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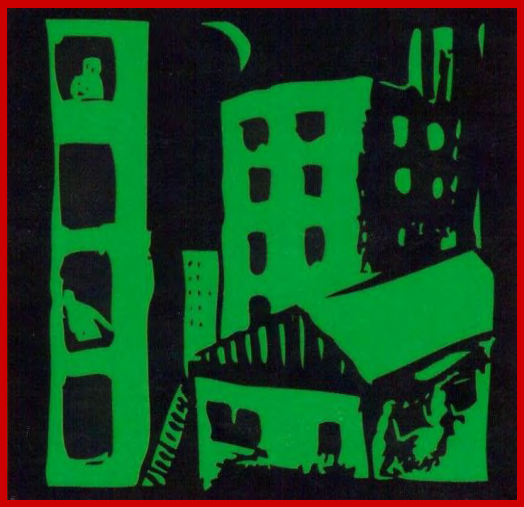

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The essential features of private property and its conceptual reform as a normatively appropriate restorative measure

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ABSTRACT

The article describes private property's essential features as it operates in South African law to show how and why it functions within a distinct realm of the law. The unique nature of private property is explained in order to reflect on its core characteristics, specifically that of being a right in rem *and enforceable against the whole world. Noting this feature, the article investigates theoretical approaches that challenge the notion of unyielding property principles and redefine property as a state-created regulatory measure that responds to political and socio-economic imperatives; core features are especially prone to allow for exceptions and adaptations that pave the way for new property constructs. The article argues that private property's wealth-enhancing, protective features continue*

to flourish for a minority group in South Africa; exceptions to core features remain exceptional because private property has not been adequately leveraged to act as a normatively acceptable restorative measure. A constitutionally driven notion of private property that responds to forms of vulnerability in order to shore up individual and communal resilience has therefore not progressed via constitutional avenues.

Keywords: private property law; property reform; property theory; land rights; land reform

1 INTRODUCTION

In many jurisdictions, private property has certain essential features which together form the foundation for a distinct area of law with unique characteristics.[1] This article begins by describing the essential features of private property as it operates in South African law and shows how and why it continues to function within a separate realm of the law.[2] The distinctive nature of property law is reflected in the essentialist work of Merrill & Smith, for whom property's core character is that it is a right *in rem* enforceable against the whole world (*erga omnes*).[3]

Noting this feature, the article investigates theoretical approaches that challenge the notion of inflexible property principles. Relying on Underkuffler and Alexander,[4] it describes private property as a state-created regulatory measure that responds to political and socio-economic imperatives; core features, such as *erga omnes*, are especially prone to allowing for exceptions and adaptations. Such variations pave the way for new property constructs as the institution reacts to societal claims. This is well noted against the backdrop of the self-assertion- and autonomy-enhancing role that private property plays for individuals and wider communities. The article draws on Waldron's justification of private property as a resource conducive to positive liberty in order to emphasise the importance of equitable redistributive practices, especially in grossly unequal societies where vulnerable groups operate outside of property's boundaries.[5]

Against this background, and noting property's institutional ability to adjust, protect and liberate, the article reflects on private property's place in post-apartheid South Africa. It argues that private property's wealth-enhancing, protective features continue to flourish for a minority group; exceptions to core features remain exceptional because private property has not been leveraged adequately to act as a normatively acceptable restorative measure. A constitutionally driven notion of private property that responds

[1] Muller G et al. *General principles of South African property law* 6th ed Durban: LexisNexis (2019) at 222.

[2] The scope of the article is restricted to the operation and use of private property rights – real rights – in the context of land.

[3] Merrill TW & Smith HE "What happened to property in law and economics" (2001) 111 *Yale Law Journal* 357.

[4] Underkuffler LS "The politics of property and need" (2010) 20 *Cornell Journal of Public Policy* 363; Alexander GS "Property as propriety" (1998) 77 *Nebraska Law Review* 667.

[5] Waldron J *The right to private property* Oxford: Oxford University Press (1988).

to forms of vulnerability so as to shore up individual and communal resilience has therefore not progressed via constitutional avenues; the result is that private property continues with the inequitable practices of the previous regime.

2 THE CHARACTER AND ESSENTIAL FEATURES OF PRIVATE PROPERTY

In the Roman-Germanic tradition, private "property" can have two meanings, namely (a) the right to a legal object, or (b) the object to which the right relates.[6] In modern civil-law jurisdictions, the focus is typically on the latter, with "property" in this sense including assets with monetary value or patrimony and often extending into other areas of law such as succession.[7] Property in Anglo-American property law is usually defined widely in relation to both the rights/expectations and the object/thing, with the latter including matters such as interests in land and intangibles.

Importantly, while the term "property" refers mostly to rights with regard to property (or rights to property), very little attention is paid to property understood as an object.[8] The Anglo-American notion of property as *rights with regard to property* is therefore similar, or at least comparable, to the Roman-Germanic conception of property, provided that the first meaning – the *right to a legal object* – is used. This article will make use of the concept of property as the right to a legal object because the object in question, land, is evidently a property object and one of the aims of the article is to consider property rights from an essentialist perspective, that is, to critically revisit the essential features of property rights and scrutinise their ability to adjust to change. The following paragraphs thus briefly describe the essential features of private property as it is understood in South Africa, before turning to the essentialist approach adopted by Merrill & Smith, one that foregrounds the importance of acknowledging such features.

In South Africa, private property law is generally considered, and taught, as being structured in accordance with six basic principles: *numerus clausus*; absoluteness; publicity; specificity; transferability; and abstraction.[9] Together, they form the foundation for the discourse not only in terms of how private property is understood, but also in terms of how it functions as a distinct area of law with unique features. This does not mean that the principles operate without exceptions. The first prominent

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[6] Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* 5th ed Durban: LexisNexis (2006) at 1 and 9.

[7] Du Bois F (ed) *Wille's principles of South African law* 9th ed Durban: Butterworths (2007) at 409. This is also the approach taken in Muller G et al. (2019) at 13; at 26, however, the authors restrict their focus to property law as "that section of the law that deals with the acquisition, nature, content, transfer and loss of real rights and the relationship to things".

[8] Van der Walt AJ *Constitutional property law* 3rd ed Cape Town: Juta (2011) at 114–115.

[9] Van der Merwe CG & De Waal MJ *The law of things and servitudes* Durban: Butterworths (1993) at 7; Van der Merwe CG *Sakereg* 2nd ed Durban: Butterworths (1989) at 9–16; Du Bois (2007) at 410. Property law textbooks generally also follow this trajectory: see specifically Muller G et al. (2019) at 222. See also Pope A et al. *The principles of the law of property in South Africa* 2nd ed Oxford: Oxford University Press (2020) at 48–63.

characteristic of property law is that of being a closed system (*numerus clausus*), which entails that a limited number of real rights are recognised[10] and mainly in order to promote legal certainty.[11] The *numerus clausus* principle is a response to the fragmentation of ownership under feudal systems and institutes the concept of ownership as a single unitary property right.[12] The principle also acts as a gatekeeper of property rights: a right must be accepted under the closed system (*numerus clausus*) to be recognised as a property right.

