

# Rethinking Property: Towards a Values-Based Approach to Property Relations in South Africa

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**ABSTRACT:** In recent decades, there has been growing dissatisfaction with the dominant theories of property law systems, founded on notions of exclusion and individualism, these systems have increasingly become associated with an unsustainable and inequitable distribution of resources. This inequitable distribution has largely been attributed to these property law systems that offer wholly disproportionate protection to the rights and interests of property owners while providing little to no recognition or protection for wider social, environmental and humanitarian concerns. These constructions of property overemphasise a single set of values – values that are largely economic, exclusionary and exploitative. Through an analysis of public land, particularly municipal land, we advocate for a rethinking of current property law relations to prioritise a more varied set of values, including social, ecological, emotional and humanist values, with the ultimate aim of realising a more social conception of property law. This is urgently required in the South African context, where access to land, tenure security and housing was historically dictated by colonialism and apartheid, and which remains influenced by deep-seated inequality. We consider possible avenues for rethinking the property law system including the social function approach to property, the social-obligation property theory and the potentially transformative constitutional property clause. We make suggestions about how to give effect to a wider range of values in our assumptions about property law and, particularly the constitutional right of access to land on an equitable basis.

**KEYWORDS:** affordable housing, constitutional law, land reform, property theory

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## I INTRODUCTION

On 29 February 2020, over 300 activists from across Cape Town, affiliated with the social movement Reclaim the City, peacefully occupied the Rondebosch Golf Club. Like many other recreational clubs in Cape Town, the club is situated on well-located land owned by the City of Cape Town (the City).<sup>1</sup> The activists staged the symbolic occupation of the golf course to protest the City's failure to redistribute well-located public land for the development of affordable housing, which they have argued is critical to redressing spatial apartheid and combatting a debilitating housing affordability crisis. For activists the significant size – approximately 46 hectares or the equivalent of a small suburb – and the prime location of the golf course close to the best hospitals, top performing schools, police stations and transport nodes (including taxi and train routes) meant that the site was ideal for the development of social or affordable housing.<sup>2</sup> They argued that the use of land as a recreational space rather than for the delivery of affordable housing constituted 'an inefficient, exclusive and unsustainable use of public land' and illustrated a failure on the part of the City to manage scarce public land in a manner that served the broader interests and social needs of Cape Town's residents.<sup>3</sup> As Reclaim the City noted in a statement on the day, the occupation was part of a broader call for accountability – calling on the City to build 'a more inclusive city, one piece of land at a time'.<sup>4</sup>

Almost thirty years after the end of apartheid, Cape Town remains one of the most spatially divided and unequal cities in the world with residential settlement patterns segregated along race and class lines. As with other South African cities and towns, Cape Town continues to grapple with undoing the legacy of an 'urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas'.<sup>5</sup>

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<sup>1</sup> This was the second time that activists had occupied the space, with the previous symbolic occupation occurring on Human Rights Day the previous year. Reclaim the City 'Reclaim Rondebosch Golf Course for Affordable Housing' Press Statement (29 February 2020), available at <https://jmp.sh/cyW6qPK>. See also T Wahinjira 'Activists Occupy Rondebosch Golf Course, Demand Land Redistribution' *Ground Up* (29 February 2020); *Sowetan* Staff Writer 'Reclaim the City Activists Occupy Rondebosch Golf Course Over Housing' *Sowetan* (29 February 2020); L Nowicki 'Rondebosch Golf Club: City of Cape Town Accused of "Subsidising the Wealthy Elite"' *Times Live* (24 January 2020); and T Knight 'Activists Occupy Rondebosch Golf Club, Celebrate "Reclaim the Land Day"' *Daily Maverick* (22 March 2019).

<sup>2</sup> Reclaim the City (note 1 above) at 1–2. The City raised a variety of technical reasons as to why the land could not be developed for affordable housing, including that a portion of the land falls below the hundred-year flood-line. However, in schematic plans published in a research report in 2019, Ndifuna Ukwazi advised that the land that fell outside the flood-line could still be developed to produce more than 2 500 housing units on the site in spite of these technical challenges, leaving wetlands intact and avoiding the floodplain entirely (of these 2 500 units, 1 433 would be cross-subsidised affordable housing, providing homes to roughly 2 400 people who could otherwise not afford to live close to decent social amenities). Ndifuna Ukwazi *City Leases: Cape Town's Failure to Redistribute Land* (March 2019) 10–11.

<sup>3</sup> Reclaim the City (note 1 above) at 1.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC) at para 122.

As a result, a fragmented experience of the City persists: the majority of Black people in urban areas<sup>6</sup> (a substantial majority of whom are low income earners, poor or unemployed)<sup>7</sup> live in densely populated, peripheral townships and informal settlements where economic opportunities, access to transport facilities and social amenities are few; while the well-located residential areas of Cape Town, where economic opportunities, transport facilities and social amenities are plentiful, are inhabited predominantly by White households (who are generally wealthier) and are significantly less densely populated.<sup>8</sup>

While this spatial inequality has its historical origin in the colonial and apartheid eras,<sup>9</sup> it has been exacerbated since the end of apartheid.<sup>10</sup> At the heart of the entrenched spatial inequality in South African cities and towns is the structural resistance to redistributing land, including public land, for purposes that would directly begin to address the legacies of colonial and apartheid era planning. The Western Cape High Court recently noted the imperative to use well-located public land to ‘urgently address apartheid’s shameful and divisive legacy of spatial injustice and manifest inequality’ in *Adonisi v Minister for Transport and Public Works: Western Cape; Minister of Human Settlements v Premier of the Western Cape Province*.<sup>11</sup> The centrality of land – particularly well-located land – as a tool in any programme to dismantle the apartheid city cannot be overstated. Land provides the ‘physical sub-stratum for all human activity’.<sup>12</sup> Land holds immeasurable socio-economic importance; it provides the location for residential shelter and economic activity. Land accordingly ‘justifies particularly sensitive treatment of the property relations it encompasses.’<sup>13</sup> However, despite the central importance of land as a tool for livelihood and redress, it can hardly be disputed that spatial apartheid and the resultant ‘state-induced inequality’ brought about by limited access to land continues to shape urban

<sup>6</sup> For the purposes of this article, and save as otherwise stated, Black people refers to, and includes Black African people, people of mixed descent and classified as ‘Coloured’ under the apartheid system, and Indian people (as per the definitions in equity legislation such as the Employment Equity Act 55 of 1998).

<sup>7</sup> J Budlender & L Royston *Edged Out: Spatial Mismatch and Spatial Justice in South Africa’s Main Urban Areas* Socio-Economic Rights Institute of South Africa (SERI) Research Report (2016) 10.

<sup>8</sup> L Odendaal ‘Affidavit of Lorna Odendaal’ (2017). See also *Adonisi & Others v Minister for Transport and Public Works: Western Cape & Others; Minister of Human Settlements & Others v Premier of the Western Cape Province & Others* [2020] ZAWCHC 87, [2021] 4 All SA 69 (WCC)(‘*Adonisi*’) at para 33.

<sup>9</sup> During the colonial era until the end of apartheid, the South African state systematically established a complex legal framework that drove Black people off their land, destroyed the various means through which Black people accessed land, steadily diminished the status of Black people in relation to the land they occupied and used, and prohibited Black people from legally owning land. The effect was that millions of Black people were forcibly removed from the cities and compelled to move to peripheral areas far away from any existing social and support networks, hospitals, schools, and employment opportunities. See, for example, JM Pienaar ‘Tenure Reform in South Africa: Overview and Challenges’ (2011) 1 *Speculum Juris* 108, 109–110; AJ van der Walt ‘Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa’ (1999) 64 *Koers* 259, 262–263; M Clark *Pathways Out of Poverty: Improving Farm Dwellers’ Tenure Security and Access to Housing and Services* Association for Rural Advancement (AFRA) Research Report (2017) 8–10; and S Wilson, J Dugard & M Clark ‘Conflict Management in an Era of Urbanisation: Twenty Years of Housing Rights in the South African Constitutional Court’ (2015) 31(3) *South African Journal on Human Rights* 472, 472–477.

<sup>10</sup> *Adonisi* (note 8 above) at para 35 (Where Sue Parnell, professor in the Environmental and Geographical Sciences Department at the University of Cape Town, provided expert evidence in the Western Cape High Court stating that central Cape Town ‘remains vastly less densified and diverse than it was fifty years ago.’).

<sup>11</sup> *Adonisi* (note 8 above) at para 95.

<sup>12</sup> K Gray & S Gray *Elements of Land Law* (2009) 1.1.1.

<sup>13</sup> S Blandy, S Bright & S Nield ‘The Dynamics of Enduring Property Relationships in Land’ (2018) 81(1) *The Modern Law Review* 85, 88.

society today.<sup>14</sup> The ‘landless class’ that was created through legislated processes that deprived Black people of their rights to title remains landless.<sup>15</sup> Today, informal settlements are ‘the most visible manifestation of inequitable land access in urban areas’<sup>16</sup> and represent perpetual land deprivation, in part, as a result of the government’s failure to intervene in public and private land markets to redistribute and allocate land. According to data from Statistics South Africa’s General Household Survey, 14 per cent of South Africa’s households (approximately one in seven) live in informal settlements,<sup>17</sup> and this figure is higher in metropolitan areas, where approximately one in every five households live in an informal settlement.<sup>18</sup>

This is the context of Reclaim the City’s campaign to respond to persistent land deprivation and spatial inequality by building ‘an inclusive city, one parcel of land at a time’,<sup>19</sup> and shifting prevailing land uses towards more just uses, including the redistribution and use of urban land for affordable housing. Central to Reclaim the City’s campaign was challenging the Rondebosch Golf Club lease, which, like many other leases over public land, has its origin in colonial era spatial planning. The first long-term lease over this property was concluded in 1937 for the exclusive use of the golf club’s paying members (after which the lease was renewed every decade).<sup>20</sup> The communities living in the area around the golf course were part of 27 895

<sup>14</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA (CC) (‘PE Municipality’) at para 10.

<sup>15</sup> Justice Dikgang Moseneke’s contributions to the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change: Report of Working Group 2 on Land Reform, Redistribution, Restitution and Security of Tenure, September 2016 in Parliament of South Africa *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (November 2017) (‘High Level Panel Report’).

<sup>16</sup> L Royston & T Ebrahim ‘Urban Land Reform: Start with Informal Settlements’ *Daily Maverick* (4 July 2019), available at <https://www.dailymaverick.co.za/article/2019-07-04-urban-land-reform-start-with-informal-settlements/>.

<sup>17</sup> These figures are based on estimates from South Africa’s 2011 Census Data and given the insecure tenure arrangements in informal settlements and the fluidity of residence in these areas, the number is likely to be significantly higher. See H Selebalo & D Webster *Monitoring the Right of Access to Adequate Housing in South Africa* Studies in Poverty and Inequality Institute Working Paper No 16 (2017) 33, available at [http://www.sp.ii.org.za/wp-content/uploads/2018/02/Right-to-Housing\\_2017.pdf](http://www.sp.ii.org.za/wp-content/uploads/2018/02/Right-to-Housing_2017.pdf).

