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'Setting Our Transformation Sights Too Low'

Land Reform, 'Expropriation Without Compensation' and 'State Custodianship of Land'

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Introduction

Two things are striking about the framework of the political debate over the 'land question' that arose from Parliament's 2018 adoption of an Economic Freedom Fighters (EFF)-introduced motion on land. The first is how, in this debate, the land question was framed as a story only, or at least most importantly, of historical dispossession and the dire need for restoration – how it was exclusively driven by what Cherryl Walker (2008: 11–20) has described as a 'master narrative of loss and restoration'. The second is the debate's stubborn focus on one legal issue alone as a solution to the land question thus framed: the power of the state to take land without having to pay compensation for it. In concrete terms, this became the question of whether section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution) should be amended to allow for 'expropriation without compensation' or 'state custodianship of land'.

Both these features of the debate have faced sustained criticism from scholarly and policy development circles. For the first, the criticism remains what Walker raised in 2008 when she identified the 'master narrative' as emblematic of the land question. At the time, Walker argued that, although on its own terms the master narrative is undoubtedly and importantly true, it is 'too simple', 'it does not tell the full story, or enough of the story, to sustain a satisfactory resolution of the plotline it sets up' (Walker, 2008: 16). This is so in three ways. First, it loses sight of a range of problems in landholding that have nothing to do with actual loss and an actual claim for restoration. These are problems such as securing existing landholding for those many who have access to land but

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do not enjoy the protection of the law (security of tenure), and enabling access to land for those who have never had it and so could never – at least not in a particular sense – lose it (redistribution) (Walker, 2008: 16). Second, it fails to account for what happened in the forty-odd years that have passed from the last actual dispossessions until restoration became possible in the early 1990s (Walker, 2008: 16). Thirdly, it fails to depict and deal with the loss and restoration as part of a much broader story of social change – to relate its project of reversal and restitution to 'other programmes of social development' and to 'mesh its own priorities with other constitutional commitments to justice, socio-economic development and equality' (Walker, 2008: 17). That is, it remains locked in a model of restitutory justice, eschewing a broader redistributive or, indeed, transformative notion of justice (Du Plessis, Chapter 3, this volume; Nocella, 2011: 4).

The most cogent response to the second of these features has been that an exclusive or primary focus on the state's power to take land without compensation as the mechanism to address the injustice of current landholding in South Africa and the need to amend the Constitution to create such a power, is simply misplaced.

This is so because whether through deprivation (s. 25(1) of the Constitution – always) or through expropriation (s. 25(2) – under exceptional circumstances), the state has, since the enactment of the Constitution, always had the power to take land without paying any actual compensation. To the extent that the state has since 1996 not taken land without paying compensation[1] it is, in other words, not section 25 of the Constitution that stands in its way. Indeed, section 25 of the Constitution, in the security of tenure and restitution-related provisions of section 25(5)–(8), gives the state far broader powers than only to take without paying in order to bring justice into our relationship with land (Ngcukaitobi, 2021: 206–207).

This is also because our failure to effect justice in landholding so far has little to do with the unavailability of land or the state's inability to acquire land. Instead, it can far more clearly be attributed to acute underfunding; administrative incapacity and, in some cases, maladministration and corruption; and a lack of clear justice-related policy direction and political will (Ngcukaitobi, 2021: 206, 212–13).

[1] It has never *expropriated* without paying compensation, but it has *deprived* land-related rights without doing so.

I agree in broad terms with these critiques of the framing of the land debate. However, my concern here is not with its technical, doctrinal or policy problems. Instead, I am interested in how this framing relates to our basic understanding and intuitions about how we relate to land in legal terms – the 'codes' that determine what we think and do about our relationship with land and our relationships with one another concerning land (Van der Walt, 2001: 261–62). Does the current framing of the debate, which is so often presented as radical and incisive, indeed break with apartheid/colonial land law? That is, is this framing truly *transformative*?

I suggest it does not and is not. To frame the land question only as a past of dispossession and a present need for restoration, which will be achieved through giving the state sufficient power to take land from some in order to give it to or place it at the disposal of others, fails to break with – still moves within and so, in fact, *confirms and validates* – apartheid land law's basic understanding of land law as determined by an absolute, and absolutely exclusive, notion of ownership. That is, it fails to break with what was apartheid land law's central and most debilitating 'code': the idea that someone or something always, in the final instance, holds absolute, exclusive power over land.

What Was Wrong with Apartheid-Era Property Law?