According to the absoluteness principle, a real right – a property right – provides absolute certainty to the holder of the right (a) that the holder's control of the object will be respected and protected, and (b) that the right will generally be given preference over third-party rights relating to the object. The holder of a real right is placed in an indisputable position *vis-à-vis* the object itself: the right is defendable and enforceable against the whole world (*erga omnes*).[13] The enforceability or strength of the right against third parties is one of the most important distinguishing features of property law (if not *the* most important), especially in comparison to contract law, as it binds non-contracting parties.[14] Real rights are considered to be more valuable than personal rights due to the strength of the holder's remedies.[15]

The absolute strength of property rights, especially against third parties, gives way to the third principle – publicity – which prescribes that the existence of real rights must be externally perceptible or publicly known.[16] The *erga omnes* effect of property rights provides legal certainty since it informs third parties of such rights, mainly to protect all stakeholders. Next, the principle of specificity concerns the fact that a real right can

[10] South Africa has an almost closed number of real rights; on exception a new real right may be created by the legislature or within an established common-law category. See Van der Merwe & De Waal (1993) at 39. See also *National Stadium South Africa (Pty) Ltd and Others v Firstrand Bank Ltd* 2011 2 SA 157 (SCA).

[11] Current categories of real rights in South Africa are ownership, servitudes, pledge, mortgage, perpetual quitrent, leasehold, and land lease. See Van der Merwe & De Waal (1993) at 48.

[12] Van der Walt AJ *The law of servitudes* Cape Town: Juta (2016) at 62. See also Van Erp S & Akkermans B *Cases, materials and text on property law* Oxford: Hart (2012) at 53–55.

[13] See Van der Merwe (1989) at 12.

[14] Contractual rights are personal rights as they bind only the contracting parties, that is, those who choose to enter the agreement. The parties' rights may however still relate to a property object. Contrarily, Muller et al. (2019) at 56–57 posit as follows: "The distinction between real and personal rights forms the basis for the division of the law of property into the law of things and the law of obligations." At 53, the following property rights are mentioned: real rights, personal rights, immaterial property rights, "real rights to other patrimonial rights", "statutory personal rights created in contracts" and "statutory rights against the state to certain resources or performance". The conceptualisation of property law, and *property rights*, in Muller et al. (2019) is therefore much broader than the approach adopted in most of the (older) property law literature. For the purposes of this article, property rights are interpreted narrowly to only include real rights.

[15] Exceptions take the form of regulatory interventions when the state offers property-like protection for holders of personal rights. In general, interference with personal rights usually results in compensatory relief.

[16] See Van der Merwe (1989) at 13; Van der Merwe & De Waal (1993) at 8.

exist only in relation to a specific object for the benefit of a specific legal subject.[17] As for the principle of transferability, it concerns the unrestricted transferability of real rights, noting exceptions such as personal servitudes.[18] Finally, the principle of abstraction disallows the invalidity of an underlying legal agreement (such as a contract) from affecting the validity or existence of a property transfer, provided that the real agreement was valid.[19] This gives preference to legal certainty (instead of fairness), which supports the principle of publicity.[20]

Importantly, these foundational principles concern a small, select, number of rights, classified as real rights; rights *in relation to property*, such as short-term leases, fall outside of the property rights realm. Together, the principles offer some depiction of how real rights operate, how and why they are established, and how they relate to other rights. Before we turn to consider selected notions of property and the ways in which some of the principles (or core features) allow for exceptions and adaptations, it must be noted that concerns about a gradual movement away from certain foundational principles are flagged in the essentialist work of Merrill & Smith.

The authors argue that the term "property" as it is used specifically by scholars in modern Anglo-American law and economics involves a simplified conception of a "bundle of rights" and that the distribution of rights and privileges among individuals with respect to things/objects is nowadays conceived as subsumed under this almost meaningless "property" label.[21] In their account, the authors refer instead to the civil law concept of property as a "distinctive type of right to a thing, good against the world" (noting the dominance of the *in rem* character of the right of property) in order to argue that this characterisation, as well as its consequences, is vital to understanding property as a legal and economic institution within Anglo-American law.[22] They argue, moreover, that the *erga omnes* principle of property has long endured across civil law and common law jurisdictions as a distinctive feature: "[it] cannot be dismissed as arid conceptualism or as a matter of attaching arbitrary labels to underlying phenomena that are really the same".[23]

Given that property rights attach to persons only through the intermediary of a property object/thing, Merrill & Smith describe such rights as having an "impersonality

[17] See Van der Merwe & De Waal (1993) at 8; Van der Merwe (1989) at 13. A property holder is generally also prohibited from transferring an unspecified collection of property objects.

[18] This principle is also referred to as the principle of transmissibility. See Van der Merwe & De Waal (1993) at 9. See also Van der Merwe (1989) at 16.

[19] Van der Merwe & De Waal (1993) at 9. It means that the intention of the parties to pass ownership is sufficient; reference to the underlying cause is not a requirement for the transfer to take effect.

[20] Van der Merwe & De Waal (1993) at 10; Du Bois (2007) at 412.

[21] Merrill & Smith (2001) at 360–366.

[22] Merrill & Smith (2001) at 359; Merrill TW & Smith HE "Optimal standardization in the law of property: The *numerus clausus* principle" (2000) 110 *Yale Law Journal* 1.

[23] Merrill TW & Smith HE "The property/contract interface" (2001) 101 *Columbia Law Review* 773 at 780.

and generality" which make them distinct from rights that attach to persons directly. A crucial consequence is third-party awareness: third parties are subject to negative duties of abstention regarding the object, and such "universal duties are broadcast from the thing itself".[24] This feature of property, along with the attendant security afforded by third-party abstention, allows the holder to develop the resource over extended periods of time while imposing burdens on almost all third parties that go beyond the need for non-contracting parties to fully understand the rights and duties of property-holders. For this reason, property must "come in standardized packages that the layperson can understand at low cost": the *numerus clausus* principle constitutes "a deep design principle" of property law which is often discounted due to the disappearance of the *in rem* aspect of property.[25] Merill & Smith argue that modern economic theorists regard the institution of property through the lens of *in personam* rights, stripping property of its distinctive nature.[26] They conclude that this development overlooks the fact that "the refined problems of concern in advanced economies exist at the apex of a pyramid, the base of which consists of the security of property rights".[27]

An essentialist approach[28] to property is concerned with the content, character and core features of the right to property, and seeks to offer a practical, functional account of what the right entails and how it differs from other areas of law. Similar to the way in which property rights are characterised in South African private law, Merrill & Smith refer to property in the sense of real rights – property rights – distinct from contractual rights that include *in personam* rights relating to property objects. Noting the importance of the *numerus clauses* principle, the authors depict the *in rem* character of property as its essential feature. The *erga omnes* principle elevates property rights to a level of third-party awareness and restraint; it places minimal information costs on third parties and enables property-holders to use and develop the property object with a sense of stability, certainty and security for lengthy periods, often across generations.[29] The duty to abstain, the right to exclude, and the absoluteness principle

[24] Merrill & Smith (2001) at 359.

