South Africa,[127] South African jurists had difficulty categorising mineral rights.[128] Mineral rights were seen as a

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124 Dale *Historical and Comparative Study* 78–87.

125 However, s 69 of the *Precious Stones and Minerals Act* 19 of 1883 applicable in the Cape Colony, did provide for the following of lodes.

126 The question is whether landowners' interests are retained in the *MPRDA*. It is suggested in par 7.1.2.3 *infra* that the maxim has completely been subrogated through the promulgation of the *MPRDA* with relation to unsevered minerals.

127 Badenhorst 1998 Stell LR 148, 149.

128 Dale *Historical and Comparative Study* 93. The court remarked in *Ex parte Pierce* 1950 3 SA 628 (O) at 634:

subtraction from the *dominium* of land and, therefore, as *iura in re aliena*[129] and not as rights of ownership independent from landownership.[130] Because these rights were transferable[131] they were either regarded as *quasi*-personal servitudes[132] or real rights *sui generis.*[133] In *Nolte v Johannesburg Consolidated Investment Co Ltd*[134] the appellate division adopted the expression 'quasi-servitude' as being the correct description of the juristic nature of mineral rights. Mineral rights became limited real rights on registration.

Dale[135] states that the term 'rights to minerals' comprised a bundle of rights, the two most important rights being the right to prospect and the right to mine. The courts have held that mineral rights included such ancillary rights as were necessary for mining purposes.[136]

The mode of acquisition of mineral rights differed according to whether the mineral rights had been separated from the ownership of land or

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> It has been frequently pointed out in our case law that it is not easy to find the exact juristic niche in which to place a reservation on mineral rights.

129 In *In Re Anderson and Greig* (1907) 28 NLR 185 at 187 doubts were already expressed on regarding mineral rights as servitudes. See also *Apex Mines Ltd v Administrator, Transvaal* 1986 4 SA 581 (T) upheld on appeal in 1988 3 SA 1 (A).

130 Dale *Historical and Comparative Study* 94.

131 Dale *Historical and Comparative Study* 100; prospecting contracts were cedeable as is illustrated by the decision given in *Henderson v Hanekom* 20 (1903) SC 513.

132 *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) at 25; *Ex parte Marchini* 1964 1 SA 147 (T); *Manganese Corporation Ltd v SA Manganese Ltd* 1964 2 SA 185 (W) at 149; *Van Vuren v The Registrar of Deeds* (1907) TS 289; Joubert 1959 *THRHR* 27 at 31.

133 *Ex parte Pierce* 1950 3 SA 628 (O) at 634:

> There can be no doubt, however, that a grant of mineral rights confers real rights, because it entitled the holder to go onto the property to search for minerals and remove them: there is a clear subtraction from the *dominium* of the owner of the land concerned. Perhaps it is correct to say that mineral rights constitute a class of real rights *sui generis.*

See also Van Warmelo 1959 *Acta Juridica* 90, 91 and De Wet 1943 *THRHR* 191. It is trite that the status of 'real right' could only be attained after the right has been registrated. Joubert 1959 *THRHR* 29-31 held the opinion that it was not necessary to classify mineral rights as real rights *sui generis.*

134 *Nolte v Johannesburg Consolidated Investment Co Ltd* 1943 AD 295.

135 Dale *Historical and Comparative Study* 109. Badenhorst *Juridiese Bevoegdheid* 6 prefers to use the term 'ontginningsbevoegdheid' *[entitlement to exploit]* in relation to the theory of subjective rights. He cannot associate with the concept of ownership as a 'bundle of rights".

136 *Buitendach v West Rand Proprietary Mines* 1925 TPD 745 at 752.

not.[137] Where no separation occurred mineral rights did not exist separately and were transferred to the transferee as part of the land on registration of the land. Minerals were regarded as such an integral part of the land that no mention is made of the minerals in any title deed where separation has not occurred. If a separation has occurred, delivery either took place by way of registration of a cession of mineral rights,[138] or by the issuing of a certificate of mineral rights[139] to the transferor prior to his transferring the land.[140] Irrespective of the mode of delivery, a prospecting contract[141] whereby prospecting companies obtained prospecting rights and which could include an option to purchase the mineral rights[142] was the most common *causa* for such delivery.[143] The title to the mineral rights did not include the ownership in minerals not severed from the land.[144]

The effects of the separation of mineral rights from the entitlements of landownership are indicative of the nature of the rights so acquired and as such important for the discussion that follows on the question whether pre-2002 mineral rights are to be regarded as property in terms of section 25 of the *Constitution*.[145] Dale[146] states the legal position:

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137 Dale *Historical and Comparative Study* 132–146.
138 Ss 16 and 3(1)(m) of the *Deeds Registries Act* 47 of 1937.
139 S 70–73 of the *Deeds Registries Act* 47 of 1937.
140 Once mineral rights were held under separate title, they remained so held and such separate title would not lapse by merger in the hands of the same person.
141 A prospecting contract that included the option to purchase the mineral rights was defined in section 102 of the *Deeds Registries Act* 44 of 1937. Section 84 of the act provided for the registration of the contract as a statutory exception to the rule that an option is not registrable.
142 Joubert 1959 *THRHR* 81. It was pointed out in *SIR v Struben Minerals (Pty) Ltd* 1966 4 SA 582 (A) that:

> Save in very exceptional circumstances, a mining company would not be prepared to buy a mining proposition without first exploring its potentialities. Nor would it be prepared to embark on exploratory work unless it is given the option of buying the mineral rights disclosed by that work. The rights to prospect and the right to buy are complementary, and one is as indispensable as the other in the normal contract of sale of mineral rights.

143 Dale *Historical and Comparative Study* 132.
144 Franklin and Kaplin *Mining and Mineral Laws* 6; *Le Roux v Loewenthal* (1905) TS 742; *Van Vuren v Registrar of Deeds* (1907) TS 289; Joubert 1959 *THRHR* 28.
145 See chapter 3 *infra*.
146 Dale *Historical and Comparative Study* 144.

> Once mineral rights are held under separate title, they remain so held, and such mineral title will not thereafter lapse by merger in the hands of the same person.

The separation of mineral rights [147] from landownership had resulted in two types of mineral rights holding, namely that by private persons[148] and that by the state.[149] In both circumstances the mineral right holder could further break down the right by granting a right to mine to a third person,[150] while retaining for itself the residuary right to the mineral right.[151] This was most commonly done by way of a mineral lease.[152] Mineral leases[153] had been recognised by the Transvaal courts as limited real rights since 1903,[154] and as such being regarded as immovable property capable of being mortgaged.[155] However, the courts had not been unanimous in their views regarding the nature of mineral leases although the decisions were unanimous in holding that there is great academic difficulty in placing the concept in an appropriate juristic niche.[156] The notion had been depicted as a sale[157] but this view

147 Separation occurred *inter alia* through the granting of mynpachts, mineral contracts conferring the right to prospect or mine and private mineral contracts issued by the holders of mineral rights. Stone *Mining Laws* 12 describes mynpacht as rights *sui generis* which were created by statute and which conferred on the state the right to dispose of precious metals and invest the state's grantees with the right to win and get them, irrespective of the ownership rights of the *dominium*

148 Private persons could be natural or corporate.

149 Dale *Historical and Comparative Study* 147.

150 It must be kept in mind that the state was the statutory holder of the right to mine certain substances for example precious metals, precious stones and natural oil until 199l. The state could, however, grant subordinate rights to mine to particular persons - Dale *Historical and Comparative Study* 147.

151 The impact of the *MPRDA* will greatly be determined by the level of holding that is affected, ie whether the 'complete' mineral right has been affected or only a subsiduary entitlement like the right to prospect or the right to mine.

152 See Dale *Historical and Comparative Study* 148-169 for a general discussion on mineral leases.

153 Different statutes have prescribed formalities in regard to the execution and registration of mineral leases.

154 This recognition was done by implication in *Henderson Consolidated Corporation Ltd v Registrar of Deeds and The Receiver of Revenue* (1903) TS 661 and explicitly in *Henderson Consolidated Corporation v Barnard* (1903) TS 279.

155 Franklin and Kaplin *Mining and Mineral Laws* 618; *Munro v Didcott* (1908) 29 NLR 249.

156 Franklin and Kaplin *Mining and Mineral Laws* 606.

157 *Steenkamp v Nederl.z.Afrok.Hypotheek Bank* 1916 TPD 396; *Munro v Didcott* 29 (1908) NLR 249.

had seemingly been opposed as often as it had been applied.[158] In *Coronation Collieries v Malan*[159] it was suggested to be a quasi-servitude.[160]

The most common form of expressing consideration payable in a mineral lease was by way of royalty payments.[161]

2.4.1.1 Summary

From this discussion of the general principles and the research already done on this subject[162] it is clear that mineral rights were regarded as limited real rights *sui generis*, separable from ownership of the land and transferable to third parties. The holder of the mineral right over land was entitled to enter the property and search for minerals. If minerals were found, they could be severed and removed. The exploitation of minerals was always to a greater or lesser extent subject to state regulation. Mineral rights were freely transferable, subject to the relevant statutory provisions.[163]

2.4.2 Legislation applicable until 1991

It has been stated above that the separation of mineral right holding from landownership resulted in two variants of mineral right holding, namely that by private persons and that by the state.[164] This state of affairs indicates that the basic policy regarding the exploitation of the natural

158 *Edwards (Waaikraal) Gold Mining Co Ltd v Mamogale and Bakwena Mines Ltd* 1927 TPD 288 at 304; *Modderfontein Gold Mining Co Ltd v CIR* 1923 AD 34 at 47. This view is supported by Franklin and Kaplan *Mining and Mineral Laws* 608.
159 *Coronation Collieries v Malan* 1911 TPD 577 at 591.
160 This discrepancy arose because the distinction between the right to mine and the right to minerals was frequently overlooked - Dale *Historical and Comparative Study* 154.
161 *Breytenbach v Union Collieries Limited* 1926 TPD 606; Dale *Historical and Comparative Study* 154.
162 *Apex Mines Ltd v Administrator, Transvaal* 1988 3 SA 1 (A); Badenhorst 1994 *THRHR* 34-46; Badenhorst 2001 *Obiter* 120-126; Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* [Original Service 2004] 3-i -3-22.
163 *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) at 25.
164 See par 2.4.1 *supra*.

resources of the country lay between the absolutes of complete state monopoly and private enterprise.[165] In encouraging the search for and exploitation of the country's vast mineral wealth to the benefit of the national economy, the state passed a series of enactments designed to reward and safeguard private enterprise. A system of control over mining operations was simultaneously imposed by the state thereby securing a substantial share in the profits derived from mining activities for the state treasury.[166]

A host of pre- and post Union mining legislation existed until these measures were largely consolidated into four important acts between 1964 and 1967.[167] For the purposes of this study the emphasis will be placed on the principles emanating from these measures, and only acts that introduced major policy changes will be discussed.[168] As the nature and transferability of rights in minerals were dealt with in paragraph 2.4.1 above, the purpose of the discussion of the legislation is mainly to determine whether traces of the principles underlying the public trust doctrine can be found and to establish to what extent landowner's rights were being influenced by the legislation.

2.4.2.1 Pre-Union Mining legislation

Each province had its own legislation applicable to the rights to mine. The discussion that follows will reflect on the principle legislative measures taken in each province up to the unification of South African provinces in the Union of South Africa in 1910.

165 Franklin and Kaplin *Mining and Mineral Laws* 1.
166 Franklin and Kaplin *Mining and Mineral Laws* 1.
167 Franklin and Kaplin *Mining and Mineral Laws* 2.
168 For a detailed discussion see Dale *Historical and Comparative Study* 174–237.

2.4.2.1.1 Transvaal

The *Grondwet van de Zuid-Afrikaanse Republiek*[169] was enacted on 13 February 1858. Section 7 declared that all land not yet alienated was state property, but obtainable by the public as before.[170] Section 29[171] determined that owners of land where minerals had been found would be compelled to lease or sell such land to the government for a reasonable price.[172] This provision, approximating to a right of expropriation,[173] was later repealed by section 68.[174] Mining companies were now allowed to steer the exploitation of mines under the auspices of the Executive Council, protecting the state's interests in the mining enterprise.

Ordinance 5 of 1866[175] was the first major ordinance dealing with the "*voorziening ... omtrent het ontginnen en bewerken van mijnen*"[176] *[provision ... for the exploitation and working of mines].* This ordinance contained the conditions for the founding of mining companies. The concept that the state was to share in the proceeds of the mineral wealth of the land was embodied in a provision that royalty was to be paid to the government.[177] The government was also to be notified of the discovery

169 *Constitution of the South African Republic.*
170 See discussion under par 2.3.1 *supra*.
171 Created by *Volksraadsresolutions* (hereafter referred to as VRR) of 14 to 23 September 1858.
172 Met betrekking tot het voorstel van den Uitvoerenden Raad, omtrent plaatsen waar mineralen gevonden worden, eiegenaars van dergelijke plaatsen verpligtende dezelve aan het Gouvernement tegen een billijken prijs te verhuren of the verkoopen, werd dit voorstel door den Volksraad eenparig goedgekeurd en bekrachtigd. [*With regard to the suggestion of the Executive Council about the land where minerals are found, that owners of such land are compelled to sell or lease such land to the Government at a fair price, the suggestion is unilaterally approved and confirmed*].
173 Dale *Historical and Comparative Study* 176.
174 Created by *VRR* of 21st September 1859.
175 Promulgated on 31 October 1866.
176 Preamble of the said ordinance.
177 Article 2. (The sections of the *VRR* are referred to as articles and therefore this word is used when referring to them).

of any precious metals.[178] The policy towards mining during 1866 was to allow private enterprise under a certain measure of state control.

The differentiation between base minerals and precious minerals was created in *Law* 1 of 1871.[179] The state assumed full control of the mining for precious stones and metals. Section 1 provided:

> Het mijnregt op alle edelgesteenten en edele metalen behoort aan den Staat, behoudens de reeds verkregene regten van privaten personen...
> *[The mining rights in respect of all precious stones and precious minerals belong to the state except for rights previously obtained by private persons...]*

Where precious metals and precious stones were found on private land, the state could take over the administration of the diggings subject to the payment of compensation.[180] No digging could commence without a licence being issued to the prospective miner[181] and no miner could transfer his entitlement without notifying the state.[182] All other mineral rights on private land, unless reserved by the state in the Land Grant, belonged to the landowner. He could mine freely himself or grant the right to mine to others.[183]

The essence of this act was the reservation of the right to mine precious stones and precious metals by the state, recognising state control of diggings including diggings on private land and to provide for the payment of licence fees.[184]

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178 Article 3.
179 It is interesting to note that *Law* 8 of 1885 was the first act where it was clarified which stones were considered precious stones, and where gold was taken to be the precious metal dealt with by the act. By *Proclamation* of 8 January 1887 *Law* 8 of 1885 was extended to apply to silver.
180 Article 15. The compensation would be equal to "de helft van de opbrengst der door den Staat te trekken licentiegelden" [*half of the proceeds of the licensing fees charged by the State*].
181 Article 14(b).
182 Article 14(d).
183 Dale *Historical and Comparative Study* 185.
184 Dale *Historical and Comparative Study* 178.

The provisions of the ensuing *Law* 2 of 1872 were basically similar to that of the preceding act. It is important to note that both these acts recognised the existence of private rights:

> Mijnregt behoort aan den Staat, behoudens reeds verkregene private regten...
> *[Mining rights belong to the State except for rights already obtained by private persons...]*

In contrast with this state of affairs, *Law* 7 of 1874, the next act regulating the exploitation of precious stones and minerals, began with the forthright statement that the right to mine precious stones and precious metals belonged to the state without the previous qualification in regard to existing rights. The government was now by law compelled to take the management of both commercial and diggings interests relating to private land where precious metals or precious stones had been discovered, under its own administration.[185]

This policy whereby landowners' entitlements to their land were grossly infringed was revised by the enactment of *Law* 6 of 1875. Section 3 states that:

> Het mijnregt op alle edelgesteenten of edele metalen behoort aan den Staat, met uitzondering nogthans van alle vroegere wettige overmaking van dat het aan een privaat persoon, personen of vennootschappen...
> *[Mining rights relating to all precious stones and precious minerals belong to the state with the exception of rights already obtained by a private person, persons or partnerships...]*

While it was still provided that any person was entitled to purchase a digger's licence from the state permitting him to prospect or dig on

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185 Article 15 reads as follow:
> Bij ontdekking van betaalbaar goud of ander kostelijke metalen of edegesteenten op privaat eigendom zal de Regering het geheele bestuur, beide van handel en delvings belangen, in hare handen nemen ... [*With the discovery of gold or other precious metals or precious stones on private land Governement will manage and regulate the trade and mining interests...*].

government land and on private land, the permission of the landowner had to be obtained before any activities could commence on private land.[186] Provision was made for a special licence which the surface owner of private land could sell to the digger.[187] The owner of private land could thus in fact prevent prospecting on his own land. However, where a discovery of precious stones or precious metals on private land was made, the government was entitled to take over the whole management of trading and digging interests.[188] The surface owner was compensated by being paid one half of the digger's licence fees and all of the trading stand licence fees.[189] Contrary to the preceding policy, the rights and entitlements of owners of private land were protected to a great extent. Dale[190] states that:

> [T]his Law carried forward the philosophy of reservation of the right to mine to the State, the onward granting thereof by licence, Proclamation of fields, the overall control of such fields, and the balancing of the interests of the surface owner and mineral rights holder, save that the private surface owner was able to prevent prospecting on his land.

Law 6 of 1875 was repealed 8 years later by the enactment of *Law* 1 of 1883. This law overturned the fundamentally recognized principle that the ownership of precious stones and precious metals could not be separated from ownership of the land. Section 2 provided that:

> Het eigendom in en mijnregt op alle edelgesteenten en edelmetalen behoort aan den Staat ...met uitzondering nogthans van alle vroegere wettige overmaking van dat regt door middel van concessie aan private personen of vennootschappen.[191]

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186 S 18.
187 S 18.
188 S 20.
189 S 20.
190 Dale *Historical and Comparative Study* 181.
191 Although the concept of 'ownership of minerals' was short lived, it is interesting to note that the Constitutional Court stated in *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) in par [42] that the Richtersveld Community's customary law interest in the land included **ownership of minerals** [own emphasis].

> *[Ownership of and mining rights in respect of all precious stones and metals belong to the state ... with the exception of all previous allocations of such rights to private persons or partnerships by means of concession.]*

It is clear that it was not merely the right to minerals that was designated to the state but that a separation of ownership of the land and of precious metals and precious stones, before severance, was envisaged. This is contrary to the *cuius est solum* maxim. It also amounted to statutory expropriation.[192] However, this far-reaching policy was changed again with the enactment of *Law* 8 of 1885 to conform with the policy that prevailed prior to *Law* 1 of 1883. Section 1 reads:

> Het mijn- en bescikkingsregt op alle edelgesteenten en edelemetalen behoort aan den Staat.
> *[The mining right and entitlement of disposition in respect of precious stones and minerals belong to the state.]*

It is clear that the idea of allocating to the state the ownership in precious stones and precious metals has disappeared. The state only reserved the entitlement to mine the minerals and the entitlement of disposition regarding the minerals.[193] Private land could be proclaimed in consultation with the owner.[194] The owner's interests were protected by *inter alia* granting him ten claims and half of the licence fees of all the claims pegged on the land.[195] All these measures indicated the state's desire to exploit the mineral potential of the land.[196]

A change in policy towards the dealing with private land occurred once again with an amendment to *Law* 8 of 1885.[197] This amendment deprived the owner of private land from the entitlement to prevent the proclamation of his land. The owner was compensated for this

192 This view is supported by Dale *Historical and Comparative Study* 182 who states that this "seems to be a form of statutory expropriation."
193 S 6.
194 S 10.
195 Ss 14, 15.
196 Dale *Historical and Comparative Study* 187.
197 Passed on 29 July 1886.

deprivation by increasing the number of owner's claims available to him on the proclamation of the land.

Law 8 of 1889 introduced an entirely new *Gold Law*. Although the provisions thereof basically confirmed preceding law, a change of policy occurred yet again in relation to private land. It was stated that the government could not proclaim the land of a private owner, unless the owner himself had prospected or permitted prospecting to take place. This stipulation is also found in *Law* 18 of 1892.

Law 10 of 1891 contains an interesting provision applicable to rights granted with reference to precious stones and metals, which is echoed in *Law* 18 of 1892. For the first time provision was made for compensation to be paid to any person whose *verleende rechten [granted rights]* were expropriated for public purposes.[198]

This act was also the first to deal with base minerals in addition to precious stones and minerals. The chapter on base minerals is titled

> *Voorlopige regeling van het mijnen naar onedele mineralen op Geproclameerde gronden.*
> *[Preliminary regulations relating to the mining of base minerals on proclaimed land]*

It authorises the granting of a licence to mine *delfstof*[199] to an applicant who had the consent of the landowner. The provisions were only applicable to proclaimed land and state land and not to unproclaimed private land.

The trend to regulate the mining of base metals on proclaimed and state land was continued with the passing of *Law* 18 of 1892. This act contained *Bepalingen [Stipulations]* with reference to specific minerals.

198 Article 59 of both the acts.
199 This included, but was not restricted to: "steenkolen, asbestos, aluminium, kobalt, phosphaat, lood, koper, tin, zwavel..." [*coal, asbestos, aluminium, cobalt, phosphorous, lead, copper, tin, sulphur...*].

It was stipulated that stone makers, rock quarries and chalk burners should obtain licences for their activities.[200] The consent of the landowner was required before such licences could be issued.[201] It was expressly stipulated in section 12 that the state could decline the renewal of a licence *"zonder tot schadevergoeding verplicht te zijn" [without being compelled to pay compensation].*

The next act that must be mentioned is *Law* 17 of 1895. This was the first act dealing comprehensively with base metals and minerals. Corresponding with the *cuius est solum* maxim, the entitlements to dispose and mine in respect of base minerals and metals accrued the landowner or his nominee.[202] To ensure that the state was not excluded from any profit made, royalties were payable to the state.[203]

The abovementioned acts set the pace for development of the mineral law dispensation in the Transvaal. The *Gold Laws* 19 of 1895 and 21 of 1896 and the *Base Minerals and Metals Law* 14 of 1897 were mere repetitions of their predecessors with minor amendments.[204] From 1898 precious stones and precious metals were dealt with by different laws, namely the *Gold Law* 15 of 1898 and the *Precious Stones Law* 22 of 1898.

After the Anglo-Boer War the British assumed control of the Transvaal. The *Crown Land Disposal Ordinance* 57 of 1903 provided that all rights to minerals, mineral products and precious stones on crown land "shall" be reserved by the crown.[205] The provision was refined by *Ordinance* 13 of 1906 by replacing the words "shall be reserved" with "may be

200 Article 1 of the *Bepalingen* annexed to the act. These provisions were carried forward by the *Brick Making, Lime Burning and Quarrying (Proclaimed Lands) Ordinance* 7 of 1905.
201 Article 6 of the *Bepalingen* annexed to the act.
202 S 1. Dale *Historical and Comparative Study* 192. This is a revision of the *status quo* whereby a licence for base minerals and metals was required for mining on private proclaimed land.
203 S 3 – On promulgation royalties were determined on 1% of the value of the explored minerals.
204 Dale *Historical and Comparative Study* 193.
205 S 7(1).

reserved". It must be noted that this provision referred to both base and precious metals and minerals. This is the first time that the reservation of base mineral and metal rights to the state are mentioned, as precious stones and precious metals were the objects of preceding legislation wherein rights were reserved by the state. Provision was made for the payment of compensation where private land was proclaimed by the state.

The *Precious Stone Law* 22 of 1898 was repealed by the *Precious Stone Ordinance* 66 of 1903. No major policy changes regarding the mining of precious stones occurred, save for providing that the same rights granted to landowners in terms of the ordinance were granted to persons to whom the rights to precious stones had been reserved.[206] This is an indication that recognition was given to the separate holding of mineral rights.

The 1898 *Gold Law* was revised in 1908 by the *Precious and Base Metals Act* 35 of 1908. The act amalgamated provisions dealing with precious metals and base minerals.[207] For the first time the phrase "holder of the mineral right" was defined in legislation although the term 'rights to minerals' was not defined. The reality of the idea that mineral right holding can be separated from landownership had been formally acknowledged. This act did not contain any other policy changing provisions. For the purposes of this study it should be mentioned that the interests of the private holder of mineral rights were preserved and no prospecting could take place on private land without the owner's consent. Prospecting and digging were still controlled by granting licences and permits against the necessary payment. Mining leases could be issued on proclaimed land. Revenue was provided for the state by way of royalty and the surface owner's interests were protected by

206 S 21.
207 Dale *Historical and Comparative Study* 199.

the imposition of a rental. This act remained applicable until 1967, although it was amended several times.[208]

2.4.2.1.2 Orange Free State[209]

The first principles embodied in legislation[210] provided for freedom of landowners to prospect on their own land,[211] the prospecting on state land by means of prospecting licences, the proclamation of land on discovery of minerals and the issuance of discoverer's, owner's and public's claims.[212] These provisions were similar to those found under the Transvaal laws.[213] No major changes were implemented after the assumption of control by the British.[214] The *Precious Metal Ordinance* 3 of 1904 did not specifically reserve the right to mine and remove precious metals to the state, but restricted the right of persons to mine them to such an extent that the implied effect was the same.[215] To guarantee the productive working of claims, provisions were later made for the forfeiture of claims that were not being worked continuously.[216]

Base metals and minerals were governed by *Ordinance* 8 of 1904. The ordinance provided for the right of the landowner to prospect. Any prospector who wanted to obtain a prospecting licence could only do so with the consent of the landowner.[217] No provisions were made for the proclamation of land for base minerals. The state's interest was protected by the imposition of a state royalty.

208 The act was *inter alia* amended by *The Mineral Law Amendment Act* 36 of 1934.
209 The Orange Free State was initially known as the Orange River Colony.
210 Chapter CXV of the *OVS Wetboek*, compiled in 1892. The provisions relating to diamonds were dealt with in Chapter CXVI and the diggings at Jagersfontein in Chapter CXXI.
211 S 1.
212 Dale *Historical and Comparative Study* 204.
213 See par 2.4.2.1.1 *supra*.
214 Dale *Historical and Comparative Study* 205.
215 Dale *Historical and Comparative Study* 206.
216 *Ordinance* 9 of 1908.
217 A licence was also necessary for prospecting for and mining base minerals on crown land.

In the *Crown Land Disposal Ordinance* 13 0f 1908, all precious stones and precious and base minerals and other minerals[218] on crown land alienated under the ordinance, were reserved to the crown. Once again, as was the case with Transvaal *Law* 1 of 1883,[219] a reservation of the minerals themselves, and not only the mineral rights, is found. This deviation from the *cuius est solum* maxim was in line with the English system but negated the principle underlying the mineral law dispensation of that time.

2.4.2.1.3 Natal[220]

The system used in Natal was very straightforward. The basis of the system was that the right to mine in respect of all minerals, base and precious, was vested in the state.[221] The system in Natal for all minerals was uniform and relied on a system of claims.[222] Landowners' rights were curtailed because prospecting on private land without the consent of the owner was possible.[223] However, landowners had the prerogative

218 The provisions were not applicable to stone.

219 See par 2.4.2.1.1 *supra*.

220 Legislation applicable to mining in Natal were *The Mineral Leases Law* 15 of 1867, *Law* 16 of 1869; *Law* 23 of 1883; *Law* 17 of 1887; Law 34 of 1888; *Natal Mines Act* 43 of 1899. These acts are not being discussed in detail in this work. Reference will only be made to the principles relevant for this work, drawn from the legislation. See *Minister of Agriculture v Elandslaagte Collieries Ltd* 26 (1905) NLR 475 at 479 for an extensive exposition of Natal mining laws up to 1905.

221 This basic philosophy of Natal mining legislation is contained in section 4 of *Law* 17 of 1887:

> The right of mining for and disposing of all gold, precious stones and precious metals, and all other minerals in the Colony of Natal, is hereby vested in the Crown for the purposes of and subject to the provisions of this Law.

The Natal court stated in *Bazley v Bongwan Gas Springs Pty Ltd* 1935 NPD 242 at 262:

> I have no doubt that the underlying idea of reserving minerals to the Crown in Title Deeds is to enable the Crown, as opposed to the surface owners, to control and regulate the mineral development of the country. Consequently I am of the opinion that a wide rather than a narrow meaning should be given to minerals in reservatory clauses.

222 Dale *Historical and Comparative Study* 216.

223 Under *Law* 16 of 1869 persons could prospect freely without the consent of the landowner. *Law* 23 of 1883 authorised a government appointee to prospect for coal on notice to any landowner, compensation for damages being provided by the state. *Law* 17 of 1887 prescribed that any prospective prospector should obtain the owner's consent when applying for a prospecting licence. Should the owner not consent to the granting of a licence, application could be made to the Resident

of prospecting-in-the-first-instance on their own land.[224] The emphasis in Natal was on public exploitation of minerals throughout the Colony and ensuring that land would not lie unexploited merely due to the caprice of the landowner.

The *Natal Mines Act*[225] changed the policy with regard to coal, limestone and other specified minerals[226] by granting the rights to these minerals to the landowner. This was an extension of the relaxing of the policy with regard to coal originating from *Law* 17 of 1887 where the owner was given the right to mine and dispose of coal and even grant a mineral lease in respect thereof,[227] even though the government was allowed to prospect for coal without the landowner's consent.

The *Natal Mines Act* is silent on the possibility of a separation of mineral right holding from the land title. Dale[228] states that such separation nevertheless existed. His view is *inter alia* supported by the fact that a landowner could grant a mineral lease with regard to coal on his property.[229]

Magistrate. The same principle applied under *Law* 34 of 1888, with the Commissioner of Mines named as the authority that could grant consent where an landowner unreasonably withheld consent.

224 *Law* 17 of 1887 stipulated that a landowner had to obtain a prospecting licence to prospect for precious metals. This requirement was not carried forward by *Law* 34 of 1888. Under this act the landowner, or anybody authorised by him, could prospect for and mine precious metals without a licence.

225 S 59 *Natal Mines Act* 43 of 1899.

226 S 59 – stratified ironstone, slate and soapstone.

227 S 30 *Law* 17 of 1887.

228 Dale *Historical and Comparative Study* 216.

229 S 59.

2.4.2.1.4 Cape[230]

Section 4 of *Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure* reads:[231]

> Government reserves no other rights but those on mines of precious stones, gold, or silver, ...: Other mines of iron, lead, copper, tin, coal, slate or limestone are to belong to the proprietor.

This set the scene for the development of the mining dispensation in the Cape Province as the reservation of rights to precious stones and minerals was echoed through the line of mining legislation applicable in the province. While rent and royalties had to be paid by prospectors and miners under the *Mining Leases Act*[232] for mining on crown land, no such regulations were applicable to private land.[233] These leases were capable of being dispensed of or sublet with the consent of the relevant authority.[234] However, the *Precious Stones and Minerals Mining Act*[235] extended the issuance of a prospecting licence to private land where the right to precious stones or minerals was reserved to the state, without the consent of the owner.[236] The landowner was compensated for surface damage by being allocated half a share of the licence moneys.[237] Provision was also made for the payment of royalty to the

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230 The most important legislation applicable to mining in the Cape were *Sir John Cradock's Proclamation on Conversion of Loan Places to Quitrent Tenure* 6 August 1813; *The Mining Lease* Act 12 of 1865; *Mineral Lands Leasing Act* 9 of 1877; *Crown Lands Act* 14 of 1878; *Precious Stones and Minerals Mining Act* 19 of 1883; *The Disposal of Crown Lands Act* 15 of 1887; *Precious Stones and Minerals Mining Law Amendment Act* 44 of 1887; *The Gold Mining Act* 10 of 1888; *The Alluvial Diamond Digging Law Amendment Act* 31 of 1893; *Precious Minerals Act* 31 of 1898; *Precious Stones Act* 11 of 1899; *Mineral Law Amendment Act* 16 of 1907. These acts are not discussed in detail in this study. Reference will only be made to the principles relevant to this study, drawn from the legislation

231 It is clear from *Cape Coast Exploration Ltd v The Registrar of Deeds* 1935 CPD 200 at 204 and *R v Boshoff* 1938 CPD 113 at 115 that parties sometimes overlooked the fact that rights to minerals had been reserved to the state. See also Dale *Historical and Comparative Study* 249, 250.

232 S 4 of the *Mining Lease Act* 12 of 1865.

233 S 6.

234 S 12.

235 *Precious Stones and Minerals Mining Act* 19 of 1883.

236 S 2.

237 S 23.

state or person in whom the reservation of precious stones and minerals vested.[238]

Owners of private land not subject to reservation of minerals or precious stones could allow the prospecting and working of minerals on their land. Rents and royalties were fixed by the landowner but the owner was obliged to pay 10% to the state "towards order and good government."[239] However, where the number of claims or the area being mined exceeded a stipulated maximum, the land could be proclaimed.[240]

Under the *Disposal of Crown Lands Act*[241] the state was given the prerogative to resume ownership of any land, where the rights to precious minerals and precious stones had been reserved for mining purposes on payment of compensation.[242] The trend to randomly diminish and extend the rights of landowners is also apparent when the mining legislation of the Cape is studied, as the rights of owners of unproclaimed land where minerals were reserved to the state were once again extended under the *Precious Stones and Minerals Mining Act.*[243] These owners were now allowed to prospect without a licence and once minerals were discovered they had the same rights as the holders of a prospecting licence.[244] The owner's consent was also required when application for a prospecting licence was made.[245] Prospecting licences were again required for both state land and private land with a reservation in favour of the crown of precious stones, gold, silver and platinum under the *Precious Minerals Act* 31 of 1898. The consent of the owner was still required before such licence could be issued to a

238 S 33.
239 S 77.
240 S 76.
241 *The Disposal of Crown Lands Act* 15 of 1887.
242 S 5 (d), (e).
243 The extension occurred under the *Precious Stones and Minerals Mining Law Amendment Act* 44 of 1887.
244 S 5 (1) of *The Precious Stones and Minerals Mining Act* 19 of 1883 as amended by the *Precious Stones and Minerals Mining Law Amendment Act* 44 of 1887.
245 S 5 (2) of *The Precious Stones and Minerals Mining Act* 19 of 1883 as amended by the *Precious Stones and Minerals Mining Law Amendment Act* 44 of 1887.

third party[246] but owners of land were free to prospect without a licence.[247] Proclamation of land could only occur on private land if the owner had permitted prospecting on the land.[248]

In 1907 the *Mineral Law Amendment Act*[249] was promulgated as a

> catch-all piece of legislation, designed to vary the 1898 act to cope with problems that had arisen in the intervening years.[250]

Landowners' rights were recognised in the sense that with regard to precious minerals, owners were entitled to peg owner's claims. Owners' were also granted the first right to obtain a dredging lease for mining in rivers or ground not suited for ordinary mining and their consent was required before such a lease could be granted to other parties.[251]

2.4.2.2 Post Union mining legislation[252]

In terms of section 135 of *South African Act* 9 of 1909, existing legislation of the individual Colonies which were to form the Union of South Africa, continued to be in force until they were expressly repealed, subject to subsequent legislation that was introduced from time to time.[253] Section 123 of the act provided that all rights in and to mines and minerals and all rights in connection with the searching for, working of and disposing of precious stones, which were vested in the government of any of the Colonies at the establishment of the Union, would on such establishment vest in the Governor-General-in-Council. It

246 S 6.
247 S 59.
248 S 29.
249 *Mineral Law Amendment Act* 16 of 1907.
250 Dale *Historical and Comparative Study* 225.
251 Dale *Historical and Comparative Study* 225.
252 Only major amendments and policy changing acts will be discussed in this section. For thorough discussion see Dale *Historical and Comparative Study* 226–237.
253 Dale *Historical and Comparative Study* 226; Franklin and Kaplin *Mining and Mineral Laws* 1. This principle is also found in section 107 of the *Republic of South Africa Constitution Act* 32 of 1961.

is clear that no individual's rights were curtailed or extended by the fact of the establishing of the Union of South Africa, the *status quo* was merely confirmed.

The tendency to reserve rights relating to minerals to the state was continued with the promulgation of the *Land Settlement Act* 12 of 1912. This reservation applied to all minerals in land granted under the act.[254] However, the policy was changed by the *Land Settlement Amendment Act* 23 of 1917, when it was provided that all rights to minerals were to follow alienation of the land.[255]

The *Transvaal Mining Leases and Mineral Law Amendment Act* 30 of 1918 provided for the granting of mining leases to holders of mineral rights or to third parties by tender.[256] Compensation was given to the landowner in rent being payable,[257] and the state received its royalty.[258]

A new system of dealing with mineral rights that had been reserved to the state was introduced by the *Reserved Minerals Development Act* 55 of 1926. The act was applicable in all the provinces. In the Cape the application of the act was restricted to reserved base minerals.[259] Section 2 stipulated that the owner of the land in respect of which "minerals"[260] had been reserved to the state would have the exclusive right of prospecting for such minerals. He could prospect on his land by himself or by nominee.[261] The only condition was that a prospecting licence had to be obtained.[262] This did not mean that the owner could frustrate the state's exploitation of the reserved minerals, as the

254 S 31(1).
255 S 16. With the proclamation of the *Land Settlement Act* 21 of 1956, the system whereby the mineral rights on land granted under the act were to be reserved to the state was re-introduced.
256 S 2. Dale *Historical and Comparative Study* 228.
257 S 4.
258 S 5.
259 S 1(1).
260 The "reservation of minerals to the Crown" was defined as the reservation of any minerals or the right of mining and prospecting therefore. Once again, ownership of minerals themselves is implied.
261 S 2.
262 S 2.

Governor General could authorise any third party to prospect on behalf of the state where the owner did not "avail himself" of the rights under the act.[263] After discovery, the owner's rights were only protected in the sense that he was either allowed all the rights of a discoverer of minerals on state land[264] where the land was proclaimed as a public digging, or he was entitled to a mining lease if proclamation did not occur.[265]

Precious stones were dealt with in the *Precious Stones Act* 44 of 1927. The right to mine for and dispose of precious stones was again vested in the state.[266] Prospecting permits were issued irrespective of the landowner's consent.

The *Base Minerals Amendment Act*[267] deviated from previous policy with regard to base minerals.

> The philosophy of the act was quite clearly to promote the prospecting and mining for base minerals in the same way as had been done in respect of precious metals and precious stones, thus ensuring that the development of base mineral deposits could not be frustrated by the private holder of minerals rights.[268]

It was, therefore, provided in the act that the Minister of Mines could investigate the occurrence of base minerals on any land[269] and that prospecting leases could be issued to third parties.[270] Provision was also made for the payment of a rental to the mineral right holder and compensation for surface damage to the surface owner.[271]

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263 S 14.
264 S 7.
265 S 7.
266 S 1.
267 *Base Minerals Amendment Act* 39 of 1942 – Specifically s 3 through which the minister is entitled to the right to prospect on private land if the holder of the base mineral rights does not prospect.
268 Dale *Historical and Comparative Study* 233, 234.
269 S 2.
270 S 3(1).
271 S 3(2)(b).

2.4.2.3 Consolidation of mining laws 1964-1967

In the years 1964–1967, the host of pre-Union and post-Union legislation were consolidated into four major acts applicable throughout the Republic of South Africa.[272] They were the *Precious Stones Act* 73 of 1964 (hereafter referred to as the *PSA*), the *Mining Rights Act* 20 of 1967 (hereafter referred to as the *MRA*),[273] the *Mining Titles Registration Act* 16 of 1967[274] and the *Atomic Energy Act* 90 of 1967.[275]

Section 2 of the MRA contains the core of the basic philosophy underlying the mining legislation applicable up to the promulgation of the *Minerals Act* 50 of 1991:

> 2(1) Save as is otherwise provided in this Act -
> (a) The right of prospecting for natural oil and of mining for and disposing of precious metals and natural oil is vested in the state.
> (b) The right of prospecting for and disposing of base minerals on any land is vested in the holder of the right to base minerals in respect to that land.

It is clear that a reservation of certain mineral rights relating to precious metals and natural oils occured in favour of the state. This was not the case with base minerals. Section 3 of the *MRA* provided that the general power of control and administration of all mining operations was vested in the state. Although the mineral rights were in the hands of the landowner, the state regulated the exercise of entitlement flowing from these rights.

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272 Franklin and Kaplin *Mining and Mineral Laws* 2; Dale *Historical and Comparative Study* 237. It is important to note that these four acts were the major acts and not the only acts dealing with minerals and mining. For a full discussion of the remaining 26 acts see Franklin and Kaplin *Mining and Mineral Laws* 210-227.

273 This act amended and consolidated the law in relation to the prospecting for and mining and disposal of precious metals, base minerals and natural oils.

274 This act regulated the registration of mining titles and other rights relating to prospecting and mining, stand titles and other deeds and documents.

275 This act provided for the regulating of prospecting and mining for and the processing, enrichment, re-possessing, possession and disposal of source material and the production of nuclear and atomic energy and radio-active nuclides.

The right to prospect and mine for any precious metals, base minerals or precious stones and natural oil depended on the class of land in which they occurred. In both the *MRA* and the *PSA* specific categories of land are defined for the purpose of the application of the acts relating to prospecting and mining. *State land,*[276] *alienated state land,*[277] *private land,*[278] and *land referred to in section 16* of the *MRA*[279] are distinguished. A host of different modes of acquisition of the right to prospect or mine and different prospecting rights of authorisations and different mining rights flowed from these classifications.[280]

Franklin and Kaplan[281] point out that these statutes did not vest the *dominium* in the minerals or the mineral rights in the state. It was only the prospecting, mining and disposal of the minerals that was to a greater or lesser extend controlled and regulated by the state. However, the effect of this regulation was that only subordinate rights to mine were conferred on applicants.[282]

Once again the national importance of the exploitation of the nation's mineral resources was stressed.

2.4.2.4 Summary of trends illustrated through mineral law legislation until 1991

When the legislation applicable to mining is taken into consideration, it is very obvious that the state has regarded the mineral wealth of the

276 This is land which is owned by the state, not held by a lessee, and where the state was also the holder of the right to the substances which were to be prospected for and mined on the land.
277 This is land which is not held by the state, or land which is held by a lessee and the title deed or lease contained a reservation to the state of the right to the particular substance which wss to be prospected for and mined on the land.
278 This is land in respect of which the state was not the holder of the right to the metals, minerals or precious stones which were to be prospected or mined for. It was immaterial who held the surface rights.
279 This is land in where the right to precious metals and minerals were held in undivided shares by the state and private enitities.
280 Kaplan and Dale *Guide* 4.
281 Franklin and Kaplin *Mining and Mineral Laws* 36.
282 Kaplin and Dale *Guide* 48.

country as an important asset. The aim of all the enacted legislation was to streamline the exploitation of minerals in order to produce revenue for the country. Before 1991 the reservation of certain rights relating to minerals in favour of the state was often encountered in legislation. Sometimes this reservation was applicable only to precious stones and metals, but it is apparent from the historical overview that a few instances existed before 1967 where even base minerals were subject to the reservation of certain rights pertaining to minerals in favour of the state. The appellate division specified in *Geduld Proprietary Mines Ltd v Government Mining Engineer*[283] that although the right to mine special metals was vested in the state, the intention was to permit the public to mine under state control. This decision was in line with a previous decision of the appellate division. In *Turffontein Estates Ltd v Mining Commissioner of Johannesburg*[284] the court indicated that the successive Gold Laws of Transvaal[285] resulted in an apportionment of rights between the landowner, the discoverer and the general public, while effecting a financial benefit to the state.

Except for the few instances where "minerals" were reserved to the state in certain pre-Union pieces of legislation[286] it was mainly incidences of mineral rights, namely the right to prospect or the right to mine, that were reserved to the state. As such, these reservations should be regarded as stringent regulatory stipulations that curtailed landowners in the exercise of their full rights of *dominium* as landowners. Where, for instance, the sole right of mining for and disposing of minerals vested in the state, the landowner was deprived of 'all beneficial ownership[287] relating to the minerals'.[288] The concept of the reservation of the right to

283 *Geduld Proprietary Mines Ltd v Government Mining Engineer* 1932 AD 214 at 220, 221.
284 *Turffontein Estates Ltd v Mining Commissioner of Johannesburg* 1917 AD 419 at 428.
285 See par 2.4.2.1.1. *supra*.
286 See par 2.4.2.1.1 *supra*.
287 *Modderfontein B Gold Mining Co Ltd v CIR* 1923 AD 34 at 44.
288 Dale *Historical and Comparative Study* 264 states that the use of the word "minerals" in this case is unfortunate, because ownership in the minerals remains wholly vested in the landowner until the minerals are severed from the land.

mine to the state constituted a subtraction from the *dominium* of the landowner.[289] The *dominium* of the unsevered precious and base minerals and metals remained in the *dominus* of the land.[290]

2.4.3 The Minerals Act *50 of 1991*

The *Minerals Act* of 1991 (hereafter referred to as the *Minerals Act)* brought an end to the differentiation in the dealing with rights to minerals. The aims of the *Minerals Act* are reflected in its long title as:

- regulating the prospecting for and the optimal exploitation, processing and utilisation of minerals;
- providing for the safety and health of persons concerned in the mines and works;
- regulating the orderly utilisation and rehabilitation of the surface of land during and after prospecting and mining operations; and
- providing for matters connected therewith.

The *Minerals Act* did away with the differentiation between different classes of land[291] and minerals[292] and reference was accordingly merely made to minerals and land uniformly.[293]

Section 5(1) of the *Minerals Act* introduced a new foundation for South African mineral legislation. The section reads:

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289 *Odendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (O) at 604; *SA Permanent Building Society v Liquidator of Isipingo Beach Homes* 1961 1 SA 305 (N).

290 *Modderfontein B Gold Mining Co Ltd v CIR 1923* AD 34 at 44.

291 These being state land, alienated state land and private land.

292 In previous legislation a distinction was made between precious metals, base minerals, natural oil, precious stones, source material and tiger's eye. It is important to note that the right to certain diamonds still vested in the state – s 46 of the *Minerals Act.*

293 A distinction was, however, drawn between minerals on land and minerals in tailing (ie waste rock, slimes or residue derived from any mining operation or processing of any mineral).

> (1) Subject to the provisions of this Act, the holder of the right to any mineral in respect of land or tailings, as the case may be, or any other person who has acquired the consent of such holder in accordance with section 6(1)(b) or 9(1)(b), shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such minerals on or in such land or tailings, as the case may be, and to dispose thereof.
> (2) No person shall prospect or mine for any mineral without the necessary authorisation granted to him in accordance with this Act.

In terms of this act holders of mineral rights had to consent[294] to the issuance of a prospecting permit or mining authorisation.[295] To ensure the optimal exploitation and utilisation of minerals, section 17 provided for the ministerial authorisation for prospecting or mining where the consent of the holder of the mineral rights could not be obtained. This was restricted to mineral rights that were already severed from ownership of land in two situations:

- where the holder of the mineral rights could not be traced;
- where a person was entitled to a mineral or undivided share therein by virtue of intestate succession or any testamentary disposition and he has not obtained cession thereof within two years after he became so entitled.

Section 18 of the Act granted the right to the state to investigate the presence, nature and extent of minerals on any land and section 24 provided for the expropriation of surface or mineral rights against the payment of compensation to the person whose right had been expropriated.

Mineral rights could only be exercised in accordance with and subject to the provisions of the act. The exercising of the rights was regulated by the state and the authorisations were intended as a control measure to

294 Consent would normally be contained in a prospecting contract or a mineral lease.
295 Ss 6(1)(b); 9(1)(b).

ensure achievement of the objectives of the act. The authorisations needed for prospecting and mining were premised on the holding of the underlying common law rights. No state authorisation was needed for the acquisition of these rights but it was a prerequisite for the issue of such authorisations. These authorisations did not confer any rights. They merely authorised the exercise of the common law rights already held. The prospecting permit or mining authorisation lapsed in the following events:

- whenever the period for which it was granted expired,
- where the holder of the permit or authorisation was the holder of the right to the mineral concerned and he ceased to be the last-mentioned holder, or
- where the consent given by the holder of the right to the mineral lapsed.[296]

This is a result of the authorisations being personal to the holder thereof.[297]

Kaplan and Dale[298] point out that the *Minerals Act* further aimed to encourage the alienation of mineral rights held by the state, so that all mineral rights would be held by private entities. The state was placed in a position equivalent to any other holder of rights to minerals. Owners of alienated state land were given a preferent right to acquire the rights to the relevant minerals. Royalties were only paid to the state in respect of mining rights where the state was the holder of the applicable right to the mineral.

2.5 Conclusion

The condensed historical survey of the mineral dispensation leading to the commencement of the *Minerals Act* was done with the purpose of determining

296 S 16 of the *Minerals Act*.
297 In terms of s 13 of the *Minerals Act* authorisations could not be alienated, transferred, ceded or mortaged.
298 Kaplan and Dale *Guide* 14.

1. whether traces or a resemblance of the Anglo-American public trust doctrine can be found in any stage of the common law and/or statutory development of the South African mineral law, [299] and
2. the nature and transferability of mineral rights in the pre-2002 era.

It was clear from the discussion of Roman[300] and Roman-Dutch[301] law as it relates to minerals that minerals were never regarded as *res publicae* or *res omnium communes.* State mines were regarded as *res publicae* but this is attributable to the fact that early mining operations were mostly conducted on state land.[302] Sources were found indicating that mining operations were later extended to private property.[303] Although evidence exists that mining activities were regulated by the state,[304] the principles underlying the Anglo-American public trust doctrine[305] can not be ascribed to the Roman-Dutch based, common law mineral law dispensation.

Due to the fact that minerals were regarded as fruits of the land and the later development of the *cuius est solum* maxim, the principle that unsevered minerals were not capable of separate ownership, but were included in the *dominium* of the landowner, is a legacy of our Roman-Dutch common law.

The survey relating to mining legislation in South Africa did not reveal any traces of the principles underlying the Anglo-American public trust doctrine. It is clear that the exploiting of the country's mineral resources

299 Although the development of the public trust doctrine is discussed in chapter 4 *infra*, it is necessary at this stage of the research to determine whether any definite connection can be found between the doctrine and the development of the mineral dispensation.
300 See par 2.2.1 *supra.*
301 See par 2.3 *supra.*
302 See par 2.2.1.2 *supra.*
303 See para 2.2.1.2, 2.2.1.3 and 2.2.1.4 *supra.*
304 See par 2.2.1.4 *supra.*
305 See chapter 4 *supra.*

were strictly regulated but the regulation never amounted to the nationalisation of these rights. Although the *Minerals Act* purported to place the full extent of common law rights towards all minerals firmly in the hands of the holder of these rights, state intervention and required authorisation for exercising these rights were so drastic that Badenhorst[306] opined that "it is still a policy of partial state holding, although in another disguise."

The nature and transferability of rights to minerals were discussed as general principles.[307] The nature of mineral rights was confirmed through case law as limited real rights *sui generis*, separable from ownership of the land and transferable to third parties. The holder of the mineral rights over land was entitled to enter the property and search for minerals. If minerals were found, they could be severed and removed. The exploitation of minerals was always to a greater or lesser extent subject to state regulation. Mineral rights were freely transferable, subject to the relevant statutory provisions.[308]

In the following chapter it will be considered whether the characteristics inherent to mineral rights are sufficient for it being classified as property according to the constitutional property concept.

306 Badenhorst *Juridiese Bevoegdheid* 200.
307 See 2.4.1 *supra*.
308 *Webb v Beaver Investments (Pty) Ltd* 1954 1 SA 13 (T) at 25.

Chapter 3: The property concept

> *What is it what you own? How do you know what is yours? How do you protect what is yours from the assertion by others, including the government, that what is yours is theirs?*[1]

3.1 Introduction

Property, a relatively short word, represents a laden concept. The essence of the concept is not clear by intuition or introspection.[2] Property had and has different forms in different cultures and different legal systems.[3] The definition of 'property' within a particular legal system is determined by various factors and it is no easy task to define it with reference to a simple definition.[4] Religious, philosophical, historical, economic, political and social factors serve as co-determiners of this concept.[5] It has *inter alia* been described as a value,[6] an institution,[7] a relationship,[8] objects,[9] rights[10] and an organising idea.[11]

When constitutional property comes under scrutiny, the focus falls on "private property rights".[12] Waldron[13] points out that there are many writers who have argued that it is impossible to define private property, as the concept itself defies definition. It is nevertheless important to attempt to determine the scope of property, for it is property that

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1 Jacobs *Private Property* 1.
2 Jacobs *Private Property* 26; Çoban *Protection of Property Rights* 1.
3 Çoban *Protection of Property Rights* 1.
4 De Waal, Currie and Eramus *The Bill of Rights Handbook* 413.
5 Pienaar 1986 *TSAR* 295.
6 Jacobs *Private Property* 27.
7 Çoban *Protection of Property Rights* 12.
8 Çoban *Protection of Property Rights* 14.
9 Çoban *Protection of Property Rights* 1.
10 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 413.
11 Harris *Property and Justice* 63.
12 *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 2 SA 34 (CC), 2003 1 BCLR 14 (CC) at par [4] – The Constitutional Court held that that the provisions of section 25 "are aimed at protecting **private** property rights..." (own emphasis). It does not fall within the ambit of this work to argue for or against a system of private or collective property. At this stage the reference to 'private' property merely represents the *status quo* of the institution of property in the South African legal system.
13 Waldron *The Right to Private Property* 26.

constitutes the object of constitutional protection in section 25 of the *Constitution*. In this chapter the focus will be on the scope of property in the South African constitutional dispensation. The boundaries within which property are protected is discussed in chapter 5 in*fra*. The focal point of this thesis does not lend itself to a comprehensive discussion of the development of the property concept in South African property law. It is not an attempt to develop a philosophical basis for the concept of constitutional property,[14] nor an effort to confine the concept of constitutional property within the boundaries of a static definition. It is nevertheless essential to sketch this development in broad terms, as consensus regarding the content of the property concept is vital for the arguments raised herein.

3.2 The pre-constitutional property concept

From the judgement of Watermeyer CJ in *Commissioner for Inland Revenue v Estate Crewe*[15] it is apparent that the concept of *property* has been interpreted since early times to indicate the object of a right as well as the right itself, depending on the context in which it is used. One could say that *the right itself* represented a relation to others through the object. The intricacy of the term is illustrated by the following quotation from the case:[16]

> The word 'property' is capable of a variety of meanings (see Salmond *Jurisprudence* ch 20). *Austin* stigmatises it as a word most difficult to get on with intelligibly and without endless circumlocution. One would expect that when the estate of a person is described as consisting of property,

14 Readers who are interested in the philosophical aspects are *inter alia* referred to – Van der Walt's articles relating thereto published in - 1992 *De Jure* 446-457; 1995 *SAPR/PL* 298-345; 1995 *TSAR* 15-42; 1995 *TSAR 322-345;* 1995 *TSAR* 493-526; 1998 *SAJHR* 560-586.

15 *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 656.

16 Also see *Vinkrivier Klipbrekery v Suid-Afrikaanse Spoorweë en Hawens en Neserberend* (KPA) 7 May 1975 (unreported) as referred to in Gildenhuys *Onteieningsreg* 71; *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163 on 175; Wethmar *2003 De Jure* 179.

> what is meant by property is all rights vested in him which have a pecuniary or economic value.[17]

However, this wide interpretation of *property* which was maintained as early as 1943 is not representative of the traditional private law view of property. Traditionally the notion of *property* in private law was interpreted in a limited manner to include mainly *ownership* of material things, with only a few concessions as far as immaterial things were concerned.[18] Ownership was not only regarded as the most comprehensive real right, but also simultaneously as the source of all limited real rights.[19] The private law notion of property was limited for pragmatic reasons[20] and this created the illusion that there was no other valid interpretation that could be given to the notion. De Waal *et al* referred to this trend when they stated that: [21]

> [L]awyers in the Roman-Dutch legal tradition prefer to conceptualise property as a legal relationship between persons and corporeal (physically tangible) things. Property is then narrowly defined as the object of this relationship, the physical object of a real right.

This view does not give credit to the full extent of the concept of *property* as it was applied in the pre-constitutional South African legal system. Although property was divided into movable and immovable property, Hathorn [22] opined that it is doubtful that those divisions were exhaustive. A right to water, patent rights, rights in terms of a contract and shares

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17 *Commissioner for Inland Revenue v Estate Crewe* 1943 AD 667.

18 Van der Merwe and De Waal *The Law of Things and Servitudes* par 15-20; Van der Walt and Pienaar *Introduction* 10; Carey Miller and Pope *Land Title in South Africa* 295; Van der Walt 2002 *SAPR/PL* 264.

19 Van der Walt 1992 *SAJHR* 434.

20 It is clear from Van der Merwe *Sakereg* (1979) 109 that the property concept was limited because the wide interpretation of property, indicating a relationship between a person and a material or immaterial legal object, was too wide to be of scientific value for the law of 'things', as the currently called 'law of property' was known. [The writer specifically refers to the 1979 edition of Van der Merwe *Sakereg* to illustrate the line of thought of the time.]

21 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 413.

22 *Torf's Estate v Minister of Finance* 15 SACT 19 on 29; also cited as 1948 2 SA 283 (N). In this case the court held: "That goodwill is property, using that word in its ordinary sense, I have no doubt at all".

were regarded as things[23] that could be expropriated in terms of the *Expropriation Act.*[24] In terms of the *Insolvency Act* 24 of 1936, property did not only include movable or immovable property,

> but all contingent interests in property other than the contingent interests of a *fidei commissary* heir or legatee.[25]

The view that not only ownership, but other rights too formed part of a person's estate did exist in South African law before the promulgation of the *Constitution.*

3.3 A paradigm shift

The principles which find application in the law of property have never been stagnant and in the private law view of property a paradigm shift has occurred.[26] It was already stated in 1983 that:

> [T]he idea of ownership has become more and more 'depersonalised'. Thus the law of property which has until recently been regarded as the pith and essence of private law has become more and more the concern of public law.[27]

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23 Gildenhuys *Onteieningsreg* 71.

24 *Expropriation Act* 63 of 1975.

25 S 2 of the *Insolvency Ordinance* No 7 of 1928 defines movable property as "every kind of property and every right or interest which is not immovable property". In s 4(a) of the *Estate Duty Act* of 1909 property is defined as "property of any description whatever movable of immovable and any interest in such property".

26 Schoeman *Silberberg en Schoeman The Law of Property* 5 states:

> It must be understood that the various rules and concepts of the law of property always had, and still have, when properly understood, 'a very necessary relation to the economic facts of life', but once created and defined, they seem to move among themselves according to the rules of a game which exist for its own purpose. Such 'movements' are in fact an indication that the substance of the rules has changed while their form is preserved.

[A previous edition of the work is referred to, to indicate the existence of a specific idea in a specific time frame.]

27 Schoeman *Silberberg en Schoeman The Law of Property* 6, 7.

Immaterial property law was recognised and a concept of commercial property was developed.[28] Economic pressure and the housing need[29] have *inter alia* contributed to the abolition of the *superficies solo cedit*-principle as far as sectional title property is concerned[30] and of the *plena in re potestas* principle in the case of property time-sharing.[31] Both the individual nature of ownership and its absolute character were limited and watered down to some extent through the operation of the law even before 1996.[32] The emphasis gradually started shifting from *ownership* to *rights in property.*[33] Even before the promulgation of the *Constitution*, legal protection was awarded to less-than-ownership property rights. This movement did not only gain momentum with the inclusion of the property clause in the *Constitution*, it was 'tsunamied' into a concept with unseverable ties with public law. Because of the protection awarded to property within the Bill of Rights, the traditional ownership-object relation changed to a rights-based paradigm. Van der Walt[34] has aptly drawn from Kuhn's[35] work when he stated:

> we are not bringing about a paradigm shift, we have witnessed a paradigm revolution.

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28 Van der Walt and Pienaar *Introduction* 1; Chaskalson and Lewis *Property* 31-3; *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 4 SA 798 (A); Kleyn 1993 *De Jure* 1-13.

29 It is interesting to note that this development was motivated by the social needs of the community. Allbeit to a much larger extent, the development with regard to the law of property that took place and is continually taking place after the promulgation of the *Constitution*, is also driven by the changing social needs of the community.

30 *Sectional Titles Act* 66 of 1971; Pienaar 1986 *TSAR* 296.

31 Pienaar 1986 *TSAR* 297.

32 Cohen's *New Patterns of Landownership* is an example the development of a new line of thought in this regard.

33 Rights in property constitute a wide concept that may include ownership, but is not limited to ownership. Examples hereof are limited real rights, mineral rights, renting and leasing, and common-law land use rights - Van der Walt and Pienaar *Introduction* 333.