Several property theorists have engaged the question of what enabled the common law of property to become so easily co-opted and infiltrated by apartheid's racially exclusive social engineering project and what enables that same common law of property to resist post-apartheid efforts at transforming our relationships to land and with one another, relative to land. The touchstone remains the late André van der Walt. Van der Walt identified and described three features of apartheid property law that enabled its unjust outcomes. The first was a narrow understanding of the objects of property as – with only a few exceptions – corporeal 'things'. The second was an equally narrow understanding of property rights as a closed and hierarchical list of rights, with ownership at the apex, followed by a small number of lesser 'real' rights. The third was an a-contextual, syllogistic understanding of the relationship between these rights and remedies, in terms of which an exclusivist remedy that could be exercised against everyone else (within its scope) followed simply and only from the fact of having the right (Van der Walt, 2012: 113–16).

What concerned Van der Walt about this understanding of property law was that it enabled a holder of one of the 'real' rights in the closed list

of property rights, within the scope of that right, to exercise absolute, exclusive control over the 'thing' against everyone else, regardless of context, other individual interests, broader public goals and concerns of fairness and justice (Van der Walt, 2012: 114). Ownership, as the apex property right, enabled this absolute, a-contextual control against everyone and everything else, including the holders of lesser 'real' rights. Van der Walt's critique of the absolute, exclusivist and a-contextual nature of ownership in South African property law was, of course, focused on notions of private ownership in the context of the common law. Nonetheless, he points out that it was mirrored in apartheid's statutory land law by the absolute control it afforded the apartheid state over the lives of black South Africans in their relationship with land. Indeed, he argues that this basic code of the common law of property as establishing zones of absolute and exclusive control enabled apartheid's social engineering project concerning land and its own absolutely exclusivist spatial imagination (Van der Walt, 2001: 266–67).

What bothers me most about this absolutist, exclusive, abstract notion of property that enables the exercise by private property owners of absolute, exclusive control over land is how peculiarly unsuited it probably is to any society, but especially to ours. After all, land in our context is so inevitably subject to a range of overlapping, entangled interests and concerns, most of which are not recognised as legal rights. In addition, we are engaged in an ambitious and overarching collective programme of redress of severe past injustice and transformation towards a more just society – the public good is inevitably an overriding concern in our relationship to land.

The first element of this concern – that an absolute notion of private ownership (and its flipside, absolute notions of state control over land) is unsuited to our reality of land being subject to different overlapping, intertwined, even enfolded interests and concerns – most obviously appears in the context of the reality of communal land ownership. As Tembeka Ngcukaitobi points out:

> The nature of private title for property is fundamentally inconsistent with communal ownership. More than twenty million South Africans live in communal settings. Although colonialism introduced individual title, it was never provided to everyone, particularly Africans. The key distinction with individual freehold title is its exclusionary nature, while on the communal side, the main feature is the coextensive nature of rights. Reforms directed at extending private title to communal settings are self-defeating, as the two are fundamentally incompatible. (Ngcukaitobi, 2021: 150)

But the problem goes far wider than that, encompassing many other aspects of what Ngcukaitobi calls the 'mystery of tenure' (Ngcukaitobi, 2021: 137). These include:

- how properly and substantively to take account of the varied interests of so-called unlawful occupiers in the context of eviction proceedings and, indeed, what legal form to give to the remaining on land of people against whom an application for eviction has failed (Mhlanga, 2022);
- how to think in law about the long-standing historical use of land in private ownership for community purposes;
- how to think transformatively about different forms of land use, such as in the context of mining, and their coexistence; and, perhaps most intractably,
- how to take legal account of the overlapping of different epistemologies and even ontologies over land.

Stuart Wilson has recently focused on the second element of this concern, that apartheid's absolutist conception of ownership is inimical to both our programme of redress and our transformational agenda:

> We live in the grip of a pervasive 'ownership model' of property. This model posits property as tangible goods or incorporeal rights over which individuals or corporations have exclusive control. The world is carved up into domains of ownership – exclusive control of a right or object, and freedom to do with it as one wishes ... Redistributive claims, concerns about inequality, poverty and social needs have always been located outside property law. (Wilson, 2021: 10–11)

In sum, as Froneman J remarked in his separate concurring judgment in *Daniels v Scribante*,[2] in a poignant tribute to Van der Walt's body of work, apartheid's 'absolutisation of ownership' not only 'confirmed and perpetuated the existing inequalities in personal, social, economic and political freedom' (para. 136), frustrating 'the rectification of historical injustice'. It also stands in the way of realising in the context of land that 'the values of the Constitution are not aimed solely at the past and present, but also the future'; of the transformation, that is, of our relationships to land and to one another concerning land (para. 137).

Against this background, it seems clear – and the consensus is (Van der Walt, 2012: 30, 128; Ngcukaitobi, 2021: 150–51; Wilson, 2021: 10–11) – that in transforming our property and land law to suit the

[2] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).

demands for land justice in South Africa, the focus should be on addressing in some way this notion of absolute and exclusive control. How can we go about that?

What Must Be Done to Fix That?