[25] Merrill & Smith (2001) at 359.

[26] Merrill & Smith (2001) at 385.

[27] Merrill & Smith (2001) at 398. The authors refer to the need to secure property rights in developing countries as a means to promote economic development, citing the seminal work of De Soto H *The mystery of capital* New York: Basic Books (2000).

[28] Merrill, Smith and Penner are the principal proponents of the essentialist view of property. See also Dana DA & Shoked N "Property edges" (2019) 60 *Boston College Law Review* 753 at 765, and specifically *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others* 2015 (6) SA 125 (CC) at para 139.

[29] The ways in which property succeeds has major implications for wealth distribution. See, for instance, Friedman LM "The law of the living, the law of the dead: Property, succession, and society" (1966) *Wisconsin Law Review* 340; Kagotho N et al. "Inheriting the family farm: Generational wealth transfers in rural Kenya" (2021) 39 *Development Policy Review* 42.

are all descriptions of this *in rem* character of property, a character which has (for the most part) survived for centuries across jurisdictions.[30]

Yet despite its characteristic quality, the *erga omnes* principle is not an unwavering principle.[31] The following section considers theoretical approaches that emphasise the fluid nature of private property's essentialist features as they (the theoretical approaches) seek to respond to socio-economic and political objectives, whilst being mindful of property's role and place within democratic societies. The section also considers the way in which the concept of property may be restructured in this process of reform.

3 EXCEPTIONS AND CONCEPTIONS

3.1 Property's institutional role

In the context of lawbreaking, Underkuffler challenges the exclusion of something like human need from the usual property rules and principles such as economic productivity, certainty and security.[32] Arguably, toleration of breach of the usual property rules is driven not by the fact that the claimant might have a heightened desire for the property (mostly due to survival), but by the fact that society believes that the need to sustain life justifies the bending of property rules.[33]

Underkuffler's argument is premised on the notion that property rights, and the rules that sustain them, are substantive choices, ones enforced by collective power: the notion of "normatively neutral" societally recognised and enforced property rights is a fallacy. Property rights are, characteristically, "the state's enforcement of substantive criteria and substantive outcomes";[34] this applies in relation to both the entrenchment and the adjustment of property. Underkuffler notes that the core objection to including human need in the property equation is that it conflicts with the principle of stability, the rule of law, and respect for property. As a compromise, she cautions that even though the regime may be unjust or immoral, rather than uprooting it on the basis of

[30] This remains the case in South Africa, where property's essential features provide the doctrinal basis for the way in which property rights operate.

[31] This is where the work of progressive property scholars departs from essentialist views as offered by authors like Merrill, Smith and Penner. Progressive property scholars, such as Joe Singer, Gregory Alexander and Laura Underkuffler, argue that property should be understood as an idea and an institution, one which confers power and shapes the community (in legal and social terms). It should also be understood as serving plural and incommensurable values.

[32] Underkuffler (2010) at 368–369. South African examples of the ways in which human need is included in property challenges include *Modder East Squatters and Another v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 (SCA) ("*Modderklip"*) and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) ("*PE Municipality"*).

[33] Underkuffler (2010) at 368–369.

[34] Underkuffler (2010) at 370.

something like human need, a more nuanced approach may be recognised through exceptions to the usual guarantees of property and the fact that exceptions have long existed. In view of this truth, the objection to including need because it will undermine respect and stability seems improbable.[35] Therefore, on occasion, property rights should be compromised for the needs of others, "but that does not mean that we should flaunt the doing of it".[36]

For Underkuffler, protection against third-party claims is the central tenet of property as it holds psychological and practical importance for human beings, especially as a political restraint on government. This property-as-protection idea has survived because it is embedded in the "psychological needs and appropriative drives" of human beings, not because it is "an absolute right by human societies and governments".[37] Considering the idea that the nature of properties and the identity of their owners may affect the extent to which they should be protected,[38] Underkuffler concludes that law in general and property law in particular are products "created from the cauldron of politics and, most critically, implemented in the cauldron of politics".[39]

Property rules (she argues) are neither neutral nor norm-free and do not exist in equality-enforcing environments; instead, they are contingent, complex and norms-driven. Crucially, they respond to "the politics of power, security, stability, greed and a myriad … other aspects of human life".[40] However, a well-structured and enforceable system of rights and duties regarding material resources that are essential for human life is conducive to political stability and a state's ability to maintain democracy.[41] The political construction and regulatory character of property is well noted against the uncontested understanding that for the individual, knowledge of secure rights in material objects is an inherent part of everyday life and necessary for psychological well-being.[42]

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[35] Underkuffler (2010) at 371–372.

[36] Underkuffler (2010) at 372.

[37] Underkuffler (2010) at 373.

[38] See specifically Radin MJ "Property and personhood" (1982) 34 *Stanford Law Review* 957; Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745; Foster SR & Bonilla D "The social function of property: A comparative law perspective" (2011) 80 *Fordham Law Review* 101.

[39] Underkuffler (2010) at 375.

[40] Underkuffler (2010) at 376.

[41] Underkuffler (2010) at 363. See also Viljoen S "Resistance to reform property: A resilient property perspective" (2022) 38 *South African Journal on Human Rights* 24; Fox O'Mahony L & Roark ML *Squatting and the state: Resilient property in an age of crisis* Cambridge: Cambridge University Press (2022) at 216.

[42] See in general Durand-Lasserve A & Royston L "International trends and country contexts: From tenure regularization to tenure security" in Durand-Lasserve D & Royston L (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* London: Earthscan Publications (2002) 1; Alexander GS "Time and property in the American republican legal culture" (1991) 66 *New York University Law Review* 273; Wolford W et al. "Global land deals: What has been done, what has changed, and what's next?" (2024) *LDPI Working Paper 9* available at https://repository.uwc.ac.za/bitstream/handle/10566/9257/hall_global%20land%20deals_2024.pdf?sequence=1&isAllowed=y (accessed 6 September 2024).

