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The functional–formal impasse in (trust) property

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Abstract

This paper identifies an impasse between two conceptions of 'property rights'. Formal conceptions explain 'property rights' in terms of an alienable right to exclude, that has moral significance in terms of individuals' preference satisfaction, and describe a trust beneficiary as having a right against the trustees' right. Functional conceptions explain a 'property right' in terms of the entitlements in a resource, which has moral significance in terms of a range of individual and social values, and describe a trust beneficiary as having a share in entitlements in the resource. This impasse has general implications for the normative analysis of property law and particular implications for the practical application of redistributive statutory provisions to discretionary trusts. The solution to this impasse lies in the abandoning the language of 'property' when we are concerned with the entitlements in a resource.

I. Introduction

'Property' is difficult to define. In fact, most common-law courts refrain from providing a general definition.[1] The definition of 'property' becomes a practical and judicial problem when legislative provisions constrain the use of property, empower the acquisition of property or enable courts and officials to reallocate property. At first blush, practitioners and judges may not find much solace in legal theory, since legal theorists themselves disagree as to how to define and conceptualise a property right. Nonetheless, by engaging property law theory, we can identify an impasse between the formalism of property law and the functionalism of legislative prescriptions. This impasse has general implications for the normative analysis of property law and particular implications for the practical application of redistributive statutory provisions to discretionary trusts. In this paper, I explore both sets of implications. In terms of general theory, I contend that 'social obligation theorists' ought to forgo the rhetorical advantage of claiming that a plurality of values are internal to property rights. Whilst it is possible to locate social obligation norms as internal or external to property rights, I argue here that there is greater analytical clarity in recognising that a plurality of values provide the basis for external constraints on the exercise of property rights. In a similar vein, I argue that legislative provisions that aim to redistribute the privileges and entitlements in assets or resources ought to also forgo the language of 'property' in favour of more functional language.

In developing these contentions, this paper touches on three debates in property law theory. These debates concern how we understand: a property right, the moral ends that property rights serve, and the legal relationship between a trust beneficiary and trust property. A property right can be understood as 'the alienable right to exclude' or as 'a bundle of privileges and entitlements'.

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1 See *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] A.C. 694; (1964) 112 CLR 12 (PC), 712 F; *Bristol Airport PLC v. Powdrill* [1990] Ch. 744 (CA), 759A–C; *Z v. Z (No. 2)* [1997] 2 N.Z.L.R. 258 (CA), 279, 282; *St Vincent De Paul Society (Qld) v. Ozcare Ltd* [2009] Q.C.A. 335, at [36]; *Wily v. St George Partnership Banking Ltd* [1999] F.C.A. 33; (1999) 30 A.C.S.R. 204, at [6]; *Kennon v. Spry* [2008] H.C.A. 56; (2008) 238 C.L.R. 366, at [52], [89], [162]; *Saulnier v. Royal Bank of Canada* 2008 S.C.C. 58; [2008] 3 S.C.R. 166, at [16]–[17]; *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] A.C. 1014 (HL), 1051.

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The conception that a property right is an alienable right to exclude all others from an object or resource can account for the legal form that a property right has. If we can understand a property right in this (formal) way, then we can view such rights as serving the moral ends of individual preference and rational desire satisfaction. In comparison, the conception that a property right is an open-ended bundle of entitlements and privileges, which may be exercised in an object or resource, can account for the function that a property right performs. This functional understanding of property rights broadens the moral horizons of property rights to include a plurality of moral ends. In terms of trust property, I suggest that disagreement as to whether a trust beneficiary has an interest *in* the trust property itself or is only owed obligations with regard to the trust property maps onto this distinction between formal and functionalist accounts of property rights.

By drawing on these debates, we are then able to appreciate an impasse between functional and formal conceptions of 'property'. Formal conceptions explain 'property rights' in terms of an alienable right to exclude that has moral significance in terms of individuals' preference and rational desire satisfaction and describe a trust beneficiary as having a right against the trustees' alienable right to exclude. Functional conceptions explain a 'property right' in terms of the privileges and entitlements in a resource, which has moral significance in terms of a range of individual and social values, and describe a trust beneficiary as having a share in the privileges and entitlements in the resource. In a context where formalism prevails, social obligation theorists, who aim to emphasise the plurality of social values that property law can serve, and legislators, who aim to constrain or redistribute 'property rights' in order to promote social values, both rely upon the functional conception of property rights. Hence, there is an impasse between the prevailing formalism in the law and legal theory and the functionalism that social obligation norms and social obligation laws are predicated upon.

II. Property, value monism and formalism

2.1 The preference satisfaction ends of property rights

All legal rights have some kind of moral ends. That is to say, all legal rights can be understood as having some underlying point, rationale or purpose that purports to explain, in normative terms, the existence of the right (Wendel, 2011, p. 1035). Property rights are no exception (Alexander, 2014, p. 1264). As Thomas W. Merrill and Henry E. Smith explain:

> '... no system of property rights can survive unless property ownership is infused with moral significance. By this, we mean that the differentiating feature of a system of property ... must be regarded as a moral right; intentional violations of this right, either by unlicensed invasions of owned things or unconsented takings of owned things, must be regarded as immoral acts.' (Merrill and Smith, 2007, p. 1850)

Let us therefore start by considering what the moral ends of our system of property rights might be. If we consider an individual's welfare or utility to be a morally significant ends, then property rights can be understood as the means of allowing individuals to secure these ends through the use and control of objects and resources (Alexander, 2014, pp. 1264–1265; Waldron, 1988, pp. 73–79). Alternatively, or in addition, if we respect the capacity of each individual to formulate their own values, goals and desires and to align their actions with such standards, it follows that we should also respect the critical role that an individual's use and control over objects and resource plays in aligning their rationally motivated values with their rationally motivated actions (Alexander, 2014, p. 1264). More broadly, if we consider self-determination and self-expression to be morally

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significant, then property rights may be a means of securing the ends of the 'abstract will' developing a content of determinative ends (Hegel and Wood, 1991; Knowles, 1983, p. 54). That is, if a person must translate his or her freedom into the 'external sphere' in order to be self-expressive, then a system of property rights provides the control over the pieces of the external sphere through which an individual can coherently express themselves (Hegel and Wood, 1991).