In his 2012 book *Property and Constitution*, André van der Walt sets out his vision of a transforming/transformed property law for South Africa. It is a vision of a property law that has moved away from the traditional view of property law as a hierarchised system of rights, syllogistically related to remedies that the right holder can exercise against others in an exclusionary fashion. It is a property law that is instead becoming a system of regulation of overlapping or potentially clashing interests or rights in property, through negotiation or mediation of the overlap or conflict, in a manner that advances constitutional (public) goals. This transforming property law shows three main characteristics. First, it is marked by a shift from a focus on the objects of property law or rights ('things') to a focus on objectives:

> [T]he primary purpose of the Constitution is not to further entrench or underwrite existing private law protection of extant property holdings by adding another, stronger layer of constitutional protection, but to legitimise and authorise state regulation that would promote constitutional goals or objectives with regard to the overall system of property holdings, proscribe action that would have certain unwanted systemic effects and bring existing law into line with the promotion of these constitutional goals. (Van der Walt, 2012: 141)

The goals Van der Walt has in mind 'include providing restitution of apartheid land dispossessions, ensuring the long-term sustainability of development and the use of natural resources, promoting equitable access to land and housing, and improving security of land holding and housing interests' (Van der Walt, 2012: 141).

The second characteristic is a move from 'property to propriety':

> [A] constitutional notion of property exceeds the narrow private law focus on individual property rights and extends to interests in property that are not traditionally recognised or protected in private law, as well as attention for the limits and the effects of rights, considered in a contextual setting, rather than just the rights themselves considered abstractly. (Van der Walt, 2012: 147)

In other words, there is a move towards recognising from among the many different interests that may apply to property in each case all those

that warrant protection in light of constitutional goals (the systemic goals of property law), in addition to the traditionally recognised closed list of property rights – an opening up of the canon of rights to property.

The third characteristic is a shift in the way in which property law is developed and applied, and property law disputes resolved, away from syllogistic and towards transformative logic and reasoning. Van der Walt advocates here a move away from the conclusory reasoning traditionally applied in property disputes. There, the focus is on determining the presence or absence of recognised property rights in a dispute and then, once those have been identified, simply mechanically applying the remedies associated with them against and to the exclusion of any other interest. The move is instead towards an approach to resolving property disputes where the focus is on mediating between all the different interests that apply, in light of both the specific context of the dispute and the historical context of property in South Africa and in a manner that best accords with the systemic public goals of property law (Van der Walt, 2012: 151).

This vision of property law is interesting and attractive to me because it amounts to a 'democratisation' of property – a dispersal or diffusion of the absolute power that ownership under apartheid property law afforded over land. This is because, first, it amounts to, if not quite a de-privatisation of property law, then the development of a 'post-private' property law, in the same sense as Karl Klare described the South African Constitution as post-liberal: 'embrac[ing] a vision of *collective self-determination* parallel to (not in place of) . . . [a] strong vision of individual self-determination' (Klare, 1998: 153). While not leaving behind the purpose of property law to protect individual rights and interests, it emphasises the public aspects and implications of property and the fact that individual interests should be given effect in a manner that advances public goals. As Van der Walt puts it: 'The Constitution requires a shift from the traditional focus on individual rights in discrete objects to a relational or contextual focus on the features or qualities of the overall property holding system and the position of and relationships between individual rights holders in that system' (Van der Walt, 2012: 154).

Ownership is relativised in relation to or contextualised within collective and public concerns. This notion of a 'post-private' property law is echoed in more recent work. Ngcukaitobi, for example, criticising the effect of our land reform programme's fixation on an absolute and exclusionary notion of private ownership on security of tenure, proposes that 'we should reconsider the exclusive and absolute nature of private

title so that the exercise of rights over land is subject to a general public-interest override, provided that such an override is itself constrained by procedural fairness' (Ngcukaitobi, 2021: 150–51).

It also resonates with the burgeoning literature on 'sharing' in property law, in terms of which the absolute and exclusive remedies afforded by rights in terms of traditional property law are softened to take account of collective, intergenerational and other more public concerns (Dyal-Chand, 2013, 2022).[3]

Van der Walt's vision of property law amounts to a democratisation secondly because it opens the canon of recognised property interests far beyond the closed list of property rights recognised in common law, to include those who, in the common-law sense, have no legally recognisable interests. In this respect, this vision of property both grants 'recognition and protection to interests that would not have qualified for it according to private law doctrine' and extends the canon of recognised interests by 'requir[ing] the courts to reduce the potential impact of what may seem like trump rights in private law, in accordance with the propriety of giving some recognition and effect to what may seem like unrecognised and unprotected or systemically weak conflicting interests, or of restricting what may otherwise seem like an unlimited or overbearingly strong right' (Van der Walt, 2012: 152). Here, one also hears Ngcukaitobi's concern with unravelling or 'untangling' the 'mystery of land tenure' to decentre what he calls private freehold and extend legal recognition to a range of other rights and interests (Ngcukaitobi, 2021: 150–53).