This relates to a general justification for private property: Why is it important *in general* that human beings should have rights of this sort?[43] Waldron argues that most of the general justifications are closely connected with rights of freedom and liberty. Liberties associated with private property (such as making autonomous decisions about the use of resources, taking refuge in a private place, or alienating without constraint) are important for individuals and a means through which freedom can be exercised. Waldron provides several justifications for private property based on ideas of positive liberty: private property offers independence and security; it allows for self-assertion (individual purpose-driven investment in a resource prompts the individual to become aware of will and rationality); and it facilitates autonomy and freedom from coercion. [44] To be a free individual "requires some degree of material security, since without it one would never have the opportunity to exercise the reflection, restraint and control that constitutes an autonomous life".[45]

Still, the strength of the argument concerns the provision of *pressing material necessities*.[46] In reply to arguments that positive liberty can just as well be promoted in a system of collective or common property, or by way of possession rather than ownership, the general response is that for the development of personality to occur, private property is necessary for cultivating and sustaining the qualities that define individual status: "Through owning and controlling property, an individual can embody his will in external objects, thus transcending the subjectivity of his existence. Property is thus essential to human development, and poverty of great concern."[47]

The premise of Waldron's argument is that it is *morally wrong* for some individuals to have no private property at all,[48] especially in a society where private property is institutionally recognised and widely held by others. If the objective is to provide everyone with private property,[49] distribution and equality complexities emerge: Should each person have enough to ensure liberty, and must surplus resources be distributed to achieve such equality?[50] Inherent in any private property system is inequality, and the extent thereof, or way in which it is countered, depends on the economic system adopted by the state[51] in accordance with its political ethos.

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[43] Lewis C "The right to private property in a new political dispensation in South Africa" (1992) 8 *South African Journal on Human Rights* 389 at 415.

[44] Waldron (1988) at 300–318.

[45] Waldron (1988) at 306.

[46] Waldron (1988) at 307.

[47] Lewis (1992) at 417.

[48] Waldron (1988) at 329.

[49] This is of course not always the case, which is also pointed out in the South African framework.

[50] Lewis (1992) at 418. See also Munzer S *A theory of property* Cambridge: Cambridge University Press (1990) at 7 for a more pluralist theory of property.

[51] Lewis (1992) at 418.

Underkuffler and Waldron posit that within an established private property system, private property holds important psychological and practical value for individuals; it restrains third-party as well as political intrusions in order to foster positive liberty. Within a system that recognises the autonomy-enhancing, self-assertive elements of private property, some truths underscore the *actual operation* of the system, namely: (a) state-created systems are conditional and continually adjusting to political, economic and social claims; (b) exceptions (or flexibilities) within the system are often located at its core features; and (c) inequalities are bound to exist, as a system of private property cannot offer complete equality. Private property as an embedded societal institution is therefore politically molded in response to economic and social claims so as to obtain specific outcomes.

Before turning to the South African position, we consider the variable concept of property in the Anglo-American context to show how property's essentialist features can change in ways that extend beyond mere exceptionalism.

3.2 Beyond exceptionalism: Building new constructs

Alexander notes that in modern Anglo-American law, property is generally conceptualised as having one purpose: "to define in material terms the legal and political sphere within which individuals are free to satisfy their own preferences, free from governmental coercion or other forms of external interference."[52] Property separates the private from the public, the individual from the collective, and the market from polity. The preference-satisfying conception of property, as it is widely used in economic terms, is that it is a commodity (referring to the exchange aspect of property), a term which has become synonymous with property for many Americans. Alexander notes that this dominant conception of property in terms of transferability (or market alienation) is relatively new;[53] what preceded it was a propriety understanding of property: "the idea that property is the material foundation for creating and maintaining the proper social order, the private basis for the public good".[54]

Throughout American history, the meaning of the proper social order has shifted, resulting in diverse, even contradictory, versions of propriety as a conception of property. Yet these different versions share a commitment to the idea that the proper social order is not necessarily the market order, even though propriety can be, and often is, reconciled with the existence of the market. Proprietarian thought is, therefore, a

[52] Alexander (1998) at 667. Over the past 25 years, the idea has been revisited by progressive property scholarship to emphasise the regulatory and conflicting character of property law. This has been done by various influential works, most recently Singer JW & Davidson NM *Property* 6th ed New York: Aspen (2022). See specifically Alexander GS "Pluralism and property" (2011) 80 *Fordham Law Review* 1017. Yet, for the American voter, property (especially the home) retains significant personal and economic value: Cifci E et al. "Housing performance and the electorate" (2023) 45 *Journal of Real Estate Research* 462.

[53] See also the fluid conception of United States' property law as explained by Davidson NM "Sketches for a Hamiltonian vernacular as a social function of property" (2011) 80 *Fordham Law Review* 1053.

[54] Alexander (1998) at 668.

commitment "to a normative conception of the social good that is prior to the market".[55] This means that citizens (property-holders) may be legitimately compelled (in line with the regulatory framework, determined by the state) to bear private sacrifices for the sake of creating and maintaining a healthy social order.

For Alexander, "the sensibilities or ideals" that constitute such a social order are neither inherent nor evident; instead they are developed and become apparent in legislation.[56] A central theme that underlies this description is that private property rights derive from the state, that they are regularly adjusted by the state, and that the extent to which they grant personal security is inevitably contingent, as all property systems are regulatory in nature.[57] More importantly, then, Alexander asks: "[W]hich exercises of state power against property interests are legitimate and by what criteria is legitimacy determined[?]"[58]

Another crucial point concerning personal independence is the conception thereof from the civic perspective as "[security] against political-ethical loss, that is, loss of the self-respect that is the basis for proper citizenship and, ultimately, the proper social order" rather than as security against material loss, that is, loss of commodities as instruments for preference-satisfaction.[59] Alexander's work is important as it takes a step further than what is offered by Waldron and Underkoffler: property's essential features do not only allow for exceptions but can also be adjusted or even flouted, depending on the role property has, and the way it is understood, within the political order.

If property is conceptualised as upholding proprietarian guarantees that prioritise the establishment of a proper social order preceding the market, the collective well-being of all human beings and communities will inevitably outrank at least some existing property rights. If a cautious approach is taken by way of an ongoing process to develop a social order where *private property serves as the private basis for the public good*, this should pave the way for legitimate interference with existing rights without stripping the institution of property of its essential or essentialising features.[60] Cautiousness requires a full appraisal of the complexity of all relevant circumstances, including the nature and purpose of the property, specifically its autonomy-enhancing, self-assertive elements for the holder and its users; the identity of the holder and users; the extent

[55] Alexander (1998) at 669.

[56] Alexander (1998) at 702, drawing on Justice Brennan for the majority in *Penn Cent. Transp. Co. v New York City*, 438 U.S. 104 (1978) at 133.