<sup>18</sup> Socio-Economic Rights Institute of South Africa *Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* (2018) 6, available at <https://www.ohchr.org/Documents/Issues/Housing/InformalSettlements/SERI.pdf>. In the context of farms and agricultural land, an audit conducted by the Department of Rural Development and Agricultural Affairs found that ‘72% of the land was owned by White people, 15% by Coloured people, 5% by Indian people, and 4% by Black people’. Department of Rural Development and Land Reform *Land Audit Report Phase II: Private Land Ownership by Race, Gender and Nationality* (2017) 2, available [https://www.gov.za/sites/default/files/gcis\\_document/201802/landauditreport13feb2018.pdf](https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf).

<sup>19</sup> Reclaim the City (note 1 above) at 1.

<sup>20</sup> City of Cape Town *Immovable Property Adjudication Committee Report of the Immovable Property Adjudication Committee to Council: Authorisation to Commence with a Public Participation Process in respect of the Proposed Granting of Rights to Use, Control or Manage Various Portions of Erven in Klipfontein Road, Sybrand Park, Mowbray, known as Rondebosch Golf Course* (4 December 2019, copies on file with the authors). In South Africa, as in many other parts of the world, large tracts of land designated to a particular land use (such as golf courses), or imposing infrastructure (such as train tracks or highways) were intentionally used by the state to create physical barriers to segregate people of different background or socio-economic categories. See, for example, J Jacobs *The Death and Life of Great American Cities* (1961) 257–269. In the South African context, the apartheid state used similar mechanisms to divide people along racial lines. The Rondebosch Golf Club acts as such a barrier by separating various residential areas. In effect, this means that every time the City renewed the lease, it perpetuated racial and class divisions rather than dismantling these divisions.

Black families that were forcibly removed after the area was declared a White-only area in terms of the Group Areas Act 36 of 1966.<sup>21</sup> However, despite the transformative potential of the land, it is not the only public land that has been reserved for the recreational purposes of a few paying members of a private club. The Rondebosch Golf Club borders another similarly sized exclusive golf course – the King David Mowbray Golf Course – which also leases City-owned land at a nominal amount. In fact, Cape Town has 24 golf courses and driving ranges (of which ten are on public land) and 35 bowling greens (of which 26 are on public land).<sup>22</sup> Yet, despite widespread landlessness and tenure vulnerability among Black families and vocal calls for more equitable use of public land, the City proposed renewing the lease to the Rondebosch Golf Club for a further ten-year period at a nominal rental based on the City’s sporting and recreational tariff – at the time that the City published a notice of the lease renewal this tariff was R1 058 a year.<sup>23</sup> Effectively, this meant that the City planned to allow the club to lease public land the size of a small suburb for the exclusive use of its paying members at a cost of R88.17 a month.<sup>24</sup> What made the City’s plans to renew this lease particularly distasteful was the historical context of land dispossession and the ongoing social and economic context of a land and housing crisis. It also demonstrated a persistent failure to break from the past and prioritise the redistribution of land in areas that will advance spatial, racial, and economic societal restructuring.

Where a person lives matters – it determines a person’s access to opportunities and the quality of services. While we focus on the City of Cape Town as an example, the issue of spatial inequality, and spatial mismatch is ‘evident across the majority of South Africa’s metropolitan municipalities’.<sup>25</sup> Many peripheral areas in Cape Town have limited access to basic services, performance in schools in these areas is generally unsatisfactory, gang violence is rife, substance abuse is more common, and social amenities such as hospitals and clinics are not easily accessible. People living in these areas spend a disproportionate component of their income and time on unsafe and unreliable transport – up to 45 per cent of their income,

<sup>21</sup> U Dhupelia-Mesthrie & K Benson ‘An Open Letter to the City of Cape Town: Land Restitution and the Rondebosch Golf Club’ *Mail & Guardian* (9 March 2020) (Who also point out that the Rondebosch Golf Club supported apartheid by objecting to the Black River area being suggested as a possible Chinese group area in 1955).

<sup>22</sup> Ndifuna Ukwazi (note 2 above) at 4.

<sup>23</sup> For the City’s public advertisement or the lease and report justifying the lease, see ‘Lease: Various Erven at Klipfontein Road, Sybrand Park – Mowbray’ *Cape Argus* (7 February 2020); and City of Cape Town *Immovable Property Adjudication Committee Report* (note 20 above). For the City’s tariff rental on properties reserved for sporting and recreational activities, see City of Cape Town *2019/2020 Budget* ‘Annexure 6: Tariffs, Fees and Charges Book, Economic Opportunity and Asset Management – Property Management’ (May 2019) at 6.2, available at [http://resource.capetown.gov.za/documentcentre/Documents/Financial%20documents/Ann6\\_2019-20\\_Property%20Management.pdf](http://resource.capetown.gov.za/documentcentre/Documents/Financial%20documents/Ann6_2019-20_Property%20Management.pdf). The annual tariff amount of R1 058 applied irrespective of the size of the leased land. In response to a public outcry over the Rondebosch Golf Club rental amount, the City reviewed and amended the rental amount it charges golf courses upward to R11 500 a year. However, the new sporting tariff remains incredibly low and, more importantly, does not address the City’s failure to redistribute public land.

<sup>24</sup> It should be noted that the City of Cape Town is not the only municipality that has come under criticism for leasing out well-located public land for nominal amounts to golf clubs or other recreational activities. R Davis ‘In the Rough: Golf Courses may be SA’s Most Wasteful Luxury’ *Daily Maverick* (11 October 2020), available at <https://www.dailymaverick.co.za/article/2020-10-11-in-the-rough-golf-courses-may-be-sas-most-wasteful-luxury/>; K Harrisberg ‘Teed Off: COVID feeds S. African Housing Crisis, Golf Courses Feel the Heat’ *Thomson Reuters Foundation News* (19 February 2021), available at <https://news.trust.org/item/20210218225919-dw6tc>.

<sup>25</sup> Budlender & Royston (note 7 above) at 20.



well over the global average of 5–10 per cent.<sup>26</sup> Critically, research shows that there is a direct relationship between where people live in South African cities and the likelihood that they will find and sustain employment opportunities.<sup>27</sup> Living on the urban periphery in South Africa therefore ends up trapping the poor and working class in a cycle of structural poverty as ‘living on the periphery leads to poverty, while poverty ensures living on the periphery’.<sup>28</sup>

The approach taken by the City highlighted further contemporary drivers of land and spatial inequality in Cape Town; namely the city’s acute housing affordability crisis<sup>29</sup> and the pace and location of state-subsidised housing delivery. With regard to the affordability crisis, the government’s inability to regulate land and property markets has resulted in stubbornly high rents and property prices that have excluded most families, especially impoverished people and low-income earners (and disproportionately affected Black households). The average property value for a home in Cape Town in 2016 was R1 513 254 (the highest in South Africa), a price that less than five per cent of households are able to afford.<sup>30</sup> Internationally, Cape Town was forecast to lead the annual price growth for residential properties for 2021 globally, matched only by Shanghai,<sup>31</sup> and in 2019, the city registered the seventeenth highest year-on-year property inflation in the world at 9.1 per cent (higher than any other city in Africa).<sup>32</sup> The effect of property inflation is even more worrying when broken down by market share as property prices in middle-priced and lower-priced markets continue to increase, thus pricing households in the lower income earning categories out of the market.<sup>33</sup> In practical terms, this has meant that the number of available affordable housing units in Cape Town has actually *decreased* in recent years.<sup>34</sup>

According to figures based on the 2011 Census Data (that have been adjusted for inflation), 75 per cent of households in Cape Town earn less than R18 000 a month (the figure rises to 92 per cent for Black households), and most people cannot afford to pay more than R3 000 a month in rent or R281 000 to own a home.<sup>35</sup> This puts rent and homeownership in well-located

<sup>26</sup> City of Cape Town *Transport Development Index* (2016).

<sup>27</sup> In the South African context, see Budlender & Royston (note 7 above). In relation to cities in the United States, see E Badger & Q Bui ‘Detailed Maps Show How Neighborhoods Shape Children for Life’ *New York Times* (1 October 2018), available at <https://www.nytimes.com/2018/10/01/upshot/maps-neighborhoods-shape-child-poverty.html>.

<sup>28</sup> Budlender & Royston (note 7 above) at 2. See also the *High Level Panel Report* (note 15 above) at 81.

<sup>29</sup> Centre for Affordable Housing Finance in Africa (CAHF) *Cape Town’s Residential Property Market: Size, Activity and Performance* CAHF Research Report (2018) 45, available at <https://housingfinanceafrica.org/app/uploads/Cape-Town-Residential-Property-Market-FINAL-REPORT-Feb-2018-2.pdf>.

<sup>30</sup> CAHF (note 29 above) at 45; and CAHF *Cape Town Housing Market Report* (2020) 3, available at <https://housingfinanceafrica.org/app/uploads/2020/10/Cape-Town-Property-Report-2020.pdf>.

<sup>31</sup> Frank Knight *Prime Global Forecast 2021* (2021) 4, available at <https://content.knightfrank.com/research/379/documents/en/prime-global-forecast-2021-7626.pdf>.

<sup>32</sup> Frank Knight *Global Residential Cities Index: Q4 2019* (2019) 2, available at <https://content.knightfrank.com/research/1026/documents/en/global-residential-cities-index-q4-2019-7111.pdf>.

<sup>33</sup> First National Bank (FNB) *Cape Town Sub-Regional House Prices* (August 2019) 1, available at <https://www.fnb.co.za/downloads/economics/reports/2019/CapeTownSub-RegionalHousePricesAug.pdf>; and CAHF (note 29 above) at 45.

<sup>34</sup> CAHF (note 29 above) at 45.

