



CORE ANALYSIS

Servitised property and personality: theorising servitisation through the personality theory of property

Jie Ouyang 

Department of Private Law and Notarial Law, University of Groningen, Groningen, The Netherlands
Email: j.ouyang@rug.nl

(Received 30 March 2023; revised 12 October 2023; accepted 3 December 2023; first published online 02 February 2024)

Abstract

This Article aims to elucidate servitisation through the lens of Hegel's personality theory, which justifies property based on its role in shaping our identity. The growing prominence of servitisation enables us to interact with and derive benefits from things not only through ownership but also through contractual access. In this light, it is submitted that the personality justification offers a helpful theoretical framework to inform a clearer conception of servitisation, which in turn sheds illuminating light on its effective legal shaping and regulation. Through the lens of personality theory, I argue that long-term servitisation is functionally equivalent to formal property in promoting the actualisation of personhood, while the short-term counterpart supports the experimentation of personality. The relational nature of Hegelian property is reinforced in servitisation. Accordingly, a functional approach to property lends itself to the proper regulation of servitisation, where contracts could be employed to set out the governance framework for servitised property. Legal regulation on servitisation should play both protective and facilitative roles in the servitised economy.

Keywords: private law; property theory; personality theory of property; servitisation; functionalism

1. Introduction

We are what we own. For better or for worse, we identify with what we have, and what we have gives away who we are.¹ However, most of the time, it is not *the stuff per se* that we want; we want the experience. We buy light bulbs not for their glassy pear shape, but for the radiant glow. While some appreciate the elegance of vinyl CDs, most of us simply turn on Spotify to enjoy the sound of music. It is fair to say that, if we are offered equivalent solutions that deliver the same functionality as the material products do, we no longer need ownership. This phenomenon captures the idea of an emerging economic trend called 'servitisation'. It was first coined by Vandermerwe and Rada in 1988² and is now widely recognised as the process of creating additional financial value and comparative edge by adding services to products or even replacing products with services.³ It is famously summarised as 'people do not want a quarter-inch drill, they

¹F Trentmann, *Empire of Things: How We Became a World of Consumers, from the Fifteenth Century to the Twenty-First* (Penguin 2016); M Csikszentmihalyi, *The Meaning of Things: Domestic Symbols and the Self* (Cambridge University Press 1981).

²S Vandermerwe and J Rada, 'Servitization of Business: Adding Value by Adding Services' 6 (1988) *European Management Journal* 314.

³TS Baines et al, 'The Servitization of Manufacturing: A Review of Literature and Reflection on Future Challenges' 20 (2009) *Journal of Manufacturing Technology Management* 547, 547; S Khanra et al, 'Servitization Research: A Review and Bibliometric Analysis of Past Achievements' 131 (2021) *Journal of Business Research* 151, 151–2.

© The Author(s), 2024. Published by Cambridge University Press. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

want a quarter-inch hole' by Freeman.⁴ Servitisation is generally seen as a circular business model and is notably on the rise in the business-to-business market in recent years,⁵ as exemplified by Rolls-Royce's TotalCare (aero-engines as a service) or Philips' Circular Lighting (light as a service). It is also gradually making its way into the business-to-consumer market,⁶ though the primary focus is limited to consumer leasing, such as bicycle rental by Swapfiets and household appliances subscription by Bundles. Software is servitised to subscription packages with automatic updates, such as Microsoft 365 and Adobe Creative Cloud. Full digitisation of CDs and DVDs into Spotify and Netflix also fleshes out servitisation in a broad sense. Some aspects of the sharing economy, especially the sharing of things,⁷ are also part of servitisation.

The business models of servitisation abound,⁸ but not all business variants differ in a legal sense. Legally speaking, servitisation models may essentially be classified into two groups: the first group involves the transfer of ownership of the product with *added* services; the second one involves no transfer, but ownership is *replaced* with contractual access to services.⁹ This Article will focus on the latter (the 'replacement model'), which invites interesting theoretical and practical questions at the intersection of property and contract law. To wit, servitisation underpins the philosophy of access-based consumption and, in an 'access economy', markets are making way for networks and ownership is being replaced by access.¹⁰ Despite the recent surge in legal research on this topic,¹¹ servitisation has remained under-theorised, particularly from a property perspective. This contribution highlights the property theory relevance of servitisation and aims to embed servitisation into a broader intellectual context and set the stage for further theoretical and policy discussions.

As depicted at the very beginning of this Article, the things we own are often associated with our personality and identity. This is potently argued by the 'personality theory of property' spearheaded by Hegel, which seeks to justify property as a necessity for self-actualisation. Now that servitisation provides an alternative means of engaging with things, how could the personality theory be mobilised to examine servitisation beyond mere contractual arrangements?¹² Should law also provide an alternative toolkit catering for servitisation and if so, what kind of toolkit is

⁴F Freeman, 'Buying Quarter Inch Holes: Public Support Through Results' 10 (2000) *Midwestern Archivist* 89.

⁵See CA González Chávez et al, 'Towards Sustainable Servitization: A Literature Review of Methods and Frameworks' 104 (2021) *Procedia CIRP* 283; J Hojnik, 'Ecological Modernization through Servitization: EU Regulatory Support for Sustainable Product-Service Systems' 27 (2) (2018) *Review of European, Comparative & International Environmental Law* 162.

⁶A Tukker, 'Product Services for a Resource-Efficient and Circular Economy – a Review' 97 (2015) *Journal of Cleaner Production* 76, 86 et seq.

⁷Some even narrowly define 'sharing economy' as merely encompassing the temporary granting of access to physical assets, see T Meelen and K Frenken, 'Stop Saying Uber Is Part Of The Sharing Economy' (*Fast Company*, 14 January 2015) <<https://www.fastcompany.com/3040863/stop-saying-uber-is-part-of-the-sharing-economy>> accessed 8 December 2023.

⁸See A Tukker, 'Eight Types of Product-Service System: Eight Ways to Sustainability? Experiences from SusProNet' 13 (2004) *Business Strategy and the Environment* 246; M Johnson et al, 'Reconciling and Reconceptualising Servitization Research' 41 (2021) *International Journal of Operations and Production Management* 465.

⁹See J Hojnik, 'The Servitization of Industry: EU Law Implications and Challenges' 53 (2016) *Common Market Law Review* 51, 32–3.

¹⁰J Rifkin, *The Age of Access: How the Shift from Ownership to Access Is Transforming Capitalism* (Penguin 2000) 4; V Mak, 'Van Ownership naar Access. Is Toegang de Nieuwe Eigendom?' 7/8 (2018) *Ars Aequi* 664. Also, see D Arthursson, 'How Millennials Are Defining the Sharing Economy' (*Entrepreneur* 2016) <<https://www.entrepreneur.com/growing-a-business/how-millennials-are-defining-the-sharing-economy/275802>> accessed 8 December 2023 ('57 per cent of adults agree that access is the new ownership.') Of course, ownership does not disappear in servitisation; it is retained in the hands of the service providers and much less exchanged in the market.

¹¹B Keirsbilck et al (eds), *Servitization and Circular Economy: Economic and Legal Challenges* (Intersentia 2023); V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' 43 (2020) *Journal of Consumer Policy* 227; Hojnik (n 9).

¹²Approaching servitisation from a contract law perspective, see D Gruyaert, 'Contractual Liability, Exoneration and Redress in the B2B Contractual Chain', in Keirsbilck et al (n 11), at 109; H Slachmuylders, 'Movable Servitization – Contractual Liability in the B2C Relationship', in *Ibid.*, Keirsbilck et al (n 11), at 135.

desirable? If the servitisation model becomes increasingly prevalent and more and more property is being replaced with access, what does it say about the personality theory itself in a modern context? This Article attempts to unpack the interplay between the personality theory, servitisation and the legal framework for servitisation. The remainder of this Article is structured as follows. I will first visit the personality theory of property, especially the works of Hegel and Radin, to distil the theoretical pillars that underpin the personality justification (Section 2). I will then apply them to inform a clearer conception of servitisation (Section 3). After that, I will explore the legal and theoretical implications of personality-servitisation (Section 4). A final conclusion follows.

2. Property and personality

A. Introduction

The ‘personality theory of property’ could be traced back to Hegel’s *Philosophy of Right*, especially its first part on *Abstract Right*.¹³ Hegel begins with the conception of a person as an abstract entity who is self-conscious of its freewill – ‘a unit of freedom aware of [her] sheer independence’.¹⁴ In order to transform the abstract unit into a concrete existence and translate the universal freedom into an actual embodiment, the freewill internal to a person must be externalised through property.¹⁵ Personality is not a given *a priori* following freewill; it must be developed by acquiring external things. By projecting my freewill onto a thing, the thing becomes ‘mine’ as it embodies my will, and my freewill finds its realisation in the existence of the thing.¹⁶ Grounded in the external world, my freewill is then able to connect to your freewill and – moving on to the third part of *Philosophy of Right* on *Ethical Life* – participate in more advanced social exchanges in the contexts of family, civil society and state.¹⁷ My personality is thereby concretised by means of social interactions. Property is thus justified as the necessity for the embodiment of freewill and the actualisation of personality in the course of human history.

How exactly does this process of embodiment happen? According to Hegel, there are three mechanisms for the will to exercise her ‘right of appropriation’¹⁸ over all external things: by *taking possession* of, *using* or *alienating* things.¹⁹ By taking possession of the thing, my will is imposed on the thing in a *positive* sense²⁰: when I grab a mug, the mug’s current state of existence – being in my hand and subject to my further actions – reflects my will to take physical control of it. By using the thing, my will occupies the thing in a *negative* sense²¹: when I drink my coffee, the non-existence of the coffee gives away my will to consume it. By alienating the thing, the will is ‘reflect[ed] from the thing back into itself’, so the will is related to the thing in an *infinite* sense.²² An infinite judgement is of the form ‘x is non-F’,²³ so, after alienation, the thing is subdued to some other will that is not my will – what comes into play here is the interaction between my will and your will. From this synoptic overview, we can see that Hegel takes heed of both the relationship between the will and the thing (subject–object relation) and that between my will and

¹³GWF Hegel, *Elements of the Philosophy of Right* (Cambridge University Press 1991).

¹⁴*Ibid.*, s 35A. In this Article, ‘freewill’, ‘will’, ‘willing’ and ‘Idea’ are used interchangeably. ‘Personality’ or ‘personhood’ in essence also refers to the same concept, but it further involves the process of the will’s endeavours and struggles to actualise itself in the external world of property.

¹⁵*Ibid.*, s 41 et seq. Also, see GS Alexander, *An Introduction to Property Theory* (Cambridge University Press 2012) 60 et seq.

¹⁶Hegel (n 13) s 44.

¹⁷JE Penner, *The Idea of Property in Law* (Oxford University Press 2000) 169–70.

¹⁸Hegel (n 13) s 44.

¹⁹*Ibid.*, s 53 et seq.

