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The trans-temporality of land ownership in South Africa

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1 Introduction

The aim of this contribution is to attempt to understand the intricate role that time plays in holding inequality in its passing, the endurance of inequality, but also in addressing inequality through its passing through mechanisms grounded in law. We look at how this is illustrated and challenged by narratives in interviews conducted in the suburbs of Bloemfontein. The purpose, therefore, is to explore the concept of ownership in relationship to the developments that have been taking place in the suburbs. The idea of trans-temporality refers to the evolving nature of land ownership and its implications across different time periods, particularly in the context of South Africa's colonial and apartheid history, and the ongoing struggles for equitable land access. It is crucial to keep in mind that the Native Land Act of 1913 and subsequent legislation institutionalised racial disparities in land ownership, resulting in an unfair distribution that persists today. Continuing inequality in access to adequate housing and the enduring historical injustices in who has the right to the city, need not only be addressed through schemes of ownership. There are other forms of secure tenure that could potentially address this, but housing delivery in Mangaung, in particular, and the

* Thank you to Danie Brand who, during the December 2021 workshop, responded to our chapter and outlined for us these 'actual' legal consequences brought about by the passage of time. For the origin of our idea of a mystical foundation, see J' Derrida 'Force of law: The mystical foundation of authority' in D Cornell, M Rosenfeld & DG Carlson *Deconstruction and the possibility of justice* (1992) 3. With reference to Montaigne: 'And so laws keep up their good standing, not because they are just, but because they are laws: that is the mystical foundation of their authority, they have no other ... Anyone who obeys them because they are just is not obeying them the way he ought to.'

Free State, in general, has been dominated by project subsidies linked to ownership.¹ Social housing projects, such as the Brandwag Social Housing Project across from the University of the Free State, are other options in providing secure housing in close proximity to the city. These social housing projects are designed to provide secure tenure, but not necessarily ownership. In fact, the insistence on ownership or title deeds in social housing schemes can be a threat to the housing scheme. While this is a crucial tension, and a tension that relates to the issue of the passage of time, that is not the focus of our contribution. We base our chapter on a series of interviews conducted in the Cape Stands in Bloemfontein. A large number of residents claim ownership of the piece of land on which they live. This insistence on ownership above secure tenure, is also a remnant of our colonial and apartheid past. The questions in the interviews were posed in a way that started with ownership and then moved to security of tenure. Despite the fact that the questions did not refer to a title deed, but just asked about documents, many of the respondents talked about title deeds. Ownership is often grounded on a titled deed, that is, the legal document granting rights to the land. However, from the interviews in the area, it appears that ownership of land is also claimed on grounds other than a title deed. Inheritance from parents and relatives but, more importantly, the duration of the possession has been put forward as evidence of ownership in several interviews.

In other words, residents who do not have a title deed claim ownership of the land in their possession on the ground that their rights on such land were transferred to them by parents and other family members who themselves were not in possession of a title deed but had nonetheless settled and remained in the area for a considerable amount of time. One of the main issues at play is whether the concept of ownership or property should be conceived in terms of entitlements or in terms of 'things':²

In everyday conversation we usually speak of 'property' rather than 'property rights' but the contraction is misleading if it tends to make us think of property as things rather than as rights, or of ownership as outright rather than as

1 L Marais, O Crofton & A Venter 'Potential demand for social housing in the Mangaung Local Municipality. CDS Research Report, Housing and Urban Settlement' (Bloemfontein: University of the Free State 2003) 1.

2 JH Dales *Pollution property and prices: An essay in policy-making and economics* (2002) 58.

circumscribed. The concepts of property and ownership are created by, defined by, and therefore limited by, a society's system of law. When you own a car, you own a set of legally defined rights to use the vehicle in certain ways and not in others ... [for] the only things that are owned are property rights[.]

Property and ownership usually fall under property rights and property law. However, it is worth noting that ownership and property are not synonyms to be used interchangeably. The essence of property is rights in respect of things, which would include secure tenure. As a result, ownership of property must be concerned with ownership of rights in respect of things. Then referring to the owner of a thing, for instance, would be meaningless unless one means by that the owner of rights in the thing.³ The South African legal system is strongly influenced by Roman-Dutch law, a system in which ownership prevails over the whole of property law. This means that in a sense, all other property interests are defined with reference to the ways in which they derive from, yield to and fall short of ownership, thereby establishing a conceptual, institutional and rhetorical hierarchy of property interests.⁴ Ownership is not merely concerned with things, but it is also about regulating the relationship between people and between people and things. Ownership can then be perceived as a bridge that connects humans and things, that is, the living and the inanimate, in line with Hegel's conception according to which private ownership is an assertion of personality whereby the person 'has as his substantive end the right of putting his will into any and every thing and thereby making it his'.⁵