<sup>35</sup> Ndifuna Ukwazi *Inclusionary Housing: Measuring Access to Residential Development by Race and Class* Ndifuna Ukwazi Working Paper (November 2018), available at: <https://jumpshare.com/v/KRIwYLLKmkqEQGzFyB1a7>. These figures have been adjusted for inflation and the City of Cape Town itself has published similar figures in *Draft Human Settlements Strategy* (2020). In 2019, Stats SA found that the median income of a South African

areas close to Cape Town's economic nodes out of reach for most middle-class South Africans, let alone the poor or working-class. All of this points to a housing crisis that affects hundreds of thousands of families in Cape Town who have been forced to live in undignified conditions in peripheral townships and informal settlements because the state – at all levels – has failed to satisfy the need for housing or redistribute well-located land.<sup>36</sup> As former Deputy Chief Justice Dikgang Moseneke lamented:

[S]tatistics on land redistribution show very little movement away from apartheid patterns of the use and ownership of land... Sadly, urban homelessness persists. Apartheid spatial patterns remain. People in informal settlements run the risk of mass evictions such as in Lwandle in Cape Town or Cato Crest in KwaZulu-Natal ... [W]e cannot talk about transformation or social justice and cohesion when urban and rural land injustice dominates the lives of the majority of our citizens.<sup>37</sup>

Added to this, another key driver of spatial inequality is that the provision of state-subsidised housing has also done little to ease the City's housing crisis and redress entrenched spatial inequality, with state-subsidised housing delivery failing to keep pace with the considerable backlog. In 2019, the Western Cape provincial housing backlog stood at over 600 000 families, of which 365 000 were in the City of Cape Town alone.<sup>38</sup> These figures only refer to the families that have registered for fully state-subsidised homes. Approximately 75 per cent of

was R13 546 per year at that time, or just R1 129 per month. Statistics South Africa (Stats SA) *Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality* (2019), available at <http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf>.

<sup>36</sup> The economic fall-out brought about by the COVID-19 pandemic has exacerbated existing social and spatial inequalities and has increased the need for well-located affordable housing. In many respects, the economic burden following the pandemic has, and will continue to be, disproportionately borne by the poor and working class. According to the South African National Income Dynamics Study – Coronavirus Rapid Mobile Survey (NIDS-CRAM), the economic impact of the COVID-19 pandemic led to significantly higher rates of unemployment, diminished incomes and higher rates of hunger. Between February and April 2020, three million South Africans lost their jobs, and a further 1.5 million lost their income (through being furloughed). This represents an 18 per cent decline in employment, with the number of employed persons dropping from 17 million in February to only 14 million in April. The vast majority of these job losses were concentrated among already disadvantaged groups, including those in the informal economy, women, the youth and less educated. Women were particularly hard hit, accounting for up to two million of the three million job losses. See NIDS-CRAM *Overview and Findings: NIDS-CRAM Synthesis Report Wave 1* (2020) 3, available at <https://www.cramsury.org>. Concerningly, the losses could be long-lasting and potentially even permanent as none of those who lost jobs and only half of those that were furloughed were reabsorbed into the economy. The economic impact of the COVID-19 pandemic was also unevenly distributed spatially – with people in rural, peri-urban as well as people living on the outskirts of cities in townships or informal settlements being disproportionately negatively affected by losses in jobs and income-generating activities. In fact, according to the second wave of the NIDS-CRAM survey people living in peri-urban areas were twice as likely to be unemployed than people living in the suburbs. See NIDS-CRAM *Synthesis Report Wave 2* (2020) 1, 4, available at <https://cramsury.org/wp-content/uploads/2020/09/1.-Spaull-et-al.-NIDS-CRAM-Wave-2-Synthesis-Findings.pdf>. Also see I Turok 'Four Lessons to Learn from the State's Management of COVID-hit Townships' *Business Day* (4 October 2020), available at <https://www.businesslive.co.za/bd/opinion/2020-10-04-ivan-turok-four-lessons-to-learn-from-states-management-of-covid-hit-townships/>.

<sup>37</sup> D Moseneke 'Reflections on South African Constitutional Democracy: Transition and Transformation' (12 November 2014) Keynote Address *20 Years of South African Democracy: So Where to Now Conference*, Mapungubwe Institute for Strategic Reflection and the University of South Africa, available at <https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-transition-and-transformation/>.

<sup>38</sup> These are the state's own figures. Q Qukulu 'About 600 000 Cape Residents on Housing Waiting List, Says Human Settlements MEC' *Cape Talk* (11 July 2020); S Fischer 'City of CT Committed to Tackling Backlog' *Eye Witness News* (September 2018).

the population of Cape Town qualify for some form of housing assistance.<sup>39</sup> In the 2018/2019 financial year, the City delivered and upgraded only 5 692 homes.<sup>40</sup> The overwhelming scale of the need means that the City itself believes that it will be over 70 years before it can eradicate the ‘housing backlog’.<sup>41</sup> Moreover, post-apartheid housing policy has prioritised the provision of state-subsidised housing through the development of larger-scale housing projects in peripheral areas where land usually costs significantly less than in areas close to economic nodes. This approach has ‘rendered housing provision highly bureaucratic, non-participatory, and expensive, as well as a significant source of corruption and fraud’.<sup>42</sup> It has also had the consequence of reproducing spatial inequality and social exclusion by creating ‘poverty traps’ on the outskirts of the city far from economic opportunities and social amenities.<sup>43</sup>

It is in the context of this layered land and housing crisis that the proposed renewal of the lease to Rondebosch Golf Club led to a fierce public outcry from activists, landless people, civil society organisations, and experts in the fields of economics, history, law, and spatial planning. In fact, the City received at least 1 827 individual objections urging it not to renew the lease but to use the public land to promote spatial transformation and much needed social restructuring.<sup>44</sup>

Perhaps most significantly, the proposed lease renewal re-ignited serious questions about the role of public land in addressing long-standing inequalities in access to land and well-located affordable housing; and the need to tackle spatial injustice in South African cities. Central to these questions is the City’s role as owner and custodian of public land, and the obligations that this position creates. On the one hand, the City is an owner that assumes exclusive rights to use, control and dispose of public land as it sees fit. On the other hand, the City is a custodian holding public land on behalf of the people – and a public entity with constitutional and legislative obligations to promote access to a more equitable city for all its residents. We found this dual role interesting, and the more we reflected, we recognised that this role sat uncomfortably with reigning property rights systems. For us, the Rondebosch Golf Course lease (and others like it) illustrates how existing conceptions of property law influence and inhibit broader societal values from being taken into account in decisions about property – particularly land. We therefore set out to investigate the possibilities of alternate property regimes that would allow for a broader set of values to be considered.

While we primarily investigate public land at the municipal level, many of the arguments we develop about the need to re-consider the value-system that underpins property are equally applicable to private property relations. We have chosen to focus here on public municipally-owned land for three central reasons. First, the public nature and importance of municipal land clearly illustrates the critical need for alternative means to give expression to the needs and interests of society in decisions about property – thereby laying the groundwork for rethinking property relations. Second, state-owned land, which constitutes approximately 18 per cent of

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<sup>39</sup> Ndifuna Ukwazi (note 35 above).

<sup>40</sup> City of Cape Town ‘Annexure 4.1: Corporate Scorecard – Quarter 4 2020 Amendments’ *2019/2020 Adjusted Budget* (May 2020) 1.

<sup>41</sup> City of Cape Town *Municipal Spatial Development Framework* (25 April 2018) 220.

<sup>42</sup> J Dugard, with M Clark, K Tissington & S Wilson ‘The Right to Housing in South Africa’ *Socio-Economic Rights: Progressive Realisation?* (2016) at 156.

<sup>43</sup> Budlender & Royston (note 7 above) at 2.

<sup>44</sup> The City’s press statement on the public participation process is available at <https://jumpshare.com/v/W4P8i539I9g7K11pG31Q>.



the land that has been accounted for according to a 2013 land audit,<sup>45</sup> presents an enormous opportunity to address land reform. The vast amounts of state-owned land could be viewed as readily accessible for land redistribution purposes, in that activating further potentially more onerous mechanisms would be required to achieve similar redistributive outcomes with private land (such as the acquisition or expropriation of private land). Third, and importantly in recent years, scholars have argued that the public and private values that inform notions of ‘public’ and ‘private’ property are not always neatly distinguishable from one another.<sup>46</sup> In fact, many of the public and private values related to property tend to blend into each other with notions of private property informing how decisions are made by government officials in respect of public land, including, for example, how land is valued, held or disposed of by the state as owner. These scholars suggest that the public and private values underpinning property systems should therefore be seen as symbiotic rather than antagonistic.<sup>47</sup>

It is against this setting that we contend that the failures of capitalism, deep inequalities in wealth and income, the worsening consequences of the climate crisis and other environmental concerns, among other considerations, necessitate an urgent reconceptualisation of property rights in the South African context. This reconceptualisation is driven by a need to develop a values-based property law system that gives expression to social values, prioritises basic needs, gives effect to ecological concerns, and recognises deep emotional connection and identity in property systems, rather than a system that is weighted disproportionately in favour of economic terms simply because these can more easily be used to express economic value. We propose that scholars and practitioners should urgently consider alternative ways of analysing property relations and rights and find innovative ways to give meaningful expression to an alternative set of values that have, historically, been excluded or diminished in the property law system.

This article is structured as follows. Part II is an overview of the theoretical framework for rethinking property. Here, we provide an overview of the dominant property systems as well as alternative views on property theories. Part III explores promising alternatives that offer potential opportunity for the construction of a preliminary framework that takes cognisance

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<sup>45</sup> Department of Rural Development and Land Reform *Land Audit* (2013) 6, available at [https://static.pmg.org.za/140515state\\_land\\_audit.pdf](https://static.pmg.org.za/140515state_land_audit.pdf) (The Department found that 14 per cent of the audited land in South Africa is registered state land owned by national, provincial and local spheres of government as well as parastatals. Another 4 per cent is recently surveyed state land).

<sup>46</sup> GS Alexander ‘Property’s Ends: The Publicness of Private Law Values’ (2014) 99 *Iowa Law Review* 1257, 1257–1296. See also 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(4) *Potchefstroom Electronic Law Journal* 1034, 1038.

<sup>47</sup> Alexander *ibid.*

of broader social, ecological,<sup>48</sup> emotional<sup>49</sup> and needs-based values.<sup>50</sup> Part IV discusses how a measure of land justice can be achieved through land serving a societal function. This section raises some concerns with the legislative and policy framework that governs municipal land and considers the ‘rethinking’ required to shift from an absolutist model of ownership, that elevates an economic perspective of property relations, towards a values-based approach to property relations – with a focus on public land as the property object. Finally, in part V we set out our conclusions and proposals to give practical meaning to ‘rethinking property’.

## II RETHINKING PROPERTY: A THEORETICAL FRAMEWORK

Property law has long been an underexplored field of comparative study.<sup>51</sup> One of the main reasons for this is the belief among property law scholars that property law systems differ radically from one jurisdiction to another, limiting the potential usefulness of comparison.<sup>52</sup> In some jurisdictions this has led to a rich development of property law, but it has also led to a certain level of calcification or stagnation of property law systems as these systems are not as rigorously reassessed as other areas of law often are. In particular, the central tenets of various

<sup>48</sup> By ‘ecological values’ we mean considerations that recognise the important inter-related benefits, interests or sets of relationships that people may have in connection with a property object, a natural resource or the environment. These values flow from a description of property law which deems property or natural resources to be more than economic commodities that an individual owner can solely make decisions about, but as resources that impact on a much wider range of interests beyond the owner. For example, the preservation of rainforests (for the protection of natural resources, as well as their central role in staving off the climate crisis) or the environmental impact of a mine on neighbouring communities. These values are central to the ‘web of interests theory of property’, which is discussed in detail in part IIA of this article (see the sources referenced in this part).