²⁰*Ibid.*, s 53.

²¹*Ibid.*

²²*Ibid.*

²³*Ibid.*, at 409.

your will (intersubjective relation) as to the realisation of personality. In the following analysis, I will call the former the internal perspective of the personality theory and the latter the external perspective.

Hegel's personality theory serves as a major source of inspiration for contemporary property theorists.²⁴ Intellectual property lawyers, for instance, actively draw on this theory to provide a rationale for the legal protection of intellectual works as the result of the individual's mental products.²⁵ The personality argument further resonates with modern constitutions and human rights instruments that put human dignity and the free development of personality in the centrepiece²⁶ and thus finds reception by theorists addressing the constitutional aspect of property.²⁷ The emphasis on individuality and identity lends Hegel's propositions to liberal property lawyers.²⁸ At the same time, interestingly, Hegel's critique of classic (especially Kantian) liberalism also appeals to theorists who take a less individualistic approach. For example, a burgeoning school of contemporary property theorists, often associated with the *progressive property movement*, who advocates a fresh interpretation of property rights, obligations and community, aligns closely with Hegel's personality perspective.²⁹ It is evident that modern theorists have been actively engaging with Hegel's personality theory. While critique has also been raised, such as the under-investigation of the personality development of the propertyless,³⁰ it by no means undercuts the theoretical traction and practical impact of Hegel's personality argument altogether.

Among these renditions, Margaret Jane Radin came up with the most influential modern iteration of the Hegelian property theory, known as the 'personhood' theory.³¹ Based on how closely property contributes to the development of personhood, Radin distinguishes two particular categories of property, namely personal and fungible property.³² According to her, there is a hierarchy of property entitlements along a continuum with personal property on one end and

²⁴It should be noted, though, that Hegel is not the first nor the only political philosopher to explain and justify property based on its role in facilitating the proper development of personality, see GS Alexander, 'Property as a Fundamental Constitutional Right – The German Example' 88 (2003) Cornell Law Review 47, 747.

²⁵See, for example, J Hughes, 'The Philosophy of Intellectual Property' 77 (1988) Georgetown Law Journal 287; JL Schroeder, 'Unnatural Rights: Hegel and Intellectual Property' 60 (2005) University of Miami Law Review 453; CS Yoo, 'Rethinking Copyright and Personhood' (2019) University of Illinois Law Review 1039. This personality argument was even placed in the European Court of Justice's line of reasoning when it decided that the reflection of 'personality' and the expression of 'personal touch' are key in determining whether a portrait photograph can be protected by copyright; see Case C-145/10 *Eva-Maria Painer* ECLI:EU:C:2011:798.

²⁶For example, Art 1 of the Universal Declaration of Human Rights provides that 'All human beings are born free and equal in dignity and rights'. Arts 22, 26 and 19 of that instrument further draws upon the 'free and full development of personality'. On a national level, Art 2(1) of the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*) provides that 'Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law'.

²⁷See, for example, CE Baker, 'Property and Its Relation to Constitutionally Protected Liberty' 134 (1986) University of Pennsylvania Law Review 741, 761–4. Also, see J Habermas, *The Crisis of the European Union: A Response* (Polity Press 2012) 71–100.

²⁸See, for example, R Claassen, 'The Capability to Hold Property' 16 (2015) Journal of Human Development and Capabilities 220.

²⁹See R Walsh (ed), 'Understanding Progressive Property: Traits, Themes, and Values', *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press 2021) 36 et seq. On the progressive property movement in general, see GS Alexander and others, 'A Statement of Progressive Property Special Issue – Property and Obligation' 94 (2008) Cornell Law Review 743.

³⁰J Waldron, *The Right to Private Property* (Clarendon Press 1990) 377 et seq.

³¹Radin first developed the personhood theory in MJ Radin, 'Property and Personhood' 34 (1982) Stanford Law Review 957. She later further elaborated and partially revised her theory in MJ Radin, 'Market-Inalienability' 100 (1987) Harvard Law Review 1849; MJ Radin, 'Lacking a Transformative Social Theory: A Response' 45 (1993) Stanford Law Review 409; MJ Radin, *Reinterpreting Property* (University of Chicago Press 1993); MJ Radin, *Contested Commodities* (Harvard University Press 1996).

³²Radin, 'Property and Personhood' (n 31) 957 et seq.

fungible property on the other: the more closely connected with personhood, the closer property falls on the personal end and the stronger the entitlement.³³ While Radin brings a modern perspective to the table, this Article retains its roots in Hegel's original account, as the latter provides a more thorough exploration of the dynamic interplay between property and personality, especially how property mediates social interactions and community engagement for individuals (the external perspective). Nonetheless, Radin's typology is helpfully complementary to Hegel's theorisation and will thus be consulted as well. In this section, I seek to synthesise some fundamental mechanisms that function to couple property with personality. The goal is to tease out some analytical tools to further inform the conception of servitisation as an alternative way to derive personality development from property.

B. Internal perspective of subjectivity

Embodying subjectivity by substantive engagement with the thing

I will start by discussing the internal perspective of the personality theory, namely the subject-object relation. We can distinguish two kinds of internal relations: first, how the subject establishes its relationship *to* the object; second, after the establishment, how the subject engages *with* the object. By relationship to the object, I mean how the subject establishes the valid title/entitlement to the thing that justifies further engagement or enjoyment. In property law, this is dealt with under the topic of acquisition of property, which could roughly be divided into original acquisition (eg by production) and derivative acquisition (eg by exchange). By engagement with the thing, I mean how, after acquiring legal title, the intrinsic conditioning of the object, ie its qualities, characteristics and value, serves to fulfil the wants and needs of the subject. In property law, this is discussed as the incidents of property rights, which usually encompass the collective of *usus* (right to use), *fructus* (right to its fruits) and *abusus* (right to dispose of the thing, such as to destroy or alienate the thing).³⁴ Among Hegel's three ways of embodiment, the subject establishes its relationship *to* the thing through possession or alienation and engages *with* the thing through use. As will be analysed later, it is the engagement through use that effectively contributes to the process of embodiment.

Hegel starts with possession. There are three modes of taking possession of a thing in Hegel's account: (1) directly grasping it, (2) forming it and (3) marking it.³⁵ However, as Hegel himself concedes, grasping is 'subjective, temporary, and extremely limited in scope' as it lasts merely as long as the physical grasping itself does,³⁶ while marking is 'highly indeterminate in its objective scope and significance' as it is not actual but rather represented or constructive.³⁷ As such, this analysis will focus on forming, which is theoretically most salient in showcasing the effect of Hegelian possession vis-à-vis one's personality.³⁸ In daily language, forming means making something one's own, such as carpentering a chunk of wood into a chair or sculpturing a piece of marble into a statue. In doing so, my will is externalised in the thing as to its new form and my 'Idea' in concept is translated into actuality.³⁹ The gap between the subjectivity of the will and the externality of the objects is bridged by my investment of time and labour: on the one hand, by shaping the external world as per my will, my abstract will is now perceivable by reference to the

³³*Ibid.*, at 986.

³⁴This is a rather civil law understanding; see S van Erp and B Akkermans, *Cases, Materials and Text on National, Supranational and International Property Law* (Hart Publishing 2012) 213–39. For a common law perspective, see T Honoré, *Making Law Bind: Essays Legal and Philosophical* (Clarendon Press 1987) 166–79.

³⁵Hegel (n 13) s 54 et seq.

³⁶*Ibid.*, s 55.

³⁷*Ibid.*, s 58.

³⁸Alexander (n 15) 63 ('More important is the second mode, imposition of form.');

³⁹Waldron (n 30) 364 ('Much more important is the case in which I work to bring about some physical change in the object').

³⁹Hegel (n 13) ss 56, 57.

thing I have worked on; on the other hand, though the thing itself now exists as an ‘independently existing externality’⁴⁰ with the new form from my work, the characteristics of the thing are nonetheless only intelligible by reference to my will.⁴¹ We can see that possession (forming) establishes the subject’s relationship *to* the thing.

However, possession is not the only way of building up the subject-*to*-object relationship. Just as important as possession, ‘[r]eason makes it [equally] necessary that human should enter into contractual relationship’, for ‘it is the interest of reason that the subjective will should become more universal and raise itself to this actualisation’.⁴² This means I can also become an owner of something by entering into a contract with another – joining a ‘common will’.⁴³ In essence, I own something when my will penetrates it – either by concretely working on it or by abstractly accepting something that another will gives up.⁴⁴ Despite Hegel’s focus on the former in the part of *Abstract Right* (which seems rather divorced from the larger system of Hegel’s philosophy), the latter is equally, if not more, important if we contextualise property against the discussion in *Ethical Life*, especially Hegel’s account on division of labour.⁴⁵ As such, both possession and contractual exchange are salient in establishing the subject-*to*-object relationship. Such a contextual reading is important to free property from the contingency of empirical possession and expand the modern remit of Hegel’s theory, given the drastic changes in modes of production since Hegel’s time – larger-scale division of labour and mass production have severed the connections between the products, their producers and their owners. Before moving on, it should also be pointed out that the subject-*to*-object relation in contractual exchanges is established through an intersubjective connection, the ‘common will’. I will further explore this external perspective later.

Now let us zoom in on use, which deals with engagement with the thing following the established relationship to the thing. Hegel defines use as ‘the realisation of my need through the alteration, destruction or consumption of the thing’.⁴⁶ Among the three modes of embodiment, use – the willful satisfaction of needs with external things – is the substantive aspect of property.⁴⁷ As Hegel puts it, ‘the relation of use to property is the same as that of substance to accident’.⁴⁸ Therefore, *having* something in itself is insufficient to establish a true property relation with the thing; it takes some actions to engage with the intrinsic usefulness of the thing before the true property relation can be established and the will can be externalised.⁴⁹ If one has ‘full use of the thing’, one becomes its owner.⁵⁰ We can now clearly observe how use describes the subject’s engagement *with* the thing: it is the intrinsic material features of the thing itself, its ‘quantity and quality’, that fulfil the subject’s ‘specific need’.⁵¹ And it is this kind of substantive engagement with the thing that effectively externalises the subjectivity.

Such engagement with the thing serves the will’s embodiment irrespective of how the relationship to the thing is established. That is, the engagement with the thing could be separated from how the subject establishes her relationship to the thing. Hegel concurs, at least implicitly, with this separation thesis in his elaboration of acquisition by forming. After my forming, the object gains ‘an independently existing externality and ceases to be restricted by my presence here

⁴⁰*Ibid.*, s 56 (emphasis added).

⁴¹Waldron (n 30) 364–5.

⁴²Hegel (n 13) ss 71, 71 A.

⁴³*Ibid.*

⁴⁴*Ibid.*, s 74.

⁴⁵*Ibid.*, s 198.

⁴⁶*Ibid.*, s 59.

⁴⁷See Waldron (n 30) 366.

⁴⁸Hegel (n 13) s 61.