The central focus of this contribution is the role that time plays in property and ownership. The passage of time has real legal consequences in some circumstances. Such is the case with acquisitive prescription, the acknowledgment of the duration of occupation in eviction legislation and jurisprudence, and the common law doctrine of *vetustas*. In part one we cover these three aspects in law. In part two, drawing on the narratives from the Cape Stands, we argue that the concept of trans-temporality is important to understand the manner in which time is connected to space in Mangaung. From the interviews, it is clear that time plays a role and is frequently invoked by the inhabitants, but none of them refers to any

3 A Clarke & P Kohler *Property law commentary and materials* (2005) 184.

4 AJ van der Walt *Property in the margins* (2009) 29.

5 GWF Hegel *Hegel's philosophy of right* trans SW Dyde (1896) s44.

of the legal doctrines that we cover in this contribution. The inhabitants invoke time not in asserting title against others, in other words, they are not under threat of being evicted, neither are they looking for formal title deeds, nor are they trying to assert their right over another; they capture something about their belonging that is connected to time. This is our primary interest in this chapter.

2 The mystical foundations of law and legal consequences of time

In this part we set out the notion of trans-temporality and its application in Mangaung. This means that, as much as we argue for space to be connected to time and for law to be connected to space time, we also draw attention to how law and legal processes transcends time and moves, as it were, outside of time. We are wary not to make the simplistic distinction that title deeds are temporal and the acquisition of rights to occupy property other than through title deeds are trans-temporal. To the contrary, we support the claims made by Keenan that title deeds in themselves are time-travelling machines and, therefore, trans-temporal.

Time, seen in this way, is a mystical foundation of law. We have in mind the idea of title as time travel put forward by Keenan.⁶ Drawing on the work of Valverde,⁷ Keenan argues that the estate illustrates a legal conceptualisation of time ‘thickening’ and ‘taking on flesh’.⁸ Valverde connects the *chronos* and *topos* of law by using Bakhtin’s notion of the chronotope. Keenan shows that the estate ‘becomes spatialised in distinct ways, and responsive to events that occur upon the land’s other three dimensions (ie its width, length and depth), with time as its fourth dimension. The estate is a temporal concept with legal flesh, its responsiveness to possession tying title to land.’⁹ When subjects own an ‘estate’, they own a ‘slice of time’ in the land.¹⁰ Relying on Pottage,¹¹

6 S Keenan ‘Smoke, curtains and mirrors: The production of race through time and title registration’ (2017) 28 *Law and Critique* 27.

7 M Valverde *Chronotopes of law: Jurisdiction, scale, and governance* (2015) 10.

8 S Keenan ‘Making land liquid: On time and title registration’ in S Beynon-Jones & E Grabham *Law and time* (2019) 2.

9 Keenan (n 9) 4.

10 KJ Gray & SF Gray *Elements of land law* (2009) 58.

11 A Pottage ‘Evidencing ownership’ in S Bright & J Dewar (eds) *Land law: Themes and perspectives* (1998) 131.

Keenan emphasises that title is not something that is owned, but instead a status indicator.¹²

By critically analysing the effects that registration systems have on the temporality of land title, Keenan argues that whereas title deed systems were oriented toward the past, title registration systems are oriented toward the future.¹³ Deed systems operate on the basis that the title to be transferred already exists, registration systems operate on the basis that title is produced anew upon every conveyance. Title registration systems facilitate the coordination of an increasingly complex and rapid trade in title which has minimal connection to the daily routines and interests of those who live and/or physically work on the land.¹⁴ Examining title registration systems in four different contexts, she argues that there is a disjuncture between the temporality of registered titles and the temporality of the land to which those titles pertain: registered title and land are out of sync. The push for a title registration system was associated with wider land reform and political enfranchisement, and the landed elite was generally opposed to the introduction of title registration.¹⁵ This loss of title by adverse possession occurs only rarely, but demonstrates the separability of title and estate in this system – the ‘slice of time’ in the land exists as a legal form independent of its owner.¹⁶ This does not mean that only title deeds and estates are connected to time. Keenan argues that registered land captures time as well, since the spatial and temporal dimensions (the duration of title) are recorded in the registry.¹⁷ In British settler colonies where land was classified as *terra nullius* (belonging to nobody) through law, the land registration system could be created based on a blank slate where titles could be manufactured.¹⁸ Keenan’s example is the Torrens system of South Australia, also a former British settler colony. South Africa’s colonial history had the effect that property law has been influenced by both Roman-Dutch and, albeit to a lesser degree, English common law. Keenan’s distinction between land registration systems and title deed systems and the way in which they

12 Keenan (n 9).

13 As above.

14 As above.

15 S Anderson ‘The 1925 property legislation: Setting contexts’ in Bright & Dewar (n 12) 109.

16 Keenan (n 9) 7.

17 Keenan (n 9) 6-7.

18 Keenan (n 9) 7.

relate differently to time, can be traced back to the distinction between English property law and Roman-Dutch property law. She also presents a very compelling critique against the call for the formalisation of land title as the answer to poverty in the Global South.¹⁹ While this is a valuable line of argument, and one that could possibly speak to the tension in social housing projects between secure tenure and formalisation of title, for purposes of this contribution, we are interested in how title and ownership relate to time. In the next parts we turn to the impact of time on title in South African law.