Whilst these formulations of the ends of property rights describe different moral rights, based upon different conceptions of what is morally significant, they share a common structure. According to these formulations, the moral ends of property rights is the satisfaction or realisation of the property right-holder's preferences, will or rational desires. In other words, the point or purpose of our system of property rights is to protect a morally significant relationship between a person, his or her preferences or rational desires and an object or resource. As Gregory S. Alexander explains, the 'one constant meaning' and 'core purpose' of property has been 'to define in material terms the legal and political sphere within which individuals are free to satisfy their own preferences, free from governmental coercion or other forms of external interference' (1998, p. 667).

In this way, our system of property rights is promoting a singular moral ends (Alexander, 2011) – a monist (rather than a pluralist) ends. We can label the ends as *the preference satisfaction ends* (Alexander, 2011, p. 1038). As we will consider below, pluralist theories of the ends of property rights aim to broaden the scope of the underlying point, rationale, purpose or function of property rights so as to include values beyond preference or rational desire satisfaction.

2.2 The exclusionary means of property rights

However, before we turn to pluralist theories of the ends of property rights, we need to closely consider how our system of property rights might secure the singular moral ends of individual preference satisfaction. According to Merrill and Smith's account, 'the differentiating feature of a system of property' (mentioned above) is the 'the [moral] right of the owner to act as the exclusive gatekeeper of the owned thing' (2007, p. 1850). They have both independently argued that the right to exclude is the defining characteristic of a property right. For Merrill, 'if we start with the right to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property' (1998, p. 744). Therefore, in order to define property rights, it becomes 'necessary to posit independently that the right to exclude exists with respect to the resources in question' as only the right to exclude has the explanatory power to account for the form of property rights (Merrill, 1998, p. 744). Viewing a property right conceptually as the right to exclude can explain the characteristic structural features of property rights, such as being enforceable against an open set of persons (as rights *in rem*) (Wall, 2015, p. 143; Penner, 1997, p. 128; McFarlane, 2008, pp. 20–22), being actionable per se (Wall, 2015, p. 148; Green, 2012, p. 536) and imposing correlative duties of non-interference (Wall, 2015, p. 155).

For Smith, 'property defines things using an exclusion strategy of "keep off" or "don't touch"' (2012, p. 1693). This right to exclude is an 'integral' aspect of the formal structure of property law (Smith, 2012, p. 1699). Smith explains why property law adopts an exclusion strategy in terms of 'information costs' (2004, p. 1753). The exclusion strategy benefits from 'rough and low-cost signals that are not tied to use in order to protect indirectly a large and unspecified set of uses' (Smith, 2004, p. 1753). In addition to this exclusion strategy, 'the system of domains of owner control' is also enriched by governance strategies (Smith, 2012, pp. 1693–1694). The overlapping strategies of exclusion and governance, which Smith associates with property law and tort law, respectively, differ in terms of their focal point. According to Smith, 'property initially focuses on things and works out from there, whereas tort law takes more direct aim at acts and activities' (2011, p. 1). Whilst the governance strategy (we will consider further below) may be concerned

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with particular acts and activities, the exclusion strategy protects an unspecified set of uses by enabling the property rights-holder to exclude all others from the object, asset or resource.

Merrill and Smith are not alone. According to James E. Penner, 'the *right* to property is that normatively protected part of our interest in using property' (1997, p. 72). As we have discussed above, we have a morally significant interest in our control over our physical environment. Our interest in the use and control of objects and resources – our interest in 'purposefully dealing with things' – is legally protected by 'the extent to which others must exclude themselves from our property' (Penner, 1997, p. 72). It follows for Penner that 'exclusion' is the 'formal essence of the right' (1997, p. 71).

Penner also adds a further hallmark: property rights are 'separable' or alienable in the sense that '[o]nly those "things" in the world which are contingently associated with any particular owner may be objects of property' (1997, p. 111). If property rights are separable, alienable or contingent rights (Wall, 2015, pp. 124–128) and 'nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another' (Penner, 1997, p. 111), then it follows that the new rights-holder adopts the former rights-holder's normative position with regards to the object (Penner, 1997, p. 113). The right to exclude is therefore an *alienable* right, since the right to exclude can be alienated to, and exercised by, another person.

2.3 Formalism and functional in property theory

These claims about property rights by Merrill, Smith and Penner are all claims about the form of property rights, that a defining characteristic of a property right is that it enables the right-holder to exclude all others from an object or resource. Although the alienable right to exclude may help us to define 'a property right', it does not help us to justify one. Hence, as Merrill, Smith and Penner all take care to mention (Penner, 1997, p. 71; Smith, 2012, p. 1705; Merrill, 1998, p. 754), although the right to exclude is a defining, integral or essential feature of property rights, it is not (by itself) a normative feature. As Smith explains:

> 'Exclusion is not the most important or "core" value because it is *not a value at all*. Thinking that exclusion is a value usually reflects the confusion of means and ends in property law: exclusion is a rough first cut – and only that – at serving the purposes of property.' (Smith, 2012, p. 1705)

The preference satisfaction norm is the moral ends of property rights and the alienable right to exclude is the means of achieving this ends. To connect the ends with the means – to connect a rights-holder's preference satisfaction with his or her right to exclude others – it is helpful to introduce a third component: *privileges and entitlements*. The exclusion of all others from an object or resources renders, according to Penner, is 'a protected sphere of indefinite and undefined activity, in which an owner may do anything with the things he owns' (1997, p. 72). The set of 'activities' or 'use-privileges' that a rights-holder may have in an item of property is an 'open-ended set' (Harris, 1996, pp. 27, 160). Such privileges and entitlements include the ability to possess, consume, derive income from, control, manage, transfer, exchange, sell, borrow against or otherwise use the item of property (Honoré, 1961, pp. 161–193; Pound, 1939, p. 997; Hohfeld, 1917, pp. 746–747). Property law protects this 'open-ended set of uses *implicitly* by giving the owner the right to exclude others from the asset' (Smith, 2004, p. 1759, emphasis in original). As far as property law is concerned, there is no need to describe or delineate use-privileges that a right-holder may exercise in an object or resource; the right to exclusion instead preserves 'an open-ended set of use-privileges' (Harris, 1996, p. 27).

Whilst we can recognise that the right to exclude is 'a means to an end and not an end in itself' (Smith, 2009, p. 964), we have located an intermediate component (privileges and entitlements) that can help us connect the ends of property rights with its means. We can therefore appreciate that the

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right to exclude 'indirectly serves a wide – and, crucially, only vaguely specified – set of interests' (Smith, 2009, p. 964). But note how the privileges and entitlements that are associated with a property right – more generally understood as 'incidents of ownership' or as a 'bundle of rights' (Honoré, 1961, pp. 161–193) – is neither a description of the form (or means) of property rights nor an account of the value (or ends) of property rights. It describes the various uses of an object or resource that a rights-holder may pursue by virtue of the rights-holder's right to exclude all others. As Hanoch Dagan explains, it follows from this view that 'understanding property as a bundle of sticks is misleading' since all of the sticks or incidents 'are mere elaborations of what the right to exclude encompasses or entails' (2012, pp. 1414–1415).