⁴⁹Alexander (n 15) 64.

⁵⁰Hegel (n 13) ss 61, 62.

⁵¹*Ibid.*, s 63.

and now'.⁵² That is, once the thing is formed, its form is indeed only explicable by reference to the will of the former. However, since 'only in use' the object can 'fulfil[] its destiny' as a 'self-less' externality,⁵³ its eventual fulfilment is not necessarily the result of the former's will but of that of the user. In use, the thing is no longer an independent object; now it actualises as the satisfier of needs.⁵⁴ Accordingly, it is helpful to conceptually separate the relationship *to* the thing and the engagement *with* the thing and anchor the development of personality in the latter. In other words, no matter how I acquire the thing (either by forming or by contractual exchanges), as long as I use it in a substantive way to fulfil my needs, my individuality is externally realised through the thing.

Radin's personhood perspective further lends support to this rendition of Hegel. According to Radin, personal property that is closely connected with the development of personhood – and that the subject *attaches* to – warrants stronger legal protection.⁵⁵ She shares Hegel's view on the linkage between property and personality, but unlike Hegel's explicit reference to possession, use and alienation as ways of embodiment, she does not spell out how exactly the attachment comes about. Radin does specify, in fact, that the personhood theory concentrates on 'where a commodity ends up', not 'where and how it starts out', namely not 'the objective arrangements surrounding production of the thing'.⁵⁶ It can well be the case that the attachment derives from having physically worked on the thing and giving it a form, but that is not decisive. What matters is the 'subjective relationship between the holder and the thing'⁵⁷ – the producer is less important. This subjective attachment is similar to Hegel's use, for use is the 'realisation of my needs' and my needs, as 'the particularity of *one* will', are also highly subjective.⁵⁸ As such, we can see that Radin separates the relationship to the thing and the engagement with the thing as well and places little importance on the former in increasing the thing's level of 'personalness'.

Moreover, Radin also anchors the development of personhood in the engagement with the thing, more specifically, the *substantive* – as opposed to the *instrumental* – engagement with the thing. Along Radin's continuum of personal and fungible property, 'a thing indispensable to someone's being' is prototypical personal property while 'a thing wholly interchangeable with money' stands at the opposite end of the continuum.⁵⁹ In other words, if the thing is merely held for instrumental purposes like exchange or investment, it cannot be personal property.⁶⁰ To give an example. Say I made a chair out of a piece of wood myself. The fact that I formed the chair does not matter much to my personhood – if I held it only for exchange, it is nonetheless fungible to me; but if I held it for personal use and got attached to it over time, it becomes personal.⁶¹ With this, we can better understand that the Hegelian 'use' is the *substantive* engagement with the object – namely, enjoyment deriving from its intrinsic qualities and characteristics – as opposed to the *instrumental* engagement with the transactional or investment value of the thing.⁶²

To conclude, substantive engagement with the thing, usually through use, is the essential mechanism that embodies personality in the external world. It is thus no surprise that use is at the

⁵²*Ibid.*, s 56.

⁵³*Ibid.*, ss 59, 61.

⁵⁴Waldron (n 30) 365.

⁵⁵Radin, 'Property and Personhood' (n 31) 986.

⁵⁶*Ibid.*, at 987.

⁵⁷*Ibid.*

⁵⁸Hegel (n 13) ss 41, 59.

⁵⁹Radin, 'Property and Personhood' (n 31) 987.

⁶⁰*Ibid.*, at 982, 987–8.

⁶¹In her own example, Radin says that a wedding ring is 'fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan's own labor. Conversely, the same item can change from fungible to personal over time without changing hand.' See *Ibid.*, at 987–8.

⁶²This 'substantive/instrumental' dichotomy also finds resonance with Marx's typology of 'use value' and 'exchange value'.

centre of modern-day property institutions and even constitutional property.⁶³ ‘True wealth consists in the use of things, not their possession.’⁶⁴

Superseding subjectivity with stability

So far, we conclude that the will is embodied by substantively engaging with the thing. There is an important caveat, however. Hegel argues that the rationale of property ultimately lies in ‘the supersession of the pure subjectivity of personality’.⁶⁵ Indeed, even mental and cognitive activities such as recognising, explaining and remembering can be seen as appropriations of the external world by the will.⁶⁶ However, we are forgetful of our thoughts and fickle about our desires; the Idea is merely a state of fluidity and evanescence. Only by affirmative actions, such as labouring on the thing, can we experience a ‘mental discipline’ and transform ‘the fleetingness and whimsicality of pure thought’ into ‘the objectivity and durability of the concretely efficacious will’.⁶⁷ As such, the thing embodies the will ‘by registering the effects of willing at one point of time and forcing an individual’s willing to become consistent and stable over a period’.⁶⁸ Once the thing gains an ‘independently existing externality’ that ‘ceases to be restricted by my presence *here and now*’,⁶⁹ I am subsequently limited by that form *there and then*. In other words, we learn to act consistently around the things we own, and such consistency and continuity contribute to who we are as an individual. *Stability* is thus the qualitative delineator of the substantive engagement requirement for personality property.

Stable use is ‘the whole use or employment of the thing in its entirety’ that excludes ‘partial or temporary use’.⁷⁰ On the one hand, stable use is full (thus non-partial) use of the thing in an undisrupted and unfettered way. The idea of ownership without any element of use (*nudum dominium*) is denounced by Hegel as ‘an empty abstraction’.⁷¹ It should be noted, though, that Hegel stresses this nature mainly to negate the *dominium directum* of the lord and elevate the *dominium utile* of the tenant,⁷² which is bound to the antifederal context of his milieu and time.⁷³ On the other hand, stability also has a temporal dimension, which points to the permanent or long-term (thus non-temporary) use of the thing. Such temporal stability affirms my agency to engage in more complex projects by registering my otherwise capricious will in an enduring form. We can thus observe that embodiment is a two-way process: first, my will affects the thing; second, the thing, in its affected form, affects my willing.⁷⁴ It is only in the stable use of the thing can this embodiment process register the personality to supersede its pure subjectivity.

As for Radin, she describes how people get attached to things ‘over time’ and people and things are getting intertwined ‘gradually’.⁷⁵ The intuitive test of personal property’s irreplaceability also

⁶³Use is the key concept that brings forth the positive closed list of limited property rights (*iura in re aliena*) and that threads the civilian property law system, see B Nicholas, *An Introduction to Roman Law* (Oxford University Press 2008) 140 et seq. From a constitutional perspective, for example, the Inter-American Commission on Human Rights, in the case of *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. Comm’n H.R., Report No 40/04, has established that the ‘customary land use practices’ of the Maya people warrant them a communal property right to be recognised and protected by the state of Belize.

⁶⁴Aristoteles, *Aristotle: in 23 Volumes* (Harvard University Press 1933), Vol. 22.

⁶⁵Hegel (n 13) s 41A.

⁶⁶Hughes (n 25) 333.

⁶⁷Waldron (n 30) 371–2.

⁶⁸*Ibid.*, at 373.

⁶⁹Hegel (n 13) s 56 (emphasis added).

⁷⁰*Ibid.*, s 62.

⁷¹*Ibid.*, s 61A.

⁷²*Ibid.*, s 62.

⁷³See A Ryan, *Property and Political Theory* (Basil Blackwell 1986) 129.

⁷⁴Waldron (n 30) 369–70. Also, see *infra* n 102 et seq and the accompanying text for the example of homeownership.

⁷⁵Radin, ‘Property and Personhood’ (n 31) 987–8.

hints at a long-term and meaningful engagement.⁷⁶ Stability is thus very important for Radin as well. It creates a contextuality that is conducive and facilitative to well-developed personhood.⁷⁷ It should be noted, however, that Radin discusses stability against a dynamic dialectic of the paradoxical coexistence of stability and flexibility in self-constitution.⁷⁸ That is, to her, the flexibility of context, namely the ability 'to change oneself, to grow and to make choices that affect oneself', is equally important for the development of personhood as stability.⁷⁹ Such flexibility is located in free trade – the freedom of alienation through contract – and is thus inherent in property.⁸⁰ If we are able to reinvent ourselves, the stable engagement with the thing would be less likely to objectify and stifle our agency and subjecthood.

To conclude, personality is developed and externalised in the thing through the substantive engagement with the intrinsic qualities of the thing in a stable way. On the one hand, the subject *uses* the thing to satisfy her needs, and the thing finds its fulfilment in such satisfaction. On the other hand, as such satisfaction itself is only a 'state of evanescence', it is the combination of use and *stability* that justifies property as the device for self-realisation. This is in line with most positive systems of property institutions that condition property to be stable: while contract law abounds with default rules open to party autonomy, property law features a multitude of mandatory rules earmarked by individual property rights in the *numerus clausus*.

C. External perspective of intersubjectivity

Against the edifice of Hegel's *Philosophy of Right*, property is merely the first step for the person to transcend from an abstract entity to a concrete member of an ethical community. The imperative of Right is to 'be a person and respect others as persons'.⁸¹ By projecting will into nature and acquiring property, nature becomes a natural history of human beings, where the will is eventually fully realised in the ethically higher social contexts of family, civil society and state. The immediate following step of property is contract, the mediation that provisionally brings together my will and others' will in 'a common will'.⁸² As such, the Hegelian property is far from an end in itself; it is an interlocutor of intersubjective relations.⁸³ This intersubjectivity sharply distinguishes Hegel from liberal property theorists and liberal political philosophers at large, such as John Locke and Immanuel Kant. According to Hegel, their approach is far too abstract and strips individuals of the particular practices and relationships and of the particular social and political roles they play in the community they belong to.⁸⁴ It is thus crucial to contextualise the Hegelian personality and the Hegelian property with the historical and community embeddedness of freewill.⁸⁵

As mentioned, the rationale of property ultimately lies in the supersession of pure subjectivity. Besides stable engagement with the thing, such supersession can also be realised by understanding ourselves in relation to others.⁸⁶ The idea is that, once the abstract will is embodied in a concrete form, it becomes perceptible to others. That is, now that we are all anchored in the actual world through things exterior to our individuality, the self is able to relate to and socialise with the

⁷⁶*Ibid.*, at 959–61.

⁷⁷MJ Radin, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood Speech' 74 (1995) Oregon Law Review 423, 429–31.

⁷⁸*Ibid.*, at 432.

⁷⁹*Ibid.*, at 429.

⁸⁰*Ibid.*, at 432.

⁸¹Hegel (n 13) s 36.

⁸²*Ibid.*, ss 71 et seq.

⁸³Schroeder (n 25) 457–8.

⁸⁴W Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford University Press 2002) 209.

⁸⁵On the contextual reading of Hegel's property theory, see, for example, S Duncan, 'Hegel on Private Property: A Contextual Reading' 55 (2017) *The Southern Journal of Philosophy* 263.