3 Acquisitive prescription

According to section 2(1) of the 1943 Prescription Act, acquisitive prescription (prescription) is the acquisition of ownership through the possession of another person's movable or immovable property, or the use of a servitude in respect of immovable property, continuously for 30 years *nec vi, nec clam, nec precario*. The meaning of this expression emerged from the development of case law and can be broken down as follows: *nec vi*, meaning 'without force'; *nec clam* that means 'openly'; and *nec precario*, meaning 'without the owner's consent'.²⁰ It is crucial to keep in mind that prescription run against natural persons as well as public corporations, municipal councils and the state.²¹ In this context, the person in possession of the land acquires ownership of the property or servitude concerned once the 30-year prescription period expires.²² This is in line with the 1969 Prescription Act that prescribes that a person acquires ownership over a property that has been possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years. If we apply this to the situation in the Mangaung municipality, those claiming land ownership without a title deed have a case in point. In addition, the control exercised on the piece of land is not a once-off occurrence but has been the result of transfer from relative to relative. This practice known as *successio in possessionem* or *accessio possessionis*,

19 Keenan (n 9) 9.

20 EJ Marais 'Acquisitive prescription in view of the property clause' Master's dissertation, Stellenbosch University, 2011 37.

21 CG Hall *Maasdorp's institutes of South African law volume II – The law of property* (1976) 80.

22 Sec 2(2) Prescription Act 18 of 1943.

implies that possession – for the purposes of prescription – need not have been held by one person only.²³ This practice logically paves the way for the accumulation of periods of possession by members of the same family to meet the 30-year requirement. One of the key requirements of *successio in possessionem* or *accessio possessionis* is that there must exist a derivative link between the predecessor and successor in title, and the circumstances of either succession or contract are applicable.²⁴ Another key requirement is that each possessor in the chain of legal predecessors and successors should have had the correct mental attitude regarding the possession of the property. If one of the legal predecessors or successors did not satisfy all the requirements for prescription, the running of prescription would be interrupted.²⁵ As a matter of fact, whether one relies on the 1969 Prescription Act or that of 1943, the following requirements clearly transpire:²⁶

- (i) possession (or use, in the case of acquiring limited real rights);
- (ii) openness;
- (iii) possession as if owner;
- (iv) continuous possession for 30 years.

It is necessary to break these requirements down to understand how acquisitive prescription works in the context of South Africa. Section 1 of the Prescription Act of 1969 reads as follows:

Subject to the provisions of this Chapter and of Chapter IV, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of 30 years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of 30 years.

In terms of the requirement of possession, the possessor should possess ‘openly and as if he were the owner’. The ‘as if owner’ requirement amounts to the *animus domini* element of *possessio civilis*. South African judges regularly observed that the required form of possession is the one referred to as *possessio civilis* or civil possession, also known as full juristic

23 Marais (n 21) 37.

24 CG van der Merwe & A Pope A ‘Property’ in F du Bois (ed) *Wille’s principles of South African law* (2007) 514; DL Carey Miller & A Pope *Land title in South Africa* (2000) 178.

25 S Robertson ‘The difficulty of proving the essentials of acquisitive prescription: *Minnaar v Rautenbach* 1999 1 All SA 571 (NC)’ (2000) 63 *Journal of Contemporary Roman-Dutch Law* 63.

26 Marais (n 21) 40.

possession.²⁷ This consists of two elements, namely, the *animus domini* (mental) and *corpus* (physical) elements.²⁸ The former implies that the person exercising possession must do so with the intention of an owner, or as if he were the owner of such property. This entails that the required animus is presumed to exist in situations where the possessor mistakenly believes that he is the owner (*bona fide*). This also applies in cases where the possessor is aware (*mala fide*) that he is not the rightful owner. In this sense it has been decided that even in cases where the plaintiff, or his predecessors in title, realise that they are in fact not owners of the property, this will not negate the 'adverse user' of the property.²⁹ In the latter, that is, the *corpus* requirement, it is imperative to pay close attention to whether the action of the person exercising possession meet such requirement, and can be judged objectively with specific regard to the circumstances.³⁰ An example of such conduct is when the possessor makes permanent improvements to the claimed property, such as by building on land or fencing it.³¹ More importantly, it is worth nothing that it is not required that every part or area of the property be occupied or used to constitute *corpus*. In the same vein, total and exclusive physical possession is also not a requirement. The person exercising possession only needs to use the property to a certain degree to meet the *corpus* requirement. In *Joles Eiendom (Pty) Ltd v Kruger and Another* the Court held, in paragraph 29, that the mere fact that the owner and/or his employees had occasional access to the property concerned did not, in itself, detract from the possessor's effective control of it, nor did it serve to interrupt prescription. Overall, when it comes to the concept of *possessio civilis* or civil possession to be valid, the key requirement is that the *animus domini* (mental) and *corpus* (physical) elements must be united for possession to be full juristic possession.