Describing property rights as vague, open-ended sets of privileges does not account for the form or structure of a property right, nor does it justify our system of property rights. Rather, the privileges and entitlements (incidents of ownership or the bundle of rights) 'sit behind' the form and structure of property rights (Smith, 2009, p. 963). They explain how the function of property rights is to enable the exercise of an open-ended set of privileges and entitlements in an object or resource.

As Smith explains, the 'bundle of rights' view can aid our understanding of property rights by explaining how 'policy-motivated adjustments' to property rights 'usually involve adding or subtracting sticks and reallocating them among concerned parties or to society' (2012, p. 1697). Whilst it is true that use-privileges in an object or resource represent a bundle that may be added to or subtracted from, a *property right* in an object or resource is, itself, silent as to the various use-privileges that may be exercised. The legal *form* of property right (the alienable right to exclude) is therefore analytically distinct from the *function* or a property right (to enable an open-ended set of use-privileges).

Form does, nonetheless, follow function; the alienable right to exclude is a way in which the law affords legal protection to the use-privileges that a person may exercise in an object or resource. There is, therefore, a link between the alienable right to exclude and use-privileges, but the link is neither conceptually nor practically necessary. It is not conceptually a necessary link because the alienable right to exclude can adequately account for the legal concept of a property right, and it is not a necessary link in practice because other branches of law can afford legal protection to the use-privileges that a person may exercise in an object or resource.

Hence, use-privileges represent an intermediate, or bridging, concept. Between *form* (the alienable right to exclude) and *justification* (preference satisfaction) rests *function* (use-privileges). Privileges and entitlements bridge the gap between form and justification – the ends and means of property – in the following way: if the purpose of property rights is to allow their holder to satisfy or realise individual preferences or rational desires, it should be achieved by affording the rights-holder an open-ended set of use-privileges in an object or resource. The way in which our system of property law preserves an open-ended set of use-privileges in an object or resource is through the exclusion of all others from that object or resource. A 'property right' is, in formal terms, the alienable right to exclude. The point or purpose of the right can be explained in terms of individual preference and rational desire satisfaction. The key point is that the various privileges and entitlements that can be exercised in an object or resource, according to this monist view, do not represent either the ends or the means of property rights.

III. Trust property, formalism and functionalism

3.1 Obligation theory of trust property

The rights pertaining to trust property add further complicity to the idea that a property rights is the alienable right to exclude. In this section, we will encounter competing accounts of the legal relationship between a trust beneficiary and the trust property (in commonwealth jurisdictions).

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I will suggest here that this theoretical disagreement reflects differing emphases on the form or the function of trust property.

When the settlor transfers an asset to the trustees, the settlor is transferring his or her property rights in the transferred asset. The trustees therefore receive the alienable right to exclude all others from the trust asset. In addition, equity imposes obligations on the trustees, with regard to the trust asset, that are obligations owed to the trust beneficiaries. Neither obligational theorists nor interest theorists (discussed below) deny that the trustees exercise the alienable right to exclude whilst also being required to discharge obligations owed to the trust beneficiaries.

Views diverge, however, when we consider how to characterise the rights and interests of the trust beneficiaries that follow from the obligations owed to them by the trustees. Lionel Smith explains the trust structure in the following way:

> 'The trustee has rights in the object; that is, rights in the trust property. The trust beneficiary's rights are rights *in* the rights that the trustee holds in the object. Those beneficiary's rights are the converse of the obligations owed by the trustee to the beneficiary, in respect of the trust property.' (Smith, 2008, p. 392)

Smith substantiates the claim that 'the beneficiary's only rights are rights held *in* the rights of his trustee' by observing 'that if a third party wrongfully causes damage to the trust property, there is no claim by a beneficiary against the third party' (2008, p. 391, emphasis in original), the broader implication being that 'the trust beneficiary has no equivalent direct right to exclude others from the … trust asset' (Penner, 2014, p. 476; McFarlane and Stevens, 2010, pp. 3–4). If property rights have the defining characteristic of being rights of exclusion, and if a trust beneficiary does not acquire any aspect of the right to exclude, it would follow that the beneficiary's interest or right with regards to the trust asset cannot be a *property* interest or a *property* right.

However, obligation theories must still account for the observation that the 'rights of a beneficiary sometimes have effects on third parties' (Smith, 2008, p. 391). For instance, 'some transferees of the trust property cannot take it unencumbered by the claims of the beneficiary' (Smith, 2008, p. 391). Smith accounts for this structural feature of trust law by suggesting that it was 'created by a distortion of the law of obligations' through 'an enormous expansion of the universally accepted possibility of third party liability for interference with obligations' (2008, p. 392).

The structure of the trust is therefore defined with reference to the obligations owed to the trust beneficiaries, the rights and interests of the beneficiaries that correlate to the obligations owed to them by the trustees, and these 'expansive' obligations can persist and apply to a third party even where the property has 'passed from the original obligor, the trustee, to a third party' (Penner, 2014, pp. 476–477; McFarlane and Stevens, 2010, pp. 1–4). Critically, according to this account, the beneficiary has no interest in the asset itself; rather, the beneficiary only has a right that is exercisable against the trustee with regard to how the trustees exercise their rights in the trust asset.

3.2 Interest theory of trust property

Interest theory suggests otherwise – that the trust beneficiary has an interest in the trust asset itself. According to Penner, 'the beneficiary's interest *in* the trust assets is accurately characterised as *an interest in the trustee's exercise of his powers over the trust assets*' (2014, p. 500, emphasis in original). To explain this view, Penner encourages a shift in focus, away from possession and the trustees' right to exclude and towards '*the powers of title* held by the trustee' (2014, p. 495, emphasis in original). These 'powers of title' are 'the powers to transfer, confer rights in, or otherwise dispose of … the right to possess tangibles or the right (through legal action or equitable suit) to realise the value of intangibles' (Penner, 2014, p. 487).