34 Van der Walt 1995 *SAPR/PL* 335.

35 Kuhn *The Structure of Scientific Revolutions* (1962) chapter X, as referred to by Van der Walt 1995 *SAPR/PL* 335.

3.4 The scope and nature of property included under constitutional protection

In the quest to determine the constitutionality of section 3 of the *MPRDA* it must first be established whether constitutional rights have been violated by the implementation of the said section.[36] In the words of Ackermann J:[37]

> Does that which is taken away ... amount to 'property' for purpose of section 25?

Theoretically speaking, it should not be a problem to define old order mineral rights[38] as property falling within the ambit of constitutional protection awarded by section 25 of the *Constitution.*[39] Was it not for the disconcerting[40] decision given in *Lebowa Mineral Trust Beneficiaries*

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36 Murphy 1993 *TRW* 41; Roux *Property* (2002) 437. It must be noted that Roux refined his opinion with regard to this two-stage approach that should be followed in every fundamental right enquiry. In Roux *Property* (2003) 46-2 he opines that although the classification of the property clause inquiry into different stages survived on a formal level, the traditional two-stage approach has largely became a single inquiry namely whether the law at issue is justified against a reviewing standard varying between reasonableness and arbitrariness.

37 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC) par [55], hereafter referred to as *FNB.* This approach is in line with the Canadian approach as highlighted and described by Van der Walt 1997 *SAPR/PL* 277 as the 'two-stages' approach:

> The first stage, in which the applicant bears the onus, involves the question whether there has been an infringement of a right protected in the bill of rights. The case proceeds to the second stage only if the first stage results in an affirmative answer.

Murphy 1993 *THRHR* 628 also identifies the starting point of the constitutional enquiry as "to determine what is meant by property".

38 The writer uses the phrase 'old order mineral right' when referring to mineral rights that existed under the previous mineral law dispensation. Old order rights are defined in s 1 of Schedule II of the *MPRDA*. A differentiation is made between old order mining rights, old order prospecting rights, OP26 mining leases, OP26 subleases and unused old order rights. For an extensive discussion see Badenhorst and Moster 2003 *Stell LR* 377-400.

39 Van der Walt refers to case law where the juristic nature of mineral right have been held to be *iure in re aliena* as authority for stating that mineral rights "are regarded as property even in contemporary South African private law circles" - Van der Walt 2004 *SAPR/PL* fn 34 55.

40 If this decision is measured against the existing principles, it is not only disconcerting or puzzling, but patently wrong.

Forum v President of the Republic of South Africa[41] resulting in the finding by the Transvaal High Court that section 25 does not protect mineral rights,[42] it would have sufficed to state that mineral rights have been regarded as *iure in re aliena* in pre-constitutional private law and should as such be awarded constitutional protection.[43] The effect of the decision, although severely criticised,[44] is that mineral rights cannot *per se* be regarded as 'property' protected under section 25.[45] Therefore, the finding of the court in *Lebowa Mineral Trust* necessitates a more detailed discussion of the scope of the concept of property and its application with reference to mineral rights.[46]

One of the explanations for the court's resistance to include mineral rights under the generic term 'property' in section 25 "is that the court was unable to overcome structural or dogmatic inertia".[47] This explanation supports the perception that the constitutional property concept is still to a large extent a strange concept to the traditional legal practitioner schooled in Roman-Dutch law. The lack of judgements where the provisions of the property clause are interpreted by the courts,[48] contributes to uncertainty within this complex legal field.[49]

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41 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T), hereafter referred to as *Lebowa Mineral Trust.* It is interesting to note that a mineral lease was explicitly dealt with as property worthy of constitutional protection by the Lesotho Court of Appeal in *Attorney-General of Lesotho v Swissbourgh Diamond Mines (Pty) Ltd* 1997 8 BCLR 1122 (Lesotho CA).

42 *Lebowa Mineral Trust supra* 31 D-E.

43 This preposition is based on the assumption raised by De Waal, Currie and Erasmus *The Bill of Rights Handbook* 414, that "property is something recognized as property in the existing law", and Van der Walt 1997 *SAPR/*PL 313 "that this includes protection of existing property rights and holdings".

44 Van der Walt 2002 *SAPR/PL* 260-265; Van der Walt 2004 *SAPR/PL* 54, 55; Badenhorst en Vrancken 2001 *Obiter* 496-507; Badenhorst and Mostert 2004 *Stell LR* 26; Roux *Property* (2003) 46-13.

45 Van der Walt 2002 *SAPR/PL* 261.

46 Although this is only a decision by one judge of the Transvaal High Court, magistrates' courts falling within this court's jurisdiction are bound to follow the decision until it is overturned or another decision on this matter is made either by the Transvaal High Court or the Supreme Court of Appeal. This is due to the working of the *stare de cissis* rule.

47 Van der Walt 2002 *SAPR/PL* 264.

48 Although the reported cases dealing with the property clause have increased in numbers, the only significant cases where the Constitutional Court dealt with the issue were *Harksen v Lane* 1998 1 SA 300 (CC) and the *FNB*-case.

49 Ackermann J found in *FNB* 723:

3.4.1 Property - a theoretical discussion[50]

The property concept is not static[51] and started to evolve even before the promulgation of the *Constitution.* This progress can be contributed to the fact that new rights develop continually as a consequence of economic progress. The *dephysicalisation* of property is not merely a theoretical argument, but the consequence of changes in the economic basis of society and advanced technological development.[52] This development constantly creates new concepts[53] unknown to the Roman and Roman-Dutch legal systems[54] and adds new dimensions to the nature of proprietary relationships. The interests that are created also create new proprietary rights.[55]

Thirteen years have passed since the first reference in South African legal history to a so-called *constitutional notion of property.*[56] At the onset of the constitutional era some writers were of the opinion that the property concept has changed fundamentally with the promulgation of the *Constitution.*[57] Others were of the opinion that the concept has

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> At this stage of our constitutional jurisprudence it is, ... practically impossible to furnish - and judicially unwise to attempt - a comprehensive definition of property for the purposes of section 25.

50 It is not the aim of this thesis to discuss the highly philosophical question as to whether there should be a right to private property. For a discussion along those lines see Brooks 1992 *Stell LR* 349-356. For a discussion on the justification of the property clause from a Christian perspective see Van der Schyff 2003 *KOERS* 237-254.

51 Çoban *Protection of Property Rights* 12; Gray 1991 *Camb LJ* 252.

52 Chaskalson and Lewis *Property* 31- 5 – this reference from an earlier edition of the work is used because the second edition deals with property from a different perspective and focuses mainly on the *FNB* decision. The later edition is also referred to in this thesis. Carey Miller and Pope *Land Title in South Africa* 296. Van der Walt *Constitutional Property Law* 65-68.

53 Apart from new land rights being created in South Africa, aspects like human genetic material, body parts, cyber-space and radio frequencies come to mind as possible property objects.

54 Lewis 1992 *SAJHR* 389-430; Chaskalson and Lewis *Property* 31-5 with reference to Charles Reicher's concept of *new property*; Murphy 1993 *THRHR* 630.

55 Chaskalson 1994 *SAJHR* 132. Pienaar 2000 *TSAR* 450 underlines that one of the most important principles regarding immovable property is that 'title' does not necessarily means 'ownership'.

56 S 28 of the *Constitution of the Republic of South* Africa 200 of 1993.

57 Van der Walt and Pienaar *Introduction* (1999) 337.

retained its normal context and meaning as no constitutional definition of property is given in the *Constitution.*[58]

If one bears in mind that the founding principles of the South African legal system were completely changed with the promulgation of the *Constitution*, it makes sense that the property concept could not have remained stagnant and unchanged.[59] Not only must the concept now be interpreted to accommodate constitutional values unknown to the previous dispensation, but the exclusive private law character has changed due to the applicability of the concept within the public law sphere. However, this does not mean that the property concept as it was known in the former era must be abolished,[60] merely that it must be expanded to adjust to and accommodate constitutional norms in a new society. Van der Walt[61] states that one must accept that while the transformation of South African law will bring about fundamental changes, not everything will change. Pienaar[62] affirms that ownership should not be degraded in the process of recognising new rights in property, these new rights, especially the different forms of land tenure rights should rather be upgraded and better protected.

Another noteworthy interpretational difference regarding the scope of the property clause is highlighted by Roux[63] and Van der Walt.[64] They point out that one line of reasoning tends to lean to the more restrictive

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58 Southwood *Compulsory Acquisition* 15; De Waal, Currie and Erasmus *The Bill of Rights Handbook* 384. [Reference is made to sources that indicate a line of thought at the onset of the constitutional era. Current editions of the works are also referred to in this discussion.] Carey Miller 1999 *SALJ* 750, 759 opined that the focus of restitution legislation is the provision of land rights rather than the development of anything new on the property-law front. He states as a tentative conclusion that it appears that although there have been major adjustments of focus and emphasis within the familiar structure and system of property law, it is not enough substantive change to say that property has become conceptually different.

59 Van der Walt *The Constitutional Property Clause* 53.

60 Currie and De Waal *The Bill of Rights Handbook* 537 opine that courts will 'obviously be guided by the existing ambit of the law of property" when interpreting the term.

61 Van der Walt 1995 *SAPR/PL* 313.

62 Pienaar 2000 *TSAR* 450.

63 Roux *Property* (2002) 440.

64 Van der Walt 2004 *SAPR/PL* 50, 51.

interpretation that section 25 does not guarantee a general right to property, but two distinct rights, namely the right not to be deprived of property and the right that property not be expropriated except under the circumstances prescribed by the *Constitution*. The other interpretation is a wider interpretation, affirming that section 25 protects property rights as a genre.[65] It is not at this stage necessary to indicate the writer's inclination towards any one of these two approaches. However, it is necessary to emphasise that the identification of what precisely will and will not be regarded as property remains the bottom line for the application of both these arguments.

The mere fact that the extent of property is not determined in the *Constitution* indicates that the courts will have to decide in each and every case dealing with section 25 whether property is under discussion.[66] This is appropriately called the threshold question.[67] Despite the fact that Roux[68] opines that the outcome of constitutional property rights cases will seldom turn on factual disputes as to whether the right in issue constitutes property, the question remains as to what will fit into the property niche. What will the criteria be that the courts use to determine whether the allegedly violated right constitutes property?

The writer agrees with the line of thought that indicates that the property concept will in the first instance be interpreted to include all rights and objects that have been recognised as property in the pre-constitutional era.[69] Roux[70] points out that all the major commentators on the right to

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65 The impact and importance of these different views are discussed by Van der Walt 1997 *SAPR/PL* 275-330.

66 Van der Walt *The Constitutional Property Clause* 15; Van der Walt 1993 *SAPR/PL* 297.

67 Murphy 1993 THRHR 628; Van der Walt 1995 *SAPR/PL* 343; Roux *Property* (2002) 446; Roux *Property* (2003) 46-3.

68 Roux *Property* (2002) 438.

69 Kleyn 1996 *SAPR/PL* 417; De Waal, Currie and Erasmus *The Bill of Rights Handbook* 414; Currie and De Waal *The Bill of Rights Handbook* 540; Roux *Property* (2002) 449; Van der Walt 1994 *THRHR* 193. This approach was also followed in the recent *Laugh It Off Promotions CC v SAB International (Finance)*

property agree that the real rights recognised under common law should enjoy constitutional protection under section 25.[71] This does not necessarily mean that these rights will be protected to the full extent of their acknowledgement in pre-constitutional terms.[72] Van der Walt[73] predicted as early as 1995 that the change that might be expected is that the hierarchy of property rights might be 'levelled out' with the result that ownership might lose its doctrinal position as the most important property right.[74] Pienaar[75] supported this viewpoint and stated that

> [a]s soon as it is accepted that ownership is not a right characterised by individuality, absoluteness and elasticity, but that it is inherently limited for the benefit of society and by other rights and that no hierarchy of rights or powers exists, it follows logically that ownership cannot be considered a preferential right or a stronger right than other use-rights.

Practise has shown that the incidence of ownership has significantly been increased, while its primacy has been curtailed.[76] The content of ownership has already been limited in constitutional jurisprudence where the public interest dictated it.[77] This is an indication that the courts and

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BV t/a Sabmark International 2004 JOL 12940 (SCA) when Harms JA found at par [10]:

> On the other hand, and in spite of some judicial resistance in certain quarters, trade marks are property, albeit intangible or incorporeal. The fact that property is intangible does not make it of a lower order. Our law has always recognized incorporeals as a class of things in spite of theoretical objections thereto.

However, the argument that existing rights constitute the foundation of the property enquiry can be taken to extremities as is illustrated in the judgement given in the controversial *Joubert v Van Rensburg* 2001 SA 753 (W).

70 Roux *Property* (2002) 450.

71 This observation was also made and effectively implemented by Ackermann J in *FNB* par [51].

72 Van der Walt *The Constitutional Property Clause* 27.

73 Van der Walt 1995 *SAPR/PL* 314, 342.

74 In a western capitalist society where one is primarily defined by what one owns, the possibility that ownership will completely be equated with other less-than-ownership rights does not seem likely. Mostert *Diversification* 17 indicates that land reform laws tend to move away from a hierarchy-based model of rights. This does not mean that ownership has lost it preferential position.

75 Pienaar 2000 *TSAR* 451.

76 Carey Miller 1999 *SALJ* 749.

77 Land reform legislation tended to bring change to established property law. Of importance is the *Land Reform (Labour Tenants) Act* 3 of 1996; the *Interim*

legislature are not using the *Constitution* as a tool to protect the *status quo* but as an instrument for "social-change and transformation under the auspices of entrenched constitutional values".[78] Ownership is nevertheless still regarded as the most complete right in property one can have in the South African legal system.[79]

To use the existing definition of property as a starting point does not in any way restrict the development of the concept. At the time of writing this thesis, the leading constitutional court case dealing with the property clause was *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance*[80] (hereafter referred to as *FNB)*. Ackermann J[81] did not attempt to define property for the purposes of section 25. He focused on the facts of the specific case and held that:

> ownership of a corporeal movable must - as must ownership of land – lie at the heart of our constitutional concept of property, both as regards to the nature of the right involved as well as the object of the right...

Contrary to Roux's[82] opinion that the court took a narrow view to the property question, it is the writer's opinion that the court merely promoted the view that the enquiry whether an interest is protected by section 25 should begin by asking whether the interest is recognised as a property right in existing law.[83] The court specifically referred to the fact that most writers accept that ownership of fixed property and

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Protection of Informal Land Rights Act 31 of 1996; the *Extension of Security of Tenure Act* 62 of 1997; the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998. See *inter alia* the dictum of Gildenhuys J in *Mkwanazi v Bivane Bosbou (Pty) Ltd* 1999 1 SA 765 (LCC) at 771B-C and *Geyser v Msunduzi Municipality* 2003 3 BCLR 235 (N) 249.

78 Van der Walt *The Constitutional Property Clause* 15.

79 Van der Walt 2002 *SAJHR* 102.

80 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 7 BCLR 702 (CC) hereafter referred to as *FNB.*

81 *FNB* par [51].

82 Roux *Property (*2003) 46-10.

83 A view expressed by Roux *Property* (2002) 449.

movable corporals must be included within the ambit of property[84] and found that both the nature of the right and the object of the right were worthy of constitutional protection.[85] By referring to the *nature of the right* and the *object of the right* the court draws from existing law. This is not a narrow approach to the property question, it is merely a functional approach that focused on the facts of the specific case. The facts of the case did not necessitate the development of the common law. There was no need for the court to discuss the full scope of the property concept and the court's finding did not hamper the development of the property concept, precisely because it did not attempt to define the "outer limits of the meaning of property".[86]

Should the existing property test be the first test to apply in determining whether a given property interest constitutes property, old order mineral rights shall without a doubt be included within the spectrum of constitutional property "both as regards to the nature of the right involved as well as the object of the right". The nature of old order mineral rights is that of limited real rights and in South African property law incorporeal assets are treated as property.[87] Incorporeals were even in Roman-Dutch law regarded as the objects of rights.[88] In South African case law examples can also be found where rights were being regarded as the objects of other rights.[89]

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84 *FNB* fn 86.

85 This corresponds with Van der Walt's finding on how courts in foreign jurisdictions deal with the threshold question. In Van der Walt *The Constitutional Property Clause* 57, he states:

> In the easier cases, which concern obvious examples of property such as land and movable corporeals, the courts tend to gloss over or skip the threshold question altogether and assume that the property question was answered satisfactorily.

86 *FNB* par [51] n 86.

87 See for example Rule 48(8) of the *Uniform Rules of Court* which provides for the attachment of incorporeal property for the purpose of execution of judgement.

88 Chaskalson and Lewis *Property* 31-3; Lewis 1992 *SAJHR* 397.

89 It has been accepted in *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 and confirmed in *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 4 SA 798 (A) that a cession *in securitatem debiti* can be construed as a pledge of an incorporeal.

3.4.2 A new test

On the other hand, if this test is later found not to be the preliminary test to apply in determining whether any property interest constitutes property worthy of constitutional protection or in cases where one moves outside the sphere of existing property rights, another test must be applied to determine whether a specific interest falls within the ambit of constitutional property.

Murphy[90] indicates that an unqualified right to property in a bill of rights opens constitutional protection to an indefinite number of incidents of ownership. Even with the negative property guarantee embodied in section 25, the holding of property is guaranteed.[91] One has to accept that no "[property] right of fixed content exists out there somewhere" waiting to be discovered by a process of judicial ingenuity.[92] Daniel Bromley[93] asserts that property rights are created by the courts out of disputes that come before them and that they are made and not found. This approach is in line with what Coval *et al*[94] call a "functional theory of property". According to this approach property is determined by "its function as a means in the satisfaction of the reason for action" as opposed to

> descriptive theories of property in which it is claimed that property rights are extendible only to those objects which have certain features.[95]

This argument is further corroborated by Van der Walt[96] when he maintains that it is impossible to furnish a single abstract interpretation of

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90 Murphy 1993 *THRHR* 628. He is supported in this by most of the writers dealing with this subject, eg Kleyn 1996 *SAPR/PL* 419 and the sources cited by him in fn 97.

91 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 57; Kleyn 1996 *SAPR/PL* 417; Van der Walt *The Constitutional Property Clause* 25.

92 Murphy 1993 *THRHR* 628; Jacobs *Private Property* 27.

93 Jacobs *Private Property* 27.

94 Coval 1986 *Camb LJ* 460.

95 Coval 1986 *Camb LJ* 460.

96 Van der Walt 2004 *SALJ* 866.

property and that its interpretation would always have to be contextual and contingent, depending on the characteristics and requirements of each individual case. In relation to this broad scope set down for the demarcation of constitutional property, Murphy[97] points out that "a broad compass of activities and interests does not mean an unlimited range".

Different mechanisms have been recommended to determine the boundaries of constitutional property. Lewis[98] argues that the notion of excludability should be applied to determine the boundaries of constitutional property.[99] The idea of excludability as criteria through which the "propertiness" of common resources can be established, was propagated by Kevin Gray.[100] However, the criteria of excludability might not be the most favoured criteria in light of the effect that exclusiveness and excludability had in the pre-constitutional history of South Africa.[101]

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97 Murphy 1993 *THRHR* 628.

98 Lewis 1992 *SALJ* 408.

99 Lewis 1992 *SALJ* 402 points out that Gray held the opinion that the test of 'excludability' could be sanctioned by legal and moral considerations. This criterion indicates that the moral limits to property are of significance when dealing with limited commodities which must be preserved for the benefit of all, including future generations. An argument that old order mineral rights should not be regarded as property because of the fact that minerals are a limited commodity and that mineral rights should, therefore, not be classified as property because they were only available to a 'lucky few' can be answered with two counter arguments: In the first instance it is important to note that, although minerals constitute a limited resource, it is not a resource like water or air that is needed to sustain life. If properly regulated and taxed, the financial benefit deriving from exploiting minerals can be evenly distributed to the benefit of the community as a whole. In the second instance it is important to note that the implementation of the *MPRDA* only changed the spectrum of beneficiaries. There are still individuals, communities and legal entities that will benefit greatly from the exploitation of minerals in this country, while the ordinary 'man on the street' will not benefit from this new mineral law dispensation any more that he benefited from the previous. The source of wealth has merely changed foundations, holdership evolved into ownership under the cloak of the "common heritage of all the people of South Africa" – see chapter 7 *infra*.

100 Gray 1991 *Camb LJ* 252-307.

101 Van der Walt 2001 *SALJ* 265 states - "This image reflects the exclusionary tendency of both the legal and ideological roots of apartheid land law." Van der Walt 1995 *TSAR* 31 –

> ... it is exactly this emphasis on exclusivity as the fundamental essence of property that transforms property relations from the use of things into power over people.

When property is looked at from a pragmatic point of view, the only way to understand the idea of property rights is to understand that this term is the benediction applied to interests that are found worthy of indemnification by the state.[102] These interests or rights must still in one way or another be connected to or related to an object, material or immaterial, to be recognised as property. Protection and indemnification do not necessarily imply exclusivity in the sense that a resource is only to the availability of one specific person. Different people can have different rights and interests towards the same object and all these rights and interests can simultaneously be worthy of constitutional protection.[103] People can also use the same thing in different ways thereby creating different protectable interests.

Carey Miller is of the opinion that only those proprietary rights that can vest in the state can be classified as property.[104] The guiding principle suggested by Van der Walt[105] limits the scope of constitutional property to "rights that are demonstrably vested in the claimant and that have some patrimonial value". This description of constitutional property is similar to the description of property given in the *Estate Crew*[106] case in 1943.

Another requirement is added - the right must in principle be transferable[107] to be classified as property. Transferability has a very wide meaning that does not only include transfer of the right to a third party. In this context it means that an entitlement or rights granted to a person can either be transferred or reassigned to a third party, but it also

102 Jacobs *Private Property* 27.
103 See Pienaar 2000 *TSAR* 450.
104 Carey Miller and Pope *Land Title in South Africa* 294-298, *ie* those proprietary rights that can be subjected to the state's *dominium* as owner, if they were to be alienated to the state.
105 Van der Walt *Constitutional Property Clauses* 353.
106 *Commissioner of inland Revenue v Estate Crew* 1943 AD 656.
107 A transferrable right is not necessarily an alienable right. Tim Kaye argues convincingly that the ability to be bought or sold is not a characteristic exclusive to forms of property – Kay *Education* 69. He argues on 71, that the only necessary condition for the existence of a property right is that the right in question can be valued in monetary terms. However, this criterion is in the writer's opinion too broad.

refers to situations where the entitlement that is allocated as consequence of the granting of the right falls back in the *dominium* of the owner, or the entitlements of the holder of the original right where this entitlement originated from, when it lapses or is extinguished. [108] Given the current meaning attached to expropriation,[109] a right or interest is not expropriable if it is not transferable. As protection against undue expropriation is one of the objectives of the property clause,[110] it would be nonsensical to extend the scope of constitutional property to interests or rights that cannot be transferred. This prerequisite might exclude social-security rights and labour rights from the ambit of property, but these rights are constitutionally protected[111] and need thus not be defined as property to receive constitutional protection.[112]

One can only speculate about the test that courts will apply when confronted with the question whether a specific interest constitutes property if that interest was not regarded as property in the pre-constitutional era. If a decision is to be made regarding the 'propertiness' of old order mineral rights and the 'existing rights'

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108 A personal servitude can still fall within this classification. Although the servitude cannot be transferred to a third person, the entitlements granted through the servitude can fall back to the original right holder and this can be regarded as a transfer of the right. Licenses and permits that are generally defined as authorisations to do something that is not otherwise permitted will fall in this category due to the fact that the license or permit usually subtracts from the owner's *dominium* or the right-holder's entitlements in the sense that he is not authorised to deal with the applicable property in any way that will hamper the license or permit holder's entitlements in terms of the license or permit. Once the permit or license lapses, that entitlement is once again brought within the owner or right holder's full entitlements.

109 See par 5.2.1 *infra.*

110 Currie and De Waal *The Bill of Rights Handbook* 534.

111 Ss 23, 26, 27 of the *Constitution.*

112 It would seem that Charles Reich's argument for 'new property' would find limited application in South Africa because of the fact that the 'government-*largesse*' and social and welfare pensions and benefits, are constitutionally protected under the South African constitution. Van der Walt *Social Participation Rights* 35 indicates that Reich's theory combines two groups of participation claims namely social or welfare benefits as well as state-granted commercial benefits. He lists the following as state-granted commercial benefits:

> state jobs, licences, quotas, radio frequencies, road and air traffic permissions and other permissions and grants that enable one to practice a trade or sell goods or services commercially.

In the South African context state jobs will be protected under s 23 of the *Constitution.* The other interests will qualify as constitutional property if the vested rights-patrimonial value- transmissible- state- vestable test is applied to them.

approach is not followed, old order mineral rights can still be classified as property as they vested in specific persons, had patrimonial value, were related to objects and were transferable. These were proprietary rights that could also vest in the state.

3.4.3 The 'bundle of rights' theory as alternative measure

Old order mineral rights can also be classified as property if Hohfeld's[113] "bundle of rights" theory is applied to them. This theory has had a significant impact on the Anglo-American legal reasoning.[114] Although the South African common law property concept following the civil tradition differs from the Anglo-American concept, it is necessary to take a brief look at this theory as it has explicitly been referred to by the court on at least one occasion.[115] In *Geyser v Msunduzi Municipality* when the scope of constitutional property was under discussion the court stated:[116]

> The property that is protected by section 25 of the Constitution includes property rights such as ownership and the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it ...

The 'bundle of rights' theory did not find application or general support in the pre-constitutional South African law of things.[117] Badenhorst,[118] in

113 Hohfeld *Fundamental Legal Conceptions as Applied in Juridical Reasoning.*
114 Çoban *Protection of Property Rights* 15.
115 *Geyser v Msunduzi Municipality* 2003 3 BCLR 235 (N) 249. It was also referred to by the court in *Victoria & Alfred Waterfront Pty Ltd v Police Commissioner of the Western Cape* 2004 5 BCLR 538 (C) 542.
116 *Geyser v Msunduzi Municipality* 2003 3 BCLR 235 (N) 249.
117 Interestingly enough, this phrase was used when the extent of entitlements that constitutes ownership was under discussion in *Glatthaar v Hussan* 1912 TPD 322 and *Estate Droste v Commissioner for Inland Revenue* 1946 TPD 435. Maasdorp *Institutes* 27 also advocated that ownership comprised of "the sum total of all the real rights which a person can possibly have to and over corporeal property". His view was severely critised by Van der Vyfer and Joubert *Persone en Familiereg* 3 n1. Van der Walt 2004 *SAPR/PL* 56 opines that it is unlikely that the notion of property as a bundle of rights will be accepted in the South African property context. As this notion has been referred to by the court the possibility of its development might not be far fetched. Roux *Property* (2003) 46-13 endorses this line of thought when he states: "...the traditional incidents of ownership ... should enjoy separate protection under the property clause.".
118 Badenhorst *Juridiese Bevoegdheid* 6.

an attempt to indicate the inapplicability of this theory, points out that *dominium* or ownership comprises of different entitlements. He states that all these entitlements are seen as a unit, an indivisible right, when ownership is under discussion. However, it is important to keep in mind that the bundle of rights theory is not used to equate property with ownership. It is used to indicate that each of the different incidents or entitlements of ownership, when extended[119] from the *dominium* of the owner to another, can qualify as a protectable right in property[120] on its own, if the other property-defining characteristics are met. [121]

Hohfeld analysed rights as paired jural relations between persons.[122] He rejected the idea of a right over a thing because the purpose of the law is to regulate the conduct of human beings and physical relations with things are not jural relations.[123] He saw property rights as the aggregation of many separate, single entitlements[124] against another person or persons.[125] As a result of this line of thought, the idea of rights over things, lost its importance to a significant extent in Anglo-American legal reasoning.[126] Hohfeld's analysis is merely descriptive and it does not identify the entitlements that are involved in the concept of property.[127] The flexibility that befalls property through the working of

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119 Due to the elasticty of ownership it might be better to refer to these entitlements being extended rather than severed from ownership as they will always fall back to the *dominium* once they cease to exist in the third party's hands.

120 Çoban *Protection of Property Rights* 24 avers: "Every single entitlement with respect to a thing constitutes property".

121 Van der Walt *Constitutional Property Law* 68 warns against conceptual severance as a result of the dephysicalization of property, whereby

> one chunk of entitlements that follow or accompany ownership ... is severed from the whole and presented as an independant and seperate property right...

122 See Lewis 1992 *SAJHR* 400 for a summary of Hohfeld's analysis.

123 Hohfeld *Fundametal Legal Conceptions* 74.

124 Çoban *Protection of Property Rights 14* aptly summarises Hohfeld's analysis:

> According to this theory a right is one of four entitlements – claim-right, privilege, power, or immunity against another person with a correlative obligation (duty) to claim, no-right for privileges, liability for power and disability for immunity.

See Lewis 1992 *SALJ* 400 for a corresponding summary.

125 Hohfeld *Fundametal Legal Conceptions* 72.

126 Çoban *Protection of Property Rights* 14.

127 Çoban *Protection of Property Rights* 16. In Anglo-American jurisprudence this flaw was enhanced by the analysis of Honoré in Honoré *Ownership.* Honoré identified 11 incidents of ownership. The Hohfeld-Honoré combination

this theory is an advantage for the development of the concept of constitutional property.

While recognising the danger of equating ownership with property, one can draw from existing law to identify the "portions of that complex of rights which make up the abstract notion of dominium".[128] If the property owner's entitlement to exercise these incidences of ownership can be curtailed or limited due to the fact that a specific entitlement may be exercised by another, that entitlement may be regarded as property worthy of constitutional protection in the hands of the other party.[129]

3.4.4 Consequences of protecting property in the Constitution – do constitutional values rub off?

As stated above, this thesis does not lend itself to a full exposition of the development and predicted future development of the property concept. The consequence of being recognised as a constitutional right does have certain implications for the property concept that need to be touched on, even if just fleetingly.

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encouraged the bundle of rights theory of property which is a mainstream theory. It is important to keep in mind that this theory, like all other theories, has been subjected to severe criticism.

128 *Natal Navigation Collieries and Estates Co Ltd v Minister of Mines* 1955 2 SA 698 (A) 702. Although it is impossible to compile an exhaustive list of entitlements of ownership, the following entitlements are usually listed:
(a) the entitlement to use the thing;
(b) the entitlement to the fruits, including the income from the thing;
(c) the entitlement to consume and destroy the thing;
(d) the entitlement to possess the thing;
(e) the entitlement to dispose of the thing;
(f) the entitlement to claim the thing from any unlawful possessor;
(g) the entitlement to restrict any unlawful invasion;
(h) the residuary entitlement - Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 94; Badenhorst *Juridiese Bevoegdheid* 108, 109; Van der Vyfer and Joubert *Persone en Familiereg* 29; Roux *Property(* 2003) 46-13. Badenhorst 1991 *TSAR* 114 and *Juridiese Bevoegdheid* 114 argues convincingly that the entitlement to exploit minerals must be seen as a separate, distinctive incidence of ownership.

129 It is imperative to take cognisance of Van der Walt's warning against conceptual severance. He concedes that the *FNB* decision could be interpreted to support conceptual severence – Van der Walt *Constitutional Property Law* 68-70. Conceptual severence would be an issue for discussion where a property owner is deprived of a certain entitlement relating to his property, not where the entitlement is already in the hands of another.

Van der Walt[130] states:

> In property theory, the counterpart of anxiety about the erosion of privacy is the popular notion that private property is under threat from increasingly aggressive and invasive government interference and regulation...

This statement illustrates the main reason why man deems it necessary to define property in precise terms. We want to protect what is 'ours'. However, despite the illusion of individuality and exclusivity that are produced when attempting to define the term property, the South African property concept has finally been rid of the egocentricity of 'absoluteness'.

By being included in a *Constitution* that accentuates basic human rights, property has been clothed in the cloak of social responsibility. This viewpoint is advanced by Van der Walt[131] when he states:

> In other words, property has a public, civic or 'propriety' aspect to it that transcends individual economic interests and that involves interdependency and the common obligations that result from it.

Pienaar[132] supports this line of thought when he argues that ownership "should inherently be limited for the benefit of society at large...".

Individual and public interests are the weights that must balance the scale of property as social construct.[133] In some cases, however, the public interest and constitutional demands require a radical interference resulting in the "decline of private property" for the public's benefit. Sax[134] promotes the view that

130 Van der Walt 2004 SAPR/PL 707.
131 Van der Walt 2004 SAPR/PL 707.
132 Pienaar 2000 *TSAR* 447.
133 Van der Walt *Constitutional Property Law* 73.
134 Sax 1983 *Wash LR* 481.

> we are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners.

He attributes this transformation to the "perceived allocational failure of traditional property".[135] Changing public values demands that "nonexclusive consumption benefits"[136] are extended and awarded protection. Sometimes this can only be done by removing the particular asset, it would most often be a natural resource or heritage site, from the private property domain. Apart from protecting these so-called nonexclusive consumption benefits the demand on a natural resource can be so extensive that it is detrimental to the resource's existence to leave it in private hands and in certain scenarios past injustices that occurred in the allocation of resource-use and the development that has since taken place, requires a re-allocation of the rights relating to the resource. The only way to allow justice to prevail is to remove the resource from the sphere of private property.

These assets cannot lose their 'propertiness'. They exist, are real and will frequently still be the objects of property rights as a result of human interaction with these resources. As a result of this line of development it is predicted that South Africans will be confronted with a new phenomenon, namely public property rights. Private property can thus be converted into a public resource. The question whether this conversion will be regarded as a deprivation that amounts to expropriation will be viewed in chapter 5 *infra.*

3.5 Conclusion

In conclusion it can be stated that old order mineral rights will be regarded to constitute constitutional property, should they be subject to constitutional scrutiny once again. The error of reasoning that led to the

135 Sax 1983 *Wash LR* 484.

136 Sax 1983 *Wash LR* 485 explains the concept of nonexclusive consumption benefits. The benefits of enjoying the beauty of nature or from maintaining an existing historic building are examples of nonexclusive consumption benefits.

decision in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*[137] is not likely to be repeated. Old order minerals rights were regarded as property in the pre-constitutional era and as such should be regarded as constitutional property under application of the existing property-principle.[138] However, even if this test is not applied, old order mineral rights will fall within the parameters set for constitutional property by the courts and academics.[139]

The property concept is subject to change due to property being recognised as a constitutional right. Social responsibility is currently a proprietary value, contradicting the previous promotion of self interest. In certain cases property has to be removed from the private law sphere in order to succumb to changing public values and adhere to constitutional demands.

It has now been established that old order mineral rights should be regarded as property worthy of constitutional protection. In order to assess the effect that section 3(1) of the *MPRDA* has on these rights, it is necessary to evaluate the impact of section 3 on these rights. In the following chapter the focus will be on the legal construct created through section 3(1). The question to be answered is whether the Anglo-American public trust doctrine has been incorporated in the South African mineral law dispensation and if so, what the ensuing consequences entail.

137 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T).
138 See par 3.4 *supra.*
139 See par 3.4 *supra.*

Chapter 4: Custodial sovereignty

4.1 Introduction

According to the historical overview in chapter 2 the *Minerals Act* of 1991 brought an end to the differentiation in the dealing with rights to minerals and placed the common law entitlements with regard to all minerals in the hands of the holders of these rights. It was an aim of the *Minerals Act* that mineral rights be alienated from the state and the act encouraged the acquisition of previously state held mineral rights by private holders.[1] As a consequence a substantial portion of mineral rights were held by the private sector by 2002.[2]

Government unequivocally stated in the *White Paper* of 1998 that the system of dual state and private ownership of mineral rights was not acceptable and set a long-term objective for all mineral rights to vest in the state for the benefit and on behalf of all the people of South Africa.[3] This approach was validated by referring to article 2(1) of the *UN Charter of Economic Rights and Duties of the State*[4] that grants full permanent sovereignty, including possession and disposal, to states over all its natural resources.[5] When the government policy as set out in the *White Paper* is considered, it is almost a surprise that South Africa's mineral resources were not outright nationalised. Instead of nationalisation it is acknowledged that South Africa's mineral and petroleum resources belong to the nation and that the state is the custodian thereof for the

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1 See par 2.4.3 *supra*.

2 Reference is made in the White Paper *A Minerals and Mining Policy for South Africa* GN 2359 in GG 19344 20 October 1998 (hereafter referrred to as *White Paper*) to statistics kept by the Department of Minerals and Energy since 1993, indicating that with the exclusion of the coastal zone and sea areas, the mineral rights in respect of which prospecting permits and mining authorisations have been issued are divided in the proportion 1/3 state-owned and 2/3 privately owned.

3 *White Paper* 20.

4 http://www.vilp.de/Enpdf/e162.pdf [2006/11/9].

5 *White Paper* 20. Dale *et al South African Mineral and Petroleum Law* [Issue 3] 11, state that this principle is found in several *United Nations General Assembly Resolutions* and emphasises from 107-114 that it is a principle of international law.

benefit of all South Africans.[6] This development is clearly in line with the spirit of the Freedom Charter[7] drafted by the ANC during the apartheid struggle.

Natural resources law has undergone a significant transformation.[8] This transformation was not only brought about by the changing political order and the constitutional demands of land restitution. Changing conceptions of property and sovereignty in natural resources, born from a better understanding of the true nature and non-renewability of natural resources, contributed to a great extent to this transformation. Section 3 of the *MPRDA* abolished the traditional concept of private property rights in minerals and transformed the country's mineral resources into a public resource subject to sovereign power.[9] With this provision the developing clash in liberal ideology between furthering individual rights of security bound up in the notion of private property, and resource preservation and land redistribution goals dependant on intrusive governmental programmes designed to achieve long-term collective goals are

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6 *MPRDA* preamble and s 3. There are those who opine that this was merely a *faux pass* engineered to elude expropriation requirements and the accompanying payment of compensation. If one keeps in mind that the acknowledgement of the mineral and petroleum resources as assets belonging to the nation, with the state exercising in a custodial capacity, is *on par* with other legislation dealing with the environmental and natural resources, it is clear that one is dealing with a new policy that is far more intricate than the mere evading of expropriation requirements.

7 The *Freedom Charter* 26 June 1955 - http://www.anc.org.za/ancdocs/history/charter.html [2006/11/9].

8 Examples are stipulations contained in eg the *National Environmental Management Act* 107 of 1998:

> S 2 (4)(0) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

The *National Water Act* 36 of 1998:

> S 3 Public trusteeship of nation's water resources — (1)As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate

9 See also the provision contained in S 2(a) *MPRDA* where the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic is recognised.

fuelled.[10] Although this development is in line with the international trend regarding mineral resources, the downside of this transformation is that the existent expectations of the traditional holders of minerals rights have been annihilated. A fundamental question underlying this study is whether this annihilation is constitutionally justifiable.[11]

Before an attempt is made to de-mistify the legal construct introduced through section 3 of the MPRDA, the concept of *custodial sovereignty* needs to be scrutinised as part of the introductory remarks of this chapter.

Custodial sovereignty, as used in the context of this thesis, refers to the sovereign's duty to act as custodian of certain interests to the benefit of the public as a whole.[12] The concept of public trusteeship is more than a utopian scenario created by an idealist legislature. The concept has respectable philosophical credentials. John Locke asserted in his *Second Treatise on Civil Government*[13] (1685) that governments merely exercise a "fiduciary trust" on behalf of their people. Roscoe Pound[14] suggested that the role of states in the management of common natural resources must be limited to "a sort of guardianship for social purposes" and Karl Marx[15] voiced the opinion that

> From the standpoint of a higher socio-economic formation, the private property of particular individuals in the earth will appear just as absurd as private property of one man in other men. Even an entire society, a nation, or all

10 As this paragraph typifies the impact of section 3 of the *MPRDA*, it is borrowed from Lazarus 1986 *Iowa LR* 633 and modified for application in this context.

11 See para 1.2 and 1.3 *supra*.

12 See Scholtz 2005 *MqJICEL* 9-30 for an exposition of the concept "custodial sovereignty" in the context of international environmental protection. Scholtz proposes that it is more appropriate to refer to "custodial sovereignty" in relation to the issue of biodiversity than to permanent state sovereignty. He argues that the notion entails that a state is the trustee of its global environmental resources and that other states have an expectation that the relevant state will protect these resources.

13 Found on http://www.constitution.org/jl/2ndtreat.htm [2006/11/15] Chapter 11 s 139. Also see Dunn *The concept of 'Trust'* in this regard.

14 Pound *Introduction* 111.

15 Marx *Capital* 911. This passage is frequently quoted. See *inter alia* Foster 1999 *AJS* 385; Foster 2002 *ISM* – http://pubs.socialistreviewindex.org.uk [2006/11/15].

> simultaneously existing societies taken together, are not owners of the earth. They are simply its possessors, its beneficiaries, and have to bequeath it in an improved state to succeeding generations as **boni patres familias**

The once ethically debated concept has been codified. A stewardship ethic has been incorporated into property law[16] through the confirmation and acknowledgement of the state's fiduciary duty, not only to its current citizens but to generations yet to come.

The notion of stewardship is also supported from a Christian legal perspective. The social responsibility that is intrinsically linked to property holding finds expression in Deuteronomy 26:12:

> When you have finished setting aside a tenth of all your produce in the third year, the year of the tithe, you shall give it to the Levite, the alien, the fatherless and the widow, so that they may eat in your towns and be satisfied.

It is also accepted from a Christian perspective that God gave norms in His creation to order the social life of human mankind into societal relations. Various societal relations may be distinghuished *inter alia* the family, the church and the state. Koning[17] indicates that every societal relation is bound to the normative structure that God has given to His creation, but in its functioning it is sovereign in its own sphere. The Scriptures declare in Romans 13: 1-7 that all authorities have been established by God. In Titus 3:1 it is written:

> Remind the people to be subject to rulers and authorities, to be obedient, to be ready to do whatever is good.

The state has been appointed as steward over the individuals subjected to its authority. From the nature and direction of the state as a societal

16 Brady 1990 *BC Envtl Aff LR* 633.
17 Koning *et al De verzorgingstaat* 16.

relationship the arrangements that the state has to make to take care of its subjects are of primary concern. This duty of care finds practical expression in the state's approach to the economy and the law. Together with the demand expressed in Genesis 1:28 to subdue the earth and take charge of the "fish, the birds and all the wild animals" but always keeping in mind that "[t]he earth is the Lord's, and everything in it, the world and all who live in it"[18], and "... the whole earth is mine ...",[19] the state's authority to act as custodian is affirmed.

The phrases "South Africa's mineral and petroleum resources belong to the nation" and "[m]ineral and petroleum resources are the common heritage of all the people of South Africa" found in the preamble and section 3 of the *MPRDA,* bring the Roman law concepts of *res omnium communes* and *res publicae* vividly to mind. It also bears a resemblance to the English and Anglo-American public trust doctrine. As the concept of *res omnium communes* is widely regarded as the basis for the public trust doctrine,[20] the study will at the outset focus on the development of *res omnium communes*[21] in the South African legal context and its pre-*MPRDA* application in the context of mineral law. Thereafter an investigation into the origin and essence of the public trust doctrine will be made in order to determine whether this doctrine is indeed introduced and incorporated into the mineral law dispensation. Because the vesting of rights previously held by traditional mineral right holders is of the utmost importance for the conclusions to be drawn from this study, the effect of converting assets previously susceptible to private holding, to a "common heritage" or public resource, will be focused on throughout this chapter.

18 Ps 24:1.
19 Exodus 19:5.
20 See par 4.3 *infra.*
21 Also referred to as *res communis.*

4.2 Res omnium communes and res publicae

4.2.1 Roman law

One of the most significant indications of the existence of property not belonging to any individual but to the people at large, is found in the Institutes of Gaius.[22] The significance of Gaius's contribution is unfortunately not found in the clarity of the principle of law written down by him. On the contrary, Francis de Zulueta[23] refers to Gaius's treatment of the aspect as *jejune in the extreme.* However, despite the apparent vagueness surrounding Gaius's classification of *res*[24] it remains significant because Gaius, one of the most respected of Roman jurists whose works have either created or interpreted the rules of ancient jurisprudence,[25] is frequently first mentioned as source when the division of things according to Roman law is discussed. From this classification it is clear that certain things (*res*) could not be privately owned.[26] Things unsusceptible to private ownership[27] were classified by Gaius as being *res extra nostrum patrimonium* as opposed to *res in nostro patrimonio.*[28] For the purpose of this study the focus will fall solely on that category of things that was known as *res extra nostrum patrimonium.* Both *res divine iuris*[29] and those things classified as public things[30] within the overarching class of *res humani iuris*[31] were included in this category.

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22 G 2.10; G 2.11. These texts are being referred to by Justininan in D 1.8.1 as the starting point for the discussion relating to the subdivision of things.

23 De Zulueta *The Institutes of Gaius* 56.

24 De Zulueta *The Institutes of Gaius* 55.

25 Scott *The Civil Law* vol 1 13; Van Zyl *Geskiedenis en Beginsels* 39, 40.

26 G 2.1; Inst 2.1 *pr*; D 1.8.2 *pr*. See also Van der Vyver *Étatisation 261;* Van Oven *Leerboek* 59; Kaser *Römisches Privatrecht* 90; Mayer-Maly *Römisches Privatrecht* 30; Kunkel *Römisches Privatrecht* 78, Lokin *Prota* 93.

27 One must keep in mind that the translation "private ownership" refers to the concept of "ownership" as it was known and applied in the specific era.

28 G 2.1. According to Kaser *Das Römische Privatrecht* 318 this division was rephrased during the classical period to *res quarum commercium est* and *non est.*

29 G 2.2.

30 G 2.10. Van Zyl *Geskiedenis en Beginsels* 122 stated that all *res humani iuris* were unsusceptible to private ownership "... terwyl die *res humani iuris* daardie sake was wat, hoewel hulle nie vir private eiendomsreg vatbaar was nie, aan alle mense gesamentlik toegekom het" *[while the* res humani iuris *were those things that although they could not be privately owned, accrued to all people jointly].* He based this preposition on G 2.2. However, this cannot be correct as it is stated in

All sacred, religious and sanctified things were subject to divine law.[32] Kaser[33] aptly states:

> Die Sachen göttlichen Rechts sind privater Rechte unfähig und gliedern sich weiter in res sacrae, religiosae, sanctae.

Although a discussion of things subject to divine law falls beyond the parameters of this study, it is important to note that it can be inferred from Kaser's discussion[34] that *res divini iuris* should be differentiated from things categorised as *res humani iuris* but regarded as *res extra nostrum patrimonium* because they were considered to be *res publicae*. The reason for the differentiation being that with reference to *res divini iuris* "*dies bedeutet 'nullius in bonis esse' bei Gai.2,9, nicht Herrenlosigkeit*".

Gaius did not illustrate his understanding of what is included under *res publicae* by giving specific examples of things so considered. He merely stated *quae publicae sunt, nullius in bonis esse creduntur, ipsius enim uniuersitatis esse creduntur...* This broad usage of the phrase *res publicae* might be misleading in creating the illusion that only one category or class of *public things*[35] existed under Roman law.[36]

G 2.10 that things subject to human law were **either** public or private and it is further explicitly stated in G 2.11 that only things which are public are considered to be the property of no individual for they are held to belong to the whole of the community, while things which are private are the property of individuals. The writer's argument is supported by Van Warmelo's discussion in Van Warmelo *Inleiding* 112. The over-simplified discussion in Thomas, Van der Merwe and Stoop *Historiese Grondslae* 156, 157 creates the impression that the Van Zyl's oversight regarding *res humani iuris* is duplicated.

31 G 2.2.

32 G 2.8 -14.

33 Kaser *Das Römische Privatrecht* 320.

34 Kaser *Das Römische Privatrecht* 320.

35 *Digest* Mommsen 24.

36 Gaius used the phrase *res publicae* in conjunction with *"...ipsius enim uniuersitatis esse creduntur...* A strict interpretation could warrant the limitation of Gaius's use of *res publicae* to those things later defined as *res universitatis.* However, Bonfante *Grondbeginselen* 251 indicates that this is merely an example of the loose usage of the terminology as Gaius is actually referring to *res publicae* when he used the terminology in conjunction with the phrase *universitatis.* Voet *Commentarius ad Pandectas* 1.8.2 opined that Gaius did indeed include things belonging to a corporation under things public. One must keep in mind that the

The nuanced distinction between the classes of *res humani iuris* becomes clear through the enactments of Justinian in both the *Institutiones* and the *Digest.*[37] Justinian states in the *Institutiones* that all things are either common by the law of nations (*res omnium communes)*, or public (*res publicae)*, or belonging to a corporate public body[38] or community[39] (*res universitatis*) or nobody's (*res nullius*) or for the greater part, the property of individuals.[40] However, it will be a mistake to think that this distinction is more transparent than Gaius's merely because it is more elaborate. The jurists compiling the *Institutiones* were unfortunately not very meticulous in their usage of terminology[41] and commentators hold different opinions regarding the existence and extent of the distinction between things common and things public.[42] The internal tension within the content and position, function and character of *res publicae* and *res omnium communes* comes to light when the notes of commentators on the relevant texts are studied.[43] Most writers find it difficult to differentiate clearly between the two terms.[44] Bonfante's[45] opinion that there was merely a difference in degrees between *res publicae* and *res communes* is echoed by Van

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'corporation' mentioned in this context is far removed from the legal *persona* known in current legal systems.

37 While the legal principles are merely stated in the *Institutiones* specific sources are referred to in the *Digest* indicating that these were indeed a compilation of existing rules *and* law and not merely the law as Justinian wanted it to be as opined by *Lazarus 1986 Iowa LR 631.*

38 Borkowski and Du Plessis *Textbook on Roman Law* 154.

39 Perruso 2002 *LHR* 74.

40 Inst 2.1.pr. – *Quædam enim naturali jure communia sunt omnium, quædam publica, qædam universitatis, quædam nullius, pleraque singulorum.*

41 Van der Vyver *Étatisation* 265; Van Warmelo *Inleiding* 112; Bonfante *Grondbeginselen* 250; Perusso 2002 *TR* 75.

42 *Voet Commentarius ad Pandectas* 1.8.2. The synonymous usage of the phrases ius *naturale* and *ius gentium* in this context contributes to the confusion.

43 Kotze JA highlighted this difference of opinion in the judgement given in *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 at 620. This is also illustrated by Stone's interpretation as found in *Water and Water rights* vol 1 ch 3 184:

> Thus, in Justinian's statement that the sea was common to all, the word 'all' is to be taken in a Pickwickian sense; he meant "all Romans."

44 Schultz *Classical Roman Law* 27 indicates that the word *communis* was sometimes used as an equivalent to *publicus.*

45 Bonfante *Grondbeginselen* 251.

Warmelo[46] who opined that the distinction between *res publicae* and *res communes* was not of great importance.[47] Perruso[48] focuses on an important aspect when he states that although the distinction between common and public property may have been intended by Marcian and the compilers of the *Corpus iuris* to be without any concrete juridical effect, the distinction was not without significance. If one keeps in mind that the roots of the public trust doctrine are said to be intertwined in Roman law and flow from the notion of *res omnium communes*, it is necessary to determine the meaning that was attributed to the concept in Roman law.

When the text of the *Institutiones* is used as a starting point, it is clear that the air, running water, the sea[49] and consequently the shores of the sea, were regarded as things common to mankind.[50] The first traces of apparent contradiction are found in the very next text where it is stipulated that rivers which can surely be classified as running water and, therefore, common to mankind, are not only specifically being categorised as things public,[51] but that the right of fishing in rivers is consequently (*ideoque)* being described as *omnibus commune est,* it is common to all men.

Therefore, the first question that comes to mind is what characteristics or attributes did specific *res* have to possess to be classified as *res omnium communes* or *res publicae.* The second and related question is why the

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46 Van Warmelo *Inleiding* 112; Van Warmelo *Principles* 64. Van Warmelo regarded *res extra patrimonium* as *res nullius.* This viewpoint is contentious as *res nullius* was susceptible to private ownership by way of *occupation* and *res extra patrimonium* was not susceptible to private ownership.

47 In his notes in his translation of Voet's *Commentarius* Books 1-IV 153 Gane refers to and differs from Noodt who opined that these two concepts were nothing but synonyms for the same notion.

48 Perruso 2002 *LHR* 73.

49 It is interesting to note that Marcian is quoted in the D 1.8.4 on saying *nemo igitur ad littus maris piscandi causa accedere prohibetur* and subjoins his warrant, *idque Divus Pius piscatoribus Formianis resripsit* that is, no man is forbidden to come to the seaside to fish, as the emperor Divus Pius did write to the fishers of Formian. From this passage it can be deduced that some emperors at least, claimed the exclusive right to fishing from the seashore.

50 Inst 2.1.1.

51 Inst 2.1.2.

necessity for the distinction. Was *res omnium communes* dealt with in a different manner? Both groups of things are being described as unsusceptible to private ownership but who was ultimately responsible for the protection and maintenance of these things and what were the rights of individuals towards these things?

When *res universitatis*, *res publicae* and *res omnium communes* are considered, it is by far the easiest to describe or label *res universitatis*. Sandars'[52] explanation of the concept is concise and clear. He explains that a *universitas* is a corporate body created by the state such as a municipality or the guilds[53] of different trades. Where such a *universitas* had things which it owned for the use of the public it was spoken of as *res universitatis.*[54] As these things were owned by the *universitas*, one can infer that the duty to maintain and protect them fell on the corporate body. Both Gaius[55] and Ulpian[56] emphasised that *res universitatis* and *res publicae* were not mere synonyms for the same concept. Ulpian[57] explained that things that were earmarked for the mutual use of the populace and cities were not classified as *res universitatis* but remained *res publicae.*

Res publicae, on the other hand, denoted a category of things that belonged to the Roman people.[58] According to Kaser[59] *res publicae* in its technical sense indicated state property or state owned property. Schulz[60] explained that the term *res publicae* meant "things belonging to the Roman people, it is the *res communes populi Romani*". It was

52 Sandars *Institutes* 92.
53 *Collegia.*
54 Things like slaves or land belonging to a *collegium* that could be sold and were actually held by the corporate body in the same way as an individual would hold an asset that is in *nostro patrimonio* were not regarded to be *res universitas.* Public baths and theatres are examples of *res universitatis.*
55 D 50.16.16.
56 D 50.16.15.
57 D 50.16.17.
58 Van der Vyver *Étatisation* 265.
59 Kaser *Das Römische Privatrecht* 322. Kaser did not differentiate here between *res universitatis* and *res publicae.*
60 Schulz *Classical Roman Law* 89. Sohm *Institutiones* par 59 links Kaser and Schulz's explanations when he defines *res publicae* as "...everything owned by the *populos Romanos*" (State property).

subject to public law and although the state's rights and claim to the particular thing was ownership, it was a public (*öffentliches*) ownership over which the principles of the private law did not apply.[61] The public- or common use of the property was regulated by the state and the deprivation, withdrawal and cancellation of common use were also state affairs. An individual was not granted any private rights in the property by the state, but remedies were available against other private persons who obstructed or hindered the individual's right to use the property. Examples of *res publicae* mentioned by Kaser included rivers,[62] ports, sewer systems, public roads and theatres.

Res omnium communes were there for the use and the enjoyment of the entire human race.[63] The air, flowing water, the sea and the shores of the sea are explicitly and specifically mentioned as the things encompassed by this category. Although these things could not be privately owned, it was possible to secure or establish exclusive use over a specific portion of the property for a limited time period.[64] Subject to the requirement that public use would not consequentially be impeded and the resource not be impaired,[65] individuals could erect buildings on the shore[66] or on piles in the sea.[67] There are even indications that private rights were allocated to individuals over specific portions of the

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61 Kaser *Das Römische Privatrecht* 322:

> *Das Recht des Staates an diesen Sachen ist zwar ein (von der Souveränität vershiedenes) Eigentum, aber ein öffentliches, auf das die Grundsätze des Privatrechts nicht angewandt warden.*

Public law was the law whereby the legal relations of the *populus Romani* were regulated. Whenever the Roman state was the subject of a legal relationship, the relationship was withdrawn from private law and public law was applied – see Schultz *Classical Roman Law* 27; Sohm *Institutiones* 370.

62 It is clear from the wording of D 43.12.1.3 that only perennial rivers were regarded as public rivers. Buckland *Manual* 108 sheds light on the apparent discrepancy found in the classification of rivers as *res publicae*. He stated that the riverbed was not public as it ordinarily belonged to the riparian owners. The running water was *res communes* - it is the river as such which was regarded as public and he opined that the river was public only *quod usum*.

63 Van der Vyver *Étatisation* 264.

64 D 1.8.6 pr – Marcian indicates that when a building is erected on the shore the people who build there are constituted owners of the ground, but only as long as the building remains there for when the building collapses the place reverts to its previous condition as if by right of *postliminium*.

65 D 43.8.3.1.

66 D 43.11.3.20; D1.8.5.1.

67 D 43.11. 4.20; D 41.1.30.4.

sea.[68] The use and enjoyment of *res omnium communes* could be regulated by law[69] and in some instances obtaining a permit[70] was compulsory before an individual could exercise any right with relation to these things. Certain common uses were also allowed without the requirement of obtaining a permit.[71]

No specific text could be found that attributed the safeguarding, preservation and protection of *res omnium communes* specifically to the state. Seen however that permits were issued by the *praetor* and that government could interdict trespassers not adhering to the requirement of obtaining a permit or hindering another individual's usage of the common property, it can be inferred that the state was the authority responsible for the protection and regulation of *res omnium communes*. This corresponds with Sandars' opinion voiced in his commentary on the Institutes of Justinian.[72] When referring to the law as stated by Celsus[73] *Litora in quæ populus Romanus imperium habet populi Romanni esse arbitror* he says:

> if we are to bring this opinion of Celsus into harmony with the opinions of other jurists, we must understand *'populi Romani esse'* to mean 'are subject to the guardianship of the Roman people'.[74]

When these two concepts are compared it seems that *res omnium communes* were destined for the use by anyone in the world, while *res*

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68 D 47.10.14.
69 Van Warmelo *Principles* 65.
70 D 39.2.24 *pr;* D 41.1.50, D 43.24.3.
71 D 47.10.13.7 – the entitlement to fish or cast a net in the sea.
72 Sandars *Institutes* 91. Sandars did not differentiate clearly between the concepts *publicus* and *communis.* He indicated that these two words were sometimes used as synonyms. He does, however (subconsciously) differentiate between "Things public belong to a particular people, but may be used and enjoyed by all men" (this description denotes *res publicae*) and "... it is not the property of the particular people whose territory is adjacent to the shore but it belongs to them to see that none of the uses of the shore are lost by the act of individuals" – (this description corresponds with *res omnium communes*).
73 D.43.8.3.
74 Moyle *Imperatoris Iustiniani Institutionum* 193 opined that Celsus's writing denoted that the seashore was treated as *res publica* rather than *res communis.* This is another example of the confusion surrounding the content of the two notions.

publicae were allocated to the citizens or inhabitants of the state[75] and depicted by the phrase *res communes populi Romani.* Both these categories of things were withdrawn from the domain of private law. It seems that Rudolph Sohm[76] was one of few writers who succeeded in clearly distinguishing between the two concepts. He explained that *res omnium communes* could not strictly speaking be regarded as 'things' in the legal sense of the term as they were by reason of their innermost nature not susceptible to human domain.[77] This opinion is later corroborated by Moyle[78] who opined that *res omnium communes* were legally incapable of being owned as it was incapable of appropriation and qualified by Bonfante[79] who stated:

> De qualificatie *res communes* ziet op den inhoud der zaken in zijn natuurlijken staat en zijn onbegrensde hoeveelheid met betrekking tot het gebruikt, dat de menschen ervan moeten maken: gedeelten van de lucht en van stroomend water, op zich zelve, kunnen privaateigendom zijn.
> *[The qualification* res communes *relates to the content of things in their natural state and their unlimited quantities with regard to their use, that people should use it: part of the air and flowing water could on their own be private property]*

Thomas[80] put the essence of the concept in words when he wrote:

> These were things of common enjoyment, available to all living persons by virtue of their existence and thus incapable of private appropriation because their utilisation was an incidence of personality not of property.[81]

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75 This submission is supported by Van Warmelo *Inleiding* 112.
76 Sohm *Institutiones* 371.
77 He compared and equated the nature of *res omnium communes* with that of the sun, the moon the stars, and the atmosphere of the earth.
78 Moyle *Imperatoris Iustiniani Institutionum* 193.
79 Bonfante *Grondbeginselen* 251.
80 Thomas *Textbook* 129.
81 This viewpoint is supported by the stipulation contained in D 47.10.13.7 determining that redress for interference with one's enjoyment of *res omnium communes* was not a proprietary action but the *actio iniuriarum.*

Res *publicae*[82] on the other hand could not be regarded as objects of exclusive individual rights *after the manner of private rights*[83] because they were *publico usui destinatae*,[84] denoted to the common use of all, directly benefiting all individuals alike and, therefore, withdrawn from the domain of private law. These things were not regarded *res extra commercium* because of any inherent attribute disqualifying them from being owned or controlled by man, but because they were reserved

> *door het positiewe recht, voor doeleinden ten algemeenen nutte, voor het algemeen gebruik der burgers.*[85]
> *[through the positive law for the benefit and general use by the citizens]*

4.2.2 Roman-Dutch Law

Grotius did not support the notion that some things were not capable of private ownership.[86] Although he acknowledged the existence of the division of things into the categories *res divini iuris* and res *humani iuris,*[87] he held the opinion that all these things belonged to man, albeit for different purposes.[88] He therefore divided all things into four categories with a view of them being the object of ownership. Things he regarded to be the property of all men were defined as *res communes*. It is important to note that Grotius did not only assign the use of what he saw as *res communes* to mankind, but awarded ownership of those commodities to mankind as it remained undivided between men. *Res*

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82 Both Sohm *Institutiones* par 59 and Moyle *Imperatoris Iustiniani Institutionum* 193 stressed that certain things could be owned by the state as if by a private person eg money and slaves, these things were not *extra nostrum patrimonium* as they were not directly *publico usui destinatae*.