I see Van der Walt's vision as a democratisation of property law, third and importantly, because it creates for those holding property interests a 'participatory space' within the system of property law. It requires participants in a property law dispute equally to account for the assertion of their interests within the specific context of their case, the broader historical context and the context of the overall systemic goals of the property law system. It then also requires courts to decide such disputes by pursuing an accommodation between competing or overlapping interests in a manner that advances constitutional goals (Van der Walt, 2012: 152). In short, it requires proper, contextualised *consideration* of and concern for everyone involved in a property-related dispute, instead of the mechanical and conclusory application of remedies flowing from

[3] My thanks to Zsa-Zsa Boggenpoel for alerting me to this literature and its relevance to the notion of a 'post-private' property law.

abstract rights (Brand & De Villiers, 2021: 102). This notion has recently been taken further by Stuart Wilson, who advocates a re-envisioned property law within which spaces are created 'in which ordinary people ... [can] shape the terms on which they access land, tenure, and credit' (Wilson, 2021: 13–14, 11).

In this sense of a property law that evinces equal consideration and concern for those involved in land disputes, the democratisation of property law is a particular expression of the notion of the Constitution's 'caring' ethos (Klare, 1998: 153; Van der Walt, 2001:303; Van Marle, 2003; Cornell & Van Marle, 2005). This is, of course, undergirded, finally, by how this vision of property relates to marginality, weakness and vulnerability. To describe property law as a system of regulation of property-related interests in light of and with the aim of furthering constitutional goals, rather than a hierarchically arranged collection of rights and remedies, creates in property law and the protection it affords a particular place for the marginal and the vulnerable – those who have no rights. Van der Walt explores this aspect of his vision in *Property in the Margins*. Here he points out that in his vision of property law, 'marginality is ... a vital element of property as a legal institution' and that 'although those on the margins usually hold weak property rights or no property rights at all, marginality in itself does not equal weakness – at least in some cases marginality holds a power of its own that is highly relevant for property theory' (Van der Walt, 2009: 24).

This then, is what, in my view, we should be working towards when we think about land and our relationship to it and, more importantly, our relationship with one another in relation to land. We should develop a conception of property and a system of property law that is transformed in the sense that it radically departs from the very foundational features of persistent apartheid-era common-law notions of property and property rights.

The focus should be on apartheid's notion, whether in the context of private ownership or state social engineering, of absolute power over land in favour of someone or some one thing. It is this feature that enabled the common law's complicity in apartheid land law and social engineering. It is this feature that renders the common law of property so peculiarly unsuited to our reality of overlapping, enfolded, entangled interests and concerns in land. It is this feature that impedes the redress of past injustice and the transformation of our living together in relation to land.

The goal should be to disperse and dissemble that absolute power; to democratise property law in the four related ways described above: by

requiring contextualisation of private interests in land within history and within constitutionally mandated transformative goals; by resolving property disputes and developing land law through creating participatory spaces within which mutual accommodation rather than trumping is sought; by opening up the canon of recognised property interests; and by fostering a particular concern for those on the margins and those who are excluded.

To be sure, to focus in this way on dispersing the absolute power that an unreconstructed notion of private ownership and its corollary in state hands affords is not a proposal to do away with individual private ownership or, indeed, more broadly, strong individual rights to land. There are many practical and principled reasons related to land use and development and to important notions of personal freedom, autonomy and equality why strong individual rights to land, capable of resisting interference both from other private individuals and communal or public power, are indispensable to the quest for justice in relation to land and our relationship to it. It is instead thinking about how to relativise private ownership, how to contextualise it within and in relation to the panoply of other individual but also public, common and cross-generational rights, interests and considerations that apply to land and that operate in disputes about land.

In light of this goal, how have we fared over the last four or five years?

The Debate of the Last Four and a Half Years

The debate of the past four and a half years around the land question has, at the political level, given rise to two main proposals for (ostensible) amendment of the Constitution.

First, it gave us the ruling party's notion that was eventually encapsulated in the Constitution Eighteenth Amendment Bill, which was tabled before Parliament and eventually defeated (Gerber, 2021). In short, this proposal sought amendment of section 25 to 'make explicit what is implicit', namely that, where expropriation occurs for purposes of land reform, the amount of compensation paid may be nil (Constitution Eighteenth Amendment Bill (CEAB) 2021, 4). That is, for all its trappings,[4] it was still only a proposal that the state should have the power to

[4] It also required that legislation be enacted to set out circumstances under which compensation for land reform-related expropriation may be nil; declared all land the 'common heritage of all citizens that the state must safeguard for future generations'; and required

take land from individual owners to give it to others, without having to pay an actual amount of compensation for it (CEAB 2021, 4).