[57] See specifically Singer J "The ownership society and taking of property: Castles, investments, and just obligations" (2006) 30 *Harvard Environmental Law Review* 309; Davidson (2011) at 1055–1056; Scoones I *Sustainable livelihoods and rural development: Agrarian change & peasant studies* Warwickshire: Practical Action Publishing (2021) at 40 and 47.

[58] Alexander (1998) at 698.

[59] Alexander (1998) at 698. The latter defines individual dependence from a classical liberal perspective.

[60] Some threshold is therefore required to ensure that regulatory interference is not too excessive or arbitrary. Alexander's civic idea of personal independence may be instructive in such a determination.

and type of the interference; the purpose of the interference; and the overall socio-economic and political project which is at work.[61]

In the absence of such an approach, the institution of property may be eradicated in its entirety,[62] which would undermine almost any redistributive mandate. Similar to the work of Underkuffler and Waldron's, Alexander's is insightful for societies that recognise and uphold private property as an institution that can contribute to individual and collective aims. However, he scrutinises the operation of a "healthy" socially constructed property system by pressing the fact that it must respond to human need, broadly and invariably.[63] This applies in relation to existing property-holders and non-rights-holders, and it applies in the regulatory (intervention) and distributive (allocation) context. A grossly biased and unequal private property system fails to serve this function (that is, responding to human need), which may lead to political instability and the state's inability to maintain democracy.[64]

Before turning to private property within the South African reform framework, some truths and obscurities should be noted. First, it is uncontested that in South Africa private property continues to function within a distinct realm of the law with unique features.[65] Property rights offer considerable socio-economic value for their holders because they are viewed as strong, secure rights that are enforceable and widely recognised by others, including the state.[66] The security and stability they offer contributes to the holder's autonomy and self-assertion as an individual able to make decisions, participate, engage and invest.[67]

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[61] See Viljoen S "Expropriation without compensation: Principled decision-making instead of arbitrariness in the land reform context (part 2)" 2020 *Tydskrif vir die Suid-Afrikaanse Reg* 259. See also Scoones (2021) at 38 and 46; Viljoen S "Wasting land amid landlessness: The expropriation (without compensation) response in South Africa" (2022) 7 *Journal of Law, Property and Society* 1.

[62] Freyfogle ET "Private ownership and human flourishing: An exploratory overview" (2013) 24 *Stellenbosch Law Review* 430 at 443. See also Richardson CJ "Learning from failure: Property rights, land reforms, and the hidden architecture of capitalism" (2006) 2 *American Enterprise Institute for Public Policy Research* 1 where it is argued that Zimbabwe's collapse was due to inapt land reform policies that dismissed property rights.

[63] Alexander (2011) at 1017; Alexander (2009); Alexander GS *Property and human flourishing* Oxford: Oxford University Press (2018).

[64] Underkuffler (2010) at 363; Fineman MA "Vulnerability and inevitable inequality" (2017) 4 *Oslo Law Review* 133.

[65] See property's essential features as described in section 2 above.

[66] See empirical evidence in Dugard J "Staircase or safety net? Examining the meaning and functioning of RDP house ownership among beneficiaries: A case study of Klapmuts, Stellenbosch" (2020) 24 *Law, Democracy & Development* 201 at 210–214; Lemanski C "Moving up the ladder or stuck on the bottom rung? Homeownership as a solution to poverty in urban South Africa" (2011) 35 *International Journal of Urban and Regional Research* 57 at 65–66.

[67] Private landownership comprises 82 per cent of South Africa's landholding (the total land surface amounts to 114,223,273 ha). See Department of Rural Development and Land *Reform Land audit report: Phase II: Private land ownership by race, gender and nationality* (2017) available at https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf (accessed 6 September 2024). Throughout South Africa, property trade takes place regularly. Properties

A second truth is that the *erga omnes* principle has shown quite some flexibility: on more than one occasion, and in more than one context, the state, via the judiciary and legislature, has limited the operation of this principle in response to others' needs.[68] Yet despite the regulatory framework's success in including human need as part of the property calculation, and in addition to ground-breaking judgments that have managed to place marginality at the centre of convoluted property conflicts,[69] a complex problem continues to brew, namely severely unequal landholding. South Africa is the most unequal country in the world[70] and has grossly unequal landownership,[71] notwithstanding that it boasts one of the most progressive constitutions in existence. Waldron would find this morally wrong as well as utterly bizarre.

In remaining sections, I attempt to answer – perhaps in a preliminary, incomplete way – the following questions in relation to landholding:

a) Why do so many poor and vulnerable South Africans continue to occupy land and dwellings without property rights, and is this a problem?

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with a low value (R250,000) have recently shown good growth (7.3 per cent) compared to higher-value properties. See Hesse M "Residential property prices in South Africa remain in the doldrums, with only the lowest-priced sector of the housing market showing above-inflation increases year-on-year" (8 March 2024) *IOL.co.za* available at https://www.iol.co.za/personal-finance/financial-planning/sa-house-prices-are-going-nowhere-20dc9d4e-92b6-4d03-88a0-469c020420ad (accessed 6 September 2024). See also Dugard (2020) at 210–214 in regard to the notion of homeownership for low-income groups. Lemanski (2011) at 70 shows that homeownership is often used by low-income groups to generate wealth via practices approximating landlordism.

[68] Placing restrictions on evictions is one example; notable legislation includes the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Groundbreaking cases in the eviction context include *Modderklip* and *PE Municipality*.

[69] Van der Walt AJ *Property in the margins* Oxford: Hart (2009) makes a compelling argument for such an approach.

[70] See The World Bank *Inequality in Southern Africa: An assessment of the Southern African Customs Union* Washington, DC: The World Bank (2022). Inequality is assessed with the use of household survey data on income and consumption. The report notes that high wealth inequality limits intergenerational economic mobility, which makes consumption inequality persist over time. The accumulation of wealth across generations is therefore central to combatting poverty in the future.

[71] See Department of Rural Development and Land Reform (2017), which indicates that 53 per cent of all land in South Africa is owned by white people. Pierella Paci, World Bank Practice Manager of the Poverty and Equity Global Practice for Eastern and Southern Africa, remarks that the World Bank report "shows that lack of access to key productive assets such as skills and land, is slowing progress towards a more equitable income distribution". See "New World Bank report assesses sources of inequality in five countries in Southern Africa" (9 March 2022) *World Bank Group* available at https://www.worldbank.org/en/news/press-release/2022/03/09/new-world-bank-report-assesses-sources-of-inequality-in-five-countries-in-southern-africa (accessed 6 September 2024).

b) Is South Africa's private property system alive and well in its response to people's vulnerability?[72]

c) How is modern private-law property conceptualised in South Africa?

The attempt to answer these questions begins with some history; with some direction-giving property, land reform and housing provisions foregrounded by the Constitution of the Republic of South Africa, 1996; and with some reflections on the shortcomings of property rights within the reform context.