<sup>49</sup> By ‘emotional values’ we mean considerations which recognise the important role that a person’s relationship to property may have to that person’s identity, dignity, emotional state and ability to participate in society as a fulfilled person. A significant historical, sacred, personal or even symbolic connection to property – to the extent that the connection to property becomes an extension of identity or important for the self-development of a person or community – can create a deep emotional connection to property. These are the types of values that Margaret Jane Radin seeks to give effect to in her body of work on the personhood perspective of property, which is discussed in detail in part IIC of this article (see the references cited in this part).

<sup>50</sup> A di Robilant ‘Property: A Bundle of Sticks or a Tree?’ (2013) 66 *Vanderbilt Law Review* 869, 875.

<sup>51</sup> JH Merryman ‘Ownership and Estate’ (1974) 48 *Tulane Law Review* 916, 916 (who describes the civil law as one of ‘ownership’ and the common law as one of ‘estate’); Di Robilant (note 50 above) at 870–871. South Africa is a notable exception, with many South African property law scholars engaging in extensive comparative study. See, among others, AJ van der Walt *Property at the Margins* (2009); AJ van der Walt ‘The Modest Systemic Status of Property Rights’ (2014) 1 *Journal of Law, Property and Society* 15, 15–106; H Mostert *The Constitutional Protection and Regulation of Property and its Influence on Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002); H Mostert & L Verstaappen ‘Practical Approaches to the Numerus Clausus in Land Rights: How Legal Professionals in South African and the Netherlands Deal with Certainty and Flexibility in Property Law’ in W Barr (ed) *Modern Studies in Property Law* Vol 8 (2015) 351, 351–372; CG van der Merwe ‘The Adaptation of the Institution of Apartment Ownership to Civilian Property Law Structures in the Mixed Jurisdictions of South Africa, Sri Lanka and Louisiana’ (2008) 19(2) *Stellenbosch Law Review* 298, 298–313; CG van der Merwe ‘A Comparative Study of the Distribution of Ownership Rights in an Apartment or Condominium Schemes in Common Law, Civil Law and Mixed Law Systems’ (2002) 31 *Georgia Journal of International and Comparative Law* 101, 101–137; and S Viljoen ‘The Constitutional Protection of Tenants’ Interests: A Comparative Analysis’ (2014) *Comparative and International Law Journal of Southern Africa* 460, 460–489.

<sup>52</sup> Merryman (note 51 above) at 916; Di Robilant (note 50 above) at 870–871. As noted above, South African property law scholars are a notable exception.

property law systems have remained largely unchanged for multiple decades, and in some instances, centuries.

The lack of change in property law systems has contributed to the dominance of two primary theories of property relations that can be found in most countries that have implemented Western systems of law today.<sup>53</sup> The first theory views property as absolute *dominium* or ownership.<sup>54</sup> This was traditionally considered as the reigning theory in the South African system but has since been regarded by some as an historical overstatement.<sup>55</sup> In terms of this conceptualisation of property, ownership is an absolute right that can be enforced against any person and, at its core, is based on exclusion.<sup>56</sup> Put differently, this concept provides that an owner has absolute power to exclude others from entitlements over a property object or resource. This concept of absoluteness of property is widely attributed to William Blackstone's identification of the right to property as the 'sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe'.<sup>57</sup> This notion of property views ownership as distinctive in nature from other lesser property rights.

On the other hand, the theory favoured in the United States is the concept of the 'bundle of sticks'. This concept, which was introduced in the US by jurist Wesley Hohfeld, and

<sup>53</sup> Van der Walt (note 9 above) at 267–269; AJ van der Walt 'Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Model to Evaluate South African Land Reform Legislation' (2002) *Tydskrif van die Suid-Afrikaanse Reg* 254, 258.

<sup>54</sup> For a discussion of this conception of property in general, see JC Williams 'The Rhetoric of Property' (1998) 83 *Iowa Law Review* 277, 280–295; and Di Robilant (note 50 above) at 871. For a discussion on how the Constitution has fundamentally altered the absolutist approach to property law in the South African context, see AJ van der Walt *Property and the Constitution* (2012) 113–114, 118; AJ van der Walt *Constitutional Property Law* (3rd Ed, 2011) 171; and Pienaar (note 9 above) at 1483–1487.

<sup>55</sup> While the South African property law system is primarily based on Roman Dutch common law, it has also been influenced by English common law. L Nydam & AWG Raath 'Celebrating the Common Law Rights of Man – A Note on Blackstone's Work on Natural Law and Natural Rights' (2009) 34(2) *Journal for Juridical Science* 118, 131. On the traditional approach to the absoluteness of ownership, see DP Visser 'The "Absoluteness" of Ownership: The South African Common Law in Perspective' (1985) *Acta Juridica* 39, 39–52. For more recent reflections on how this approach to property and ownership have shifted, see Van der Walt (note 9 above) at 267–269; Van der Walt (note 54 above) at 171; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24, 2009 6 SA 391 (CC) at para 33; G Pienaar 'The Effect of the Original Acquisition of Ownership of Immovable Property on Existing Limited Real Rights' (2015) 18(5) *Potchefstroom Electronic Law Journal* 1480, 1483–1487; and Van der Walt (2014)(note 51 above)(for a description on how the constitutional property system has the potential to alter the conception of absoluteness).

<sup>56</sup> Van der Walt (2014)(note 51 above) at 23 argues that the notion that exclusion is at the heart of the property system is a fundamental element of property law for property scholars who are referred to as 'information theorists' or, as Lovett refers to them, 'information or formal exclusion theorists' such as HE Smith and TW Merrill, among others. See JA Lovett 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska Law Review* 739, 746. According to Van der Walt the information theorists' conception of property 'pivots on the right to exclude because and to the extent that exclusion consolidates a large number of powers in one property owner which sends a simple message to non-owners, namely, to keep off'. Van der Walt (2014)(note 51 above) at 23, who cites JB Baron 'The Contested Commitments to Property' (2010) 61 *Hastings Law Journal* 917, 936–940.

<sup>57</sup> Williams (note 54 above) at 281; Di Robilant (note 50 above) at 877. For an analysis of Blackstone's impact on the South African property system, see Nydam & Raath (note 55 above). Even during Blackstone's period, the English government exercised extensive regulatory powers over property – suggesting that the idea and application of absolute control is largely fictitious. This raises import questions about why absolutist notions have been so enduring. For a detailed discussion of these questions, see Williams (note 54 above).

later fleshed out by the legal realists,<sup>58</sup> characterises property as a bundle of entitlements regulating the relationships between different parties in relation to a particular property object or resource.<sup>59</sup> The metaphor supposes that the various entitlements can be retained by the owner or distributed among different persons as a bundle of sticks could be. The entitlements or sticks are malleable and capable of being changed over time. This implies that the state, courts and private actors may reshape the bundle, add or remove sticks, or alter the shape of individual sticks.<sup>60</sup> Central to the theory is the recognition that a property system is primarily about the relationships among people and only secondarily or incidentally about a property object.

Both of the reigning theories of property are based on notions of exclusion,<sup>61</sup> and individualism,<sup>62</sup> in which a single owner has the right or entitlement to make certain decisions, and are premised on the idea that these systems are the most efficient way to allocate or distribute resources or property objects.<sup>63</sup> In many respects, these notions of property are also premised on tacit assumptions about the ability of the market to distribute property or resources to the actor who would be most capable of deriving value from it.<sup>64</sup>

While these notions have existed for long periods of time, they have been criticised for being overly simplified. In recent decades there has been a growing dissatisfaction with both theories as the property law systems bolstered by them have increasingly become associated with an unsustainable and inequitable distribution of resources,<sup>65</sup> harmful environmental and ecological consequences,<sup>66</sup> and an inability to incorporate societal or social concerns into

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<sup>58</sup> W Hohfeld *Restatement of Property* (1936). See also AL Corbin ‘Taxation of Seats on the Stock Exchange’ (1922) 31 *Yale Law Journal* 29, 429 (who notes that ‘[p]roperty has ceased to describe any *res*, or object of sense, at all and has become merely a bundle of legal relations—rights, powers, privileges and immunities’); TC Grey ‘The Disintegration of Property’ in J Roland Pennock & JW Chapman (eds) *Nomos: Property* (1980) 69.

<sup>59</sup> FS Cohen ‘Dialogue on Private Property’ (1954) 9 *Rutgers Law Review* 357, 363; JW Singer *Property Law* (3rd ed 2002) xiv; Di Robilant (note 50 above) at 877–889.

<sup>60</sup> Di Robilant *ibid*.

<sup>61</sup> Van der Walt (2014)(note 51 above) at 23; Baron (note 56 above) at 936–940; S Viljoen ‘Property and “Human Flourishing”: A Reassessment in the Housing Framework’ (2019) 22 *Potchefstroom Electronic Law Journal* 1, 5 n 39.

<sup>62</sup> Van der Walt (2014)(note 51 above) at 23. For an analysis of the linkages between reigning notions of property and ‘possessive individualism’, see Williams (note 54 above). See also Viljoen (note 61 above) at 5.

<sup>63</sup> An often unexpressed assumption that underlies the reigning theories of property is that communal ownership will promote overuse, underproduction and the eventual destruction of a property object or resource. This assumption stems largely from the work of Garret Hardin and Harold Densetz (G Hardin *Tragedy of the Commons* (1968) and H Densetz *Towards a Theory of Property Rights* (1967)). For a criticism of these assumptions, see GS Alexander (note 46 above) at 1286–1287.

<sup>64</sup> Williams (note 54 above) at 300, who notes: ‘The most sophisticated proponents of strong property rights today typically articulate their defence of property on the grounds that strong property rights structure social relations in the best way possible; they not only protect the liberty and autonomy of owners, they also best serve redistributive goals by strengthening a market whose rising tide will raise all ships (unlike more direct redistributive measures, which will impede the functioning of the market, and by so doing will ultimately hurt their intended beneficiaries).’

<sup>65</sup> P Peters ‘Beyond Embeddedness: A Challenge Raised by a Comparison of the Struggles Over Land in African and Post-Socialist Countries’ in FV von Benda-Beckmann, KV von Benda-Beckmann & MG Wiber (eds) *Changing Properties of Property* (2006); JW Singer ‘The Ownership Society and Takings of Things of Property: Castles, Investments, and Just Obligations’ (2006) *Harvard Environmental Law Review* 309, 311.