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In typical trusts, Penner explains, 'the beneficiaries' right lies in their rights that the trustee exercise his power of title appropriately, not his right to immediate, exclusive possession' (2014, p. 483). The value of trust assets is (typically) realised through the acts of exchange, sale or reinvestment. It is not realised through the act of possession of the asset. Although the right to exclude may protect the possession of the asset, the right to exclude is asserted by the trustees against interference as a way of protecting acts of exchange, sale and investment, thereby protecting the value of the trust asset (Penner, 2014, p. 483). It follows for Penner that 'the beneficiaries are the beneficial owners of the title to trust assets' (2014, p. 487). In other words, trust beneficiaries have the right that powers of transfer, exchange and reinvestment be exercised for their benefit.

As Penner is himself aware, this shift in focus (from the right to exclude to the powers of title) represents a shift from form to function (2014, p. 484). Note how we are no longer explaining the beneficiaries' rights to trust property as structure of rights that are exercisable against the alienable right to exclusion. Rather, we are now explaining the beneficiaries' rights function to require that the trustees exercise their powers of transfer, disposition and realisation of value in favour of the beneficiaries. Penner is nonetheless conceptually consistent with his above view that property rights are exclusive rights by emphasising that 'the hallmark of a property right is not a *right to exclusion*, but a right to *alienable exclusivity*, which is the power to put another, a transferee into one's shoes as holder of an exclusive right' (2014, pp. 488–489, emphasis in original).

Powers of exchange, sale and investment are powers premised upon the *alienability* of the right to exclude. This is because powers of exchange, sale and investment are all powers that enable a third party to obtain and exercise (exclusionary) rights in the object, asset or resource. Therefore, according to Penner's interest theory of trust property, a trust beneficiary has a 'right to the exercise of powers of title' by virtue of the fact that they have the right that powers of transfer, exchange and reinvestment be exercised for their benefit (2014, p. 489). Since the 'powers of title' are powers *in* the assets, and since beneficiaries have a right to such powers, the beneficiaries have an interest *in* the asset itself.

3.3 Formalism and functionalism in trust property theory

The shift in focus, from the right to exclude to the powers of title, is important. In order for the interest theory to identify that a trust beneficiary has a right or interest *in* the trust asset (rather than a right or interest in the exercise of the trustees' right to the asset), the theory needs to emphasise the function of trusts; trust law facilitates the exercise of privileges and entitlements, such as acts of exchange, sale or reinvestment of the trust asset for the benefit of trust beneficiaries. These are privileges and entitlements associated with the use of the trust asset (that 'sit behind' the alienable right to exclude). The interest theory of trusts therefore emphasises the functional component of property rights as consisting of a set or bundle of privileges and entitlements. In essence, rights and interests *in* the trust property can be divided between the trustees and beneficiaries because the rights and interests are conceptualised as a divisible bundle of rights and interests.

For property rights *simpliciter*, the use-privileges in the object, asset or resource are (formally) unspecified and open-ended. For trust property, the terms of the trust may specify the obligations that are owned to the beneficiaries (by the trustees) with regard to the privileges and entitlements in the trust asset. Alternatively, such obligations may be discretionary, meaning that the privileges and entitlements would remain unspecified. The extent to which the privileges in the trust asset are specified depends largely on how discretionary the powers of title are. The disagreement that we have encountered in this section concerns whether the exercise of the powers of title is part of the trustees' right in the trust asset (which is a right curtailed by obligations owed to the trust beneficiaries) or whether the powers of title represent a set of privileges and entitlements that trust beneficiaries have a right in.

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Hence, we can begin to isolate two strands of theory. According to a formal view, a property right is an alienable right to exclude, and obligations imposed on a trustee correlate as personal rights that are exercisable against the alienable right to exclude. In comparison, according to a more functional view, a property right is a series of use-privileges in an object or resource, and a trust is the division of use-privileges between legal and equitable title holders.

IV. Property, pluralism and functionalism

4.1 The social ends of property rights

Whilst property rights have a moral ends, that can explain and justify the current system of property rights, the moral ends need not be a singular moral value. Rather, the moral ends of property rights could be a plurality of values. Without denying the right to exclude as a formal feature of property rights, and without denying the preference satisfaction norm that the right to exclude promotes, social obligation theorists argue 'that a main function of property is to structure social relations and that a legal property system must therefore have a moral vision of what type of social relationships it seeks to foster' (Alexander, 2011, p. 1023).

The point, rationale or purpose of our system of property rights, according to social obligation theorists, is to help structure and promote social relationships of a particular normative character. It follows that our system of property rights has a 'social vision' beyond an individual's preferences or rational desires (Alexander, 2011, p. 1023).

Let us briefly consider the arguments of three social obligation theorists. According to Dagan, our system of property law will engage a range of different values that will vary depending on 'social contexts … and with respect to a given category of resources' (2012, p. 1439). Because of the variation in values, contexts and resources, Dagan describes 'property' broadly, as 'an umbrella for a set of institutions' (2012, p. 1439). The point, purpose or rationale for property is to serve:

> 'a pluralistic set of liberal values: autonomy, utility, labor, personhood, community, and distributive justice. Property law, at least at its best, tailors different configurations of entitlements to different property institutions, with each such institution designed to match the specific balance between property values best suited to its characteristic social setting.' (Dagan, 2012, pp. 1412–1413)

The task for our system of property law is to 'facilitate … the coexistence of a variety of social institutions embodying different underlying reasonable (albeit at times conflicting) modes of valuation' (Dagan, 2011, p. 72; 2012, p. 1443). For instance, the law that governs commercial real estate will promote a norm of negative liberty (Dagan, 2012, p. 1439) whilst residential tenancy law will prioritise values of personal identity (Dagan, 2012, p. 1441; Radin, 1982, pp. 992, 1013). The laws that provide for matrimonial or relationship property division will engage values of community sharing and distributive justice (Dagan, 2012, p. 1439). Moreover, in other contexts, such as intellectual property, patent laws will be informed by utilitarian norms (Dagan, 2012, p. 1411). It follows that a range of values therefore underpin property rights, and the purpose of property law is to calibrate the values that are best suited to the social context and the object or resource itself.

Joseph W. Singer also conceptualises property broadly, arguing that it cannot be defined 'by reference to a fixed conception but by reference to human values' (2000, p. 37). These underlying values are 'various and incommensurable' (Singer, 2000, p. 38) and include fairness, economic efficiency, social welfare, social justice and individual autonomy (pp. 20, 31, 63, 68). We arrive at these values by viewing property rights in terms of their impact. As Singer explains:

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> 'Every legal right should be understood not merely by reference to the powers and rights it gives the owner but by reference to the impacts of the exercise of those powers on others and the shape and character of the social relationships engendered by those rights and powers.' (Singer, 2009, p. 1047)

It follows that we ought to examine and evaluate property rights in terms of how such rights structure social relationships (Singer, 2009, p. 1050). Given this relational lens, we are able to view property as inclusive of obligations to others and recognise 'some substantive limitations on the packages of rights property law will recognize' (Singer, 2009, pp. 1050–1051). As Jane Baron commentates, '[f]or progressive theorists, what is most interesting and important about property is the outcomes it produces' and, given that property 'is at least capable of fostering human flourishing, virtue, freedom, and democracy', we ought to understand, examine and evaluate property rights with reference to these pluralistic values (2010, p. 932).