Second, it resulted in the EFF's proposal for 'state custodianship' of all land: that all land be declared the common heritage of the people of South Africa and placed in the custodianship of the state, which will allocate use rights to land through an administrative process, based on need (EFF, 2021: 4, 7).

Although presented by their backers as in some way having important differences (Masungwini, 2021), these two proposals have much in common. As stated in the introduction, they first both clearly move within the same 'master narrative' of the land question, that the only or at least the most important issue is to restore land to those from whom it was taken. I return to this aspect in the conclusion. Secondly, they are the same in that they fail to recognise that the main problem with apartheid property and land law, which enabled colonialism and apartheid's excesses concerning land, was the notion of absolute and exclusive control of land. Indeed, both proposals remain within and, in fact, validate this central 'code' of apartheid land and property law.

This is, of course, most obvious with the African National Congress (ANC) proposal. The method for taking from some to give to others that it has so stubbornly clung to – *expropriation* – is inevitably bound up with the notion of ownership. That is, it is almost nothing other than a proposal of how to enable the state to transfer *ownership* of land from some to others without having to compensate or compensate substantially. That the notion of ownership that this proposal works with is still the unreconstructed apartheid-era notion of absolute exclusive control is borne out by the current government's track record in land reform over the last two decades. As Ngcukaitobi points out in some detail (others have also, see e.g. Cousins, 2020: 9), its efforts at generating access to land have been dominated by a notion of private ownership that affords absolute and exclusive control to the holder and in that sense is no different from apartheid ownership ('our entire "land reform policy" is premised on the idea that land is to be individually owned, in absolute terms, to the exclusion of non-owners') (Ngcukaitobi, 2021: 134), or its complete opposite, through highly attenuated and precarious forms of landholding (such as conditional leasehold in the agricultural context) in which the state retains, and exercises, absolute control (Hall & Kepe,

the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land' (CEAB 2021, 4).

2017: 8). In doing so, the government has failed to unravel Ngcukaitobi's 'mystery of tenure'. That is, it has assumed that the 'promise of the Constitution' is for absolute ownership without properly and centrally considering other forms of rights to land, whether 'formal' or 'informal', that would be better suited to our reality of overlapping and enfolded rights and interests in land (Ngcukaitobi, 2021: 150–51). In sum, it has either given land absolutely, or not at all, with nothing in between, staying in this way within the apartheid imaginary of absolute control over land residing exclusively in someone or something, with its absolute absence the consequence for others.

The recurrence of the apartheid-era 'code' of absolute and exclusive control is more difficult to trace in the EFF's proposal for 'state custodianship' of all land. This proposal was consciously presented as a radical departure from apartheid-era notions of private ownership and the idea of absolute control associated with it. It is of course, first, a proposal to abolish private ownership of land in favour of land becoming common heritage and being placed in public (the state standing in for public) custodianship (EFF, 2021: 4). More importantly, care is taken to distinguish the idea of state custodianship from nationalisation by pointing out that while in the latter the state becomes the owner of the land and assumes the control that entails, in the former it does not: 'The difference between nationalisation and custodianship is that nationalisation translates to the transfer of ownership to the State. The State takes some form of management or control of nationalised assets. Whereas custodianship suggests [that] the State acquires rights on behalf of others to facilitate access without either managing, controlling, or exploiting' (EFF, 2021: 2–3).

But this impression is countered by the track record over the last decade or so of the notion of state custodianship of land in the context that the EFF proposal uses as an example: state custodianship of mineral resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). Rather than this mechanism affording impoverished communities more control over their land and the mineral resources associated with it it has diminished their control in favour of the state. Even as custodian of mineral resources rather than owner, the state exercises absolute and final control over who gets access to those resources. As, for example, Aninka Claassens and Boitumelo Matlala have shown exhaustively in their study of the record of mineral rights applications in the North-West platinum belt, this, moreover, has failed to displace patterns of control over mineral resources and the land

associated with it in favour of impoverished people and communities (Claassens & Matlala, 2014). The system has instead created a space within which powerful private commercial interests, with influence and political capital, have far better and more effective access, perhaps even than they had at common law. In sum, this record shows that state custodianship neither attenuates absolute control nor effectively de-privatises or equalises access to resources such as land.