<sup>66</sup> CA Arnold ‘The Redistribution of Property: Property as a Web of Interests’ (2002) 26(2) *Harvard Environmental Law Review* 281, 281–364.

decisions about property, among other concerns.<sup>67</sup> In other words, there has been broader acknowledgment that existing property law systems (which are constructed around notions of exclusion and individualism) offer a wholly disproportionate protection to the rights and interests of individual property owners when compared to the protection of wider social, environmental and humanitarian concerns. These challenges have highlighted the need for a different conception of property law that is able to give effect to a more wide-ranging set of values.<sup>68</sup>

Many of the criticisms levelled against the reigning notions of property relate to the intimate relationship between these models and conceptions of economic value.<sup>69</sup> The dominant models of property emphasise individualism (which promotes ease of regulatory control), exclusive rights, efficient use (which is closely aligned to notions of ‘the market’ as an equitable distributor of resources), and the idea that compensation should occur when a person has been deprived of a property right. The assumptions underpinning these models of property are therefore closely aligned to an economic logic in which the economic value of property is the dominant ‘language’ of reigning property systems. In essence, this means that both the ownership-based and ‘bundle of sticks’ models are easily given expression through economic values – i.e., property rights as understood by these models can be measured, attributed an economic or financial value, and traded in terms of existing markets.

The critiques of existing property law systems have, in recent decades, given rise to a proliferation of property law theories that have sought to give effect to a more nuanced and varied set of values in the context of property relations.<sup>70</sup> These alternative views have been developed in a variety of different fields, including environmental, humanist, legal and developmental perspectives, and describe property as a ‘web of interconnected interests’, as a continuum of land rights, as an essential component of personhood, and as nested or layered communal property systems that must prioritise social needs. These alternative views are discussed in detail below.

<sup>67</sup> For some of the key criticisms of these reigning approaches to property law, see GS Alexander ‘The Social-Obligation Norm in American Property Law’ (2009) 94 *Cornell Law Review* 745, 745–819; MJ Radin *Reinterpreting Property* (1998); JW Singer & JM Beerman ‘The Social Origins of Property’ (1993) 6 *Canadian Journal of Law and Jurisprudence* 217, 219–220; JW Singer ‘No Right to Exclude: Public Accommodations and Private Property’ (1996) 90 *Northwestern University Law Review* 1283, 1477; JW Singer ‘Property and Social Relations: From Title to Entitlement’ in GE van Maaren & AJ van der Walt (eds) *Property on the Threshold of the 21st Century* (1995); JW Singer *Entitlement: The Paradoxes of Property* (2000); Williams (note 54 above); and Di Robilant (note 50 above) at 875.

<sup>68</sup> This is also evident in the social-obligation or progressive property theorists’ approach to the property system, which recognises that the property system should ‘reflect their concerns with human flourishing; respect for human dignity; virtue; freedom; and democratic governance’ (Van der Walt (2014)(note 51 above) at 21, where he refers to Baron (note 56 above) at 927–932). See also Alexander (note 46 above) at 1257–1296; EM Peñalver ‘Land Virtues’ (2009) 94 *Cornell Law Review* 821–888; J Purdy ‘A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debate’ (2005) 72 *University of Chicago Law Review* 1237–1298; and JW Singer ‘Democratic Estates: Property Law in a Free and Democratic Society’ (2009) 94 *Cornell Law Review* 1009–1062. For a description of the multifaceted private and public values inherent in the American property law system, see Alexander (note 46 above).

<sup>69</sup> Both Williams and Alexander have shown how the absolutist and bundle of sticks approaches to property are closely tied with notions of market liberalism at the core of the law-and-economics approach to property which Locke’s writing has been interpreted to support. Williams (note 54 above); Alexander (note 46 above).

<sup>70</sup> For a broad-based discussion of some of these alternative theories, see Williams (note 54 above) at 295–308.



## A Property as a ‘web of interconnected interests’

The notion of property as a web of interconnected interests has its origins in the environmental and ecological perspective of property that is motivated by concerns over the effects of existing property law systems on the environment, ecology and society at large.<sup>71</sup> This perspective rejects dominant notions of property law for an ‘over-emphasis on the economic and exploitative nature of property at the expense of obligations and responsibilities to other people and the environment’.<sup>72</sup> The critique of existing property systems, and particularly the ‘bundle of sticks’ approach, is premised on a failure of these systems to recognise the importance of the person-thing or person-natural resource relationship.<sup>73</sup>

For proponents of this perspective, property law systems should give effect to ‘the interconnectedness between people, between people and their physical environment, and between objects [and resources] in the physical environment’.<sup>74</sup> While the reigning notions of property recognise (to differing extents) that property involves human relationships vis-a-vis a property object or resource, the web approach to property goes further by giving recognition to the connections ‘between person-person relationships and person-thing relationships’.<sup>75</sup> The connections between these parties and the object, as well as the connections between the parties to each other, are represented by a ‘number of interwoven strands representing a concept in human-land relations’.<sup>76</sup> Arnold describes the metaphor of the web of property as follows:

[A] web of property interests in land leased to a tenant would contemplate not just the landlord-tenant relationship nor just the owner-land relationship, but the ways that the owner is connected to the land, the tenant, the government, neighbours, utility easement holders and so on.<sup>77</sup>

The web of interests approach acknowledges that different types of property are often treated differently in the law, and therefore, there cannot be a one-size-fits-all approach to property. It is also based on the belief that the distinctiveness or unique characteristics of the property object or natural resource play a central role in determining how the legal relationships interact with that property.<sup>78</sup> Importantly, this approach also acknowledges that a property object or resource lies at the heart of the web and may be subject to multiple overlapping sets of rights held by different individuals, groups or social entities. This feature of the web approach is informed by a ‘nature-orientated’ approach to property, in terms of which the particular features of land and natural resources should define the nature and scope of the property rights over it.<sup>79</sup> To this end, the property as a web of interconnected interests approach views

<sup>71</sup> For a discussion of property as a web of interests, see CA Arnold (note 66 above) at 281–364; R Meinzen-Dick & E Mwangi ‘Cutting the Web of Interests: Pitfalls of Formalizing Property Rights’ (2009) 26(1) *Land Use Policy* 36–43; M Barry & C Augustinus ‘Property Metaphors, Property Theory and Communicating the Continuum of Land Rights’ presented at the *World Bank Conference on Land and Poverty*, Washington DC USA (23–27 March 2015) 13.

<sup>72</sup> Barry & Augustinus (note 71 above) at 11. See also Arnold (note 66 above) at 318.

<sup>73</sup> This does not mean that proponents of the web metaphor support an ownership-based model of property law; they unequivocally do not. Their position is that the ‘bundle of sticks’ metaphor has rendered objects or natural resources invisible – and by extension our interdependence on the natural world. For example, see Arnold (note 66 above) at 331.

<sup>74</sup> Barry & Augustinus (note 71 above) at 11.

<sup>75</sup> Arnold (note 66 above) at 332–333.

<sup>76</sup> Barry & Augustinus (note 71 above) at 11; Arnold (note 66 above) at 333–334.

<sup>77</sup> Arnold (note 66 above) at 334.

<sup>78</sup> *Ibid* at 281 and 331–332.

<sup>79</sup> *Ibid* at 318.

land and resources as more than economic commodities that an individual owner can solely make decisions about,<sup>80</sup> but rather as resources that impact on a much wider range of interests beyond the owner.

## B Property as a continuum of land rights

The continuum of land rights has been described as a theory, a metaphor, an advocacy tool or an ‘aspirational tool’.<sup>81</sup> In terms of this approach, property – and land rights in particular – has been reconceptualised as a continuum of land rights by development and tenure professionals who have advocated for alternatives to private titling of property, which they believe entrenches existing assumptions about property and over-prioritises economic value.<sup>82</sup> The continuum approach tries to break free from the binaries that are usually attached to land tenure and property. Rather than viewing land rights as ‘formal/informal, legal/extra-legal, secure/insecure, *de facto/de jure*’, the continuum approach recognises that property includes ‘a wide and complex spectrum of appropriate, legitimate tenure arrangements [that] exist between these extremities’.<sup>83</sup> In other words,

[t]he rights along the continuum may be documented or undocumented, formal as well as informal, for individuals and groups, including pastoralists and residents of slums and other settlements that may be legal or not legal. The rights do not lie along a single line and they may overlap.<sup>84</sup>

The premise of the continuum is that land rights fall along a continuum ranging from informal land rights (that are generally weaker) to formal land rights (that are generally stronger). There are various dimensions that contribute to the strength of the land rights people hold, including economic tenure (based on a person’s ability to pay for their tenure rights, for example paying rental in terms of a lease agreement or making mortgage payments), legal tenure (based on a legal recognition of tenure, for example a title deed), and social tenure (based on notions of acceptance, recognition and protection that flow from social relationships with families, neighbours and communities). The ultimate tenure security that a person has is dependent on the interaction between these different forms of economic, legal and social recognition.

The continuum of land rights approach to property therefore also recognises that property relations are often more complex than what the existing legal framework provides for and seeks to give some form of recognition to the realities under which people live, even if this means giving effect to informal and potentially even extra-legal forms of tenure.

## C Property as personhood

Various scholars have drawn on feminist legal theory and Native American tenure systems to propose the personhood theory of property – in terms of which human-object relationships are ‘socially mediated’ and property relations are ‘human-centric’.<sup>85</sup> In a series of articles, Margaret

<sup>80</sup> Ibid at 333–334.

<sup>81</sup> Barry & Augustinus (note 71 above).

<sup>82</sup> Ibid at 13.

<sup>83</sup> See the description of the land rights continuum on the website of the Global Land Tool Network (GLTN), an international network of development professionals facilitated by UN Habitat. GLTN *Access to Land and Tenure Security* (2021), available at <https://glt.n.net/access-to-land-and-tenure-security/#>; and Barry & Augustinus *ibid*.

<sup>84</sup> GLTN *ibid*; Barry & Augustinus *ibid* at 11.

<sup>85</sup> Barry & Augustinus (note 71 above) at 12–13. The personhood theory of property has been largely developed by the influential scholar Margaret Jane Radin. MJ Radin ‘Property and Personhood’ (1982) 34 *Stanford Law*

Jane Radin offers a sustained analysis of the personhood perspective of property.<sup>86</sup> In terms of the personhood approach, a person's being, development, fulfilment and ability to flourish requires one to have control over certain things in one's external environment.<sup>87</sup> As Radin notes, 'self-constitution takes place in relation to an environment, both of things and people'.<sup>88</sup>

The personhood approach proposes that people's relationships to property objects fall somewhere along a continuum.<sup>89</sup> On the one end of the continuum, property objects may be 'personal property', which implies that these objects are closely tied up with, or even constitutive of, the identity of a person either as an individual or as a group, or to which a person has deep emotional connections (for example, a wedding ring).<sup>90</sup> Personal property is property to which a person has an important connection that 'contributes to the holder's self-development, [and] enables her to participate in society as a fulfilled person'.<sup>91</sup> Radin argues that the strength of a person's relationship to a property object can be measured by the degree of pain they would suffer if the property object were lost.<sup>92</sup> On the other end of the continuum, property objects may be fungible, these are objects which can be easily replaced and that hold little or no emotional value to the people who possess them.<sup>93</sup> A particular object may fall on different points of the fungible-constitutive continuum at different points in time, and depending on who possesses it (for example, a ring could be a fungible object or commodity to a jeweller, but could constitute personal property intricately tied to the personhood of the owner).<sup>94</sup>

At the heart of Radin's theory is the notion that the specific connection that a person has to a property object is central to determining how much protection to afford the person's interest in the property object. Radin believes that personal property deserves a higher degree of protection than fungible property, because the depth and constitutive nature of the connection to personal property is more important from a moral perspective.<sup>95</sup> In making these claims,

*Review 957, 957–1001; MJ Radin 'Residential Rent Control' (1986) 15(4) *Philosophy and Public Affairs* 350, 350–380; and MJ Radin (note 67 above).*

<sup>86</sup> Radin (1982)(note 85 above); Radin (note 67 above) at 7–9; and Williams (note 54 above) at 303. For a critique of Radin's personhood approach to property, see SJ Schnably 'Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood' (1993) *Stanford Law Review* 347, 347–407; and S Krecizer-Levy 'Property without Personhood' (2017) 47(3) *Seton Hall Law Review* 771, 771–807.