⁸⁶D Knowles, 'Hegel on Property and Personality' 33 (1983) *The Philosophical Quarterly* 45, 56–7.

other – with the mediation of property.⁸⁷ The parties thus join together in a contract – the ‘common will’ – where they recognise and verify each other as an owner and as an end.⁸⁸ In this process, I learn to respect the other’s property as well as her individuality and vice versa. Property as a mediation thus allows for both self-expression and social intelligibility. This relational understanding of property relates back to Hegel’s conception of persons. Hegel initially assumes an abstract and generic person but later defines her particular personality in relational terms. That is, as the individual is embedded into social practices and social institutions in the contexts of family, civil society and state, her personality is constituted and fleshed out by the reciprocal rights and duties between herself and the others in those arrangements and relationships.⁸⁹ By occupying social positions and engaging in social interactions, she evolves beyond an abstract rights bearer with subjective freedom to a fully developed person with substantial freedom.⁹⁰ By contrast, Radin starts with a concrete conception of persons and is less concerned with relational development. The particular personhood is defined by the particular things one owns – the ‘holder could not be the particular person she is without [the thing]’.⁹¹ Even so, Radin still recognises that ‘physical and social contexts are integral to personal individuation’ and calls for ‘a positive commitment to act to create particular contexts’.⁹²

It is important to reconcile the freewill as ‘a unit of freedom aware of its sheer independence’⁹³ and the social and institutional embeddedness of personality development. On the one hand, to recognise each other as a person is to respect each other as independent owners of their things and create a sphere of personality development where they can use objects without the constant need to seek permission and authorisation.⁹⁴ Mutual recognition does not entail the merging of individual wills with their shaping community or their subjugation to the common will.⁹⁵ In fact, the need to ensure independent personality development lies at the heart of Hegel’s justification for *private* property. Since the will of a person is a ‘single will’, only private property – with its total obedience to that ‘single will’ – is rational.⁹⁶ ‘Having at least a minimal amount of private property is essential to the development and maintenance of capacities and self-understandings that make up free personality’.⁹⁷ On the other hand, our personality is significantly shaped by ‘dependence and reciprocity’ in higher ethical contexts.⁹⁸ In this regard, Hegel’s case for private property is not irrefutable. For example, without private ownership, it is perfectly feasible to devise a collective decision-making mechanism that assigns resources to individuals at a degree that is required to express their individuality.⁹⁹ More importantly, the role of property in Hegel’s larger system is not just to safeguard individual freedom but to guide people toward the more substantial ends in their ethical lives.¹⁰⁰ Therefore, independence is crucial in the sense that it frees us from arbitrary interference and coercive domination, but it should not be absolutely conceptualised and rigidly

⁸⁷P Stillman, ‘Property, Individuality, and Freedom in Hegel’s and Marx’s Political Thought’ 22 (1980) *Nomos* 130, 143.

⁸⁸Hegel (n 13) s 36; A Brudner, *The Unity of the Common Law* (Oxford University Press 2013) 143–5.

⁸⁹Alexander (n 15) 68.

⁹⁰Duncan (n 85) 276 et seq.

⁹¹Radin, ‘Property and Personhood’ (n 31) 971–2.

⁹²Radin, ‘Market-Inalienability’ (n 31) 1905–6.

⁹³Hegel (n 13) s 35A.

⁹⁴Waldron (n 30) 295.

⁹⁵R Jaeggi, *Alienation* (Columbia University Press 2014) 219.

⁹⁶Hegel (n 13) s 46.

⁹⁷A Patten, *Hegel’s Idea of Freedom* (Oxford University Press 1999) 140.

⁹⁸Hegel (n 13) s 198. From different disciplines and perspectives, see, for example, C Taylor, *Sources of the Self: the Making of the Modern Identity* (Harvard University Press 1989); N Rose, *Inventing Our Selves: Psychology, Power, and Personhood* (Cambridge University Press 1998); M Dani, ‘Assembling the Fractured European Consumer’ (2011) LEQS Paper No. 29/2011 LSE ‘Europe in Question’ Discussion Paper Series; Jaeggi (n 95).

⁹⁹Patten (n 97) 161–2.

¹⁰⁰Duncan (n 85).

defined in a way that re-abstracts our concretised personality from our social roles and social embeddedness.

To conclude, property helps supersede the pure subjectivity of individuals by enabling them to understand themselves in relation to others. It provides a venue for the self to be recognised by others, to relate to others and to engage in the higher ethical contexts of community life, where our personality is concretised and enriched through social interactions and relational networks.

D. Legal implications

Hegel's theory provides a personality justification of property and warrants legal protection of property on its contribution to embodying individuality. Law should thus protect the stable and undisturbed use of property to secure a safe space for personality development. Radin further identifies two specific categories of property and affords them different legal treatment. On the moral correlation between particular things and particular personhood, she argues that personal property (or property closer to the personal end in the continuum) deserves more stringent legal protection, while fungible property (especially purely fungible property) should not be afforded more protection than it rightly deserves.¹⁰¹ In other words, the strength of legal protection should correspond to the closeness of personality connection. The more substantially the property contributes to our identity, the higher the level of stability and exclusivity that the law should uphold. Though Hegel falls short of identifying any particular types of property rights, his contextual conception of property does necessitate differentiated legal solutions for varying relational contexts. Where specific categories of property enable the development of 'thicker' social relationships or create a higher degree of dependence among the parties, law should have a more proactive response to allow for socialisation on the one hand and ensure independence on the other.

The legal framework of homeownership – the paradigm case of personal property in Radin's lens¹⁰² – well illustrates the legal implications of the personality theory. Home is a shelter over our heads, a worldly place of escapism away from the public domain and a safe harbour from which we can engage with family, community and state.¹⁰³ It invests our life with stability: home provides a stable space to develop and express our identity, and such stability promotes the conditions we need for self-realisation.¹⁰⁴ The longer we live and the more we invest (both materially and emotionally) in a home, the more embedded we are in that space at that moment. Such intense interaction between homeownership and the owner's personality is the most important reason why Radin advocates, in the same vein as a great many scholars,¹⁰⁵ for the special legal protection of homeownership. Hegel would likely find agreement, considering the thick social relationships that home mediates. Such special protection is readily available in most national jurisdictions and even on the European level, such as in cases of mortgage enforcement.¹⁰⁶ Meanwhile, when the personal and social interaction is much less intense such as in the case of property acquired exclusively for investment purposes ('buy to let'), the owner- rightly- receives radically less favourable legal protection than normal homeownership.¹⁰⁷

¹⁰¹Radin, 'Property and Personhood' (n 31) 978–91.

¹⁰²Radin, *Reinterpreting Property* (n 31) 83.

¹⁰³See I Domurath and C Mak, 'Private Law and Housing Justice in Europe' 83 (2020) *Modern Law Review* 1188, 1190–1.

¹⁰⁴S Mallett, 'Understanding Home: A Critical Review of the Literature' 52 (2004) *The Sociological Review* 62, 82 et seq; L Fox, 'The Meaning of Home' 29 (2002) *Journal of Law and Society* 580, 599.

¹⁰⁵See, for example, Ballard (n 104); Fox (n 104); L Fox, 'Re-Possessing Home: A Re-Analysis of Gender Homeownership and Debtor Default' 14 (2007) *William & Mary Journal of Women and the Law* 423.

¹⁰⁶See Domurath and Mak (n 103); I Visser et al, 'Different Models of Forbearance and Mortgage Enforcement Proceedings: Comparing Default Resolution Approaches in Europe' 9 (2022) *European Journal of Comparative Law and Governance* 152.

¹⁰⁷'Amsterdam's Partial Ban on Buy-to-Let Taking Effect on 1 April' (*NL Times*, 3 February 2022).

In sum, law should protect property – especially the stable use thereof – that contributes to personal and relational development, and the degree of protection should correspond to the intensity of such contribution. Before moving on, a few words on the normative implication of the personality theory are in order. Take Radin. Though she initially defines personal property in a rather subjective sense, to distinguish ‘good’ object-relations from ‘bad’ ones (fetishism), Radin limits this subjective test with ‘an objective moral consensus’ that promotes ‘healthy self-constitution’, which she later refers as ‘human flourishing’.¹⁰⁸ The inherent ambiguity of benchmarks like this leaves great room for manoeuvre for theorists and policymakers to work around or even manipulate the normativity behind positive property institutions. This ‘manipulation’ can effectively dictate individuals to pursue a certain perceived ‘good’ life or suppress their individuality in favour of a particular notion of ‘common good’. For example, the aforementioned legal restriction on ‘buy to let’ discourages some people from speculative investment in the real estate market but may stabilise the cost of housing for the overall society. The legal delineation of what kind of property is worth protection can thus amount to a normative prescription of what central script is to be followed and what worthy life is to be pursued. However, this paternalistic and somewhat perfectionist reading of property should not be objectionable as such due to its potential to interfere with individual choices.¹⁰⁹ This is because Hegel does not know abstract individuality but acknowledges that personality is profoundly shaped by historical, communal and ethical contexts. These contexts, in a way, always ‘interfere’ with the abstractly free and autonomous development of individuality. Steering some property relations and institutions to a vision of the ‘good’ life or the ‘common good’ within a particular social and political context in itself does not contradict Hegel’s conception of property and represents a more realistic view of self-formation and individual decision-making.¹¹⁰ What can be problematic, in my view, is the absence of pluralistic representation, procedural transparency as well as democratic debate in defining what qualifies as ‘good’ and what constitutes justifiable interference – whether from the collective community or the state – to attain this ‘good’, which I will not explore in depth in this Article.

3. In context: servitisation, property and personality

A. Introduction

Besides property theorists, psychologists, archaeologists and cultural and behavioural scientists have also been directly engaged with the connection between property and the self.¹¹¹ Looking back, things were historically viewed as external, to be distanced from our pure mind and soul, but this perception gradually shifted as things evolved to become integral to our identity, offering a social grammar that connects strangers and cultivating a consumer culture in modern society.¹¹² Some cultural studies, for example, have zoomed in on how fashion and clothing contribute to the constitution of identity.¹¹³ Psychologists have also pointed out how our possessions help us

¹⁰⁸See Radin, ‘Property and Personhood’ (n 31) 968–70; Radin, ‘Market-Inalienability’ (n 31). Her self-critique in this regard, see Radin, ‘Lacking a Transformative Social Theory’ (n 31) 422 (n 42, 43).

¹⁰⁹For an overview of the wrongness of paternalism, see N Cornell, ‘A Third Theory of Paternalism’ 113 (2015) Michigan Law Review 1295, 1295–336.

¹¹⁰See supra n 98 and accompanying text.

¹¹¹See, for example, Csikszentmihalyi (n 1); H Dittmar, *The Social Psychology of Material Possessions: To Have Is to Be* (Harvester Wheatsheaf 1992); JA Blumenthal, ‘“To Be Human”: A Psychological Perspective on Property Law’ 83 (2009) Tulane Law Review 609. However, we should bear in mind that Hegel’s *a priori* philosophical claims about personality development is not a conclusive empirical investigation. As such, it might well be the case that there are numerous other ways in which people actually develop their selves, which I cannot all address within the scope of this Article.