This is further illustrated, perhaps more tellingly, in those instances where the state has, in the context of land reform, already assumed the position of 'custodian' of rights, such as through the acquisition and lease of farmland to enable access for impoverished black South Africans in terms of the State Land Lease and Disposal Policy (SLLDP) of 2013. Ruth Hall and Thembela Kepe have argued that this system of affording strongly attenuated conditional land use rights has turned out to be a 'highly prescriptive managerial approach' and 'a key way in which black rural populations can be controlled', with the requirement 'to use land in compliance with official designs ... [often being] the basis for them to lose land' (Hall & Kepe, 2017: 8). This leads them to conclude that 'South Africa's land reform seems to have succumbed to the ingrained scepticism held by officials in successive [apartheid-era] departments of "native affairs" and "bantu affairs" about secure and independent land rights for black people' (Hall & Kepe, 2017: 8; see also Hall & Williams, 2003; Hall, 2015). To this, one must add that this system has in-built vulnerability to elite capture, with political and economic power conditioning access, to the detriment of those on the margins who are the intended beneficiaries of the policy (PLAAS, 2020: 3–4).

In fact, at the risk of taking this point too far, the EFF proposal for state custodianship of all land mirrors apartheid's absolute notion of ownership in much the same way that statutory apartheid land law, which applied only to black South Africans, mirrored the then common-law ownership right in its absoluteness and exclusivity. As André van der Walt has argued persuasively, it was the common-law absolute notion of ownership that enabled the absolute control that the state could exercise over black South Africans' landholding through statutory land law. Once black South Africans were statutorily divested of the capacity to hold common-law ownership or other 'real' rights to land in 'white' areas, they were, in legal terms, at the mercy of the state's absolute control – in a system of absolute rights, the absence of rights renders one absolutely without control (Van der Walt, 2001: 268).

In sum, in its failure to break with the apartheid notion that, whether through ownership or through the state, someone or

something, somewhere, must hold absolute control over land, the past four and half years' debate over the land question has failed to engage Ngcukaitobi's 'mystery of land tenure'. Fixated on who holds absolute control at the expense of whom and on wresting absolute control from some in favour of others, it has failed to grapple with the real land question of how to mediate overlapping rights and interests over land in a democratised manner, that takes account of the public good. To do the latter, rather than focus on the wresting of absolute control from some in favour of others, we should focus on how to dissemble absolute control itself, by thinking of a different system of rights over land, one that is not hierarchical, at least in a fixed linear sense, and where conflict between rights and interests can be mediated in democratic ways.

What Have We, in the Process, Left Behind?

The irony is that, through the courts, there have been various encouraging lines of development concerning this – cases in which, whether through the creation or bolstering of participatory spaces, recognition of previously unrecognised rights and interests or introduction of a 'public interest override' (Ngcukaitobi, 2021: 151), the democratisation of property law has started to emerge. The myopic focus of the political debate on land of the past four and a half years left these developments behind and has diverted attention from the urgent need to consolidate and further the gains so achieved. I give examples of these developments from two areas, although there are others also: contestation about mineral rights and the land attached to them, and eviction.

The clash between mineral rights awarded in terms of the MPRDA and so-called surface rights to the land to which such mineral rights relate is a particularly fruitful context within which to consider ways to dissemble apartheid's notion that somewhere, someone or something must hold absolute control over land to the exclusion of all else. This is because mineral rights such as prospecting or mining rights provide the most acute version of this absolute control: within their scope, they afford their holders the strongest control over the land to which they apply, trumping even the otherwise apex right of ownership.

The notion that a prospecting or mining right within its terms affords its holder absolute control over the resource to which it applies, and the land under or on which it is found, has steadily been dispersed and democratised. This has happened in two ways.

First, cases rendering robust interpretations of statutory requirements that surface right holders be consulted at various stages of the acquisition and implementation of mineral rights have subjected mineral rights holders' ostensibly absolute control to versions of Van der Walt's 'participatory spaces', providing opportunities for achieving mutual accommodation of overlapping rights and interests. On the back of a basic principle established in the early case of *Bengwenyama*[5] that all requirements imposed on applicants for mineral rights or mineral rights holders to consult with the holders of surface rights to the land concerned should be interpreted substantively, to require 'negotiation and . . . agreement' and 'engagement in good faith to attempt to reach accommodation . . . in respect of the impact on the [surface right holder's] right to use his land' (para. 65), potentially robust participatory spaces have been created at various stages of the process of acquisition and implementation of mineral rights. In *Maledu*,[6] for example, it was held that the grant of a mineral right does not simply automatically extinguish informal rights to the land to which it applies, held in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). Instead, these rights could only be deprived with the consent of their holders, obtained in the case of communally held land at a meeting of which all actual right holders had prior notice and in which they had a reasonable opportunity to participate (*Maledu*, paras. 107–108).[7] It was further held that the grant of a mining right also does not, on its own, entitle its holder to evict surface right holders to the land in question. Before it could apply for an eviction order it would have to show that it had made a good faith and reasonable attempt through mediation to achieve the accommodation of the surface right holders' interests, which had failed (paras. 109–10). Both these holdings are examples of the court subjecting the ostensibly absolute control that mineral rights afford to strong, substantive participatory

[5] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

[6] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (Mdumiseni Dlamini and Another as Amici Curiae)* 2019 (2) SA 1 (CC).