This legal process, however, is not uncontested. The notion of prescription is challenged in African law. According to Ramose,³² extinctive prescription is unknown in African law and inconsistent

27 As above.

28 Carey Miller & Pope (n 25) 160-161.

29 Marais (n 21) 42.

30 Carey Miller & Pope (n 25) 161.

31 Marais (n 21) 45.

32 MB Ramose 'Title to territory: its constitutional implications for contemporary South Africa and Zimbabwe' *Southern Journal for Contemporary History* (2001) 101-124

with the indigenous belief that time cannot change the truth. Quoting M'Baye,³³ Ramose writes:³⁴

Prescription is unknown in African law. The African believes that time cannot change the truth. Just as the truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery. It is for this reason that judicial decisions are not authoritative. They must be able to be called into question. So it is that even at the juridical level there is a conceptual clash. This would certainly exacerbate the tension created by the exclusion of a matter of fundamental justice.

The critique, therefore, is clearly applicable to extinctive prescription, but it is not clear what the position with regard to acquisitive prescription would be. The question is whether the inhabitants invoke the passage of time because they are aware of the legal process of acquisitive prescription, or whether these narratives show that time can indeed 'change the truth'.

4 Eviction legislation

4.1 Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

Less clear as in the Extension of Security of Tenure Act (ESTA), but established through the rich body of ever-developing jurisprudence of South African courts on evictions, is the provision for the passage of time to be a consideration in eviction proceedings under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).

The PIE Act stipulates in section 4(9): 'In determining a just and equitable date contemplated in sub-section (8), the court must have

33 K M'Baye 'The African conception of law' *International Encyclopedia of Comparative Law Vol II* (1974) 147. M'Baye's understanding of African law with regard to prescription is a confirmation of a similar understanding 40 years earlier. It was expressed in these terms: 'A debt or a feud is never extinguished till the equilibrium has been restored, even if several generations elapse ... to the African there is nothing so incomprehensible or unjust in our system of law as the Statute of Limitations, and they always resent a refusal on our part to arbitrate in a suit on the grounds that it is too old', JH Driberg 'The African conception of law' (1934) 16 *Journal of Comparative Legislation and International Law* 238.

34 Ramose (n 32) 112.

regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land question.’

4.2 Extension of Security of Tenure Act

ESTA is more explicit in making provision for legal consequences to flow from the passage of time. The following provisions are key: Section 3 deals with consent to occupy land and determines that consent to a person who qualifies as an occupier in terms of the act, can only be terminated under the conditions described in section 8 of the Act. This consent is presumed in certain cases, determined by the passage of time (with the exception of land held by the state or by institutions exercising powers on behalf of the state – see section 3(6)). In this regard, sections 3(4) and (5) provide as follows:

- (4) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land *for a period of one year* shall be presumed to have consent unless the contrary is proved.
- (5) For the purposes of civil proceedings in terms of this Act, a person who has continuously and openly resided on land *for a period of three years* shall be deemed to have done so with the knowledge of the owner or person in charge.

Persons who became occupiers in terms of ETSA after 4 February 1997 can only be evicted under the circumstances set out in section 11 of the Act. Importantly, this section determines that such an order can only be granted if it is just and equitable to do so.

- (1) If it was an express, material and fair term of the consent granted to an occupier to reside on the land in question, that the consent would terminate upon a fixed or determinable date, a court may on termination of such consent by effluxion of time grant an order for eviction of any person who became an occupier of the land in question after 4 February 1997, if it is just and equitable to do so.
- (2) In circumstances other than those contemplated in subsection (1), a court may grant an order for eviction in respect of any person who became an occupier after 4 February 1997 if it is of the opinion that it is just and equitable to do so.

The decision of whether an order for eviction would be ‘just and equitable’ should be made with reference to the factors set out in section 11(3)(a), which includes, first, the period that the occupier has resided on the land in question. Time also plays a role in the provisions regarding eviction, contained in section 12 of ESTA. This section regulates the

determination of a just and equitable date on which the occupiers should vacate the land in question. Again, the question of what a just and equitable date would be is determined with reference to all relevant factors, which includes 'the period that the occupier has resided on the land in question' (section 12(2)(c)).

5 *Vetustas*

In *Grootkraal*³⁵ the community's use of a piece of land, for a school, among other things, was labelled 'immemorial usage'.