More broadly, 'the normative foundation of private property', according to Alexander, 'is human flourishing' (2014, p. 1260). The ends of property law therefore include a plurality of values, such as 'individual autonomy, personal security/privacy, self-determination, self-expression, and responsibility' (Alexander, 2014, p. 1260). The application of these values, or any plurality of values that social obligation theorists nominate, is guided by the underlying claim that a property rights-holder 'is morally obligated to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing' (Alexander, 2009, p. 774).

Alexander argues that this general social obligation norm explains a series 'doctrinal practices in which private owners are required to sacrifice their ownership interests in some way' (2009, p. 774). Consider some of Alexander's examples. For instance, he argues that 'the power of eminent domain' (the power of the state to compulsorily acquire private property) can be explained in terms of 'the capacities necessary for individuals to flourish as autonomous moral agents' that require 'the mundane elements of infrastructure' (Alexander, 2009, p. 776). Since 'individuals can develop as free and fully rational moral agents only within a particular type of culture', Alexander suggests that social obligation norms can explain historic preservation laws (significant restrictions on the use of historically important buildings) in terms of individuals' obligations 'to support in appropriate ways the institutions and infrastructure that are part of the foundation of that culture' (2009, pp. 794–795). Moreover, according to Alexander, since every landowner is under an 'obligation to contribute to the vitality of capabilities-nurturing elements of her community', social obligation theory can explain why the landowner is burdened by restrictions on their use of land 'for environmental purposes like wetlands preservation' (2009, p. 799).

What unifies these social obligation theorists is the general contention that the moral ends of property rights is inclusive of obligations to bestow benefits on others that society reasonably regards as necessary. This overarching social obligation norm is premised upon the observation that the exercise of property law is responsive to, or informed by, a plurality of values, beyond (but still including) the individual preference satisfaction norm that we encountered earlier.

4.2 The functionalism of social obligation theory

There are three aspects of social obligation theory that I wish to highlight here. The first is that it succeeds in isolating and calling attention to laws that are predicated on social obligation norms. There is no denying that these laws are part of our legal system. Recall the examples that Alexander has given; there are laws that protect residential tenants, allocate relationship property upon division, protect historical buildings and preserve wetlands. As social obligation theorists successfully explain, to understand tenancy law, relationship property or environmental

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regulation is to appreciate an underlying tension between social obligations norms and individual preference satisfaction norms that 'the umbrella institution of property law' is tasked with resolving.

Second, when a social obligation norm provides the normative basis for a law, it does so by asserting *normative priority* over the preference satisfaction norm. That is, despite the normative weight of the individual preference satisfaction norm, and the underlying values of individual utility, agency or self-expression, there are many instances where the law requires the rights-holder to bestow a benefit on another because social values and norms have priority over individualist values and norms (in other instances, the normative priority may be different) (Alexander, 2009, pp. 815–817; Makdisi, 2017), which we would expect: there are many instances that we can think of where an individual's preferences or rational desires with regard to an object or resource are outweighed by the interest of others in society (and vice versa).

Third, and most importantly, social obligation theories broaden both the ends and means of 'property rights'. If social relationships of a particular normative character are the moral ends of property rights, then the *means* of property rights need to be able to connect with this pluralist conception of the ends of property rights. In order to show that it is 'property law' that is structuring and promoting social relations or human flourishing, social obligation theorists must treat 'property law' as a very broad church. For the above examples to work, residential tenancy laws, relationship property laws, compulsory acquisition laws, restrictions on historic buildings and environmental protection laws all need to be conceptualised as 'property laws'. This is why Dagan defines property as 'an umbrella for a set of institutions' (2012, p. 1439) (and why Singer avoids a 'fixed conception' of property; 2000, p. 37). Defined broadly or fluidly, social obligation theorists can illustrate how property – as an umbrella concept – can be a means of achieving social obligation ends; the laws that *touch and concern* property rights engage a plurality of values.

In a functional sense, social obligation theorists are right that 'property law' governs the privileges and entitlements in objects, assets or resources in order to structure social relations in a way that promotes a plurality of values. As we have discussed, viewing property rights as a bundle of privileges and entitlements helps us to identify 'policy motivated adjustments' to property rights (Smith, 2012, p. 1697) and the examples that social obligation theorists identify are all instances of 'policy-motivated adjustments' to property rights. Hence, social obligation theories of property law are functional theories of property law. They are concerned with how property law (in the functionalist sense) configures privileges and entitlements in assets and resources, how these configurations impact on social relationships and how property law requires rights-holders to the sacrifice of privileges and entitlements.

Social obligation theories of property law are functional theories because the laws that they call our attention to are 'property' laws in the functionalist sense; they are laws that are directly concerned with the privileges and entitlements associated with an object, asset or resource. Residential tenancy laws and environmental protection laws, which are motivated by social welfare concerns, take 'sticks' from the 'bundle'. Similarly, relationship property laws, which are motivated by distributive justice concerns, reallocate the 'sticks'.

In comparison, the principal opponents of social obligation theorists – exclusion theorists and value monists – are concerned with the form of property law: the set of laws that facilitate the exercise of the alienable right to exclude. In a formal sense, the social obligation theorists are not analysing property rights. Their examples are statutory controls and statutory limitations on the exercise of property rights. These laws are about the external control on the exercise of property rights. They are not internal property law itself.

It follows for exclusion theorists (and value monists) that all the statutory impositions placed on property rights are external constraints, which are constraints that must (and can) be justified. It also follows for exclusion theorists (and value monists) that, although we cannot understand *the system of property* (an umbrella for a set of institutions) without reference to these external constraints, these

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external constraints that promote social obligation norms are unnecessary to our understanding of *property rights*. Whilst these implications of the exclusion theory of property may appear to be unwelcome implications to those who share the overall concerns of social obligation theory, as I will now turn to explain, there is an important analytical clarity to be gained from accepting (the formal view) that laws that advance social obligation norms are external constraints on the exercise of property rights rather than internal restraints on the rights themselves.