83 Sohm *Institutiones* par 59.

84 Van Oven *Leerboek* 59 translated this phrase to "*voor den publieken dienst bestemt" [meant for public service]*.

85 Bonfante *Grondbeginselen* 252.

86 Van der Vyver *Ètatisation* 272.

87 Grotius *Inleidinge* 2.1.15.

88 Grotius *Inleidinge* 2.1.15 -

> *... doch alles wel ingezien zijnde zal men bevinden dat alle die zaken den menscehn toe-behooren, maer tot verscheiden ghebruick. [...everything considered, it would be found that all things belong to humans but for different purposes].*

publicae[89] and *res universitatis* were the terms defining those things that were the property of certain large societies of men.[90] State property was specifically categorised as *res publicae*[91] and it is further stipulated that all public property belonged to the state.[92] Property of individual men was *res singulorum* and property belonging to no one *res nullius.*

Grotius identified the sea and air as things common to all men[93] because they possessed certain characteristics.[94] Because of "their vastness and

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89 Grotius *Mare Liberum* Van Deman Magoffin translation http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17] on 17 explained that he regarded public property as the "*private property of a whole nation.*"

90 Grotius *Inleidinge* 2.1.16. Van der Vyver *Etatisation* 275 opined that Grotius did not uphold the distinction made in Roman law between *res publicae* and things belonging to corporate bodies such as towns and cities. In light of the stipulations contained in Grotius *Inleidinge* 2.1.24 and 31 the writer hereof is unable to support such a contention

91 Grotius *Inleidinge* 2.1.24.

92 Grotius *Inleidinge* 2.1.29.

93 Grotius *Inleidinge* 2.1.17; Grotius *Inleidinge* 2.1.22.

94 Grotius's reasoning for defining the air and the sea as *res omnium communes* is explained and elaborated on in his work *Mare Liberum.* In the translation by Van Deman Magoffin http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17] on 3, the origin of the rule is emphasised:

> Now, as there are some things which every man enjoys in common with all other men, and as there are other things which are distinctly his and belong to no one else, just so has nature willed that some of the things which she has created for the use of mankind remain common to all, and that others through the industry of labor of each man become his own.

He referred to older writers like Seneca and Cicero and poets like Vergil and Ovid to underline the long recognised existence of the rule. It is in chapter 5 of the work that one finds the core of his argument. In the first instance he indicated that the words 'sovereignty' and 'common possession' had other meanings in the earliest stages of human existence than those attributed to them at the 'present' time. In ancient times 'ownership' merely meant the privilege of lawfully using common property. He refers to Cicero, Horace and Avienus to indicate that in this sense all things were held in common property in ancient times and that the notion of private ownership did not exist in those times. One must, therefore, be aware of the fact that "Poverty of language compels the use of the same words for things that are not the same". The transition to the 'present' notion of ownership developed gradually "nature herself pointing the way". Things possessing certain characteristics like being consumable or being able to be appropriated or possessed were capable of being held in private ownership. This appropriation came through occupation. Grotius continued to indicate that as states began to be established a new category of ownership originated namely public ownership. This term denoted that things public were the property of the people. Public and private property arose in the same way. However, things that could not be appropriated through occupation and all things which could be used by one person without loss to any one else ought to remain in the same condition as when it was first created by nature – common to all men. Air accordingly belongs to this category as it is not susceptible to occupation and its common use is destined for all men. Grotius asserted that occupation of the sea is neither permissible by nature nor on grounds of public utility. The sea "is for the same reason common to

on account of the common service which they have to render"[95] the rights of foreigners[96] to sail and fish in the open sea, even along the Dutch coastline, were acknowledged.[97] The necessity for government regulations concerning the use of the sea was stressed by him.[98] Grotius distinguished between the open sea and the open shore. Contrary to the Roman definition,[99] he opined that the rights of mankind only extended as far as the sand of the sea which was for the greater part of time, or at mean-tide,[100] under water. The open shore belonged to the people of the country[101] and one can, therefore, infer that it was regarded as *res publicae.* [102]

Another Roman principle that was not applied in Roman-Dutch law related to fishing in rivers. It was not lawful for every man to fish in the public rivers[103] using any method other than fishing with a rod[104] as the right of fishing where the state was proprietor of the rivers[105] belonged to the state.[106] Because certain rivers[107] were regarded to be public and

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all because it is so limitless that it cannot become a possession of any one". It is within this 'limitlessness' that the distinction is found between rivers and the sea. With reference to Johannes Faber Grotius stated on 19 "A nation can take possession of a river, as it is enclosed within their boundaries, with the sea, they cannot do so".

95 Grotius *Inleidinge* 2.1.17.

96 Although this was the principle, Grotius deviated from this principle in a legal opinion based on the question whether the inhabitants of his country may prevent strangers from fishing in the water of the Island Spitzbergen. He argued that because the English, Danes and other nations have adopted laws whereby no strangers were allowed to fish on their coasts within a specific range, mostly canon-range, these nations could be compelled to abide by their own laws and consequently be denied the right to fish on the Dutch coast line - De Bruyn *The Opinions of Grotius* 131.

97 Grotius *Inleidinge* 2.1.18.

98 Grotius *Inleidinge* 2.1.19.

99 See par 4.2.1 *supra.*

100 Mean-tide is midway between high-water and low-water – Maasdorp *Introduction* 43.

101 Grotius *Inleidinge* 2.1.21.

102 Voet *Commentarius ad Pandectas* 1.8.9. held a different opinion as he regarded the open shore among the *regalia* or domains of the Emperor.

103 Maasdorp *Institutes* 81 indicated that it was the general opinion of the old Roman-Dutch law writers that the the rivers of Holland belonged to the sovereign.

104 Grotius *Inleidinge* 2.1.28 and Wessels *History* 475 indicated that the right of fishing was thrown open to all subjects if Holland in 1795 and the law of Holland were made the same as the Roman law of Justinian.

105 Grotius *Inleidinge* 2.1.25.

106 According to the stipulation contained in Grotius *Inleidinge* 2.1.27 the state granted the right of fishing to the Counts. The principle that the right of fishing belonged to

state owned, the governments of Holland and West-Friesland were entitled to levy tolls and other taxes[108] for use of the rivers by foreigners.[109] These taxes and levies were to be used for the conservation of the rivers.[110]

That the apparent clarity enfolding the notion of *res communes*[111] as it was understood in Roman-Dutch law is misleading, is illustrated by the following remark by Van der Vyver:[112]

> In his comments on these passages Van der Keessel poured cold water on Grotius's exposition of *res omnium communes* and the entitlements supposedly sanctioned as a matter of '*het algemeene recht*' in respect thereof.

According to Van der Keessel[113] one should in the first instance note that the air and the sea are not legal objects and consequently not capable of being owned. It should accordingly not be understood as though everybody had ownership in respect thereof, but rather that everybody had the use of such things. He also indicated that the right of foreigners to fish in the seas along the Dutch coastline did not stem from the principle of *res omnium communes*, but originated from the natural law as much as it did from international treaties.[114]

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the State in those rivers owned by the State seems to be a remnant of the Germanic institution of *regalia* – Van der Vyver *Ètatisation* 272, 274. Also see Wessels *History* 474 in this regard.

107 These were rivers flowing perennially within the borders of the Netherlands; Lee *An Introduction* 124.

108 Grotius *Inleidinge* 2.1.26.

109 Grotius *Inleidinge* 2.1.25.

110 Grotius Inleidinge 2.1.26.

111 William Welwod interpreted the notion of *commune* to be equivialent to *publicum, quasi populicum*, thus signifying a thing common for the usage of any sort of people and not for all nations - *The Free Sea* 69 edited by David Armatage.

112 Van der Vyver *Étatisation* 273.

113 *Prael ad Gr Inl* 2.1.17.

114 *Prael ad Gr Inl* 2.1.18. In defence of Grotius it must be stated that he did indicate in *Mare Liberum* Van Deman Magoffin http://oll.libertyfund.org/Texts/Grotius0110/Freedom [2005/06/17] on 16 that "what the Romans call 'common to all men by natural law' and what is now regarded as being 'public according to the law of nations' are to be viewed as synonyms in modern language".

Johannes Voet was another renowned jurist who commented on the distinction between *res omnium communes* and *res publicae.* When Voet's remarks on the subject are evaluated, it must be kept in mind that he was mainly commenting on the Pandects. One finds mere brief references to the state of law of his time.[115] As Voet's comments on the Pandects were referred to while discussing the Roman law,[116] the focus here will be on the law of his time. Voet attenuated Justinian's classification of things to two major categories, namely things that are somebody's and things that are nobodies.[117] *Res omnium communes* were then said to be those things which are nobody's which fall under human law.[118] Any individual could take for himself what is enough for himself,[119] but these things could not be *seized wholesale by private persons.*[120]

Res publicae were those things in public ownership of many persons[121] falling under the main category of things belonging to somebody.[122] They were differentiated from *res communes* because they had already *begun to be in ownership.*[123] Voet stated, however, that the shores of the sea and rivers were not reckoned to be *res publicae* because they were considered among the *regalia* or domains of the Emperors. This

115 This cautionary approach was also recommended by Van der Vyver *Ètatisation* 276.
116 Par 4.2.1 *infra*.
117 Voet *Commentarius ad Pandectas* 1.8.1.
118 It would seem that Voet and Grotius had a major difference of opinion on this aspect. Grotius *Mare Liberum* Van Deman Magoffin http://oll.libertyfund.org/Texts/Grotius0110/Freedom on 16 differentiates between the meaning of *res* nullius when things marked out for common use are the subject and when things that are capable of being appropriated eg game and fish are under discussion. In the first instance *res nullius* denotes nothing more than things not susceptible to private ownership.
119 Voet *Commentarius ad Pandectas* 1.8.3. Voet did not qualify the terms "what is enough for himself". Seen in the light of the qualification that follows one can aver that it meant enough to sustain livelihood.
120 Voet *Commentarius ad Pandectas* 1.8.3.
121 Voet *Commentarius ad Pandectas* 1.8.1, 1.8.8.
122 Voet *Commentarius ad Pandectas* 1.8.10 acknowledged the existence of another kind of public property namely *res universitatis.*
123 Voet *Commentarius ad Pandectas* 1.8.8.

state of affairs can be attributed to the Germanic heritage and feudal practices of his time.[124]

Simon van der Leeuwen saw *res omnium communes* as an example of things within the patrimony of man,[125] therefore, the common property of all persons. In this he sided with Grotius and parted with Voet. He held that no-one was entitled to appropriate to himself the exclusive use of common property as everyone was entitled to its use and enjoyment.[126] He also differentiated between things not allotted to someone but capable of appropriation, like fish and game, and things which were common to all human persons.[127] Van der Leeuwen confirmed that *res publicae* became part of the *regalia* and that the ownership of *res publicae* and the use and enjoyment thereof have been separated.[128] While the use of the seashore was common and public, it belonged to the Prince who had the administration and authority over it.[129]

An important aspect that must be taken into consideration is discussed by Bort.[130] He pointed out that the Counts were initially allowed to alienate things falling within the category of *domeyn-goederen* (previously known as *res publicae*) provided that it was not to the serious detriment of the public interest.[131] However, a resolution was passed by the States of Holland on the 15th September 1620 forbidding the future sale, transfer, pledge or other cession of the country's *regalia domeynen* or other public rights and property except upon express resolution passed by the States in their public capacity.[132]

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124 Van der Vyver *Ètatisation* 279.
125 *Cens For* 1.2.1.5.
126 *Cens For* 1.2.1.7.
127 *Cens For* 1.2.1.7.
128 *Cens For* 1.2.1.7. He is supported in this by Huber who held the view that all things public belonged either to the state or to a structured community of people the so-called *Gemeente* – Huber *Heedendaegse Rechtsgeleetheyt* 2.1.16.
129 Kotze J.A. *Surveyor-General (Cape) v Estate De Villiers* 1923 588 on 623.
130 Bort *Tract van de domeynen van Hollandt cap 2, notes 3-5.*
131 Bort *Tract van de domeynen van Hollandt cap 2, notes 3-5.*
132 *Groot Placaat Boek 3* on 734 as referred to by Van der Vyfer *Ètatisation* 283.

Given the difference of opinion reflected in the above outline of Roman-Dutch authorities on the notion of *res omnium communes* it is difficult to ascertain what the state of affairs was as far as the nature of *res omnium communes* is concerned. The fact that *res omnium communes* were to the avail of every human person was, however, never disputed. It seems that the air and the open sea were the only two categories of things considered to be *res communes*[133] due to the feudal influence of the time. *Res publicae* became subject to the ownership of the state but the

> public retained an interest in the use and enjoyment of those objects destined for general use by members of the community.[134]

It remains now to determine how these notions featured in South African law.

4.2.3 South African law

The notions of *res omnium communes* and *res publicae* were known to jurists from the onset of the South African legal system. Due to the Roman-Dutch roots of South African common law, the Roman-Dutch view was followed in South African jurisprudence. As a result the air and the open sea were the only two categories of things considered to be *res omnium communes* while *res publicae* became subject to the ownership of the state with the public retaining an interest in the use and enjoyment of those objects destined for general use by members of the community.

Although the open sea and air were not regarded as legal objects and could, therefore, not be 'owned' by anybody, the state regulated the use

133 Van der Vyver *Ètatisation* 282 opined that the seashore was also regarded as *res communes.* This opinion is correct if one considers the boundaries set for the shore. However, it was a very small area that was regarded to be *res communes.* The rest of the shore was regarded to be under the *regalia* of the Emperors.

134 Van der Vyver *Ètatisation* 283.

and prohibited the abuse and pollution of these 'entities' from early in history.

It was mainly in cases where water-rights[135] and rights to the seashore[136] were the nature of the state's interests in *res* publicae came under discussion. Although aspects of *res publicae* featured in very early cases,[137] it seems that *Surveyor-General (Cape) v Estate De Villiers*[138] was the first case where an historical overview of both these principles was given.

Interesting aspects emerge when case law dealing with water-rights and rights to the seashore are scrutinised. In the first place it is evident that the principle of custodial sovereignty is not a novice to South African jurisprudence, but that the state has previously been regarded as the custodian of at least the seashore. Secondly, it is obvious that the public's right to water has duly been guarded by the state. Thirdly, it is noticeable that a differentiation was made between two *modi* according to which the state held property.

The motivation for the first of the three abovementioned suppositions is found in case law. In 1891 it was held by De Villiers CJ in *Anderson and Murison v Colonial Government*:[139]

> No doubt the Government are (sic) in one sense the custodian of the seashore, but they are such only on behalf of the public. They may as Voet (1.8.9) points out, grant permission to individuals to build on the seashore ... but that permission is, I take it, subject to the condition that the rights of the public shall not be interfered with.

135 See cases referred to in this paragraph *infra*.
136 Eg *Anderson and Murison v Colonial Government* (1891) 8 SC 293 on 296, *Colonial Government v Town Council of Cape Town* (1902) 19 SC 87.
137 Eg *Anderson and Murison v Colonial Government* (1891) 8 SC 293.
138 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588.
139 *Anderson and Murison v Colonial Government* (1891) 8 SC 293 on 296.

The nature of the state's right relating to the seashore was clarified in *Surveyor-General (Cape) v Estate De Villiers*[140] where Kotze JA[141] stated more than 30 years later:

> while the ownership of the seashore is in the Crown, the public has the free right of its lawful use.

Here one is directly confronted with the terms 'custodian', 'crown ownership' and 'public right of free use'. These terms are not only used in relation to each other, but lead to the other noteworthy observation regarding to the two *modi* according to which the state held property.

In *Rex v Lapierre*[142] a distinction was made between property held by state to which the public has a 'right of user' and property held by the state in the same way as an individual would hold an asset that is in *nostro patrimonio.*[143] Here the High Court of the Orange Free State held that:[144]

> The expression "private property" ... is used in contradistinction to property to which the public have a common right of user; consequently the property of the Crown, which is not subject to such a right of user, falls within the meaning of the term.

In 1902 this principle was elaborated on in *Colonial Government v Town Council of Cape Town*[145] where it was held in relation to the seabed that:

> The Crown is not the owner of the land in the same sense that it owns Crown lands above high water mark, but it enjoys the supreme right of control, which carries with it the

140 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624.
141 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624.
142 *Rex v Lapierre* 1905 ORC 61.
143 This distinction led to the finding that some state property was deemed to be inalienable and others not. In *Union Government (Minister of Lands) v Estate Whittaker* 1916 AD 194 Innes CJ held that:
> Rights which from their nature involved a recognition of sovereignty ... were not prescribable. And the same may be said of inalienable State domains.
144 *Rex v Lapierre* 1905 ORC 61.
145 *Colonial Government v Town Council of Cape Town* 1902 19 SC 87.

right of claiming ownership of the land itself whenever the land ceases to be covered by water.

Although it came to be generally accepted that ownership of the seashore was vested in the crown,[146] the crown was not granted the competence to freely dispose of the asset. The nature of ownership of the sea shore rebelled against such a contention. Despite the fact that the State President was 'declared' to be the owner of the seashore in terms of the *Seashore Act*[147] of 1935, ownership was linked to the office and not the person.[148] The public's rights were still protected to such an extent that Schreiner JA held in a concurring judgement in *Consolidated Diamond Mines v Administrator, SWA*[149] that although the state "could effectively grant rights out of its regalia to private persons"[150] it could not grant ownership of the foreshore to a private person in the absence of legislative authority,[151] and Steyn JA in a dissenting judgement regarded the government as "merely the custodian of the seashore on behalf of the public". It is clear that although the state was deemed to be the owner of the seashore, it was restricted to a great extent in its dealings with the seashore and the public's rights had to be protected and considered when dealing with the seashore. A distinction was made between the *modi* of state ownership of the seashore and other assets held by the state that could be alienated.

The remaining supposition relates to the public's right to water.

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146 *Surveyor-General (Cape) v Estate De Villiers* 1923 AD 588 on 624. Different opinions were held on this subject and Steyn JA in *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) at 643 in a dissenting judgement regarded the Government as "merely the custodian of the seashore on behalf of the public".

147 *Seashore Act* 21 of 1935.

148 Van der Vyfer denotes this as the *Ètatisation* of *res publicae.* This view cannot be supported as it must merely be seen as an effort to bring the seashore under the ambit of the property concept of the time and private ownership was the ultimate method to 'protect' property. As stated in *Surveyor-General (Cape) v Estate De Villiers* 23 AD on 594 "the *dominium* of the beach must be in someone...". The public's rights are still protected within the ambit of the wider public interest.

149 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A).

150 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) 638. See the earlier case of *Rex v Carelse* 1943 CPD 242 where it is explicitely stated that the act is declatory of the common law and preserves the rights of the public.

151 *Consolidated Diamond Mines v Administrator, SWA* 1958 4 SA 572 (A) 636.

Maasdorp[152] referred to the *Origineel Placaat Boek* to indicate that the Dutch East Company claimed an absolute right to control the use of streams for irrigational purposes in its own interests[153] and stated:

> That the State... was actually *dominus fluminis* is apparent throughout the resolutions of the Council of Policy from 1770 onwards .... As *dominus fluminus* the Company exacted a preferential user both for its gardens and its mills.

Although the concept of the state as *dominus fluminis* was incomprehensible to English and Scottish lawyers appointed when the Cape of Good Hope became a British Colony, the rights of the Crown to regulate rivers were kept in tact while the principle of riparian ownership was introduced.[154] The public's right to certain privileges in relation to water was also protected despite the introduction of riparian ownership. In *Van Heerden v Weise*[155] the court held:

> When once the public nature of the stream or river is established, the rights of each riparian proprietar *(sic)*... are limited by the natural rights of the public.

Henry Juta[156] defined the scope of the public's interest as:

> Public streams are public or common to all in this sense, that every man drink of it or apply it to the necessary purpose of supporting life.

Through regarding the state as *dominus fluminis* while simultaneously protecting the public 'right to use' the state's *dominium* was upheld as far as *res publicae* was concerned. Even with regard to riparian ownership, proprietary rights had to bow before the public rights of navigation and fishing, and the state retained the supreme right of control. *Butgereit v*

152 Maasdorp *Institutes* 81.
153 Maasdorp *Institutes* 82.
154 Maasdorp *Institutes* 84.
155 *Van Heerden v Wiese* 1 BUCH AC 5 1880.
156 Juta *A selection of Leading Cases* 421.

Transvaal Canoe Union[157] is indicative thereof that the entitlement of members of the public to the use and enjoyment of perennial rivers remained intact save to the extent that the public's common law rights have been restricted by state regulation. The notion of water as a distinct inalienable category of *res publicae* is also woven through the *National Water Act* of 1998[158] like a golden thread.[159]

4.2.4 Minerals

It is sufficient to state at this stage of the study that minerals have not been regarded as either *res omnium communes* or *res publicae* in Roman, Roman-Dutch or South African law. Although minerals have an established economic value, they are not necessary for supporting life and it is difficult to imagine a general 'public right of user' as it exists in relation to air, water, the sea and the seashore. The idea that 'mineral resources are the common heritage of all the people of South Africa' is not a legacy of our pre-1994 common law heritage.

4.2.5 Conclusion

The notion of *res omnium communes* as it came from in Roman law did not survive the Germanic notion of *regalia* or the influence of the feudal system when received into Dutch law. All but the air and open seas came to be regarded as *res publicae*, which vested in the *princeps. Res publicae* in Roman-Dutch law became inalienable and its use was common to all, save for regulatory measures instituted by the state. The Roman-Dutch law formed the basis of the South African legal system and the Roman-Dutch concept of *res publicae* was followed. From the onset of South African legal history, it was only perennial rivers and the seashore that were regarded to be *res publicae*.

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157 *Butgereit v Transvaal Canoe Union* 1988 1 SA 759 (A).
158 *National Water Act* 36 of 1998.
159 Pienaar and Van der Schyff 2003 *Obiter* 132-156; Pienaar and Van der Schyff *History, Development and Allocation* 263-284.

It must be emphasised that indications are found in case law that the state is regarded as the custodian of at least the seashore and that the public's rights to water and the seashore have always been protected.[160] A distinction has also been made between the *modi* of state ownership regarding property owned by the state to which the public has a common right of user and property which is not subject to such right of user.[161]

No suggestion that minerals or the right to minerals was included in any of these categories could be found in the historical survey of these notions. As a result it can be stated that minerals were not historically included in either of these classes. Where it is now stated that *South Africa's mineral and petroleum resources belong to the nation* and *mineral and petroleum resources are the common heritage of all the people of South Africa*[162] in conjunction with the fact that the state is regarded as the custodian of these resources to the benefit of all South Africans, one is not dealing with a classical occurrence of *res publicae.* Things falling into the ancient categories of *res omnium communes* or *res publicae* were either life sustaining commodities like water and air,[163] regarded as gifts from nature's bounty reserved for the whole of mankind, or things used by all the inhabitants of a certain region like roads or public baths. One must keep in mind that the concept of *private ownership* developed alongside *res publicae*, but the things regarded as *res publicae* or *res omnium communes* were excluded from private property holding specifically because they possessed the said attributes. Minerals were never included in either.

This does not imply that a new, modern version of *res publicae* or *res omnium communes* cannot be created. Development on the

160 See par 4.2.3. *supra.*
161 See par 4.2.3. *supra.*
162 Preamble and s 3 of the *MPRDA*.
163 Water and land are the commodities that are regarded as most valuable by many nations. In light of changing atmospheric conditions whereby water is frequently becoming more scarce, it can be regarded as liquid gold. Water and air are the two commodities every individual has to have personal access to, in order to survive. Food can be produced on land owned by another and this distinguishes the need for land from the need for water.

international front has already indicated the existence of a notion akin to these two concepts. The origin of this new concept does not lie in the natural law, but is found written in international treaties. Van der Vyver[164] indicated that that the notion of *res omnium communes* has been kept alive in contemporary international law through the protection afforded by the international community of states to certain regions of the world that have been designated as *the common heritage of mankind.*[165] Early examples are *The Antarctic Treaty*[166] and the *Treaty on Principles Governing the Activities of States in the Exploration and use of Outer Space, including the Moon and other Celestial Bodies.*[167] Freedom to navigate the oceans of the world beyond territorial waters, the right to fish in such waters, to lay pipelines and submarine cables and to exercise other rights as recognised and condoned by international law are dealt with in the *Geneva Convention on the High Seas*[168] and the *Convention of the Law of the Sea.*[169]

In light of this development, the character of modern South African environmental protection legislation might justify the preposition that a new category of *res publicae* is being created. However, this should not be viewed as a renaissance of the ancient concept. Today, it is not the limitlessness, vastness or availability of a resource that necessitate a more hands on approach by the state. The present–day aim of

164 Van der Vyver *Ètatisation* 284.
165 See *inter alia* the *World Heritage Convention Act* 49 of 1999.
166 *The Antarctic Treaty* 1959 UK TS 97 (1961) Cmnd 1535 – while recognizing the acquired rights of certain countries in respect of Antarctica in article 4, article 1(1) expressly prohibits military activities in the region as it is the aim of the treaty to ensure that the South Pole region will only be used for peaceful purposes.
167 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies* 1967 UK TS 10 (1968) Cmnd 3519 – while the need for further exploration and use of outer space is recognised, all states party to the Treaty undertook in article 1 to carry out the exploration and use of outer space and the celestial bodies in the interest of all the countries in the world and with a view to peaceful objectives only. As a result article 2 of the Treaty expressly prohibits military activity and particular nuclear testing in outer space. It is determined in the said article that outer space and celestial bodies are not subject to national appropriation.
168 *Geneva Convention on the High Seas* 1958 UK TS 5 (1963) Cmnd 1919.
169 *Convention of the Law of the Sea* UN Doc A/Conf 62/122; (1982) 21 *ILM* 1261.

classifying a resource as non-alienable *res publicae* would be to ensure the protection of that resource for future generations.[170]

It has been stated above that the new notion of the country's mineral resources belonging to the nation with the state appointed as custodian on the nation's behalf does not fall in the established or contemporary concepts of *res omnium communes* or *res publicae.* At first glance there are striking similarities between present-day mineral law regime and the Anglo-American public trust doctrine. As the public trust doctrine is foreign to South African jurisprudence,[171] it is necessary to study the character and content of this doctrine to determine whether it has been introduced in the mineral law dispensation.

4.3 The public trust doctrine

4.3.1 Introduction[172]

At the onset of the discussion it must be stated that terminology can be misleading. The word 'trust' must be interpreted to refer to the fiduciary responsibility attributed to the state through the working of the doctrine, rather than to the legal nature of the doctrine.[173] The tripartite nature of the creation and operation of trusts disqualifies the public trust from being classified as a true legal trust in the United States of America. The features of the doctrine emphasise the fiduciary duty of the state.[174]

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170 The need for such protection has been necessitated by various factors eg over population and resource depletion.

171 In the *White Paper on a National Water Policy for South Africa*, 1997 http://www.dwaf.gov.za/Documents/Policies/nwpwp.pdf [2005/10/24] it has expressly been stated that the public trust doctrine has been incorporated in the water law dispensation. One finds no exposition of the content of the doctrine in the said *White Paper* and no South African study could be found where this doctrine has been discussed extensively.

172 The 'public trust' is not to be confused with the socalled 'state land trusts' administered by the state for the benefit of the original inhabitants of land. The latter was applied to public land "in order to affect a compromise between land-hungry colonists and the conscience of the colonial authorities" – Bennett and Powel 2000 *SAJHR* 601.

173 See par 4.3.6 *infra.*

174 See par 4.3.2.2 *infra.*

This fiduciary obligation of the state to hold resources for the benefit of the public is at the core of the public trust doctrine.

Wilkinson[175] warned that the public trust doctrine is complicated. This innate complexity of the doctrine can be ascribed to the fact that there is no universal and uniform law upon the subject because each state has dealt with the lands under the tidal waters within its borders according to its own views of justice and policy.[176] Heeding the warning, and keeping the complexity of the doctrine in mind, the writer will attempt to concretise this concept which, until recently, has been unknown and foreign to South African jurisprudence.

4.3.2 The traditional public trust doctrine

4.3.2.1 The nature and scope of the traditional public trust doctrine

The public trust doctrine essentially recognises that certain public uses ought to be specifically protected.[177] It entails the distinction between

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175 Wilkinson 1989 *Envtl L* 425. Kearney and Merril 2004 *U Chi LR* 800 added: "The public trust doctrine has always been controversial" and described the doctrine as "a jarring exception of uncertain dimensions".

176 *Shively v Bowlby* 152 US 1 (1894) at 26 – also cited with approval in *Phillips Petroleum Co et al v Mississippi et al* 484 US 469 (1988) 475 where the court confirmed that

> it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.

See also *Washington State Geoduck Harvest Association v Washington State Department of Natural Resources* 124 Wn App 441 (2004) 451 where the court confirms that each state individually determines the public trust's limitations within the boundaries of each state.

177 *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842) as found in http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=use&vol=41&invol=367 hereafter referred to as *Martin v Waddell*. Different writers defined the public trust doctrine from their own subjective focus, but the essence of the doctrine boils down to the protection of certain public uses. Casey 1984 *Nat Resources J* 812 defined the public trust doctrine

> as the right of the individual state to regulate and control its navigable waters and the lands underlying them on behalf of it's citizens' interests in certain public uses, namely navigation, commerce and fisheries.

Sax 1980 *UC Davis LR* 188-189 described the central idea of the public trust doctrine as:

> [P]reventing the destabilising disappointment of expectations held in common but without formal recognition such as title. The function of the public trust as a legal doctrine is to protect such public expectations

private title and public rights and recognises that the state, as sovereign, acts as trustee of public rights in certain natural resources.[178] This notion has been present as an unbreakable thread woven through mankind's history. [179] It is anchored *inter alia*[180] in aspects of Roman law,[181] English common law,[182] specifically in the Magna Charta[183] and

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against destabilising changes, just as we protect conventional private property from such changes.

According to Lazarus 1986 *Iowa LR* 633

> ... the historical function of the public trust doctrine has been to provide a public property basis for resisting the exercise of private property rights in natural resources deemed contrary to the public interest.

Searle 1990 *SCLR* 898 concisely described the concept as:

> state ownership of property held exclusively for the benefit of and use by the general public.

Rasband 1998 *U Colo LR* 331 held that the doctrine described the state's fiduciary responsibilities with respect to land under navigable water and certain associated resources. See also Williams 2002 *SC Envtl LJ* 31.

178 *Glass v Goeckel* 473 Mich 667 (2005) 673.

179 Sax 1970 *Mich LR* 471, 475; *Shively v Bowlby* 152 US 1 (1894) 11; Reed 1986 *J Env L & P* 107, 109; Cohen 1970 *Utah LR* 388, 389; Stevens 1980 *UC Davis LR* 195-198; Hannig 1983 *Santa Clara LR* 212, 214; Casey 1984 *Nat Resources J* 812; Manzanetti 1984 *Pac L* 1307; Lazarus 1986 *Iowa LR* 633-640; *California Earth Corps v California State Lands Commission et al* 27 Cal Rptr 476 (2005) 480, hereafter referred to as *California Earth Corps.* It is important to take cognisance of the fact that considerable controversy surrounds the historical origins of the doctrine. It is not the existence of the doctrine that is doubted but "whatever the doctrine may have meant" – Dunning 1989 *Envtl L* 519; Searle 1990 *SCLR* 898-901; Araiza 1997 *UCLA LR* 395-397; Langella 2000 *NYSLR* 182-184; Morris 2003 *Catholic ULR* 1018.

180 Another example of the occurrence of the notion is found in French jurisprudence where a clear distinction is made between *le domain public* - and private ownership *(propiété).* Reed 1986 *J Env L & P* 110 and Lazarus 1986 *Iowa LR* 634, indicated that the same concept formed the basis of Spain's *Las Sieta Partidas* published in 1265 by King Alfonso X, a work in which the public's right of common use in the sea, rivers and harbours were acknowledged. This work also became the basis of Mexican law. Wilkenson 1989 *Envtl L* 428,429 pointed to the existence of a similar notion in the Far East, Nigeria and Muslem *(sic)* countries.

181 Fernandez 1998 *Alb LR* 627 indicated that the Roman concepts of common property and public rights were incorporated by the English into both the Magna Charta and the English common law. However, Stone's interpretation of Justinian's concept of the open sea *res communes* implies a restricted interpretation of the concept as he opined that Justinian meant to include only Romans in this category – Stone *Public Rights in Water Uses* 184. Daniel Coquilette named the public trust doctrine the *res communes* doctrine – Coquilette 1979 *Cornell LR* 761-821, 800. See also Scott 1998 *Fordham Envtl LJ* 24-36; Sax 1980 *UC Davis LR* 185.

182 Olson 1975 *Det CLR* 161-209, 161; Walston 1982 *Santa Clara LR* 65; *Raleigh Avenue Beach Association v Atlantis Beach Club* 185 NJ 40 (2005) at 51.

183 Sax 1980 *UC Davis LR* 1980-185. Harnsberger *Eminent Domain and Water* 99:

> Some authorities indicate that it was not clear whether a public right to fish in tidal waters existed before King John granted Magna Charta in 1215. The fact that the King before the time did grant the exclusive right of fishing to individuals and excluded the public is, however, of academic interest because it remained unquestioned that after Magna

the American Revolution.[184] Because certain interests like navigation and fishing were sought to be preserved for the benefit of public use, property used for those purposes was distinguished from general public property. The latter could be granted to private owners by the sovereign.[185] The former was subject to the state's *dominium*.[186] In *Shively v Bowlby*[187] Justice Gray explained the common law perspective on the nature of the sovereign's claim when dealing with navigable waters and the sea:[188]

> Such waters, and the land which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature,... Therefore the title, *jus privatum*, in such lands ... belongs to the king, as the sovereign; and the dominium thereof, *jus publicum*, is vested in him, as the representative of the nation for the public benefit.

His conclusion[189] portrays the state's claim to property subject to the public trust doctrine effectively:

Charta exclusive fisheries could not be granted by the Crown to individual subjects.

184 *Martin v Waddell* 407-410 – here the court explained that the people of each American state became themselves sovereign when the revolution took place. In that character they held the absolute right to all navigable waters, and the soils under them for their own common use, subject only to the rights surrendered by the constitution to the general government. In *Shively v Bowlby* 20, 21 it is stated that upon the Revolution the state succeeded to the rights of the crown in the navigable waters and the soil under them. The Supreme Court of the United States reiterated in 1988 with the findings in *Phillips Petroleum Co et al v Mississippi et al* 484 US 469 (1988) 473-481, hereafter referred to as *Phillips Petroleum Co et al,* that all land subject to the ebb and flow of the tide are within the public trust given to the states upon their entry into the Union. By virtue of the "equal-footing doctrine" states acquired all land lying under any waters influenced by the tide at the time of statehood and held it in public trust.

185 Sax 1970 *Mich LR* 476.

186 It is stated in *Knight v United States Land Association* 142 US 161 (1891) 183 that it is the settled rule of law in this court that absolute property in, and *dominium* and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.

187 *Shively v Bowlby* 152 US 1 (1894) hereafter referred to as *Shively v Bowlby.*

188 *Shively v Bowlby* 11, 12.

189 *Shively v Bowlby* 56.

> ...state control and ownership therein being supreme, subject only to the paramount right of navigation and commerce.

This principle originated from *Illinois Central Railroad Company v Illinois,*[190] widely regarded as the *locus classicus* in American public trust law.[191] The case embodies the essence of the doctrine and indicates the extent to which the trusteeship restrains governments.[192] In this case the court confirmed[193] that the geographical reach of the doctrine was extended to non-tidal waters which are navigable.[194] It is important

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190 *Illinois Central Railroad Company v Illinois* 146 US 387 (1892), hereafter referred to as *Illinois Central Railroad Company*. Kearney and Merrill 2004 *U Chi LR* 805-924 indicate in an interesting article that *Illinois Central Railroad Company* needs to be re-read against the background that prevailed during the time the case was decided by the court. After a thorough analysis of these circumstances they had to conclude that the railroad company most probably used corrupt means to procure the Lake Front Act of 1869.

191 Cognisance must be taken of the fact that *Arnold v Mundy* 6 NJL 1 (1821) is another leading case in public trust law. In this case an American court formulated the traditional public trust doctrine. In the 1988 Supreme Court decision of *Phillips Petroleum Co* 473 the court expressed the view that *Shively v Bowlby* is in fact the seminal case in American public trust jurisprudence. *Shively* rested on prior decisions of the US Supreme Court eg *Illinois Central Railroad Company* and *Knight v United States Land Association* 142 US 161 (1891).

192 The facts of the case are that an extensive grant of submerged lands was made in fee simple to the Illinois Central Railroad by the Illinois legislature 1869. The grant included all the land underlying Lake Michigan for one mile out from the shoreline and extended one mile in length along the central business district of Chicago. It comprised virtually the whole commercial waterfront of the city and it is not surprising to find that by 1873 the legislature had regretted its generosity. The legislature repealed the said grant and brought an action to have the original grant declared invalid. The court gave an extensive account of the history of the title to the land claimed by the company. Thereafter the common law position on the ownership of navigable waters was discussed. The court stated that it was settled law that the ownership of and *dominium* and sovereignty over lands covered by tide waters, within the limits of the several states, belonged to the respective states within which they were found. The states could use or dispose of any portion thereof when that could be done without substantial impairment of the interest of the public in the waters. The right of congress to control navigation was an inherent limitation on the states *dominium* that had to be considered when these lands were alienated. Consequently the court held that the grant of the lands to the railroad company was revocable and revoked it. One of the unresolved questions from *Illinois Central Railroad Company* is whether a grant of trust resources is voidable or void *ab initio*. There is language in the case suggestive of both concepts and subsequent courts have taken different approaches. The writer hereof concedes that the *ratio* favors the interpretation of the grant being voidable

193 The court confirmed the principle stated in *The Propeller Genesee Chief v Fitzhugh* 12 How 443 (1852) 457 and *Barney v Keokuk* 94 US 324 (1877) 338 extending the doctrine to waters which were nontidal but nevertheless navigable.

194 The court acknowledged that 'tidewater' and 'navigability' were synonyms at common law. This was a significant change to the original English doctrine. It also seems as if the court left room for the further expansion of the public trust.

to note that the extension of the scope of the doctrine from tidal waters to all navigable waters did not simultaneously withdraw from public trust coverage those lands beneath nonnavigable waters.[195] The public trust doctrine was extended to cover navigable fresh water without reducing the scope of the public trust in tidelands.[196]

When dealing with the scope of the traditional public trust doctrine it is, therefore, important to note that although the sovereign was deemed to hold land acquired by right of discovery as representative of the nation and in trust for them,[197] the *dominium* and property in navigable and tidal waters[198] and the soil beneath them were traditionally the only things subject to the benefit of the doctrine. States could only exercise their *dominium* in a way that would insure freedom in their use, a use consistent with the public interest. The court emphasised that state

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Not only was the extension from tide water to navigable water endorsed but it was stated on 454 that:

> So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be entirely beyond the direction and control of the state.

This occurrence was later highlighted by Olson 1975 *Det CLR* 161-209. Some commentators interpreted the *Illionois Central Railroad Company* to signify the navigability of water as the distinguishing characteristic which determined whether lands fell within the scope of the trust. Patric Dunphy explained in an interesting article how the changing definition of 'navigable water' contributed to the expansion of the public trust doctrine - Dunphy 1976 *Marq LR* 794-796. Stevens 1980 *UC Davis LR* 202 indicated how the varying definitions of navigation created the paradoxical situation in which public trust uses are being increasingly furthered away by new and expanded definitions of public right having nothing to do with the common law concept of ownership by the sovereign of the bed of a waterway. However, the US Supreme Court made it clear in *Phillips Petroleum Co* 478 that navigability should not be regarded as the *sine qua non* of the public trust interest. The dissenting judges did however argue at 486 that

> Navigability, not tidal influence, ought to be acknowledged as the universal hallmark of the public trust.

195 It was explicitly stated in *Phillips Petroleum Co* 478-480 that the Supreme Court will not abandon the ebb and flow rule and seek to fashion a new test to govern the limits of public trust tidelands, since the ebb and flow rule has the benefit of uniformity and certainty and ease of application. It also has a lengthy history at common law and in many state courts.

196 This statement is in principle supported in *California Earth Corps* 480 where the court stated in 2005:

> Though the rule applies generally to all navigable waters, it had its first application to tidelands.

197 *Martin v Waddell* 409; *Shively v Bowlby* 14.

198 The 'public common of piscary' is included in the *dominium* of navigable water. It is stated in *Illinois Central Railroad Company* 436 that the English notion of *dominium* and ownership by the crown of land within the realm under **tide** waters were equated with the requirement of navigability.

ownership of lands subject to the public trust were held by a title different in character from that which states hold in lands intended for sale:[199]

> It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.

Being consistent with the public interest, the use of lands subject to the public trust doctrine could be modified or altered. Any modification of existing use was permissible as long as the public interest was not substantially impaired.[200] The character of the title held by the government compelled the government to preserve such waters for the use by the public since the trust devolved upon the state for the public's benefit. The state can only fulfil its responsibilities through the management and control of the property and it cannot be relinquished from that duty by a transfer of the property. The control of the state for purposes of the trust can never be lost except when a public interest is being promoted or where the alienation does not substantially impair the public interest in the remaining lands and waters. The crux of the finding is summarised in the following quotation:[201]

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them... than it can abdicate its police powers in the administration of government and the preservation of the peace.

In conclusion it was stated that public property subject to the public trust cannot be placed entirely beyond the direction and control of the state.

This does not mean that there is a naked prohibition on the alienation of public trust lands. Some states have even relinquished a public trust

199 *Illinois Central Railroad Company* 452.
200 *Illinois Central Railroad Company* 452.
201 *Illinois Central Railroad Company* 453.

claim to tidelands.[202] The argument that trusteeship put public trust lands wholly beyond the police power[203] of the state making them inalienable is not consistent with existing precedents.[204] In both *Martin v Waddell* and *Shively v Bowlby* it was held that since the suit property was held in trust for the public, property clothed with this perpetual public right of user could not easily be alienated by the sovereign.[205] Courts found that a stricter standard was to be applied when conveyances were scrutinised. There was a presumption against the sovereign's intention to part with any portion of the public domain, unless clear and specific words to that effect were used.[206] It was also held that whatever title the grantee took was burdened by the public trust and would be read in conformity with it.[207] The state lacked the power to diminish public trust rights when trust property was conveyed to private parties.[208] Thus, when a private party acquired property burdened with the public trust, it acquired only the *jus privatum.* The test to determine the validity of alienation would, therefore, lie in the question whether the grant was of such magnitude that the state would effectively have given up its authority to govern the property to protect the public's rights in the property.[209] While it is permissible that the public use can be diminished or altered, it would not be permissible for the public's right afforded under the doctrine to be completely obliterated.

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202 *Phillips Petroleum Co* 483. It is worth noting, however, that even in some of these states public rights to use the tidelands for the purposes of fishing, bathing and hunting have been recognised – *Bradford v The Nature Conservancy* 224 Va 181(1982) 195-198.

203 Van der Walt *Constitutional Property Clause* 103 explains that 'police-power' refers to the state's duty to promulgate and enforce regulations that promote or secure public health, public security and public safety.

204 Sax 1970 *Mich LR* 486 indicated that although precedents exist from which excerpts can be quoted to indicate that the government may not alienate trust property or effect changes to its use, those statements are mere *dicta*. Reed 1986 *J Env L & P* 120.

205 Sax 1970 *Mich LR* 476.

206 *Martin v Waddell* 411; *Shively v Bowlby 10.*

207 Sax 1970 *Mich LR* 487. This principle is confirmed in a 2005 decision by the Supreme Court of Michigan in *Glass v Goeckel* 473 Mich 667 (2005) 679.

208 *Glass v Goeckel* 473 Mich 667 (2005) 673, hereafter referred to as *Glass v Goeckel.*

209 Casey 1984 *Nat Resources J* 814.

When the traditional public trust doctrine is scrutinised the following features stand out:

- the doctrine applied to tidal and navigable waters and the soil covered by these waters;
- original state ownership of these resources was confirmed;
- this state ownership was not unrestricted but subject to the public's right of user for purposes of navigation, fishing and commerce;
- the uses of navigation, fishing and commerce were the only protected uses and it can be inferred that it was not the broad public interest in the resources which was protected but the public interest in relation to these specific uses. These interests were deemed protectable according the reigning societal values of the era wherein they originated;
- public uses could be diminished or altered as long as the public interest was not substantially impaired;
- the courts could apply public trust reasoning when scrutinising government dealings in connection with trust resources and even put an end to and reverse government actions not in line with the principles of the trust;
- in the rare occasion that trust property was alienated, the property received by the new owner would be subject to the conditions of the trust.

4.3.2.2 Classification of the traditional public trust doctrine

The public trust developed in the American legal system as an adjunct of the ownership of the beds of navigable waters.[210] It was the product of an effort to reconcile the opposing concepts of common ownership dating back as far as the Roman Empire and the development of the notion of ownership requiring that virtually everything has an owner.[211]

210 Stevens 1980 *UC Davis LR* 200.
211 Stevens 1980 *UC Davis LR* 195,197-198.

Stevens[212] suggests that both English and American law adopted the trust analogy to satisfy the need to identify an owner of, at least, the legal title to the resources in which people had a common right.[213] Ownership of these resources was then burdened with

> the rule of law that public rights, and such things as are materially related to them, are inalienable...[214]

and could consequently not be separated from the sovereign. Huffman, on the other hand, argues convincingly that the use of the word 'trust' in the name of the doctrine is misleading.[215] He maintains that only in the original English law formulation could the notion possibly be described as a trust:[216]

> In a legal regime that recognized title to waters and submerged lands in the King, it was possible to describe the rights held in common by the members of the public either as an easement or as an equitable interest in property in which the King had legal title. Because the King was clearly distinct from the people (that is, the trustees and the beneficiary were not the same), the trust model is applicable. Nevertheless, the questions of who created the trust, and thus its purpose, remain unanswered.

In the American context this explanation would not suffice. To position the notion within the trust concept more is needed than the mere acknowledgement that legal title can be said to vest in the state while the equitable title vests in the public.[217] The tripartite nature of the creation and operation of trusts disqualifies the traditional American public trust from being classified as a true legal trust.[218] It appears that the word

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212 Stevens 1980 *UC Davis LR* 195, 197-198, Huffman 1989 *Envtl L* 544.

213 Bader 1992 *BC Envtl Aff LR* 751 opines that the English adopted the Roman principle of *res omnium communes* but replace the notion of common ownership with that of state ownership.

214 Bracton H *On the Laws and Customs of England* 39-40 (S Thorne trans 1968) as referred to by Stevens 1980 *UC Davis LR* 197.

215 Huffman 1989 *Envtl L* 534.

216 Huffman 1989 *Envl* L 561.

217 Huffman 1989 *Envtl L* 535.

218 Huffman 1989 *Envtl L* 535, 538 points out that three parties are needed to create a trust in American law, the creator or settler of the trust, the trustee and the beneficiary. The purposes of the creator define the relationship between the

'trust' rather refers to the fiduciary responsibility of the sovereign than to the legal nature of the doctrine. The state fulfils the duty imposed on it by the public trust doctrine, by honouring the restraint on alienation and the public's right of user. The public trust right exists not at the grace of the sovereign, but despite it. In its traditional, common-law formulation the traditional public trust doctrine is, therefore, best understood as an easement that members of the public hold in common.[219] Drawing from the earliest origins of the public trust doctrine, Huffman indicated that the doctrine was the basis of private rather than public rights.

> The private rights were held in common by all members of the public, but they were exercised privately.[220]

As such it falls within the sphere of property law.[221]

4.3.3 The modern public trust doctrine

Huffman[222] noted

> The law is the handmaiden of social existence.

Considering that the law has no life of its own and that property, like any other social institution, has a social function to fulfil[223] it is not that remarkable to find that the traditional public trust doctrine has evolved into a modern public trust doctrine. The wheels of development were set in motion once the doctrine's reach was expanded from tidal waters to

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parties holding legal and equitable title. When attempting to answer the question as to who are the creator, trustee and beneficiary of the alleged trust of the public trust doctrine Huffman points out that the public can be identified as the beneficiary and the state as the trustee. However, a single entity cannot be the trustee and beneficiary of a trust.

> The democratic state is the agent of the people. It acts at the behest of the people and, therefore, for the benefit of the people. The people cannot act as fiduciary, through the state, for themselves.

The question as to the identity of the creator can also not be answered.

219 Huffman 1989 *Envtl L* 527.
220 Huffman 1989 *Envtl L* 550.
221 Coquillette 1979 *Cornell LR* 811-813; Hannig 1983 *Santa Clara LR* 211.
222 Huffman 1989 *Envtl L* 531.
223 Stevens 1980 *UC Davis LR* 199.

navigable waters. The underlying principle stimulating development has since been changing public needs created by growth and progress. The formerly common law principle has evolved into a modern doctrine with tributaries in constitutional and statutory law. In the following section the development and principles underlying this development will be scrutinised. It is important to note from the onset of the discussion that the development mainly touched the codification of the doctrine and the expansion of the scope of the doctrine. The underlying principles as discussed above remained unchanged.

4.3.3.1 Development of the traditional public trust doctrine into the modern public trust doctrine

The modern public trust doctrine has been hailed the *ultimate environmental protection tool* by many ecologists and environmentalists.[224] Yet others have criticised it.[225] It is apparent that one's philosophical perspective determines one's attitude and perception of the doctrine.[226] Supporters of the doctrine tend to romanticise its origin[227] and suggest ways to expand it. Critics on the other hand state that arguments in favour of the application of the doctrine are unpersuasive and condemn the public trust concept

> as being so vague as to introduce virtual *de novo* court review into all administrative matters.[228]

Some perceive the doctrine as ground-breaking, yet others feel it destroys the basic fabric of property law.[229]

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224 Brooks, Jones and Virginia *Law and Ecology* 182; Blumm 1989 *Envtl L* 573; Scott 1998 Fordham *Envtl LJ* 3.

225 Lazarus 1986 *Iowa LR* 656-691; Huffman 1986 *Denv ULR* 583 described the public trust doctrine as a "tool for political losers or for those seeking to avoid the costs of becoming political winners".

226 This view is shared by Bader 1992 *BC Envtl Aff LR* 754.

227 Brooks, Jones and Virginia *Law and Ecology* 182:

> Recovered from the mists of Roman law, English history and early opinions of the U.S. Supreme Court, the doctrine was discovered by Joseph Sax.

See also Reed 1986 *J Env L & P* 107.

228 Coquillette 1979 *Cornell LR* 813.

In an attempt to give an overview of the modern public trust doctrine, Joseph Sax's works and the application of the doctrine in Anglo-American jurisprudence will be emphasised.[230] Opinions of commentators, lines of development and landmark rulings by U.S. courts will be integrated with Sax's perception to provide the reader with an objective, comprehensive account of the notion. Only after the concept has been de-mystified can its applicability and significance in the South African context and specifically the mineral law dispensation be evaluated.

4.3.3.2 First tentative steps towards expansion

Joseph L Sax[231] has widely been acknowledged as the *father* of the modern public trust doctrine.[232] From the introductory comments made in his seminal work[233] it is clear that Sax considered the application and expansion of the public trust doctrine in an attempt to find one norm

229 Scott 1998 *Fordham Envtl LJ* 4; Kearney and Merrill 2004 *U Chi LR* 800.

230 Sax 1970 *Mich LR* 471-566; Sax 1980 *UC Davis LR* 185-232. The actual contemporary definition of the public trust varies from state to state. It is clear that there is no single or uniform definition of application of the doctrine. Wilkinson 1989 *Envtl L.* 425; Scott 1998 Fordham *Envtl LJ* 23; Langella 2000 *NYSLR* 185. The reason for this can be attributed to the fact that the traditional doctrine has been expanded by courts as well as the legislature. Despite this state of affairs the doctrine is based upon a few central principles.

231 As a professor of Law, first at Michigan Law School then at California, Berkeley, Joseph Sax completed meticulous research in the field of Public Trust Law. His seminal work *The Public Trust Doctrine in Natural Resource Law: Effective in Judicial Intervention* published in 1970, has sparked the usage and development of the Public Trust doctrine in American environmental law.

232 Olson 1975 *Det CLR* 162 referred to Sax's seminal work as the leading treatment on the public trust doctrine and emphasised that Sax's article was a mandatory reading for a comprehensive understanding of the public trust doctrine. Huffman 1986 *Denv ULR 566* stated: "the rebirth and dramatic growth of the public trust doctrine is in no small part the product of a classic article on the subject by Jonathan Sax". Dunning 1989 *Envtl L* 524 voiced a more balanced opinion when he stated that Professor Sax's work drew the attention of environmental law students to the public doctrine during a period of heightened public interest in environmental protection and among that environmental law scholars, interest and attention have remained high. Brady 1990 *BC Envt Aff LR* 622. Bader 1994 *Hamline LR* 52 contended that Sax *resuscitated* the public trust doctrine and applied it to modern environmental problems. Grant 1995 *Ariz St LJ* 443 described Sax as "the nation's leading public trust doctrine scholar". See also Araiza 1997 *UCLA LR* 385, 397; Kearney and Merrill 2004 *U Chi LR* 806.

233 Sax 1970 *Mich LR* 473.

which could apply throughout the spectrum of environmental management problems.[234] Inconsistency in legislative response and administrative action and the enormous disparity in legal standards whereby different resource problems were managed, necessitated the search for "a broad legal approach which would make the opportunity to obtain effective judicial intervention more likely".[235] To be an effective tool in the trade of environmental protection, the public trust doctrine had to possess three characteristics. It should create an obligation that could be enforceable against the government, vest some concept of a legal right in the general public and be capable of being interpreted consistent with contemporary concerns for environmental quality.[236]

Sax opined that the public trust doctrine possessed all three required attributes and therefore rendered it

> useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.[237]

He understood the principle underlying the Roman concepts of *res omnium communes* and *res publicae* and valued the protection given to certain public uses in the English common law. He found that those same principles underlie the American law of navigable waters and the sea. The potential this doctrine held for environmental protection did not

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234 Sax 1970 *Mich LR* 474 - Sax considered the doctrine because it is apparent from earlier case law, eg *City of Milwaukee v State* 193 Wis 423 (1927) 451-52 that the doctrine did exist specifically with reference to navigable water. Sax merely intended to indicate that the doctrine could be applied to other environmental questions. Searle 1990 *SCLR* 897 indicated that the doctrine was 're-discovered' in response to the twentieth century's environmental crisis.

235 Sax 1970 *Mich LR* 474. Sax was not alone in this search. Another article published on the public trust doctrine in 1970 indicated the urgency of finding a constructive tool in preventing environmental degradation. Cohen 1970 *Utah LR* 388-394 stated:

> In order that the great increase of public concern for our environment may be made an effective force in protecting the environment, a viable legal theory which can be used by private litigants is urgently needed.

236 Sax 1970 *Mich LR* 474.

237 Sax 1970 *Mich LR* 474.

escape his attention. Initially[238] he found conceptual support for the doctrine in a combination of ideas "which have floated rather freely in and out of American public trust law".[239] The most important of these theories was that

> certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.[240]

It was, therefore, unthinkable that any person could claim a private property interest to the detriment of the community. A related principle was

> that certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.[241]

Then there was also the recognition "that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate".[242] Von Tigerstrom[243] indicated that the key elements in all of these ideas

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238 It is interesting to note at this point, that while Sax initially chose to describe the doctrine as not substantive and rejected the property rationale as too inflexible - Sax 1970 *Mich LR* 478-483, he later described the doctrine's operation in terms of property rights and did not refrain from attaching substantive standards to judicial application of the doctrine - Sax 1980 *UC Davis LR* 185, 189-193.

239 Sax 1970 *Mich LR* 484 – Sax did not support the idea that the general public should be viewed as a property holder in the same sense that an individual can be the owner of a specific tract of land. His view is explained in Sax 1970 *Mich LR* 478-483. Coquillette 1979 *Cornell LR* 811-813 held a different opinion and stated that the true origins of the public trust doctrine lay in a property doctrine namely the *res communes* property doctrine. He declined to interpret the public trust doctrine as a principle of administrative law and stated that his approach would ensure greater protection for the public. Coquillette opined that *res communes* could well be alienated if the beneficial interest of the public is protected. In the writer's opinion this is the flaw of his argument as the concept of *res omnium communes* clearly indicates 'things common to all'. Use could be restricted but *res* communes could not be permanently alienated. Hannig 1983 *Santa Clara LR* 211 supported Coquillette's view that conceptual support for the public trust doctrine is to be found in a property notion.

240 Sax 1970 *Mich LR* 484; Casey 1984 *Nat Resources J* 812. In the case of *Arnold v Mundy* 6 NJL 1 (1821) 78 New Jersey's Chief Justice stated that a grant purporting to divest citizens of their common rights in navigable rivers would be a grievance "which never could be long borne by a free people".

241 Sax 1970 *Mich LR* 484.

242 Sax 1970 *Mich LR* 485.

243 Von Tigerstrom 1997 *J Env L & P* 382.

seem to be access and conservation: preserving public access to important resources and conserving those resources for the use of the public. The public trust concept provided a point of intersection for these notions.[244]

At first Sax had some reservations whether the public trust doctrine could function and apply within the environmental protection framework. He knew that the public trust concept could only be of value if it recognised judicially enforceable rights which restrain government activities dealing with particular interests and which are more strict than the restraints applicable to government's dealings in general.[245] One of his main concerns was that although it was clear that perpetual use was granted to the public in certain common properties like the seashore and running water, it was not clear whether these rights could legally be enforced against a recalcitrant or noncompliant government.[246] Sax[247] also indicated that the extent to which this trusteeship constrained states has been a subject of much controversy. These two concerns are interrelated, for the extent of government's constraint to deal with trust property would determine the remedy available to an injured subject.[248]

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244 This is illustrated by the remark of the court in Illinois *Central Railroad Company v Illinois* 146 US 387 (1892) 436 that the doctrine is found upon the necessity of preserving the use of navigable waters from private interruption and encroachment to the public. Al three underlying theories find application in this reasoning.

245 Sax 1970 *Mich LR* 477.

246 Sax 1970 *Mich LR* 476.

247 Sax 1970 *Mich LR* 476, 477.

248 Government can negate its responsibilities in at least two ways. On the one hand the benefit of public use can be annihilated by the alienation of the property subject to the trust. On the other hand government can use its police power to discard public use. These two possible incidences of state abuse define the parameters within which the state's limitation to deal with this property is to be determined. While it cannot not be asserted that the trusteeship put such lands wholly beyond the police power of the state making them inalienable and unchangeable in use, Sax 1970 *Mich LR* 477 correctly indicated that:

> if the trust in American law implies nothing more than that state authority must be exercised consistent with the general police power, then the trust imposes no restraint on government beyond that which is implicit in all judicial review of state action-[namely] the challenged conduct, to be valid, must be exercised for a public purpose and must not merely be a gift of public property for a strictly private purpose.

Sax's concerns about the extent to which this trusteeship constrained states disappeared after he analysed *Illinios Central Railroad.* He opined that *Illinois Central Railroad Company* articulated the central substantive thought in public trust litigation.[249] Apart from the contention that trust property cannot be sold at random,[250] Sax identified two types of restrictions on government authority which seemed to be imposed by the public trust.[251] These restrictions entailed that the property subject to the trust may not be used for any public purpose,[252] it must be held available for use by the general public[253] and the property must be maintained for certain types of uses that includes traditional uses or uses that are in some sense related to, or compatible with, the natural uses peculiar to that resource. As a result a rule was developed in certain states that a change in the use of public lands is impermissible without evident legislative approval,[254] and that public trust land can only be devoted to private use if a clear justification for the change was proved.[255] This led to the view that the doctrine had assumed the character of an implied constitutional doctrine.[256]

Cognisance must also be taken that alienation or change of use for 'a public purpose' cannot summarily be equated with the public's right of use under the public trust doctrine. To do that would be to deny that the state has a special obligation with respect to trust property.[257]

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249 Sax 1970 *Mich LR* 490.