4 PRIVATE PROPERTY RIGHTS: IN AND OUT OF THE CONSTITUTIONAL REALM

4.1 A brief history

In the last decade of the 20th century, there was vexed debate about the notion of the *right to private property* and whether it should have any place in South Africa's future constitution.[73] Initially, the weight of academic opinion was overwhelmingly in favour of a constitutional provision guaranteeing "the right to property".[74] Article 22 of the draft bill of rights included such a right: the right "to be or to become the owner of private property or to have a real right in private property or to acquire such a right or to be or to become entitled to any other right".[75] The bone of contention, however, concerned not "whether there should be rights to property at all, but the redistribution of existing wealth and means of production".[76]

Van der Walt argued that it would be a mistake to approach ownership in isolation when drafting a property clause, since a clause that aimed to protect ownership in isolation would serve only to give constitutional approval to the abstract perception thereof and preclude possibilities of allowing property law to develop and adjust to

[72] This question is informed by Martha Fineman's Vulnerability Theory, which draws on the fact that, as embodied beings, individual humans are dependent on, and embedded within, social relationships and institutions (property being one of them). Such dependency is a societal concern, with responsibility shared across social institutions. According to the theory, the equitable allocation of responsibility for individual and societal well-being has to be shared between the individual, the state, and its institutions. Social problems require some confrontation with, and response to, conditions of inherent inequality. Human vulnerability, in short, requires the creation of social institutions: "[s]ocial problems emerge when these social institutions and relationships are not functioning well". See Fineman (2017) at 142.

[73] See Lewis (1992) at 389.

[74] See Lewis (1992) at 389. See also Lewis (1992) at 390–391, citing Van der Walt AJ "Towards the development of post-apartheid land law: An explanatory survey" (1990) 23 *De Jure* 1 at 43 and Van der Walt AJ "Development that may change the institution of private ownership so as to meet the needs of a non-racial society in South Africa" (1990) 1 *Stellenbosch Law Review* 26 at 47. Van der Walt's objection to the inclusion of a right to property is that it would enshrine a "capitalist-liberalist concept of ownership" and stifle both the progressive development of ownership (in theory and practice) as well as efforts towards a new land law characterised by social justice.

[75] South African Law Commission *Project 58: Group and human rights: Interim report* (1991) at 365.

[76] See Lewis (1992) at 390. See Coggin T "There is no right to property: Clarifying the purpose of the property clause" (2021) 11 *Constitutional Court Review* 1 at 3–10 for a comprehensive discussion of how section 25 of the Final Constitution came into being.

societal change. Seeking to move away from landownership per se and emphasise the importance of acknowledging other (land) rights, he added that "land rights are not synonymous with or reducible to landownership".[77] In order to restructure land rights for a new social order, the ownership paradigm – in which ownership is assumed to be the most comprehensive, natural and desirable land right, one rendering all other land rights temporary, limited and less valuable – would have to be debunked. For Van der Walt, this did not mean ownership had to be abolished; instead, a wider range of land rights had to be developed alongside landownership. The problem was not so much ownership but its paradigmatic, hierarchical position in relation to "lesser" land rights. His argument was that, going forward, new land rights had to be developed on their own terms so to meet diverse needs and reflect such diversity.[78]

What emerged in the property clause of the Final Constitution was a compromise between redistributive imperatives and the protection of existing property rights:

> 25. Property
>
> 1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
>
> 2. Property may be expropriated only in terms of law of general application …
>
> 5. The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.
>
> 6. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
>
> 7. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

Subsections 25(1)–(4) protect extant property rights against arbitrary deprivation and illegitimate expropriation, whereas the remainder promote mostly land reforms, though also other reforms too. This is noted against the backdrop of the Constitution's foundational values: "Human dignity, the achievement of equality and the advancement of human rights and freedoms."[79] The land-reform provisions (subsections 25(5)–(9)) reflect the constitutional assembly's intention that land reform should form part of the property clause; in this regard, the obligations to redistribute land (section 25(5)),

[77] Van der Walt AJ "The fragmentation of land rights" (1992) 8 *South African Journal on Human Rights* 431 at 433.
[78] Van der Walt (1992) at 434–435.
[79] Section 1.

strengthen weak land tenure (section 25(6)), and offer restitution (section 25(7)) are clear indicators of what legitimate deprivation and expropriation entail.[80] The property clause thus justifies and demands wide-ranging, progressive regulatory measures that pave the way for land reform; it is foreseen that existing property rights will have to be reshaped accordingly.

A conceptualisation of this kind resonates with Alexander's propriety understanding of property, namely that property interferences are justifiable and necessary to serve social objectives. The South African criterion for legitimate interference is underpinned by restorative justice and elaborated on in the reform provisions (such as those relating to land and housing).[81] This is a far cry from any sort of positive property guarantee[82] along the lines of a right to private property.

Interestingly, the absence of a property guarantee is also evident in the land reform provisions. Except in the case of restitution, which is intended mainly to provide persons or communities with specific pieces of property of which they had been deprived, the redistribution (section 25(5)) and tenure reform (section 25(6)) imperatives are directed at providing *access to land* and *improved land tenure*.[83] Even though these priorities clearly relate to property – land is a property object – they neither serve as guarantees of property rights, nor place a duty on the state to uphold property rights.

4.2 Reflections on shortfalls

After having been at work for some 30 years, the South African land reform programme is generally regarded as unsuccessful: (a) only 8 per cent of commercial farmland has been redistributed and its production outcomes have been poor;[84] (b) redistribution has not enhanced individuals' well-being; (c) restitution has failed to enable sustainable, active and productive use of land;[85] and (d) tenure reform laws are directed mainly at protecting occupiers against eviction, with the result that tenure is embedded in a

[80] Coggin (2021) at 6.

[81] The housing clause provides as follows: "26. Housing 1. Everyone has the right to have access to adequate housing. 2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. 3. No one may be evicted from their home, or have their home demolished, without an order or court made after considering all the relevant circumstances."

[82] See generally Coggin (2021).

[83] The right of access to adequate housing does not guarantee specific types of rights.

[84] Cousins B "Land reform in South Africa is sinking: Can it be saved?" A paper commissioned by the Nelson Mandela Foundation (n.d.) at 8 available at https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf (accessed 6 September 2024).

[85] Lahiff E *Land reform in South Africa: A status report* Cape Town: Programme for Land and Agrarian Studies (2008); Sibanda N *The social obligation norm as the framework for land restitution in South Africa* (LLD thesis, University of the Western Cape 2017) at 36–60.

process of "entitlement" even while the content of tenure rights often remains elusive.[86] Overall, the restitution programme has had some success,[87] whereas redistribution and tenure reform are fraught with drawbacks. Thus, one of many questions that are raised by these two programmes, in addition to ones relating to the right of access to adequate housing in section 26 of the Constitution, is whether private property has been adequately relied as a restorative measure.