¹¹²See Trentmann (n 1).

¹¹³See F Davis, *Fashion, Culture, and Identity* (University of Chicago Press 1994); J Craik, *The Face of Fashion: Cultural Studies in Fashion* (Routledge 1994).

reinforce memories or bring back recollections, embody our ideals and shape our material self.¹¹⁴ ‘Our fragile sense of self needs support, and this we get by having and possessing things because, to a large degree, we are what we have and possess.’¹¹⁵ In this light, one might wonder whether such attachment can also be developed with ‘servitised property’ – if I rent a piece of clothing, does it shape my identity just as if I own it?

As delimited earlier, this Article will mainly deal with the replacement model, primarily in the context of the consumer market. In this model, instead of buying goods from the sellers, consumers get contractual access to the products. Intuitively, servitisation as an alternative to ownership allows for flexibility and breeds detachment as one is not bound by stable property but gets connected through elastic access.¹¹⁶ This is the case for short-term hire that operates on an as-needed basis, such as car-sharing services by Flinkster or Greenwheels. It is also to an extent true for longer-term leasing that grants a period of more exclusive use, such as bike rental with Swapfiets, as we are in a more flexible position to request and terminate access. One might think, if we focus on functionality instead of the things that provide the functionality, once the problem is solved or the need is fulfilled, we have no incentives to cling to those things for their mere instrumentality. However, human beings are creatures of habit, so as long as we are exposed to the servitised property a few times, we get accustomed to this new form of use and start to automatically repeat our new behavioural patterns and build ongoing attachments.¹¹⁷ If this is the case, it might be problematic because the consumers engaging in servitisation are not covered by the more protective property rules. With this in mind, we now move on to apply the principles from the personality theory to servitisation.

B. Personality theory and servitisation: the internal perspective

Long-term servitisation as property

In the replacement model, the providers retain the ownership of the object, but their rights and powers as an owner are significantly restricted contractually. The customers, despite not being the title holders of the object, have extensive – sometimes exclusive – contractual rights to use the object and enjoy other related services. The right of ownership and the right to use are disconnected. On the one hand, the providers merely hold the products for the instrumental purpose of renting them out to someone else who needs them. This is similar to alienation in the sense that such deployment of the thing is not related to its inherent quality but its value, but it is dissimilar as the thing here is never fully exchanged and the provider’s will is never fully withdrawn. On the other hand, it is the customer, not the owner, who enjoys the usefulness of the thing and has her needs fulfilled and identity developed with its physical characteristics. In other words, the thing involved in servitisation is subject to the customer’s will and realises its destiny in the customer’s use. As such, though the user establishes her relation *to* the property through contractual access, it is nonetheless this user, instead of the formal owner who holds the legal title, that engages substantively *with* the thing, putting her in a better moral position to be the philosophical ‘owner’ who deserves the proprietary entitlement.

However, use in itself is insufficient to justify property; it is full, long-term and thus stable use that is theoretically salient in facilitating the development of personality. In essence, servitisation has to carry the same moral weight as classic ownership in order for it to be elevated to real personality property. This means that the statutory or contractual assurance for this type of

¹¹⁴Csikszentmihalyi (n 1) 270–5.

¹¹⁵YF Tuan, ‘The Significance of the Artifact’ 70 (1980) *Geographical Review* 462, 472.

¹¹⁶S Kreiczer-Levy, ‘Property without Personhood’ 47 (2017) *Seton Hall Law Review* 771; S Kreiczer-Levy, ‘Share, Own, Access’ 36 (2017) *Yale Law & Policy Review* 155.

¹¹⁷WA Woods, ‘Psychological Dimensions of Consumer Behavior’ 24 (1960) *Journal of Marketing* 1; CM Barbu et al, ‘From Ownership to Access: How the Sharing Economy is Changing the Consumer Behavior’ 20 (48) (2018) *Amfiteatru Economic* 373.

servitisation must ensure a high degree of uninterrupted, even exclusive access, extending for a meaningfully long period of time. Uninterrupted access ensures that the object is readily available to the user as her needs-satisfier, while precluding arbitrary projections of others' will onto the object. The long-term nature implies that the subject can steadily rely on the object to achieve her life plans, meanwhile necessitating a level of consistency in her interactions with the servitised product to transcend her pure subjectivity. Tenancy is a perfect example. At its core, a lease is 'a transfer of the right to control the use and enjoyment of the premises' from the landlord to the tenant,¹¹⁸ be such a right of contractual or proprietary nature. Just as homeownership provides the material and emotional shelter for the development of personality, insofar as it is the tenant's 'home' in the same vein, a residential tenancy carries similar moral significance as homeownership and deserves similar legal security.¹¹⁹

Of course, uninterrupted and long-term control is not always necessary should the same moral significance of stability or 'mental discipline' be realised in other arrangements.¹²⁰ For example, in the Swiss 'More than Housing' initiative, in order to promote low-carbon living, by design, there are only shared launderettes and centrally located freezer lockers for rent – no private washing machines and freezers are made available.¹²¹ Here, uninterrupted and long-term use is replaced by a collective design that ensures ready availability and continuing offering at a community level. Stability still plays a role, but in a much less rigid sense: compared with ownership or the classic long-term servitisation model, owner exclusivity takes a back seat to community inclusivity while long-term engagement is secured by joining a chain of intermittent yet consistent short-term uses. The thing yields to its functionality or usefulness, so needs-satisfaction is not dependent on one specific object but on communally enabled access. More importantly, such an arrangement represents an informed choice made by each well-disciplined individual freewill who then joins together in a community through the 'unstably stable' objects. In other words, they choose *not to own*.¹²² According to Hegel, property is there to enable connection and socialisation, so if the individuals in this model find self-expression and social intelligibility in their common commitment to greener pastures in their community, their lack of internal ties to property should be made up for by their external connection with each other. The freewill's active and reasoned choice of servitisation as a way of communal material consumption as such could well be conducive to their development of personality.

Short-term servitisation as alternative

Servitisation can indeed accommodate equivalent long-term engagement as formal property does, but it can also open the gate to more casual and detached interactions with things. Actually, this latter version of short-term servitisation might be more attractive and prevalent among consumers. Property comes with stability, but this very stability might also be perceived by consumers as the 'burdens of ownership', because with each purchase decision, the risk of failing expectations lurks and financial loss and even negative social evaluation might ensue.¹²³ Consumers value access-based consumption for the very reason that it allows for flexibility

¹¹⁸TW Merrill and HE Smith, 'The Property/Contract Interface' 101 (2001) Columbia Law Review 773, 822.

¹¹⁹Radin, *Reinterpreting Property* (n 31) 83.

¹²⁰Actually, in Hegel's conception, the mere process of labour could already impose a sort of discipline, see Hegel (n 13) s 197.

¹²¹'More than Housing' (*World Habitat*) <<https://world-habitat.org/world-habitat-awards/winners-and-finalists/more-than-housing/>> accessed 8 December 2023.

¹²²Kreiczer-Levy, 'Share, Own, Access' (n 116) 182 et seq; J Hamari et al, 'The Sharing Economy: Why People Participate in Collaborative Consumption' 67 (2016) Journal of the Association for Information Science and Technology 2047.

¹²³T Schaefer et al, 'How the Burdens of Ownership Promote Consumer Usage of Access-Based Services' 27 (2016) Marketing Letters 569, 571–2.

and fluidity.¹²⁴ With accessible entry, low upfront investment and less stringent legal obligations, consumers get to benefit from the product's functionality without necessarily having to consign themselves to the ensuing risks and responsibilities of ownership.

Broader contexts spawn access as a form of casual and liquid use.¹²⁵ First, modern technology makes it much easier for owners to connect with users and pool users' needs, enabling more efficient use of (under-utilised) resources.¹²⁶ Notably, the rise of platforms and platform-driven servitisation, especially the sharing economy, significantly lowers the threshold for consumers to opt for access-based use.¹²⁷ Second, stability not only connotes temporal continuity but also territorial localism. However, globalisation entails deterritorialisation and popularises global mobility, which by definition compromises stability.¹²⁸ Third, there is also a remarkable demographic transformation. It is pointed out that the Y-generation, or millennials, has developed a generational preference for flexibility, which means they are less willing to prioritise traditional financial milestones like buying a car or a house.¹²⁹ Meanwhile, the lack of such investments and reduced wealth also backfire to make them less capable of acquiring new ownership.¹³⁰ *A priori* or *a posteriori*, the younger generation becomes enthusiastic participants in the access economy. In sum, as our possessions 'dematerialise' into intangible access, the notion of ownership itself seems to be phased out, which is discussed by some as the 'end of ownership'¹³¹ and the beginning of a 'post-ownership economy'.¹³²

Therefore, if short-term, flexible servitisation is equally, if not more, significant than its long-term, stable counterpart, does this mean that the personality theory only applies to the long-term version? I argue this is not necessarily the case if we take a more dynamic conception of personality.¹³³ The development of personality is a gradual and iterative process, which involves trial and error and back and forth. Property as the embodiment of personality leaves us the impression that the actualisation of personality is a once-and-for-all and conclusive exercise, and the stability of ownership erects major barriers to change and thus limits the uncovering of one's full spectrum of possibilities. The stable embodiment makes moral sense only if we have been given ample opportunities to experiment with who we are and learn about what we want. It is equally important that we are not deprived of 'the ability to change [ourselves], to grow'¹³⁴ and 'to exit, withdraw, refuse further engagement, dissociate, and cut off relationships'.¹³⁵ Access, in this regard, allows accessible experimentation with personality and testing of one's lifestyle.¹³⁶ It encourages the dynamic process of discovering one's personhood as life unfolds and pushes the boundary of one's identity as new options open up. To recognise such a dynamic mechanism is

¹²⁴According to a survey done in 2016, 'flexibility', 'temporary nature of use' and 'opportunity to test' together account for more than half of the key motivations behind access-based consumption, see EG Edbring et al, 'Exploring Consumer Attitudes to Alternative Models of Consumption: Motivations and Barriers' 123 (2016) *Journal of Cleaner Production* 5, 10.

¹²⁵Generally, see, Kreiczer-Levy, 'Property without Personhood' (n 116) 782 et seq; Kreiczer-Levy, 'Share, Own, Access' (n 116) 173 et seq.

¹²⁶A Perzanowski, *The End of Ownership: Personal Property in the Digital Economy* (The MIT Press 2016) 170.

¹²⁷Hojnik (n 9) 7 et seq.

¹²⁸F Bardhi et al, 'Liquid Relationship to Possessions' 39 (2012) *Journal of Consumer Research* 510.

¹²⁹Kreiczer-Levy, 'Property without Personhood' (n 116) 791–3.

¹³⁰Perzanowski (n 126) 170.