250 Blumm 1989 *Envtl L* 584, 585 explained that although trust property is alienable, it is encumbered with an implied servitude restricting uses consistent with trust purposes. Consequently, fee simple titles remain subject to the trust. See also Kearney and Merrill 2004 *U Chi LR* 802.

251 Sax 1970 *Mich LR* 477.

252 Bader 1994 *Hamline LR* 58 emphasised in his effort to constitute a novel theory that in the context of applying the *prior use public doctrine,* the term 'public use' means that the public possesses certain rights to the use or enjoyment of the property.

253 Sax 1970 *Mich LR* 477 illustrated this restriction with the following example – A Bay might be said to have the trust imposed upon it so that it may only be used for water-related commercial or amenity uses. A dock or marina might be an appropriate use, but it would be inappropriate to fill the bay for trash disposal or for a housing project.

254 Sax 1970 *Mich LR* 492; Williams 2002 *SC Envtl LJ* 41.

255 Sax 1970 *Mich LR* 514.

256 Dunning 1989 *Envtl L* 516.

257 Sax 1970 *Mich LR* 521.

Sax promoted the view that courts should show awareness of the potential for abuse which exists whenever power over public lands is given to a body which is not directly responsible to the voting public.[258] Courts should recognise their judicial responsibility to examine legislative authority not only for its general conformity to the scope of regulatory power, but also for its consonance with the state's special obligation to maintain the public trust.[259] In determining the impact of proposed action, courts should not be narrow minded but examine the broad impact of the operation upon public uses in general.[260]

In his concluding remarks Sax admitted that the historical scope of public trust law was quite narrow.[261] It was mainly applicable to the sea, navigable waters[262] and the soil underneath these waters.[263] Parklands were also considered to be included in the trust, particularly if they had been donated to the public for specific purposes.[264] He held the opinion that the judicial techniques developed in public trust cases

> need not be limited either to these few conventional interests or to the question of disposition of public properties.[265]

He believed the principles of the public trust to be broader than their traditional application indicated and equally applicable and appropriate in controversies involving *inter alia* air pollution, strip mining or wetland filling.

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258 Sax 1970 *Mich. LR* 492.
259 Sax 1970 *Mich LR* 511.
260 Sax 1970 *Mich LR* 515.
261 Sax 1970 *Mich LR* 557.
262 Sax opined that the concept of navigability was so vague it could be considered to include all waters which are suitable for public recreation - Sax 1970 *Mich LR* 557.
263 The subjective approach followed in the interpretation and definition of the doctrine is illustrated by the fact that Bader 1992 *BC Envtl Aff LR* 754 asserted that the public trust doctrine did not simply arise to protect navigable waterways for navigation, commerce and fishing but that it rather reflects the fundamental precept that some resources in natural systems are so central to the well-being of the community that they must be protected by distinctive principles.
264 Sax 1970 *Mich LR* 557.
265 Sax 1970 *Mich LR* 557.

From this discussion it is clear that Sax regarded the public trust doctrine as an administrative tool in the hands of the judiciary to ensure that all dealings in connection with natural resources adhere to trust principles. By acknowledging the public's right of access and use of specific resources a vested right originated which was enforceable against the government. The object of this right was not static and unchangeable but could correspond with changing public needs dictated by a changing society. In 1970 Sax said:[266]

> Only time will reveal the appropriate limits of the public trust doctrine as a useful judicial instrument.

4.3.3.3 Embracing the future of environmental protection

The magnitude of articles[267] dealing with the public trust and the number of court cases where the doctrine has been invoked in litigation to stop environmentally destructive activities[268] indicate that this doctrine has stood the test of time. It did not fade away in obscurity as time went by. The reason for the expansion and continuation of the public trust idea is surely to be found in the fact that this doctrine addresses a very real problem of modern-day society.

While Sax's first article was typical of pioneering, a tentative testing of the possible application of existing legal principles to new problems, others were more assertive in their approach. Cohen[269] broadened the scope of the public trust doctrine from the onset of his exposition of the doctrine. Where Sax described the essence of the doctrine based on

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266 Sax 1970 *Mich LR* 557.

267 Lazarus 1986 *Iowa LR* 649 a critic of the doctrine acknowledged that:

> the fact that the public trust doctrine has expanded, without a concomitant reassertion of the taking issue, apparently confirms the validity of promoters' predictions that the doctrine was capable of adapting to broader environmental concerns.

268 Lazarus 1986 *Iowa LR* 632.

269 Cohen 1970 *Utah LR* 388.

the historical development as a potential device for ensuring that valuable governmentally controlled resources are not diverted to the benefit of private profit seekers,[270] Cohen[271] bluntly stated that

> the Public Trust Doctrine makes the government the public guardian of those valuable natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man.

He justified this giant leap from "navigable waters, the sea and the soil beneath them" to "natural resources which are not capable of self-regeneration and for which substitutes cannot be made by man" by advocating the existence of a constitutionally protected right to "breathe clean air, drink clean water, eat uncontaminated food and have wilderness areas preserved".[272] The distinction between Sax's approach and Cohen's, is that Sax scientifically defined the extent of the public trust doctrine within its historical boundaries and motivated its continued application to present-day environmental dilemmas while Cohen defined the concept from the *utopia* he wanted to reach with his argument that both courts and governments should recognise that the government has dominion and control over valuable resources and -

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270 Sax 1970 *Mich LR* 537.

271 Cohen 1970 *Utah LR* 388.

272 Cohen 1970 *Utah LR* 392. Cohen based his proposition on this statement made by Secretary Holmes of President's Rooseveldt's National Conservation Commission:

> The resources which have acquired ages for their accumulation to the intrinsic value and quality of which human agency has not contributed, which there are no known substitutes, must serve as the welfare of the nation. In the highest sense, therefore, they should be regarded as property held in trust for the use of the race rather than for a single generation and for the use of the nation, rather than for the benefit of a few individuals who may hold them by right of discovery or by purchase.

This remark, plausible as it may be, was just a comment. The historical development of the public trust doctrine could not be negated or overrode by this remark. This statement did not have the power to force courts or the legislature to adopt a new way of thinking. At most, it could be regarded as an influential 'push' in the right direction.

> has obligations imposed on it by a public trust to guard against environmental insults and the resulting despoliation of the resource and the environment.[273]

4.3.3.3.1 Judicial expansion of the doctrine

James Olson[274] is one of many commentators who argued that the public trust doctrine was flexible enough not to be confined by traditional boundaries. He contended that the doctrine could be used to protect other unique natural resources to which the public asserts a special claim. It is noteworthy that Olson found support for his argument that the public trust is not necessarily confined to established objects as submerged lands or tidelands in the *locus classicus* of public trust law, the *Illinois Central* case.[275] He pointed out that the *Illinois Central* case explicitly noted that submerged lands were just one example of public trust resources.[276] As stated in the discussion of the case[277] the court left the door open for future development by stating:[278]

> So with trusts connected with public property, or property of a special character **like lands under navigable waters,** they cannot be entirely beyond the direction and control of the state. (own emphasis).

Recognising that public rights' protection were accorded not only to traditional trust objects but extended to "other areas of special public importance farther inland",[279] Olson analysed the courts' *ratio decidendi.* He wanted to find an underlying principle which would indicate the extent to which the doctrine could expand.[280] The common principle found in

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273 Cohen 1970 *Utah LR* 392. Cohen advocated that environmental rights had to be included within the 'penumbra' of the unenumerated (*sic*) rights of the Ninth amendment.

274 Olson 1975 *Det CLR* 178.

275 *Illinois Central Railroad Company v Illinois* 146 US 387 (1892).

276 Olson 1975 *Det CLR* 179.

277 See para 4.3.2 *supra.*

278 *Illinois Central Railroad Company v Illinois* 146 US 387 (1892) 454.

279 Olson 1975 *Det CLR* 177 specifically referred to protection given to natural resources by legislation.

280 Olson 1975 *Det CLR* 179-183. Wilkenson 1989 *Envtl L* 427 is one many commentators indicating that different courts have extended the public trust doctrine to many kinds of resources.

all the cases he referred to is aptly encapsulated in the following citation:[281]

> The public trust doctrine – like all common law principles - should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

It is clear that the doctrine expanded along the same principle that governed the first expansion from tidal to navigable waters.[282] This illustrates that law in a democratic society reflects society's values. Although it was established that the range of public purposes protected by the trust is dictated by the "public need for continued protection of a public benefit related and attached to the land",[283] the parameters of the 'public need' were not determined by the different decisions to which Olson referred. He nevertheless opined that the concept appeared to be broad enough to fit *prima facie* showings of public need through past use and activities as well as current legislative declarations of intent concerning natural resources.[284] Because the public's needs were regarded as an important factor in determining the interests and uses protected under the trust, American case law states that -

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281 *Borough of Neptune City v Borough of Avon-by-the-Sea* 61 NJ 296 (1972) 309.

282 See para 4.3.2 and 4.3.3 *supra.* A more subtle approach than Cohen's proposition was followed in expanding the doctrine.

283 Olson 1975 *Det CLR* 182. Dunphy 1976 *Marq LR* 794 indicated that even the definition of navigability has been proved flexible enough to accommodate the changing needs of the public and contributed to the expansion of the application of the public trust doctrine. Stevens 1980 *UC Davis LR* 196 supported this assertion and Hannig 1983 *Santa Clara LR* indicated that the redefining of navigable water was one of the methods used to expand the public trust doctrine. Manzanetti 1984 *Pac LJ* 1309 also referred to the fact that the development indicated that the uses that the state must protect are defined by the 'eb and flow' of 'changing public needs'.

284 Olson 1975 *Det CLR* 183. The truth of his assertion is proved by the fact that the doctrine continued to expand despite criticism that it outlived its purpose. Bader *1994 Hamline LR* 53 stated that -

> the public trust doctrine is not a concept "fixed or static", but rather it is dynamic, meeting the changing conditions and needs of the public it was created to benefit.

> the servitude of public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use...[285]

This reasoning resulted in trust protection to be extended not only to public uses including sailing, rowing, fishing, fowling, bathing and skating[286] but the recognition that one of the most important public uses of tidelands is the preservation of these lands in their natural state so that they may serve as ecological units for *inter alia* scientific studies, open spaces and as environments which provide food and habitat for birds and marine life and affect the scenery and climate of areas.[287] In 2005 the Supreme Court of Michigan held through Corrigan J that traditional public rights under the public trust doctrine can only be protected by simultaneously safeguarding activities inherent in the exercise of those rights.[288] Stevens indicated that the development of oil and other mineral resources discovered under tidelands also emerged

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285 *Moore v Sanborne* 2 Mich 519 (1853) 525 as cited by Stevens 1980 *UC Davis LR* 221. Walston 1982 *Santa Clara LR* 81 explained that the function of the public trust doctrine is to ensure that the people retain a sovereign interest in their water resources so that they can adapt their resources to changing public needs. This view is in conformity with the development that has taken place.

286 *Caminiti v* Boyle 107 Wn 2d 662 (1987) 669; *Washington State Geoduck Harvest Association v Washington State Department of Natural Resources* 124 Wn App 441 (2004) 448. The doctrine has been used in New Jersey to ensure access by the public to areas of the beach – *The Times of Trenton Publishing Corporation v Lafayette Yard Community Development Corporation* 183 NJ 519 (2005) 532. The Supreme Court of New York, New York County held on September 1, 2005 in *Landmark West!, Board of Managers of the Parc Vendome Condominium et al v City of New York and New York City Economic Development Corporation* 2005 NY Slip Op 25362 part v that the public trust doctrine has no application with reference to buildings as the doctrine historically applied to natural resources.

287 Stevens 1980 *UC Davis LR* 221, 222. Walston 1982 *Santa Clara LR* 66 supported this view and stated that the trust is a dynamic rather than static concept and seems destined to expand with the development and recognition of new public uses. Hannig 1983 *Santa Clara LR* 226; Manzanetti 1984 *Pac LJ* 1308. Lazarus 1986 *Iowa LR* 652 stated that because of the flexibility of the doctrine "highways, driving ranges and shopping malls have passed the public muster". Bader 1992 *BC EnvtLR* 755 attributed extension of the doctrine by the courts to the fact that courts began to realise the importance of certain natural resources in sustaining the human species. Thereby the *anthroposolipsistic* nature of the doctrine was recognised. See also Pearson 2004 *J Land Resources & Envtl L* 174.

288 It is interesting to note that the Supreme Court of Michigan confirmed in 2005 in *Glass v Goeckel* 674 and 698 that walking along a sea- or lakeshore is inherent in the exercise of traditionally protected public rights of fishing, hunting and navigation. This principle has also been confirmed in *Raleigh Avenue Beach Association v Atlantis Beach Club* 46-52. The court stated on 54:

> It follows then, that use of the dry sand has long been a correlate to use of the ocean and is a component part of the rights associated with the public trust doctrine.

as a public trust use in response to felt necessities of the twentieth century.[289]

In *National Audubon Society v Superior Court of Alpine County*[290] the court expanded the reach of the doctrine to non-navigable tributaries of navigable waters where government approved conduct on the tributaries affecting the public trust values in the protected water source. This development is consistent with public trust reasoning because it would be illogical to expect the court, as watchdog, to ensure that public trust values are protected by focusing only on the resource itself but not on the surrounding circumstances that impact on and influence the status of that resource. A year later, in 1984 the Supreme Court of Montana decided that the navigability of water was immaterial when determining if the state held waters in trust for the public.[291] In 2004 a decision to the same effect was made by the Supreme Court of South Dakota in *Parks v Cooper.*[292] The reader should take note of the fact that this development did not take place in all the states. In 1990 the Supreme Court of Kansas concluded that a non-navigable body of water overlying private beds was not subject to the public trust.[293] This diversity in approach emphasises the uniqueness of the application of the doctrine in the different states.

The development that took place in individual states illustrates the evolutionary character of the law.[294] Dunning,[295] however, draws the attention back to the historical classification of resources covered by the

289 Stevens 1980 *UC Davis LR* 223. Walston 1982 *Santa Clara LR* 70 also referred to this extension of the public trust corpus. The principle to be drawn is that navigation will not always be regarded as the most important public use. Commerce can effectively compete with it. See also Lazarus 1986 *Iowa LR* 649-650 where it is pointed out that a historical battlefield, archaeological remains, a downtown area, and all natural resources including air and water are aspects regarded by different courts to be protected by the public trust doctrine.

290 In *National Audubon Society v Superior Court of Alpine County* 658 P 2d 709 (Cal 1983).

291 *Montana Coalition for Stream Access Inc v Curran* 682 P 2d 163 (Mont 1984).

292 *Parks v Cooper* 676 NW 2d 823 (SD 2004).

293 *Kansas ex rel Meek v Hays* 785 P 2d 1356 (Kan 1990).

294 Reed 1986 *J Env L & P* 107.

295 Dunning 1989 *Envtl L* 517.

doctrine. He emphasised that the two most important characteristics which a resource must possess before it can be regarded to be protected by the doctrine is scarcity and the natural suitability for common use:

> Common use by the general population serves as the basis to characterize these natural resources as common heritage or public trust assets.[296]

The sovereign's responsibility lies within this parameter as the government has an obligation to preserve the people's historic freedom of access. This is precisely the reason, argues Dunning, that justifies the demand that the state recognises a public property right and that the courts are able to limit legislative abolition or modification of that property right.[297]

Huffman[298] resented the public trust doctrine for opening the door for the judiciary to step in and annihilate government action. He argued that the doctrine undermined democracy[299] and constituted a remedy for the perceived failure of public allocation.[300] He objected to the fact that judicial review under the doctrine has taken over the role appropriately played by the political branches of government.

The initial aim of using the public trust doctrine as a device for ensuring that valuable government controlled resources are not diverted solely to the benefit of private profit seekers[301] has exploded into an all embracing environmental protection mechanism. Where the traditional doctrine evolved to protect common rights of access for commercial purposes,

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296 Dunning 1989 *Envtl L* 522.
297 Dunning 1989 *Envtl L* 522; Maguire 1997 J *Env L & P* 11.
298 Huffman 1986 *Denv ULR* 582-584.
299 Contrary to Huffman's perception Blumm 1989 *Envtl L* 580 considered the doctrine:
> a democratizing force by (1) preventing monopolization of trust resources and (2) promoting natural resource decision making that involves and is accountable to the public.
300 Huffman 1986 *Denv ULR* 584.
301 Sax 1970 *Mich LR* 537; Casey 1984 *Nat Resources J* 812.

the modern public trust doctrine proclaims conservationist principles. It is this expansion of the doctrine to cover property not previously subsumed by the doctrine that elicits criticism.

Lazarus[302] opined that the public trust doctrine rests on legal fictions created to avoid judicially perceived limitations or consequences of existing rules of law. He described the notions of "sovereign ownership" of certain natural resources and the "duties of the sovereign as trustee" to natural resources as -

> judicially created shorthand methods to justify treating differently governmental transactions that involve those resources.[303]

He doubted the ancient law origins of the doctrine and in assuming its existence stated that the viability of the ancient roots is largely irrelevant to the doctrine's current application.[304] In his opinion ancient history merely provided the "seeds of ideas".[305] While the application of this "legal fiction" might have been necessary in the wake of changing circumstances that strained existing legal norms, Lazarus[306] deemed that the need for its application dissipated over time

> as the fabric of the law was woven in a more coherent and systematic fashion in response to those initial changes.[307]

He argued that the fiction is no longer necessary and that its continued use obscures analysis and impedes the law's coherent development.[308] According to Lazarus[309] a "new and unified fabric for natural resources

302 Lazarus 1986 *Iowa LR* 656.
303 Lazarus 1986 *Iowa LR* 656.
304 Lazarus 1986 *Iowa LR* 657.
305 Lazarus 1986 *Iowa LR* 657.
306 Lazarus 1986 *Iowa LR* 657.
307 Contrary to Lazarus's opinion, it seems as if the courts have increasingly relied upon the public trust doctrine to justify an assortment of decisions that had the purpose of protecting natural resources from degradation or destruction in the same period that Lazarus wrote his article – Huffman 1986 *Denv ULR* 565.
308 Lazarus 1986 *Iowa LR* 657.
309 Lazarus 1986 *Iowa LR* 658, 691.

law" is being woven by the development which has taken place in the law of standing, tort law, property law, administrative law and the police power, driven by increased societal concern for, and the awareness of, the environmental and natural resources dilemmas. Although he recognised the possible influence of the public trust doctrine in this development he concluded:

> much of what the public trust doctrine offered in the past is now, at best, superfluous and, at worst, distracting and theoretically inconsistent with new notions of property and sovereignty developing in the current reworking of natural resources law.

Lazarus's verdict was that the public trust doctrine has outlived its purpose.[310]

4.3.3.3.2 Legislative codification of the doctrine

The discussion above indicates the extent to which courts have expanded the public trust doctrine or commentator's advocate it should be done. Although the modern public trust doctrine is primarily a creation of state courts,[311] Sax's work also motivated the legislature to take action.[312] Following Sax's seminal work many state legislatures passed environmental statutes expressing that the public trust extended

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310 Searle 1990 BC *Envtl Aff LR* 632.

311 Reed 1986 *J Env L & P* 117; Wilkinson 1989 *Envtl L* 461 held the opposite opinion of the doctrine being mainly federally and constitutionally imposed.

312 Blumm 1989 *Envtl L* 574 aptly stated that judges have found "this deeply conservative doctrine in state constitutions, state statutes and in the common law". The Supreme Court of Hawai'I confirmed in *Morimoto and Yamada v Board of Land and Natural Resources* State of Hawai'i 107 Haw 296 (2005) 301 n16 that the public trust doctrine has been adopted in Hawai as a fundamental principle of constitutional law. Article XI, section 1 of the *Hawai'i Constitution* provides that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilisation of these resources in a manner consistent with their conservation and in furtherance of the self-suffiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

In Florida the public trust doctrine is incorporated in the *Florida Constitution*,1968 Article X, ss 11, 16.

to all natural resources.[313] The public trust doctrine retained flexibility and vitality through this criterion because this approach permits the active management of the *corpus* of the trust by the elected representatives of the public.[314]

4.3.3.3.3 Conflicting public trust uses

As more public uses are being protected by the trust the need for the prioritisation of public trust rights develops.[315] There is no rigid prioritisation of public trust uses and when uses conflict a balancing process has to be undertaken.[316] This necessarily obligates the state to balance the protection of the public's right to use resources with the protection of the resources that enable these activities.[317] Thus, when impairment of a public trust use occurs the impairment is balanced against other public trust uses.[318] Cassey[319] indicated that the state may choose between trust uses and has the power to "destroy the navigability of certain waters for the benefit of others". The doctrine provides for choice between competing uses like navigation and commerce, or between development and conservation. This prerogative belongs exclusively to the state and cannot be exercised by private individuals.[320] Ray J stated on behalf of the majority in *California Earth Corps*[321] that the trust grantee has primary authority over how its trust

313 Stevens 1980 *UC Davis LR* 228. Stevens *inter alia* indicates that the wording of the *Pennsylvania Constitution*,1874 that reads as follow were taken to state a public trust:

> Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

His view is shared by Ryan 2001 *Envtl L* 477. Hannig 1983 *Santa Clara LR* 215 identified constitutional and statutory provisions as a source whereby the public trust is expanded.

314 Dunphy 1976 *Marq LR* 802.

315 Stevens 1980 *UC Davis LR* 223.

316 Stevens 1980 *UC Davis LR* 223.

317 *Washington State Geoduck Harvest Association v Washington State Department of Natural Resources* 124 Wn App 441 (2004) 448.

318 Hannig 1983 *Santa Clara LR* 213, 232.

319 Casey 1984 *Nat Resources J* 815.

320 Walston 1982 *Santa Clara LR* 63-93.

321 *California Earth Corps* 766.

lands are administered and the right to select among competing uses for a particular trust parcel. The legislature has the power to amend the trust grant to dictate a particular trust use at a particular trust site. Any exercise of a traditional public right remains subject to criminal or civil regulation by the legislature.[322] Through regulation, the state manages the use of the resources on the land in the public interest.

If it is kept in mind that the courts are the protectors of the public trust, it makes sense that they have to be able to investigate the motives behind government's decision and review the considerations taken into account when one public use is fostered to the detriment of another. It was stated in the *Citizens for Responsible Wildlife Management*[323] that courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny as if measuring the legislation against constitutional protection. In this way the principles of the doctrine will be promoted as the courts will be able to ensure that the public's rights are protected.

4.3.3.3.4 Infringement of vested private property rights

The public trust doctrine interferes with private property rights. In American jurisprudence the question has been asked whether the Fifth Amendment can be regarded as a limitation on the public trust doctrine. The principal problem is the extent to which the public trust doctrine can eliminate property rights without Fifth Amendment compensation.[324] If a vested right is reduced or extinguished because of incompatibility with public trust uses, the question is whether the deprived person is entitled to be compensated for the loss.[325] It is on this specific aspect that the expansion of the doctrine to new fields not historically included under the

322 *Glass v Goeckel* 698.
323 *Citizens for Responsible Wildlife Management et al v State of Washington* 124 Wn App 566 (2004) 570, 571.
324 Callies and Breemer 2002 *Val ULR* 355. See par 4.3.3.3.4.1 *infra* for a short discussion on the content of the Fifth Amendment.
325 This question is relevant in the South African mining dispensation context.

coat of the doctrine provokes the most criticism.[326] Callies and Breemer[327] correctly stated that the expansion of the doctrine has precipitated a collision between the newfound rights of the public under the trust doctrine and private rights traditionally flowing from private property. In evaluating the effect of the public trust doctrine on any given resource it should, however, be kept in mind that the doctrine does by no means permit *every use* of trust lands and waters,[328] neither does the status of trustee permit the state, through any of its branches of government, to secure to itself property rights held by private owners.[329] It is only limited public rights that are protected.[330]

To contextualize the doctrine's interferences with private property rights it is necessary to cast a bird's eye view over relevant aspects of Anglo-American takings law.

4.3.3.3.4.1 The takings analysis[331]

In American jurisprudence the Takings Clause of the Fifth Amendment prevents the government from taking "private property ... for public use without just compensation." A 'taking' need, however, not arise from an actual physical occupation of land by the government but the Supreme Court has held that "if a regulation goes too far it will be recognized as a taking".[332] In order to prove a compensable taking not arising from the physical appropriation or occupation of private property, the *Penn Central* analysis applies. The American Supreme Court set forth a three

326 Huffman 1989 *Envtl L* 554 stated that while the doctrine was historically focused on protecting individual liberties from the abuses of monarchical power, the doctrine is today employed to limit the acquisition and exercise of private rights in *inter alia* water and water-related resources, often through abuse of sovereign power.

327 Callies and Breemer 2002 *Val ULR* 357.

328 *Glass v Goeckel* 698.

329 *Glass v Goeckel* 694.

330 *Glass v Goeckel* 698.

331 For a thorough exposition of the Unites States of America's federal constitutional property clause see Van der Walt *Constitutional Property Clauses* 398-458. Also see chapter 5 *infra* for a discussion of the concept of expropriation in South African law.

332 *Penn Central Transportation Co v New York City* 438 US 104 (1978) 124, hereafter referred to as *Penn Central*.

part analysis in *Penn Central* to determine whether or not a compensable taking has occurred. The main factors which provide the framework for the analysis are (1) the character of government action, (2) the economic impact of the action on the claimant, and 93) the extent to which the action interfered with the claimant's reasonable investment-backed expectations. The court stressed that the focus must be on the "parcel as a whole" [333] and that each case should be judged on its own facts[334] when conducting the takings analysis. It is made clear in *Lucas v South Carolina*[335] that for purposes of takings analysis, the title one takes to property is subject to background principles of state law. In *Lucas* the Supreme Court stated that the government need not compensate the property owner if the regulated or prohibited use was not "part of his title to begin with".[336] This perspective should be kept in mind when the doctrine's interferences with private property is evaluated.

4.3.3.3.4.2 Perspectives from practise

In *National Audubon Society v Superior Court of Alpine County*[337] the public trust doctrine was formulated to allow the state to reconsider[338] water allocation decisions that permitted harm to come to the *corpus* of the trust, even though the initial allocation decisions were made after due consideration of their effect on the public trust. The purpose of the modern trust doctrine was defined by the court as follows:[339]

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333 *Penn Central* 130-131.
334 *Penn Central* 124.
335 *Lucas v South Carolina* 505 US 1003 (1992), hereafter referred to as *Lucas*.
336 *Lucas 1027.*
337 *National Audubon Society v Superior Court of Alpine County* 33 Cal 3d 419 (1983), hereafter referred to as *National Audubon Society.*
338 According to Manzanetti 1984 *Pac LJ* 1291 this power to reconsider vested water rights was a new facet to the public trust doctrine. However, Casey 1984 *Nat Resources J* 815 stated that the principles set forth in the *Illinois Central* decision illustrated that the power of the state in administering the trust resource extended to revocation of previously granted rights and the "enforcement of the trust against resources long thought free of the trust".
339 *National Audubon Society* 558-559.

> The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

The court confirmed that the public trust doctrine preserves the continuing sovereign power of the state to protect uses for water deemed to be in the public interest, as there are no 'vested rights' in trust property.[340] Although the decision in this case was merely advisory because no vested rights had been affected directly, the California Supreme Court suggested that it would reject a claim that these reductions constitute takings for which compensation is required as no one is divested of any title to property. However, this could result in the total annihilation of owners' rights towards their property or exclude current right holders.[341] The Washington Supreme Court voiced a similar opinion in *Orion Corporation v State of Washington.*[342] The Court held that the public trust precludes a constitutional claim for taking without compensation because title to trust resources are acquired subject to whatever state action may be deemed necessary to protect the public's interest in the trust resources.[343]

Perhaps the most far-reaching extension of the public trust doctrine is illustrated by the Hawaiian case *In re Water Use Permit Applications.*[344] Here the court imposed a broad version of the doctrine onto the state's fresh water supply thereby rewriting Hawaii's legislative water code. The court held that "resource protection" was a protected public trust use of such resources. In response to a taking objection the court stated:[345]

340 *National Audubon Society* 447.
341 *National Audubon Society* 440.
342 *Orion Corporation v State of Washington* 747 P 2d 1062 (Wash 1987).
343 *Orion Corporation v State of Washington* 747 P 2d 1062 (Wash 1987) 1081-1082.
344 *In re Water Use Permit Applications* 9 P 3d 409 (Hawa 2000).
345 *In re Water Use Permit Applications* 9 P 3d 409 (Hawa 2000) 494.

> the reserved sovereign prerogatives over the waters of the state precludes the assertion of vested rights to water contrary to public trust purposes. This restriction preceded the formation of property rights in this jurisdiction; in other words, the right to absolute ownership of water exclusive of the public trust never accompanied the "bundle of rights" conferred ...

Manzanetti[346] indicated in an interesting article that the public trust doctrine avoids the takings issue by claiming a pre-existing title[347] in the property in favour of the state. He argued that the compensation requirement may only be dispensed with if the property holder had actual or constructive prior notice that the state was obliged to protect public trust uses.[348] He continued and stated that the doctrine would only be applicable as means to avoid the compensation requirement if it could be shown that the right holder had prior notice of expectations by the public which are incompatible with his expectations regarding his right as owner or holder.[349] He researched the development of the scope of the

346 Manzanetti 1984 *Pac LJ* 1305. This view is shared by Bader *1994 Hamline LR* 54 who contended that explicit notice of the public trust interest in land is not necessary and is assumed to run with trust resources from the moment of statehood. His view does not explain the inclusion of non-traditional resources within the scope of the doctrine. See also Grant 1995 *Ariz St LJ* 427.

347 Manzanetti 1984 *Pac LJ* 1306 explains that according to the theory of pre-existing title, the state always has had a title in the property. Property holders should, therefore, have known that the state had pre-existing title when they acquired their property and when the state acts to reassert title to the detriment of the property holder, compensation is not required. The need for compensation under the Fifth Amendment is obviated by the prior knowledge of the pre-existing title. The reason behind this contention is that if the property holder had notice of the pre-existing title in the state, the reassertion of the rights in the title caused neither a change in the law, nor a change in the structural rules under which the property holder was to make choices regarding expectations in his property rights. If, however, announcement by the state that a pre-existing title clouded the property holder's title is "constituting a sudden change in state law, unpredicted in terms of relevant precedents" government action pursuant to that announcement constitutes a deprivation of property for which compensation is required. Lazarus 1986 *Iowa LR* 673 supported Manzanetti's argument when he stated that parties who engage in economic activities in an area that they know is of public concern and regulated by government, are on notice that the government may regulate in the future. For that reason they cannot complain when their investments are adversely affected by subsequent regulations.

348 Manzanetti 1984 *Pac LJ* 1307. Grant 1995 *Ariz St LJ* 427 confirmed that an owner is entitled to compensation if the government action "goes beyond what the relevant background principles would dictate".

349 Manzanetti 1984 *Pac LJ* 1296. See also Blumm 1989 *Envtl L* 586. Neither Manzanetti nor Blumm referred to Justice Field's majority opinion in *Illinois Central 146 US at 455* where he opined that where a state resumes control over a previously granted trust resources, the state "ought to pay" for any "expenses

public trust doctrine and confirmed that although the uses protected by the public trust remained linked to navigation, commerce and fishing for several decades the 'changing public needs' dictated the extension of protection awarded under the public trust doctrine.[350] He contended that the retroactive application of this expanded definition of the public trust in derogation of exercised property rights constituted a taking requiring compensation.[351] Determining the existence of prior notice would remain a factual question to be answered in every individual case.

Manzanetti's line of reasoning was echoed in the U.S. Supreme Court's decision of *Phillips Petroleum Co et al v Mississippi et al*[352] The court found that:

> The fact that certain private claimants have long been the record title holders of lands in the state of Mississippi that lie under nonnavigable waters, or that such claimants have long paid taxes on such lands, does not divest the state of its ownership of those lands under the public trust given to the state upon its entry into the Union... the state's ownership of those lands could not be lost via adverse possession, laches, or any other equitable doctrine.[353]

The importance of the *National Audubon Society* decision is the government's greater reliance on the public trust doctrine as a tool to expand sovereign authority and enhance state enforcement efforts over natural resources covered by the doctrine.[354] A natural result of the

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incurred in improvements made under such a grant". Rasband 1998 *U Colo LR* 333 argued that this remark indicated that although a state exercise of a public easement might not require just compensation under the Fifth and Fourteenth Amendments, it may merit some compensation as a matter of equity. He relied on *Mistaken Improver Law*, a concept dealt with in South Africa under Enrichment Law, and also argued that equitable compensation should be regarded as being part and parcel of the public trust doctrine.

350 See para 4.3.2.2 and 4.3.3.3 *supra.*

351 Manzanetti 1984 *Pac LJ* 1310. He is supported by Huffman 1989 *Envtl L* 559 who contended that by expanding the scope of public trust rights, the state will expand its ability to regulate beyond the constraints of the *Constitution* and evade the taking limits on the police power.

352 *Phillips Petroleum Co* 481-485.

353 Dissenting judges argued that this finding broke a chain of title that reached back more than 150 years. They opined that settled expectations of landowners would be disrupted.

354 Lazarus 1986 *Iowa LR* 655.

expansion of the doctrine which compromises previously privately held property, is the blurring of traditional boundaries between public and private property.[355] Huffman[356] was annoyed that the public trust doctrine "ignored the fact that the foundation of our resource allocation system is private property rights".[357]

Reed[358] warned that the public trust doctrine should not be regarded as creating a reversionary right by which the public can reclaim trust property long lost. Where the public uses secured by the doctrine are lost for any significant period of time, the doctrine should cease to apply. He emphasised the importance of the law's interest in the stability of land title and argued that the

> re-emergence of an ancient doctrine should not be allowed to upset titles created and relied upon previous to the doctrine's rediscovery.[359]

4.3.4 Impairment of the public trust and limitation on government activities.

The limitations placed on governments' activities, strictly speaking, determine the scope of the public trust doctrine. Because the state is regarded as the trustee of property impressed with the public trust doctrine, the legislature is charged with the task of managing the trust.[360] The legal title of trust property vests in the state and is restricted only by the trust. As such the trust requires the legislature to act in all circumstances where action is necessary, be it to preserve or promote

355 Searle 1990 *SCLR* 916.
356 Huffman 1986 *Denv ULR* 584.
357 Hufmann relied strongly on Garrett Hardin's 'tragedy of the commons' in substantiation of his argument in favour of private property rights. An opposite view is promoted by Rose 1986 *U Chi LR* 711, 723, 749-761, 774-777 who indicated that the inherent public nature of waterways and submerged lands persisted through history precisely because the privitisation of these resources would be counter effective and not produce efficiency. Public rights in roadways and waterways fostered commerce by producing return of scales and eliminating dangers of privitisation such as holdouts and monopolies.
358 Reed 1986 *J Env L & P* 118.
359 Reed 1986 *J Env L & P* 119.
360 Dunphy 1976 *Marq LR* 796.

it.[361] An affirmative duty is imposed on the state.[362] The judiciary is to act as watchdog of the trust. Existing precedents have indicated that the judiciary would go beyond form to substance, to insure that the legislative authority fulfils its duty in administering the trust.[363]

The broadest parameter of the public trust doctrine, therefore, has its origin in the state's valid exercise of the police power and the power of eminent domain in the reallocation and disposition of natural resources.[364] The public trust doctrine is also an additional limitation on the exercise of the police power and the power of eminent domain in relation to the reallocation of natural resources. In a sense this doctrine expands the exercise of the police power because stricter regulation may be required to safeguard the use of the resource by the general public.[365] Bader[366] appropriately stated:

> unlike most property, real estate containing public trust resources is subject to far more restrictive regulation in its use than other private lands.

This stems from the unique value trust resources have to society as a whole.

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361 Dunphy 1976 *Marq LR* 797.

362 Blumm 1989 *Envtl L* 585.

363 Dunphy 1976 *Marq LR* 798. Stevens 1980 *UC Davis LR* 217 supported this contention and stated that the courts would not be bound by patently inaccurate declarations of public purpose for legislation having as its goal the destruction of public waters for private profit. This role suits the judiciary well for as Pearson 2004 J *Land Resources & Envtl* L 173 remarked: "While the doctrine can originate in constitutional or statutory law, typically its genesis is judicial decision".

364 Olson 1975 *Det CLR* 164.

365 Lazarus 1986 *Iowa LR* 655 indicated that developments in the public trust arena in the early 80's were confined to suits in which the private citizen is the plaintiff asserting the doctrine and the government is the unwilling defendant resisting the trust's application. Government argued that the public trust doctrine expands sovereign authority over natural resources covered by the doctrine, limiting the nature of valid private property rights in those resources while rendering permissible governmental measures that impinge on those private interests.

366 Bader 1994 *Hamline LR* 54.

However, the view that the doctrine is a source of authority for state regulation is seen by some commentators as a distortion of the historical purpose of the public trust doctrine:

> The problem with the equation of public trust and police power is that the public trust doctrine purports to be the basis of a rights claim rather than a source of governmental power. Because public trust rights are understood to predate other property rights, their status in relation to those rights claims is always prior in time, and therefore, superior in right. There can be no claim that enforcement of public trust right results in a taking because individual property rights are by definition subject to the prior public rights.[367]

Huffmann[368] argued that by expanding the scope of the public trust doctrine, the ability of the state to regulate beyond the constraints of the Constitution will simultaneously be expanded. In so doing the state can evade the due process and takings limits on the police power. The valuable protection thus awarded to private property rights will be non-existent.

Dunphy[369] indicated that the proper application of the public trust doctrine may even cause the doctrine of the constructive taking of property to be inapplicable where a zoning ordinance could be classified as preventing a harm,[370] regardless whether the land in question was rendered practically, or substantially useless for all reasonable purposes or shouldered the individual owner with a loss disproportionate to the social benefit. The public trust doctrine simultaneously provides a basis

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367 Huffman 1989 *Envtl L* 558.

368 Huffman 1989 *Envtl L* 556-561.

369 Dunphy 1976 *Marq LR* 790.

370 Dunphy 1976 *Marq LR* 790-792 indicated that the majority of zoning ordinances are rarely designed to prevent loss of life and property. Normally they promote health, safety and general welfare. The nuanced differentiation between promoting health and explicitly preventing the loss of life or property may not be easy to determine. Where a specific danger can be avoided by strictly regulating the use of trust property a distinction can be made between a valid police power regulation and an invalid taking without just compensation –

> A constructive taking does not occur when a change of the essential natural character of land, harmful to the public, is prevented by the police power.

for the state to retain continuing jurisdiction over the trust *corpus* so that continuing choices dictated by the public need can be made.[371] However, the power of eminent domain may be limited where a public trust is shown to be present in the resource as the taking needs to be proved in consistence with the public's right of user connected to the resource.

Five elements have been identified on the basis of case law as the criteria that must be applied when the factual determination of justified impairment of the trust *corpus* is to be made.[372] The application of the following five basic concepts, representing the substantive limitations named by Sax,[373] will indicate the extent and validity of the impairment:

(1) some retention of governmental control;
(2) continued public use and availability;
(3) relative diminution of size;
(4) non-interference with past or existing public uses; and
(5) a subjective test of public reaction to the new or proposed use.

When proposed dealings with trust resources are being evaluated these five elements will indicate whether the proposed action honours public trust values. Where courts have to resolve conflict between public trust use rights and other uses which private landowners and public entities would like to make or may currently be making of trust resources a similar but extended balancing test has been proposed.[374] This test also consists of five weighted factors:

(1) current public trust uses should be accorded the greatest weight;
(2) potential public trust uses should be considered;

371 Walston 1982 *Santa Clara LR 64,* 85 indicated with reference to the allocation of water rights that the public trust doctrine enables the state to allocate, and if necessary reallocate its water supply for the protection of important public interests.
372 Olson 1975 *Det CLR* 184; Williams 2002 SC *Envtl LR* 42.
373 See par 4.3.3.2 *supra.*
374 Hannig 1983 *Santa Carla LR* 232-236.

(3) compatibility of new uses with public trust rights should be investigated;

(4) the reasonable expectations of all concerned parties and the public should be taken into consideration; and

(5) the court should consider whether appropriation or private use of trust property would constitute a significant diminution in the amount of land or water locally available upon which the public could exercise its trust rights.

Hannig[375] conceded that this test might be a more equitable test for resolving conflicts between public and private uses of trust lands.

4.3.5 Procedural and substantive aspects

It is apparent that some substantive advantages are brought about by the application of the public trust doctrine. Cohen pointed out that application of classical public trust law suggested

> opportunities for the additional benefit of presumptions in favor of the protection of trust resources.[376]

In addition, a preference was shown towards the continuation of the trust[377] and the "prohibition of invasion of the *corpus*".[378] An important consequence of this development is that the burden of proving the necessity for desecrating the trust *corpus*, or altering existing use will fall on the party who wants to change existing use, be that the government or a private party. This party will be required to show that its actions are promoting the public benefit and are consistent with the public trust.[379]

375 Hannig 1983 *Santa Carla LR* 232-236.
376 Cohen 1970 *Utah LR* 392; Reed 1986 *J Env L & P* 108.
377 Lazarus 1986 *Iowa LR* 654 pointed out that courts required strict statutory construction of legislative delegations of authority to administrative action as a method to check governmental activities that threaten trust resources. The general test is whether the legislative delegation of authority to the administrative agency is clear, express and specific. See also Blumm 1989 *Envtl L* 587-589.
378 Cohen 1970 *Utah LR* 392.
379 Cohen 1970 *Utah LR* 392.

This approach would require, at minimum, an environmental assessment and in most cases a full environmental impact statement.[380]

Michael Blumm[381] stated that the chief characteristic of the doctrine was not so much the resources to which it attached but the diversity of remedies it provides to resolve resource conflicts. He identified four different types of public trust remedies:

(1) a public easement guaranteeing access to trust resources;[382]

(2) a restrictive servitude insulating public regulation of private activities against constitutional takings claims;[383]

(3) a rule of statutory and constitutional construction disfavouring terminations of the trust; and

(4) a requirement of reasoned administrative decision making.[384]

The public trust doctrine can, therefore, be relied on in three different scenarios. It can be used by private parties against the government where proposed government action threatens the corpus of the trust or negates the public trust values. It can be used by government to prevent private parties from infringing on trust values and it can be used by private parties against other private parties where trust values are ignored or infringed.

4.3.6 Classification of the modern public trust doctrine

There seems to be no unanimity on the nature of the modern public trust doctrine. American courts have treated the doctrine largely as a public

380 Reed 1986 *J Env L & P* 108.

381 Blumm 1989 *Envtl L* 575.

382 Blumm 1989 *Envtl L* 583 explained that public trust access did not acquire a rigid pattern of public use. The doctrine has proved to be flexible enough to prescribe taxation and regulatory schemes that while not prohibiting public access to trust resources made it difficult.

383 See par 4.3.3.3.4.1 *supra.*

384 Blumm 1989 *Envtl L* 589, 591 indicated that courts require government agencies to offer detailed explanations of their decisions, justify departures from past practices, allow effective participation in the regulatory process of a broad range of affected interests and consider alternatives to proposed actions. As a result judicial emphasis has been placed on procedural fairness and reasoned decision making.

property right of access to certain public trust resources for various public purposes.[385] It can thus be described as a public easement,[386] a servitude.[387] This opinion is supported by Huffman[388] who stated that the traditional public trust doctrine is property law as it defines an easement which members of the public hold in common.[389] In an effort to liberate the public trust doctrine from its "historical shackles", Sax[390] concedes that the public trust doctrine protects expectations "quite like those that attach to traditional forms of property". It is the function of the public trust doctrine to protect such expectations against destabilising changes.

While no suggestion can be found that the traditional public trust doctrine had any relation with constitutional law,[391] the codification and reception of the doctrine into state constitutions and statutes warrant a present day classification of the doctrine as constitutional law in relevant circumstances. Where the doctrine is only applicable as a common law doctrine and was judicially expanded, it will be difficult to classify it under constitutional law.

Huffman[392] indicated that reliance on constitutional law seems to have two theoretical bases. One approach advocates that the public rights linked to public trust law are analogous to the rights which individuals have pursuant to the due process clause and other general rights guaranteed by the constitution. This approach is a product of the search for a constitutional basis for private action to protect the environment. Proponents of the second approach argue that the public rights of public trust law are comparable to the rights of people in a democratic system

385 Blumm 1989 *Envtl L* 581; Dunning 1989 *Envtl L* 519. Scott 1998 *Fordham Envtl LJ* 15 described the basic doctrine in its simplest sense as a principle of sovereignty.
386 Blumm 1989 *Envtl L* 580.
387 Wilkinson 1989 *Envtl L* 450.
388 Huffman 1989 *Envtl L* 527: Dunning 1989 *Envtl L* 515.
389 It is important to note that Huffman 1989 *Envtl L* 528 stated that his argument does not describe the law as it is interpreted by several state courts.
390 Sax 1980 *UC Davis LR* 185-194.
391 Huffman 1989 *Envtl L* 545-555.
392 In South Africa this right is explicitly protected under section 24 of the *Constitution*.

of government. According to Huffman this view reduces the public trust doctrine to a justification for democratic action pursuant to the police power. He accepted that state and federal constitutions could be amended to provide for a constitutional right of navigation, fishing, sunbathing, skinny-dipping or any other activity that might be deemed to rise to the level of importance for which constitutional protection is merited.[393] He also emphasised that a state constitutional amendment creating public rights in the use of some resources would only be valid to the extent that it did not infringe on any pre-existing, vested property rights. He pointed out that the concept of public rights is different in constitutional jurisprudence as the rights of the people as an entity are exercised and protected through the political process of democratic government. Only when democratic processes fail is there a possible justification for judicial intervention to prevent public rights. Private rights on the other hand are nothing without the protection of the courts.[394]

Although public trust rights have the characteristic of being shared by all individuals in common with constitutional rights, they remain property. Like all other property rights they must be fitted into the total bundle of rights which comprise property interests in navigable waters and submerged lands. Huffman made a clear distinction between public rights which the public possess as an entity and individual rights held in common. He portrayed public rights as the rights of sovereignty protected by the democratic process whereas the public trust doctrine serves to protect individual rights held in common against invasion by the people or their representatives. "The doctrine operates as a limit on the exercise of public rights, not as a guarantee of such rights"[395] and the *Constitution* should not be regarded as the source of property rights inherent in the doctrine. These rights are merely benefiting from constitutional guarantees of due process and just compensation.

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393 Some state courts have suggested that such rights exist under their *Constitutions*.
394 Huffman 1989 *Envtl L* 549.
395 Huffman 1989 *Envtl L* 551.

It seems that Harrison Dunning has struck the precious 'middle ground". He stated, that the public trust doctrine, although a fundamental doctrine of American property law, has assumed the character of an implied constitutional doctrine.[396] As a result the doctrine illustrates

> a fascinating and significant intersection of property rights and constitutional concepts. It provides a dramatic example of how common heritage natural resources, given constitutional protection, can inspire a unique property rights regime. It is a regime more heavily weighted towards public rights than we usually find in our property law, and it deserves much more attention than it gets.[397]

Although the doctrine originated from the common law, it can today be seen as an umbrella of legal thought incorporating both common and statutory law to embrace natural resources protection.

4.3.7 Conclusion

In summary it can be stated that the public trust doctrine determines that certain 'things' are neither susceptible to private ownership nor unrestricted state ownership. As a compromising result private and public law intertwine to create a sphere where public and private interests are simultaneously protected. The title to certain resources vests in the state but although the state holds supreme title as owner, the title is not unrestricted. State ownership of lands subject to the public trust are held by a title different in character from that which states hold in lands intended for sale. It is a title held in trust for the people of the state. It is state ownership of property held exclusively for the benefit of, and use by, the general public. As a result, the state is obliged to protect both the resource and the established uses associated with the resource. In a nutshell it can be stated that the public trust doctrine recognises state ownership of certain resources while simultaneously

396 Dunning 1989 *Envtl L* 516.
397 Dunning 1989 *Envtl L* 525.

preserving public access to these resources and conserving these resources for the use by the public.

It is important to note that the concept of "public trust" should not be confused with the concept of "public interest". "Public interest" is a wide concept and basically every action that has public value or generates economic gain is in the public interest. "Public trust" refers to matters of common property that are held in trust by the state for the use and benefit of present and future generations of citizens. There is a nuanced differentiation between protection of public uses and "ensuring that environmental resources are beneficially used in the public interest". As indicated above, property subject to the trust may not be used for any public purpose. It must be held available for use by the general public and the property must be maintained for certain types of uses which include traditional uses or uses that are in some sense related to or compatible with the natural uses peculiar to that resource.

The expansion of both the geographical scope of the doctrine and the range of interests protected by the doctrine is a result of the recognition that 'public need' dictates the direction of growth, as in any other field of the law. The possibility of conflict generated by the expansion of the doctrine is inevitable. In a society where the divide between rich and poor is constantly growing, in an overpopulated world where the most needy have already lost the race for the use of resources due to poverty and a lack of means, it might be necessary to redefine the property concept when natural resources are the objects of rights.[398]

4.3.8 South Africa

When the wording of the preamble and section 3(1) of the *Mineral and Petroleum Resources Development* Act is scrutinised,[399] it is clear that

398 See par 3.4.4 *supra.*
399 Preamble:

the principles underlying the public trust doctrine have indeed been codified in the South African mineral law dispensation.[400] Minerals are a valuable resource in terms of the revenue that is generated through its exploitation. Due to its intrinsic nature minerals meet the criteria of a vulnerable, non-renewable resource. The mineral wealth of the country is by nature not susceptible to common use by the general public. The criteria should be that it is accesible by all interested parties who meet the statutory criteria in order to ensure the optimal exploitation of the country's mineral resources. Through the inherent attributes of the doctrine, the question as to where the ownership of the country's unsevered minerals vest, is answered.[401] This is not a mere theoretical or unsignificant aspect[402] as the nature of the ownership paradigm incorporated through the public trust doctrine differs from that of private ownership. The state holds the mineral resources on behalf of the nation and a pre-existing public trust title is established in the country's mineral resources. This might hold significant implications for the future development of the new mineral law regime.[403]

> Recognising that minerals and petroleum are non-renewable resources;
> Acknowledging that South-Africa's mineral and petroleum resources belong to the nation and that the State is the custodian thereof;
> Affirming the State's obligation to promote the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources an to promote economic and social development; ...
>
> S 3(1):
>
> > Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

400 As stated in par 4.1 the doctrine has also been implemented through *inter alia* the *National Environmental Management Act* and the *National Water Act.* Although the concept is a novice to contemporary South African jurisprudence it is interesting to note that it has been referred to in recent case law, although not in the context of mineral law. In *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd* t/a *Pelts Products* 2004 1 All SA 636 (E) 652, 653 the court stipulated that a state functionary nominated in legislation to see that the regulations in terms of the *Atmospheric Pollution Prevention Act* 45 of 1965 are adhered to, should do all that can reasonably be done in order to discharge the state's obligation arising from the fact that the state, as custodian, is holding the environment in public trust for the people.

401 See chapter 7 *infra.*

402 Badenhorst 2001 *Obiter* 127 argues that it is not significant whether ownership vests in the people, the state or the landowner.

403 See para 4.3.3.3.3 and 4.3.3.3.4 *supra.*

It is the duty of the courts to ensure that the spirit of the public trust doctrine is allowed to roam freely in South African mineral law. The nation as a whole must benefit from the implementation of this legal construct and although the previously priviliged may feel deprived during the initial stages of implementation, it is the state's resposibility to use the doctrine to the advantage of all South Africans. All South Africans should reap economical benefits from the exploitation of the country's minerals. The system of mineral exploitation must be accessible to all who meet the stated criteria and not only the previously disadvantaged.

As the doctrine was introduced to South African jurisprudence as a new dispensation the issue relating to expropriation and compensation will be highlighted in the transition from one system to another. It is, therefore, necessary to focus on expropriation law before the full impact of the introduction of the doctrine on the mineral law dispensation can be assessed.[404] This will be done in chapter 6.

4.4 Conclusion

Despite the fact that minerals were never regarded as *res omnium communes* or *res publicae* an interesting feature of South African jurisprudence emerged from the survey in this chapter. Although the term 'public trust doctrine' did not surface during the survey on the application of *res omnium communes* and *res publicae* in South African law, the concept of the state having *dominium* in an asset on behalf of and to the benefit the public emerged. As early as 1891 the goverment's role as custodian in relation to the seashore was emphasised and in 1905 a distinction was made between property held by the state as private property and property held by the state to which the public had a common right of user. These attributes are also ascribed to the public trust doctrine.

404 See chapter 7 *infra.*

In the following chapter the focus will be on the concept of expropriation as it functions in South African law. It is neccessary to detemine the content of this concept as well as the content of the concept deprivation before the implications brought about by the implementation of the principles underlying the public trust doctrine can be assessed.

Chapter 5: Expropriation

> *The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.*
> John Stuart Mill, *On Liberty* (1859)[1]

5.1 Introduction

In this thesis the research revolves around the constitutionality of section 3 of the *MPRDA*. It has already been indicated above that one mineral law dispensation was replaced by another.[2] Vested rights were extinghuised and ownership is affected through the stipulations contained in the provisions of the *MPRDA*. Section 25 of the *Constitution* contains the requirements set for constitutionally viable interference with property.

Section 12 (1) of Schedule 2[3] of the *MPRDA* provides for the payment of compensation to any person who can prove that his or her property has been expropriated in terms of any provision of the act in the process of transition. The writer hereof is of the opinion that an in depth analysis of the content of expropriation is integral and vital to the conclusions to be reached in this study. As the study focuses on the legal definition of expropriation, an in depth analysis of the constitutional requirements for expropriation namely - 'law of general application', 'non-arbitrary', 'public purpose', 'public interest', the calculation of compensation and the relation between section 25 and section 36 fall outside the scope of the chapter.[4] It is accepted for the purpose of this study that the *MPRDA* will

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1 As cited by Byrne 2000 *The Canadian Yearbook of International Law* 89.
2 See chapters 2 and 5 *supra.*
3 Transitional arrangements are contained in Schedule 2.
4 For a clear explanation of these aspects see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 97-101; Gildenhuys *Onteieningsreg* 151-205; Van der Walt *Constitutional Property Clause* 72-100, 133-145; Southwood *Compulsory Acquisition* 16-35; Badenhorst *Expropriation* http://fpb-win2/butterworthslegal/lpext.dll/BCLLC.../2443?f [2002/10/10]; Meyer *Expropriation* 131-237. To inform the reader a few cursory remarks: Section 25 states the requirements for validity with which all infringements of property rights must comply. In order to be a legitimate deprivation, the infringement must be

withstand section 25(1) scrutiny. This is a law of general application and writer postulates that it complies with the non-arbitrary requirement as stated in *FNB* and referrred to in note 4 *supra*.[5] Therefore this chapter deals exclusively with the definition of expropriation.

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authorised in terms of a law of general application and it may not be arbitrary. It is stated in *Minister of Transport v Du Toit* 2005 10 BCLR 964 (SCA) 968 that

> [t]he injunction in section 25 of the *Constitution* against any law permitting "arbitrary deprivation of property" was designed not merely to protect private property but also to advance the public interest in relation to property.

The ordinary meaning of the word 'arbitrary' leads one to think that an arbitrary deprivation takes place mercurially and is neither based on reason nor principle - Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 99. In this context, 'arbitrary' is, however, "not limited to non-rational deprivations, in the sense of there being no rational connection between the means and the end" - *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance* 2002 7 BCLR 702 (CC) in par [65], hereafter referred to as *FNB v SARS* or the *FNB* case. In summary, it was stated in *FNB v SARS* par [100], that a deprivation will be arbitrary if:

- it is procedurally unfair; or
- the provision under adjudication does not provide sufficient reason for the deprivation concerned.

Whether there is *sufficient reason* for the deprivation, is to be decided on all the relevant facts of each particular case. A "complexity of relations" has to be considered when evaluating the relationship between the purpose of the law and the deprivation effected by that law. The process would *inter alia* entail:

- evaluating the relationship between the particular deprivation and the ends sought to be achieved;
- scrutinising the relationship between the purpose of the deprivation and the affected individual;
- assessing the purpose and extent of the deprivation in relation to the nature of the property affected;
- focusing on all the material facts of each individual case.

Interpreting these criteria - Yacoob J stated in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 on 547 that "if the purpose of the law bears no relation to the property and its owner, the provision is arbitrary". For a thorough exposition of this aspect see Roux *Property* (2003) 46-21 – 46-25.

This approach was welcomed by Van der Walt 2004 *SALJ* 870, because Ackerman J managed to introduce a more substantive element into the first-stage analysis of any infringement of property. According to the *ratio* of the *FNB* decision par [59], the question whether a deprivation constitutes an expropriation will only come into consideration if all the above-mentioned requirements have been met.

The phrase "law of general application" has been held not only to include legislation that does not single out certain people or groups of people for discriminatory treatment - *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) 29 G-H, but also the common law, equally applicable to all - *Du Plessis v De Klerk* 1996 3 SA 850 (CC) par [44] and [136]; *Trustees, Brian Lackeytrust v Annandale* 2004 3 SA 281 (C) par [18].

5 Neither Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* nor Dale *et al South African Mineral and Petroleum Law* argue that the *MPRDA* will not be able to withstand s 25(1) scrutiny.

In few other fields of the South African law does the grammatical or ordinary meaning of a word differ from the legal meaning to such an extent as in expropriation law. The ordinary meaning of the word expropriation is "to dispossess of ownership, to deprive of property".[6] 'Dispossess' is interpreted to mean *inter alia* "deprive, take away, leave without, divest".[7] However, when the concept of expropriation is dealt with in a legal context, it entails more than the mere taking away or divesting of property. An individual, who is deprived of property or a right in property, might feel that he was expropriated, while the legal meaning of the word requires something more before a divesting or depriving act will be regarded as an expropriation. As expropriation is accompanied by the constitutional guaranteed right to compensation,[8] the need to define the parameters of the concept is important.

Although the legal requirements for expropriation are set out clearly in the *Constitution*, the concept is neither outlined nor defined. It is, therefore, necessary to determine whether it was the legislature's intention that the concept retains its pre-constitutional definition and meaning, or whether the content of the concept was left open to develop within the constitutional framework into a constitutionally based, bill of rights-compatible concept.[9]

A layperson may wonder why expropriation needs to be defined. The answer is simple - expropriation is based on the constitutional guaranteed right to compensation. [10]

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6 *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515A; *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 975C-F.

7 *Per* Microsoft Office *Thesaurus*. See also Alswang and Van Rensburg *New English Usage Dictionary* (2000).

8 This was according to Zimmerman 2005 *SALJ* 405 a motivating factor in the over-cautious procedural formulation of the *Extension of Security of Tenure Act* 62 of 1997, hereafter referred to as *ESTA*.

9 Epstein *Takings* 31 asked "What does it mean to take property?" It is clear that one needs to define the parameters of expropriation.

10 This was according to Zimmerman 2005 *SALJ* 405 a motivating factor in the over-cautious procedural formulation of *ESTA*.

The chapter will be structured in order to indicate the constitutional merger of the two distinct concepts of regulation and expropriation under the umbrella of 'deprivation' as referred to in section 25(1) of the *Constitution.*[11] This amalgamation combined the two concepts, but it also emphasised the nuanced differentiation between them. The result of this differentiation culminates in the consequence of a right to compensation being constitutionally granted only in instances of expropriation.[12]

The reader's attention is drawn to the fact that terminology foreign to South African expropriation law is emerging in literature regarding expropriation. The terms 'eminent domain', 'police power' and 'inverse condemnation' have been introduced as a result of comparative studies conducted on the subject. Where these terms are referred to in this chapter, the first reference will be accompanied by an explanatory footnote.

5.2 Section 25 of the Constitution[13]

No meaningful discussion of the concept of expropriation can take place without referring to the purpose of section 25 of the *Constitution.* The property clause (section 25 of the *Constitution*) embodies a negative protection of property and the right to acquire, hold and dispose of

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11 The phrases 'police power' and 'eminent domain' were not frequently used in South African law in the pre-constitutional era. However, they became frequently used since the introduction a property clause in the Constitution, to indicate the differentiation between the regulation of the use and exploitation of property and the power of expropriation or compulsory acquisition. This can be attributed to the fact that the horizon has expanded to allow foreign legal systems to be scrutinised and "the property clause in most constitutions consist of two or more subsections dealing with" these notions. Van der Walt 1998 *SAJHR* 560.