In the tenure reform programme, only one statute – the Upgrading of Land Tenure Rights Act 112 of 1991[88] – incorporates a private property right as a means to improve weak tenure. The Act applies in rural areas where deeds of grant and rights to leasehold and quitrent[89] were granted in townships by the apartheid government. In terms of the Act, these rights have been upgraded to ownership to be held under customary tenure for the community.[90] The remainder of the tenure reform laws offer new, statutory types of land rights;[91] these are diverse in nature and content and created to fulfil the needs of individual and community-based beneficiaries.[92] Noting the concern that many of the reform-inspired land rights require clarification (a task often placed at the door of the courts),[93] it is clear that they fall outside of the "common law system of rights",[94] specifically private property rights.

This amounts to a fragmentation of land rights, one signifying that context (as well as the requirements of occupation) determines the characteristics, content, protection and limits of a given land right – the right's assertive position in the common law system is neither important nor determinative of its standing or strength.[95] Van der Walt's vision thus came true: a spectrum of statutory land rights has arisen alongside landownership. However, in moving away from the landownership paradigm, the tenure reform discourse – noting the types of rights awarded to beneficiaries – may have stepped outside of the private property framework altogether. Much the same is true for

[86] Pienaar JM *Land reform* Cape Town: Juta (2014) at 436. See also Viljoen (2022) at 4–6 for some of the reasons that these programmes have failed.

[87] Sibanda (2017) at 36–60. See Pienaar (2014) at 644–654 for pertinent issues within the programme.

[88] The Act is being amended. See the Upgrading of Land Tenure Rights Amendment Act 6 of 2021.

[89] See specifically Schedule 1 of the Act.

[90] The appropriateness of landownership in communal areas, where communities live under customary law, is widely contested. See Cousins B & Claassens A "Communal land rights, democracy and traditional leaders in post-apartheid South Africa" in Saruchera M (ed) *Securing land and resource rights in Africa: Pan-African perspectives* Cape Town: Programme for Land and Agrarian Studies (2004) 139. See also the Communal Property Associations Act 28 of 1996 where rights in land can be established communally, thus resonating with customary practices.

[91] For an overview, see Muller G & Viljoen S *Property in housing* Cape Town: Juta (2021) at 119–125. For more detail, see Pienaar (2014) at 378–508.

[92] See Van der Walt (2011) at 316.

[93] Muller & Viljoen (2021) at 174–175. See also footnote 99 below.

[94] Van der Walt AJ "Dancing with codes: Protecting, developing and deconstructing property rights in a constitutional state" (2001) 118 *South African Law Journal* 258 at 288.

[95] Van der Walt (2001) at 288.

redistribution and the right of access to adequate housing: on various occasions the executive, legislature and courts have settled with (and sometimes even endorsed) informal tenure, or interim forms of protection, for marginalised groups.[96] Together, developments of this kind steer land and housing reform away from what is essentially, or characteristically, considered to be property law – that is, rights *in rem*. For this reason, the "property question" in land disputes automatically gravitates towards the legitimacy of placing limitations on property rights, namely the rights of the landowner.

As we celebrate milestone cases such as *PE Municipality* and *Modderklip* where the courts cautiously reconfigured the characteristic *erga omnes* principle of private property to assist persons in need, it may leave some with a sense of wanting more: to move beyond exceptions in distinct cases; to know what the right to remain entails;[97] and to fully understand the rights and obligations of land reform beneficiaries, as well as the tenets of statutory protection for them.[98] In the light of the fragmented land-rights approach, are we clear on the characteristics, content, protection and limits of statutory land rights, and are these enough for land reform beneficiaries[99] and their families?[100]

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[96] See Viljoen (2022) at 1–3; *Rakgase v Minister of Rural Development and Land Reform* 2020 (1) SA 605 (GP); Mhlanga L *To remain* (LLD thesis, University of the Free State 2022); Viljoen S & Strydom J "Tenure security and the reform of servitude law" in Muller G et al. (eds) *Transformative property law* Cape Town: Juta (2018) 96 at 98–102; *Modderklip*; *PE Municipality*.

[97] Mhlanga (2022) at 55–95.

[98] See, for example, Pienaar JM "The tale of two women" in Zenker O et al. (eds) *Beyond expropriation without compensation* Cambridge: Cambridge University Press (2024) 95 at 112.

[99] Pienaar (2014) at 436. What is suggested by cases like *Daniels v Scribante* 2017 ZACC 13 – where the Constitutional Court had to decide whether an ESTA occupier may maintain the dwelling that she and her family had occupied for many years and whether the landowner should consent to improvements being made (at the occupier's own cost) – is that the content and characteristics of statutory tenure rights are unclear. Other cases that point to instability in the tenure-reform context include *Chagi v Singisi Forest Products (Pty) Ltd* 2007 (5) SA 513 (SCA); *Oranje and Others v Rouxlandia Investments (Pty) Ltd* 2019 (3) SA 108 (SCA) (where the SCA held that the relocation of an ESTA occupier to a different house on the same farm is not an eviction order); *Klaase v Van der Merwe* 2016 (9) BCLR 1187 (CC) (eventually deciding on women's status as ESTA "occupiers"); *Grobler v Phillips and Others* [2021] ZASCA 100; *Nimble Investments (Pty) Ltd v Malan* (4) SA 554 (SCA). See Pienaar (2024) at 106, where she argues that "although a new eviction paradigm emerged, and although land reform legislation would essentially embody the property clause's transformative thrust, the legislation itself had limits, specifically regarding scope and application". The body of case law, and the matters being dealt with, suggest that it is not only the application but the content of the laws that requires clarification.

[100] For instance, it is unclear whether an ESTA occupier's occupation right will succeed to family members (such as spouses and dependants). See sections 8(5) and 9 of ESTA, read with section 8(1)–(4). See also *Ncholo Trust v Mphofu and Another* [2014] ZALCC at para 3; *Drumearn (Pty) Ltd and Others v CP and Others* [2020] ZALCC. Pienaar C "What to do after the death of a long-term occupier" (2021) 11 *Stockfarm* 1 suggests that a long-term occupier's occupation right will not succeed to spouses or dependants (dependants are given 12 months after the death of the ESTA occupier before the landowner may start with eviction proceedings). This suggests that dependants of ESTA occupiers who do not fall under section 8(4)–(5) will have no succession rights. If so, the application and effect of ESTA is inherently

In our efforts to steer clear of weighing these rights against the common law system of property rights because the latter is not important in determining the rights' standing and strength, some may still be curious to ask essentialist property-type questions about the features, characteristics and ability of such rights to enable, empower and emancipate formerly oppressed and dispossessed people to live dignified, self-assertive lives.[101] These questions arise amidst acute awareness that private property continues to flourish for a minority group just as it did under the previous regime.