<sup>87</sup> Radin's approach to property is therefore closely aligned with Hegel's belief that the ultimate end of property is to ensure human flourishing or living a life that is as fulfilling as possible. Her approach to property is also reminiscent of the capabilities approach developed by Amartya Sen and Martha Nussbaum, in terms of which a person's ability to achieve fulfilment is seen as dependent on having access to certain core functions. A Sen *Development as Freedom* (1999); MC Nussbaum *Women and Human Development: The Capabilities Approach* (2000). For a discussion of the capabilities approach in a South African context, see S van der Berg 'The Need for a Capabilities-based Standard of Review for the Adjudication of State Resource Allocation Decisions' (2015) 31 *South African Journal on Human Rights* 330.

<sup>88</sup> Radin (note 67 above) at 138; Van der Walt & Viljoen (note 46 above) at 1056.

<sup>89</sup> Radin (1986)(note 85 above) at 362–363; Barry & Augustinus (note 71 above) at 12; Van der Walt & Viljoen (note 46 above) at 1056 n 67.

<sup>90</sup> Radin (1982)(note 85 above) at 985–986; Williams (note 54 above) at 300–301.

<sup>91</sup> Van der Walt & Viljoen (note 46 above) at 1056.

<sup>92</sup> Radin (1982)(note 85 above) at 959; Van der Walt & Viljoen (note 46 above) at 1056.

<sup>93</sup> Radin (1982)(note 85 above) at 985–986; Williams (note 54 above) at 300–301.

<sup>94</sup> Radin (1982)(note 85 above) at 985–986.

<sup>95</sup> Radin *ibid* contends: 'I am interested in developing a non-utilitarian, moral theory which would provide an alternative explanation for the observed hierarchy of protection ... It should be possible to give moral reasons why some claims are or should be subject to greater protection ... than others.' See also Van der Walt & Viljoen (note 46 above) at 1056.

Radin relies on the vision of human flourishing by drawing on particular values that she argues are implicitly shared by our society.<sup>96</sup>

The personhood approach therefore offers a useful paradigm for comparing and justifying decisions when property interests are in conflict. If a dispute arises where one person has a deep emotional connection to a property object – so that the object is an extension of their identity – while another person only has a fungible or commercial interest in the object, the relative importance of the personhood interest may, in certain circumstances, create ‘a priority claim over curtailment of merely fungible interests of others’.<sup>97</sup> For example, Radin argues that this approach provides a rationale that would, in some circumstances, allow a tenant or unlawful occupier’s non-commercial personal use interest in their home (a personhood interest) to trump their landlord’s commercial interest in the return on the property through collecting rent (a fungible interest).<sup>98</sup>

Radin’s personhood approach to property also provides for the possibility that the ‘personhood dichotomy in property’ can be viewed as ‘the source of a distributive mandate’.<sup>99</sup> In essence, this argument asserts that states ‘should make it possible for all citizens to have whatever property is necessary for personhood’ and ‘rearrange property rights so that the fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property’.<sup>100</sup>

The personhood approach to property relations therefore acknowledges that a person’s relationship to property may have an important role in a person’s identity, dignity, emotional state and ability to participate in society as a fulfilled person, thereby recognising that property

<sup>96</sup> For example, Radin (1982)(note 85 above) at 987 suggests that our society currently values a home (‘There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic’). See also Van der Walt & Viljoen (note 46 above) at 1056. Schnably (note 87 above) critiques this aspect of Radin’s conception of human flourishing founded on shared societal values, on the basis that no such consensus exists – and uses the example of a home to illustrate his point. For Schnably, there is no shared normative value attached to a home as a home can mean different things to different people. As Schnably states, the home can also be ‘a place of domination and resistance, conflict and discord, as [often as it can be] the centre of a “healthy life”’ (Schnably (note 86 above) at 367).

<sup>97</sup> Radin (1986)(note 85 above) at 365; Van der Walt & Viljoen (note 46 above) at 1056.

<sup>98</sup> Radin *ibid*; Van der Walt & Viljoen *ibid*. The personhood theory of property also offers a potentially useful justification for some of the jurisprudence that the Constitutional Court has developed in its consideration of the balancing of landowners’ right to property and unlawful occupiers’ right of access to adequate housing. Some cases where a personhood view of property might be visible include *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC)(‘*Modderklip*’); *PE Municipality* (note 14 above); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC)(‘*Blue Moonlight*’). A full investigation of the usefulness of the personhood theory as a means of understanding this jurisprudence falls outside the scope of this article.

<sup>99</sup> Radin (1982)(note 85 above) at 990. See also Williams (note 54 above) at 300–304, for a brief analysis of Radin’s distributive arguments.

<sup>100</sup> Radin (1982)(note 85 above) at 990; Williams (note 54 above) at 301. Radin’s conception of the distributive mandate of the personhood approach to property is closely aligned with the notions of the redistributive importance of property articulated by the social-obligation or progressive property law scholars (although the basis for the distributive mandate in their case lies in social obligation norms, which suggest that redistribution may be necessary for the sake of both the property holder and others). See the discussion of social obligation theory and the social function of property in part IV of this article. See also Alexander (note 67 above) at 768 (‘Hence, human flourishing requires distributive justice, the ultimate objective of which is to give people what they need in order to develop the capabilities necessary for living the well-lived life’); Singer (note 67 above); and Peñalver (note 68 above). In the South African context, see Van der Walt (2014)(note 51 above) at 41.

may have deep emotional value. The personhood perspective of property also recognises that land and notions of a 'home' could, in circumstances where a person or community have established a deep personal or symbolic connection with the land as a component of their personal and collective identity and the dispossession of land causes human suffering beyond the material or economic value that the land holds,<sup>101</sup> deserve additional protection. Conversely, in circumstances where a person has not established a personal connection with land or where land has purely commercial value, such fungible land may be redistributed to allow others to establish their own personal connection with it.<sup>102</sup> In the South African context, where access to land, tenure security and housing was historically dictated by colonialism and apartheid and remains influenced by deeply entrenched inequality, land is understandably deeply emotive and intimately tied with many people's human dignity.<sup>103</sup>

#### D Communal property as a 'nested' or 'layered' system that prioritises need

In recent years, scholars have turned to indigenous, pre-colonial African communal property systems for guidance on how to avoid the shortcomings of the Western conceptions of property relations.<sup>104</sup> Okoth-Ogendo describes communal property practices in markedly different terms to historical assumptions about entirely collective ownership. He rejects the notion that communal tenure is necessarily 'communal' in nature – with 'collective' ownership vesting in a whole group and decisions made by the community as a whole. Instead he argues that social relations create 'reciprocal rights and obligations that bind together, and vest power in community members over land'.<sup>105</sup> In other words, in order to determine who is granted access to, or control over land, one has to consider the rights and obligations that emerge from the relationships between people.<sup>106</sup> This approach to communal land tenure is based on the fact that land relations in terms of customary law are relational – that is, they are about the relationships between people as they relate to a piece of land as opposed to the powers or entitlements over land of individual owners.

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<sup>101</sup> Radin (1982)(note 86 above) at 959; Barry & Augustinus (note 71 above) at 12–13.

<sup>102</sup> The degree or protection, or need for redistribution, would depend on the type of property and the way in which it is used or valued by the holder. In the German context, see R Lubens 'The Social Obligation of Property Ownership: A Comparison of German and U.S. Law' (2007) 24 *Arizona Journal of International and Comparative Law* 389, 389–449.

<sup>103</sup> C Walker *Land Marked, Land Claims and Restitution* (2008), who notes that 'land is emotional'. See also Barry & Augustinus (note 71 above) at 13.

<sup>104</sup> For some examples of this scholarship, see C Lund 'Negotiating Property Institutions: On the Symbiosis of Property and Authority in Africa' in K Juul & C Lund (eds) *Negotiating Property in Africa* (2002) 11, 11–43; P Peters 'The Limits of Negotiability: Security, Equity and Class Formation in Africa's Land System' in K Juul & C Lund (eds) *Negotiating Property in Africa* (2002) 45, 45–66; and A Claassens & D Gilfillan 'The Kalkfontein Land Purchases: Eighty Years On and Still Struggling for Ownership' in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 295, 295–314.

<sup>105</sup> HWO Okoth-Ogendo 'The Nature of Land Rights under Indigenous Law in Africa' in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008) 95, 129. See also C Cross 'An Alternate Legality: The Property Rights Question in Relation to South African Land Reform' (1992) 8 *South African Journal on Human Rights* 305, 314–315.

<sup>106</sup> WJ du Plessis 'African Indigenous Land Rights in a Private Ownership Paradigm' (2011) 14(7) *Potchefstroom Electronic Law Journal* 45, 54.



Cousins articulates a similar notion of communal tenure as inclusive and ‘socially embedded’.<sup>107</sup> According to him, ‘land tenure was [and is] both “communal” and “individual”’ and can be seen as a ‘system of complementary interests held simultaneously’ by different people.<sup>108</sup> In other words, communal tenure systems are based on an idea that individuals and families hold relative rights to the same residential and agricultural land. These relative rights may even overlap.<sup>109</sup> These individuals and families must negotiate access to common resources such as land for grazing, forests or rivers. Communal property systems are therefore ‘nested’ or ‘layered’ with different people or groups holding varying degrees of rights and interests over land and resources.<sup>110</sup> For this reason, communal tenure practices require decision-making about land to take place at various levels and with various people or groups, including individuals, households, kinship networks and wider communities.