12 The writer hereof is of the opinion that the payment of compensation is a result of the inherent differentiation between the concepts expropriation and deprivation. Another view is expressed by Van der Walt *Constitutional Property Law* 15 who regards the requirement of compensation as a characteristic that distinguishes expropriation from deprivation.

13 In this chapter the emphasis falls on the concepts deprivation and expropriation as it features in s 25. Chapter 3 *supra* dealt with the constitutional property concept as it emanates from the same section of our *Constitution.* In both these chapters the focus is on a specific aspect of the property clause.

property is not guaranteed.[14] Through this negatively framed property guarantee property is not rendered inviolable but limits and requirements are set for state intervention.[15] Linked to the fact that the preamble of the *Constitution* indicates that one of the aims of its adoption was the development and promotion of a society based not only on 'democratic values and fundamental human rights', but also on 'social justice' and the positive obligations with regard to various social and economic rights placed by the Bill of Rights on the state,[16] the purpose of section 25 has to be seen as protecting property rights while serving the public interest.[17] O'Regan J eloquently summarised this perspective when she stated in a minority judgement in the *Mkontwana* case:[18]

> A balance must be struck between the need to protect property, on the one hand, and the recognition that rights in property may be appropriately limited to facilitate the achievement of important social purposes, including social transformation, on the other.

It is inevitable that tension is created whenever a balance is to be struck between seemingly opposing interests.[19] It must also be kept in mind that the right to property

> is no stronger or no weaker than any other right; whether it is a real right, a personal right, contractual, delictual or a constitutional right.[20]

With this perception in mind, the curtailment and infringement of property will be viewed.

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14 *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance* 2002 7 BCLR 702 (CC) par [48], hereafter referred to as *FNB v SARS* or the *FNB* case.

15 Van der Walt 2005 *Constitutional Property Law* 13.

16 See, for example section 24 (environment), 26 (housing), 27 (health care, food, water and social security) and 29 (education).

17 *FNB v SARS* par [52]; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 11; Van der Walt *The Constitutional Property Clause* 8. As *per* O'Regan J in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) 565.

18 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) 566.

19 According to Hall *Keynote Address* at 28 the overriding concern in the *Constitution* is not with rights but with equity. It is argued that an equitable distribution of land runs against the individual rights of white landowners.

20 *Transnet Ltd v Nyawuza* 2006 5 SA 100 (D) at 106.

5.2.1 Pre-constitutional curtailment and infringement of property[21]

The tension that might develop when an individual's private property rights are to be curtailed in the public interest, is not a constitutionally created tension. The view that property rights are not absolute has its roots in our common law with its strong Roman-Dutch inclination.[22] In the pre-constitutional era a distinction was made between regulatory or control measures and expropriation.[23] The regulation of the use of property occurred through measures taken by the state *inter alia* to promote economic prosperity and public safety and health.[24] The justification for state interference through regulation was, and still is, imbedded in the principle that every member of the community must contribute towards the obligations of the community according to his[25] means. However, where an individual's contribution is excessive, the principles of justice require that he must be compensated.[26] The question to be answered is therefore: When is an individual's[27] contribution towards the community's obligations excessive? The answer seems to be obvious – when the infringement placed on his property rights goes beyond that which can be expected of the public as a whole.[28] Those instances where the relationship between the

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21 The phrase *pre-constitutional* refers to the era before the promulgation of the *Constitution*.

22 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 96; *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 SA 1074 (SE) 1081.

23 Carey Miller and Pope *Land Title in South Africa* 285, 299.

24 Gildenhuys *Onteieningsreg* 2.

25 Every reference in this thesis to him or his must *mutatis mutandis* be read as she or her.

26 Gildenhuys *Onteieningsreg* 3 – The principle is known as the principle of proportionality. It is interesting to note that the Supreme Court of Appeal has recently found in the *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par [31] that negating the principle of proportionality might result in a breach of section 9(1) of the Bill of Rights.

27 Juristic persons are included when reference is made to the 'individual'. S 8(4) of the *Constitution* expressly provides that juristic persons are entitled to the rights contained in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person in question.

28 Searles 1972 *Real Estate Law Journal* 234 argues where an owner suffers loss through regulatory actions it is either *damnum absque injuria* or the loss is being considered compensated by the owner's sharing in the benefit to the general welfare sought to be obtained by the exercise of the power.

prejudice suffered by the individual and the public interest that is served is disproportionately large and individual is forced to

> bear public burdens which in all fairness and justice, should be borne by the public as a whole.[29]

Although this kind of burden or infringement can occur by means of regulation or expropriation, it is generally accepted that only expropriations are compensated unless the payment of compensation for losses caused by regulatory actions is specifically authorised by the legislation authorising the regulatory measure.

5.2.1.1 Appropriation *versus* restriction

For the current discussion it is important note that whenever the pre-constitutional meaning of the concept of expropriation is under discussion, many commentators and judges revert to the well known decisions given in *Beckenstrater v Sand River Irrigation Board,*[30] *Tongaat Group Ltd v Minister of Agriculture*[31] and *Apex Mines Ltd v Administrator, Transvaal*[32] for an exposition of the concept.[33] These cases emphasised that although the ordinary meaning of the word expropriate was "to dispossess of ownership, to deprive of property",[34] the concept of expropriation entailed more than the mere dispossession or deprivation of property. It was the indispensable accompanying requirement of 'appropriation' of the particular property by the expropriator that gave rise to legally defined expropriation. The inclusion of the element of acquisition or appropriation in the inherent

29 *Armstrong v United States* 364 US 40 (1960) 49.
30 *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T), hereafter referred to as *Beckenstrater.*
31 *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A).
32 *Apex Mines Ltd v Administrator, Transvaal* 1988 3 SA 1 (A), hereafter referred to as *Apex Mines.*
33 Van der Vyfer 1988 SALJ 5; Southwood *Compulsory Acquisition* 14; Gildenhuys and Grobler *Expropriation 3; Harksen v Lane* 1997 11 BCLR 1489 (CC) par [38]; *Steinberg v South Peninsula* Municipality 2001 4 SA 1243 (SCA); *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C).
34 *Beckenstrater* at 515A.

requirements set for compensative expropriation excluded state actions that destroyed or took away rights.[35] This line of reasoning led to the viewpoint that a prerequisite for expropriation was *inter alia* the compulsory acquisition of rights by the expropriator.[36] It also contributed to the development of the clear distinction made between so called control measures or regulation,[37] and expropriation. The regulation of property[38] merely prevented a person from using his property in a particular manner and neither the property nor any rights were acquired by the expropriating authority.[39] Therefore, no compensation was payable for damages or losses arising from regulatory actions by the state.[40] The distinction can be summarised as 'appropriation (expropriation) *versus* restriction (regulation)'.[41]

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35 *Cape Town Municipality v Abdulla* 1976 2 SA 370 (C) 374-6, *Apex Mines.*

36 It is indicated in par 5.4.2.1.2 infra that it is questionable whether it is compatible with the spirit of the Bill of Rights that 'acquisition' remains the sole determining factor when it is to be established whether a compensable expropriation has taken place.

37 Gildenhuys *Onteieningsreg* 2, 3 states that the regulation of the use of property occurres through measures taken by the state *inter alia* to promote economic prosperity and public safety and health. The justification for state interference through regulation is imbedded in the principle that every member of the community must contribute towards the obligations of the community according to his means.

38 In some foreign jurisdictions *eg* the United States of America the power to execute control measures is called 'police power'. This phrase is common to American Law but has been used in South African literature. See *eg* Van der Walt *Constitutional Property Clauses* 19.

39 The court found in *Cape Town Municipality v Abdulla* 1976 2 SA 370 (C) 375B-D that a regulation was not legislation "for the taking away of rights from one person and conferring them upon another" but legislation constituting a curtailment of the rights of the owner. This line of reasoning was in line with the principle set in *Feun v Pretoria City Council* 1949 1 SA 331 (T) at 342 that "... mere restriction on user is in the first place not expropriation in that sense...".

40 Compensation was payable in the case of expropriation unless the authorising act provided for expropriation without accompanying compensation - Gildenhuys *Onteieningsreg* 10, 15; *Joyce and McGregor Ltd v Cape Provincial Administration* 1946 AD 658, 671. In a few cases the court held that a common law right to compensation existed in South African law - see *inter alia* - *Van Niekerk v Betlehem Municipality* 1970 2 SA 269 (O) at 271E. The prevailing principle was that no compensation was paid for damage caused by the exercise of control measures unless explicitly provided for by legislation - Gildenhuys and Grobler *Expropriation* 4 fn 3; *Feun v Pretoria City Council* 1949 1 SA 331 (T) at 342.
With reference to control measures it was the approach of the courts to construe the legislative intention as one desirous of restricting the circumstances in which compensation is payable. This is to be contrasted with the liberal approach to the question of compensation adopted when construing expropriation legislation - See *inter alia Belinco v Belville Municipality* 1970 4 SA 589 (A) at 597C.

41 Searles 1972 *Real Estate Law Journal* 234 explain the two concepts as follows:

5.2.1.2 Revealing another dimension

Through the often referred to case law mentioned above,[42] the perception was created that there was no room for compensable indirect expropriation in the pre-constitutional era. Indirect expropriation refers to those situations where certain regulatory measures taken by the state are so severe that they either infringe on a legal subject's rights in the affected property to such an extent that he cannot exercise the entitlements inherent to these rights or they annihilate his rights with regard to the affected property completely. In neither of these scenarios are any rights transferred to or acquired by the state and as a result the depriving state action does not fall within the ambit of the legal definition of expropriation. As a result a question arises regarding the state's obligation to compensate. Indirect expropriation is *inter alia* referred to as *de facto* expropriation, constructive expropriation, regulatory expropriation or inverse condemnation.[43]

Although the popular viewpoint seems to be that there was no room for compensable indirect expropriation in the pre-constitutional era, case law to the contrary exists. In a few instances the exercise of a 'measure of control' was regarded as *analogous* or *akin* to expropriation. In *Minister van Waterwese v Mostert*[44] the appellate division held that the extinction of rights amounted to their 'expropriation' and the holders

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> In eminent domain the Government takes private property for its own use; in police power, it merely denies (*sic*) to a private person the right to use his property as he sees fit.

Van der Walt *Constitutional Property Clauses* 25 also distinguishes between the concepts:

> Generally speaking, expropriations or compulsory acquisitions involve the ... taking of title to or a right in property, whereas other, non-acquisitive deprivations amount to nothing more than the imposition of certain restrictions on the use of the property.

42 See eg *Apex Mines Ltd v Administrator, Transvaal* 1988 3 SA 1 (A); *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A); *Hewlett v Minister of Finance* 1982 1 SA 490 (ZS).

43 Van der Walt *Constitutional Property Law* 184, 189–192; Van der Walt *The Constitutional Property Clause* 19, 60-61, 102, 114; Van der Walt *Constitutional Property Clauses* 19, Mostert 2003 *SAJHR* 567-592; Van der Walt 1999 *SAPR/PL* 273, 277; Van der Walt 2002 *THRHR* 459; Pienaar and Van der Schyff 2003 *Obiter* 150.

44 *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 669.

thereof were entitled to be compensated directly by the expropriator. Jansen J held in *Pretoria City Council v Blom*[45] with reference to a local authority's prerogative to lay pipes over private property:

> This power to override private rights appears to be in many respects analogous to a form of expropriation.

In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*[46] Hoexter JA elaborated on this line of thought. Discussing the implication of the application of section 134 (b) of the then *Local Government Ordinance* 17 of 1939 (T) that entitled a local authority to lay storm water pipes over private property, he stated:

> In all these circumstances it is tolerably clear, in my opinion, that the right taken by the respondent is a taking akin to expropriation.

He motivated this assertion by stating that:

> Ownership of land connotes the existence of an aggregate of distinct and valuable rights inhering in the owner. These include not only the right to exclusive possession and the right to disposal, but also the right to the use and enjoyment of the land for all lawful purposes... These facts afford, I think, a useful example of an owner of land being partially divested, without his consent, of one of his rights to ownership.[47]

It is apparent from the above-mentioned passages that the distinction between regulatory measures and expropriation of property was not always a 'black and white' distinction. Case law, however slim, exists that indicates the existence of a grey middle ground of regulatory

45 *Pretoria City Council v Blom* 1966 2 SA 139 (T) 144A.
46 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 3 SA 122 (A) 129.
47 *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 3 SA 122 (A) at 129.

expropriations. Gildenhuys[48] states that these cases represent indirect constructive expropriation.[49]

This viewpoint was not taken into account when the pre-constitutional concept of expropriation was first discussed and applied in the constitutional era.

5.3 The relation between deprivation and expropriation

It is trite that the clear cut distinction that existed between regulatory measures and expropriation according to the popular viewpoint on the subject could not be maintained in the current constitutional milieu. This fact is endorsed by the decision in *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance*,[50] where expropriation is described as a sub-species of deprivation. The Constitutional Court has thus determined that deprivation constitutes a broad, encompassing category that includes expropriation. This has the effect that all expropriations are regarded as deprivations while just some deprivations can be regarded as expropriations.[51]

In defining the concept deprivation a cautious approach is to be followed. One should be careful not to define deprivation in terms that were used to define the regulatory authority of the state in the pre-constitutional era.[52] It was explicitly stated in *FNB v SARS*[53] that deprivation refers to a wide *genus* of interference in property:

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48 Gildenhuys *Onteieningsreg* at 13 and 349.

49 *Eg* in *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd supra* n 47 the state appropriated a right in the property although they did not take over full ownership. Their appropriation annihilated the owner's entitlements with respect to a specific aspect of the property. It seems as if a similar line of reasoning was followed in the court in *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 1 SA 125 (T).

50 *First National Bank of SA Limited t/a Wesbank v The Commissioner for the South African Revenue Services and the Minister of Finance* 2002 7 BCLR 702 (CC) hereafter referred to as *FNB v SARS*.

51 Van der Walt *Constitutional Property Law* 132.

52 See par 5.2.1 *supra*.

> In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation...[54]

This *genus* is not limited to limitations aimed at "protecting and promoting public health and safety"[55] and it does not "invariably refer to the taking away of property".[56] By including the word 'invariably' the court did not exclude the 'taking away of property' from the category of deprivation. The court merely stated that deprivation is not limited to the taking away of property, but expands to include any interference with property. The question that arises now is whether the 'taking away of property' will be treated as a deprivation that falls under the sub-species of expropriation or whether additional requirements, inherent to the concept of expropriation, will have to be met.

5.4 Expropriation

5.4.1 Current state of affairs

If all expropriations are deprivations, but not all deprivations expropriations, what then are the supplementary criteria that a deprivation must fulfil in order to be classified as an 'expropriation' and carry within the right to compensation?[57]

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53 *FNB v SARS* par [57].

54 Van der Walt *Constitutional Property Law* 127 argues convincingly that this definition should be upheld despite the remarks on the aspect in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) par [32] at 545J-546C, hereafter referred to as *Mkontwana*.

55 Van der Walt *Constitutional Property Law* 131.

56 *FNB v SARS* par [57]. This view was followed in *Mkontwana* par [32].

57 It is imperative to take cognisance of Heher JA's remark in *Minister of Transport v Du Toit* 2005 10 BCLR 964 (SCA) 968 that an owner of land is not entitled to compensation merely because a right to use his property is taken, even if the exercise of the right involves "...a permanent deprivation of some elements of his land". Compensation is only payable if the taking has caused "actual financial loss". It is interesting to note that this criteria is neither stipulated in s 25(2) not s 25(3) of the *Constitution*.

The inherent attributes of expropriation have been set pre-constitutionally.[58] In mathematical terms it can be stated that expropriation equals the sum of taking away plus acquisition by the expropriator (E = T+A). In light of the application of the *stare decisis* rule in South African jurisprudence, courts will be bound by this interpretation of expropriation until it is redefined by the appellate division or Constitutional Court. This is exactly what is happening in practice. In many instances where expropriation was under consideration, courts set the accompanying act of appropriation or acquisition as a requirement for expropriation.[59] The reader's attention is directed to examples stemming from case law. Cases are referred to according to the date on which they were decided in order to give a chronological overview of the judicial interpretation of the concept.

As far as an exposition of expropriation is concerned *Harksen v Lane*[60] remains the leading post-constitutional authority.[61] Goldstone J defines expropriation as follows:[62]

> [E]xpropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) ... involves acquisition of rights in property by a public authority for a public purpose.[63]

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58 See par 5.2.1.1 *supra.*

59 See par 5.2.1.1 *supra.* Van der Walt *Constitutional Property Law* 130-131, 180 argues that the acquisition alone should not be seen as the sole distinctive feature of expropriation. However, it might not be the only distinctive feature, but in South African jurisprudence it is a very important distinctive feature. On 187 n 2 he concedes that in determining whether a deprivation is an expropriation the permanent acquisition test can be reverted to once a deprivation has passed the initial arbitrary deprivation test.

60 H*arksen v Lane* 1997 11 BCLR 1489 (CC). This point of view is also confirmed in *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1246F-C.

61 Although the judgement given in this case has severely been criticised, *inter alia* by Van der Walt in *Constitutional Property Clauses* 337, Van der Walt and Botha 1998 *SAPR/PL* 20-23; Chaskalson and Lewis *Property* 31-18 - 31-20 and Freedman 2002 *SAJELP* 63, it has been applied in other judgements and remains the only Constitutional Court judgement where the notion is explained. Roux *Property* (2003) 46-30 names *Harksen v Lane* as one of the leading decisions dealing with the distinction between expropriation and other forms of deprivation. The other is *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

62 1502 C [32].

63 Badenhorst 1998 *De Jure* 252 supports this view; however, see the criticism of Van der Walt 1998 *SAPR/PL* 17–41 on this view.

From this it is clear that the courts still set the accompanying act of appropriation as a requirement for expropriation. This requirement mirrors the requirement previously stated in *Davies v Minister of Lands, Agriculture and Water Development*[64] where it was stated that expropriation only takes place when the deprivation is of such a nature that it amounts to *compulsory acquisition.* In *Farmerfield Communal Property Trust v Remaining Extent of Portion 7 of the Farm Klipheuvel No 459*[65] the element of acquisition was named as the element that determines whether and when expropriation has occurred. In *Shells Annandale Farm (Pty) Ltd v Commissioner for the SARS*[66] the court relied on the restrictive interpretation of expropriation as found in the *Beckenstrater* and *Tongaat*[67] cases.

Conradie J also relies on pre-constitutional authority in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services*[68] when he says: "The effect of an expropriation is to vest ownership (of land) in the government." In *Colonial Development v Outer West Local Council*[69] Combrink J remarks: "In any event expropriation involves appropriation".

Steinberg v South Peninsula Municipality[70] brought a slightly different perspective when the supreme court of appeal held that there is a

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64 *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS).

65 *Farmerfield Communal Property Trust v Remaining Extent of Portion 7 of the Farm Klipheuvel No 459* 1998 JOL 4152 (LCC) 5.

66 *Shells Annandale Farm (Pty) Ltd v Commissioner for the SARS* 2000 JOL 5948 (C) 16.

67 *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) at 972 D where Rumpff said:

> ...die problem ontstaan omdat die gewone betekenis van die woord 'onteiening' verwys na 'n handeling deur die Staat (of ander bevoegde instansie) waardeur o.a. grond van die eienaar ontneem word en die eiendom van die Staat word...
> *[...the problem arises because the ordinary meaning of the word 'expropriation' refers to an act by the State (or other competent institution) in terms of which* inter alia *land is taken away from the owner and becomes the property of the state].*

68 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2001 3 SA 310 (C) 329.

69 *Colonial Development v Outer West Local Council* 2002 2 SA 589 (N) 611.

70 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA).

fundamental distinction between deprivation and expropriation with deprivations being a kind of taking enabling the state to regulate the use of property for the public good without the "fear of incurring liability to owners of rights affected in the course of such regulation".[71] An interesting development in this case was the remark by Cloete AJA that the "principle of constructive expropriation creates a middle ground, and blurs the distinction between deprivation and expropriation" thus causing some deprivations to attract the liability to pay compensation. Unfortunately this line of thought was not pondered on in other decisions.

The appropriation rationale was once again applied in *Nkosi v Bührmann*[72] when Howie JA stated that the taking of a grave site as an occupier's right would amount to appropriation and cause a permanent diminution of the right of ownership of the land.[73]

In *Lebowa Mineral Trust Beneficiaries Forum*[74] the court once again followed the restrictive interpretation of expropriation and stated that claims against the state in expropriation law were restricted to the immediate act of acquisition of property. No claims could be based on interference with property rights beyond the immediate act of acquisition. Even state action that extinguished property rights was not recognised as expropriation unless there was some transfer of rights.

In *City of Cape Town v Rudolph*[75] the court interpreted expropriation very restrictive and quoted from *Harksen v Lane* to motivate their finding that *PIE* only regulates the exercise of property rights.

A slight diversion from the appropriation requirement is found in *WF Osner Investments (Pty) Ltd v Buffalo City Metropolitan Municipality.*[76]

71 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1246, 1247.
72 *Nkosi v Bührmann* 2002 1 SA 372 (SCA).
73 *Nkosi v Bührmann* 2002 1 SA 372 (SCA) 384.
74 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T).
75 *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C) 1264.

Erasmus J stated that "... expropriation is not a physical act but a legal device whereby a person is deprived of his or her private rights in or to land or property".

A disconcerting opinion was voiced by Heher JA's in *Minister of Transport v Du Toit*[77] that an owner of land is not entitled to compensation merely because a right to use his property is taken, even if the exercise of the right involves "...a permanent deprivation of some elements of his land".

From the majority of passages referred to above, it is clear that the courts currently attach the established pre-constitutional value to the content of the concept of expropriation.[78] This definition of expropriation excludes a claim to compensation in all cases falling short of state acquisition. It fuels the longstanding debate whether state regulatory action can in some instances be regarded as expropriatory of private property interests where the property is destroyed or extinguished by regulatory control measures[79] or not acquired by the state but transferred to a third party for a legitimate government purpose or where state actions, or omissions, lay an excessive burden to the benefit of society at large, on an individual or small group of owners.[80]

The defining of expropriation in pre-constitutional terms creates tension as the playing field has changed dramatically since the inception of the Bill of Rights. The question that arises is whether it is the correct

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76 *WF Osner Investments (Pty) Ltd v Buffalo City Metropolitan Municipality* 2005 JOL 14516 (E).

77 *Minister of Transport v Du Toit* 2005 10 BCLR 964 (SCA) 968.

78 The dispossessed person can challenge the amount of compensation offered - *Expropriation Act* 63 of 1975 s 14; Southwood *Compulsory Aquisition* 69. There is no need to argue that this act of acquisition takes place without the agreement of the owner of the property involved. From the wording of s 25 it is apparent that only the state may expropriate property. State is used here in the widest sense and includes all government institutions. See also *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 1 SA 125 (T) 137.

79 See *inter alia* Mostert 2003 *SAJHR* 567-592; Van der Walt 1999 *SAPR/PL* 273, 277; Van der Walt 2002 *THRHR* 459; Van der Walt *Constitutional Property Law* 125.

80 Van der Walt *Constitutional Property Law* 125.

approach to define expropriation from a pre-constitutional framework.[81] Van der Walt[82] questions the court's assumption in *Harksen v Lane*[83] that expropriation had to be given the same limited scope in the constitutional dispensation as set out in the *Beckenstrater*,[84] *Hewlett*[85] and *Davies*[86] decisions. He argues that to restrict expropriations to actual expropriations in the formal sense is unnecessarily restrictive and proposes that it is sufficient that the state acquires some benefit from a specific action to fulfil the 'appropriation' requirement.[87] He blames an "overly conservative approach to the definition of an expropriation" that 'finds support in the strong traditional view of ownership' for the court's hesitance to develop the concept.[88]

It is the writer's contention that the scope of expropriation could be broadened by recognising a uniquely South African version of constructive expropriation embracing those circumstances where the results of state actions, or omissions, amount to *de facto* expropriations.

5.4.2 Constructive expropriation

The doctrine of constructive expropriation normally arises in instances where the regulatory acts of the state exert such an enormous restriction on the rights in the property of the entitled person, that the holder of the entitlements is deprived of the ability to exercise any or a substantive portion of his entitlements.[89] It also comes to the foreground in those

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81 Van der Walt 2002 *THRHR* 469 states:
> Tradition-based arguments that rely on settled judicial interpretations of what expropriation meant in the pre-constitutional era cannot carry much weight in a situation where our courts are confronted by something completely new...

82 Van der Walt *Constitutional Property Clauses* 337.
83 *Harksen v Lane* 1998 1 SA 300 (CC).
84 *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T).
85 *Hewlett v Minister of Finance* 1982 1 SA 490 (ZSC).
86 *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS).
87 Van der Walt *Constitutional Property Clauses* 338.
88 Van der Walt 2002 *Stell LR* 408.
89 Van der Walt 1999 *SAPR/PL* 273-331; Mostert 2003 *SAJHR* 567-592; Van der Walt 2002 *THRHR* 459; Van der Walt 2004 *SAPR/PL* 46-89; Van der Walt *Constitutional Property Law* 209-237; Gildenhuys *Onteieningsreg* 137-149.

instances where rights are mere extinghuised. Even if no rights are transferred to the state, the deprived person suffers incalculable damage.

Initially it appeared as if this subcategory of expropriation found a foothold in the constitutional era. Cloete AJ in *Steinberg v South Peninsula Municipality*[90] found that space exists for the development of a doctrine of constructive expropriation in South African law.[91] However, he was not convinced that this would contribute to legal certainty and feared that the doctrine might obscure the distinction between deprivation and expropriation.[92]

Van der Walt[93] welcomes the scope left for the development of this doctrine and Duard Kleyn[94] argues that the notion of 'inverse condemnation' has shown that in its constitutional guise, expropriation can also imply a severe infringement of property without it actually being acquired by the state. This will offer a remedy in cases like *Apex Mines v Administrator Transvaal,*[95] where rights were totally extinguished but it was not regarded as expropriation because those rights did not *vest* in the state and no compensation was paid to the prejudiced persons. However, it should be kept in mind that the doctrine of constructive expropriation is no quick-problem-solving-solution for the dilemma that arises when regulatory measures go too far.[96] The courts will have to decide each individual case on its own merits.

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90 *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) 1246C-F.

91 If recognition is given to the development that has taken place pre-constitutionally on this aspect, see par 5.2.12 *supra*, it is clear that this doctrine was developing in South African law before s 25 of the *Constitution* was introduced.

92 See Van der Walt's criticism of this argument - Van der Walt 2002 *THRHR* 459-473; the finding in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services* 2002 7 BCLR 702 (CC) confirms that the pre-constitutional difference between *deprivation* and *expropriation* will not necessarily be applied in the constitutional dispensation.

93 Van der Walt 2002 *THRHR* 459. According to Gildenhuys *Onteieningsreg* 147 traces of this doctrine were present pre-constitutionally. See par 5.2.1.2 *supra*.

94 Kleyn 1996 *SAPR/PL* 437.

95 *Apex Mines v Administrator Transvaal* 1988 3 SA 1 (A).

96 Van der Walt 2002 *THRHR* 469 states that a theory of constructive expropriation will not necessarily make the court's work easier, but it will act as a valuable guideline. Lindfors 1998 *Wm Mitcell LR* 263 indicates that although American

After the finding in *First National Bank v South African Revenue Services*[97] the rigid distinction that was made between regulatory actions of the state and expropriation became more blurred. With reference to the *adequate reasons* test[98] that was developed to determine whether encroachment upon property is arbitrary, it appears that the field of application of the doctrine of constructive expropriation was limited. The question to the

> appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve[99]

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courts have tried to develop a definite regulatory takings standard they have been unable to articulate more than a series of unpredictable tests. He refers *inter alia* to:

- the nuisance test that focuses on protecting the public from harmful activities and, therefore, recognises non-arbitrary, non-discriminatory legislation that protects the public from harmful activities as a proper exercise of police power not affecting a taking;
- the diminution-in–value test in terms whereof it is regarded as being a taking where the damage to a landowner's property exceeds a certain monetary level, unless it is a nuisance control measure;
- the three-factor test also known as the 'economic viability test. The following three factors are considered to determine whether a taking occurred:
  - the severity of the regulation's economic impact on the claimant,
  - the extent of interference with the property owner's investment backed expectations, and
  - the character of the governmental action;
- the extinguished-economic-value test where a regulatory measure that "denies all economically beneficial or productive use the land" constitutes a taking;
- the essential-nexus test according to which a takings issue is resolved by determining
  - whether there is an essential nexus between the legitimate state interest and the permit condition imposed by the city, and
  - whether the degree of exactions bears the required relationship or rough proportionality to proposed development;
- the temporary-takings test determining that a temporary taking occurs when governmental activity or regulation denies a landowner all property use for a period of time and the regulation is later invalidated.

He is supported in his argument by Rose 1984 *South California LR* 562 who states that courts continue to reach *ad hoc* determinations on takings issues, rather than principled resolutions. Kleyn 1996 SAPR/PL 438 states that this aspect is as problematic in German law as it is in most jurisdictions.

97 *First National Bank v South African Revenue Services* 2002 7 BCLR 702 (CC) 724.

98 See par 5.1 *supra.*

99 *First National Bank v SARS* 2002 7 BCLR 702 (CC) 739 par [98].

is already posed at an early stage of the investigation into the constitutional validity of the encroachment. Roux[100] opines that *FNB* has minimised, rather than increased, the likelihood that something akin to constructive expropriation will be adopted in South Africa. However, until the Constitutional Court has formally rejected this concept, an inquisitive approach could assist in evaluating the possibility of its development.

5.4.2.1 Possible development

It is important to keep in mind that since the commencement of the *Constitution*, legal concepts must comply with the *Constitution* and its fundamental values.[101] It is the *Constitution* that provides the principles and values and sets the standards to be applied whenever property is expropriated.

> Every act of expropriation ... must comply with the *Constitution*, including its spirit, purport and objects generally and section 25 in particular.[102]

The underlying constitutional values are set out in section 39:

> [w]hen interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

It is proposed that the scope of expropriation can be extended in at least two ways to adress the scenario's where property is excessively burdened, extinguished or destroyed by regulatory control measures in circumstances where the current requirements set for expropriation, do not apply. In both these cases courts will have to focus on the consequences caused by the depriving act. The first is to focus on the

100 Roux *Property* (2003) 46-32.
101 S 39 of the *Constitution; S v Makwanyane* 1995 3 SA 391 (CC) 403; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 545 (CC); *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par [26].
102 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par [26].

constitutional value of equality and the second is to shift the focus point from the requirement of acquisition to the effect that the state action has on the the deprived party.

5.4.2.1.1 Focusing on the constitutional value of equality

Zimmerman[103] states that equality in a South African perspective 'is a state of social relations that must be achieved.' Seen in its historical setting

> equality is not to be regarded as being based on a neutral and given state of affairs from which all departures must be justified. Rather, equality is envisaged as something to be achieved through the dismantling of structures and practices which unfairly obstruct or unduly attenuate its enjoyment.[104]

One must keep in mind that equality is a two sided coin. On the one side it is indeed true that in the process of dismantling structures and practices it must be accepted that

> we need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment... is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.[105]

On the other side it is imperative that if equilibrium is to be reached where all South Africans are indeed equal, the road to equality cannot be paved with inequality.

A precedent was set with the ruling of the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty)*

103 Zimmerman 2005 *SALJ* 390.
104 Zimmerman 2005 *SALJ* 390.
105 *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) 23.

Ltd[106] for situations where state actions lay an excessive burden on an individual to the benefit of society at large. The court stated:

> It is unreasonable for a private entity such as Modderklip to be forced to bear the burden which should be borne by the State...

Where a private entity must bear the burden "which should be borne by the state" equality rights under sections 9(1) and 9(2) of the *Constitution* are breached and this breach elicits a right to compensation.[107] This breach of equality rights is founded in the fact that the burden is not shared alike by all the citizens of the state who are represented by the state and who jointly share the burden through the payment of taxes. In this scenario the burden was placed on the shoulders of one private entity alone. In this sense it is not only a matter between the state and the particular person, it is also a matter concerning persons, natural and legal, on a horisontal level.

Van der Walt[108] equates the court's decision with "equalization or administrative compensation payments" provided for by some foreign jurisdictions.

If the judgement given in *FNB* and the stipulation contained in section 9 of the *Constitution* will function as catalysts for ensuring that individuals are not effectively plundered or stripped of their entitlements in relation

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106 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

107 De Villiers J declared in *Modderklip Boerderye (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 1 All SA 465 (T) on 517:

> 1.6.4 dit gevolglik die applikant in stryd met artikel 9 van die Grondwet ongelyk behandel deurdat hy **as enkeling** die las van die besetting van die agtste respondent van sy grond ten behoewe van die gemeenskap moet dra.(own emphasis)
> *[1.6.4 it consequently deals unequally with the applicant because he as* ***an individual****, bears the burden of the occupation of his land by the eighth respondent to the benefit of the community. This is contrary to section 9 of the* Constitution*]*

This viewpoint was confirmed by Supreme Court of Appeal in *Moddefontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) at par [52].

108 Van der Walt 2005 *Constitutional Property Law* 135, 162.

to their property by excessive regulatory burdens, constructive expropriation has been received in South African law under the auspices of section 9 of the *Constitution*, because this will result in expropriation being

> a seizure of property, either in the form of a taking or a burden, that affects an individual or a group unequally in comparison to the rest of society. They must make a special sacrifice in the public interest that is not demanded of others. Such a sacrifice is in conflict with the right to equality.[109]

Although this approach will broaden the scope of expropriation, it will still not be helpful in situations where property was destroyed or extinguished by regulatory control measures[110] or not acquired by the state but transferred to a third party for a legitimate government purpose. Another approach might be to extend the concept by shifting the focus point.

5.4.2.1.2 Extending the concept by shifting the focus point

Expropriation is regarded as a *modus* of original acquisition of property.[111] The content of the concept has developed in the common law and it is not defined by statute.[112] It seems that expropriation has been defined from the perspective of the state or beneficiary. Only when rights were transferred to the state was an act of expropriation deemed to be completed. To determine whether expropriation occurred, the question was asked: Was property or a right in property acquired by the state or its beneficiary? The impact that the particular state action had on the individual was never taken into consideration in determining whether expropriation had occurred. The impact or effect of the state action was only taken into account when compensation was determined.

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109 Kleyn 1996 *SAPR/PL* 439.

110 See *inter alia* Mostert 2003 *SAJHR* 567-592; Van der Walt 1999 *SAPR/PL* 273, 277; Van der Walt 2002 *THRHR* 459; Van der Walt *Constitutional Property Law* 125.

111 Van der Merwe *Sakereg* 294-295.

112 *Hewlett v Minister of Finance* 1982 1 SA 490 (ZS) 502.

Although this approach works well in circumstances of straight forward compulsory acquisition of property by the state, it leads to grave injustices where heavy burdens are placed on individuals or where rights are extinguished but not transferred.

It is doubted whether this approach whereby the focus is on the acquirer of property and not the deprived party, is still justifiable under the *Constitution*. Although it is trite that section 25 does not contain an unqualified property guarantee, a negative property guarantee has found its way into the *Constitution*.[113] From the wording of section 25 it is clear that the right not to be deprived or expropriated of property other than in terms of section 25 forms a major component of the property guarantee. The property clause does not guarantee the holding of property, but it does purport to protect the property holder's rights by prescribing the limits for state interference and commentators[114] and the court[115] argues that the right to hold property is included within the scope of protection afforded by the section. The right to acquire property is, however, not included in a broad interpretation of this section.

If the right to hold property is protected, albeit by way of a negative property guarantee, but the right to acquire property is not protected at all, it is difficult to understand how acquisition can be a determining factor in deciding whether expropriation occurred or not. The property clause is directed at the protection of property in the hands of a person and it seems illogical not to take the effect of state actions as it effects the person who is supposed to be protected into consideration, when the constitutionality of that state action is investigated.[116]

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113 *In re: Certification of the Constitution of the Republic of South Africa 1996* 1996 10 BCLR 1253 (CC) 1287 C-E.
114 Van der Walt *Constitutional Property Clause* 21-28.
115 *In re Certification supra* at 1287F-H.
116 Irrespective whether it is a natural or legal person.

Should the focus not shift to the effect that the detrimental action has on the property owner when it is determined whether expropriation has occurred? Should the question whether a governmental act denies all economically beneficial or productive use of the property[117] not be asked if the question whether rights were acquisitioned is answered in the negative, thereby extending the concept of expropriation to reflect on the consequence of the state action on the deprived person?[118] This approach would be in line with Carol Rose's[119] suggestion that

> takings jurisprudence could turn to ordinary language as a guide for what constitutes a taking of property.

If the concept of expropriation is extended by shifting the focus to the consequences of the state action on the deprived party, while keeping in mind the social responsibility accompanying property holding, expropriation will become a matter of both fact and law. *De facto* expropriation will gain recognition and the concept of constructive or effective expropriation will formally be acknowledged in South African law.

5.5 Conclusion

Although the majority of cases dealing pre-constitutionally with expropriation defined expropriation as 'compulsory acquisition', examples exist of cases where heavy burdens placed on property by the state were regarded to be akin to expropriation. Even though the

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117 This test is borrowed from *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

118 In the following scenario an ordinary person could feel that he was expropriated, while the burden created by the state falls short of the acquisition of property. Sites are zoned by a local authority as *residential 3* and later rezoned to *residential 1*. As no rights have vested in the state in the re-zoning of the sites, there is no expropriation involved here and the entitled person cannot claim any compensation. The entitled person may suffer damages in the process and the question arises whether he has any remedy available by means of which he can claim compensation.

119 Rose 1984 *South California LR* 598.

Constitutional Court found it unnecessary in *Modderklip*[120] to answer the question regarding expropriation, constitutional damages had to be paid to an applicant who was effectively expropriated. One can argue that the concept of expropriation was extended under the *Constitution* with the simultaneous application of sections 9 and 25. The need for expanding the current extent of expropriation is to ensure that justice prevails. Constructive expropriation can be veiled as 'equality-assurance' if the holder of the infringed property right is justly compensated.

Expropriation can also be extended if the consequences of the deprivation on the holder of the property right of the deprivation are taken into account. The property clause must be interpreted from the perspective of the current holder of the property rights and not solely from the perspective of the future beneficiary.

A broader definition of expropriation would not *per se* negate the constitutional aim of reaching equality in the different spheres of the South African community. The state will not be hindered in exercising its police power and regulating society in society's best interest, but individuals will be afforded compensation for excessive regulatory measures that amount to expropriation, if not in name, then in fact. Prophets of doom may predict that the extension of the concept of appropriation along the proposed lines will close the door on land reform initiated through the land tenure reform and land redistribution programmes, due to the implied requirement for the payment of compensation.[121] Section 25(8) of the *Constitution* should soothe their qualms due to the fact that it is expressly stipulated that no provision of section 25 may impede the state from addressing land reform and provides for the departure from these provisions in accordance with

120 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

121 Due to the nature of the land restitution programme, land is currently either bought on the 'willing buyer, willing seller' principle or formally expropriated.

section 36.[122] The principle that constitutional rights and freedoms are not absolute is manifested in section 36.[123] Infringements that take place for a reason "that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom"[124] will not be regarded to be unconstitutional. Land reform through the land tenure reform and land redistribution programmes has been identified as a high priority in the South African constitutional state and it is the writer's submission that it will be accepted as a justification to deviate from the requirement to pay compensation in terms of section 25(2).

Expropriation is a given fact in the current constitutional era. Legal certainty will be enhanced when one starts to 'call a spade a spade'.

122 For a thorough discussion of section 36 see Currie and De Waal *Bill of Rights Handbook* 163-188. See also Van der Walt *Constitutional Property Law* 51-57.

123 Currie and De Waal *Bill of Rights Handbook* 163. *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC) is a very good example where the court held that the right to compensation was curtailed by section 36.

124 Currie and De Waal *Bill of Rights Handbook* 164.

Chapter 6: Canadian Law of Mining[1]

6.1 Introduction

As indicated earlier[2] it is not the objective of this study to do a comprehensive legal comparative study between the South African and Canadian legal systems. The legal status of minerals forms the basis of this study and, therefore, it is the aim of this work to give a detailed analysis of the legal status of minerals in Canadian mining law. Canadian mining law has been chosen as the counterpart of this study for the main reason that the Canadian mining industry is a global industry and the Canadian governments have clearly recognised the contribution of the Canadian mineral industry to the Canadian economy.[3] As a result a legal regime which is "simple, straight forward, transparent and highly effective"[4] has developed in Canada.

One of the characteristics of Canadian resources law is the primacy of crown[5] ownership of minerals.[6] As both the Canadian and former South

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1 A note of gratitude to the Canadian Institute for Natural Resources Law at the University of Calgary for the office space and assistance during a research visit in April 2006 that made the writing of this chapter possible.

2 See par 1.3 *supra*.

3 Singer and Vaughan *The Canadian Mineral Industry* 1 http://www.mcmbm.com [2006/11/9]; *Mineral and Metal Policy* I; Shinya 1998 *Resources Policy* 95.

4 Singer and Vaughan *The Canadian Mineral Industry* 1 http://www.mcmbm.com [2006/11/9]. This is not to say that the system is completely flawless. An indepth report has jointly been published in 2005 by the Canadian Institute of Resources Law and the Canadian Arctic resources Committee in order to address some problems relating to mining in the Northwest Territories. The report prepared by Wenig, O'Reilly and Chambers is titled "The Mining Reclamation Regime in the Northwest Territories: A Comparison with Selected Canadian and US Jurisdictions" and is available online at www.carc.org.

5 Research to the essence of the reference to the "crown" led to an interesting finding, strange in essence to the South African scholar. Reference to the "crown" symbolises the power of government which was formally held by the 'wearer of the crown"- *Town Investments v Dept of Environment* (1978) AC 359, 397 (HL). Theoretically under the Canadian *Constitution*, executive power vests in the crown in Great Britain. The Queen acts only through her representatives in Canada. On federal level the executive authority vests in the Governor of Canada while the various Lieutenant Governors of the respective provinces hold executive power provincially – Gall *Canadian Legal System* 58. However, Gall continues by stating that this explanation is not a truly representative description of the *de facto* exercise of executive power in Canada. Under the conventional rules of Canadian Constitutional law executive power in Canada on the federal level mainly lies in the hands of the Prime Minister and his cabinet and provincially with the various

African mineral law dispensations have points of contact with English law during is initial development,[7] it could be beneficial for development in South Africa to understand how the majority of mineral rights in Canada came into the *dominium* of the crown and how the taking of resource interests, specifically property interests in minerals, is dealt with in Canada.

The legal nature of the different interests in minerals that exist in the Canadian mineral law dispensation impacts directly on the payment of compensation for the annihilation of these interests. A survey of the legal principles governing this aspect might prove beneficial for determining the same under South African law. Due to its significance for this study, the legal status of minerals in Canadian mineral law will be dealt with in the first instance. Of further importance are the rights that the crown, native nations and the private sector have in relation to minerals. As property law is required in order to analyse these rights, the Canadian property concept will be scrutinized in so far as it is relevant to the aim of the study. The impact of the public trust doctrine in Canadian natural resources law will also be analysed.

6.2 Constitutional jurisdiction over minerals

When the Canadian mineral law dispensation is studied the foreign scholar must constantly keep three important aspects in mind. The first is that the South African concept of ownership differs from the Canadian

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premiers and their cabinets - Gall *Canadian Legal System* 59, and the Queen is merely recognised as the formal head of state - Hogg *Constitutional Law 10-2.* Reference to the crown, therefore, essentially denotes the federal or provincial government - depending on the context wherein it is used. Hogg *Liability* 9 indicates that lawyers still use the term "crown" when referring to the 'government, administration [or] executive.' In 1999 s 3 the *Mining Act* RSQ 1990 c M-13 was amended to replace all references to the 'crown" with "state". As the bulk of the literature studied, refers to the "crown" the writer will continue referring to the "crown" to be consistent.

6 Barton *Canadian Law of Mining* 1.

7 See par 2.4 *supra.*

concept. Canadian real property law originated from English feudal law[8] and was modified by statute.[9] The feudal origins provided two fundamental property concepts:

> the Crown owns all the land and property is a bundle of rights and obligations, recognized and enforced by law.[10]

As a result the crown retained ultimate sovereignty. Sinclair and McCallum[11] state that in this system landownership is actually ownership of a bundle of rights.[12] The fullest aggregate of rights available in land is called a "fee simple estate".[13] Consequently no piece of land is owed by anybody but the crown. What is held in ownership is the right to the land. This viewpoint made it possible to distinguish between the surface and subsurface of land and created the possibility to grant a fee simple in the subsurface so that surface and subsurface could be owned separately.[14] This differentiation between the perception of ownership in the two legal systems is attributable to the fact that the Canadian ownership concept has it roots entrenched in the feudal system. As a result -

> The fee simple is the most ample estate which can exist in land.[15]

In lay terms the holder of a 'fee simple absolute in years" will be called the owner.[16] Oakley[17] points out that although fee simple in theory falls

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8 Burn *Modern Law of Real Property* 1-8; Sinclair and McCallum *An Introduction to Real Property Law* 5.

9 For a comprehensive discussion see Burn *Modern Law of Real Property* 1-110.

10 Sinclair and McCallum *An Introduction to Real Property Law* 5.

11 Sinclair and McCallum *An Introduction to Real Property Law* 5, 7.

12 Although the owner of a fee simple estate owns the most comprehensive bundle of rights in land that a person can have at common law, the rights of the fee simple owners are not without limit. Zoning by-laws and statutes protecting the environment are examples of limitations on ownership - Sinclair and McCallum *An Introduction to Real Property Law* 47.

13 Burn *Modern Law of Real Property* 166-168 explains that "fee simple absolute in possession" is the only freehold estate capable of existing as a legal estate. The word *fee* denotes that the estate is inheritable and the word *simple* indicates that the estate is capable of passing to any heir and not just a specific class of heirs.

14 Sinclair and McCallum *An Introduction to Real Property Law* 39.

15 Oakley *Megarry's Manual of the Law of real Property* 40.

short of absolute ownership, it amounts to absolute ownership in practice, because nearly all traces of the old feudal burdens have disappeared.

The South African ownership concept as it emanated from the Roman-Dutch and civil law, was more individualised and absolute in nature than the English common law concept of property.[18] The reader should, therefore, note that any reference to private ownership or private lands under Canadian law refers to ownership in fee simple.

The second is that although the greatest portion of minerals in Canada is owed by the crown some minerals are still in private hands (in fee simple).[19] The minerals that are in private hands are located on private lands while the minerals subject to the dominion of the crown can be situated on private or crown land. This distinction necessitates a discussion of both these mineral right holdings.

The third aspect is that Canada is a confederation and that distinguishable rights regarding minerals exist on the federal and provincial tiers of government.[20] It is necessary to resort to history for a full understanding of the constitutional role of natural resources in general and mineral rights specifically.

6.2.1 Historical overview

The principle that the sovereign owns all ungranted lands and minerals, subject only to the burden of aboriginal title, is the historical starting point

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16 Oakley *Megarry's Manual of the Law of real Property* 5.
17 Oakley *Megarry's Manual of the Law of real Property* 40.
18 See chapter 3 *supra* for a discussion on the development of the South African property concept.
19 Barton *Canadian Law of Mining* 28.
20 An in depth discussion of this aspect falls outside the cader of this work. For information on this aspect see Helliwel *Overlapping Federal and Provincial Claims on Mineral Revenues* 182-198. Helliwell *inter alia* indicates that the federal government has used the tax system in an attempt to increase the rate and alter the direction of development in mineral resources.

of a discussion on mineral ownership.[21] At the time of Confederation the assets and liabilities of the confederating provinces that were not previously given over into private hands[22] were apportioned between the new Dominion[23] and the provinces.[24] Barton[25] states in summary that the colonial legislatures had acquired control and management of crown lands by the time of Confederation and, therefore, the proceeds arising from crown lands were confided to the local governments and to the legislative action of the local legislatures. The practical effect was that although crown lands stood in the name of the Queen, they were for all intents and purposes the public property of the respective provinces in which they were situated.[26] Section 109 of the *Constitution Act, 1867*[27] codified this state of affairs by providing that:

> All Lands, Mines, Minerals and Royalties belonging to the several Provinces ... shall belong to the several Provinces ... in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.[28]

The new federal government received only minor property interests in the provinces such as canals, public harbours and military property under section 108 of the act.[29]

These provisions applied only to the four original provinces of Ontario, Quebec, New Brunswick and Nova Scotia.[30] When Prince Edward

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21 Barton *Canadian Law of Mining* 3. For an in-depth discussion of this principle see La Forest *Natural Resources* 1-6. See also Morine *Mining Law of Canada* 57.
22 Marshall *A Review of Mine Reclamation Activities in Canada* 15.
23 The federal government.
24 The leading work on this subject is La Forest N*atural Resources* chs 1-7. See also Laskin *Canadian Constitutional Law* 662-667.
25 Barton *Canadian Law of Mining* 3.
26 La Forest *Natural Resources* 14.
27 This act is also known as *the British North American Act* 1867 30 & 31 Vict c 3 *(Imp)*.
28 S 117 reinforced this stipulation, declaring that the provinces should retain all their public property.
29 McEvoy1986 *Dal LJ* 118.
30 Hogg *Constitutional Law* 28-1; Blue *Exploration Dispositions 1*; McPherson and Clark *The Law of Mines in Canada* 1.

Island and Newfoundland joined the Confederation[31] largely analogous arrangements were made.[32] Although the same arrangements were applicable upon British Columbia's entry into Confederation in 1871, a strip of land called the Railway Belt was conveyed to the Dominion for the purpose of building a railway to the Pacific coast. At a later stage another piece of land named the Peace River Block was also conveyed by the province British Columbia to the Dominion.

A "striking exception",[33] and deviation from the *status quo* occurred with the creation of Manitoba in 1870 and again when Alberta and Saskatchewan were created in 1905.[34] By virtue of the *Dominion Lands Act*[35] the Dominion reserved all crown lands in these provinces to itself, to be administered for the purpose and benefit of the Dominion. The underlying ratio for this deviation from the existing principle was to enable the federal government to carry out its policies with respect to land settlement, railways and native lands.[36] In 1930 the *Natural Resources Agreements* were entered into between the Dominion and the Prairie Provinces, transferring to the provinces the assets referred to in section 109 of the *Constitution Act,* 1867. An agreement was also reached in terms whereof the 'Railway Belt' and the 'Peace River Block' were conveyed back to the province of British Columbia. All these agreements were confirmed by the *Constitution Act,* 1930[37] and equalised the provincial control of crown lands, finally securing the administration of these lands and the revenues from them for all Canadian provinces.[38]

Despite these arrangements substantial portions of crown lands are still in federal control. This includes land in every province that was

31 Prince Edward Island in 1873 and Newfoundland in 1949.
32 Barton *Canadian Law of Mining* 3.
33 Hogg *Constitutional Law* 28-2.
34 Manitoba, Alberta and Saskatchewan are also referred to as the three Prairie Provinces.
35 *Dominion Lands Act* 1872 35 Vict c 23.
36 Barton *Canadian Law of Mining* 4.
37 *Constitution Act* 1930 [UK] 20-22 GeoV c 26.
38 Barton *Canadian Law of Mining* 4; Blue *Exploration Dispositions* 2.

transferred by the provinces to federal government for federal purposes such as defence or national parks.[39] However, the Northwest Territories and the Yukon are the only jurisdictions where almost all the crown lands are under federal control. These territories are not provinces and are, therefore, in all respects subject to the legislative jurisdiction and executive power of the Federal Parliament.[40]

For a period following Confederation, resource rights were frequently allocated through outright crown grants of fee simple title to the land.[41] Together with previously granted land, these alienations resulted in private (fee simple) mineral ownership as the owner of the fee simple title to the land was the owner of the minerals of the land. Increasingly, however, the bundle of property rights was fragmented and resource rights in crown land were granted through an increasingly complex system of licenses, permits and leases.[42] This resulted in the provinces[43] retaining ownership of the land while establishing a multitude of private interests in minerals and other resources. These interests differ significantly in duration, comprehensiveness and strength.[44]

Of significance is the fact that the provinces do not only own most natural resources, they also have regulatory authority over land and all resources, irrespective whether they have been publicly retained or privately acquired.[45] This exposition indicates that the crown acts in a

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39 Barton *Canadian Law of Mining* 4.
40 Barton *Canadian Law of Mining* 10.
41 Lucas *Resource-Use Rights* 2; Martin, Barton and Samoil *Surface and Subsurface Rights* 1-1.
42 Schwindt *Report 6.* This was a result of increased government awareness and recognition of the value of mineral rights that developed in Canadian history - Lucas *Resource-Use Rights* 3.
43 Note that 'province' may also denote federal government in those instances where crown land is own by the federal government.
44 Schwindt *Report 6.*
45 Section 92(5) of the *Constitution* empowers the provinces to make laws regarding "the management and sale of the public lands belonging to the province...", s 92(13) gives the provinces further power over "property and civil rights in the province" while a 1982 constitutional amendment created s 92A confirming the provinces' general regulatory and taxing powers in relation to minerals. According to Barton *Canadian Law of Mining* 7, this did not work any great alteration to the existing division of powers, but it did define provincial powers more clearly. It does seem, however, that the enactment of this amendment was an effort to resolve

dual capacity.[46] On the one hand it is the original owner of the bulk of mineral resources, capable of transferring them permanently or granting a host of property interests[47] in relation to these resources. On the other hand the crown is the legislator, obliged to regulate development and preserve the environment in the public interest. In the process of keeping up with changing public needs, the crown in its capacity as regulator and legislator can restrict the activities of those who have previously secured rights relating to mineral resources. The paradox is that it is in the sphere of regulating mineral resources to keep up with public expectations and changing public needs that existing expectations are normally trampled. As in all other legal jurisdictions the question arises whether the annihilation of existing expectations regarding mineral resources gives rise to the payment of compensation. Before this question can be answered it is necessary to determine the legal status of mineral rights in the Canadian mineral law dispensation.

6.2.2 Private ownership of minerals[48]

It was indicated in the historical overview that ownership of all crown lands and natural resources not previously given over in fee simple to private hands were given over to the provinces.[49] Although the provinces subsequently owned the mineral rights on most of the lands

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federal-provincial disputes brought about by spiraling world energy prices in the 1970s - Moull 1986 *Osgoode Hall LJ* 416. There is, however, cynicism about the federal-provincial conflict solving abilities of section 92A. Whyte stated in *Managing Natural Resources* at 332:

> The ownership interests of provinces as well as their jurisdiction over exploration, development, conservation and management of non-renewable resources [under section 92A] are increasingly likely to come in conflict with federal economic regulatory objectives.

Although the specific regulatory and taxation scope of province and federal government is of importance to Canadians, it does not fall within the crux of the scope of this chapter and will not be discussed in depth. For a more extensive discussion of this topic see Moull *Mineral Taxation in Saskatchewan under the New Constitution* 221.

46 This analysis is also made by Martin *Land withdrawals* 130.

47 See par 6.2.3.3.1 infra for a discussion of these interests.

48 A clear distinction must be made between minerals that are privately owned and private interests that can exist in public resources. The first is dealt with in this paragraph and the latter will be discussed under the main heading of "Crown ownership of minerals" in par 6.2.3 *infra.*

49 *Supra* par 6.2.1.

within their boundaries, many of the early land grants were conveyed with the mineral rights as 'fee simple' lots or grants. Thus the rights to certain minerals in significant land areas are no longer within the crown domain but are instead owned by individuals or companies in fee simple.[50] This section is aimed at discussing private ownership of minerals.

6.2.2.1 Minerals as part of the land

Minerals that are owned in fee simple are incidents of land[51] and before extraction the ore remains an indivisible part of the land.[52] As a result of this point of departure the common law rule[53] that minerals belong *prima facie* to the owner of the land, subject to certain exclusions and qualifications, prevails.[54] The exceptions to the common law rule are the following:

- The precious metals, gold and silver, belong to the crown by way of special prerogative;[55]
- The rule of capture regulates ownership of the fugacious substances, oil and gas;[56]
- Minerals vested in another by the severance of surface and mineral rights;[57] and

50 Marshall *A Review of Mine Reclamation Activities in Canada* 15.
51 Barton *Canadian Law of Mining* 28; Burn *Modern Law of Real Property* 172.
52 *Anyox Metals Ltd v Morod* (1950) 3 DLR 16 (BCCA).
53 In Quebec this common law rule has been incorporated in legislation - s 951 of the *Quebec Civil Code* provides that "ownership of the soil carries with it ownership of what is above and what is below the surface". The rule is also qualified to exceptions imposed by the terms of crown grants and legislation.
54 Barton *Canadian Law of Mining* 28. See also *Landowners Mutual Minerals Ltd v Registrar of Land Titles* (1952) 6 WWR 230.
55 This rule emerged from the *Precious Metals Case AGBC v AG Can* (1889) 14 App Cas 295 (PC) but can be traced back to the *Case of Mines (1567) 1 Plowd 310, 75 ER 472 (Exch).* Barton *Canadian Law of Mining* 32 states that this is part of the prerogative of the crown as governing authority rather than as owner of land. See also Morine *Mining Law of Canada* 58.

- Minerals vested in the crown by statute.[58]

The real-property nature of minerals in private hands is important.[59] Being regarded as real property these rights are exclusive, contain no inherent qualification, can be sold, bequeathed or otherwise dealt with by the owner and be protected if necessary through legal action, subject only to crown's regulatory actions.[60]

As in the South African mineral law dispensation, it is possible and actually typical for the rights in minerals to be held separately from the rights to the rest of the land.[61] This is where the comparison ends as a totally different entity is created in Canadian mineral law when the right to minerals is severed from landownership and conveyed. When a severance occurs, a distinction is made between the surface estate[62] and the mineral estate.[63] Barton[64] emphasises that a severance -

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56 This rule has been established in *Borys v CPR* (1953) AC 217 (PC Alta) but has been qualified in *Anderson v Amoco Canada Oil & Gas* 2004 CarswellAlta 941 (SCC), to the extent that the court held that "rule of capture" does not confer ownership of evolved gas upon non-petroleum owners. Rather, the reservation of petroleum in the original grants required that the relative ownership rights of the petroleum and non-petroleum owners were to be determined at the time of the reservation, that is, by the conditions of the hydrocarbons in the pool before human intervention.

57 Barton *Canadian Law of Mining* 29. This situation arises where the right to minerals was reserved in a grant or patent of land issued by the crown.

58 Barton *Canadian Law of Mining* 28.

59 Lucas *Resource-Use Rights* 3.

60 For a more detailed discussion see Barton *Canadian Law of Mining* 50-53.

61 Barton *Canadian Law of Mining* 33.

62 'Surface estate' indicates the balance of rights in the land and depending on the exact terms of severance it could denote more than just the top soil or land surface.

63 'Mineral estate' denotes the specific mineral right or rights granted with the conveyancing. A grant may encompass the total of mineral substance in the earth or be limited to specified minerals. It is possible to restrict the severance to open mines, specific veins or strata or specific depths. The wording of the instrument of severance will be the decisive factor in any dispute – Barton *Canadian Law of Mining* 40-47. Barton *Canadian Law of Mining* 53-64 also points out that because the common law aims to preserve the mineral property and the surface property as two distinct entities, presumptions have been established to keep both viable. A logical principal is *inter alia* confirmed in *Dand v Kingscote* (1840) 6 M&W 174, 151 ER 370 at 379 (*Exch*) where the court held that with an express right is reserved all things depending on that right and necessary for the obtaining of it.

64 Barton *Canadian Law of Mining* 34.

> creates a distinction that is not the same as the distinctions amongst an estate in fee simple, a life estate, and leasehold. It is preferable to describe the subject of separate mineral rights as a hereditament or a tenement.

Corporeal or incorporeal interests in land can be created through severance. Corporeal interests include a fee simple estate in the minerals,[65] a fractional fee simple estate[66] or a leasehold estate. The owners of mineral estates may transfer or encumber their property just as other real property and may grant lesser interests therein.[67] Possession of the minerals is attributed to the owner of the corporeal interest even though minerals have not been severed from the earth. Incorporeal interests that can be created is known as *profits à prendre* – or the right to enter upon the land of another, sever minerals and remove the minerals for one's own use.[68] Title and possession of the minerals pass at the moment of severance. The main distinction between a profit and a corporeal interest is that the proprietor of a *profit* does not have possession of the minerals *in situ* but only after severance from the earth.

If one is to draw a concise conclusion on the legal nature of fee simple ownership of minerals in the Canadian context, one can conclude by stating that fee simple mineral ownership constitutes more than a limited real right. Once severed from landownership, it creates full blown fee simple ownership of a so called mineral estate.