The Court remarked: 'The inevitable conclusion from the history canvassed is that the circumstances in which the church community at Grootkraal came into being, and obtained the use of the property for the church and church related purposes, *are lost in the mists of time*.'

Vetustas is a common law mechanism that basically entails that if one has occupied land since time immemorial, one can continue to do so and have a legal right to continue to do so despite the absence of any other legal ground on which one occupies the land. Another common law mechanism in the context of evictions, which concerns the explicit existence of an agreement that one may occupy land, is that of *estoppel*.³⁶ *Estoppel* entails that representations and misrepresentations will be treated as the truth between the parties. This results in somewhat of a fiction, since the misrepresentation of the representor is upheld as the truth. *Estoppel* becomes relevant in landlord-tenant law when a tenant claims that they had permission or obtained consent to occupy premises that are rented. Prior to the Constitution, *estoppel* was raised successfully in some cases in order to prevent ejection in terms of the *rei vindicatio*, the owner's action. The classic case concerning *estoppel* and ejection from rental property is *Garlick Ltd v Phillips*. In terms of the doctrine of *vetustas*, communities may secure formal legal rights to use and occupy land that they do not own. What we have in *Grootkraal* is occupation that commenced so long ago that no one remembers its origins, because it happened so long ago – truly a mystical foundation for real consequences in law. What happens on the Mangaung stands, as

35 *Community of Grootkraal v Kobot Business Trust* 2019 (2) SA 128 (SCA) para 47.

36 E du Plessis 'Can estoppel be raised against an eviction in terms of PIE?' (2015) 30 *Southern African Public Law* 434.

described above, is also echoed in this case. A cycle of life unfolds on the property. In many instances, time accounts for the inequalities.

6 Trans-temporality in Mangaung: Ownership as an intersecting feature between the living and the inanimate

If ownership seems to first refer to a thing, it is also about the regulations of the relationships between people and such a thing in terms of rights and liabilities. Ownership is concerned with two sets of relations, the first one being about the owner's relationship with other people (whether they be non-interest holders or subsidiary interest holders in the thing owned) whereas the second one emphasises the owner's relationship to the thing itself.³⁷ It is deemed the ultimate property interest and the means by which other people with primary (but not necessarily exclusive) control of a thing are notified. In this way, non-owners cannot really challenge or withstand the right of ownership; only the owner herself can do that in the sense that she can grant derived rights to others that she must then honour as long and as far as they are valid.³⁸ This is a clear reference to the absoluteness of the personal sovereignty aspect of ownership, that is, *dominium* conceived by the Roman-Dutch civil law tradition as follows:³⁹

Describing ownership as 'absolute' in the sense of the fullest, most complete and most valuable property right indicates that it grants the owner the most comprehensive collection of entitlements possible, including the right of exclusive possession. In this perspective, ownership is described as hierarchically superior to limited real rights and personal rights in property in the sense that only ownership includes all the entitlements of ownership, including residuary, whereas limited real rights or personal rights only grant a limited entitlement to use someone else's property temporarily and partially.

In other words, the idea of 'ownership' amounts to a particular type of property interest in which the holder of right, that is, the owner is vested with the power to exercise *dominium* over a thing. It is within this framework that Blackstone defines ownership as 'that sole and despotic dominium which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in

37 A Clarke & P Kohler *Property law commentary and materials* (2005) 180.

38 Van der Walt (n 5) 33.

39 Van der Walt (n 5) 32.

the universe'.⁴⁰ The *dominium* implies that the owner is entitled with all prerogatives without restrictions (except those imposed by law or by own agreement and consent). They are then free to use or not use the thing at all.

It is worth noting that the concept of ownership is built upon the right to possess the thing and thereby exercising control over it and reaffirm their ownership. Possession amounts to a factual control of things and contrasts with ownership, which is defined as legal control that normally also includes factual control, unless the owner agreed to allow another person to exercise factual control.⁴¹ The apparent dual regime currently in place in the suburbs of Bloemfontein may incite one to reflect in terms of factual control and legal control of land. The point is to know whether the title deed can be perceived as the symbol of legal control, legal ownership, whereas possession without a title deed would instead amount to a factual control, factual ownership of the land. If that was to be the case, this would mean a denial of the powerful effects of time and an ignorance of the apartheid and colonial histories of the country. However, prior to further elucidation, it is worth paying a close attention to the occurrences pertaining to land ownership in the Cape Stands in Bloemfontein.

7 An account of the situation in the suburbs of Bloemfontein

As previously observed, a thing is that which gives some meaning to the concept of ownership. A thing logically implies the idea of possession, something upon which the claim of ownership and/or property can effectively be tested. If we shift the attention to our area of study, that is, the suburbs of Bloemfontein, the thing at stake here is the land or the properties built in that area. It clearly transpires from the interviews that a portion of the people living in the area claim ownership of land based on a title deed they possess in accordance with property law of South Africa. The following is an excerpt of one of the interviews, file 1440 conducted in this area where a resident claimed ownership of his house on the ground of a title deed in his possession:

40 S Stern (ed) *The Oxford edition of Blackstone's commentaries on the laws of England: Book II: Of the rights of things* (2016).