4.3 The functional–formal impasse in property theory

It therefore appears as if we have reached an impasse. Exclusion theorists explain 'property rights' in terms of the alienable right to exclude that has moral significance in terms of individuals' preference and rational desire satisfaction. Social obligation theorists describe 'property rights' in terms of the privileges and entitlements in resources that have moral significance in terms of human flourishing and social relationships. It will come as no surprise that theorists view 'property rights' as serving different moral ends given that theorists have different conceptions of what 'property rights' are in the first place.

Since social obligation theorists are attempting to disrupt exclusion as what Baron describes as 'the central fault line in property law and theory' (2010, p. 919), some of these theorists seek to demonstrate that these statutory provisions, which embody social obligation norms, fall within our concept of 'property rights'. This is why Alexander argues that such laws, which represent a 'governance strategy' or 'mechanism', ought to be understood as part of the 'core' or property law and not at the periphery of property law (2012, p. 1858). It is also why Singer argues that we ought to 'use a combination of common law, statutes, and social custom to define the boundaries of allowable packages of property rights' (2009, pp. 1052–1053). These are attempts by social obligation theorists to persuade us to conceptualise 'property' functionally in order for us to then appreciate the plurality of moral ends that 'property' serves and avoid this general impasse in property law theory.

We can appreciate why social obligation theorists seek to broaden 'property law' to include the laws that restrict and reallocate the privileges and entitlements in objects, assets and resources. Social obligation theorists want to capture the rhetorical high ground by describing 'property rights' as serving a plurality of values (beyond individual preference satisfaction). They would be able to claim that 'property rights' also serve social obligation norms and can therefore be used to cure the defects in an overly individualistic property law regime.

As Lorna Fox O'Mahony persuasively argues, the 'rhetorical and doctrinal power of proprietary claims have ensured that when it comes to substantive ownership contests', it is the 'strong' or exclusionary rights that have 'typically prevailed over weak or no-right claims, even after legislation has been enacted specifically to counter this balance' (2014, p. 13). Hence, O'Mahony suggests that 'Finding a vocabulary in which to talk about the unequal effects of property laws, and a methodology for structuring arguments provoked by a concern for inequality, is a challenging task within the dominant discourse of English property law' (2014, p. 435).

Although social obligation theorists may gain a rhetorical advantage by broadening property to include social obligation norms, it sacrifices analytical clarity by setting 'property' against 'property' (Alexander, 2009, p. 749).

Herein lies the problem with setting *property against property* (Davies and Naffine, 2001, p. 9). According to social obligation theory, 'property' serves moral ends of personhood, social welfare and distributive justice as well as the moral ends of individual utility, agency and self-expression. As we know, in some but not all situations, the social ends can defeat the individualistic ends. Social obligation theorists seek to emphasise a plurality of values that 'property rights' serve whilst trying to minimise the dominant role that individual preference satisfaction and the alienable right to exclude play in our understanding of property rights. Given a plurality of values

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that 'property rights' can serve, we are left to somehow adjudicate the conflict between values that are said to be internal to property rights.

Moreover, herein lies the need for analytical clarity (even for proponents of social obligation theory). The problem is that we have two analytically distinct concepts (property as the right to exclude and property as a set of privileges) *that use the same label of 'property'*. Social obligation theorists, by focusing on property as a set of privileges, are attempting to demonstrate the normative priority of one set of internal values over another set of internal values. Yet, the existence of laws that advance social obligation norms already answer the question of the posited normative priority of social obligation values and norms. To highlight the priority of social obligation norms (over individualist norms) as the basis of reallocating or limiting the bundle of entitlements in assets, objects or resources, it is unhelpful to invoke the language of 'property', since we have two analytically distinct concepts that use the same label of 'property'.

Hence, the problem is twofold. First, the language of 'property' can equivocate between two analytically distinct concepts. Second, even when we use 'property' in a functional sense (in order to focus on the configurations of privileges and entitlements), we forgo the clarity of viewing social obligation norms as justified constraints on the alienable right to exclude, and we are instead left with a plurality of values that are said to be internal to property rights. I therefore suggest that it is analytically preferable (albeit perhaps less rhetorically persuasive) to accept that social obligation norms are directly concerned with the privileges and entitlements in assets, objects or resources (and only indirectly concerned with 'property rights'). As a result, the laws that advance social obligation norms are seen as external constraints on the exercise of property rights rather than internal restraints on the rights themselves.

Viewing the restriction and reallocation of privileges and entitlements as distinct from the exercise of the alienable right to exclude – *viewing function as distinct from form* – enables us to better appreciate the moral significance of laws that advance social obligation. Such laws *owe their existence to* concerns for social welfare or distributive justice that have been afforded normative priority over individual welfare, agency or self-expression. Such laws therefore restrict or reallocate the privileges and entitlements in the asset, object or resource to give effect to this normative priority. In this way, it is easier to identify that social obligation norms ought to have, or have been given, normative priority over individual preference satisfaction norms.

We once again arrive at two conceptions of property law: property law either facilitates the exercise of alienable rights to exclude or property law governs the exercise of privileges and entitlements in objects, assets or resources. In terms of the latter conception, there is no denying that some of the complexity of 'property law' (in the functional sense) can be explained as an uneasy plurality of values (Alexander, 2009, p. 752). Property law (in this sense) must therefore arbitrate between the norms that concern 'what is good for a person, what that person values, is what he or she rationally prefers' (Alexander, 2011, p. 1038) and obligation imposed on the same person 'to provide to the society of which the individual is a member those benefits that the society reasonably regards as necessary for human flourishing' (Alexander, 2009, p. 774).

The difficulty is that, whilst we hold fast to our formal understanding of property rights, which defines property rights in terms of their legal form, then we will fail to identify any social obligation norms as ends of property law. It is only when we cast the net much wider, and adopt a functional understanding of property, that we see 'property rights' serving a plurality of values. And yet, adopting a functionalist understanding of property, in order to usher in a plurality of values, can only be a rhetorical manoeuvre, as it does not circumvent the impasse created by having a formal concept and a functional concept sharing the label of 'property'. If we want to clearly identify the normative priority of the laws that give effect to (or laws that ought to give effect to) social obligation norms, then we ought to accept that such laws are external to property law.