Mnisi-Weeks and Claassens argue that communal property systems are based on ‘social cohesion’ and ‘mutual support’ in terms of which relational rights are negotiated to ensure that the ‘basic needs’ of households in the community are met.<sup>111</sup> They argue that these ‘vernacular values that prioritise need could be instruments for realising socio-economic rights’.<sup>112</sup>

## E Dissatisfaction with the dominant notions of property

Although the abovementioned theories on property vary widely, have their origins in distinct fields and are informed by varied societal concerns, when viewed together they advance a singular idea. The current constructions of property are limited due to property’s overemphasis of a single set of values – values that are largely economic, exclusionary and exploitative. Each of these theories aims to realise a more social conception of property law by arguing for current property law systems to be radically restructured to make room for a more varied set of values, including social, ecological, emotional and needs-based values. In short, these theories advocate that property should serve a social function.<sup>113</sup>

Critically, these alternative approaches to property are premised on the assumption that property rights are not only externally limited through state regulation or the interests of others, but also internally limited by their social function.<sup>114</sup> In terms of these approaches, property owners cannot simply do with their property as they please. Instead, property rights are inextricably linked with social obligations that rights holders owe to society and may even require a measure of self-sacrifice.<sup>115</sup>

A key challenge to these theories is that the alternative value set – societal, ecological, emotional or needs-based values – are incorporeal and therefore harder to be demonstrated

<sup>107</sup> B Cousins ‘Characterising “Communal” Tenure’ in Claassens & Cousins (note 105 above) 109, 110.

<sup>108</sup> Ibid at 110–111.

<sup>109</sup> Okoth-Ogendo (note 105 above) at 129.

<sup>110</sup> Cousins (note 107 above) at 125; T Weinberg *The Contested Status of Communal Land Tenure in South Africa* (2015) Institute for Poverty, Land and Agrarian Studies (PLAAS) Rural Status Report 8.

<sup>111</sup> S Mnisi-Weeks & A Claassens ‘Tensions between Vernacular Values that Prioritise Needs and State Versions of Customary Law that Contradict Them: “We Love These Fields that Feed Us, but Not at the Expense of a Person”’ (2011) 22(3) *Stellenbosch Law Review* 823, 823–824.

<sup>112</sup> Ibid at 824.

<sup>113</sup> See the full discussion of property as social function below in part III.

<sup>114</sup> Alexander (note 46 above) at 160; Viljoen (note 61 above) at 4 and 7.

<sup>115</sup> Singer (2000)(note 67 above); Alexander (note 46 above) 748; Williams (note 54 above) 296–300; and Viljoen (note 61 above) at 4, 7.

than existing property interests (which, as argued above, generally hold clearly articulated economic value). For example, one might argue that it is difficult to place a measurable value on the improvement in the quality of life of a person who has been able to gain access to land that is more conveniently located for the purposes of housing or employment opportunities, or the ongoing emotional turmoil, harm and loss suffered as a result of the legacy of apartheid forced removals and displacement.

While scholars have therefore advocated for a more nuanced values-based approach to property and articulated a set of values that could form the backbone of such a values-based approach, conceptions of property have remained largely unchanged. In the South African context, the most significant developments in constitutional property law during the post-apartheid period seem to have been less about the inherent nature of property and more about the negotiation or balancing of constitutional property rights with various conflicting rights<sup>116</sup> in particular, through a series of cases aimed at interpreting and giving effect to the right of access to adequate housing,<sup>117</sup> as well as the rights to life, human dignity,<sup>118</sup> equality, freedom of assembly<sup>119</sup> and freedom of movement.<sup>120</sup> While each of these cases is intrinsically about property,<sup>121</sup> property law scholars and litigators have chosen to view these cases primarily as a negotiation or balancing of competing rights, rather than challenging deep-seated tensions in South African conceptions of the property system.<sup>122</sup> Property law scholars argue that these cases point to a more modest role or status for property in the broader constitutional scheme – and that the work of challenging the property system can, and should, be done primarily with reference to other non-property rights.<sup>123</sup> Put differently, property rights have a more limited

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<sup>116</sup> For a detailed discussion of these developments and the potential implications that they have for the status of property rights in the broader constitutional scheme, see Van der Walt (2014)(note 51 above); and Van der Walt & Viljoen (note 46 above).

<sup>117</sup> For case law illustrative of this approach, see *Modderklip* (note 98 above); *PE Municipality* (note 14 above); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 8, 2008 (3) 208 (CC)(‘*Olivia Road*’); and *Blue Moonlight* (note 98 above). See also Van der Walt (2014)(note 51 above).

<sup>118</sup> For case law illustrative of this approach, see *Victoria & Alfred Waterfront (Pty) Ltd & Another v Police Commissioner of the Western Cape & Others* [2003] ZAWCHC 75, [2004] 1 All SA 579 (C)(‘*Victoria & Alfred Waterfront*’).

<sup>119</sup> For case law illustrative of this approach, see *Growthpoint Properties Ltd v SA Commercial Catering & Allied Workers Union* [2010] ZAKZDHC 38, 2011 (1) BCLR 81 (KZD). See also Van der Walt (2014)(note 51 above) at 76–83.

<sup>120</sup> *Victoria & Alfred Waterfront* (note 118 above). See also Van der Walt (2014)(note 51 above) at 84–88.

<sup>121</sup> Scholars like Van der Walt and Viljoen at points argue that these cases are not so much about property rights per se, but rather about defining the space where adjudication should be regulated by property rights. See Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above). On the other hand, some scholars believe that these cases have fundamentally altered property rights. See, for example, S Wilson ‘Breaking the Tie: Evictions, Homelessness and the New Normality’ (2009) 126(2) *South African Law Journal* 270, 270–290.

<sup>122</sup> Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above).

<sup>123</sup> Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above). Van der Walt compellingly argues that considering property disputes of this nature primarily from the perspective of property is not necessary from a normative perspective and has the potential to further strengthen the centrality of property rights. Van der Walt (2014)(note 51 above) at 42 (‘there is no compelling reason why non-property legal objectives such as life, liberty, human dignity or equality have to be pursued through the protection of property rights and at least some ground for believing that the pursuit of property objectives might actually frustrate the pursuit of those personhood- or human-flourishing securing objectives’). Similarly, he argues elsewhere that presumptive power in property may inadvertently uphold absolutist or ownership paradigm of property. See Van der Walt (2009) (note 51 above) at 50–51.

role to play in these kinds of disputes (potentially even to play a more traditional protective role for property).<sup>124</sup> While this approach also presents a potentially powerful challenge to reigning notions of property that are based on absolutism and exclusion,<sup>125</sup> it does not adequately deal with the property system itself and the societal values that the dominant theories of property continue to entrench because the negotiation or balancing approach depends on a countervailing right that can be leveraged against property interests in order to expose the social or political values that underlie the property system. Those who are unable to establish countervailing rights are therefore precluded from challenging the property system. In this respect, our arguments are like those of Moon, who argues that these kinds of property disputes should be seen against the backdrop of the state-created system of property and the distribution of property inherent in it.<sup>126</sup> As he writes (in relation to the Canadian case of *Committee for the Commonwealth of Canada v Canada*):<sup>127</sup>

This approach, of treating the distribution of property rights as a potential constitutional wrong, shifts the focus of judicial review from discrete state acts, and even discrete private acts, to the state created system of property rights. The injustice the courts are striking at when they grant an individual (or the general public) access to privately owned property is an imbalance in communicative power, an unfair distribution of communicative resources, and the consequent restriction on the individual's opportunity to communicate ... The wrong at issue is not so much the exclusion of communicative access by the private owner, but rather the system of property rights which makes the exclusion of access from a particular property so significant. The wrong is systemic rather than the discrete act of a particular actor who invades or restricts an individual's freedom of expression.<sup>128</sup>

In our opinion, the reliance on countervailing rights to challenge the values that underpin the property system is too focused on the 'discrete act' rather than the 'systemic wrong' and has, to a degree, insulated property rights from more intensive scrutiny and protected the property system from more vigorous interrogation in relation to the societal values that the system protects and entrenches. This is particularly the case in the context of South Africa's colonial and apartheid history of dispossession, which has effectively stripped a significant segment of the population of potential countervailing rights that could be used to challenge the property system – at least in so far as access, use or occupation of land is concerned.

Former Deputy Chief Justice Moseneke suggested a similar argument in late 2014, when he observed:

One would have expected that a matter so pressing as land use, occupation or ownership would pre-dominate the list of disputes in the post-conflict contestation... It may be that the property and restitution provisions of section 25 of the Constitution have been hopelessly underworked.<sup>129</sup>

Therefore, because the majority of contestations about property law have not grappled with how South Africa's property law system – with a focus on land – should be re-imagined under

<sup>124</sup> Van der Walt (2014)(note 51 above); Van der Walt & Viljoen (note 46 above).

<sup>125</sup> A more limited role or status for property in the constitutional scheme challenges many of the information theorists' beliefs that all rights flow from the right to property.

<sup>126</sup> R Moon 'Access to Public and Private Property under Freedom of Expression' (1988) 20 *Ottawa Law Review* 339, 339–375. See also Van der Walt (2014)(note 51 above).

<sup>127</sup> *Committee for Commonwealth of Canada v Canada* [1985] 2 FC 3, 25 DLR (4th) 460 (TD)(Federal Court, Trial Division); *Committee for the Commonwealth of Canada v Canada* [1987] 2 PC 68, 36 DLR (4th) 501 (AD) (Federal Court of Appeal).

<sup>128</sup> Moon (note 126 above) at 367.

<sup>129</sup> Moseneke (note 37 above).

the democratic dispensation, we advance arguments that the principles underlying the property law system ought to shift and align with the reality of South Africa's historical, constitutional and political context.<sup>130</sup> The slow development of this aspect of the constitutional property order is especially concerning given the central role that the dispossession and denial of land and property rights played in the mechanics and enforcement of the apartheid project.

The discussion above has emphasised the need to rethink property by considering alternative ways of analysing property relations and rights and exploring innovative ways to give meaningful expression to an alternative set of values that has, historically, been excluded or diminished in property law systems. To this end, we believe that an approach which relies on countervailing rights to challenge the property related considerations fails to consider the system, the societal values that are upheld by the system, and the nature and extent of the shift that is required. In what follows, we discuss the possible avenues for a reconceptualisation that would give effect to these concerns.

### III RETHINKING PROPERTY: POSSIBLE AVENUES

Despite the proliferation of potential alternative property models that have been put forward by scholars, no definitive alternative has yet emerged that offers a coherent framework for the incorporation of a values-based approach to property that takes cognisance of broader social, ecological and emotional values.<sup>131</sup> However, there are some promising alternatives that offer an opportunity for the construction of a preliminary framework but require detailed exploration.