¹³¹*Ibid.*

¹³²R Belk, 'You Are What You Can Access: Sharing and Collaborative Consumption Online' 67 (2014) *Journal of Business Research* 1595, 1599.

¹³³Contemporary psychology recognises that personality is in the dynamic process of constant change, across time and space, see, for example, N Beckmann and RE Wood, 'Dynamic Personality Science. Integrating between-Person Stability and within-Person Change' 8 (2017) *Frontiers in Psychology* 1.

¹³⁴Radin, 'The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood Speech' (n 77) 429.

¹³⁵H Dagan, *A Liberal Theory of Property* (Cambridge University Press 2021) 43.

¹³⁶Kreiczer-Levy, 'Property without Personhood' (n 116).

to acknowledge the ongoing demographic transformation and the diversity of human lives and experiences.

There is an important caveat, however. Ownership comes with responsibility. As such, if we have to go through all the extra hassle to acquire and maintain property, we would probably have second thoughts and factor the ‘burdens of ownership’ into our risk calculation before acquiring ownership. This ‘filter’, despite being inflexible and restrictive, does lower the risk of objectification by providing a mechanism to ensure that the identity we choose to embody is fairly important to who we are and sufficiently close to our true selves. Our capacity to deal with the ‘burdens’ of stability also reaffirms our moral agency to engage in complex projects. In this sense, the boundary between long-term and short-term servitisation is not only empirical but also moral – the greater the depth of engagement with a servitised product and, consequently, the more moral significance it carries, the more stability and corresponding responsibilities should follow. However, as discussed, servitisation is attractive precisely because users can avoid the risks and responsibilities of ownership. The subject might thus identify with external things prematurely due to their easy accessibility or behave immoderately due to the lack of accountability. Recall that property is justified by transcending pure subjectivity. To mitigate the heteronomous risk of short-term servitisation, there needs to be a balance between promoting flexibility and adaptability and ensuring stability and responsibility.

C. Personality theory and servitisation: the external perspective

Now we will move on to the external aspect, namely how servitisation could embed the actors into social relationships. It is fair to say that servitisation is by nature relational. Rather than engaging with each other in a one-off transaction of selling and buying, the parties are bound by an ongoing contractual relationship with evolving rights and obligations. This relational nature is even more pronounced when the service provider undertakes to ensure the usability of the product throughout the contract duration or when the service is tailor-made to fulfil the user’s specific requirements. The parties are tied to each other by these relational links, and the more closely tied they are, the more the user relies on the provider to deliver its promises and realise the thing’s functionality.

It is helpful to pit the relational nature of servitisation against Hegel’s theoretical lens. The relationality of Hegelian property is mostly manifested in the process of contractual alienation, and it is through the eyes of the user – the beneficiary of the substantive utility of the thing – that we observe the relational dynamics. From the user’s eyes, alienation actually develops in two angles, namely alienation from others and alienation to others. In servitisation, the former angle is reinforced relationally for the user while the latter runs in a completely opposite direction. To elaborate, since providers never fully alienate the thing but merely servitise it contractually, users are intensely bound to the providers due to privity. At the same time, users find themselves effectively disconnected from further networks they would otherwise be able to connect with had they owned the assets. For example, the General Terms and Conditions of Swapfiets disallow its users to engage with third parties by ways of subletting or creating security interests.¹³⁷ As such, property plays a drastically different role in the transactions of servitisation. As Rifkin points out, it is not that property disappears in the ‘age of access’; property continues to exist but is far less likely to be (fully) exchanged in the marketplace.¹³⁸

As such, relationality takes a different form in servitisation than Hegel’s one-off style of relationship building. The Hegelian way allows the owner to connect with others so that the object

¹³⁷See Art 6.5 of the General Terms and Conditions of Swapfiets (‘The Micro-Mobility Product is intended exclusively for personal use by the Renter. The Renter shall not allow third parties to use the Micro-Mobility Product. The Renter shall not sell, hire, sub-let, create or grant any security interest or other right in respect of the Micro-Mobility Product to a third party.’).

¹³⁸Rifkin (n 10) 4.

is more than a secluded chateau of her own, while it also ensures her independence in the full control of her property so that she is free to design her chateau however she pleases. In other words, such a conceptual design balances Hegel's conception of *private* property and the imperative of relationality, allowing the 'common will' to facilitate connection without assimilating the 'single will' into a singular, common will. Servitisation, however, seems to be fraught with dependence. As ownership remains with the providers, users cannot have the full prerogative to control the thing. Though users could still undertake their social roles by having access to the thing's functionality and thus partake in their ethical life, there remains a level of dependence as to how they can effectively carry out their roles. In short-term servitisation, it means that they need to constantly ask for the owner's 'permission' to grant access (eg by clicking the request button). In long-term scenarios, though users' right to use and their independence are better secured contractually, the very existence of a continuing contractual tie itself indicates that the individual's 'single will' is relentlessly subordinated to the 'common will', further exacerbated by unilateral terms and conditions dictatorially imposed by the providers. The inability to pursue one's goal independently and the peril of constantly living under someone else's prescription explain consumers' reluctance to embrace servitisation into a broader realm of their lives.¹³⁹ Should this type of engagement become mainstream, the unchallenged doctrine of free alienation of property might be estranged.¹⁴⁰

Once again, in Hegel's philosophical world, dependence per se is not problematic; it is the degree and the context that matter. The personality theory in Hegel's mind prioritises the product's substantive usefulness – hence the user is the moral owner – while servitisation as a business model operates on the products' instrumental value as the products are rented out in exchange for money. In this very *modus operandi* of commercial servitisation lurks the risk of *commodifying* dependence.¹⁴¹ In a market society where companies are no longer satisfied with selling products one at a time to as many customers as possible, they start to cultivate a long-term relationship with each individual customer – customers themselves become the market.¹⁴² In other words, firms shift from facilitating exchanges to building ostensibly 'thicker' relational ties, mostly defined by their terms and conditions, in order to 'lock consumers in'.¹⁴³ The more advanced the service packages are – with functionality and solutions fully or partially designed by the providers – the more tightly the providers get hold of the users and the more dependent the users are on the providers. This is beyond the mere design and production of the products; it is about whether we can use the products to satisfy our own needs in our own idiosyncratic ways and to what extent we are enabled to mobilise the objects to come up with creative solutions to our own distinctive problems. Moreover, servitisation, especially in its long-term iteration, as an intrinsic financing device¹⁴⁴ also furthers the financialisation of social interactions.¹⁴⁵ Meanwhile,

¹³⁹B Keirsbilck and E Terryn (eds), *Consumer Protection in a Circular Economy* (Intersentia 2019) 116–7.

¹⁴⁰Here, the point is that dependence could denaturalise the natural principle of freedom of property – whether this is normatively desirable is a separate issue. Of course, freedom in (private) property is at the core of individual liberty and crucial for personality development. However, if conceptualised boundlessly and absolutely, this freedom could induce exclusionary and extractive effects. To this extent, the limitation on the free alienation of property is not necessarily a bad thing – what makes it problematic, as will soon be discussed, is that commercial actors create and capitalise on over-dependence.

¹⁴¹This is especially true if one takes a Marxist understanding of commodification or the theory of commodification developed by Hermann, see C Hermann, 'A Theory of Commodification' in C Hermann (ed), *The Critique of Commodification: Contours of a Post-Capitalist Society* (Oxford University Press 2021) 20–39.

¹⁴²Rifkin (n 10) 98.

¹⁴³S Becher and S Dadush, 'Relationship as Product: Transacting in the Age of Loneliness' (5) (2021) University of Illinois Law Review 1555 et al. This is also captured by the idea of 'relationship marketing', see SD Hunt et al, 'The Explanatory Foundations of Relationship Marketing Theory' 21 (2006) *Journal of Business & Industrial Marketing* 72.

¹⁴⁴TW Merrill, 'The Economics of Leasing' 12 (2020) *Journal of Legal Analysis* 221, 232 et al; J de Vogel, 'Private Lease: Consumer Credit in Disguise?' 9 (2020) *Journal of European Consumer and Market Law* 51.

¹⁴⁵On financialisation, see, for example, G Comparato, *The Financialisation of the Citizen: Social and Financial Inclusion through European Private Law* (Hart Publishing 2018).

servitisation could lead to the concentration of ownership – and thus the accumulation of wealth – in the hands of (a few) big companies.¹⁴⁶ Ultimately, with more and more to-go service solutions available in the market, everything becomes a paid-for experience and our life itself is subject to manipulation, expropriation and commodification by the market.

D. Personality theory and property in a modern context

Following the preceding arguments, one might have already noticed that I take a (much) less rigid reading of Hegel's personality theory of property but try to adapt it to a modern context. Here I mainly draw on the context of the replacement model of servitisation, but the insights produced in this Article could easily be extended to other contexts such as the sharing economy in peer-to-peer relationships and more broadly, the digital transformation of tangible property. Simply put, I propose an updated understanding of both 'personality' and 'property'. To begin with, I have been exploring a dynamic and whole-process understanding of personality. It mandates personality property to safeguard not only the embodiment process, as stressed by Hegel, but also the preparatory phase involving trial and experimentation with one's personality, as well as the subsequent developmental steps of change and self-reinvention. This dynamism further invites us to bring to the fore the dialectical unity and struggle of the opposites of stability and flexibility. Stability elevates individuals beyond their pure subjectivity, but it should not stand in the way of flexible and continuous development of personality. Flexibility allows trial and error and self-recreation, but it should not encourage premature decision-making and immoderate behaviours. Only in unity can stability and flexibility best shape the full development of one's personality.

Moreover, the diversity of personalities calls for a pluralistic conception of property. As already presented, owning, leasing, hiring and even sharing can all embody the subject's will in one way or another. They merely represent different arrangements of access and strategies of 'governance' in relation to the thing. In essence, it is the consistent engagement with the intrinsicality of the thing, rather than any particular class of formal property rights, that brings about the moral significance of personality actualisation. And it should be up to the subject to choose in which specific way(s) she would like to engage with the thing. This idea is echoed in Dagan's 'structural pluralism', where he argues that in order to facilitate self-determination, property law should offer people a 'rich repertoire' of different legal arrangements that function as 'partial functional substitutes' so that people can make meaningful choices to advance their own life plans.¹⁴⁷ Accordingly, property rights and institutions should be more contextual to the specific access arrangement and governance strategy chosen.¹⁴⁸ In line with this view, it is also helpful to conceptualise contracts as the device that underwrites the various access models and that sets out corresponding governance frameworks.¹⁴⁹ Servitisation contracts can thus be mobilised as a property governance tool to determine how the parties make decisions over what to do with the things and how they organise the use and management of the things.¹⁵⁰

There is also an institutional aspect to the governance view of property (through contracts). With the possibilities of contractual governance of product relationships, the relationality of property is much reinforced in a servitised economy. As discussed, such reinforced relationality

¹⁴⁶See F Pasimeni, 'The Origin of the Sharing Economy Meets the Legacy of Fractional Ownership' 319 (2021) *Journal of Cleaner Production* 128614.