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65 This is typically the situation described in *Re Algoma Ore Properties Ltd and Smith* 1953 CarswellOnt 75 (CA) par [23] by MacKay JA:

> ...there may be a severance of the mines and minerals from ownership of the surface and ... the mines and minerals so severed are a separate tenement capable of being held for the same estates as other hereditament.

66 This phenomenon is described in *Bensettee v Reece* (1973) 2 WWR 497 (Sask CA) where a transfer and sale of a six percent royalty in minerals were regarded to connote a conveyance of an interest in the minerals *in* situ and, therefore, an interest in the land.

67 Barton *Canadian Law of Mining* 35.

68 Barton *Canadian Law of Mining* 37.

It must be noted that all mining legislation in all the jurisdictions of Canada are applicable to privately owned minerals unless the relevant statute determines otherwise.[69]

6.2.3 Crown ownership of minerals

As stated above, one of the main characteristics of Canadian mining law is the primacy of crown ownership of minerals.[70] This places crown owned mineral rights squarely in the scope of public property. The consequence of the provinces[71] having property rights in resources is that it brings with it the authority to act in respect thereof in the same way as an ordinary landowner could act.[72] However, this absolute power is being curtailed by the crown's unique responsibility towards the public as a whole, that includes the task of managing the public's property for the common good.[73]

Barton[74] explains that the state policy of reserving minerals to the crown has been a major driving force in keeping minerals in public ownership in most parts of Canada. This policy has been supported by mineral land taxes aimed at returning private minerals to public ownership. A historical overview of the development within the provinces offers insight in the process of Canadianising mineral resources.

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69 See *inter alia Mines and Minerals Act* RSA 2000 c M-17 s 2(b); *Mineral Resources Act* SNS 1990 c 18, s 3; *Mines and Minerals Act* SM 1991-92 c 9 s 3(3) determines specifically which sections of the act are not applicable to minerals not vested in or belonging to the crown. See also Marshall *A Review of Mine Reclamation Activities in Canada* 30.

70 See par 6.1 *supra.*

71 Where applicable the federal government.

72 Valiante 2003 *J Env L and P* 47.

73 *Authorson v Canada* (2002) 58 OR 3d 417 (CA) par [62]; Elliot 2003 *Queens LJ* 9.

74 Barton *Canadian Law of Mining* 65.

6.2.3.1 Historical overview

6.2.3.1.1 Quebec

Since 1763 almost all minerals, except gold and silver, passed in property to the owner of the land.[75] This principle was confirmed in section 414 of the *Civil Code* of 1866, but deviated from the promulgation of the *General Mining Act* of 1880.[76] Since 24 June 1880 all mining rights were reserved to the crown and available for disposition by the crown under mining legislation. Nevertheless some lands were still granted out of the crown domain in full ownership of land including surface and mineral rights.[77] In order to replace the existing system of double ownership the provincial government enacted *An Act Respecting the Revocation of Mining Rights and amending the Mining Act*[78] in 1982 revoking all mining rights in lands acquired before 1880 and all pre-1911 mining concessions and mining rights under seigneurial tenure.[79] The consequence of this expropriation was to vest all mineral rights in the crown.[80] Persons whose mining rights were expropriated became entitled to compensation by way of a profit-based royalty from the crown on any production from the land.[81]

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75 Dussault and Borgeat *Administrative Law* 40; *Barton Canadian Law of Mining* 66.

76 *General Mining Act SQ* 1880 c 12.

77 Barton *Canadian Law of Mining* 65.

78 *An Act Respecting the Revocation of Mining Rights and amending the Mining Act* SQ 1982 c 27 altering s 237 of the *Mining Act* RSQ 1990 c M-13.

79 Wojcieohowski and McMurray *Mineral Police Update* 45, 46. Barton *Canadian Law of Mining* 66 explains that 'grants in seigniorial tenure" were a legacy from Quebec's strong roots with France. For a detailed explanation of this tenure system see Munro *The Seigniorial System in Canada: a Study in French Colonial Policy*. A case that deals with this retroactive expropriation is *Yvan Vèzina, requèrant c Le Procureur Gènèral de la Province de Quèbec, intimè et Northgate Exploration Limited et une autre, mises en cause* 1983 CS 1039 where the court held that the mineral rights were indeed expropriated because the provisions to renew mining rights under the provisions of the act were not adhered to.

80 Previous mining legislation in Quebec also contained similar provisions but it was revoked 2 years later. In 1984 the court referred to this legislation and stated that it was revoked precisely because it practically came down to expropriation. It is, therefore, interesting that the 1982 legislation was accepted without eliciting noticeable response – See in this regard *Les Constructions CTM Inc c Talc BSQ Inc* 1984 CS 1076 at 1085.

81 *Mining Act* 1990 RSQ c M-13 s 240.

6.2.3.1.2 Ontario

Although Ontario initially shared the early history of reservations of gold and silver with Quebec,[82] the reservation was rescinded due to pressure in 1869.[83] By 1890 property rights to all major ore bodies were alienated to the private sector. In addition the *Public Lands Act* of 1913[84] revoked all past reservations of minerals,[85] including precious metals and prohibited the future reservation of minerals.[86] Regretting the effect of the generosity of its predecessors in title, the provincial government of Ontario enacted the *Public Lands Act* of 1990[87] qualifying that all patents for land sold for agricultural purposes after 1 April 1957 are subject to a reservation of the mines and minerals to the crown. In the case of land patented before 6 May 1913, mines and minerals are deemed to have passed to the patentee and the reservation thereof, whether by letters patent or statute, is deemed void[88] except where the land was alienated under the *Mining Act* or its predecessor.[89] In the case of land patented after 6 May 1913 mines and minerals pass to the patentee, unless expressly reserved.[90] It also provided that a reservation in a pre-1913 grant is not to be void in instances where the minerals have reverted, or may revert, to the crown due to their abandonment, cancellation or forfeiture.

Despite the fact that this retroactive mineral-grabbing in respect of agricultural land,clearly constitutes expropriation, no case law can be found where any plaintiff questioned the validity of this action by the

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82 Morine *Mining Law of Canada* 62 held
> It is a question not altogether free from doubt whether gold and silver mines have been transferred by any grants or patents of the Province of Ontario after the 4th day of May, 1891, since precious metals are not incidents of the land, but belong to the Crown...

83 *An Act relative to Mining* 1869 32 Vict c 34 s 4.
84 *Public Lands Act* 54 Vict c 7.
85 An exception was made where minerals were alienated under the *Mining Act.*
86 Hunter and Stephenson *Report* 27.
87 *Public Lands Act* RSO 1990 c P43, s 60.
88 *Public Lands Act* RSO 1990 c P43, s 61(1).
89 *Public Lands Act* RSO 1990 c P43, s 61(2)(b).
90 *Public Lands Act* RSO 1990 c P43, s 61(3).

legislature. The act contains no stipulation regarding the payment of compensation.

6.2.3.1.3 Northwest Territories and Prairie Provinces

In 1887 minerals were reserved to the crown through the *Dominion Lands Act.*[91] Although this reservation was extended to cover all patents and grants for land in Manitoba and the Northwest Territories,[92] no previously allocated rights to minerals were expropriated in these regions.[93] Legislation that regulated the granting of land mostly reserved the mines and minerals in favour of the regulating authority of the time.[94] These rights were transferred to the Prairie Provinces in 1930[95] and the policy of reserving all mines and minerals was continued in the said provinces and the Northern Territories.

6.2.3.1.4 British Columbia[96]

Except for precious metals which were declared to belong to the crown as early as 1857,[97] it is only after the promulgation of the *Lands Act*[98] in

91 *Dominion Lands Act* 1872 35 Vict c 23.
92 Barton *Canadian Law of Mining* 70.
93 As a result, some minerals remained privately owned – *Mines and Minerals Act* SM 1991-92 c 9, s 3(3).
94 Barton *Canadian Law of Mining* 70 explains that grants made to the Hudson Bay company included minerals other than gold and silver. Homesteaders from the Company continued to receive minerals until 1908. The same applied to lands being granted by the Pacific Railway to individuals. Even though a small percentage of minerals were in private hands it is apparent from a quotation from the Annual report of the Department of Natural Resources of 1947-1948 as referred to by Murray *Provincial Mineral Policies* 30 - that the authorities were not happy with this state of affairs:

> The policy of allowing mineral rights to become alienated from the Crown, as followed by the Dominion authority in the past was wrong in principle, was not in the best interest of the people and militated against the conservation of the country's natural resources.

95 See par 6.2.1 *supra.*
96 For an interesting discussion on the history of mining legislation in early British Columbia see Cail *Land, Man and the Law* 70-90.
97 Proclamation of 28 December 1857, reprinted in Martin *Martin's Mining Cases* 537; Cail *Land, Man and the Law* 71.
98 *Land Amendment Act* 1891 SBC 1891 c 15, s 11.

1891 that all minerals other than coal were reserved to the crown. Today all interests in coal are reserved as well.[99]

6.2.3.1.5 Atlantic Canada

6.2.3.1.5.1 Nova Scotia

Once again one is confronted with the retroactive reservation of minerals.[100] Although surface owners were conferred full mineral interests reserving only "gold, silver, tin, lead, copper, coal, iron and precious stones" through the promulgation of *An Act to Extend the Operation of Certain Grants of Lands,*[101] state interests were asserted by legislation which amended the 1858 mineral reservation by broadening the scope to include "all other minerals, excepting limestone, plaster and building materials".[102] In 1918 the legislature retrospectively expropriated private mineral interests by declaring all grants made between 1858 and 1892 to be construed in accordance with the latter legislation - thereby reserving the bulk of minerals to the crown. The policy of reserving minerals to the crown was carried forward with the promulgation of the *Mineral Resources Act.*[103] An interesting feature of the act is that it empowers the Governor in Council to declare crown ownership of formerly excluded minerals if circumstances so require.[104] Consequently all statutory defined minerals are state property.[105]

99 *Land Act* RSBC 1996 c 245, s 50(1)(b).
100 *Crown Lands Act* SNS 1920 c 32, s 1.
101 *An Act to Extend the Operation of Certain Grants of Lands* SNS 1858 c 2, s 3.
102 *An Act to Amend Chapter 2 of the Acts 1858, Antitled an Act to Extend the Operation of Certain Grants of Land* SNS 1892 c 16, s 1.
103 *Mineral Resources Act* SNS 1990 c 18, ss 2, 4. Once again no case law by any plaintiff who took on the retroactive provisions in the statute - only one case could be found that deals with the extent of compensation – *Fraser v Shaw Group Ltd* 2001 CarswellNS 540 (NS Utility&Rev Bd).
104 *Mineral Resources Act* SNS 1990 c 18, ss 5-8.
105 McEvoy1986 *Dal LJ* 118.

6.2.3.1.5.2 New Brunswick

It is apparent from case law[106] that certain crown grants reserved mines and minerals to the crown. In 1855 a compromise was reached between defenders of private property rights and supporters of the principle of state control. *An Act Relating to Mines and Minerals*[107] was promulgated recognizing the private property interest[108] by granting an exclusive mining right to landowners while simultaneously asserting state control through licensing and rental requirements.[109] In 1891 the crown once again followed the path of acknowledging the importance of minerals for the province and expressed the extent of its interest in minerals by stating in section 4 of the *General Mining Act:*[110]

> It is hereby declared to be the law that in all grants in which mines and minerals have been excepted and reserved to the Crown, such mining rights are property separate from the soil covering such mines and minerals and constitute a property under the soil which is public property independent from that of the soil which is above it.

According to McEvoy[111] this was merely declatory of what the legal regime had been in practice. The effect of this promulgation was that the surface owner's exclusive mining right was replaced by the right of the state to license or lease mineral interests while the surface owner merely retained the right to compensation for damages.

Some mineral rights, however, remained in private hands. According to Koven[112] no uniformity existed concerning mineral rights. Some grants reserved all mineral rights to the crown, others only precious metal and coal. In many instances there was a deadlock situation where mineral

106 *Gesner v Gas Co* (1853) 2 NSR 72 (SC) 86; *Gesner v Cairns* (1853) 7 NBR 595 (CA).
107 *An Act Relating to Mines and Minerals* SNB 1855 c 76.
108 Preamble.
109 S 1-3.
110 *The General Mining Act* SNB 1891 c 16.
111 McEvoy1986 *Dal LJ* 112.
112 Koven *Working Paper No 7* 12.

rights were vested in both the crown and the grantee. This was mentioned as one of the main reasons for promulgating the *Ownership of Minerals Act*[113] providing for the extension of crown ownership in minerals by expropriation. While this legislation referred only to minerals reserved in favour of the crown, legislation[114] was enacted between 1967 and 1973 retroactively expropriating oil, gas, bituminous shale, salts and radioactive minerals from the surface owners of unreserved mineral rights.[115] According to Barton[116] the longstanding policy of reservation has led to the result that only 3-5% of mineral resources of the province are vested in private hands.[117]

6.2.3.1.5.3 Prince Edward

Initially only the rights to gold, silver and coal were reserved to the crown.[118] In 1920 the legislature declared most metallic minerals, coal, salt, oil and gas to be public property separate from the soil.[119] As such it vested in the crown. In 1957 the scope was broadened to include all naturally occurring minerals.[120] The current resource ownership regime is dealt with in two separate acts namely *Oil and Natural Gas Act*[121] and *the Mineral Resources Act.*[122] The latter act includes a provision enabling the Lieutenant-Governor in Council to declare any natural substance to be a mineral allowing for a compensation claim by the affected party.[123] Subsequently all statutory defined minerals are state property.[124]

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113 *Ownership of Minerals Act* SNB 1953 c 10 now RSNB 1973 c 0-6.
114 *Bituminious Shale Act* SNB 1912 c 35, s 2 now RSNB 1973 c B-4.1, s 3(1); *Oil and Natural Gas Act* RSNB 1973 c O-2.1; *Mining Act* SNB 1961-62 c 45, s 8(3) now SNB 1985 c M-14.1, s 1.
115 McEvoy1986 *Dal LJ* 114.
116 Barton *Canadian Law of Mining* 72.
117 This is confirmed by McEvoy1986 *Dal LJ* 118.
118 McEvoy1986 *Dal LJ* 117 – he also describes this retroactive reservation as an expropriation.
119 *An Act to Encourage the Discovery and Development of Oil and Natural Gas* SPEI 1920 c 20, s 28.
120 *The Oil, Natural Gas and Minerals Act SPEI 1957 c 24, s 1(A).*
121 *Oil and Natural Gas Act* RSPEI 1988 c O-5.
122 *Mineral Resources Act* RSPEI1988 c M-7.
123 S 3.
124 McEvoy1986 *Dal LJ* 118.

6.2.3.1.5.4 Newfoundland

An unique system was initially followed in Newfoundland. Large alienations of minerals from the crown were made under concessions.[125] This entailed that the government and a company would enter in an agreement granting the company exclusive exploration rights to a large area with the automatic right to acquire mining leases should minerals be found. Special taxation and revenue regimes were also agreed upon. Although this arrangement suited the frail mining operations of the early 1900's, mining concessions lost their suitability once the province's mining industry matured in the 1960's.[126] By reverting to the effective method of taxation, Newfoundland became a leader in Canada in terms of regaining control of its mineral resources.[127]

6.2.3.2 Conclusionary remarks

It is clear form this historical survey that the policy of reservation of minerals to the crown was implemented through legislation. In most cases it was the retroactive working of legislation that culminated in the expropriation of minerals rights in favour of the crown. Despite the fact that this seems like a gross infringement in property, no case law where these actions have been challenged in a court of law could be found.[128]

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125 Prince *Provincial Mineral Policies: Newfoundland* 15-24.

126 Barton *Canadian Law of Mining 73.*

127 Olewiler and Pye *The Newfoundland Mining Industry* 42.

128 It falls outside the scope of this study to determine why this issue was not advanced. A few theories can be offered as explanation: It might be that the legislation merely codified the existing practice. It could also be that nobody challenged the legislation because it did not really affect the mining industry. People who wanted to continue with mining actions, could proceed as before. If one keeps in mind that these measures were taken to stimulate mining activities, the people who were actively mining now merely continued under a new system. The effect of legislation being applied retroactively might also have an influence on the lack of case law. *Austin v Riley* (1910) 23 OLR 593 (CA) is a case that dealt with the effect of the revocation of a reservation of minerals to the crown. The relevant statute determined that

> ... all reservations of mines, ore or minerals contained in any patent hereto issued for lands patented under the said Act, ... are hereby rescinded and made void and all mines, ore and minerals in such lands shall deemed to have passed with the said lands to the subsequent and present owners thereof.

The next important aspect that will be discussed is acquisition of title under mining legislation.

6.2.3.3 Acquisition of title under mining legislation

In most jurisdictions there are several basic types of interests that can be acquired from the state for mining purposes.[129] Different jurisdictions will have variations of these. It is the aim of this section to give a basic overview of the property interests that can be obtained under Canadian mining and mineral law.

At the onset of any discussion relating to mining activities, the first question to be answered is – How can the potential mining site be entered for purposes of prospecting and exploration? Two main systems regulate the right to enter lands in search of crown minerals in Canada. This can be explained by differentiating between the expressions 'duty' and 'discretion'.

6.2.3.3.1 Duty *viz a viz* The Free Entry System

The principle of free entry is well established in the legislation of the main Canadian mining jurisdictions.[130] According to this system, mineral operators are given permits or licenses allowing them to enter lands

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The court interpreted this at 597 not as a present conveyance or release of the mineral rights to the person who at that time had acquired the title conferred by the patent -

> but as a withdrawal *ab initio* of the reservation and a confirmation of the title of the original patentee and of all persons claiming under him as if no such reservation had been made.

Another reason might be the fact that the sovereign's right to take land or to affect injuriously some or all the rights of ownership in land has always been recognised in Canada - *Steer Holdings Ltd v Government of Manitoba* 1992 CarswellMan 150 (Man CA) at par [2].

129 Harries *Mining Exploration Agreements* 67.

130 Barton *Canadian Law of Mining* 151. These jurisdictions are Manitoba, Saskatchewan and British Columbia.

where minerals are in the hands of the crown. [131] It obliges the government to grant exploration and development rights if the miner applies for them.[132] This system comprises of three elements: the right to enter lands containing crown minerals, the right to stake a claim and the right to obtain a lease. The right of entry extends to private property if the minerals are owned by the crown.[133]

6.2.3.3.1.1 Right to enter lands

The right to enter lands is often linked with possession of a prospecting license.[134] Where a person meets the statutory criteria the government has no option but to issue a prospecting license. This license may be renewed but it is not transferable. In British Columbia a free miner certificate will be issued to an application meeting the statutory requirements.[135] The certificate may also be renewed but it is not transferable. In Saskatchewan an equivalent to the free miners certificate or prospecting license does not exist and a party will directly continue to stake a claim to secure his interest.[136]

In his discussion of the subject, Barton[137] indicates that the granting of a prospecting license or free miner's certificate is automatic if an applicant meets the statutory criteria. [138] The relevant authority has no discretion

131 This system is *inter alia* in effect in British Columbia, Manitoba, Ontario, New Brunswick and Saskatchewan – Curry *Canadian Encyclopedic Digest* 90-45 # 36, Barton *Canadian Law of Mining* 152.

132 Barton *Canadian Law of Mining* 151.

133 Barton *Canadian Law of Mining* 152. Certain classes of land have been withdrawn from mineral activity - this *inter alia* include cultivated land and land occupied by a building - Curry *Canadian Encyclopedic Digest* 90-47 # 47, 48.

134 Curry *Canadian Encyclopedic Digest* 90-45 # 38 – Manitoba is an example of a jurisdiction requiring a prospecting license. See *Mines and Minerals Act* SM 1991-92 c 9, s 45(1).

135 *Mineral Tenure Act* RSBC 1996 c 292, s 8(2)-s 8(5) stipulates that a person may hold mineral title - ie claim or lease - without the free miner certificate. This section avoids forfeiture of a claim merely because the certificate has lapsed – Curry *Canadian Encyclopedic Digest* 90-46 # 40.

136 Curry *Canadian Encyclopedic Digest* 90-46 # 41.

137 Barton *Canadian Law of Mining* 152.

138 It must be noted however, that Southin JA remarked in *Cream Silver Mines Ltd v British Columbia* 1993 CarswellBC 14 (BCCA) at par [6] that there has never been any absolute right of access to the claim area for the purpose of winning the ore

to refuse the granting of these licences or certificates if the stated criteria are met.

6.2.3.3.1.1.1 Nature of right under prospecting license or free miner's certificate

These licenses do not represent any real property interest in the area to which they relate.

> They are contracts with the state granting certain exclusive rights in return for commitments to carry out work.[139]

6.2.3.3.1.2 Right to stake a claim

Barton[140] explains that the second element of free entry is the right to acquire a claim in order to secure mineral rights in priority over other miners. It is often 'part and parcel'[141] of the right to enter and use crown lands. The aim of staking a claim is securing tenure.[142] It, therefore, makes sense that most jurisdictions require the proper recording of the process. The stakes are the outward and visible signs of the boundaries of the area intended to be embraced by the staking.[143] Staking is fundamental to acquiring title to a mineral claim.[144] Even in the free entry system the recorder of the claim is allowed discretion to grant or refuse a claim when claims are staked covering large areas of land. An

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and that a minister of the crown always had some power to refuse approval to a claimed right of way.

139 Harries *Mining Exploration Agreements* 67.

140 Barton *Canadian Law of Mining* 155.

141 Barton *Canadian Law of Mining* 155.

142 Barton *Canadian Law of Mining* 156.

143 Barton *Canadian Law of Mining* 156 describes the process of ground staking. In accordance with the law on staking claims, posts must be erected on the site, information must be inscribed on these posts and blazed lines must be run through the bush. The claim comes into existence when this process is completed and the recorder must record the claim on application in those jurisdictions where he has no discretion in the matter. Barton opines that actual ground staking is not a *sine qua non* of a free entry system but proposes that a claim can be described by map reference as well. Curry *Canadian Encyclopedic Digest* 90-48 # 52 argues that ground staking is essential as it is paramount over the description of a claim in an application to record.

144 *Aldous v Hall Mines* (1897) 6 BCR 394 (CA).

exception exists where a statute imposes a duty to record where the applicant has met all the statutory requirements.[145] Once a claim is properly staked an exploration license can be issued.[146]

6.2.3.3.1.2.1 Nature of interest under claim

Different jurisdictions allow different activities under this license but the basic elements of the rights conferred by a claim are common to most jurisdictions.[147] The first basic element is exclusivity.[148] As a result claim holders can prevent trespassing and receive damages if it is proven that trespassing did occur and a quantity of minerals were removed from the claim.[149] The second common element of claim is a right to explore for minerals. [150] This does not usually include the right to develop or produce minerals.[151] Research indicates that the interest acquired by a recorded holder of a claim is, unless expressly stated otherwise in relevant statutes, a chattel interest.[152] Furthermore, unless relevant statutes contain stipulations to the contrary, this chattel interest is not to be regarded an interest in land.[153] The implication thereof is, as

145 Curry *Canadian Encyclopedic Digest* 90-50 # 61.
146 Barton *Canadian Law of Mining* 157.
147 Barton *Canadian Law of Mining* 383.
148 Barton *Canadian Law of Mining* 383.
149 Barton *Canadian Law of Mining* 383. See also *Karup v Rollins* (1992) 64 BCLR (2d) 257 (CA) and *Lamb v Kincaid* (1907) 38 SCR 516 (YT).
150 Barton *Canadian Law of Mining* 383.
151 Barton *Canadian Law of Mining* 384 indicates that the Yukon is an exception to this rule.
152 Barton *Canadian Law of Mining* 387- 395, Curry *Canadian Encyclopedic Digest* 90-55 # 84, 85; *Rock Resources Inc v British Columbia* (2003) 229 DLR (4th) 603 (BCCA) at 614.
153 *Cream Silver Mines Ltd v British Columbia* 1993 CarswellBC 14 (BCCA) par [15], Curry *Canadian Encyclopedic Digest* 90-55 # 84. Barton *Canadian Law of Mining* 387-395 holds a different view but in light of the decision in *Cream Silver Mines* that was followed in *Read Marketing Inc v British Columbia (Minister of Transportation and Highways)* 1995 CarswellBC 2577 (BCECB) and the preceding decision in *Hilton v Ministry of Transportation* (1986) 37 LCR 37 (BCSC) it can be stated that the viewpoint held by the court in *Cream Silver Mines* that the true nature of a licence is nothing more and nothing less than "leave or permission to do a thing, which would otherwise be unlawful", subsists. See also Morine *Mining Law of Canada* 174 and Harries *Mining Exploration Agreements* 67. *Saskatchewan* legislation states that a recorded title was a 'chattel real"- *Saskatchewan Mineral Disposition Regulations* 1986 s 35 – thereby stating that it was to be regarded as an interest in land and therefore real property. See however *Rock Resources v British Columbia* (2003) 229 DLR (4th) 603 (BCCA) at

was held in the case in the *Cream Silver Mines* case[154] that the owner may be without remedy for the chattel interest lost.[155]

6.2.3.3.1.3 Right to obtain a lease and to enter into production

Barton[156] identifies the right to "produce from a mineral deposit and win the rewards for which the whole exploration effort was mounted" as the third element of free entry. In the free entry system the relevant authority is compelled to issue a mining lease if the application satisfies the statutory requirements and the preconditions.[157] It permits the holder to develop and exploit the minerals within the designated area while requiring the holder to pay rent to the state.[158]

6.2.3.3.1.3.1 Nature of interest under a mining lease

The mining lease is the highest form of tenure under mining legislation.[159] The status of the mining lease provides the necessary security for the miner to start with mine development, a time and money consuming effort. It conveys an interest that is property and an interest in land.[160] As such it is freely transferable in fee simple or for a term.[161]

614, where the principles of constructive expropriation was extended to "personal property".

154 *Cream Silver Mines Ltd v British Columbia* 1993 CarswellBC (BCCA) 14.

155 For a more detailed discussion on the taking or expropriation of mining interests see par 6.2.6 *infra*. See also Barton *Canadian Law of Mining* 385. However, see *Rock Resources Inc v British Columbia* (2003) 229 DLR (4th) 603 (BCCA) for an opinion to the contrary.

156 Barton *Canadian Law of Mining* 157.

157 Barton *Canadian Law of Mining* 157. Barton *Canadian Law of Mining* 158 states that New Brunswick is the only free entry jurisdiction where the entitlement to a mining lease is subject to the discretion of the authority. See also Curry *Canadian Encyclopedic Digest* 90-60 111 and Bartlett *Right to Mine* 26.

158 Harries *Mining Exploration Agreements* 68.

159 Harries *Mining Exploration Agreements* 69; Barton *Canadian Law of Mining* 333.

160 Barton *Canadian Law of Mining* 386; Curry *Canadian Encyclopedic Digest* 90-62 # 120.

161 Barton *Canadian Law of Mining* 386 – Sometimes ministerial consent is required for transferring the mining lease to another – Harries *Mining Exploration Agreements* 69.

6.2.3.3.2 Discretion *viz a viz* the Discretionary System

Under the discretionary system the crown has a discretion whether to issue a mineral disposition.[162] Exploration or prospecting licenses are issued to allow a potential miner to enter lands that hold crown minerals. The relevant authority has a discretion in granting these licenses.[163] It must be noted that the relevant authority can only refrain from issuing the license if it (i) does not comply with the statutory regulations or (ii) if it is not in the best interest of the province or would hinder mineral development. It seems that where a miner has been issued with the authority to prospect or explore, there are no major stumble blocks in his way if he want to acquire a mineral lease –

> it is available as of right once the applicant meets certain prerequisites, the main one of which is to undertake production.[164]

The lease is a necessity if the miner wants to open, work or operate a mine extracting minerals.[165]

The legal nature of a license and a lease obtained in jurisdictions following the discretionary system is tantamount to licenses and leases issued under the free entry system.

6.2.4 Conclusion

It might be beneficial to review the crux of the information contained in the previous paragraphs of this chapter before endeavouring to explain

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162 The discretionary system is applicable in Alberta, Nova Scotia and Prince Edward Island – Barton *Canadian Law of Mining* 158; *Curry Canadian Encyclopedic Digest* 90-64 # 135; *Mineral Resources Act* SNS 1990 c 18, s 32(3).

163 Curry *Canadian Encyclopedic Digest* 90-64 # 135; *Mines and Minerals Act* RSA 2000 c M-17.

164 Barton *Canadian Law of Mining* 156; *Mineral Resources Act* RSPEI 1988 c M-7, s 36(3).

165 *Mineral Resources Act* RSPEI 1988 c M-7, s 34.

the content and extent of native ownership and management of minerals.

Under the Canadian mineral regime two *modi* of mineral right holding can be distinguished. Minerals are held by private entities in fee simple or by the state (or crown). The majority of minerals are crown property with a very small quantity of minerals in private hands in fee simple ownership. Minerals owned in fee simple are regarded as land and, therefore, real property. A mineral estate can exist separate from the surface estate and the holder of such a mineral estate is regarded as the owner of the minerals, not withstanding the fact that they might not have been severed from the land. The owner of the mineral estate can grant prospecting or exploration rights in his property or he can grant an interest in land by granting a lease or selling the mineral estate, or portion thereof,[166] in fee simple.

The policy of reserving minerals to the crown has resulted in keeping minerals in public ownership in most parts of Canada. Many pieces of legislation have retroactively reserved minerals in favour of the crown. In present times lands and minerals are not alienated from crown ownership anymore but rights in minerals are granted. Depending on the law of the applicable province, an exploration or prospecting license or free miner's certificate must be obtained before any prospecting activities can be started. The legal nature of these licenses is that they grant a personal interest and not an interest in land. It is only after a mining lease has been obtained that an interest in land has been obtained.

166 One must keep in mind that the fact that minerals are land has regulatory implications. Subdivision must, therefore, be done in accordance with applicable law.

6.2.5 Native Ownership and management of minerals

In a study dealing with minerals and mineral rights, it is necessary to focus on indigenous rights to minerals as native legal issues affect mineral activities in a number of ways.[167] The Canadian courts' early consideration of the existence and scope of aboriginal and treaty rights arose primarily in quasi-criminal cases dealing with the enforcement of hunting, fishing and forestry regulations.[168] Lately, the focus point has shifted to the rights to regulate the use of lands. Barton[169] observed that the determination of the existence and extinguishment of aboriginal title usually arises in the context of a proposed resource development project. Mineral exploration is being questioned when it evidently infringes on aboriginal or treaty rights.

At the onset of the discussion it is necessary to make a distinction between aboriginal rights and treaty rights.[170] Aboriginal rights derive from aboriginal people's occupation and use of lands at the time the Europeans arrived[171] and it is recognised in Canadian common law.[172] For the purpose of this chapter the focus will be mainly on aboriginal title and land use rights.[173] Treaty rights have their origin in negotiated

167 Barton *Canadian Law of Mining* 80.

168 See *inter alia R v Sparrow* (1990) 70 DLR (4th) 385 (SCC); *R v van der Peet* (1996) 50 SCR (4th) 1 (SCC).

169 Barton *Canadian Law of Mining* 1.

170 The distinction between treaty and aboriginal rights was noted by Cory J in *R v Badger* (1996) 1 SCR 771 (SCC) on 812:

> There is no doubt that aboriginal and treaty rights differ in both origin and structure. Aboriginal rights flow from the customs and traditions of the native peoples. To paraphrase the words of Judson J. in *Calder, supra*, at p. 328, they embody the right of native people to continue living as their forefathers lived. Treaty rights, on the other hand, are those contained in official agreements between the Crown and the native peoples. Treaties are analogous to contracts, albeit of a very solemn and special, public nature. They create enforceable obligations based on the mutual consent of the parties. It follows that the scope of treaty rights will be determined by their wording, which must be interpreted in accordance with the principles enunciated by this Court.

171 Sinclair and McCallum *An Introduction to Real Property Law* 49.

172 Reiter *The Law of First Nations* 1.

173 Reiter *The Law of First Nations* 1 states that aboriginal rights can be divided in the categories of - land, land use, customary law and self-government.

agreements between the crown and various First Nations.[174] Both aboriginal and treaty rights are protected under section 35 of the *Constitutional Act.*[175]

The Indian interest in land falls in one of these categories. The lands that are affected by aboriginal or treaty rights are either traditional territories or lands set aside for Indian use.[176] The latter category consists of reserves created either by way of treaties, agreement or executive action.[177] The Supreme Court of Canada has found that the nature of the Indian interest in both categories of land is the same.[178] The nature of the Indian interest in land whether it derives from aboriginal title or treaty is important. The next section will deal with the nature of aboriginal interest in land. Thereafter, the focus will be on the entitlement to minerals.

6.2.5.1 The nature of aboriginal title and rights

In *Calder v AGBC*[179] the Supreme Court of Canada decided that the aboriginal peoples of Canada have a legal right to ancestral lands where their aboriginal title has not been surrendered or validly extinguished. Until the land mark decision in *Delgamuukw*[180] courts seemed to be indecisive about the source,[181] nature and content of aboriginal title. Since *Calder* courts have held that aboriginal title and rights derive from

174 The phrase 'first nations' denotes the aboriginal peoples who occupied Canada, before the first settlers arrived. Reiter *The Law of First Nations* 2; Pentney *The Aboriginal Rights Provisions* 122; Hogg *Constitutional Law* 624.
175 *Constitution Act* 1982 RSC 1985 App II No 44.
176 Reiter *The Law of First Nations* 2.
177 Reiter *The Law of First Nations* 2, 3.
178 *Guerin v R* 1984 CarswellNat 813 (SCC) at par [43]; *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC) par [120]. See also Slattery *The Nature of Aboriginal Title* 18 and McNeil *The Meaning of Aboriginal Title* 150. As aboriginal title and aboriginal rights are been regarded as being of the same nature reference in par 6.2.5.1 to aboriginal title includes aboriginal rights and *vice versa*.
179 *Calder v Attorney-General of British Columbia* (1973) SCR 313 (SCC) at 328.
180 *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 (SCC) herefater referred to as *Delgamuukw*.
181 McNeil *The Meaning of Aboriginal Title* 137.

"'the Indians' historic occupation and possession of their tribal lands".[182] McNeil's[183] problem with this approach is that aboriginal rights can not be regarded as pre-existing solely on the basis of occupation of lands by an organized society at the time the crown asserted sovereignty. To exist as a legal right before the crown acquired sovereignty, it will have to be based on a legal system. If aboriginal title originated from an aboriginal law system, the question is why the courts did not require any proof of the existence of this system to establish aboriginal title.

Courts have also not been able to give a clear and concise definition of the true nature of aboriginal title.[184] Courts have either categorized aboriginal rights as *sui generis* rights,[185] as personal and usufructuary rights,[186] or described them as a beneficial interest.[187] In *Guerin*[188] the Supreme Court of Canada stated that there is no real conflict between characterizing Indian title as a beneficial interest of some sort or as a personal, usufructuary right. The inconsistency is the result of the fact that courts apply inappropriate terminology drawn from general property law to describe a unique interest in land:

> The nature of the Indian's interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indian's behalf when the interest is surrendered.

The Supreme Court's decision in *Delgamuukw* was hailed as a "groundbreaking ruling" containing the Supreme Court's first definite statements on the content of aboriginal title in Canada.[189] The court

182 *Guerin v R* 1984 CarswellNat 813 (SCC) par [39]; *Delgamuukw* par [114]; *Roberts v Canada* (1989) 1 SCR 322 (SCC) at 340.
183 *McNeil The Meaning of Aboriginal Title* 137.
184 McNeil *The Meaning of Aboriginal Title* 141. See in this regard Flanagan 2006 *Queens LJ* 279-326.
185 *Simon v R* (1985) 2 SCR 387 (SCC) at 410.
186 *St Catharine's Milling and Lumber Co v R* 1888 CarswellNat 20 at par [7].
187 *Western International Contractors Ltd v Sarcee Developments Ltd* 1979 CarswellAlta 210 (Alta CA) at par [47].
188 *Guerin v R* 1984 CarswellNat 813 (SCC) par [50].
189 Hurley *Aboriginal Title* 3; McNeil *Aboriginal Title as a Constitutionally Protected Property Right* 55.

suggested a *second source for aboriginal title* besides the physical fact of prior occupation.[190] Without elaborating, or returning to this later in his judgement Lamer CJC stated as this second source

> the relationship between common law and pre-existing systems of aboriginal law.

This remark suggests that the content of aboriginal right under aboriginal legal systems has to be researched in order to establish this relationship and compare the content of the interest to land under common law with the interest to land under aboriginal law. However, the court never returns to this aspect.

Being presented with the contradicting arguments that aboriginal title equals inalienable fee simple, or entails nothing more than exclusive land tenure in order to engage in certain 'aboriginal' activities as fishing and hunting,[191] the supreme court held that the content of aboriginal law "lies somewhere between these positions".[192] The court held[193] that the aboriginal interest in land is a *sui generis* interest and distinct from 'normal' proprietary interests, particularly fee simple. It encompasses the right to exclusive use and occupation of the land[194] but contains the inherent limitation -

> not to use the land in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis for the group's claim to aboriginal title.[195]

At first glance it seems that the court is inconsistent for just a few paragraphs earlier it held that

> on the basis of *Guerin* aboriginal title also encompasses mineral rights and land pursuant to aboriginal title should

190 *Delgamuukw* par [14].
191 *Delgamuukw* par [110].
192 *Delgamuukw* par [111].
193 *Delgamuukw* par [125].
194 *Delgamuukw* par [117].
195 *Delgamuukw* par [125].

> be capable of exploitation in the same way, which is certainly not a traditional use for those lands.[196]

It is, therefore, necessary to understand the scope of the limitation in light of its rationale.[197] It seems that what the court wanted to stress is that because of the fact that prior physical occupation is a source of aboriginal rights, the destruction of the continuity of the relationship of an aboriginal community with its land would negate the very basis for the existence of the right and, therefore, aboriginal title does not include the right to alienate, one of the very characteristics of fee simple.

Reconciling the principles that the purposes for which the land may be used need not be confided to those

> aboriginal practices, cultures and traditions which are integral to distinctive aboriginal cultures.[198]

It would be the task of the courts deciding on the individual facts of each case to ascertain that

> land held pursuant to aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to aboriginal title[199]

It falls outside the scope of this study to theorise what exactly the criteria would be to determine the scope of this *sui generis* interest in land. What is important is the confirmation that aboriginal title is an interest in land, albeit be it *sui generis.* This right in land includes mineral rights unless the exercise of the rights would result in negating the character of the use of the land that epitomized the group's relationship with the land and gave existence to aboriginal title in the first place.[200]

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196 *Delgamuukw* par [122].
197 Slattery *The Nature of Aboriginal Title* 18.
198 *Delgamuukw* par [117]. See Pienaar 2005 *THRHR* 533-545 for a comparative analysis of aboriginal title and indigenous ownership.
199 *Delgamuukw* par [125].
200 Waters 2001 RPR states:

In summary it can be stated that since *Delgamuukw* aboriginal rights to land are recognised as *sui generis* containing the following features:

- inalienability, except to the crown;
- communal tenure;
- it encompasses the exclusive use and occupation of land;
- it is more than a personal right, it is a right to the land itself;
- it is bound to its aboriginal character in a pre-existing system of aboriginal law;
- it has to be viewed from both aboriginal and non-aboriginal perspectives;
- it is not absolute but may be infringed upon when justified;
- Canadian common law rights comprise of English, French and aboriginal land tenure principles.

Delgamuukw has ascertained the recognition of aboriginal title as a true property right that may be maintained against the whole world,[201] requiring the payment of compensation for its extinguishment.[202]

6.2.5.2 The right to minerals

Although aboriginal rights and treaty rights may be similar in nature,[203] the existence of a negotiated treaty influences the extent of native claims to minerals.

Reiter[204] states that the right to minerals based solely on aboriginal title, without an accompanying treaty right, seems questionable. However, it was held in *Delgamuukw* that aboriginal title, like in reserve lands,

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> In other words, that land can be used for whatever purpose the holder of Aboriginal title wants, provided that it does not undercut the fundamental nature of Aboriginal title...

201 Slattery *The Nature of Aboriginal Title* 15, 22; McNeil *Aboriginal Title as a Constitutionally Protected Property Right;* Woodward *Converting the Communal Aboriginal Interest into Private Property* 93.

202 Slattery *The Nature of Aboriginal Title* 22, 25, 26.

203 See par 6.2.5.1.*supra*.

204 Reiter *The Law of First Nations* 291.

includes mineral rights and should be capable of exploitation in the same way.[205]

In the discussion that follows, the writer will first take 'one step back' before endeavouring to take 'two steps forward'. As a result a short discussion of the history and nature of treaty rights will be discussed before the focusing on the exploitation of mineral rights in aboriginal lands as part of the aboriginal interest in land.

6.2.5.2.1 Resource development and Treaty land entitlement

6.2.5.2.1.1 Treaty rights as a source of aboriginal rights

An historical survey of the source of aboriginal title explains the distinction between aboriginal rights and treaty rights. While the French did not enter into treaties with the original occupants of the land when they asserted sovereignty, early British Imperial policy dictated the recognition of aboriginal title to lands.[206] The *Royal Proclamation* of 1763[207] was issued, establishing the policy which determined that only the crown might acquire traditional aboriginal lands and only if the aboriginal people consented thereto. The scope of the Proclamation was geographically limited by its terms[208] and did not extend to lands initially occupied by the French. The Proclamation laid the foundation for future treaties and agreements with aboriginal peoples with respect to their traditional lands, a road that was pursued in Ontario, the Prairie

205 *Delgamuukw* par [122]. The South African Supreme Court of Appeal held in *Richterveld Community v Alexkor* 2003 6 SA 104 (SCA) that the customary law right held by the community was akin to ownership and encompassed a right to minerals – para [8], [85]. This viewpoint was confirmed by the Constitutional Court in *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC).

206 Bartlett *Resource Development and Aboriginal Land Rights* 1; Reiter *The Law of First Nations* 6; *Guerin v R* 1984 CarswellNat 813 (SCC) par [5].

207 *The Royal Proclamation* 1763 [UK] in RSC 1985 Appendix II No 1.

208 *Calder v Attorney-General of British Columbia* 1973 CarswellBC 263 (SCC) para [12], [13]; McNeil *Common Law Aboriginal Title* 274-276.

Provinces, North-Eastern British Columbia, parts of the Yukon, the North West Territories and Nunavut.[209]

Treaties entail that aboriginal bands surrender their right to their land in return for undertakings by the crown.[210] In *Pawis v The Queen*[211] it was held that a treaty is "tantamount to a contract." As a result it has been held that "[a]n Indian treaty is unique; it is an agreement *sui generic*".[212] As a result the extent of mineral rights holding under the treaties will be determined by the terms of the relevant treaty.

Between 1871 and 1921 eleven treaties were negotiated, molded on the earlier Robinson Treaty (1850) and the Douglas Treaty (1850-1859). These treaties were entered into to allow for resource development.[213] The terms of the numbered treaties are similar – all providing for the surrender of Indian title in return for the establishment of reserves.[214] The treaties also guaranteed entitlements as to "hunting, trapping, fishing rights and annuities" and certain social and economic undertakings by the Government of Canada. [215] The first nations' rights toward the mineral wealth in the land allotted to them was not always written down in the treaties themselves, but it is clear from recorded exchanges between Treaty Commissioners and Indian Chiefs that it was pre-empted.[216]

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209 Bartlett *Resource Development and Aboriginal Land Rights* 2; Sinclair and McCallum *An Introduction to Real Property Law* 49.

210 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* (i).

211 *Pawis v The Queen* (1979) 102 DLR (3d) 602 (FCDT) at 607.

212 *Simon v R* 1985 (SCC) CarswellNS 226.

213 Reiter *The Law of First Nations* 8; Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 40.

214 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 45.

215 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 45; Sinclair and McCallum *An Introduction to Real Property Law* 50.

216 Morris *The Treaties of Canada with the Indians of Manitoba* at 62-70. In negotiating treaty # 3, the Fort Francis Chief stated in the discourse:

> The sound of the rustling of the gold is under my feet where I stand; we have a rich country; it is the Great Spirit who gave us this, where we stand is the Indian's property, and belongs to them. ... It is our chiefs, our young men, our children and great grandchildren, and those that are to be born, that I represent here, and it is for them that I ask for

6.2.5.2.1.2 The content of treaty rights as it relates to minerals

The agreement reached under a treaty would determine the extent of mineral right holding in land subject to the treaty. The interpretation of treaty rights in order to determine the scope and content thereof, is an interesting process. In *R v Taylor and Williams*[217] the Ontario Court of Appeal held that oral discussions held between parties pursuant to the concluding of a treaty should be considered as part of the terms of that treaty. Treaty entitlements should, therefore, be construed with regard to this principle of statutory interpretation.[218] Another principle that emanated from case law was that

> treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.[219]

Although this generous principle was affirmed in other cases[220] it was qualified in *R v Blais*[221] where the court held that a constitutional document must be read "generously to fulfil, but not to 'overshoot' its purpose". The Supreme Court of Canada recently held[222] that the logical evolution of aboriginal practices must be taken into account when the scope of treaty rights is considered.[223]

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terms. The white man has robbed us of our riches, and we don't wish to give them up again without getting something in their place.

As an answer to the direct question posed by the said Chief regarding the status of any metal to be discovered by the Indians on their land, Lieutenant Governor Morris answered:

If any important minerals are discovered on any of the reserves the minerals will be sold for their benefit with their consent.

217 *R v Taylor and Williams* (1981) 34 OR (2d) (Ont CA) 360.

218 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 47; Murphy *Consultation with Aboriginal Communities* 154.

219 *Nowegijick v R* (1983) 1 SCR 29 (SCC) at 36.

220 *Simon v R* (1985) 2 SCR 387 (SCC) 410; *R v Sioui* (1990) 3 CNLR 127 (SCC); *Saanichton Marina Ltd v Claxton* (1989) 57 DLR (4th) 161 (BCCA) par [20]–[25]; *R v Badger* (1996) 1 SCR 771 (SCC) at 798.

221 *R v Blais* 2003 CarswellMan 386 (SCC) par [17].

222 R v Bernard 2005 CarswellNS 318 (SCC); *Marshall v Canada* (1999) 3 SCR 456(SCC)

223 McKay 2005 *Windsor R Legal & Soc Issues* 81 argues that these latest developments must be seen as a move to a more restrictive interpretation.

The application of these principles of statutory construction determines that the treaty land entitlements extended to the full resource interest of the land including mineral and timber.[224] In the *Indian Act* of 1927[225] a reserve is defined as

> any tract or tracts of lands set apart by treaty or otherwise for the use or benefit of or granted to a particular band of Indians, of which the legal title is in the Crown, and which remains so set apart and has not been surrendered to the Crown, and includes all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.

With the amendment of the act in 1951, the reference to

> trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein

has been removed. McNeil[226] states that this amendment could not have been intended to diminish the Indian band's interest in reserve lands, as it would have infringed a vested right. The Canadian Supreme Court has indeed confirmed that the aboriginal interest in reserve lands include the rights to minerals.[227]

6.2.5.2.1.3 The nature of rights conferred by Treaties

The question arises whether treaty entitlements do not pre-suppose a surrender of aboriginal title. It was held in *Liidlii Kue First Nation*[228] that the wording of a treaty might indicate the fact that aboriginal title has

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224 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 48. He stated at 48 that the only uncertainty that might be said to exist is with respect to water and precious metals. As the object of the treaties was not merely the provision of land for settlement, but the provision of a land and resource base for survival and development of the Indian people, Barton suggests that circumstances contemplated that the crown would not retain the interest to precious metals. The account between Lieutenant Governor Morris and the Fort Francis Chief *supra* at n 216 also indicates that the rights to gold were not reserved in favour of the crown.

225 *Indian Act* RSC 1927 s 2(j).

226 McNeil *The Meaning of Aboriginal Title* 149.

227 *Delgamuukw* par [122].

228 *Liidlii Kue First Nation v Canada* 2000 CarswellNat 1536 (FCTD) par [42].

been extinguished by the treaty.[229] Although the treaty might have extinguished the aboriginal title in the land, it was replaced by rights of a similar nature. [230] There are also those reserve lands where the aboriginal title was never extinguished prior to a conveyance to the crown.[231] As the nature of rights under both holdings is similar, this aspect will not be pondered on.

As the acquired rights do not vest ownership in fee simple, the Indian bands are not allowed to alienate the land or parts thereof or burden it with *inter alia* leases, unless it is done subject to the provisions of the *Indian Act.*[232] As this has direct implications for mining activities in the reservations, the relevant sections of the said act will be considered.

6.2.5.2.1.4 *The Indian Act* R.S.C. 1985, c. I-5

The *Indian Act* provides for the administration and management of Indian reserves. A reserve is defined in this act as:[233]

> a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band ...

Provisions in the act established the rules for ascertaining Indian status and band membership, for band internal government, taxation, financial management, regulation of land use[234] and the making of bylaws by the band council. Section 93 stipulates that minerals, stone, sand, gravel, clay or soil may not be removed from a reserve without the written permission of the Minister. The Minister may, however, dispose of sand, gravel, clay and other non-metallic substances on lands in a reserve provided that the band and/or individual Indian in lawful possession of

229 Pentney *The Aboriginal Rights Provisions* 211.
230 *Guerin v R* 1984 CarswellNat 813 (SCC) par [50].
231 Cumming and Mickenberg *Native Rights in Canada* 228.
232 *Indian Act* RSC 1985 c I-5.
233 S 2(1).
234 S 24 determines that transfer of a piece of the land by a band member to a band member is allowed but subject to the approval of the minister.

the land is paid the proceeds of the transaction.[235] The Minister may issue a permit in terms of s 28(8) for a period not exceeding one year, or, with the consent of the band for a longer period, to allow for prospecting or exploration on reserve lands.

Sections 37-41 determine that reserve lands and resources are inalienable until the Indian band surrenders them or designates them by way of a surrender in favour of the crown. An absolute surrender brings the Indian interest to an end[236] while a designation allows for a right in the land, such as a lease, to be allocated to an interested party.[237] When dealing with surrendered lands a fiduciary obligation is owed to an Indian band by the crown.[238]

6.2.5.2.1.4.1 The *Indian Mining Regulations*[239]

The *Indian Mining Regulations* provide for the disposition of surrendered minerals underlying lands in Indian reserves, excluding reserves located in British Columbia.[240] Minerals are defined in s 2(1) as:

> naturally occurring metallic and non-metallic minerals and rock containing such minerals, but does not include petroleum, natural gas and other petroliferous minerals or any unconsolidated minerals such as placer deposits, gravel, sand, clay, earth, ash, marl and peat.

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235 S 58.

236 *R v Smith* 1983 CarswellNat 534 (SCC).

237 S 38(2) Designation -
> A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

238 *Guerin v R* (1984) 2 SCR 335 SCC); Bennett and Powell 2000 *SAJHR* 609-614.

239 *Indian Mining Regulations* CRC 1978 c 956.

240 *Indian Mining Regulations* CRC 1978 c 956, s 3. In British Columbia the control and disposal of minerals are subject to the laws of the province that relate to prospecting, staking, recording, developing, leasing, selling or otherwise disposing of minerals or mineral claims - Barton *Canadian Law of Mining* 97. Minerals and mines are reserved as the property of the province. Revenues and royalty payment as distributed equally between the province and the federal government who administers the funds to the benefit of the bands.

It is specifically stipulated in section 4 of the *Indian Mining Regulations* that the particular province's mining legislation will be applicable. The disposition of minerals under the regulations is subject to the discretion of the Division Chief, an officer from the department of Indian Affairs and Northern Development.[241] A tender process may be followed by the Division Chief in terms of section 5 or if the consent of the band is acquired in terms of section 6, a permit or lease may simply be issued. Barton[242] states that in practice the most leases are issued by negotiated consent. While a permit is issued for exploration and development, a lease is necessary for production. Royalty payments are made to the benefit of the band.[243]

6.2.5.2.1.5 Unfulfilled treaty obligations[244]

It is important to note that treaty originated obligations are continuous in nature. The lands subject to the treaties were not always defined and outlined during the actual agreements. Bartlett's[245] quotation from the Treaty Commissioner's Report with respect to Treaty # 8 explains the situation:

> As the extent of the country treated for made it impossible to define reserves or holdings, and as the Indians were not prepared to make selections we confided ourselves to an undertaking to have reserves and holdings set apart in the future, and the Indians were satisfied with the promise that this would be done when required.

241 S 5.
242 Barton *Canadian Law of Mining* 104.
243 Royalty rates are normally set by negotiation and the royalty rate of the provincial government is regarded as a minimum rate - Barton *Canadian Law of Mining* 104.
244 It is not the aim of this paragraph to deal in detail with the internal conflict that existed between federal and provincial government regarding the fulfillment of Treaty obligations. For an overview see Barton *Canadian Mining Law* 92-99.
245 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 53.

Through the *Natural Resources Transfer Agreements*[246] a constitutional obligation was imposed on the provinces with respect to outstanding treaty land entitlements. The obligation on the provinces entails that they must endeavour to reach agreement on the selection of reserve lands in order to set aside land upon request of the Superintendent General of Indian Affairs.[247] Once land has been set aside it has to be

> administered by Canada in the same way in all respects as if they have never passed to the Province.[248]

In addition to the fact that the numbered treaties were to provide a land and resource base for the survival and development of the Indian people and the obligation to provide land in the future in order to fulfil treaty obligations, the treaties reserved to the crown the "right to deal with any settlers... as she shall deem fit".[249] Due to development that has taken place in the past years, the current problem is the availability of suitable lands.[250] In some areas crown lands are 'burdened' with third-party mineral right holdings[251] and in others there are simply not enough suitable lands.[252] This problem was addressed in a number of individual instances by either negotiating a settlement to protect third-party interests or rendering financial compensation *in lieu* of land.[253] To date no comprehensive solution to this problem has been arrived at.[254]

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246 *Natural Resources Transfer Agreements* in *Constitution Act* 1930 [UK] in RSC 1985 Appendix II No 26.

247 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 85.

248 *Natural Resources Transfer Agreements* in *Constitution Act* 1930 [UK] in RSC 1985 Appendix II No 26.

249 This phrase is included in all the numbered treaties.

250 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 89.

251 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 86

252 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 89.

253 Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 89, 90.

254 See Bartlett *Resource Development and Treaty Land Entitlement in Western Canada* 91-94 for a discussion on the distinct situation in British Columbia.

6.2.6 Compensation for the taking of resource interests

The aim of this section is to give an account of the principles in Canadian law for determining whether compensation is payable when private interests in mineral resources are taken by the crown. After an overview has been given of the general principles governing the payment of compensation as it relates to expropriation, the focus will be on the three categories of mineral ownership namely, privately owned minerals, minerals in crown ownership and minerals under aboriginal title.

6.2.6.1 Overview of Canadian expropriation law: the core principles of expropriation

Canada has no legal guarantee of property rights[255] although one can argue that section 35 of the *Constitution Act* provides constitutional protection for aboriginal title and, therefore, a specific spectrum of property rights are constitutionally protected.[256] The issue of expropriation is nevertheless constitutional in the sense that it deals with the relation between state powers and individual rights.[257]

Historically the power to expropriate was part of the crown's prerogative as the right to take land was a right enjoyed by the sovereign power of the state.[258] Today the power is spelled out in statutes and extended from the crown to municipal and other public bodies.[259] It is for this reason that some Canadian judges have expressed the opinion that there are no common law principles in the law of expropriation[260] and that

255 Cullingworth 1985 *ULP* 385.
256 See par 6.2.5.1 *supra.*
257 Barton 1987 *Canadian Bar Review* 145.
258 *Steer Holdings v Government of Manitoba* 1992 CarswllMan 150 (Man CA) par [2], hereafter referred to as *Steer Holdings*; *Expropriation Report No* 12 8; Cullingworth 1985 *ULP* 386.
259 *Expropriation Report* No 12 8.
260 *Purchase v Terrace (City)* 1995 CarswellBC 109 (BCSC) par [32].

> compulsory acquisition and compensation are entirely creatures of statute.[261]

To rid the rule that "[c]ompensation claims are statutory and depend on statutory provisions"[262] of its inherent unfairness, courts have made an effort to award compensation for takings by compulsory acquisition.[263] Subsequently a rule of statutory interpretation is invoked to redress the unjust results flowing from the strict application of the rule that the owner of expropriated property has no inherent right to compensation for the property lawfully taken from him.[264] Whenever a statute provides for expropriation, but neither expressly provides for the payment of compensation nor expressly excludes a right to compensation, courts rely on the statement by Lord Atkinson in *Attorney General v De Keyser's Cream Silver Royal Hotel Ltd*[265]

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demands, a statute is not to be construed so as to take away the property of a subject without compensation.

However, this longstanding presumption of a right to compensation should not be characterized as a positive rule of law –

> obliging the Crown to pay compensation for all 'takings', for all types of property' no matter what the legal nature is of that property and no matter how the 'taking' occurred, unless the enabling legislation expressly denies compensation.[266]

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261 *Rugby Joint Water Board v Footit* (1972) 2 WLR 757 (HL) at 763.
262 *Rockingham Sisters of Charity v R* (1922) 2 AC 315 at 322.
263 *Steer Holdings* par [6].
264 A discrepancy in the nature of the right to compensation exists in the literature. While the right to compensation is being described as indicated *supra* as depending on statutory provisions, the application of the presumption lead some writers to perceive it as a "positive common law rule for compensation"- See *inter alia* Barton *Canadian Law of Mining* 185 and Young 2005 *Sask LR 345.*
265 *Attorney General v De Keyser's Cream Silver Royal Hotel Ltd* (1920) AC 508 (HL); *Manitoba Fisheries Ltd v The Queen* (1978) 88 DLR (3d) 462 (SCC) at 467; *The Queen (BC) v Tener* 1985 CarswellBC 7 (SCC) par [12].
266 *Cream Silver Mines Ltd v British Columbia* (1993) 75 BCLR (2d) 324 (BCCA) para [19], [20].

The presumption can only be rebutted by a clear contrary intention in the enabling act.[267]

As a result courts have to construe expropriation statutes strictly[268] and in those case where it is not clear that an expropriation has taken place because ownership was not transferred, as is usually the case with infringing regulatory provisions,[269] it is the court's task to determine whether the regulation in question entitles the aggrieved party to compensation under the *Expropriation Act*.[270]

6.2.6.1.1 Defining expropriation

Expropriation is defined in the different statutes dealing with it. The definitions vary in content.[271] The common denominator found in all

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267 *BC Medical Services Association v R* (1984) 15 DLR (4th) 568 (CA) 572.

268 It is emphasised in *Steer Holdings* par [32] that the strict constructions of these statutes does not mean further enabling authorities to expropriate, it means limiting these powers if there is vagueness and doubt and maintaining the proprietary interest.

269 Young 2005 *Sask LR* 346.

270 *Mariner Real Estate Ltd v Nova Scotia* 1999 CarswellNS 254 (NSCA) par [41]. It is not for the court to pass judgement on the way the Legislature apportions the burdens flowing from land use regulation.

271 Under the *Federal Act, An Act respecting the expropriation of land* RSC 1985 c E-21, *as am* expropriation is defined as "taken by the Crown". Definitions under provincial acts include *inter alia*:

"expropriation" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers - *Expropriation Act* RSA 2000 c E-13 *as am*;

"expropriate" means the taking of land by an expropriating authority under an enactment without the consent of the owner, but does not include the exercise by the government of any interest, right, privilege or title referred to in section 50 of the *Land Act - Expropriation Act* RSBC 1996 c 125 *as am*;

"expropriation" means the acquisition of title to land without the consent of the owner thereof - *The Expropriation Act* RSM 1987 c E190 [CCSM c E190], *as am*;

"expropriate" means to take land without the consent of the owner and, subject to the *Clean Environment Act*, includes diverting or authorizing the diversion of a watercourse where such diversion affects land of an owner other than the person diverting or seeking the authorization to divert the watercourse but does not include the cancellation or suspension of any lease, licence or permit under the *Crown Lands and Forests Act* or regulations thereto, or the withdrawal or removal, in accordance with that Act and regulations thereto, of any land from a licence made there under - *The Expropriation Act* RSNB 1973 c E-14 *as am*;

these definitions can be phrased as 'taken or acquisitioned without consent.'[272] This resulted in expropriation being described in general terms as the compulsory acquisition of property by the crown or any of its authorized agencies.[273] Once again one finds that acquisition or appropriation forms an inherent part of the concept of expropriation, demanding more than the mere 'taking away' of property[274] before the elements of expropriation are met.