41 Van der Walt (n 5) 29.

- Interviewer:* Do you own this property?
- Respondent:* Yes I bought it with R300 in the 1960's it is mine.
- Interviewer:* Why do you think you own it?
- Respondent:* I have a title deed
- Interviewer:* Do you have any evidence?
- Respondent:* The title deed.
- Interviewer:* Do you think you have the right to live here?
- Respondent:* I bought it with my money at the municipality.
- Interviewer:* Why do you think so?
- Respondent:* I have the title deed.

It has to be mentioned that there are several other interviews similar to this one where residents have a title deed to justify control over the land in their possession. Two examples are files 3806 and 3807, where participants have title. In file 3787, the importance of tangible documents and value attached to them are highlighted with the mention of a marriage certificate:

- Participant:* Yes we have the right to stay here me, my wife and the children.
- Interviewer:* Why do you think so?
- Participant:* Because this place was allocated to me and my wife so that we can help the coming generation to go forward. Because we have children together and we share everything. Marriage certificate says a lot Mam, and also have to know how do we resolve issues between us. We must not forget our plans together when we are angry at each other. We must not separate because of issues or problems that we encounter in our marriage. We have built a house together, we have children together, so we must not allow small problems to ruin our marriage. Everything in life has rules.

On the other hand, other people living in the same area claim ownership not on the ground of a title deed, but instead for having been in possession of the thing, that is, the land for an extended period of time. In fact, they were generally born and grew up there and took possession of the land from their relatives as exemplified by the following except of the interviews, file 1433:

- Interviewer:* Do you own this property?

- Respondent:* Yes because I am the one who is living here. I have ask my brother and sisters that we must go and change the name on the title deed, and they agreed we just need time to go to Deeds.
- Interviewer:* Why do you think you own it?
- Respondent:* I was born here and I have lived here for the rest of my life.
- Interviewer:* Do you have any evidence?
- Respondent:* I don't have evidence of document but my brother and sisters knows that it is mine.
- Interviewer:* Do you think you have the right to live here?
- Respondent:* Yes I do have the right. This is my home and I lived here since I was born.
- Interviewer:* Why do you think so?
- Respondent:* It is home my parent's house.
- Interviewer:* How did you obtain this right?
- Respondent:* Like I said it is home.
- Interviewer:* What documents do you have?
- Respondent:* No I don't have except it is home my parent's house.

The above two excerpts from the interviews account for the apparent dual regime of ownership and possession (factual and legal) currently in place in the Cape Stands in Bloemfontein. On the one hand, ownership of land is justified through the possession of the title deed and, on the other, through the actual possession of the land for a lengthy period despite the lack of a title deed. What is evident in both situations is the tangibility of the thing possessed by those with a title deed and those without a title deed. In both situations, the two features namely, the *animus domini* (mental) and *corpus* (physical) elements are reunited. It is worth noting that in the former case, ownership derives not only from a legal/administrative document that produces the relevant effects, that is, rights and control over the thing, but also of the actual possession of the thing. In the latter, ownership is the product of time, that is, something more abstract but somehow which seems to have successfully managed to produce the same effects as in the case of a title deed. In this particular case, where time plays a determinant role, one can consider time as a feature that successfully produced the effects attached to ownership and thereby engendering some legitimacy of the possession of the land irrespective of any formal administrative procedure. If that is

the case, this would also mean that the tangibility either of the thing or the title deed may not be considered as an absolute criterion to produce the effects of ownership and, therefore, residents should be vested with the relevant prerogatives over the thing. There are situations where a 'thing' may be available but only at a highest level of abstraction. This can happen, for instance, in the case of intellectual property rights when people can rightfully claim a property right in a musical composition. As a result, while there must be some 'thing' in respect of which a property right subsists, it need not be a tangible thing. Once again, it is worth emphasising the valuable relationship that exists between people and things as confirmed by the following Hegelian perspective:⁴²

[P]roperty for Hegel is essential for men if they are to lead a full life of reason. In owning property, men act in the external world. They dominate Nature. They create social institutions. In shaping the natural and the social orders according to their intentions and goals, men develop and express their own capabilities; in reflecting on the results of their actions, they educate themselves about the world of actuality and about themselves and thereby prepare themselves for further action in the natural and social worlds. At the same time, men claim themselves, their minds and their bodies, as their own properties; from the right to property derive the rights to life and liberty, so that they are permanent subjects and actors, continuously shaping the natural and social worlds and themselves.

