

The trans-temporality of land ownership in South Africa: Response to De Villiers and Kamga

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Like sands through the hourglass, so are the days of our lives. This allegory encapsulates much of what the chapter is trying to say. The sand in the hourglass captures both the passage of time as well as its stillness. It also captures the space in between. It significantly foreshadows the paradox of human endeavour, which is that the more things change, the more they remain the same.

The chapter titled 'The trans-temporality of land ownership in South Africa' by De Villiers and Kamga provides an account of how the passage of time contributes to the entrenchment of inequality through the illusion of autonomy and boundlessness. In this approach, time not only holds disparity in its passage, but also gives an opportunity to address inequality in its passing through the re-organisation of property law notions. The chapter explores the concept of ownership in relation to developments in the suburbs of Bloemfontein, South Africa. It connects the experiences of residents in Bloemfontein's Cape Stands who have claimed ownership of the land on which they live through a titled deed or through longevity of possession to make the point that the difference between the two perhaps is conceptually superfluous. The chapter explores the transformative utility of viewing and approaching property or ownership through a lens that views property (ownership) as relational.

This response is elicited by a consideration of the value of viewing ownership as relational and the space it creates with time. The belief seems to be that by changing our approach to ownership, we may solve the imbalance in property relations in South Africa that time has kept in place. While I do not discount the potential thereof, I intervene in this short response to ask: Why do we find ourselves back to the future? Is

movement and progress interchangeable? Why does the South African land ownership story after apartheid versus earlier read like a translated Sumerian script to the vernacular of the times? I intervene to briefly look at the space that time creates and to ask whether this space is usable for change.

The chapter begins with a background on the impact of Roman law on how we have come to think of property. It links this ongoing influence to concentric actions and property-related rhetoric. The manner in which we speak of 'property' rather than 'property rights', a contraction that is deceptive because it leads us to think of property as things rather than rights, or ownership as absolute rather than constrained. An absolute idea of ownership involves, among other things, a total separation of factual holding and legal title; also, ownership is a unique or sole type of entitlement. Closer analysis demonstrates, however, that the theory of absolute title does not correspond to the realities of Roman legal practice.¹ First, the difficulties of demonstrating ownership under a legal order that lacked not only a system of land registration, but also competent writing technology, indicate that Roman law must have functioned in practice with a presumptive title system.² This brought possession and ownership far closer together than is typically assumed. To also view of Roman ownership as a distinct type of entitlement is also problematic because non-Romans held title similar to dominium (factual), enforced by a fictional *vindicatio*.³

Divorced from its Roman origins, the influence of property rhetoric on how the concept of property ownership is imagined in absolute terms and later transacted by the majority on the same terms remains relevant. The contempt that persons who possess property on conditions other than title have for the law, law as a system of regulation, is based on the inhabitability of notions that do not hold both the absolute in the inabsolute and the inabsolute in the absolute. The law's avarice is frequently expressed and felt by individuals whose intended transactions are either oblivious and/or odious to an idea of property that is not

1 H Scott 'Absolute ownership and legal pluralism in Roman law: Two arguments (2011) *Acta Juridica* 23.

2 As above.

3 When a civil law owner transferred a *res Mancipi* without the required Roman procedure (*mancipatio*), instead of employing the *traditio* (easy delivery) of the *ius naturale*, a type of praetorian (bonitary) ownership was created.

uttered or part of everyday speech, such that any other conception is abstract and of mystical composition, not meant for some but meant for others.

Through interviews, the authors show that time plays a role and is frequently invoked by the inhabitants, not only in asserting title against others, that is, not only in instances of eviction where time influences the just and equitable balance towards remaining on land, nor in applications for formal rights where time is considered for acquisition. What we know about time in relation to the legal organising principle for land holding, and its impact on the continuance of 'othering', particularly on the approach to the interests of those without rights to land in eviction cases, for example, is the emphasis on exclusion, on who to exclude and when to exclude, rather than on who to include and when to include in the property system.⁴

According to the interviews, residents use time as a means of proving belonging, in general, and uniquely in cases when there is no formal ownership. This creates a dual regime that provides a separate picture of factual and legal land control. In this duality, there is a meta-narrative to see the title deed as a decisive symbol of control and ownership over factual control and factual ownership. In reality, as the interviews show, 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 factual possession of the thing. In the latter, ownership is the product of time, that is, something more abstract but which somehow seems to have successfully managed to produce the same effects as in the case of a title deed.

This discovery is what I would like to describe as an encounter with the abstraction of the tangible (the title deed or the item). An encounter with the history of land dispossession in South Africa involved not only physical but also attempts at metaphysical dispossession. To retain a sense of belonging in the absence of the tangible, attempts to carve out a stay, even if only in the metaphysical, had to resemble and hold the same value as real land holding, at least among the dispossessed.

⁴ AJ van der Walt 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258; AJ van der Walt *Property in the margins* (2009).

The authors highlight that 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 in possession would be paralysed. The reality is that they are not paralysed but can be viewed to have been kept in some kind of abeyance and with time practised in the margins. Therefore, this encounter is also an encounter with the moment of abstraction-time standing still and not only its passage in the margins. Still, the chapter indirectly seeks to highlight the incorporation of the margins into the mainstream. 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.

Wilson warns us of traditional interpretations that have placed too much emphasis on the formation of space and not enough on what occurs within it.⁵ (Wilson 2021:1-15). The continuation of space through time allows for discursive and non-discursive contestation between unequal forces: those with interests in sustaining the status quo on the one hand (stronger), and those with interests in changing the status quo on the other (weaker). The law, and with it the approach to law, lends itself to the restrictions of considerable change as a result of the disproportionate discursive and non-discursive influence of people who may not necessarily benefit from the change. To the extent that temporality can be understood as 'the social patterning of experiences and understandings of time' and not simply about the passing of time, but about how time is felt by individuals and shaped through social circumstance, it would seem we are back to the future. This unequal contestation is actively (re) produced by social relations which in the South African context have remained fundamentally influenced by retention power and conservative symbolism, a 'complex web of relations of domination and subordination, of solidarity and cooperation', which has been called 'power-geometry' (Massey 1994:80-81). Even where time creates and allows for something more(space), and the raging contestations ought to be accounted for, if only to maintain the space's inviolability. The assurance of space must

5 S Wilson *Human rights and the transformation of property* (Juta 2021) 1-15.

also include conditions that allow for actual and equal participation by all in the space.⁶

References

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⁶ N Haysom 'Constitutionalism, majoritarian democracy and socio-economic rights' (1992) 8 *South African Journal on Human Rights* 451.