Expropriation occurs if the crown or public authority acquires an interest in property from the owner.[275] The 'vesting of title' has been identified as an essential concept of expropriation.[276] However, decisions of the Supreme Court of Canada "speak to an imaginative and fluid concept of taking"[277] and does not limit takings to a "real transfer of possession from the citizen to the state".[278] The effect of the legislation is indicatory of whether a taking has occurred and, therefore, *de facto* expropriations or constructive expropriations have been recognised as expropriation where an element of constructive acquisition or constructive appropriation was present.[279]

In *The Queen (BC) v Tener,*[280] a landmark decision by the Canadian Supreme Court, the idea is advanced that regulatory restrictions can in certain circumstances amount to expropriation. The court extended the principles concerning expropriation to a situation where the regulation of

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"expropriated" means taken by an expropriating authority under this Act - *Expropriation Act* RSNWT 1988 c E-11*as am*;
"expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers - *Expropriations Act* RSO 1990 c E-26 *as am*.

272 Another interesting point to consider is that most of these definitions refer to the "taking of land". It falls outside the scope of this thesis to determine a broad category that will be regarded as property that can be expropriated or affected by a taking.
273 Todd *The Law of Expropriation* 1.
274 See par 5.2.1.1 *supra*.
275 *The Queen (BC) v Tener* 1985 CarswellBC 7 par [8].
276 *ALM Investments Ltd v Strata Plan NW 2320 (Owners)* (1989) 42 LCR 269 (BCCA) at 271.
277 Bauman 1994 *The Advocate* 571.
278 Bauman 1994 *The Advocate* 569.
279 *BC Gas Inc v Lansdall* 1992 CarswellBC 2503 (BCECB) par [29].
280 *The Queen (BC) v Tener* 1985 CarswellBC 7 (SCC) hereafter referred to as *Tener*.

property led to the effective expropriation of a right holder. At the same time the clear distinction between regulation as a mere negative prohibition that reduces the value of the property concerned or simply extinguishing it and expropriation as an acquisition where the property, rights or value are transferred or captured by the government authority, was confirmed.[281]

The court's reasoning will be better understood if the facts of this specific case are highlighted. In 1937 Tener's predecessor in title obtained sixteen crown-granted mineral claims from the crown. These grants conveyed to their holders all minerals under the claims and the right to use and possession of the surface of the claims for the purpose of winning the minerals. In 1939, Wells Grey Park was gazetted under the *Provincial Parks Act*. The crown-granted mineral claims were situated in the allocated area but they were not expropriated. Exploration of the claims continued but it became increasingly difficult to obtain the necessary authorization to get access to and work the claims. In 1978 Tener was informed that no new exploration or development work would be authorized.

The key question was whether an expropriation had occurred in the circumstances. Of importance is the fact that the majority of the court held that the interest that the respondents had, namely the crown granted mineral claims, was an interest in fee simple in the lands.[282] Estey J writing for the majority, held that although the taking did not include title to the minerals themselves, what had been lost was the right of access. What then, has been acquired by the crown?[283] Estey J[284] held that the denial of access to the land amounted to a recovery by the crown of a part of the right granted to the respondents in 1937. The crown benefited from this regulatory measure. It was clear that the claims had been rendered virtually useless while the value of the Park

281 *Tener* par [21].
282 *Tener* para [8], [15].
283 *Tener* par [9].
284 *Tener* par [20].

had been enhanced.[285] A *de facto* or effective expropriation has occurred.

Important implications for future development that originated from the *Tener* decision are that expropriation is a matter that concerns both fact and law. If the loss of the aggrieved party is accompanied by a form of appropriation by the governing body, compensation becomes payable irrelevant of the fact whether the proper expropriation procedures have been set in motion to acquire the relevant interest. It is also clear that the right or interest acquired need not necessarily be the same as the right or interest lost. In the *Tener* case the respondents lost their right of access while the crown in effect gained the "outstanding property interest"[286] held by the respondents.

The court was clear on the fact that *de facto* expropriation, or constructive expropriation was to be distinguished from zoning and land use regulation as these measures add nothing to the value of public property and there is no corresponding acquisition of rights by the designating authority.[287]

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285 The Court relied to a large extent on its previous decision in *Manitoba Fisheries Ltd v R* (1978) 88 DLR (3d) 462 (SCC), hereafter referred to as *Manitoba Fisheries*, where the government was held liable to pay compensation to a company that had been deprived of its goodwill by legislation that set up a crown corporation with a monopoly in the business. In *Tener* par [20] the court explained that *Manitoba Fisheries* represents a scenario where goodwill was acquired by the crown. It is clear that the concept of constructive appropriation is used to justify the court's decision in *Manitoba Fisheries* that compensation was payable.

286 *Tener* par [10]. By preventing the exploitation of minerals in the land the crown has taken another step in establishing the National Park. The denial of access to these lands amounted to a recovery by the crown of a part of the right granted to the respondent in the sense that although the respondent was left with the minerals, he was prohibited from exploring them. The respondent's property rights were 'captured' by the government authority.

287 *Tener* par [21]. In *Mariner Real Estate Ltd v Nova Scotia* 1999 CarswellNS 254 (NSCA) par [48] Cromwell AJA once again reminded that in Canada the
> bundle of rights associated with ownership carries with it the possibility of stringent land use regulation.

As a result of this case Canadian courts have held that compliance with formal procedure is not required for a finding that expropriation has taken place. In *Purchase v Terrace* the court stated as follows:[288]

> What does or does not constitute an expropriation will depend on whether or not the facts come within the definition of 'expropriation'.

Ancillary to the principle that the crown should in fact acquire at least some interest and that the aggrieved party's loss should not merely entail the diminution of rights, it has been held that *de facto* expropriation only occurs when there has been an action which effectively takes away or extinguishes the claimant's only or principal interest in the land.[289] Dorgan J held[290]

> As expropriation is an extraordinary power, only to be allowed under stringent conditions to protect the property rights of landowners, so too is the power in a Court to declare *de facto* expropriation, an extraordinary power, only to be used when there has been a complete denial or invasion of a landowner's property interests and/or rights.

In 2002 the British Columbia Supreme Court listed the essential elements for a claim based on the theory of constructive expropriation as[291] (a) the taking of property from a subject, (b) a corresponding acquisition by the 'expropriating authority', and (c) that the property taken be an interest in land, thus real property. In 2003 the same court extended these principles by declaring that compensation is payable

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288 *Purchase v Terrace (City)* 1995 CarswellBC 109 (BCSC) par [54] hereafter referred to as *Purchase.*

289 *Purchase* par [66]; *ALM Investments Ltd v Strata Plan NW 2320 (Owners) (No2)* (1989) 42 LCR 269 (BCCA) 271-272; *BC Gas Inc v Landall* 1992 CarswellBC 2503 (BCECB) par [29]; *Casamiro Resource Corporation v British Columbia* (1991) 45 LCR 161 (BCCA) 169-170; *McEachern v British Columbia Hydro and Power Authority* 1997 CarswellBC 3143 (BCCA) par [48]; *Mariner Real Estate Ltd v Nova Scotia* 1999 CarswellNS 254 (NSCA) par [48]. See also Bauman 1984 *The Advocate* 574; *64933 Manitoba Ltd v Manitoba* 2002 CarswellBC 299 (Man CA) par [13]; *Alberta (Minister of Public Works, Supply and Services) v Nilsson* 2002 CarswellAlta 1491 (Alta CA) par [48].

290 *Purchase* par [66].

291 *TFL Forest Ltd v British Columbia* 2002 CarswellBC 270 (BCSC) par [24].

with respect to personal property[292] that has been constructively expropriated.

It is clear from the discussion that although extensive and restrictive land use regulation is the norm in Canada, governmental action that goes beyond drastically limiting use or reducing the value of the owner's property, may be viewed as *de facto* expropriation and give rise to a claim for compensation if the element of constructive appropriation is present.

It now remains to be determined what will be regarded as property that can be expropriated.

6.2.6.1.2 What is property?

At the onset of this discussion, it is necessary to keep in mind that the provisions contained in the different expropriation acts will to a great extent determine the meaning of 'property' that can be affected by either expropriation or *de facto* expropriation.[293]

This point can be illustrated by referring to some of these acts once again. Under the Federal *Expropriation Act*[294] property does not only include land or an interest in land as "expropriated interest" is defined to include

> any right, estate or interest that has been lost, in whole or in part, by the registration of a notice of confirmation under Part I...

292 *Rock Resources v British Columbia* (2003) 229 DLR (4th) 603 (BCCA) 614.

293 In *Thompson v Thompson* 2005 CarswellOnt 1021 (Ont CA) par [24], the court specifically held that the purpose of legislation and the definition of terms contained in different acts, will determine the concept of property under that specific legislation.

294 *Expropriation Act* RSC 1985 c E-21, s (2).

In contrast to this wide open category, some of the provinces' expropriation legislation refers specifically to 'land'.[295] Where the term 'land' is not defined in the applicable statute, it will in the ordinary process of statutory interpretation be read as including an interest in land and the extinction of an interest in land will likewise be included in the expression "expropriation of land".[296]

Keeping the importance of the provisions of the different statutes in mind, a broad overview of interests that has been regarded as property that can be expropriated is interesting. It is clear that the ordinary meaning of the term "private property" is not confined to real estate or real property.[297] In *Manitoba Fisheries Ltd*[298] the goodwill of a business has been characterized as property. The intangible nature of goodwill did not prevent a finding that it was property.[299] A similar finding was made in *Ulster Transport Authority v James Brown and Sons Ltd*[300] This broad view should not be taken as a rule of thumb. Of importance is the decision in *National Trust Co v Bouckhuyt.*[301] Although the court was not dealing with the issue of whether the taking of a tobacco quota would amount to expropriation but whether tobacco quota was property within the narrow meaning of the *Personal Property Act* of Ontario, the reasoning of the Court was followed in *Sanders v British Columbia,*[302] a case dealing with precisely this subject. In *Bouckhuyt*[303] the court held that a tobacco quota is not property and substantiated its finding by stating that -

> [t]he notion of "property" imports the right to exclude others from the enjoyment of, interference with or appropriation of a specific legal right. This is distinct from a revocable

295 See par 6.2.6.1.1 *supra.*
296 *Tener* par [15].
297 Boyd *Expropriation in Canada* 1.
298 *Manitoba Fisheries Ltd v R* (1978) 88 DLR (3d) 462 (SCC).
299 Baumann1994 *The Advocate* 568.
300 *Ulster Transport Authority v James Brown and Sons Ltd* (1953) N1 79.
301 *National Trust Co v Bouckhuyt* 1987 CarswellOnt 141.
302 *Sanders v British Columbia (Milk Board)* 1991 CarswellBC 13 (BCCA).
303 *National Trust Co v Bouckhuyt* 1987 CarswellOnt 141 (Ont CA) par [24].

> licence, which simply enables a person to do lawfully what he could not otherwise do.

Bauman[304] states that this qualification has important implications in the expropriation sphere, specifically with relation to regulatory schemes affecting licensed operations such as liquor sales and taxi businesses. It also has a direct implication on mining activities, a fact that has been proven in the decision in *Cream Silver Mines Ltd v British Columbia.*[305]

6.2.6.1.2.1 Mining interests as property

6.2.6.1.2.1.1 Privately owned minerals

It has already been established in the discussion above that minerals that are owned in fee simple are incidents of land.[306] Both the *Tener* and *Casamiro*[307] cases dealt with crown granted minerals in private (fee simple) ownership. Regulatory provisions that denied the respondents the ability to exercise their rights have been held to be expropriatory, as they infringed on the property of the respondents and the state acquired (ancillary) interests in the process. From these cases, as well as the dicta from *Cream Silver Mines Ltd v British Columbia* that will be dealt with below,[308] it is clear that crown granted rights to minerals are regarded as property. Strengthening this submission is the rule of practice that title questions to minerals in freehold property are not resolved under mining laws but under real property laws.[309]

304 Bauman 1994 *The Advocate* 569.
305 *Cream Silver Mines Ltd v British Columbia* (1993) 75 BCLR (2d) 324 (BCCA), also referred to as *Cream Silver Mines Ltd v British Columbia.*
306 See par 6.2.2.2.2
307 *Casamiro Resource Corporation v British Columbia* (1991) 45 LCR 161 (BCCA).
308 *Cream Silver Mines Ltd v British Columbia* (1993) 75 BCLR (2d) 324 (BCCA).
309 Harries *Mining Property Acquisition* 167.

6.2.6.1.2.1.2 Minerals in crown ownership

As stated above, the majority of minerals in Canada are subject to crown ownership.[310] It became the rule rather than the exception in all the provinces that minerals and mineral rights were reserved by the crown whenever land was granted in fee simple ownership. When the 'propertiness' of these interests are under discussion, a distinction must be made between permits, licences and mineral leases.

There is no question about the fact that a mineral lease will be regarded as property.[311] It is the highest and most secure form of tenure under modern mining legislation[312] and questions to title are resolved under real property laws.[313] The provisions of the relevant mining acts will, however, be useful if a dispute arises in a given set of facts. Under the Ontario *Mining Act*[314] a mineral lease is defined as a leasehold patent and a patent is defined as

> a grant from the Crown in fee simple or for a less estate made under the Great Seal, and includes leasehold patents and freehold patents.

The *Mineral Tenure Act*[315] of British Columbia states that a mining lease is an interest in land and as such it will be regarded as property capable of being expropriated.

At first glance, a different scenario exists in respect of mineral claims, licenses and permits.

It was unequivocally stated by the British Columbia Court of Appeal in *Cream Silver Mines Ltd v British Columbia*[316] that mineral claims under

310 See discussion under paragraph 6.2.3 *supra.*
311 Barton *Canadian Law of Mining* 386.
312 Barton *Canadian Law of Mining* 333.
313 Harries *Mining Property Acquisition* 167.
314 *Mining Act* RSO 1980 c 268, s 1.
315 *Mineral Tenure Act* RSBC 1996 c 292, s 48(2).

modern mining legislation are to be distinguished from crown granted mineral claims. It was regarded by the court as statutory creations not known to the common law, and definitely not to be regarded as property for purposes of expropriation. Once again, if one turns to the legislation for direction one finds in the British Columbia *Mineral Tenure Act* the provision that

> [t]he interest of a holder of a mineral claim shall be deemed to be a chattel interest.[317]

Harries[318] states that an unpatented mining claim is no more than a license granted by the crown to enter upon the described lands for purpose of exploring.

Read together with the case law mentioned above in the discussion regarding the nature of an interest subject to a license or permit the conclusion to be drawn is that no compensation will be payable for the extinguishing of the authority to act under the license.[319] However, the law is never stagnant and even a speck of injustice will encourage development. In 2003 the British Columbia Court of Appeal decided in *Rock Resources Inc v British Columbia*[320] that the decision in *Cream Silver Mines* did not give effect to the presumption, based on fairness and justice, that the crown would pay full compensation in cases of expropriation regardless of the nature of the expropriated property. The court held that modern mineral claims were indeed personality and not interests in land due to the fact that the M*ineral Act*[321] converted a mineral claim from an interest in land to a chattel, or personality interest. The court argued

316 *Cream Silver Mines Ltd v British Columbia* (1993) 75 BCLR (2d) 324 (BCCA) para [4], [5].
317 *Mineral Tenure Act* RSBC 1996 c 292, s 28(1).
318 Harries *Mining Property Acquisition* 167.
319 See also par 6.2.3.3.1.1.1 *supra*.
320 *Rock Resources v British Columbia* (2003) 229 DLR (4th) (BCCA) 603.
321 M*ineral Act* RSBC 1979 c 259.

> whatever the nature and scope of plaintiff's rights under the mineral affected, they were recognized in the mining industry as having value.

As a result the crown was ordered to pay full compensation for the value of the rights lost.

6.2.6.1.2.1.3 Native ownership

For purposes of this discussion it can be stated that where aboriginal title to minerals have not been extinguished, the law according to private mineral holding will apply *mutatis mutandis*. An additional element that enters the arena when aboriginal title is the subject under discussion, is the crown's duty to consult with first nations whenever the crown has real or constructive knowledge of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it.[322] This duty exists in cases of aboriginal rights and treaty rights.[323]

Another point to consider is Johnston J's remark in *R v Douglas*[324] that

> the factors that must be considered in deciding whether the honour of the Crown has been upheld in the case of infringement of an Aboriginal right, must be determined on the circumstances of the case, not on whether the interest infringed relates to land.

A bold inference that can be drawn from this statement is that even chattel interests can be 'protected' if they are held as an aboriginal right as their infringement or destruction would require prior consultation.

322 *Halfway River First Nation v British Columbia (Ministry of Forests)* (1997) 4 CNLR 45 (BCSC) 71; Sharvit, Robinson and Ross 1999 *CIRL* 6 5-7; Ross 2003 *CIRL* 12 8-10.

323 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* 2005 CarswellNat 3757 (SCC).

324 *R v Douglas* 2006 CarswellBC 774 (BCSC) par [135].

6.2.6.2 Conclusion

The concept of property is determined by the purpose and provisions of applicable legislation. In Canada, where separate expropriation and mining legislation exists in every province, it is of importance to determine the context of property that can be expropriated within the realm of the relevant act.

In giving a broad perspective that has to be read in context it can be stated that *de facto* expropriation or constructive expropriation is included under the Canadian expropriation concept. The requirements set for constructive expropriation depending on the wording of the relevant expropriation act are:

(a) the taking of property from a subject;
(b) a corresponding acquisition by the 'expropriating authority'; and
(c) that the property taken be an interest in land, unless the interpretation allows for a broader scope.

Unless otherwise stated in mining legislation, it is only crown granted mineral interests and mineral leases that can be regarded as property capable of being expropriated. Licenses and permits are not deemed to be property but merely as any authorisation, leave or permission to do something which would otherwise be unlawful.

Although minerals under aboriginal title can also be expropriated, a duty is placed on the crown to consult with the people affected by the infringing regulation or legislation. Due to the unique nature of aboriginal title and aboriginal rights and the fact that they are expressly protected under the *Constitution Act* the possibility exists for more lenience by the courts when *de facto expropriation* is the subject matter, as the rights lost need not necessarily be 'interests in land" to be protected or compensated.

6.3 Influence of the public trust doctrine in attaining crown ownership of minerals.

It has been stated more than once in the course of this chapter that minerals in Canada are primarily in crown ownership. This is the result of legislation that spanned over centuries. Research indicates that although the argument can be made that the foundations of a Canadian variant of the public trust doctrine already exist,[325] a truly Canadian public trust doctrine is merely in developmental stage.[326] The public trust doctrine has not directly influenced the development of Canadian Mining Law to date. In Canada, the crown's interest in land has continued unabated since Confederation[327] and the crown's role as guardian of the public interest has recently been recognised.[328] Although this predicts future development of the public trust doctrine, there is no material available at this stage to discern what the influence of the public trust doctrine on mining and minerals would be. The writer surmises that it falls outside the scope of the current study to predict a line of development.

6.4 Application of Canadian guidelines regarding constructive expropriation to the South African scenario

Canadian guidelines relating to the concept of constructive expropriation might prove to be the necessary motivation for the development of a uniquely South African doctrine of constructive expropriation. The

325 Maguire 1997 *J Env L & P* 15.

326 Maguire 1997 *J Env L & P* 1-41; DeMarco, Valiante and Bowden 2005 *J Env L & P 233-256;* Kidd 2006 *J Env L & P* 187-209. In *Prince Edward Island v Canada* 2005 CarswellPEI 78 the court recognised the existence of a public trust related fiduciary duty that rests on the government and stated in par [37]:

> If a government can exert it's right, as guardian of the public interest, to claim against a party causing damage to that public interest, then it would seem that in another case, the beneficiary of the public interest oughts to be able to claim against the government for a failure to properly protect the public interest. A right gives rise to a corresponding duty.

327 Maguire 1997 *J Env L & P* 19.

328 *Prince Edward Island v Canada (Minister of Fisheries and Ocean)* 2005 CarswellPEI 78 par [37]; *British Columbia v Canadian Forest Products Ltd* 2004 CarswellBC 1278 (SCC) par [72]–[82].

Canadian approach warrants a third way of extending the concept of expropriation as it currently applies in South African jurisprudence.[329] It is possible that this doctrine will only be received in the South African legal system if it can be brought closely within the parameters of existing principles. Despite the increased interest in Anglo-American law during the drafting of the 1996 *Constitution*,[330] the developing of a rigid regulatory takings standard akin to that of the United States might not stand the test of time as it might be seen as the introduction of a foreign concept in South African jurisprudence. As an alternative option it might prove beneficial to view constructive appropriation as the essential requirement for a finding of constructive expropriation in those instances where existing rights are completely extinguished. By expanding the range of appropriation, the doctrine of constructive expropriation can develop along established guidelines and principles. The reasonable extension of principles concerning expropriation may lead to the accommodation of the doctrine.

The range of appropriation can be expanded by accepting that any benefit befalling the state can be regarded as an appropriated interest. Where this appropriation is accompanied by rendering property useless or extinguishing core elements of rights in relation to the property, the doctrine of constructive expropriation will justify the payment of compensation to the aggrieved party.

It is not necessary that the exact same right of which the individual is deprived must be acquired. As seen in the discussion in the *Tener* case,[331] the individual was deprived of his right of access while the government enhanced the value of a park that amounted to a recovery by the government of a part of the right initially granted. They took value from the respondent and added value to the park.

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329 See par 5.4.2.1 *supra.*
330 Mostert 2003 *SAJHR* 568.
331 See par 6.2.1.1 *supra.*

The diminution of rights will not always amount to a taking which is equivalent to expropriation. The state will not profit from or benefit from all regulatory measures. However, where an individual's deprivation is the state's gain, a *de facto* expropriation most probably has occurred. If the range of appropriation can be extended to include any form of gain or benefit to the expense of the property owner's core competence in relation to the property as an acquisition the doctrine of constructive expropriation can find application in South African jurisprudence.

Chapter 7: Assessing section 3 of the MPRDA

7.1 Introduction[1]

Section 3(1) of the *MPRDA* can be regarded as one of the most controversial legislative clauses promulgated during the last 5 years. Until the courts have interpreted this section, lawyers will speculate about its true meaning. Two contradicting opinions have been voiced regarding the interpretation and implication of this section.

7.1.1 Two interpretations

According to Badenhorst[2] the legislature borrowed from the law of the sea in formulating section 3(1). Applied to the law of property, this entails that section 3(1) vests mineral resources in the people of South Africa and these resources, therefore, became *res publicae.*

Dale *et al*[3] strongly object to this viewpoint. They hold that minerals were never regarded as *res publicae* in Roman law[4] and argue that the *MPRDA* never changed the common law principle that unsevered minerals belong to the owners of the land in which the minerals are located. According to them section 3(1) did 'nothing more' than to obliterate the legal institution of the rights of an owner to deal with and exploit his minerals.[5] They motivate their viewpoint along the following lines:

- The reference to 'mineral and petroleum resources' is a broad reference to all the minerals and petroleum occurrences countrywide.

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1 As stated in chapter 1 *supra*, this thesis focuses on the country's mineral resources and the discussion and research are limited to minerals and rights to minerals.

2 Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* [Revision Service 2, 2006] 13-4. Badenhorst opines that the legislature borrowed from the law of the sea in its formulation of section 3(1).

3 Dale *et al South African Mineral and Petroleum Law* [Issue 3]120-123.

4 This view is supported in chapters 2 and 4 of this thesis. Note that Badenhorst did not imply that minerals were regarded as *res publicae* in Roman law. He merely argues that it has now became *res publicae* through the working of the *MPRDA.*

5 If this postulation is correct it means that the owner is left with nothing but an empty shell.

- This collective wealth, as opposed to minerals *in situ* on individual properties, 'belongs' to the nation.
- No provision of the *MPRDA* vests minerals *in situ* on individual properties in anyone else than the owner of the land.
- The provisions of the *MPRDA* do not warrant an interpretation that the *cuius est solum*-principle is abrogated.
- Ownership cannot legally vest in the nation as the nation has no legal personality enabling it to acquire or hold ownership.
- The formulation of custodianship does not fit a private law interpretation that ownership of minerals *in situ* vests in the state.

7.1.2 A third perspective

7.1.2.1 Setting the scene for a controversial interpretation

A third viewpoint is advanced in this thesis. When section 3(1) of the *MPRDA* is assessed, it must be read in context with other provisions of the act. The starting point for an inquiry into the meaning or aim of section 3(1) is the preamble of the *MPRDA*. Although not strictly speaking a provision of the act, the preamble introduces one to the thoughts of the makers of the act.[6] Courts have increasingly relied on preambulatory statements in statutes for interpretative purposes since the interim *Constitution*[7] and, therefore, the content of and spirit purported through the preamble should be taken into account in any discussion relating to the *MPRDA.*

It is clear from the preamble that it is *inter alia* the legislature's intention to acknowledge -

> that South Africa's mineral and petroleum resources **belong to the nation** and that the **State is the custodian** thereof (own emphasis).

6 *Law Union and Rock Insurance Co Ltd v Carmichael's Executor* 1917 AD 593 at 597.
7 *National Director of Public Prosecutions v Seevnarayan* 2003 2 SA 178 C at 194D-F, Du Plessis *Re-Interpretation of Statutes* 239-244.

7.1.2.2 Substantiating initial indications of change

The intention of the legislature as set out in the preamble is converted into a reality through the integrated working of certain provisions of the *MPRDA.* One is initially confronted with the objects of the *MPRDA* as stated in section 2 -

> 2 The objects of this Act are to -
> (a) recognise the internationally accepted right of the State to exercise **sovereignty** over all the mineral and petroleum resources within the Republic;
> (b) give effect to the principle of the State's custodianship of the **nation's mineral and petroleum resources**;
> (c) promote equitable access to the **nation's mineral and petroleum resources** to all the people of South Africa;
> (d) substantially and meaningfully expand opportunities for historically disadvantaged persons ... to benefit from exploiting the **nation's mineral and petroleum resources** (own emphasis).

These objectives together with the intention of the legislature as set out in the preamble, set the scene for section 3(1) where it is specifically stated that

> [m]ineral and petroleum resources are the **common heritage** of all the people of South Africa and the **State is the custodian** thereof for the benefit of all South Africans (own emphasis).

Then, as if anticipating the initial disbelief of lawyers schooled in the traditional Roman-Dutch law the legislature determines in section 4 that -

> 4(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.
> (2) In so far as the common law is inconsistent with this Act, this Act prevails.

This line of thought culminates in the provision contained in section 5(1) where the legislature determines that -

> [a] prospecting right, mining right, exploration right or production right granted in terms of this Act is a limited real right in respect of the **mineral** or petroleum **and** the land to which such rights relate (own emphasis)

and is enhanced by the fact that contractual royalty payments will generally only be made to the holder of the common law mineral right until the old order mining right ceases to exist,[8] whereafter royalties will be paid to the state.

7.1.2.3 The subrogation of the *cuius est solum* maxim

The content of section 5(1) is truly revolutionary. It forms the basis for the abrogation of the common law *cuius est solum* maxim.[9] The content of this clause indicates that the legislature distinguishes between unsevered minerals and land. This was an inconceivable concept in the common law mineral law regime where land and mineral were intrinsically bound together. The interconnected nature of land and minerals, along with the effect of the *cuius est solum* principle, resulted in an undividable and inseparable land-mineral entity in South African common law.[10] Mineral rights, as they existed in the previous mineral law dispensation, were regarded as limited real rights in respect of land despite the fact that they had the exploitation of unsevered minerals as objective.[11] In the realm of the law of things, limited real rights were only recognised in those things that were capable of being the objects of

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8 Item 11 Schedule 2 of *MPRDA.*

9 Badenhorst 2001 *Obiter* 127, referring to the Bill, also holds the view that the maxim has been abolished.

10 It should be stated that this clause is also open to another interpretation. The "and" binding 'mineral or petroleum **and** land' could be interpreted as having an inclusive meaning combining mineral and land in one concept. This interpretation would entail that minerals can still be regarded as being integrally part of the land and that only one limited real right vests in "mineral and land" as entity. However, such an interpretation is not compatible with the foregoing statements and stipulations contained in the act building up to this climax. The mere fact that the legislature deemed it necessary to differentiate between mineral and land, is indicatory of the intention to change the previous system where the object of rights to minerals was the land itself. Dale *et al South African Mineral and Petroleum Law* [Issue 3] 134 also hold that the real right extends to the minerals themselves. See par 2.5 *supra.*

11 See par 2.6 *supra.* In the previous dispensation mineral rights were registered in the Deeds Registry. Only limited real rights in respect of immovable property can be registered in the Deeds Registry -

> S 63(1)No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration

ownership. In fact, ownership has been regarded as the source of all limited real rights.[12] If a limited real right is now recognised in respect of the unsevered mineral, it implies that unsevered minerals are recognised as an independent legal object because of the fact that a limited real right burdens ownership and ownership can only exist in correlation with a legal object.[13]

7.1.2.4 Ownership of South Africa's mineral resources

The question that immediately comes to mind is – where does the ownership of this legal object fall? The *MPRDA* reflects the legislature's clear intention that unsevered minerals, the so-called mineral resources, belong to the nation. The usage of the word 'belong' does not answer the question of ownership. The phrase "common heritage" does not cast more light on the concept of ownership either, as a heritage can also befall a beneficiary and does not necessarily bestow ownership on the recipient.

The other side of the coin is indeed that ownership cannot legally vest in the nation because the nation has no legal personality enabling it to acquire or hold ownership. To understand the mechanism that the legislature employed to overcome this fundamental hurdle, it is imperative to note that the state's fiduciary role and fiduciary responsibilities are emphasised in the *MPRDA*. It is precisely this fiduciary responsibility created in the *MPRDA* that casts light on the ownership of the country's mineral resources.

7.1.2.4.1 The public trust doctrine finds ground through the MPRDA

The public trust doctrine, previously discussed in chapter 4 *supra*, is the legal vehicle for transporting the notion that mineral resources are the common heritage of the nation – even though the nation is not an entity clothed with legal personality. This doctrine is not a legacy of the South African Roman-Dutch based common law system. It contradicts everything that the Roman-

12 See par 3.2 *supra.*
13 The country's mineral resources throughout the *MPRDA* are addressed as an entity, a *genus*. One can deduce that unsevered minerals constitute this mineral resource and as such represent a legal object.

Dutch schooled lawyer was taught, although traces of the principles underlying the doctrine were found in the historical survey in chapter 4.[14] Property subject to the public trust doctrine falls in a unique category not previously recognised in South African law. It falls in that space where private and public law overlaps, where certain expectations are held in common by the people of the country. Minerals have changed from private property to a public resource. This is emphasised by the fact that contractual royalties previously paid by the holder of a mineral lease to the landowner, to compensate him for the depletion of the mineral wealth contained in his land, will henceforth be paid to the state, as custodian of the nation's mineral riches.[15] This line of reasoning is supported by the statement contained in the preamble of the *Draft Mineral and Petroleum Resources Royalty Bill*, 2006[16]

> RECOGNISING that South Africa's mineral resources are non-renewable and are part of the common patrimony of all South Africans, thereby entitling the nation to consideration for the value of those resources when extracted and transferred.

Research of the Anglo-American public trust doctrine indicated that the title in public trust property vests in the state as custodian, trustee or fiduciarius, for the nation as beneficiary.[17] At the core of the public trust doctrine is the principle that state ownership of property subject to the doctrine is held by a title different in character from that which states hold in property intended for sale.[18] Where the state owns property that it can sell in the open market under the obligation that its dealings with such property should be governed by the principles of good governance, the state's holding of the property can

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14 See par 4.2.3 *supra*.
15 Certain exceptions exist – see item 11 of schedule 2 of the *MPRDA*.
16 *Draft Mineral and Petroleum Resources Royalty Bill*, 2006 [B1-2006] issued by the National treasury for comment by 31 January 2007 - http://www.polity.org.za/pdf/Min&PetResRoyBill.pdf [2006/11/8].
17 It was also indicated in para 4.3.2, 4.3.3 *supra* that the state can alienate trust property in exceptional circumstances but the recipient of the title accepts it encumbered with the public trust and subject to the public's pre-existing title. However, recipients of public trust property can use the property to their advantage while adhering to the burden placed on it by the doctrine. If ownership of minerals were to be ascribed to landowners, it will have no advantage for them at all because the absolute entitlement to deal with the property has been acquired by the state.
18 See par 4.3 *supra*.

be equated with that of any other private holder or owner.[19] The state holds property subject to the public trust solely as representative of the nation for the benefit of the nation, not the state treasury or the leading political party. It is impossible to analyse and explain this *genus* of ownership solely from a private law point of view as it represents a legislatively created, novel concept in South African jurisprudence.

The public trust doctrine is an internationally recognised instrument that encapsulates the concept of ownership of public resources and the dimension of the fiduciary responsibility of the state as expressed in the *MPRDA*.[20] Although it is not explicitly stated in the *MPRDA* that ownership of unsevered minerals vests in the state, it is a natural consequence of the legal institution created through the wording of the *MPRDA*. The legislature unambiguously stated that mineral and petroleum resources are henceforth to be regarded as 'the nation's'.

It was emphasised in chapter 4 *supra*, that terminology can be deceiving. The term "public trust" should not be interpreted to indicate the existence of a true legal trust, for the public trust doctrine can not fit into the ordinary trust-mould. The word 'trust' reflects on the fiduciary responsibility of the sovereign and not on the legal nature of the doctrine. The fiduciary responsibility of the state is expressed by usage of the word custodian.[21] Through this doctrine the state is appointed as 'public guardian' or custodian of South Africa's valuable mineral and petroleum resources and should ensure that these resources are not diverted to the benefit of private profit seekers and exploited to the benefit of the nation as a whole. The state is bound by the fiduciary responsibility that it created through legislation.

The four regime changing attributes of the new mineral law dispensation as formulated by the *MPRDA*, can be listed as:

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19 Moyle *Imperatoris Iustiniani Institutionum* 193; Sohm *Institutiones* par [58] as referred to in n 92 par 4.2 *supra*. See also par 4.2.3 *supra* and the case law cited therein.

20 See par 4.3 *supra*.

21 Custodianship entails the safeguarding of assets and denotes the same meaning as guardianship - Alswang and van Rensburg *New English Usage Dictionary* 193.

- the object of the *MPRDA* "to give effect to the state's custodianship of the nation's mineral and petroleum resources",
- the 'appointment' of the state as the custodian of the nation's mineral resources,
- the legislature's unequivocal interpretation that the provisions of the *MPRDA* prevail in so far as the common law law is inconsistent with the act, and
- the viable interpretation that the country's unsevered mineral resources are recognised as an independent legal object that belongs to the nation.

These four attributes add up to the interpretation that a uniquely South African public doctrine has seen the light with the promulgation of the *MPRDA*.

It is clear that the South African mineral law dispensation that existed since 1991 has been changed irrevocably. Unsevered minerals, previously regarded as being the property of the owner of the soil wherein they were embedded became a public resource to be administered by the state as custodian.[22] Due to the pre-existing system where the owner of land could grant mineral rights in the land to third parties, this change does not only affect the ownership of unsevered minerals, but impacts directly on all previously existing mineral rights and rights in relation to minerals. This is no subtle, cautious transition but so drastic that it can be described as a regime change. When the constitutionality of this section is being determined, it is the consequences ensuing from this change for previous holders of mineral rights and the impact that the new system will have on landowners and the 'people of South Africa' that will be scrutinised and considered.

The remaining part of this chapter will, therefore, be structured in the following manner:

- the consequences ensuing from the *MPRDA* for the holders of common law mineral rights and old order rights;
- the impact of the *MPRDA* on ownership of landowners;

22 S 3(1) *MPRDA*, Badenhorst and Mostert *Mineral and Petroleum Law* [Revision Service 1, 2005] xi.

- the significance of section 3 of the *MPRDA* for the 'people of South Africa'.

7.2 Impact of the MPRDA on holders of common law mineral rights and holders of old order rights

One tends to think that the impact of the *MPRDA* on the holders of old order rights and common law mineral rights can only be determined once old order rights have been converted according to the *MPRDA* into new order rights or when the conversion failed. The ratio of this line of reasoning is that it is only at that point that an assessment can be made of what has been lost and what has been gained. The writer hereof opines that a different approach should be followed.[23] The loss of existing rights is merely a consequence of the regime changing fact that unextracted or unsevered minerals are now recognised as property captured in, but unconnected to land.[24] Although this dichotomy falls strange on the ears of the Roman-Dutch property lawyer, it is a reality that has to be accepted and dealt with. To add to the peculiarity of this separation or segregation of the components of land, ownership of unsevered minerals is taken from landowners and acquired by the state in its capacity of custodian.[25] This development should be the starting and focus point of a study dealing with the impact of the *MPRDA* on old order rights and common law mineral rights. This is the incident through which the nature of mineral right holding in South African jurisprudence has been changed irrevocably when the *MPRDA* commenced on 1 May 2004.

The creation of a new legal order relating to ownership of minerals resulted in the fact that the nature of the rights in terms of which minerals are held and can be exploited, has changed.[26] Minerals themselves have changed from private property to a public resource. It is, therefore, a logic consequence that the nature of rights relating to minerals has also changed. To compare old

23 The extent of the loss resulting from the regime change, assessed according to the value of the specific rights lost, can only assist in determining the actual monetary loss suffered by the different affected parties.
24 S 5 of the *MPRDA*.
25 S 3 of the *MPRDA*.
26 The nature of new order rights will be discussed in par 7.4 below.

order rights with new order rights would, therefore, be the same as to compare apples with lemons.[27]

The underlying reason necessitating an inquiry into the impact of the *MPRDA* on old order rights is one of fairness to the holders of common law mineral rights in the face of the changed regime brought about by changed values. The question that has to be answered is whether the preceding mineral right holders' property rights have been infringed and if so, whether the infringement is justifiable in light of sections 25 and 36 of the *Constitution*. Due to the fact that mineral right holders feel deceived and in many instances suffer actual monetary losses, the compensation issue is a pressing issue. According to section 25(2) of the *Constitution*, compensation will follow expropriation.[28] Item 12 of Schedule 2 of the *MPRDA* allows for the payment of compensation to any person who can prove that his property has been expropriated in the transition from one mineral law regime to another. It is, therefore, important to determine whether any property has been expropriated in the transition.[29]

7.2.1 Revisiting the preceding mineral law dispensation

The historical survey in chapter 2 *supra* indicated that under the 1991 mineral law dispensation unsevered minerals were not capable of being the legal object of separate ownership.[30] This was a result of the application of the *cuius est solum* principle as it found application in the South African legal system.[31] Due to the indivisibility of ownership of land and the minerals contained therein, the previous South African system had developed over many years into a dual system whereby unsevered minerals were either

27 This is illustrated *inter alia* by differences in duration, obligations conferred on holders and the capacity to alienate freely – see *inter alia* Ferreira and Harrison *Mining Werks-Item [50400]* http://www.werkmans.co.za [2005/01/27]. This does not mean that there nothing is to be gained from a comparison of old order and new order rights. The newly introduced is often better understood when evaluated from a familiar perspective.
28 See par 5.1 *supra*.
29 See chapter 5 *supra* for an exposition of the concept expropriation as it is currently interpreted in South African law.
30 See para 2.4.1 and 2.4.3 *supra*.
31 See par 2.4.1 *supra*.

'owned' by the state or by private entities, depending on who held the title to the land.[32] One of the multitudes of rights or entitlements included in the *dominium* of landownership was the rights to the unsevered minerals in the land, known as mineral rights. However, the common law mineral rights and the right to prospect or the right to mine could vest in a person other than the landowner. As a result mineral rights constituted a unique form of property rights in land under former mineral law. Ownership of the substance, unsevered minerals, vested in the landowner as part of the land, while the rights to exploit these unsevered minerals could simultaneously vest in another *persona*.[33] The state regulated the exercise of these mineral rights through legislation.

The term "mineral rights" represented a conglomerate of rights or entitlements, including the right to prospect and the right to mine.[34] Mineral rights were tradable and could be separated from the land. The holder of mineral rights could either dispose of the mineral rights or grant subordinate rights to prospect under a prospecting contract or to mine under a mineral lease. The holder of the mineral rights was compensated by the exploiter of the minerals for the depletion of the non-renewable resource through the payment of royalties normally charged on production or revenue. He was also compensated for surface damage to the property.

Holders of mineral rights, or grantees of the right to prospect or mine, were not permitted to prospect or mine for minerals without having obtained a prospecting permit or mining authorisation from the state.[35] Prospecting permits and mining licences were not classified as mineral rights but were subsidiary to mineral rights. These licences and permits were aimed at controlling prospecting and mining, having regard to considerations for health

32 The concept of unsevered minerals being 'owned' did not feature in the preceding mineral law dispensation under the 1991 *Minerals Act*. Due to the fact that the mineral-land entity was an undividable entity unsevered minerals were regarded to be the property of the landowner.

33 See par 2.4.1 *supra.*

34 See par 2.4.1 *supra.*

35 The existence of these mineral rights was not linked to the permits and authorisations. The rights existed but they could only be exercised once the necessary authorities were granted.

and safety, environmental rehabilitation and responsible extraction from the ore. The permission of the holder of the relevant mineral right was needed before these permits and licences could be granted or transferred.

Mineral rights were regarded as limited real rights in land and the intrinsic economic value it had is illustrated by the fact that the holder of a mineral right could freely dispose of the right in the open market or be paid royalties by the exploiter of the right. It provided security of tenure for investors in mining companies and real security for banks.[36] Prospecting rights and mining rights were incidents of mineral rights and could be exercised by the holder of the common law mineral right or granted to third parties through prospecting contracts or mineral leases.

Since the commencement of the 1991 *Minerals Act* in January 1992, the following possible scenario's existed with relation to mineral rights:

1 Mineral rights were not separated from the full ownership of the land in which case the landowner either -
    1.1 did not exercise his mineral right, or
    1.2 prospected and mined for minerals himself, or
    1.3 granted prospecting rights to a third party, or
    1.4 entered into a mineral lease with a third party allowing them to mine for minerals.

2 Mineral rights were separated by the landowner from the full ownership of land in which case he either -
    2.1 did not exploit or use his right, or
    2.2 prospected and mined for minerals himself, or
    2.3 granted prospecting rights to a third party, or
    2.4 entered into a mineral lease with a third party allowing them to mine for minerals, or

36 Badenhorst and Mostert *Mineral and Petroleum Law* [Original Service 2004] 3-21.

2.5 disposed of all the mineral rights or the rights to specific minerals in which instance the title in respect of the mineral rights (or the specific mineral) was ceded to a third party.

3 Where the mineral rights were state owned, the occupier of the land or the holder of a nomination contract who was the holder of a prospecting permit was deemed to be the mineral right holder.

When considering the scenarios above, it is important to keep in mind that the title to mineral rights subsisted in perpetuity.[37] The duration of the rights to prospect and mine, when granted by the landowner as limited real rights in relation to the mineral right, was determined in the contracts whereby they were created. These rights were extinguished and replaced through the working of the *MPRDA*. The ownership of unsevered minerals was acquired by the state in its capacity as custodian on behalf of the nation.[38] The fact that a limited real right in minerals is recognised, is indicatory of the fact that unsevered minerals are now regarded as 'a' legal object. This explains the disappearance of the concept 'mineral rights' from the *MPRDA,* as the entitlements inherent to the limited real right previously known as 'mineral right' have been incorporated in the concept of ownership of minerals.

It is important to note that two distinct situations arise through this. On the one hand one is confronted with the acquisition of rights that were previously held by landowners as part and parcel of the land, by the state. This is a consequence of unsevered minerals being recognised as an independent legal object subjected to the ownership of the state, in it's custodial capacity. Secondly one deals with the extinguishment of rights. Both these aspects are dealt with below.

37 Par 2.3 *supra*; Badenhorst 2004 *J of En & Nat Res L* 222. Although the mineral right once created subsisted in perpetuity, it could be transferred or even cancelled.

38 See par 7.1.2 *supra*.

7.2.2 Landowners as holders of mineral rights

7.2.2.1 The severance of the land-mineral entity

The first group of people affected by the *MPRDA* is landowners. Inherent to the concept of ownership of land was the entitlement to exploit the minerals in the land because land and unsevered minerals were not regarded as divisible legal objects. The interconnected nature of land and minerals and the effect of the *cuius est solum* principle resulted in an undividable land-mineral entity. As a result one of the entitlements of the landowner, imbedded in the concept of landownership, was the right to exploit the minerals. Due to the economic value of minerals and the weakening of the *cuius est solum* principle, it was possible to separate the right to exploit the minerals from ownership of land-minerals entity.

However, unsevered minerals became a separate legal object on 1 May 2004.[39] The mineral component of land was taken through legislation and acquired by the state in it's custodial capacity. The right to exploit the minerals, an entitlement inherent to the substance 'mineral', included in the concept of ownership of minerals was simultaneously acquired by the state.[40]

7.2.2.2 Consequences following the severance of the land-mineral entity

7.2.2.2.1 Value lost

Before the full consequences following the severance of the land-mineral entity can be realised, it is necessary to determine whether unsevered minerals were of any value to the landowner in the previous mineral law dispensation. To answer this question one ends up reasoning in circles. On the one hand it can be argued that the unsevered minerals had no value at all, because it was only after they were severed from the land that they were

39 Not only are minerals regarded as the "common heritage of all the people of South Africa", s 5(1) explicitly states that prospecting and mining rights are limited real rights, not only in land but also in minerals. See par 7.1.2.4 *supra.*

40 Dale *et al South African Mineral and Petroleum Law* [Issue 1 Schll] 208.

regarded as legal objects and became of worth. To accept this opinion would mean that it is not unsevered minerals that were valuable, but the right to exploit the minerals. But the right to exploit minerals is in itself worthless. The value of the right for the holder thereof is determined by the percentage of minerals present in the land. The only thing that can be stated with certainty is that it is the presence of a particular substance in land, namely minerals, that gave rise to the exploiting-entitlement imbedded in landownership. If minerals were to be found in clouds, the entitlement to exploit them would not intrinsically be bound with landownership.

The presence of a particular substance in land, the mineral, enhanced the value of landownership as it conveyed the entitlement to exploit that particular substance. Once minerals are removed from the land-mineral entity the accompanying right to exploit that vested in the landowner is removed with it. Due to the intrinsic nature of minerals, it carries with it the inherent right to be exploited and if the land-mineral entity is dissolved and unsevered minerals regarded as property on its own, the mineral-component will still confer the entitlement to exploit. The value of unsevered minerals can, therefore, not be determined without taking into account the right to exploit the minerals and the value of the right to exploit the minerals is interconnected to the percentage of minerals that need to be exploited. It can be accepted, though, that the presence of minerals in land enhanced the value of the land. As such unsevered minerals and the accompanying entitlement to exloit them, were valuable.

7.2.2.2.2 Investigating expropriation as a consequence following the severance of the land-mineral entity

Chapter 5 *supra* deals with the notion of expropriation. From that discussion it is clear that expropriation is regarded as a sub-category of deprivation but entails more than the mere loss of rights or property. The theory has been advanced that expropriation, in its narrow sense at least, entails a deprivation accompanied by an appropriation by the state. It is clear from the scenario under discussion that landowners have been deprived of a substance known

as mineral that formed an integral part of land. This substance has been acquired by the state in its custodial capacity. It can, therefore, be stated that the mineral-component of the land-mineral entity has been expropriated[41] and this resulted in the accompanying expropriation of the mineral rights in the land.[42] It falls outside the scope of this study to determine the criteria that will be used to determine the compensation payable to landowners.[43] It is suggested that compensation will not be paid for potential losses in the case of landowners who never used their mineral rights to their advantage. In determining just and equitable compensation that reflects an equitable balance between the interest of the public and the persons affected by the expropriation, the actual losses determinable at the time of expropriation will be relevant when compensation is calculated. This principle is in accordance with the decision of the Constitutional Court in *Du Toit v Minister of Transport.*[44]

41 See chapter 5 par 5.2 *supra* for an exposition of the concept of expropriation.

42 The position of mineral right holders who granted mineral leases relating to their mineral rights falls in this category. In practise, grantors of mineral leases contracted for themselves a right to royalty payment. It has been explained in chapter 2 *supra* that the holder of a mineral lease acquired the right to mine for minerals and dispose of these minerals for his own account, against the payment of royalties to the mineral right holder. The *MPRDA* does not leave room for the continuance of a mineral lease. Holders of mining rights in terms of this lease have to apply for a conversion of the mining right. On the conversion of an old order mining right or the extinguishment of that right, the right to receive royalties also ceases to exist. Can the grantor of the mineral lease claim compensation? In other words, was he expropriated? Implicit in the entitlements of the holder of common law mineral rights was the entitlement to conclude mineral leases against payment of royalties. This entitlement has been acquired by the state in its custodial capacity at the moment that the state acquired ownership of the mineral resources. This entitlement has not only been acquired, it is also being exercised in terms of ss 19(2)(g) and 25(2)(g). The state's right to claim royalties is not a newly created right as in the case of a new order prospecting or mining right. While old order prospecting or mining rights cease to exist once they are converted into new order rights, the entitlement to claim royalties vested in the common law mineral right holder and that entitlement was transferred to the state to complete the collection of entitlements that constitute ownership of minerals.

43 It falls outside the scope of this thesis to indicate how the value of either unsevered minerals or old order mineral rights is to be determined, and this question poses an interesting research question for another study. The aim of this thesis is only to determine the constitutionality of the regime change and whether compensation should be paid in certain instances.

44 *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) par [31], [34].

It must be noted that it is generally accepted that the public trust doctrine avoids the expropriation issue by claiming a pre-existing title.[45] This line of argument cannot be followed when the transition from the previous mineral law regime to the current is under discussion. No pre-existing public trust rights existed, they were created through the *MPRDA*. Seen in light of the decision in *Bareki v Gencor Ltd*,[46] it is doubtful whether a court of law will hold that these provisions apply retroactively.

7.2.3 Non-landowners who were holders of mineral rights

An interesting situation is encountered in the case where the holder of the previously recognised mineral right was not simultaneously the owner of the land in which the minerals were located. The third party holder of mineral rights was never regarded as the owner of unsevered minerals. The unsevered minerals belonged to the landowner and these unsevered minerals were expropriated in the hands of the landowner.[47] The argument can be forwarded that once the unsevered minerals were expropriated, nothing remained that could simultaneosly or otherwise, be expropriated. The question therefore needs to be answered whether mineral rights were expropriated in the hands of the the non-landowner-mineral rights holder[48] with the acquisition of the unsevered minerals as legal object by the state.

The writer proposes that it can be argued that these mineral rights have indeed been expropriated, even though the unsevered minerals were expropriated in the hands of the landowner. Due to the nature of the previous

45 This line of thought is clearly illustrated by a remark of Prof Kader Asmall, the then Minister of Water Affairs and Forestry who stated during his opening address at the National Consultative Conference on the South African Water Law, 17-18 October 1996:

> The public trust doctrine is particularly interesting to the concern about the diminution of existing [water] rights. The public trust doctrine would imply that where prior allocations of rights violated that public trust, they can have had no validity. Governments that seek to undo these past actions cannot be held up by claims of "existing rights" based on the illegitimate actions of the previous government.

http://www.info.gov.za/speeches/1996/0406223-374.htm 2005/10/09.

46 *Bareki v Gencor Ltd* 2006 1 SA 432 (T) at 445C-D. The court held that the provisions of s 28 of *NEMA* are not retrospective and that retrospectivity would entail unfairness that parliament could not have intended.

47 See par 7.2.2 *supra*.

48 See par 7.2.1 *supra*.

common law regime the substance, unsevered minerals, and rights related thereto, mineral rights, could be separated. Once unsevered minerals were acknowledged to form a separate legal entity and that entity was acquired by the state, the rights that formed the core of the mineral right holding reverted to the state in its custodial capacity. The state acquired both the substance and the accompanying legal entitlement relating to the substance.

One finds a precedent for the situation where both the owner of land and other holders of rights in the land were deemed to be expropriated in preceding case law. In *Minister van Waterwese v Mostert*[49] Van Wyk AR stated:

> Daar bestaan geen rede waarom 'n eienaar van grond se regte asook die regte van ander ten opsigte van die grond nie onteien kan word nie.
> *[There is no reason why the rights of the owner of land as well as the rights of others in respect of the land cannot be expropriated.]*

This case dealt with a landowner and a lessee of land in terms of a long term lease. The court found that the land was expropriated in the hands of the landowner and the rights forth flowing from the long term lease were expropriated from the lessee.

7.2.4 Holders of prospecting and mining rights.

However, a different scenario exists with relation to prospecting and mining rights exercised by parties in terms of prospecting contracts or mineral leases entered into between the mineral right holder and an another party. The right to prospect and the right to mine were entitlements flowing from a mineral right. It could be exercised as subsidiary rights flowing from the mineral right

49 *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 667E-G.

but did not on its own constitute independant mineral rights.[50] They were merely subsidiary to mineral rights. Once the mineral right is expropriated, the basis for contracting with other parties in relation to mining activities falls away as the entittlements regarding prospecting and mining have been transferred to the expropriator. Due to *vis maior or impossibility* the party who granted the right to prospect or to mine loses his authority over the related subject. He is physically unable to continue with the contract or uphold his side of the agreement.

According to item 7(7) and 7(8) of schedule 11 of the *MPRDA* holders of these prospecting or mining rights have to apply for the conversion of their rights. On conversion - or after the lapse of a stipulated period of time - these rights will cease to exist. They are extinguished. Although the holders of the prospecting – or mining rights are being deprived of their specific rights, nothing that is taken from them is acquired by the state. In theory it has already been acquired with the expropriation of the mineral rights. If the courts hold on to the requirement that expropriation only occurs when a deprivation is accompanied by an appropriation,[51] holders of prospecting or mining rights who are not simultaneously the holders of the common law mineral rights, will have a difficult time to prove that expropriation has occurred.

It is important to note that landowners are not only affected as a result of the severance of the land-mineral entity. The *MPRDA* impacts to a great extent on the ownership of the landowners. This aspect is dealt with in the following section of the chapter.

50 See par 2.4.1 *supra.*
51 See chapter 5 *supra.*

7.3 The impact of the MPRDA on ownership of landowners

7.3.1 Prospecting and mining rights – the nature and content of the newly established prospecting and mining rights

Apart from the fact that the entitlement to deal with unsevered minerals in their land has been expropriated from landowners, another infringement or deprivation that landowners must face relates directly to the entitlement to decide which activities will be allowed on their land and who may enter upon their land and engage in certain activities.

Section 5(1) determines that a prospecting right and mining right, granted in terms of the *MPRDA* are limited real rights in respect of the land to which they relate.[52] Although classified as limited real rights, these rights are not exactly similar to the prospecting and mining rights from the previous regime. In the current mineral law era, the emphasis falls on the word 'limited' in the phrase 'limited real rights'. These rights exist only within a specific time frame whereafter they lapse.[53] They confer stringent obligations on the holder thereof.[54] The minister's written consent is required before these rights can

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52 The precise moment of 'creation' or coming into being of the s 5(1) stipulated limited real rights, leaves room for different viewpoints. *The MPRDA* is silent on this aspect. However, s 2(4) of the *Mining Titles Registration Act* 16 of 1967 as amended by the *Mining Titles Registration Amendment Act* 24 of 2003, hereafter the *MTRAA* clarifies the issue. Here it is expressly stated that:

> The registration of a right in terms of this Act in the Mineral and Petroleum Titles Registration Office shall constitute a limited real right binding on third parties.

Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* [Original Service 2004] 30-11-30-15 state that the provisions of the *MTR* and *MPRDA* are confusing and inconsistent. They indicate on 13-13 the absurdities that arise from a joint reading of s 5(1) of the *MPRDA* and s 2(4) of the *Mining Titles Registration Act* 16 of 1967, hereafter the *MTR*. They discuss the issue comprehensively in Chapter 30. Dale *et al South African Mineral and Petroleum Law* [Issue 3] 135 argue that since the *MTRAA* commenced in 2004 it 'overruled' the *MPRDA* on this aspect.

53 Ss 17(5), 18(4) refer to prospecting rights. Ss 23(6) and 24(4) refer to mining rights and it is notable that there is no limitation to the further periods that a holder of a mining right can apply for renewal. Strict conditions must be met before the minister is obliged to renew any of these rights.

54 Ss 19, 25.

be "ceded, transferred, let, sublet, assigned, alienated, or otherwise disposed of".[55]

The strict regulation of these rights is in accordance with the principles ensuing from the public trust doctrine. The state is merely exercising its duty as custodian to ensure that the nation's common heritage is protected. One of the consequences of this strict regulation and the fixing of the boundaries of prospecting and mining rights, is that no claims for compensation can arise if these newly acquired rights are lawfully terminated or lapse.[56]

7.3.1.1 The burden on ownership of land brought about by rights ensuing from prospecting and mining rights

The prerogatives created in section 5(3)[57] reflect the scope of the limited real rights created by section 5(1) and mirrors the entitlements inherent to these limited real rights.[58] Prospecting and mining right holders are thus entitled to enter upon land, prospect, mine, explore and carry out any other activity incidental to prospecting and mining operations. The *MPRDA* burdens the landowner's ownership with a limited real right that subtracts from the *dominium* of the owner in the sense that these rights burden the land itself directly and are enforceable against the landowner, his successor in title third parties for as long as the right exists. Furthermore, it diminishes the ownership of the land[59] as it burdens the owner's entitlement to refuse the commencement and continuance of the activities exercised in terms of these rights.[60]

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55 S 11(1).

56 Holders will not succeed in claiming that they were expropriated due to the fact that they are fully informed about their obligations and the extent of their entitlements and the timeframe of existence of these rights in terms of the *MPRDA*.

57 These prerogatives entail that the holder of the relevant right may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto.

58 Other sections of the *MPRDA* contain provisions to the same effect. See eg s 15(1).

59 A characteristic of limited real rights as stated by Van der Walt 1992 THRHR 201.

60 Although s 54 at first glance creates the impression that the landowner may refuse entry to his land, it is not refusal in the sense that he exercises one of his entitlements as owner of the land that will be honoured by the state. This section provides for the payment of compensation in those cases where the exercise of any right or permission

7.3.1.2 Expropriation as consequence of the scope of these limited real rights

Limited real rights are acquired by the holders of prospecting and mining rights and in essence the state, as custodian, benefits from this subtraction from the *dominium* of the landowner. Without this benefit acquired by the state, it would not have been possible to interfere in the owner's *dominium.* The state would not have been able to advance the exploitation of the country's mineral resources if it did not appropriate this fragment of ownership. In a sense this appropriated entitlement completes the state's power to pursue its objectives to ensure that security of tenure is protected in respect of prospecting and mining operations and promotes equitable access to the nation's mineral resources. Without this acquisition of the entitlement of ownership the state would not be able to give effect to the principle of its custodianship of the nation's mineral resources. If it is further considered that Van der Walt[61] stated that a limited real right "can be regarded as a part of the ownership that has been transferred to another", it is clear that the concept of expropriation features strongly. This is in the writer's opinion a 'pure' acquisition required for expropriation.[62]

Even if it is found not to be a direct expropriation, it will fall in the category of constructive expropriation. As stated in par 5.4.2 *supra*, constructive expropriation manifests in instances where the regulatory acts of the state exert such an enormous restriction on the entitled rightholder's rights in the property that the holder of the entitlements is deprived of the ability to exercise any or a substantive portion of his entitlements. Whenever a prospecting or mining right is granted, such a severe restriction is placed on the landowner's entitlements to deal with that portion of his land subject to the

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obtained in terms of the *MPRDA* cause the landowner or lawful occupier to suffer loss or damage as a result of the exercise of the said right, permission or permit. The landowner still has no say in the matter but can enter into negotiations for compensation to be payable in cases of loss and damage. He is not compensated for the infringement of his right as owner, but for damages incurred as a result of prospecting or mining operations.

61 Van der Walt 1992 *THRHR* 181.

62 See chapter 5 *supra*.

relevant prospecting or mining right that it amounts to constructive expropriation.

One is also confronted with a

> a seizure of property, either in the form of a taking or a burden, that affects an individual or a group unequally in comparison to the rest of society. They must make a special sacrifice in the public interest that is not demanded of others. Such a sacrifice is in conflict with the right to equality.[63]

The precedent set in the *Modderfontein Squatters* case[64] that confirms the importance of section 9 of the *Constitution* as catalyst when reviewing the impact of limitations placed on ownership by or due to the lack of state action, holds promises of constitutional damages for affected landowners. Schedule II Item 12 provides for

> the payment of compensation to any person that can prove that his or her property has been expropriated in terms of any provision [of the *MPRDA*].

The determination of the criteria that should be employed in calculating either constitutional damages or compensation in relation to expropriation falls outside the scope of this study.

7.3.2 Remainder of new order rights

A landowner's entitlements to deal with his land as he deems fit is not only burdened by the limited real rights expressly created[65] in the *MPRDA*. Other new order rights also impact to a great extent on the ownership of land.

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63 Kleyn 1996 *SAPR/PL* 439.

64 *Modderfontein Squatters, Great Benoni Council v Modderklip Boerdery (Pty)* 2004 6 SA 40 (SCA) par [52].