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V. Trust property, pluralism and functionalism

5.1 Two implications so far

I have so far attempted to draw out two implications from the contrast between formal and functional views of property rights and trust property. In terms of property rights, I have so far explained the formal view of the ends and means of property rights: a property right is the alienable right to exclude all others from an object or resource. It serves the purposes of property law by promoting individual preference and rational desire satisfaction. I have also explained a functional view of the means of property rights: a property right represents a set of privileges and entitlements in an object, asset or resource. Viewing property rights in this (functional) way enables us to identify how 'property rights' govern the set of use-privileges to serve a plurality of values. The pluralist moral ends of (functional) property rights provide the basis of social obligation norms that we can identify as competing with, and having normative priority over, the individual preference satisfaction norm. The implication from this contrast is that, if we hold fast to our formal view of property, then we are unable to view property law as embodying any other value beyond the value of the individual preference satisfaction norm. However, if we adopt a functionalist view of property, we can view the moral ends of property as pluralistic.

In terms of trust property, I have so far explained that, following the formal view of property rights as the alienable right to exclude, the rights or interests of trust beneficiaries can be understood as rights against the trustees' alienable right to exclude all others from the object or resource. In comparison, if we adopt a functional view of property rights, as a series of use-privileges in an object or resource, then the rights or interests of trust beneficiaries can be understood in terms of a share of the series of use-privileges. The implication from this contrast is that if we hold fast to our formal view of property, then a trust beneficiary has no right or interest *in* the trust property. Alternatively, if we adopt a functionalist emphasis, then a trust beneficiary has a property right or interest *in* the trust property by virtue of having a share of the use-privileges and powers in the trust property.

In what follows, I briefly draw these two implications together to isolate a particular problem with the application of social obligation norms to discretionary trust property. Recall that, if we understand property rights in terms of a formal legal structure of rights and duties, then the privileges and entitlements in an object, asset or resource are 'only vaguely specified' (Smith, 2009, p. 964), if specified at all, by the legal structure. Yet, the legal rules that advance social obligation norms are directly concerned with the privileges and entitlements associated with an object, asset or resource. The rules that aim to advance social obligation norms and the legal form of property rights are caught by the formal–functional impasse.

5.2 The functional–formal impasse in trust property

The formal–functional impasse is not a problem for property rights *simpliciter*. This is because, for property rights *simpliciter*, the formal structure of rights and the vaguely specified privileges and entitlements are located in the same place: the property right itself. A legal rule can identify the property rights-holder, his or her item of property and specify the way in which a privilege or entitlement (from an otherwise formally unspecified 'bundle' of privileges) is to be limited or reallocated. Legislative provisions that are predicated on social obligation norms are able to provide a stipulated limitation on the otherwise 'undefined sphere of activity' (Penner, 1997, p. 72). Property right-holders can be required to pay tax from the income derived from their property, be required to forgo a proportion of their property to a former partner or be prevented from developing their land to the extent that his would impact on an environmentally significant feature and so on. These limitations exist because the form (the alienable right to exclude) and the function (the set of privileges and entitlements) are correlative within the property right.

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The functional–formal impasse is not a problem for trust property, *provided that* the (functional) privileges and entitlements are specified in the terms of the trust. Where a trustee is obligated to dispense set benefits to the trust beneficiaries, legislative provisions are also able to constrain or reallocate these specified interests. However, discretionary trust property is different: the (formal) rights and the unspecified privileges and entitlements are located in different places. The trustees exercise the (formal) alienable right to exclude whilst the trust beneficiaries benefit from the privileges and entitlements in the trust asset (either by virtue of their rights *in* the asset or by virtue of their right against the trustees' right). For general discretionary trusts, the privileges and entitlements that the trust beneficiaries benefit from remain unspecified. Hence we encounter the settled doctrinal proposition that a beneficiary under a general discretionary trust has no legal or equitable interest in the trust property, but a mere expectation that the trustees' discretion may be exercised to his or her benefit.[2] A discretionary beneficiary has an unspecified, and therefore informal and legally unrecognisable, interest in the trust property.

A legal rule that aims to reallocate or limit a privilege or entitlement in an object, asset or resource (in promotion of a social obligation norm) by taking aim at 'property' confronts the formal–functional impasse when the legal rule encounters an item of property that is subject to a general discretionary trust. To illustrate, a court may 'alter the interests of the parties to [a] marriage' (with respect to 'the property of the parties to the marriage') in 'property settlement proceedings',[3] may secure payment for a court ordered debt by imposing a charge on 'any such property of the debtor'[4] and may grant a receiver control over 'all property belonging to or vested in' the bankrupt person in order to discharge obligations to creditors.[5] These statutory provisions concern 'property' and, whilst we hold fast to 'property' in the formal sense, beneficiaries under a general discretionary trust – who have no formal interest in the trust property – will not be captured by these reallocative or redistributive statutory provisions. Whilst the language of these provisions is concerned with 'property', and whilst 'property' is conceptualised in formal terms, the application of these provisions to general discretionary trusts will be caught in the functional–formal impasse.

5.3 Avoiding the impasse

Functionalism can nonetheless prevail over formalism. It could prevail as an interpretive approach. Courts could interpret the word 'property' in redistributive statutory provisions in a functional way. Common-law courts have demonstrated a willingness to adopt this interpretive approach with

2 See *Gartside v. Inland Revenue Commissioners* [1968] A.C. 553, 607, per Lord Reid, and 615, per Lord Wilberforce; *Queensland Trustees Ltd v. Commissioner of Stamp Duties* (1952) 88 C.L.R. 54, 62–65; *Commissioner of Stamp Duties (Queensland)* [1965] A.C. 694; (1964) 112 CLR 12 (PC); *Pearson v. Inland Revenue Commissioners* [1981] A.C. 753, 775, per Viscount Dilhorne, and 786, per Lord Keith of Kinkel; *Hunt v. Muollo* [2003] 2 N.Z.L.R. 322 (CA), at [11].

3 Family Law Act 1975 (Cth Aust.), s. 79(1)(a): 'In property settlement proceedings, the court may make such order as it considers appropriate: in the case of proceedings with respect to the property of the parties to the marriage or either of them altering the interests of the parties to the marriage in the property.'

4 Charging Orders Act 1979, s. 1(1): 'Where, under a judgment or order of the High Court or a county court, a person (the "debtor") is required to pay a sum of money to another person (the "creditor") then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.'

5 Insolvency Act 1986, s 283(1): '. . . a bankrupt's estate for the purposes of any of this Group of Parts comprises – (a) All property belonging to or vested in the bankrupt at the commencement of the bankruptcy; or (b) any property which is or is treated as being comprised in the estate by virtue of the provisions of the Act which relate to the insolvency of individuals.'