5 AN ATTEMPT TO ANSWER REMAINING QUESTIONS

Private property, and landownership in particular, has a bad reputation in South Africa because it is associated with drawing segregationist, race-based boundaries between the haves and have-nots.[102] Not too long ago, it empowered landowners, with the helping hand of the state, to enforce property's essential features in the service of political aims – that is, to persecute and suppress black people.

So, without much doubt in mind about retaining private property as an institution with a place in the new order, the post-apartheid state focused on the need to change property's essential features, specifically that of absoluteness;[103] the need to urgently, progressively and innovatively distribute private property rights as a corrective and emancipatory measure was inconsequential. Private property, in other words, remains out of reach because it is not a constitutional priority: it has not adequately filtered into executive policies, legislative frameworks and judicial reasoning as a normatively appropriate restorative mechanism. Even though property rights have been distributed via certain policies, programmes and laws, they have never featured at the centre of redistributive efforts; in their place, a fragmented land rights framework came into being.

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restricted to one, mostly two, generations. From the perspective of intergenerational wealth-enhancement, ESTA adds very little to curb increasing inequality because there is no asset transfer.

[101] A full weighing-up exercise is not possible here, but selected laws and case law, some of them referred to in this article, suggest that the regulatory framework has created a range of rights in relation to land that are characteristically somewhere between a right *in personam* and a right *in rem*. In the reform context, a land right often attaches to a specific beneficiary who can enforce the right against all others, but if the right cannot succeed, it is usually also not transferable. Modderklip occupiers can also enforce their right to remain against all others, but the ability to transfer the right is unclear. It is doubtful whether sentiments – such as privacy/autonomy, security, legacy and authority (Dugard (2020) at 211) – that attach to something like homeownership for low-income occupiers will be found in Modderklip township or any other informal settlement where vulnerable people are allowed to remain.

[102] Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 11 *South African Journal on Human Rights* 169 at 186; Muller & Viljoen (2021) at 8–10.

[103] See, for example, *Molusi v Voges NO and Others* 2016 (3) SA 370 (CC) at para 39. See also Dhilwayo P & Van der Walt AJ "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* at 34 and works cited there.

To say this was a step in the wrong direction is unfounded. Progress has been made, and various measures have paved the way for improved livelihoods. Yet the limited success of the land reform programme, the protracted inability of homeless persons to gain access to adequate housing,[104] the extent to which vulnerable groups continue to live with insecurity,[105] and the level of inequality in South Africa call for reflection on previous decisions.

The suggestion in this article is that private property's place in South Africa should be carefully revisited to debunk its legacy as a segregationist tool and purposively use it whenever prudent to serve constitutional aims. Private property has to be brought into the constitutional realm to fulfil its institutional role of responding to vulnerability in its many forms and shoring up individual and communal resilience.[106] Only by way of such a process can private property be reconceptualised in order to fulfil constitutional aims, specifically by being used to serve the foundational values of human dignity, equality, and human rights and freedoms.

Given South Africa's diversity and plurality of needs, customs and beliefs, it would be ignorant to suggest that private property rights are appropriate in all contexts for everyone. A spectrum of land rights that include rights under customary law, statutory land rights, common law property rights and other common law rights is not the problem. Instead, problems arise when (a) property as an institution falls by the wayside as a viable wealth-enhancing redistributive and corrective measure in situations where it is not only contextually appropriate but also preferable;[107] (b) a fragmented land-rights approach leads to dual property-rights systems where vulnerable groups acquire land rights that are characteristically inferior to private-property rights; and/or (c) private property has been identified as an appropriate restorative measure but actual delivery is constrained by protracted, overly complex bureaucratic processes.[108]

In all of these cases, the institution fails to respond to vulnerability and therefore also fails to shore up resilience; it continues the work of the apartheid regime – to divide, exclude, suppress and control. Even though aspects of these three scenarios are arguably playing out in South Africa, the first scenario is a particularly critical impediment because the notion of private property remains unchanged.

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[104] Thwala WD, Aigbavboa CO & Ramovha NT "Housing delivery: Making sense of the demand for state-subsidised housing in South Africa" Proceedings of the International Conference on Industrial Engineering and Operations Management. Washington DC, 27-29 September 2018, available at https://ieomsociety.org/dc2018/papers/326.pdf (accessed 6 September 2024).

[105] Viljoen & Strydom (2018) at 98–114.

[106] See Fineman (2017); Fox & Roark (2022) at 216. See also Viljoen & Strydom (2018) for one of the many ways in which limited real rights can offer strengthened tenure protection.

[107] See, for example, *Rakgase;* Dugard (2020) at 201.

[108] See, for example, *Rakgase* and *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45. See also Fox & Roark (2022) at 216 where they explain the self-interest of the state and how it can work against transformative aims.

This brings into focus the concept of private property in modern South Africa.[109] For some, private property is about transferability as it is widely used by affluent investors and developers to make profits.[110] For many, private property is the gateway to a sphere of freedom where the individual can satisfy preferences and live an autonomous life, free from interference.[111] This notion gained traction as part of the liberation party's vow to emancipate previously dispossessed groups and give the land back to them.[112] Failure to deliver gives rise to divergent notions of private property: for those who have private property it offers wealth, security, opportunity and liberty; for those who do not, it continues to promise all of these things as it remains out of reach. In this way, private property operates as a segregationist tool that entrenches inequality.[113] Consequently, a post-apartheid concept of private property – perhaps one where private property serves as the private basis for the public good – has not transpired.

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[109] Pienaar (2024) at 112–113 mentions that "by focusing on the balancing of rights, the concept of property and what it entails within a transformative framework … has largely fallen by the wayside".

[110] See, for example, "Growthpoint Properties Ltd" (n.d.) *Financial Times* available at https://markets.ft.com/data/equities/tearsheet/profile?s=GRT:JNB (accessed 6 September 2024).

[111] See Dugard (2020) at 210–214; Freyfogle (2013) at 435–437; Lemanski (2011) at 70. Arguably, this notion is shared by millions of householders who have the benefit of title regardless of income.

[112] See Oldfield S & Greyling S "Waiting for the state: A politics of housing in South Africa" (2015) 47 *Environment and Planning* 1100; Alexander A *Land, law and the politics of redistribution in South Africa* (PhD thesis, Columbia University 2016); Levin R & Weiner D "The politics of land reform in South Africa after apartheid: Perspectives, problems, prospects" (1996) 23 *Journal of Peasant Studies* 93.

[113] See, for example, Freyfogle (2013) at 436.

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