Ownership is a key concept of our time as it can be considered to be a device with the power to connect people and things, that is, the living and the inanimate in which subsists a strange and mystical relationship where both seem to have become the reference point of one another. In such a context, the Roman maxim *quod nullius est, id ratione naturali occupant conceditur*, that is, 'natural reason concedes ownership to the first occupier' should be given a proper place given that the aim of life in society is to promote the welfare of one another. From a progressive perspective, it is currently observed that 'private property is so important for human welfare that it should be distributed as widely as possible, with the consequence that the equitable distribution of property is just as important as the protection of extant holdings'.⁴³ This statement appeals to the 'moral foundation' of property grounded on what Alexander

42 Clarke & Kohler (n 37) 181.

43 AJ van der Walt & S Viljoen 'The constitutional mandate for social welfare – Systemic differences and links between property, land rights and housing rights' (2015) 18 *Potchefstroom Electronic Law Journal* 1038.

referred to as 'human flourishing' defined as the opportunity for a person to live a fulfilling life, which is also the normative foundation of property.⁴⁴ A neighbouring concept to that of human flourishing was also explored by Alexander. Known as the social-obligation norm, this concept implies a commitment to a social welfare system embedded in the very notion of property. According to Alexander:

If human capacities such as survival (including physical health), the ability to engage in practical reasoning, and to make reasoned decisions about how to live our lives are components of the well-lived life, then surely we are all obligated to support and nurture the social structures without which those human capabilities cannot be developed.

A crucial observation is that ownership claimed on the ground of a title deed as well as that which is claimed on the basis of time (at least until now) has proven true in terms of its trans-temporality. One could assume that because the effects of the latter were produced outside legal procedures, that is, the actual (factual) possession of the land without a title deed, this would have resulted in a situation where the rights of persons controlling the things would be paralysed.

Some of the interviews captures this combination by acknowledging the importance of the title deed, but claiming subsequent ownership based on the fact that the title deed has been in the family for a long time. In several interviews, the fact that the title deed has not been transferred to a specific child's name, does not alter the claim to ownership in the eyes of the participants. See for example file 3694:

Interviewer: Do you own this property?

Participant: This house belongs to my parents, it's not mine.

Interviewer: Do you think you have the right to live here?

Participant: Yes I have the right to live here because it's my parent's house/stand.

Interviewer: How did you obtain this right?

Participant: Because I grew up in here, my parents raised me up.

Interviewer: Is there anybody else who has a right to this house/ stay in this house?

⁴⁴ GS Alexander 'Ownership and obligations: The human flourishing theory of property' (2013) 43 *Hong Kong law Journal* 451.

- Participant:* It's all my siblings.
- Interviewer:* Why do you think they have the right?
- Participant:* Because we are siblings.
- Interviewer:* Okay ... what is the relationship between you and the person on the title deed?
- Participant:* They are my parents.
- Interviewer:* How secure is the tenure you/ mother have on this stand? How safe it is the contract or perhaps the papers?
- Participant:* It is safe because she kept it in a safe place, and also because it is registered with her ID numbers.

Yet, it is evident that this particular type of ownership (without a title deed) was already claimed in the past, is still claimed today and will probably be claimed in the future. It is not because people are not in possession of a title deed, that their prerogatives over a thing should be discarded. Such prerogatives that came into being with the initial possession of the land by parents and relatives decades or centuries ago have been the object of transfer from generation to generation through time. This is the meaning of the above-mentioned maxim *quod nullius est, id ratione naturali occupant conceditor* (natural reason concedes ownership to the first occupier). To expand our understanding of this issue, we can put everything back into context by briefly revisiting the British colonisation of Australia and the parallel with South Africa will quickly emerge, for the techniques used in one space and time were very similar in another one. The following account was borrowed from a book by Clarke and Kohler entitled *Property law commentary and materials* published in 2005. When Britain colonised Australia in the eighteenth and nineteenth centuries, native Australians had already settled there for thousands of years. This resulted in that English law, especially English property law, became the law of Australia (subsequently modified first by the Crown to meet the special requirements of colonial administration and then by the Australian government). Yet, up until that time, native Australians had relationships between themselves in respect of their personal possessions, the land on which they lived, the natural resources of the land that they used, and the tangible and intangible things they manufactured. The issue was to know what happened to these pre-existing relationships when English property law became the law of Australia. If one considers the situation of a native Australian being in possession of

his house at the time when their country was annexed by Britain, the question is whether he was treated under the new Australian property law imposed by the Crown as having the same rights on the house as he would have had if he had had full ownership of the house under English law; or whether the law treats his occupation of his house as subject to the same rules, and giving rise to the same entitlements, as existed before colonisation (so that if, for example, there was a pre-existing native Australian rule that all rights in houses automatically pass to the eldest son on the death of the 'owner', this rule would continue to apply here; or whether he was treated under the new law as having no entitlements at all in his own house.⁴⁵ It is this same situation that can be tested in modern-day South Africa, in general, and the suburbs of Bloemfontein in particular. If some persons have been claiming ownership on land on the ground of inheritance or transfer from a previous generation of relatives who passed on, it means that such ownership has always been there and is genuine. It has successfully crossed the boundary of time and space with a validity that has legal force similar to that of the (modern/contemporary) title deed.