¹⁴⁷Dagan (n 135) 6–7; J Penner, 'Property and Self-Determination' 35 (2022) *Canadian Journal of Law & Jurisprudence* 537, 537–40.

¹⁴⁸Similarly, see S van Erp, 'Fluidity of Ownership and the Tragedy of Hierarchy' 4 (2015) *European Property Law Journal* 56.

¹⁴⁹Similarly, on how contracts could be conceptualised as a useful tool to govern the set-up and operation of commons, see A Nervi, 'Common Goods and the Role of the Contract' 2 (2013) *European Property Law Journal* 342. As will soon be discussed, some types of servitisation actually have the reminiscence of commons.

¹⁵⁰Penner (n 147) 539.

could be very problematic in commodifying our property relations and ultimately our life experiences themselves. However, if we think of other institutional settings for servitisation, the reinforced relationality of servitisation might be less problematic but even promising. First, servitisation could be provided on a peer-to-peer basis as in the sharing economy, which provides for flexibility with low risks of being manipulated by the counterparty. Second, servitisation could also be made available by local or broader communities, such as the aforementioned ‘More than Housing’ initiative. Third, servitisation could even be offered by states, such as in the case of public transport systems and public libraries, though some may consider the dependence on the state undesirable.¹⁵¹ Under these alternative institutional settings, the reinforced relationality in servitisation could be geared to promote neighbourly sharing and communal ties, as opposed to commodifying dependency. These ways of structuring servitisation could create new forms of commons¹⁵² that hopefully provide a better decision-making mechanism for more effective distribution of scarce resources and cultivate a new culture of sharing, cooperation and solidarity.¹⁵³ They could also balance the over-exclusive and thus extractive and coercive nature of private property¹⁵⁴ that engenders, *inter alia*, material over-consumption and commodifying servitisation. As discussed earlier, Hegel’s defence for private property is not uncontested, especially within the context of his larger philosophical system. Whether personality-servitisation opens new possibilities to reimagine commons as a form of property governance is beyond the scope of this Article.

4. Legal implications of servitised property

A. Functional approach to servitised property

As to long-term servitisation where stable use of the servitised goods carries sufficient moral weight to foster personality development, the overarching implication is that the legal protection of these goods should be elevated to a comparable level as that given to classic property. Methodologically, this would be more compatible with a functional approach to proprietary entitlement as opposed to the formalistic and unitary conception of ownership¹⁵⁵ – (un)coincidentally, servitisation is sometimes discussed as the ‘functional’¹⁵⁶ economy. The implication is twofold. On the one hand, it means ensuring equal protection of proprietary functions even when they take varying forms.¹⁵⁷ The starting point of the traditional doctrinal

¹⁵¹CA Reich, ‘The New Property’ 73 (1964) *The Yale Law Journal* 733.

¹⁵²See, for example, K Bradley and D Pargman, ‘The Sharing Economy as the Commons of the 21st Century’ 10 (2017) *Cambridge Journal of Regions, Economy and Society* 231.

¹⁵³Some even view sharing as embodying a ‘postcapitalist ethic’: ‘the resources in question are produced for use, rather than for exchange value, are produced by peers, rather than in hierarchical command structures, and are based on an ethic of sharing and common ownership, rather than competition and private property’, see *Ibid.*, at 243–4.

¹⁵⁴See RL Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ 38 (1923) *Political Science Quarterly* 470.

¹⁵⁵Here, the functional approach is mainly drawn from two strings of scholarship, namely the US functional approach to security interests (as opposed to the formalistic approach) and the Scandinavian functional approach to ownership (as opposed to the unitary conception of ownership).

¹⁵⁶See, for example, J van Niel, ‘L’économie de fonctionnalité : principes, éléments de terminologie et proposition de typologie’ 5 (2014) *Développement durable et territoires*. Économie, géographie, politique, droit, sociologie; B Keirsbilck and S Rousseau, ‘The Marketing Stage: Fostering Sustainable Consumption Choices in a “Circular” and “Functional” Economy’ in Keirsbilck and Terryn (n 139), 93.

¹⁵⁷Functionalism in this sense is well illustrated by the development of functional laws on secured credit spearheaded by Art 9 of the Uniform Commercial Code (UCC). According to §9-109(a) UCC, Art 9 applies to ‘a transaction, *regardless of its form*, that creates a security interest in personal property’ [emphasis added]. It is later followed by other harmonisation instruments such as the UNIDROIT Convention on International Interests in Mobile Equipment (2001), the EBRD Model Law on Secured Transactions (2004), Book IX of the Draft Common Frame of Reference (2009) and the UNCITRAL Model Law on Secured Transactions (2016). Also, see I Davies, ‘The Reform of English Personal Property Security Law: Functionalism and Art 9 of the Uniform Commercial Code’ 24 (2004) *Legal Studies* 295.

exercise is to qualify the factual relations into legal categories, and corresponding rules then follow. Functionalism, on the contrary, pierces the veil of dogmatic qualification to enquire about the underlying purpose which certain arrangements substantially seek to serve and applies essentially the same legal rules to address those similar legal devices with varying forms but the same function. On the other hand, such a functional lens further calls for a relational and contextual approach to address proprietary disputes.¹⁵⁸ While most European jurisdictions group various incidents of proprietary interests – eg right to use, right to fruit, right to disposal – into one all-encompassing, unitary concept of ‘ownership’, the functional approach disassembles the unity of ownership into a bunch of powers vested in different layers of right holders, which could be transferred separately at different times.¹⁵⁹ One object can thus host more than one (formal and informal) proprietary interest at the same time, and protection against different competing claims based on ‘the same ownership’ can arise at varying points in time.¹⁶⁰ In such a case, it is of little avail to talk about the abstract concept of ‘ownership’ without referring to the contested incidents or the disputed interests and resolving these disputes in a more contextually specific and relationally balanced manner.¹⁶¹

Thus, where law protects property for its constitutive function to personality, similar legal rules should also be put in place to secure all other functionally equivalent forms of arrangements and institutions – including servitisation – that contribute to personality in comparable manners. In this way, the subject can safely choose any forms that best suit her needs to engage with the thing, without the unease of a less favourable legal position merely for the lack of certain legal formality. Both the formal owner and the contractual user can be viewed as proprietary right-holders (or at least interest-holders) with competing interests awaiting to be balanced in a relational context. The calibre is that the emotional attachment of the user is safeguarded as personal property and the predominantly financial interests of the provider/owner are protected as fungibles.¹⁶² Accordingly, when it comes to servitised life essentials – such as cars or solar panels – that carry sufficient moral weight, the user could have a directly enforceable right against third parties such as reclaiming these essentials from the estate of an insolvent third party or seek exemption in an enforcement or bankruptcy proceeding to ensure necessary life stability for at least a reasonable period of time.

Besides the moral imperative of equal protection, the enquiry of ‘substance over form’ under the functional and relational approach also brings more consistency into the legal system. We can thus protect personality property systematically without the need for ever more special legislation, piecemeal exceptions or exceptions to exceptions, in order to effectively protect the holders of ‘informal’ entitlements of a personal nature. By doing so, we can also prevent tactical circumvention, particularly by business actors who operate on the goods’ instrumental value but still claim protection for personal property. Moreover, from a technical point, the said approach focuses on the ‘end’ of protective effects but stays flexible about the ‘means’ of doctrinal gateways. For example, in the context of tenancy, substantively prioritising adequate legal protection for tenants – against unreasonable rent increases or unwarranted evictions, for example – is more crucial than formally classifying them strictly as contractual creditors or property owners. It strategically eschews the tricky question of legal qualification – that is deeply rooted in varying national traditions – and thus eases the political tension of harmonisation projects (for example,

¹⁵⁸See C Martinson, ‘The Scandinavian Approach to Property Law, Described through Six Common Legal Concepts’ 22 (2014) *Juridica International* 16.

¹⁵⁹KR Haug, ‘The Historical Development of the Scandinavian Functional Approach to Transfer of Ownership: A Tale of Change and Continuity’ 6 (2017) *European Property Law Journal* 236.

¹⁶⁰*Ibid.*

¹⁶¹KR Haug, ‘Transfer of Movables: A Comparison of the Unitary Approach and the Scandinavian Functional Approach’ (PhD Thesis, University of Amsterdam 2021) 124 et seq.

¹⁶²Radin, ‘Property and Personhood’ (n 31) 992 et seq.

for the European Union to introduce tenancy rules).¹⁶³ In essence, national legal systems need not formally adopt a ‘functional’ approach or any other specific approach but should strive to translate the protective effects into their own framework.

Let us take a closer look at tenancy as the servitised alternative to homeownership. It has been argued that national policy and regulation should not treat tenancy less favourably than homeownership.¹⁶⁴ From the personality perspective, we could easily map out the general directions for tenancy law reform.¹⁶⁵ To ensure use, it is presupposed that the thing is ‘usable’, which derives the requirement of habitability of the rental property. With a usable place, use should be secured both in a positive sense, such as allowing the tenants to decorate the home as their self-expression, and in a negative sense, such as granting tenants directly enforceable rights to exclude third parties from interference. To ensure stability, law should secure the duration and (automatic) renewal of the lease, protect tenants’ rights in case of transfer (*emptio non tollit locatum*) and impose eviction restrictions. To ensure relationality, unreasonable prohibitions of subletting should be prohibited, and to avoid over-dependence, termination of long-term tenancy should be allowed with reasonable notice. Again, it does not really matter whether these goals are positively achieved by property or contract law, as long as the tenants are effectively treated like the homeowner. Moreover, the functional approach further allows the interests of the landlord – the legal owner of the residence but as fungible property – to be factored into the dispute resolution process to reach a more balanced decision.

B. Contracts as governance tools for servitised property

Servitisation runs on contracts, and contract terms mark the boundary of servitised ‘property’ – just like how statutory rules mark the boundary of ownership. Thus, contract terms are also central to anchoring the legal regulation of servitisation. In this sense, the regulation on how contracts may stipulate for the use of goods could be seen as a sort of light-touched version of *numerus clausus*. Law could of course introduce mandatory rules for critical categories of servitised property to secure stable use by the users, but in this part, I will focus on mapping out some implications from the personality theory for *general* (consumer) contract law. This is especially important to ensure at least some minimum level of protection for servitised products which have not yet been secured by special legislation or as proprietary interests. Given the commercial dominance of servitisation, this approach further constitutes an important check on the corporate dictation of product enjoyment through their terms and conditions.

Needless to say, existing doctrines in contract law apply to servitisation contracts as well.¹⁶⁶ However, certain challenges come with such a contractual approach. I will illustrate a couple of them with Directive 93/13/EEC¹⁶⁷ as an example. To determine whether a term is ‘unfair’

¹⁶³The EU legislative competence is already organised on a functional basis, giving Member States freedom of manoeuvre in implementation, see R Mańko, *EU Competence in Private Law: The Treaty Framework for a European Private Law and Challenges for Coherence : In Depth Analysis* (Publications Office 2015). This technique of functional legislation has also been employed in international treaties, such as the 2001 Cape Town Convention on International Interests in Mobile Equipment and the 1988 Convention on International Financial Leasing.