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regard to the power to revoke a discretionary trust and the general power of appointment under a discretionary trust.[6] Such powers have been described as being 'tantamount to ownership',[7] representing an '"absolute disposing power" over the property'[8] and having the 'practical effect' of enabling the trustee to appoint all the assets in to themselves or to anyone else.[9] In these such cases, the general discretionary trust property was held to be subject to redistributive provisions on the basis of 'substance over form'.[10] To otherwise hold onto the distinction between powers and property was described as seeking to 'grasp at a shadow while the substance escapes'.[11]

However, these particular powers in question were unconstrained by any fiduciary duties owed to other beneficiaries. This helps dissolve the formal conception of the trust as beneficiaries' exerting rights (based on duties or obligations owed to them) against the trustees' rights (in the asset), since there are no obligations owed to other trust beneficiaries with regard to these powers. In these particular circumstances, functionalism can prevail over formalism when the form of the trust is a mere shadow, but the form of general discretionary trusts cannot always be reduced to a mere shadow.

Hence, functionalism has greater chances of prevailing over formalism through legislative language. Since redistributive statutory provisions are concerned with the way that property rights function to deliver a bundle of privileges to the rights-holder, which then ought to be reallocated, such provisions can and ought to speak in functional terms. For example, in determining spousal maintenance, a court may be directed to take into account 'the income, property and financial resources of each of the parties'.[12] Similarly, in making financial provision orders or property adjustment orders in divorce proceedings, a court may be directed to take into account 'the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future'.[13] A provision of the latter type enabled

6 *Tasarruf Mevduati Sigorta Fonu v. Merrill Lynch Bank & Trust Co (Cayman) Ltd and others* [2011] U.K.P.C. 17; [2012] 1 W.L.R. 1721; *Clayton v. Clayton* [2016] N.Z.S.C. 29; [2016] N.Z.F.L.R 189.

7 *Tasarruf Mevduati Sigorta Fonu* [2011] U.K.P.C. 17; [2012] 1 W.L.R. 1721, at [59]: 'The powers of revocation are such that in equity, in the circumstances of a case such as this, Mr Demirel can be regarded as having rights tantamount to ownership. The interests of justice require that an order be made in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment.'

8 *Tasarruf Mevduati Sigorta Fonu* 2011] U.K.P.C. 17; [2012] 1 W.L.R. 1721, at [43], citing E. Sugden (1861) *A Practical Treatise of Powers*, 8th edn. London: H. Sweet: 'A donee of a truly general power can appoint the subject matter of the power to himself. He therefore has an 'absolute disposing power' over the property, citing Sugden, p. 394. Consequently, for many purposes, the law regards the donee as the effective owner of that property.'

9 *Clayton* [2016] N.Z.S.C. 29; [2016] N.Z.F.L.R 189, at [62]: 'The practical effect of the provisions . . .is that Mr Clayton, as Trustee of the VRPT, could appoint all the assets of the VRPT to himself, especially (though not exclusively) if he has already exercised his power as Principal Family Member under cl 7.1 to remove all other Discretionary Beneficiaries.'

10 *Ibid*., at [75]: 'Counsel for Mrs Clayton also relied on a recent decision of the Court of Final Appeal of Hong Kong, *Kan Lai Kwan v. Poon Lok To Otto* and the English cases on which it is based, especially *Charman v. Charman, Charman v. Charman (No 4)* and *Whaley v. Whaley*. While we see these cases as less relevant to the issue than *Kennon v. Spry*, we consider the approach taken in them supports a substance over form approach to the problem before us.'

11 *Tasarruf Mevduati Sigorta Fonu* [2011] U.K.P.C. 17; [2012] 1 W.L.R. 1721, at [60] (citing *Masri v. Consolidated Contractors International (UK) Ltd (No.2)* [2008] EWCA Civ 303; [2009] QB 450).

12 Family Law Act 1975 (Cth Aust.), s. 75(2)(b): 'In exercising jurisdiction under section 74, the court shall take into account. . .(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment'; see *Stephens v. Stephens* [2009] Fam.C. A.F.C. 240, at [67]–[68], per May, Boland and O'Ryan JJ.

13 Matrimonial Causes Act 1973, s. 25(2)(a): ' . . . the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future.'

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the England and Wales Court of Appeal to find that, although '[a] discretionary beneficiary has no proprietary interest in [a trust] fund', 'the court looks at resources; not just at ownership'.[14] What is therefore relevant in determining spousal maintenance 'is the likelihood of the trust fund or part of it being made available to [a discretionary beneficiary]', meaning that '[t]he question is not one of control of resources: it is one of access to them'.[15] What then becomes subject to reallocative statutory provisions is the functional access to assets and resources, not the formal powers of control.

Moreover, functionalism ought to prevail through statutory language, since constraining and reallocative provisions ought to speak in functional terms. Such provisions are concerned with removing and reallocating sticks of the bundle of privileges and entitlements (that property rights function to preserve). They do so on the basis that concern for social welfare or distributive justice has greater normative priority than the preference satisfaction of the rights-holder. Such provisions owe their existence to the normative priority of social obligation norms over preference satisfaction norms. In the same way as social obligation theorists ought to abandon the language of property when demonstrating the normative priority of social obligation norms, statutory provisions ought to constrain and reallocate the privileges and entitlements in objects, assets and resources rather than prescribing limits on what constitutes 'property'.

VI. Conclusion

The purpose of this discussion has been to develop a general contention about pluralism in property law theory and a particular contention about the statutory redistribution of privileges and entitlements in items of property. The overall claim has been that both social obligation theorists and redistributive statutory provisions ought to abandon the language of 'property'. Whilst the formal conception of a property right (as the alienable right to exclude) prevails in legal practice and legal theory, social obligation theories struggle to identify a plurality of values that these 'property rights' serve. In the same way, whilst the formal conception of trust beneficiaries' legal relationship with the trust asset (as exercising a right against the trustees' right in the asset) prevails, statutory provisions struggle to identify the discretionary and therefore unspecified privileges and entitlements that ought to be redistributed. In terms of property law theory, social obligation theorists ought to forgo any rhetorical advantage in claiming that social obligation norms are internal to property rights and instead call attention to the normative priority of laws that constrain the exercise of property rights. More practically, the best way for legislation to implement the normative priority of social obligation norms that require the redistribution of the functional benefits of property is through taking aim at the privileges, entitlements and benefits that a person may have in objects, assets and resources, instead of taking aim at 'property', which, after all, is difficult to define.

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14 *Whaley v. Whaley* [2011] EWCA Civ 617; (2011–2012) 14 I.T.E.L.R. 1, at [113].

15 *Ibid.*, at [113].

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