8 Ownership and time: The idea of trans-temporality

In a previous part we emphasised the contrast between a factual control of a thing characterised by possession and the legal control that amounts to ownership, which is also inclusive of factual control. With regard to the dual regime in place in the suburbs of Bloemfontein, the issue was to know whether the title deed can be considered to be the expression of legal ownership. On the other hand, the ground for factual ownership was not clear and it is our contention that this is where the effect of time plays a crucial role. Temporality is generally defined as the state of existing within or having some relationship with time. In the field of philosophy, temporality amounts to the linear progression of past, present and future. Similarly, a basic meaning of trans-temporality relates to time travel but more importantly to the transcendence of time. It is not our purpose here to speculate on concepts such as time travel, but instead to rely on this concept to sustain our argument regarding the effect of time on land ownership. Within this framework, we do not consider the idea

⁴⁵ Clarke & Kohler (n 37) 138.

of time travel per se, but instead the effects of time, that is, its remnants at the origin of the patterns, experiences and perceptions in the Cape Stands of Bloemfontein. It is within a similar context that Blomley⁴⁶ conceptualises property relations and ownership resonate with resident experiences, perceptions and performances, which in our opinion can only be the result and effects of time.

Over the years, time has successfully brought about conditions and situations that in one way or another cannot be simply discarded or cancelled by regulations and bureaucracy. The dual regime in place in the suburbs of Bloemfontein where people claim ownership on land on various grounds, including, among others, a title deed, birth and life on the property and inheritance from relatives who themselves enjoyed a factual control of land can explain these developments. Such control can be determined through various interventions over the land including, among others, the enhancement and improvement of the land under the control of the possessor. As rightly observed by Blomley, both discursive practices, such as persuasive narrative building and story telling, and material practices, which are tangible spatial and physical interventions in and on the landscape of property are these ongoing enactments that sustain property.⁴⁷ One can assume that such enactments have successfully crossed the boundaries of time and still play a key role in defining the actual relationship between people and the land in the suburbs of Bloemfontein. Whether one is in actual possession of a title deed or not as evidence of land ownership in the area, the fact is that over the years, a durable relationship between the living and the inanimate was established. As a result, it may be counterproductive to institute a legal document, that is, the title deed with the aim to bringing about homogeneity in terms of ownership in an area that by its very nature is heteroclitic and heterogeneous in terms of the lived experiences of the residents. As a matter of fact, it is said that the heterogeneity of tenure experience challenges uniform readings of ownership and tenancy.⁴⁸ This emphasises the need to approach property as not only legal and

46 N Blomley *Unsettling the city: Urban land and the politics of property* (2004).

47 Blomley (n 46) 50-53.

48 Blomley (n 46) 47.

material but, more importantly, relational and political.⁴⁹ To sustain this argument, the following observation was made:⁵⁰

[P]erceptions and performances of ownership and claims to property are not solely shaped by an individual's legal tenure status. A sense of 'ownership' quite outside the law can be engendered by social and kin networks and their sanction; available economic means to assert property claims; pervasive narratives of rights to a place; and community mobilisation to stake out those claims. It is only by approaching gendered and generational negotiations of housing and property at the 'scale of experience'. Women's negotiation of housing and home-building in both contexts reflect the 'situated material practices, the constitution of identities and relations of power in the multiple, inter-connected arenas of everyday life'.

The above quote is another testimony of the powerful patterns and lived experience of residents in terms of land ownership that find their origin not in a legal document but in the effects generated by time; effects that came into being a long time ago as the result of the relationship between the living and the inanimate. The (factual) ownership that was built up over the years cannot be wiped out decades later on the ground that the title is the only legal document that can confirm ownership over the land.

The central question of this project is the way in which space endures and can endure, both in a positive and a negative sense. In this sense, the project considers the way in which apartheid inequalities persist through the holding of space, but it also draws attention to the importance of the continuation of space through time for notions of belonging and home. The way in which space and time interact, therefore, is important. The narratives from the Cape stands in Mangaung both weave together and contest these established connections between time and space in law. In understanding the intricate role that time plays in reproducing and addressing inequality in respect of land ownership and security of title, it is clear that space cannot be disconnected from time.

In a nutshell, the trans-temporality of land ownership reflects a complex interplay of historical injustices, current reform efforts, and evolving societal needs. To address these issues, it is vital to review and understand the past and current dynamics of land ownership, as well as a commitment to a fair distribution and equitable access that bring together the diverse needs of the most vulnerable people.

49 Blomley (n 46) xv.

50 Blomley (n 46) 59.

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