[7] Some of the implications of Petse AJ's judgment in *Maledu* were shortly after the judgment was handed down illustrated in the so-called Xolobeni matter of *Baleni and Others v Minister of Mineral Resources and Others* (2019 (2) SA 453 (GP)), where Basson J held that the Minister could not grant a mining right to an applicant mine on land occupied in terms of IPILRA rights by the Umgungundlovu community unless the community themselves had given their free and informed consent to be deprived of the informal rights to the land in question. For a discussion of the Xolobeni matter and *Maledu*, see Meyer (2020).

spaces in which interests that overlap or conflict with the mining right can be protected and at least partially vindicated. In doing so, both of course also democratise the mineral rights context in one of the other ways outlined above: through providing strong protection against the exercise of mineral rights to interests not previously recognised in this context, informal land rights.

The mineral rights context has also been significantly democratised in another way than the creation of strong participatory spaces and the consequent recognition of previously ignored individual or communal interests. In *Maccsand*,[8] the Constitutional Court held that the award of a mining right does not divest its holder of complying, before it can start mining, with requirements for environmental authorisation and land use permission imposed, respectively, by the National Environmental Management Act 107 of 1998 (NEMA) and the Western Cape's Land Use and Planning Ordinance 15 of 1985 (LUPO). This judgment is a powerful subjection of the potentially exclusive power that a mining right affords its holder to the broader public interest in environmental protection and orderly land use and planning protected by the NEMA and the LUPO and, importantly, to the participatory spaces that are created in these laws for members of the public to object to applications for authorisation or land use modification. It has since been extended into areas other than environmental and land use regulation.

The other area in which there are hints of the democratisation of ownership and property law is in the law regulating home evictions. In these cases, the progressive recognition of certain checks on the exercise of ownership rights through the *rei vindicatio*, the halting but increasing extension of these into *private* ownership and the recognition of new kinds of rights or at least old kinds of rights applied in new contexts with which to counter ownership have made significant inroads into the absoluteness of ownership.

On the basis of the judgment in *Port Elizabeth Municipality*,[9] Van der Walt pointed out in 2012 that the constitutional requirement given effect in home eviction legislation, that an eviction order from a home may only be granted after a court has concluded eviction would be just and equitable in the circumstances, could develop into a full-fledged substantive rather than only procedural right not to lose one's home arbitrarily. He argued that the 'just and equitable' enquiry during eviction proceedings was a

[8] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).
[9] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

signal space for the destabilisation and dispersal of the previously absolute power that ownership afforded over land (Van der Walt, 2012: 156–58).

His prediction concerning this has, frustratingly slowly but nonetheless progressively, come to fruition in the cases. In the context of the state seeking evictions from homes, the courts have recognised a range of interests and factors as 'relevant' to justice and equity and important enough to qualify the absoluteness of ownership and prevent its absolute exercise through eviction. Of these, the duration of occupation of the homes concerned; the extent of 'settledness' in economic, social and other networks of those whose eviction is sought; their vulnerability to homelessness and other depredations upon eviction; uncertainty about the validity of the title of the owner seeking eviction due to pending proceedings to challenge it; the reason why eviction is sought; the extent to which the owner attempted to avoid eviction by negotiating ('engaging') with those on the land; the use to which the land will be put once eviction is achieved; and the extent to which social instability may arise from an eviction are some examples.[10] These developments in the context of state or state-sponsored eviction have also increasingly been extended to evictions sought by private owners. First, in cases such as *Blue Moonlight*,[11] private property owners were held to have to 'endure' the presence of persons on their land against whom an eviction order has been obtained for as long as it takes the state to find them alternative accommodation. Second, there have been increasing numbers of cases in which eviction orders sought by private owners concerning private property have been denied because eviction was held to be unjust and inequitable under the prevailing circumstances.[12] To be sure, these developments have been stop–start (Brand & De Villiers, 2021); there

[10] See e.g. *Port Elizabeth Municipality; President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Classprop (Pty) Ltd v Nini Crescent Legode* Case no. 80910/16 (NGHC) 30 February 2018.

[11] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

[12] *All Builders and Cleaning Services CC v Matlaila and Others* (42349/13) [2015] ZAGPJHC 2 (16 January 2015); *Classprop v Nini Crescent*, 2018; *Grobler v Phillips and Others* (446/2020) [2021] ZASCA 100 (14 July 2021); *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC). But see Liebenberg and Kolabhai (2022) for a discussion of the nevertheless enduring embrace of the distinction between public and private in evictions case law.

remains unevenness in the actual application in, for example, the Magistrates Courts of the principles so developed (Singh & Erasmus, 2022: 24–25, 27–28); and the development in this direction is certainly not yet conceptually coherent (Liebenberg & Kolabhai, 2022: 258–67). Nonetheless, they represent significant conceptual destabilisation of the apartheid notion of ownership as an apex right, affording absolute power to exclude.