¹⁶⁴C Schmid, ‘Final Report Summary – TENLAW (Tenancy Law and Housing Policy in Multi-Level Europe)’ (23 June 2016) <<https://cordis.europa.eu/project/id/290694/reporting>> accessed 8 December 2023.

¹⁶⁵This is only a brief showcasing – the conclusions might be premature and impetuous, but they are all in line with the findings presented in the report, see *ibid*.

¹⁶⁶Admittedly, the qualification of servitisation is not so straightforward. In common law parlance, the long-term version of servitisation could usually be qualified as a ‘lease’, which has proprietary effect, while the short-term counterpart is closer to a ‘rental’ or ‘hire’ contract, see Merrill (n 144) 226, 230. The qualification under civil law is even more intricate given the vast divergence of service-related contracts in varying civil law jurisdictions, see E Tjong Tjin Tai, ‘Services, Including Services of General Interest’ in C Twigg-Flesner (ed), *Research Handbook on EU Consumer and Contract Law* (Edward Elgar 2016) 336 et seq.

¹⁶⁷Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.

and thus non-binding under said Directive, it is to be assessed whether the term creates ‘a significant imbalance in the parties’ rights and obligations’ against good faith and to the consumer’s detriment.¹⁶⁸

First, there is little room for considering personality significance in assessing the fairness of contract terms. With the ongoing constitutionalisation of European private law,¹⁶⁹ fundamental rights such as the ‘right to accommodation’¹⁷⁰ are gaining prominence in the fairness assessment as per Directive 93/13/EEC. Though the Directive does cover tenancy contracts,¹⁷¹ the extent to which the ‘right to accommodation’ can be factored into the evaluation of these contracts remains unclear. The general recognition of broader personality significance within the scope of the Directive poses an even more intricate challenge. Second, classic doctrines in general contract law have largely evolved from the prototype of sales contracts, which typically involve one-off exchanges of performances.¹⁷² However, these doctrines may not well befit service contracts and especially complex servitisation cases. Again, think of Swapfiets. The contracts that Swapfiets operates on are a blend of bike rental, maintenance provision, credit offering and even insurance security (eg a small fee for a new bike in case of theft). With this involved legal arrangement, it is challenging to tell whether a certain term creates ‘a significant imbalance’ between the parties. Moreover, the sales model proves ill-equipped to deal with the relational and continuous nature of servitisation contracts. Effectively regulating this aspect is crucial given the critical need to address the reinforced relationality in servitisation – namely, to avoid over-dependence and domination while promoting neighbourly cooperation and community ties.

The challenges in applying the unfairness test further underline the deficiency of default rules on hire or service contracts and the urgency to enhance state legislation in this area. This is evident because the unfairness test under Directive 93/13/EEC is operationalised by examining contractual deviations from the otherwise applicable default rules that put consumers in ‘a less favourable legal situation’.¹⁷³ With better-formulated default rules – which take personality facilitation and the specific features of service contracts into account – as a benchmark, it is easier to safeguard the fairness of servitisation contracts. This reform could also facilitate the development of servitisation by making such transactions easier,¹⁷⁴ while aligning the development of servitisation with public policy goals such as redistributive justice and sustainability – recall the normative implications of the personality approach. It has been rightly proposed that the general law of contract should not assume away the significance of contracts for self-realisation to avoid insufficient protection for some personality-critical contracts.¹⁷⁵ This could be done, for example, by

¹⁶⁸See Art 3(1) of Directive 93/13/EEC.

¹⁶⁹See, for example, A Hartkamp, ‘The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law’ 18 (2010) *European Review of Private Law* 527; E Spaventa, ‘The Horizontal Application of Fundamental Rights as General Principles of Union Law’ in A Arnulf et al (eds), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 199–218; C Mak, ‘Unchart(Er)Ed Territory: EU Fundamental Rights and National Private Law’ [2013] Centre for the Study of European Contract Law Working Paper Series No. 2013-05, Amsterdam Law School Research Paper No. 2013-25; A Colombi Ciacchi, ‘European Fundamental Rights, Private Law, and Judicial Governance’ in H Micklitz (ed), *Constitutionalization of European Private Law: XXII/2* (Oxford University Press 2014) 102–36; N Reich and O Cherednychenko, ‘The Constitutionalization of European Private Law: Gateways, Constraints, and Challenges’ 23 (2015) *European Review of Private Law* 797.

¹⁷⁰See, for example, Case C-34/13 *Kušionová* ECLI:EU:C:2014:2189; Case C-415/11 *Aziz* ECLI:EU:C:2013:164.

¹⁷¹Case Case C-488/11 *Asbeek Brusse and de Man Garabito* ECLI:EU:C:2013:341.

¹⁷²L Nogler and U Reifner, *Life Time Contracts: Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (Eleven International Publishing 2014) 8–10. In the context of Directive 93/13/EEC, see Keirsbilck and Rousseau (n 156) 122.

¹⁷³See, for example, Case C-415/11 *Aziz* (n 170).

¹⁷⁴On the role of default rules in contract law, see, for example, I Ayres and R Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ 99 (1989) *Yale Law Journal* 87; H Dagan and M Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017).

¹⁷⁵See Nogler and Reifner (n 172).

granting contractual remedy for harm to one's identity formation that arises from the other party's failure to keep up with their 'ethical' promises.¹⁷⁶ Lawmakers could even reach beyond the performance stage but also target, for example, (emotionally) manipulative marketing tactics as unfair commercial practices,¹⁷⁷ with the view to safeguarding the entire process of personality progression. Regarding proposals for addressing relationality, incorporating continuous information provision by the service provider, giving more attention to change of circumstances throughout the contractual duration and actively utilising renegotiation and (judicial) adaptation of contract terms could be crucial.

C. Enabling dynamic personality development

The discussion so far outlines the major legal implications of long-term servitisation. When it comes to short-term servitisation, the legal protection should be proportionate to its short-term and flexible nature. With this in mind, some of the same rationales of the long-term version could apply *mutatis mutandis* to support the relatively loose connection between short-term access and personality, such as the fairness control of (standard) contract terms as well as the avoidance of relational manipulation by the service providers. However, compared with the predominantly protective role of legal regulation in long-term servitisation, more important for the short-term counterpart is the facilitative role of law to make servitisation an available option and thus enable ample opportunities to experiment with personalities. This could also be achieved, for example, by removing the legal obstacles in tax law, permit law, anti-discrimination law and insurance law and by re-evaluating the institutional design supporting access.¹⁷⁸ Generally speaking, the legal order must allow for certain flexibility to reinvent oneself. Property law already allows owners to freely dispose of their property to recalibrate their planning. Contract law, to the extent that it sets out the governance framework for property, should follow suit. For example, the law should be careful in enforcing long-term contractual commitments that could constrain the self-determination of contractors' future selves.¹⁷⁹

Meanwhile, the legal framework for short-term access should also foster responsible conduct of the participants in order to strike a balance between flexibility and stability. Certain limitations should be instituted so that servitisation is not reduced to a way of evading owners' responsibilities. For example, the consumer should use the servitised product (eg the rented bike) with the same duty of care as she is using her own property (*diligentia quam suid rebus adhibere solet*). To incentivise responsible use, there could also be a contractual deposit or fine in place. On the flip side, if the user does not take proper care, she might lose certain remedies, such as getting the rented bike repaired at the provider's expense, or she could even be held liable for any damage caused. Moreover, the higher risk of depreciation of the servitised product could also be factored into the fairness assessment of the terms of the servitisation contract, which could, for example, justify a reasonably higher price (than the amortised sales price). Considering the full process of personality development, in situations where short-term servitisation can easily transition to long-term engagement, policies should discourage marketing practices that lure consumers into hasty, impulsive and uninformed decisions without fully comprehending the ensuing responsibility, especially if such responsibility is critical to the (non-servitised) relationships.

¹⁷⁶See, for example, S Dadush, 'The Law of Identity Harm' 96 (2019) Washington University Law Review 56.

¹⁷⁷See, for example, Becher and Dadush (n 143).

¹⁷⁸Kreiczer-Levy, 'Property without Personhood' (n 116) 803 et seq; Kreiczer-Levy, 'Share, Own, Access' (n 116) 204 et seq.

¹⁷⁹H Dagan and T Kricheli-Katz, 'Long-Term Contractual Commitments and Our Future Selves' 48 (2) (2023) Law & Social Inquiry 1.

5. Conclusion

The personality theory of property has enjoyed a wide uptake by modern property theory. It explains property on its constitutive role in the development of personality – we are what we own. However, in a world wherever more products are servitised into contractual access, we are not only what we own but also what we can access. This Article has employed the personality theory to inform the conceptual understanding and legal response of servitisation. Based on a synergistic analysis of Hegel and Radin, this Article distilled two major analytical pillars that underpin the personality perspective: (1) from the internal perspective, the freewill is embodied in the thing by the former's substantive engagement in the latter as to its intrinsic qualities; and, in order to supersede subjectivity, such engagement must take a stable form; (2) from an external perspective, for Hegel, property is the mediation for subjects to connect with each other, and it is such relational connections that concretise the Hegelian personality and enable the freewill to partake in higher social and ethical contexts.

Applying the personality theory to servitisation, from the internal perspective, we can see that it is the contractual user, as opposed to the property owner (ie service provider), who engages substantively with the intrinsicity of the servitised product. To be more nuanced, it is argued that long-term servitisation carries the same moral weight in embodying personality as formal property and thus constitutes the latter's functional equivalent, while short-term servitisation offers a flexible alternative to experiment with lifestyles and personality. From the external perspective, it is submitted that servitisation comes with reinforced relationality and increased dependence on the service provider. Based on this new construction of servitisation, this Article proposes to adopt a functional approach to put in place a similar legal framework for formal property and servitised property. Contracts as governance tools should be regulated to ensure fairness and avoid over-dependence. Lawmakers should also facilitate the development of short-term access while promoting responsible behaviours. Servitisation gives us brand new perspectives on how property should be conceptualised, how contracts are to be mobilised and how we ought to perceive others and ourselves.

Acknowledgements. I am deeply indebted to Candida Leone for her invaluable feedback on earlier drafts of this Article. For comments, discussion and encouragement at various stages, I would also like to thank Joe van Anken, Selma de Groot, Nick Haasjes, Arpi Karapetian, Charlotte Pavillon and the participants in the Young Property Lawyers' Forum (YPLF) Annual Conference 2023. I am also grateful for the comments from the anonymous peer reviewers. All errors are mine alone.

Funding. The work has not been supported by any specific funding source.

Competing interests. The author has no conflicts of interest to declare.