65 It is still a contentious issue whether the limited real rights are in fact 'created' by s 5(1) of the *MPRDA* or whether they are created through registration in terms of the *Mining Titles Registration Act* 16 of 1967, hereafter referred to as the *MTR*. See Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* [Original Service 2004] 30-1 – 30-15.

Badenhorst[66] has done extensive research on the nature of new order rights and little remains to be added. The remaining authorisations[67] granted in terms of the *MPRDA* are not expressly classified in the act as limited real rights. They are not classified as personal rights either. Badenhorst[68] suggests that reconnaissance permissions, retention permits and mining permits constitute personal rights, irrespective of their recording or registration in the Mineral and Petroleum Titles Registration Office.[69] When attempting to determine the nature of these permissions and permits, it should be kept in mind that there is no closed system of limited real rights in South African law and that new limited real rights can be recognised.[70] Hence it is important to keep in mind that it is not explicitly stated in the *MPRDA* that these authorisations are mere personal rights. The writer hereof suggests that if it is found that these permissions and permits satisfy the requirements of the subtraction from the *dominium* test[71] the essential requirements for being

66 Author of various distinguished works on South African mineral law and the *MPRDA*. See *inter alia* Badenhorst and Mostert *Mineral and Petroleum Law of South Africa*; Badenhorst 2005 and the host of publications referred to in this thesis.

67 In relation to minerals these are reconnaissance permissions (s13), permission to remove and dispose of minerals (s20), mining permits (s27) and retention permits (s31).

68 Badenhorst and Mostert *Mineral and Petroleum Law* [Original Service 2004] 13-13, 14-5.

69 See Badenhorst 2005 *Obiter* 505-525 where he contends that limited real rights may or may not be created when these authorisations are registered or recorded.

70 Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 37, *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 2 SA 419 (T) 434D-E. The promulgation of the *MPRDA* and the content of this act are striking examples that new developments in commerce and society bring about, and indeed necessitate, the recognition of new and more varied real rights. Through the *MPRDA* the way in which land is used and minerals exploited has changed dramatically. In order to classify the rights created in the *MPRDA* according to their true nature it is necessary to attempt to determine the legislature's intention with the creation of these rights, whether these rights burden the land and the minerals themselves, whether these rights diminish ownership of the land and mineral they relate to and whether they would be registrable as real rights under the *MTR*.

71 It could be argued that the subtraction from the *dominium* test originated from our Roman-Dutch based common law and that it is misplaced in the arena created by the *MPRDA*. Badenhorst 2005 3 Obiter 17 argues that the legislature attempted to rid the mineral system of its common law features. This verdict may be a little harsh. The writer hereof opines that the legislature merely wanted to introduce the public trust doctrine into the mineral law system and, therefore, common law hurdles had to be overcome. This is not necessarily an attempt to override all common law principles when dealing with the *MPRDA*. It is suggested that the 'subtraction from the *dominium*' test should be used in order to determine whether any limited real rights, including personal servitudes, come into being when these authorisations, created by the *MPRDA*, are registered or recorded in terms of the *MTR*. The mere fact that this test originates from our common law jurisprudence does not disqualify it *per se*.

recognised as limited real rights are met. However, it is trite in South African property law that an entitlement that places a burden on ownership of immovable property is only recognised as a limited real right once it is registered in the Deeds Registry. It does seem that the registration requirement has been extended when dealing with limited real rights in minerals to registration in the Mineral and Petroleum Titles Registration Office. Through section 2 of the *Mining Titles Registration Act (MTR)* the Mineral and Petroleum Titles Registration Office is established as the office for the registration of all mineral titles and other related rights. It is expressly stated in section 2(2) that all mineral titles shall be dealt with in terms of the *MTR* after the commencement of the *MPRDA.* Section 2(4) stipulates that the registration of a right in terms of the act in the Mining Titles Registration Office "shall constitute a limited real right binding on third parties".

Due to the fact that registration is still a prerequisite for creating a limited real right the inference can be drawn that new order rights that cannot be registered but only recorded in terms of the *MTR,* would not meet the requirement to be regarded as limited real rights even if they meet the requirements of the subtraction from the *dominium* test. This facet of the new mineral law dispensation will only be clarified once a dispute on this aspect has been settled by the courts.

This thesis is not aimed at de-mystifying the distinction between real and personal rights that has, according to Van der Walt,[72] acquired something of a mystical nature. If the criteria set out for constitutional property as stated in chapter 3 *supra* is considered, these permits and permissions will be regarded as property worthy of constitutional protection irrespective whether they are

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The 'subtraction from the *dominium* test' has been formulated by the courts. It is based on the reasoning that a limited real right diminishes the owner's *dominium* over property to such an extent that it is not only the owner personally, but the construct of 'ownership' that is bound. It either confers on the holder certain entitlements inherent to the right of ownership and/or prevents the owner of the thing to some extent from exercising his right of ownership. - Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 59. See *inter alia Ex parte Geldenhuys* 1926 OPD 155; O*dendaalsrus Gold, General Investments and Extensions Ltd v Registrar of Deeds* 1953 1 SA 600 (C); *Lorentz v Melle* 1978 3 SA 1044 (T); *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA).

72 Van der Walt 1992 *THRHR* 170-203.

regarded as limited real rights or personal rights. Holders of these new rights must just be aware of the fact that they acquired and hold these rights under a pre-existing public trust title. The protection guaranteed under section 25 of the *Constitution* will be alligned with the principles of the public trust doctrine.[73]

The nature of the rights created in the *MPRDA* is not indicative of the constitutionality of section 3 through which the new regime was introduced. The impact of these newly created rights on landowners and the extent of the limitation it places on the ownership of land are the important aspects.

7.3.2.1 Reconnaissance permissions

Reconnaissance operations are defined in the *MPRDA* as[74]

> any operation carried out for or in connection with the search for a mineral ... by geological, geophysical and photo-geological surveys and includes any remote sensing techniques, but does not include any prospecting or exploration operation.

Section 13 describes the procedure to be followed when applying for a reconnaissance permission and section 14 determines that a reconnaissance permission must be issued by the Minister if -

> (a) the applicant has access to financial resources and has the technical ability to conduct the proposed reconnaissance operations in accordance with the reconnaissance working programme;
> (b) the estimated expenditure is compatible with the proposed reconnaissance operation and duration of the reconnaissance work programme; and
> (c) the applicant is not in contravention of any relevant provision of the Act.

Section 14 creates the impression that the minister does not have a wide discretion in refusing to issue the permission. However, section 49 should not

73 See par 4.3.3.3.4 sup*ra*.
74 S 1.

be left out of consideration as this section vests the minister with the power to prohibit or restrict any or all of the rights relating to minerals created through the *MPRDA.* The minister may prohibit or restrict the issuing of a reconnaissance permission before it is issued but not after issuance. While the right to restrict any right relating to mining is indicative of the state's prerogative under the public trust doctrine,[75] section 49(2) embodies a limitation of that prerogative by determining that such restriction or prohibition will not affect prospecting or mining on land subject to a reconnaisance permission, prospecting right, mining right, retention permit or mining permit.

Aspects that shed light on the nature of reconnaissance permissions are -

- reconnaissance permissions are valid for only two years;[76]
- reconnaissance permissions are not renewable;[77]
- reconnaissance permissions entitle holders thereof to enter the land concerned for purposes of conducting reconnaissance operations after consulting the landowner or lawful occupier;[78]
- reconnaissance permissions cannot be mortgaged;[79]
- reconnaissance permissions do not entitle the holder thereof to -
    - conduct any prospecting or mining operations;[80] or
    - any exclusive right to apply for or be granted a prospecting right or mining right.

Badenhorst[81] correctly states that a reconnaissance permission precedes or complements prospecting operations for minerals. It is clear from the rights and obligations arising from this permission, coupled with the duration of the permission and its non-renewability, that from the holder of the reconnaissance permission's perspective one is dealing with nothing more than permission to do something that is otherwise prohibited. It is a fact, however, that this permission, once granted, exists irrespective of who the

75 See par 4 3.3.3.4 *supra.*
76 S 14(5).
77 S 14(5).
78 S 15(1).
79 S 14(5).
80 S 15(2)(a).
81 Badenhorst and Mostert *Mineral and Petroleum Law* [Original Service 2004] 14-1.

owner of the specific land is or whether the land changes hands during the existence of the permission.

From the landowner's point of view his ownership has been restricted.[82] To allow or disallow people to enter one's property is an entitlement inherent to ownership of land. The owner of land is merely to be 'consulted' by the holder of the reconnaissance permission before the permission holder attempts to enter the land. By not requiring the landowner's consent for this entrance and leaving the decision whom to grant the right of entry to in the hands of state officials, the state infringes on this entitlement of ownership. At this stage of mining activities it is doubtful whether this infringement will be regarded to be an expropriation as the landowner's entitlement to decide who is allowed on his property is not completely destroyed or appropriated by the state but only curtailed in respect of holders of reconnaissance permissions.[83] It is furthermore not a given fact that all reconnaissance operations will entail the 'invasion of land'[84] or lead to full blown mining activities. The extent of the infringement in any individual case will have to be considered when determining whether a landowner's rights have been so severely curtailed that it amounts to constructive expropriation. It is suggested that this infringement is, in theory, an example of a limitation of ownership that will be regarded as essential to regulate the search for minerals.

Even though the impact of this violation of a landowner's rights in relation to his property will normally be minimal, this is suggestive of the decline of the priority of ownership and the concept of private property.[85]

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82 Ss 5(3)(a) and 27(7)(a) contains similar provisions. See par 7.4 *infra*.

83 Section 54 creates a procedure through which compensation can be claimed by the landowner if he is likely to suffer damages or loss as a result of the reconnaissance operations.

84 Aerial surveys might be done.

85 However, the content of s 54 suggests that an owner with good cause might refuse right of entry although that right is created through legislation. S 54 prescribes the procedure that the holder of any new order right must follow when he is prohibited from entering the land. Dale *et al South African Mineral and Petroleum Law* [Issue 3] 222 suggest that a landowner may apply for an urgent spoliation action if the holder of a new order right endeavours to enter the land notwithstanding the owner's objection.

7.3.2.2 Retention permits

Retention permits relate directly to prospecting rights. A retention permit has been described as a permit –

> suspending a prospecting right while enabling the holder thereof to acquire a mining right in respect of the mineral.[86]

This description does not fully capture the essence of a retention permit. The retention permit ensures security and continuity of tenure whenever economic and market factors prevent the holder of a prospecting right from proceeding to apply for a mining right.[87] As such it prevents losing the benefits of the prospecting expenditure incurred by such holder[88] and extends the "exclusive right to apply for and be granted a mining right in respect of the mineral and the prospecting area in question"[89] with a maximum of 5 years[90] if all requirements are met.

Retention permits burden the mineral in the sense that the state is prohibited to deal with the mineral in any way that could negatively affect the rights of the holder of the retention permit.[91] The state's ability to deal with minerals subject to a retention permit is suspended. No other authorisations or rights may be awarded to third parties relating to those minerals. The state is even barred from restricting or prohibiting prospecting and mining activities on an area that is the subject of a retention permit.[92] It is clear that the permit burdens the mineral itself and diminishes the state's ability to deal with it. The retention permit is also a burden that binds the land itself. Ownership of the landowner is restricted in the sense that the alienation of the land would be

86 Badenhorst and Mostert *Mineral and Petroleum Law* [Original Service 2004] 15-1, 15-18.
87 S 31, Dale *et al South African Mineral and Petroleum Law* [Issue 3] 300.
88 Dale *et al South African Mineral and Petroleum Law* [Issue 3] 300.
89 S 19(1)(b).
90 S 32(4) together with s 34(3).
91 S 35(1).
92 S 49(2).

subject to the existence of the permit. This burden transferrs to the landowner's successors in title.[93]

7.3.2.3 Permission to remove and dispose of minerals during prospecting operations

This permission is ancillary to a prospecting right.[94] It complements and completes the right. The need for qualifying this specific right, integral to a prospecting right, is to protect the nation's mineral resources from excessive exploitation by prospectors. It is not a separate right or permission allocated to prospectors but a way of regulating the prospecting activities. As such it does not subtract anything more from either the mineral or landowner's *dominium* that has not already been subtracted by the issuing of the prospecting right and should be regarded as an incident of a prospecting right.[95]

7.3.2.4 Mining permits

Mining permits relate to small-scale mining where the mineral in question can be mined optimally within a period of two years[96] and the mining area in question does not exceed 1,5 hectares in extent.[97]

The nature of the mining permit is dubious due to the fact that it is not explicitly stated in section 5(1) of the *MPRDA* that a mining permit is a limited real right. Badenhorst[98] submits that it constitutes a personal right while Dale

93 Dale *et al South African Mineral and Petroleum Law* [Issue 3] 30 state that 'retention permits are indeed permits, not rights'. Badenhorst and Mostert *Mineral and Petroleum Law* [Original Service 2004] 15-20 argue that a retention permit is not listed in s 5(1) of the *MPRDA* as a limited real right and submit that it constitutes a personal right. Whether the true nature of a retention permit is that of a personal or real right is irrelevant considering the permit's effect on the ownership of the landowner.

94 S 20.

95 Dale *et al South African Mineral and Petroleum Law* [Issue 3] 250.

96 This period may be extended by renewing the mining permit "for three periods each of which may not exceed one year" – s 27(8)(a).

97 S 27(1).

98 Badenhorst and Mostert *Mineral and Petroleum Law* [Original Service 2004] 16-19.

et al[99] opine that it is a permit and not a right. Irrespective of the nature of the right, it is clear from the essence of the mining permit that the issuing of this permit infringes to a great extent on the ownership of the landowner. In essence the holder of the permit is granted rights similar to those under a mining right, it is only shorter in duration. The ownership of the landowner and his successors in title is curtailed to the same extent that it is curtailed through the issuing of a mining right. Once again, the landowner can claim compensation in terms of section 54, not for the loss or severe limitation of certain entitlements of ownership, but for any loss or harm he has suffered or is likely to suffer as a result of the mining operations.

7.3.2.5 Conclusion

It is the writer's contention that the *MPRDA* recognises unsevered minerals as a separate, independent legal object.[100] The aim of the legislature to recognise and protect the nation's interest in this legal object while impressing state custodianship over the object, is emphasised in the act.[101] This notion is strange to a strongly Roman-Dutch based environment but finds points of contact in the internationally recognised public trust doctrine. When the public trust doctrine applies, ownership vests in the state but the state holds the title in its capacity as representative of the nation and as guardian, custodian or trustee of the trust property. The fiduciary responsibility ascribed to the state is the main distinguishing characteristic of the doctrine.

The acquisition of unsevered minerals through the working of the *MPRDA* is accompanied by the acquisition of common law mineral rights, as the entitlements flowing from these rights form the core of ownership of minerals.[102] An object cannot be acquired without acquiring the entitlements inherent to the nature of that object. Once rights are acquired by the state one is dealing with the concept of expropriation and the issue of compensation becomes significant.

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99 Dale *et al South African Mineral and Petroleum Law* [Issue 3] 280.
100 See par 7.1.2.3 *supra.*
101 See par 7.1.2.4.1 *supra.*
102 See par 7.2 *supra.*

In order to give effect to the entitlements created through new order rights, the state had implicitly limited landownership in the interest of the nation. The state has limited the landowner's prerogative to determine who will be allowed to enter his land in search of minerals. This amounts to the restrictive regulation of an entitlement inherent to landownership. It is the writer's contention that it is not only unsevered minerals and their accompanying entitlements that have been expropriated through the working of the *MPRDA*. The landowner is also expropriated of other entitlements inherent to landownership in those instances where a prospecting right, mining rights or mining permit is issued in relation to his land.[103]

The landowner is not expressly compensated for this inroad into ownership or the infringement of his entitlements through the provisions of section 54. Section 54 merely creates a mechanism that can be used to claim compensation in cases where prospecting and mining operations cause damage or loss to the landowner or lawful occupier. However, section 12 of Schedule 2 does provide for the payment of compensation to any person who can prove that his property was expropriated. Although this section is contained as part of the 'transitional arrangements' one can infer that it would find application in the scenario's described above in those instances where the deprived party can prove he was expropriated.

7.4 The significance of section 3 of the MPRDA for the people of South Africa

Through the *MPRDA* the legislature intended to

> make provision for equitable access to and sustainable development of the nation's mineral ... resources.[104]

103 See par 7.3.1.2 *supra.*
104 Long title of the *MPRDA.*

It is also acknowledged that South Africa's mineral resources belong to the nation with the state as custodian thereof.

Due to the nature of South African property law and the previous mineral law dispensation the legislature had to create a new regime to give effect to this objective. The legislature had to create a mechanism through which mineral resources could belong to the nation and become the common heritage of all the people of South Africa, for this theory did not form part of South African jurisprudence or common law history. It is the writer's contention that the legislature incorporated the foreign public trust doctrine to give effect to this intention.[105] Through the incorporation of this doctrine, the legislature introduced new concepts to South African jurisprudence and the consequences will ripple out further than just the field of mineral law. The introduction of this new doctrine is illustrative of the decline of the priority of private ownership in a democratic South Africa and introduces a system of public rights in South African jurisprudence.[106]

First and foremost it is important to note that the *MPRDA* reflects a system of state ownership and public rights foreign to the Roman-Dutch tradition. The same concept is created in other legislation relating to the environment.[107] This affirms that the legislature intended to introduce a new dispensation, a new mechanism through which the state could give effect to the constitutional obligations of equitable access to mineral resources, environmental protection, sustainable resource use and justifiable social and economic development.[108] It is indicative of the rising of a new dimension in property law theory, a dimension necessitated by the over population and reckless exploitation of the earth and its resources. As more and more demands are made on natural resources it becomes increasingly impossible to justify

105 The presumption or contention that the public trust doctrine is a forgotten section of our common law is not correct. See chapter 4 *supra.*

106 Another example where public rights are recognised through the inception of a public trust doctrine is the *National Water Act* 36 van 1998.

107 Eg *National Environmental Management Act* 107 of 1998; *National Water Act* 36 of 1998; *National Environmental Management: Biodiversity Act* 10 of 2004. See also Stein 2005 *Texas LR* 2167-2183.

108 Stein 2005 *Texas LR* 2168.

private ownership of natural resources. Values change and the social responsibility of property owners that is an accepted principle in constitutional property law, proved to be inadequate to address the increasing demands on natural resources. Sax[109] proposes that the concept of private property developed because it was assumed that the uses private owners would make of their property would maximize net social benefits. The individual character of ownership in the previous regime did not favour "socially desirable use allocations."[110] The recognition of public rights and the transformation of mineral resources from private property to public resource may have been expedited in an effort to throw off the remaining shackles of the apartheid regime, but in a country as densely populated as South Africa, with the relative scarcity of available mineral resources, it would only have been a matter of time before it became clear that a system allowing for the 'secluded' development of mineral resources by a fortunate few, is not only intolerable, but unjust. This being said, it is important to ensure that the transition from one mineral law regime to another must be as just and equitable as possible in the circumstances. If private property were to be 'confiscated' and transformed into a public resource without the payment of compensation to affected parties, the principles of the very *Constitution* that the doctrine seeks to enforce would be undermined and contradicted.

Although the ownership of the country's mineral resources is vested in the state through the application of the public trust doctrine, the people of South Africa can truly regard mineral resources as their common heritage. The state holds the mineral resources as custodian only and all actions of the state that relate to mineral activities can, and should constantly be scrutinised to ensure that they are indeed beneficial to the nation. The innate benefits of the public trust doctrine accrue to the nation despite the fact that the public trust relating to minerals is a creature of statute and -

109 Sax 1983 *Wash LR* 487; see par 3.4.4 *supra.*
110 Sax 1983 *Wash LR* 487.

> closely circumscribed with respect to powers that may be exercised in the control of the mineral resources in the public interest.[111]

The doctrine should not be viewed as a tool that bestows unrestricted powers on the state. While the state has a great discretion to determine the direction that the management of public trust property for public benefit should take, such development is subject to limits to ensure that the rights of the public are not unduly prejudiced.[112] The legislature may have been the creator of the public trust, but the courts are the protectors of the trust and need to act as watchdog to ensure that the state manages this asset on behalf of and in the best interest of the people of South Africa.

In the final instance the writer holds the view that the public trust doctrine underwrites constitutional objectives and values. Similar rights and opportunities are accorded to all citizens irrespective of their race. Due to the inherent attributes of the doctrine it is possible to hold government accountable for its dealings in respect of the country's mineral resources.

7.5 Conclusion

The fact that the rights and authorities created in the *MPRDA* are all time-restricted, strictly defined and burdened with obligations, is a consequence of and ensuing from the application of the public trust doctrine. By burdening the holders of rights with obligations to exercise their rights and guard the environment effectively, the interests of the people of South Africa are protected. By creating mechanisms and procedures for compensation to be payable in cases of expropriation and where landowners or lawful occupiers suffer losses or damage as a result the enforcement of new order rights, the *MPRDA* adheres to the basic principles of fairness and equity. How these principles will find application in practise is in the final instance to be determined by the courts of South Africa.

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111 Dale *et al South African Mineral and Petroleum Law* [Issue 3] 125.
112 Dunning *Public Right* 45.

Chapter 8: Conclusion and recommendations

8.1 Revisiting the research questions and objectives of this study

The research question that constituted both the foundation and centre of this study was whether the concepts introduced by and consequences emanating from the implementation of section 3 of the *MPRDA* are constitutionally justifiable. Section 3 articulates the core of the new mineral law dispensation. In order to answer the research question an assessment of section 3 of the *MPRDA* and consequences ensuing from its implementation formed the focal point of this thesis.[1] As a result the primary objective of the thesis was to determine the constitutionality of the said section.

In order to achieve this objective, the following secondary objectives were pursued:

1) to review the historical development of South African mineral law;
2) to reflect on the development of the constitutional property concept;
3) to examine the concept of custodial sovereignty featuring in the *MPRDA*;
4) to analyse the concept of expropriation as it finds application in the present constitutional dispensation.

A tertiary objective of this study was to compare the newborn South African mineral law system with its Canadian counterpart. This comparison did not entail a thorough legal comparative study but was undertaken due to the fact that both the Canadian and previous South African mineral law systems had some similarities to English legal principles during their initial development. It is suggested that it might prove beneficial for the present development in South Africa to understand how the majority of Canadian mineral rights came into the *dominium* of the crown and how the taking of resource interests, specifically property interests in minerals, is dealt with in Canada.

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1 See chapter 1 para 1.2 and 1.3 *supra.*

Due to the broad scope of mineral and petroleum law the study was limited to mineral resources and did not include a study regarding developments relating to petroleum resources.

8.2 Secondary objectives as foundation for the realisation of the primary objective

Conclusions reached when researching the individual components that constituted the secondary objectives of the study as stated in 8.1 *supra*, blended together in an overarching perspective regarding the constitutionality of section 3 of the *MPRDA* and its ensuing consequences. It is, therefore, necessary to take a retrospective view of the research done in this thesis before the research question is finally answered.

8.2.1 Historical perspective[2]

The history and development of South Africa's mineral law dispensation was scrutinised to ascertain the historical perspectives and trends impacting on the nature of mineral right holding in previous mineral law systems that existed in South Africa. The brief historical survey was done with the purpose of determining

- whether traces of the Anglo-American public trust doctrine could be found in any stage of the common law and/or statutory development of South African mineral law, and
- the nature and transferability of mineral rights in the pre-2002 era.[3]

The research confirmed that the principle underlying the preceding mineral law regime namely that unsevered minerals formed part of the land and were not capable of being separately owned before being separated from the land, is a legacy of our Roman-Dutch based common law. This is a consequence of the fact that minerals were initially regarded as fruits of the land and the

2 See chapter 2 *supra.*
3 See par 2.1 *supra.*

development of the *cuius est solum* maxim at a later stage in South African common law.[4]

It was clear from the discussion of Roman[5] and Roman-Dutch[6] law as it relates to minerals, that minerals were never regarded as *res publicae* or *res omnium communes.* Neither the survey of the South African common law mineral law heritage nor the survey of the preceding mining legislation in South Africa revealed any traces of the principles underlying the Anglo-American public trust doctrine. It is, however, clear that the exploitation of the country's mineral resources was strictly regulated, even after the commencement of the *Minerals Act* of 1991. Save for the few short-lived instances where 'minerals' were reserved to the state in certain pre-Union pieces of legislation[7] some incidences of mineral rights, namely the right to prospect or the right to mine, were from time to time reserved to the state.[8] These reservations should be regarded as stringent regulatory stipulations that curtailed landowners in the exercise of their full rights of *dominium* as landowners. The *Minerals Act* purported to place the full extent of common law rights towards all minerals firmly in the hands of the holder of these rights. This act set the pace for the development of the South African mineral law dispensation immediately before the commencement of the *MPRDA.*

Initially the nature and transferability of rights to minerals were discussed.[9] In the preceding mineral law dispensation mineral rights developed to be regarded as *sui generis* limited real rights in land, separable from ownership of the land and freely transferable, subject to the relevant statutory provisions.[10]

Following the historical perspective that placed the study in context, it needed to be determined whether the characteristics inherent to these old order

4 See par 2.2.1 *supra.*
5 See par 2.2.1 *supra.*
6 See par 2.3 *supra.*
7 See par 2.4.2.4 *supra.*
8 See par 2.4 *supra.*
9 See par 2.4.1 *supra.*
10 See par 2.4.1 *supra..*

mineral rights were sufficient for it to be classified as property worthy of constitutional protection.

8.2.2 The property concept[11]

In order to fully understand the impact of section 3 of the *MPRDA* on the holders of old order mineral rights, it was essential to determine whether old order mineral rights contained the indispensable attributes to obtain constitutional protection under section 25 of the *Constitution*. As a result of this objective it was necessary to focus on the constitutional property concept. It was also vital to reflect on property theory underlying the concept of public rights being established in property, previously regarded as 'private' property.

The research indicated that the South African property concept started to evolve long before the notion of constitutional property appeared on the horison, a notion that later developed into a full blown concept. The South African Roman-Dutch property concept followed the civil law tradition and as a result a property concept developed that was individualistic and to a certain extent, absolute in nature. Ownership epitomised the most comprehensive real right in property and was regarded as the source of all limited real rights.[12] Due to the realities of life it was recognised that less-than-ownership property rights needed to be recognised. The inclusion of a property clause in the *Constitution* revolutionised the South African property concept and the ownership-object relation changed to a rights-based paradigm with the emphasis shifting from *ownership* to *rights in property*.[13]

In order to rely on the protection awarded by the property clause, old order mineral rights must be classified or characterised as 'property'. A few viewpoints exist as to the criteria that will be used to determine whether an allegedly violated right constitutes property. Without restricting the development of the constitutional property concept, the line of thought is

11 See chapter 3 *supra*.
12 See par 3.2 *supra*.
13 See para 3.3; 3.4.1 *supra*.

advanced that the constitutional property concept will be interpreted to include all rights and objects that have been recognised as property in the pre-constitutional era. Due to the fact that the "hierarchy of property rights" is levelled out by the upgrading of other rights in property, these pre-acknowledged rights will not necessarily be protected to the same extent as they were protected pre-constitutionally.[14]

Where one moves outside the sphere of existing property rights, other criteria should be used to determine whether a specific interest can be defined as constitutional property. Different mechanisms have been recommended to determine the boundaries of constitutional property. This includes, but is not limited to, excludability, exclusivity, the attribute to vest in the state, an inherent patrimonial value and the 'bundle of rights' theory. The writer hereof proposed that a right must in principle be transferable to be classified as property. Transferability indicates that an entitlement or right can either be transferred to a third party or reassigned to it's original source once the entitlement lapses or is extinguished. Transferability is suggested as a requirement due to the fact that protection against expropriation is one of the objectives of the property clause and it is nonsensical to recognise 'something' as property if it cannot be transferred and thus not expropriated.[15]

Despite the patently wrong judgement granted in *Lebowa Mineral Trust Beneficiaries Forum*[16] where the court held that mineral rights did not fall in the category of constitutional property, the research indicated that old order mineral rights should be regarded as property worthy of constitutional protection, as it displays the qualities required to be acknowledged as constitutional property.[17]

With the inclusion of the property clause in the Bill of Rights that emphasises basic human rights, property *inter alia* became a social construct. It 'burdens' the holder with a social responsibility, the extent unknown in the pre-

14 See par 3.4.1 *supra.*
15 See para 3.4.2; 3.4.3 *supra.*
16 See par 3.4 *supra.*
17 See par 3.4 *supra.*

constitutional era. In a certain sense it can be stated that constitutional values rubbed off and that individual and public interests are the weights balancing the scale of property as social construct. In some instances more is required than the mere limitation of rights in property to ensure that "society at large" benefits from this legal construct.[18] Changing public values demands a radical transformation resulting in the "decline of private property".[19] A new property concept is emerging that recognises that certain interests are the "common patrimonial interest of all South Africans".[20] These interests were previously held as private property and should consequently be removed from the private property domain. Property has crossed the sacred boundary between private and public law. As a result of this development South Africans are confronted with a new phenomenon, namely public property rights. South Africa's mineral resources are a striking example of property previously held under private ownership that has been statutory converted to a public resource that forms part of the "common patrimonial interest of all South Africans". The question remained to be answered in whom the title and *dominium* of these assets vest. This question led to the third secondary objective of this study, namely to examine the concept of custodial sovereignty introduced by the *MPRDA*.

8.2.3 Custodial sovereignty[21]

Custodial sovereignty, as used in the context of this thesis, refers to the sovereign's duty to act as custodian of certain interests to the benefit of the public as a whole. The concept of the sovereign acting as custodian of certain interests to the benefit of the public as a whole features strongly in the *MPRDA*. Through the confirmation and acknowledgment of the state's fiduciary duty, not only to its current citizens but to generations yet to come, a stewardship ethic has been incorporated into South African mineral law law.[22]

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18 See par 3.4.4 *supra*.
19 See par 3.4.4 *supra*.
20 See par 7.1.2.4.1 *supra* in this regard.
21 See chapter 4 *supra*.
22 See par 4.1 *supra*.

The phrases "South Africa's mineral and petroleum resources belong to the nation" and "[m]ineral and petroleum resources are the common heritage of all the people of South Africa" found in the preamble and section 3 of the *MPRDA,* resemble the Roman law concepts of *res omnium communes* and *res publicae*. It also bears a resemblance to the Anglo-American public trust doctrine, a legal construct not previously examined in South African legal literature. As the concept of *res omnium communes* is widely regarded as the basis for the public trust doctrine, the study focused at the outset on the development of *res omnium communes* in the South African legal context and its pre-*MPRDA* application in the context of mineral law, whereafter the public trust doctrine was scrutinised.

8.2.3.1 *Res omnium communes* and *res publicae*[23]

The notions of *res omnium communes* and *res publicae* were known to jurists from the onset of the South African legal system. The Roman-Dutch view was followed in South African jurisprudence.[24] As a result the air and the open sea were the only two categories of things considered to be *res omnium communes*. *Res publicae* became subject to the ownership of the state with the public retaining an interest in the use and enjoyment of those objects destined for general use by members of the community.[25] Although the categories of things falling into these two classes in South African jurisprudence were very limited, an interesting perspective emerged from the research. Indications were found in case law that the state is regarded as the custodian of at least the seashore and that the public's rights to water and the seashore have always been protected.[26] A distinction has also been made in early South African jurisprudence between the *modi* of state ownership regarding property owned by the state to which the public has a common right of user and property which was not subject to such right of user.[27] These

23 See par 4.2 *supra*.
24 See par 4.2.2 *supra*.
25 See par 4.2.3 *supra*.
26 See par 4.2.3 *supra*.
27 See par 4.2.3 *supra*.

findings were important due to the fact that these principles are akin to the foundational standpoints underlying the public trust doctrine.

No suggestion that minerals or rights to minerals were included in either of these classes of things could be found in the historical survey of these notions. The notion that "mineral resources are the common heritage of all the people of South Africa" is not a legacy of our pre-1994 common law heritage.[28] The declaration that "South Africa's mineral and petroleum resources belong to the nation" and "[m]ineral and petroleum resources are the common heritage of all the people of South Africa" with the state being the statutory appointed custodian can, therefore, not be regarded as an example of a classical occurrence of *res publicae.* This does not imply that a new, modern version of *res publicae* or *res omnium communes* cannot develop in South African jurisprudence.[29] Development on the international front has already indicated the existence of a notion akin to these two concepts. The origin of this new concept does not lie in the natural law, but is found written up in international treaties. In light of this development, the character of modern South African environmental protection legislation might justify the preposition that a new category of *res publicae* is being created. However, this should not be viewed as a renaissance of the ancient concept. Today, it is not the limitlessness, vastness or availability of a resource that necessitates a more hands on approach by the state. The contemporary aim of classifying a resource as non-alienable *res publicae* would be to ensure the protection of that resource for future generations.[30]

Although the new notion of the country's mineral resources belonging to the nation with the state appointed as custodian on the nation's behalf does not fall in the established or contemporary concepts of *res omnium communes* or *res publicae*, there are striking similarities between the current mineral law regime and the Anglo-American public trust doctrine. This necessitated an enquiry into the nature and application of the said doctrine.

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28 See par 4.2.4 *supra.*
29 See par 4.2.5 *supra.*
30 See par 4.2.5 *supra.*

8.2.3.2 Anglo-American public trust doctrine[31]

At the onset of the discussion of the public trust doctrine it was emphasised that the fiduciary responsibility attributed to the state is accentuated through the operation of the doctrine.[32] Despite critique, this doctrine that was revived through the seminal work of Jonathan Sax, developed into the most powerful environmental protection tool of the millennium.[33]

The public trust doctrine essentially recognises that some resources are so central to the well being of the community that they are neither susceptible to private ownership nor unrestricted state ownership. The doctrine further recognises that certain public uses ought to be specifically protected. Initially applicable only to tidal waters, the once ebb-and-flow restricted doctrine navigated itself through the watercourses of America into the full scope of resource protection.[34]

8.2.3.2.1 The state's fiduciary responsibility

Through the inherent nature of the public trust doctrine a distinction is made between private title and public rights. It is recognised that the state, as sovereign, acts as trustee of public rights in certain natural resources.[35] American courts have emphasised that state ownership of land subject to the public trust are held by a title different in character from that which states hold in land intended for sale. Lands intended for sale can be granted unrestricted to private owners by the sovereign. However, the title *jus privatum* in property falling under the public trust belongs to the sovereign, while the *dominium, jus publicum,* is vested in the sovereign as representative of the nation for the public benefit.[36]

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31 See par 4.3 *supra.*
32 See par 4.3.1 *supra.*
33 See para 4.3.3.1; 4.3.3.2; 4.3.3.3 *supra.*
34 See par 4.3.2.1 *supra.*
35 See para 4.3.1; 4.3.2 *supra.*
36 See par 4.3.1 *supra.*

An important consequence of the fiduciary responsibility of the state comes to the foreground whenever the alienation or development of public trust resources is considered. Although the state generally has a great discretion to determine the direction that management of public trust property for public benefit should take, such development is subject to limits to ensure that the rights of the public are not prejudiced unduly. Grantees of state sovereign lands ordinarily take title subject to the same public right that bound the state.[37]

Although the title of public trust property vests in the state, the interrelated fiduciary responsibility creates an obligation that is enforceable against the government as it vests judicially enforceable rights in the general public - a legal right of access to important resources and a right to demand the conservation of these resources for public use.[38]

The public trust doctrine should, therefore, not be seen as an unrestricted source of state power - it is the affirmation of state power to use public property for public purposes. While the state has an important responsibility in managing the resource, this responsibility is enclosed within the limitations set by the public trust. The courts are the protectors of the public trust and even though the legislature has the power to amend the trust grant to dictate a particular trust use at a particular trust site, courts are able to investigate the motives behind government's decision and review the considerations taken into account when any public use is impaired.[39]

8.2.3.2.2 The takings-issue

The public will not always feel that they are the beneficiaries of the trust. Once the public trust doctrine is applicable to a specific resource, the property rights regime has been altered. Property under the public trust is incapable of unrestricted ordinary and private occupation as its natural and primary uses

37 See par 4.3.1 *supra.*
38 See para 4.3.1; 4.3.3.3.1 *supra.*
39 See para 4.3.3.3.4; 4.3.4 *supra.*

are public in nature. Due to this fact, all grants of sovereign resources and use rights in trust property are revocable if the public need demands it. The public trust doctrine avoids the takings or expropriation issue by claiming a pre-existing title in the property in favour of the state. The restriction inherent to public trust property precedes the formation of property rights in trust property. American writers warn that the public trust doctrine should not be regarded as creating a reversionary right by which the public can reclaim trust property long lost.[40]

8.2.3.2.3 Substantive advantages

Substantive advantages are brought about by the application of the public trust doctrine. The application of public trust law suggests opportunities for the benefit of presumptions in favour of the protection of trust resources, a preference towards the continuation of the trust and the prohibition of invasion of the *corpus.* An important consequence of this development is that the burden of proving the necessity for desecrating the trust corpus, or altering existing use, will fall on the party who wants to change existing use, be that the government or a private party.[41]

8.2.3.2.4 Introduction of the public trust doctrine to South African mineral law

The wording of the preamble and section 3(1) of the *Mineral and Petroleum Resources Development* Act indicates that the principles underlying the public trust doctrine have indeed been codified in the South African mineral law dispensation.[42] Due to the fact that the country's mineral riches constitute a valuable, vulnerable, non-renewable resource, the nation as a whole must benefit from the implementation of this novel legal construct. This development is in line with other environmenatlly related development through which the public trust doctrine is incorporated in South African law.[43]

40 See par 4.3.3.3.4.1 *supra.*
41 See par 4.3.5 *supra.*
42 See par 4.3.8 *supra.*
43 See par 7.4 *supra.*

The doctrine was introduced to South African jurisprudence by statute. It transformed the mineral law regime and it impacted to the highest degree on preceding mineral right holding. Therefore, the extent of justifiable infringements of property and property rights under section 25 of the *Constitution* needed to be clarified before the full impact of the introduction of the doctrine on the mineral law dispensation could be assessed.[44]

8.2.4 Expropriation[45]

In order to assess the impact of the transition from one mineral law system to another, the extent of justifiable infringements of property and property rights under section 25 of the *Constitution* were studied. The justification for state interference in property is imbedded in the principle that every member of the community must contribute towards the obligations of the community according to his means. However, where an individual's contribution is excessive, the principles of justice require that he must be compensated.[46] Due to the fact that Item 12 of Schedule 2 of the *MPRDA* allows for the payment of compensation to any person who can prove that his property has been expropriated in the transition from one mineral law regime to another the primary aim of this part of the research was to determine the content of the concept of expropriation as it is currently applied in the constitutional dispensation.

The grammatical or ordinary meaning of the word 'expropriation' differs to a great extent from the legal meaning attached to the concept. Because a constitutional guaranteed right to compensation accompanies expropriation, it was deemed important to define the parameters of the concept.[47] As a result chapter 5 dealt exclusively with the definition of expropriation as voiced by the courts of South Africa, although some tentative suggestions were made to broaden the scope of the concept.

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44 This assesment was done in chapter 7 *infra.*
45 See chapter 5 *supra.*
46 See par 5.2.1 *supra.*
47 See par 5.1 *supra.*

Research indicated that although commentators advance a broad approach towards the concept of expropriation, the inherent attributes of expropriation had been set pre-constitutionally.[48] Courts regarded appropriation as an indispensable requirement for expropriation. This requirement was carried over to the constitutional era with the judgement of the Constitutional Court in *Harksen v Lane.*[49] In mathematical terms it can be stated that expropriation equals the sum of taking away plus acquisition by the expropriator (E = T+A).[50]

Although the popular viewpoint seems to be that there was no room for compensable indirect expropriation in the pre-constitutional era, the attention is drawn to case law that indicates the opposite.[51] This embryonic existence of a doctrine of constructive expropriation in pre-constitutional South African jurisprudence was overlooked in case law dealing with the concept of expropriation in the constitutional era.[52]

The question came up in South African legal literature whether it is justifiable to define expropriation as it features in the South African *Constitution* from a pre-constitutional framework. It was argued in this chapter that the scope of expropriation could be broadened by recognising a uniquely South African version of constructive expropriation embracing those circumstances where the results of state actions, or omissions, amount to *de facto* expropriations.[53] One suggestion made in the study was to broaden the scope of expropriation by focusing on the constitutional value of equality and accepting that section 9 of the *Constitution* can function as catalyst ensuring that specific individuals are not effectively plundered or stripped of their entitlements in relation to their property by excessive regulatory burdens.[54] Another suggestion was that the concept should be re-defined from the perspective of the deprived person as the property clause purports to protect the property holder's rights by

48 See par 5.4.1 *supra.*
49 See par 5.4.1 *supra.*
50 See par 5.4 *supra.*
51 See par 5.2.1.1 *supra.*
52 See par 5.2.1.2 *supra.*
53 See par 5.4.1 *supra.*
54 See par 5.4.2.1.1 *supra.*

prescribing the limits for state interference. It was questioned whether the current approach, whereby the concept is defined from the perspective of the acquirer of property and not the deprived party, is still justifiable under the *Constitution*.[55]

However, the application of the *stare decisis* rule in South African jurisprudence bind courts to the current interpretation of expropriation until the concept is redefined by the appellate division or Constitutional Court.[56] Therefore, this definition of the concept was taken into account when the impact of the transition from one mineral law system to another was assessed in chapter 7. Before this assessment was done the Canadian mineral law dispensation and related issues were studied.

8.2.5 Canadian Law of Mining[57]

The historical development and current state of the Canadian mineral law system was researched and the Canadian concept of expropriation was examined in order to understand how the majority of mineral rights came into the *dominium* of the crown and how the taking of resource interests, specifically property interests in minerals, is dealt with in Canada.

It was not the objective of this study to do a comprehensive legal comparative study between the South African and Canadian legal systems.[58] The legal status of minerals and rights to minerals in the Canadian system were focused on as well as the effect of the annihilation of these interests in the hands of its holders.[59]

It was clear from the overview that the majority of mineral rights vested in the state with only a small percentage in private hands in fee simple mineral estates. Minerals owned in fee simple are regarded as land and, therefore, as

55 See par 5.4.2.1.2 *supra*.
56 See par 5.4 *supra*.
57 See chapter 6 *supra*.
58 See par 6.1 *supra*.
59 See par 6.2 *supra*.

real property.[60] Mineral estates can be separated from surface estates and the owner of the mineral estate can grant prospecting or exploration rights in his property or he can grant an interest in the land by granting a lease or selling the mineral estate or a portion thereof in fee simple.[61]

The policy of the reservation of minerals to the crown has been implemented through legislation and in most cases it was the retroactive application of legislation that culminated in the expropriation of mineral rights in favour of the crown.[62] Depending on the law of the applicable province, an exploration or prospecting licence or a free miner's certificate must be obtained before any prospecting activities can commence. The legal nature of these authorisations is merely that they grant personal interests and not interests in land. Mineral claims under modern mining legislation are statutory creations and defined as "chattel interests".[63] It was held in *Delgamuukw* that aboriginal title includes mineral rights. These rights should be capable of exploitation in the same way as in reserve lands[64] and where the aboriginal title to minerals has not been extinguished, the law according to private, fee simple, mineral holding will apply *mutatis mutandis.*[65]

Whenever private interests in mineral resources are taken or expropriated by the state, compensation is payable to the deprived party.[66] Although the formal definition of the concept of expropriation requires the actual acquisition of an interest by the crown, the concept of constructive or *de facto* expropriation is acknowledged in Canadian expropriation law.[67] This is due to the acknowledgement of the presumption, based on fairness and justice, that the crown would pay full compensation in cases of expropriation regardless of the nature of the expropriation.[68]

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60 See par 6.2.2.1 *supra.*
61 See par 6.2 *supra.*
62 See par 6.2.1 *supra.*
63 See par 6.2.3.3 *supra.*
64 See par 6.2.5.2 *supra.*
65 See par 6.2.6.1.2.1.3 *supra.*
66 See par 6.2.6 *supra.*
67 See par 6.2.6 *supra.*
68 See par 6.2.6.1.2.1.2 *supra.*

The writer suggested that the Canadian approach of recognising 'constructive appropriation' as a way to broaden the scope of expropriation could be applied effectively in the South African context.[69]

Although the public trust doctrine found ground in Canadian jurisprudence, a truly Canadian variant of the doctrine is in a developmental stage and Canadian mineral law has not been influenced by the application of the doctrine.[70]

8.2.6 Assessing section 3 of the MPRDA[71]

Section 3 of the *MPRDA* was assessed after the information obtained in the previous chapters was considered.

The legislature's intention to acknowledge "that South Africa's mineral and petroleum resources **belong to the nation** and that the **State is the custodian** thereof" was converted into a reality through the integrated working of the provisions of the *MPRDA*. An assessment of section 3(1) of the *MPRDA* can, therefore, not be done in seclusion. The section must be dealt with in the context of its setting in the *MPRDA*. The study revealed that is was not without reason that the legislature expressly stipulated in section 4 that the act prevails whenever a provision of the act is inconsistent with the common law. [72]

8.2.6.1 Subrogation of the *cuius est solum* maxim

The viewpoint is advanced in chapter 7 that common law-altering[73] provisions are found in the *MPRDA*. The first is the abrogation of the *cuius est solum* maxim. The analysis of section 5(1) led to the inference that unsevered minerals, South Africa's mineral resources, are recognised as an independent

69 See par 6.4 *supra*.
70 See par 6.3 *supra*.
71 See chapter 7 *supra*.
72 See para 7.1.2.1; 7.1.2.2 *supra*.
73 Roman-Dutch based common law.

legal object.[74] Ownership cannot legally vest in the nation and consequently the question surfaced as to where the ownership of this legal object falls.[75] Due to the fact that the public trust doctrine is the legal vehicle for transporting the notion that the country's mineral resources are the common heritage of the nation while the title to the unsevered mineral resources vests in the state as custodian, the writer proposed that the doctrine has been incorporated through the provisions of the *MPRDA*.[76] This submission is corroborated by the emphasis placed on the fidusiary responsibility of the state and the fact that the country's mineral resources are portrayed in the Draft *Mineral and Petroleum Recources Royalty Bill* to form part of the "common patrimony of all South Africans".[77] Unsevered minerals, previously regarded as being the property of the owner of the land wherein it was embedded, became a public resource to be administered by the state as custodian of the resource. The creation of a new legal order relating to ownership of minerals resulted in the fact that the nature of the rights in terms of which minerals are held and can be exploited, has changed.[78] Therefore, the consequences ensuing from the *MPRDA* for the holders of common law mineral rights and old order rights and the impact of the *MPRDA* on the ownership of landowners and the significance of the act for the people of South Africa, were examined in the remainder of the chapter.

8.2.6.2 Deprivation of unsevered minerals and mineral rights

The view is advanced in this study that landowners have been deprived of the substance known as mineral that formed an integral and part of land. Because this substance has been acquired by the state in its custodial capacity, the mineral component of the land-mineral entity has been expropriated.[79] Due to the intrinsic nature of minerals, it carries with it the inherent right to be exploited and if the land-mineral entity is separated and unsevered minerals regarded as property on their own, the mineral-

74 See par 7.1.2.3 *supra.*
75 See par 7.1.2.4 *supra.*
76 See par 7.1.2.4.1 *supra.*
77 See par 7.1.2.4.1 *supra.*
78 See par 7.2 *supra.*
79 See para 7.2.2.1; 7.2.2.3 *supra.*

component will still confer the entitlement to exploit. Once minerals are removed from the land-mineral entity the accompanying right to exploit that vested in the landowner, is removed with it. This results in the simultaneous expropriation of the pre-existing mineral rights in the land.[80]

Due to the fact that the state acquired both the substance and the accompanying legal entitlement relating to the substance, it is also proposed that mineral rights vesting in non-landowners according to the preceding system were expropriated.[81] A different scenario exists with relation to prospecting and mining rights exercised by parties in terms of prospecting contracts or mineral leases entered into between the mineral right holder and another party. Rights attained in terms of these contracts were subsidiary to mineral rights. It is proposed that these subsidiary rights ceased to exist with the expropriation of the mineral right they originated from.[82]

8.2.6.3 Restriction of landowners' *dominium*

Apart from the fact that their land's unsevered mineral riches and the entitlement to deal with the unsevered minerals in their land have been expropriated from landowners, landowners' *dominium* is to a greater or lesser extent restricted through the statutory created new order rights relating to the exploitation of minerals.[83] The view is advanced in this thesis that the burden on ownership of land brought about by rights ensuing from prospecting and mining rights created in terms of section 5(1) of the *MPRDA* amounts to the expropriation of a landowner's entitlements towards the affected portion of land.[84] It is a contentious issue whether these rights are to be regarded as limited real rights from the moment they come into existence, or only after they have been registered in the Mineral and Petroleum Titles Registration

80 See par 7.2.2.2.1 *supra.*
81 See par 7.2.3 *supra.*
82 See par 7.2.4 *supra.*
83 See par 7.3 *supra.*
84 See para 7.3.1.1; 7.3.1.2 *supra.*

Office as required through the *Mining Titles Registration Act.* The latter view is advanced.[85]

Other new order rights also impact to a great extent on a landowner's entitlements to deal with his land as he deems fit.[86] With relation to reconnaissance permissions the writer proposes that the extent of the infringement caused by the activities undertook in terms of the said permission would have to be taken into account when determining whether a specific landowner's rights have been so severely curtailed that it amounts to constructive expropriation. However, the general theory advanced herein is that this amounts to a limitation of ownership that will be regarded as essential for regulating the search for minerals.[87] Retention permits burden the mineral in the sense that the state is prohibited to deal with the mineral in any way that could negatively affect the rights of the holder of the retention permit. Ownership of the landowner is restricted in the sense that the alienation of the land would be subject to the existence of the permit and the burden will be transferred to the landowner's successors in title.[88] Permission to remove and dispose of minerals during prospecting operations does not subtract anything more from either the mineral or landowner's *dominium* that has not already been subtracted by the issuing of the prospecting right. This particular permission should, therefore, be regarded as an incident of a prospecting right.[89] The holder of a mining permit is granted rights similar to those under a mining right. Although the entitlements acquired under the permit are valid for a limited time only, it is held that the ownership of the landowner and his successors in title is curtailed to the same extent that it is curtailed through the issuing of a mining right.[90]

Landowners are not expressly compensated for inroads into ownership. Section 54 merely creates a mechanism that can be used to claim compensation in cases where prospecting and mining operations cause

85 See par 7.3.1 *supra.*
86 See par 7.3.2 *supra.*
87 See par 7.3.2.1 *supra.*
88 See par 7.3.2.2 *supra.*
89 See par 7.3.2.3 *supra.*
90 See par 7.3.2.4 *supra.*

damage or loss to the landowner or lawful occupier. However, section 12 of Schedule 2 provides for the payment of compensation to any person who can prove that his property was expropriated.[91]

8.2.6.4 Significance of section 3 of the *MPRDA* for the people of South Africa

The significance of section 3 of the *MPRDA* for the people of South Africa is that the legislature incorporated the foreign public trust doctrine to provide for equitable access to and sustainable development of the nation's mineral resources. The introduction of this new doctrine is illustrative of the decline of the priority of private ownership in a democratic South Africa and introduces a system of public rights in South African jurisprudence. The innate benefits of the public trust doctrine accrue to the nation. The state has a great discretion to determine the direction that the management of public trust property for public benefit should take but the courts are the protectors of the trust and need to act as watchdog to ensure that the state manages this asset on behalf of and in the best interest of the people of South Africa.[92]

8.3 Answering the research question and attaining the primary objective of the thesis

The research question that formed the basis of this study was whether the concepts introduced by and consequences emanating from the implementation of section 3 of the *MPRDA* are constitutionally justifiable.

The view has been advanced in this study that the legislature introduced the public trust doctrine to South African mineral law through section 3. This resulted in a transformation of the South African mineral law dispensation as minerals were removed from the sphere of private property and transformed into a public resource.

91 See par 7.3.2 *supra.*
92 See par 7.4 *supra.*

To determine whether the consequences brought about by this section are constitutionally viable, its impact on holders of old order rights as well as consequences that will predictably flow from its contemporary application had to be considered.

Regarding its current application, the concept of the state holding the *dominium* in a resource as custodian to the benefit of the people as a whole, cannot in itself be regarded as unconstitutional. In fact, similar principles were acknowledged in South African jurisprudence relating to ownership of the sea-shore.[93] Through this notion constitutional values are promoted and the nation's entitlements in relation to the environment, specifically its mineral resources, are protected. It was stated in paragraph 7.4 *supra* that the recognition of public rights and the transformation of mineral resources from private property to public resource may have been expedited in an effort to throw off the remaining shackles of the apartheid regime. However, in a country as densely populated as South Africa, with the relative scarcity of available mineral resources, it would only have been a matter of time before it became clear that a system allowing for the 'secluded' development of mineral resources by a fortunate few, is not only intolerable, but unjust.

If the transformation from one mineral law regime to another does not conform to constitutional standards, the constitutionality of the whole act can be in jeopardy. The conclusions reached with reference to the secondary objectives of this study indicate that the mineral component of the common law land-mineral unity and the entitlements inherent to the substance mineral but previously captured in the legal construct known as "mineral rights" were appropriated by the state. The research also indicated that the newly created rights relating to minerals (new order rights) infringe on the ownership entitlements of landowners. Landowners are deprived of certain entitlements in relation to their land. It was indicated that the extent of the deprivation brought about by the different provisions of the *MPRDA* varies between expropriation and the mere regulation of mining activities. Due to the fact that

93 See par 4.2.3 *supra.*

expropriation in the narrow sense is accompanied by the constitutional guaranteed right to compensation, the inclusion of section 12 of Schedule 2 ensures that the act can withstand constitutional scrutiny. Although the doctrine of constructive expropriation has not formally been accepted in South African law it was indicated in paragraph 7.3.2.1 *supra* that the scope of activities undertaken under a reconnaissance permission may curtail the landowner's *dominium* to such an extent that it comes down to constructive expropriation. The writer proposes that it is just to allow for the payment of compensation under section 12 of Schedule 2 of the *MPRDA* in those circumstances.

The fact that acceptance of the incorporation of the public trust doctrine through the *MPRDA* will not be without resistance from traditional Roman-Dutch schooled lawyers who are set in their ways, is acknowledged. In a genre where people are constantly confronted with changes affecting every aspect of their daily lives that is often accompanied by losses incurred, opposition can be expected. However, the other side of the coin is that the legislator intended to better the lives of the previously disadvantaged and bring about an unparalleled and unprecedented equilibrium in the distribution of the country's mineral resources. Using the public trust doctrine as the legal vehicle to bring about this much needed and sought after equality surpasses expectations. Instead of taking 'my' property and giving it to 'you', the application of the public trust doctrine ensures that 'we' are all beneficiaries of valuable resources that vest in the state on 'our' behalf. 'We' have the authority to ensure that the state administers the country's mineral resources to 'our' advantage. The nation is united through the incorporation of the public trust doctrine and although ownership of this resource vests in the state, it is a limited ownership and entitlements can only be exercised if it is to the advantage of the nation as a whole. In a politically diverse South Africa it might prove beneficial to all that the judiciary is to act as watchdog over the public trust created through the *MPRDA* and that the exploitation of the country's mineral resources is not left solely in the hands of power-hunger politicians.

Consequently a concise answer to the research question would be that it was concluded through this study that the concepts introduced by and the consequences emanating from the implementation of section 3 of the *MPRDA* are constitutionally justifiable.

8.4 Recommendations

As a result of this study, it is recommended that:

- old order mineral rights be regarded as property worthy of constitutional protection once compensation claims are instituted;
- old order mineral rights have been expropriated from their holders and acquired by the state;
- unsevered minerals have been expropriated by the state;
- it is formally accepted that the public trust doctrine has been incorporated in South African mineral law;
- courts set out to interpret the statutory created public trust doctrine whenever a suitable opportunity arises. This will indicate the direction and parameters of development that a uniquely South African public trust doctrine will take. Currently no indication of future development of the application of the doctrine can be deduced from practice, because the whole mining industry is caught up in the conversion of old order rights;
- no pre-existing public trust title is recognised in South African law;
- the doctrine of constructive expropriation is developed to extend the scope of expropriation. Individuals are to sacrifice private property in promoting constitutional and statutory aims and values. In certain instances the deprivation that accompanies these sacrifices amounts to expropriation, if not in name then in fact. The spirit of transformation will be strengthened if those who sacrifice are compensated, even if the 'just and equitable' compensation is but a token of acknowledgement of the sacrifice. Constitutional compensation is to be determined according to the norms and values entrenched in the *Constitution*. The determining of constitutional compensation for all

categories of expropriation that flow from the implementation of the *MPRDA* is an aspect that needs further research;

- regarding the extension of expropriation, it was recommended in chapters 5 and 6 of this thesis that a uniquely South African doctrine of constructive expropriation are developed by –
    - focusing on the constitutional value of equality;[94]
    - shifting the focus point from what is gained by the 'deprivator' or beneficiary to the impact of the deprivation on the property holder;[95] and/or
    - expanding the scope of appropriation by acknowledging constructive appropriation as the essential requirement for a finding of constructive expropriation along the lines of Canadian constructive expropriation law.[96]

A new concept has been introduced into South African mineral law. One should not be afraid to exploit the benefits inherent to this doctrine to the advantage of the South African nation. The decline of the concept of private property is a reality given the overpopulation of the planet and the depletion of its limited resources. The public trust doctrine offers a viable alternative to the downright nationalisation of resources. If state administration is efficient and uncorrupted section 3 of the *MPRDA* will result in the equitable exploitation of the nation's mineral resources. If not, it is the South African courts' responsibility to ensure that the principles of the public trust doctrine are enforced to the benefit of the South African nation.

Per gratias Dei ad finem veni

94 See par 5.4.2.1.1 *supra.*
95 See par 5.4.2.1.2 *supra.*
96 See par 6.4 *supra.*

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An Act to Encourage the Discovery and Development of Oil and Natural Gas SPEI 1920 c 20

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List of abbreviations

Journal Titles

AJS: American Journam of Sociology

Alb LR: Albany Law Review

Ariz St LJ: Arizona State Law Journal

BC Envtl Aff LR: Boston College Environmental Affairs Law Review

Camb LJ: Cambridge Law Journal

Catholic ULR: Catholic University Law review

CILSA: Comparative and International Law Journal of Southern Africa

Cornell LR: Cornell Law Review

Dal LJ: Dalhousie Law Journal

Denv ULR: Denver University Law Review

Det CLR: Detroit College of Law Review

Envtl L: Environmental Law

Fordham Envtl LJ: Fordham Environmental Law Journal

Hamline L R: Hamline Law Review

IJS: International Socialism Journal

J Land Resources & Envtl L: Journal of Land, Resources and Environmental Law

J En & Nat Res L: Journal of Energy and Natural Resources Law

J Envtl L & Litig: Journal of Environmental Law and Litigation

J Env L & P: Journal of Environmental Law and Practice

LHR: Legal History Review

LR: Law Review

Marq LR: Marquette law Review

Mich LR: Michigan Law Review

MqJICEL: Macquarie Journal of International and Comparative Environmental Law

NYSLR: New York Law School Law Review

Nat Resources J: Natural Resources Journal

Osgoode Hall LJ: Osgoode Hall Law Journal

Pac LJ: Pacific law Journal

RPR: Real Property Reports

S Cal LR:Southern California Law Review

SAJELP: South African Journal of Environmental Law and Policy

SAJHR: South African Journal on Human Rights

SALJ: South African Law Journal

SAPR/PL: SA Publiekreg/Public Law

Sask LR: Saskatchewan Law Review

SC Envtl LJ: South Carolina Environmental Law Journal

SCLR: South Carolina Law Review

Stell LR: Stellenbosch Law Review

THRHR: Tydskrif vir die Hedendaagse Romeins-Hollandse Reg

TR: Tjdschrift voor Rechtsgeshiedenis

TRW: Tydskrif vir Regswetenskap

TSAR: tydskrif vir Suid-Afrikaanse reg

U Chi LR: University of Chigaco Law Review

U Colo LR:University of Colorado Law Review

UC Davis LR: UC Davis Law Review

UCLA LR: UCLA Law Review

ULP: Urban Law and Policy

ULR: Utah Law Review

Val U LR: Valparaise University Law Review

Wash LR: Washington Law Review

Windsor R Legal & Soc Issues: Windsor Review of Legal and Social Issues

Wm Mitchell L R: William Mitchell Law Review

Miscellaneous

AJA: Acting judge of Appeal

CIRL: Canadian Institute of Resources Law

JA: Judge of Appeal

eg: for example

J: judge

ie: *id est* – it is

par: paragraph

para: paragraphs

Prof: Professor

s: section

ss: sections