The eviction context has also seen the recognition of new rights and interests or the 'repackaging' of existing rights at common law to erode the absoluteness of ownership. Most obviously, the fact that our new, constitutionally inspired eviction law contemplates refusal of eviction orders sought against 'unlawful' occupiers of land (that is, people who occupy without any recognised right in law to do so), means that a new category of tenure security has been created: an entitlement to remain on someone else's land although you have no 'right' to do so. Much work remains to be done to develop, conceptualise and describe this category, which seems a dramatic and clear relativisation and contextualisation of ownership against concerns and factors other than countervailing rights (Mhlanga, 2022). In addition, long-established common-law mechanisms have been adapted to new circumstances to give effect to constitutionally required security of tenure. One example occurred in the case of *Community of Grootkraal*.[13] In this case, the Supreme Court of Appeal recognised, based on the somewhat obscure common-law evidentiary mechanism of *vetustas*, that a public servitude had arisen in favour of a community of farmworkers to continue their use for religious, educational and social purposes of a portion of a private owner's farm. On this basis, the farm owner's attempt to evict them failed.

Conclusion

In the introduction, I mention two features of the past four and half years' debate about the land question that are striking: the framing of the basic problem as one of loss and the consequent need for restoration; and the notion that the only solution to the problem thus framed is to enable the state to take land from some to place it at the disposal of others, without having to pay for it. In the body of the chapter, I focus on the latter. I argue that the fixation on enabling the state to take land so as to

[13] *Community of Grootkraal v Botha NO and Others* 2019 (2) SA 128 (SCA).

place it at the disposal of those who have none, whether through 'expropriation without compensation' or 'state custodianship of land', has caused the debate to remain caught up in the basic conceptual structuring of apartheid land law, conditioned by an understanding of ownership as an apex property right that affords its holder absolute and exclusive control of the land to which it applies. I conclude that, indeed, the two proposals that have arisen based on this feature of the debate have validated and confirmed the notion of absolute control so central to apartheid land law.

Here, in conclusion, I turn to the former of the two features: the framing of the problem as only one of land having been taken so that it should now be taken and then given back. As already alluded to in the introduction, Cherryl Walker in 2008 expressed her concern about reducing the land question to this 'master narrative of loss and restoration'. Although, so she argues, this master narrative is undoubtedly true and a central and important aspect of the land question, it is only one part of a much broader question. As a lens through which to consider the transformation of our relationship to land and to one another concerning land, she concludes, it is limited (Walker, 2008: 16).

But it goes further than this. Framing the question thus is also limiting – it constricts our transformative imagination and ambition. In an engagement with different understandings of the transformation of our land law, André van der Walt considers the kind of oppositional approach of 'challenge and demand' that the master narrative of loss and restoration and a purely restitutory approach to land reform embody. Drawing on Njabulo Ndebele (2000a, 2000b, 2000c), he points out first that such an oppositional approach inevitably validates that which it is directed against:

> In the confrontational stand-off of challenge and demand the reform process derives its power and its dynamics from its position of confronting and facing the other, waiting for something to be given or done by the other. The inherent recognition of the confronted other as the source of injustice is ... understandable in this aesthetic, but the aesthetic and rhetorical implication is that the confronted other is still recognized as the source of power, even at a time when political power has already been wrested away from the other. (Van der Walt, 2001: 292)

Moreover, so he continues, to adopt such an oppositional, restitutory approach to the transformation of our land law means that 'the shadow, the ghost of apartheid land law continues to hover over ... land reform jurisprudence, even after the formal demise of apartheid politics and law,

thereby potentially restricting our sources of energy and power to imagine a different future, where change and justice no longer depend on opposition to the denounced other of the past' (Van der Walt, 2001: 292).

Drawing together Walker and Van der Walt, in framing the land question over the past four and a half years as only about taking what was taken unjustly in the past and giving it back we are 'setting our transformation sights [far too] low' (Van der Walt, 2002: 271). It has limited our gaze to only the restitutory aspects of land reform and caused us to lose sight of the real, broader question – the question of how to live together concerning land. It has restricted our transformative imagination and blinded us to the admittedly nascent, halting and interspersed but nonetheless truly transformative developments in our land law jurisprudence towards democratising our relationship to land and the need to nurture, confirm, validate and expand these developments. Perhaps most gallingly, the narrow focus on better enabling the state to take land to 'give it back' has caused us to mirror, and so strongly validate, precisely that away from which we most need to transform: the apartheid notion of land and property law being simply about locating absolute and exclusive control.

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