#### A Social function of property: property as a tree

A promising alternative that offers a rigorous framework to incorporate a pluralist value system is the social function of property theory.<sup>132</sup> This theory stems largely from French jurist Léon Duguit who popularised the notion in Buenos Aires in 1911.<sup>133</sup> Since then, the concept has been imported, to varying degrees, into legal systems in Latin America, including Mexico, Colombia, Brazil and Chile, and has also been influential in the development of the social-obligation theory of property (or progressive property theory) in the United States.<sup>134</sup>

The central tenet of this model is that property is not a right but rather a social function.<sup>135</sup> This means that owners are under a social obligation to put their property into the service of the community or put it into production.<sup>136</sup> For Duguit, this means that the state should only

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<sup>130</sup> We do not suggest that judges and property scholars have not been careful to locate property disputes within their appropriate historical and systemic contexts. There are ample decisions where this is the case, most notably *PE Municipality* (note 14 above), *Blue Moonlight* (note 98 above), *Modderklip* (note 98 above), and *Victoria & Albert Waterfront* (note 118 above). See Van der Walt & Viljoen (note 46 above) at 1059–1072 (who consider, in-depth, how a contextual reading in the *PE Municipality* (note 14 above) case shifted the proper space for property and housing rights).

<sup>131</sup> Di Robilant (note 50 above) at 875.

<sup>132</sup> On the social function of property see L Duguit *Las Transformaciones del Derecho Publico y Privado* (1975); SR Foster & D Bonilla 'The Social Function of Property: A Comparative Perspective' (2014) 80 *Fordham Law Review* 1003, 1003–1015; MC Mirow 'The Social-Obligation Norm in Property: Duguit, Hayem and Others' (2010) 22 *Florida Journal of International Law* 191, 201; Alexander (note 67 above) at 745–819; Viljoen (note 61 above).

<sup>133</sup> Foster & Bonilla (note 132 above) at 1004; Viljoen (note 61 above) at 4.

<sup>134</sup> Foster & Bonilla *ibid*.

<sup>135</sup> Duguit (note 132 above) at 236.

<sup>136</sup> *Ibid* at 240; Alexander (note 46 above) at 1270; Viljoen (note 61 above) at 5.

protect property when it fulfils its social functions. When a property owner acts in a manner that is inconsistent with the social functions of the property, the state can intervene to encourage or punish non-cooperative owners using mechanisms like taxation or expropriation.<sup>137</sup> This suggests that the state has both negative and positive obligations in relation to property.<sup>138</sup>

The notion of the social function flows from the recognition that property relations are essentially entrenched in greater social structures.<sup>139</sup> From this perspective, private property is firmly located in the public. This has led property law theorist, Alexander, to draw correlations and connections between the values associated with private property (including individual security, personal security and self-determination) and fundamental public values (including equality, inclusiveness, community, participation and self-constitution) to show that these values are not at odds with each other but instead, are often mutually reinforcing.<sup>140</sup>

According to some proponents of the social function of property, the theory also implies a version of distributive justice as it is premised on each person requiring access to certain forms of property to enable them to live a life with purpose.<sup>141</sup> For instance, Alexander notes that ‘the social obligation norm ... can be the basis for social transformation’.<sup>142</sup> Alexander centres the notion of ‘human flourishing’ and argues that in order to achieve this, property owners must:

provide from their surplus, and in ways that are appropriate to them as property owners, to the communities to which they belong ... those benefits that the community reasonably regards as necessary for development of the capabilities essential to human flourishing.<sup>143</sup>

The social function of property theory is closely aligned with the tree concept of property proposed by French and Italian jurists before the Second World War.<sup>144</sup> While there are no express historical linkages between Diguít and these jurists, their theoretical underpinnings share many similarities. This concept of the tree has been described as follows:

The tree concept views property as a tree with a trunk—representing the core entitlement that distinguishes property from other rights—and many branches—representing many resource-specific bundles of entitlements. The trunk of the tree is the owner’s entitlement to control the use of a resource, mindful of property’s ‘social function’. For the theorists of the tree model, the social function of property evokes a plurality of values: equitable distribution of resources, participatory management of resources, and productive efficiency. The branches of the property tree are the multiple resource-specific property regimes present in modern legal systems: family property, agricultural property, affordable-housing property, industrial property, etc.<sup>145</sup>

<sup>137</sup> Foster & Bonilla (note 132 above) at 1005; Viljoen *ibid* at 5.

<sup>138</sup> Foster & Bonilla *ibid* at 1005. This approach is therefore tangentially linked to notions of the right to property as an economic, social and cultural right in international law. See, for example, C Krause ‘The Right to Property’ in A Eide, C Krause & A Rosas (eds) *Economic, Social and Cultural Rights* (1995) 143, 143–158.

<sup>139</sup> Viljoen (note 61 above) at 7.

<sup>140</sup> Alexander (note 46 above). See also Viljoen (note 61 above) at 7.

<sup>141</sup> Many of the United States-based scholars who have relied on Diguít’s idea of the social function of property, ascribe to the Aristotelian notion that the purpose of property is to enable human flourishing. Alexander (note 46 above); Alexander (note 67 above); Singer (2000)(note 67 above).

<sup>142</sup> Alexander (note 67 above) at 782.

<sup>143</sup> GS Alexander ‘Ownership and Obligations: The Human Flourishing Theory of Property’ (2013) *Hong Kong Law Journal* 451, 458–459. See also Alexander (note 67 above) at 782 (Who refers explicitly to the South African Constitution and *Modderklip* (note 98 above)).

<sup>144</sup> Di Robilant (note 50 above).

<sup>145</sup> *Ibid* at 872.



The tree concept was developed by French and Italian jurists to challenge the rise of fascism in Italy by incorporating ideas of collectivism into property law, while simultaneously offering protection to individual owners' autonomous control of certain property entitlements.<sup>146</sup>

The challenge for the tree theorists was to find a 'new equilibrium between the individual and the social element of property'.<sup>147</sup> Their proposed solution: to make the social function central to the property model by incorporating the social elements of property not only into the branches, but also into the trunk of the tree. Owners are thus required to exercise their use-control entitlements while remaining mindful of the property's social function. For tree theorists, the recognition and incorporation of the social elements of property were not in conflict with existing concepts of property. As Barassi notes:

At no point in history, not even in Roman law, was property absolute. The idea of a social interest, parallel to the interest of the individual owner, has always been there.<sup>148</sup>

The appeal of the tree model of property lies in its delicate fusion of an owner's control and use of a resource and the social function of property, coupled with the recognition of a plurality of values in property relations, including equitable distribution of resources, participation management of resources and productive efficiency of resources. Proponents of the tree concept's recognition of a multiplicity of social values (while still clearly articulating what these values were) was an important break from previous attempts at incorporating social values into property relation, which were hampered by being 'hopelessly evasive about the meaning and content of the social element of property'.<sup>149</sup>

In this respect, the tree concept offers a potential blueprint for understanding the potential advantages and pitfalls for a values-based conception of property law.<sup>150</sup> In particular, it suggests that any notion of a values-based property system should be founded on clearly articulated values.

## B Harnessing the Constitution

The Constitution is unambiguously 'transformative'<sup>151</sup> and offers enormous potential to give expression to a values-based approach to property. It aims to give effect to the large-scale

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<sup>146</sup> Ibid at 900 ('The theorists of the tree concept of property sought to resist and to offer an alternative to the theory of "Fascist property"').

<sup>147</sup> Di Robilant (note 50 above) at 907.

<sup>148</sup> L Barassi 'Il Diritto di Proprietà e la Funzione Sociale' in *La Concezione Fascista Della Proprietà Privata* (1935) 195 (as translated in Di Robilant (note 50 above) at 907).

<sup>149</sup> Di Robilant (note 50 above) at 909.

<sup>150</sup> While it is important to be wary of importing unsuitable or incomparable ideas from a foreign context into our law, the context within which the tree theorists developed their theories share similarities with contemporary South Africa. The rise of fascism in Italy, while undoubtedly influenced by similar movements throughout Europe, was also a consequence of the crisis of liberalism. Growing discontent among a large urban proletariat was fuelled by inequality, and particularly inequalities in the distribution of land in the wake of the agrarian crisis in the late 1800s. In many respects, South Africa is facing similar challenges. The country is characterised by extreme income and wealth inequality and significant lack of access to land and affordable housing. The dissatisfaction with the enduring nature of these challenges almost 30 years after the end of apartheid has led to fierce debates in the public domain about property and the need for land redistribution.

<sup>151</sup> For more on the 'transformative' nature of the South African Constitution, see KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146; C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248; D Moseneke 'The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication' (2002) 18 *South African Journal on Human*

transformation of South African society; from a divisive, apartheid past, to an egalitarian society founded on human dignity, equality and social justice.<sup>152</sup> Albertyn and Goldblatt argue that this transformative mandate envisages:

a complete reconstruction of the state and society, including redistribution of power and resources along egalitarian lines. [And] the eradication of systemic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.<sup>153</sup>

The Constitution contains various transformative commitments, including the attainment of social justice and substantive equality,<sup>154</sup> the infiltration of human rights norms into the private sphere,<sup>155</sup> and the fostering of a ‘culture of justification’.<sup>156</sup> In order to achieve the objective of substantive equality and social justice, the Constitution compels a contextual re-examination of existing power structures and social relationships, as well as an engagement with social vulnerability and disadvantage.<sup>157</sup> The realisation of the collective good, through redistributive justice and the dismantling of social vulnerability, lies at the heart of the transformative mandate.<sup>158</sup> Legal commentators have justified this constitutional interpretation by relying on the constitutionally enshrined right to equality,<sup>159</sup> as well as the justiciable nature of socio-economic rights.<sup>160</sup> The Constitution also seeks to introduce public law norms into private relationships and structures.<sup>161</sup> This is due to the fact that the private sphere harbours significant substantive inequality, by creating and sustaining imbalances in private power.<sup>162</sup> This mandate flows directly from the horizontal application of the Bill of Rights.<sup>163</sup>

The Constitution’s social transformation mandate is particularly apparent in the constitutional property clause, section 25 of the Constitution, which both protects property rights against unconstitutional state action (section 25(1)–(3) prohibit arbitrary deprivation of property rights and governs compensation in cases of expropriation) and entrenches an explicit commitment to radical land reform (sections 25(4)–(9) make provision for land restitution, land redistribution and the strengthening of insecure land rights).<sup>164</sup> By including

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*Rights* 309; M Pieterse ‘What do we mean when we talk about Transformative Constitutionalism?’ (2005) 20 *South African Public Law* 155; P Langa ‘Transformative Constitutionalism’ (2006) 17 *Stellenbosch Law Review* 351; S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) ch 2; and various chapters in H Botha, A Van der Walt & J Van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2003).

<sup>152</sup> Moseneke (note 151 above) at 315; Pieterse (note 151 above) at 155–156; Langa (note 151 above) at 351.

<sup>153</sup> Albertyn & Goldblatt (note 151 above) at 249.

<sup>154</sup> Moseneke (note 151 above) at 316–317; Pieterse (note 151 above) at 159–160; Langa (note 151 above) at 352.

<sup>155</sup> Pieterse *ibid* at 161–162.

<sup>156</sup> Pieterse *ibid* at 161; Langa (note 151 above) at 353.

<sup>157</sup> Moseneke (note 151 above) at 318–319; Pieterse *ibid* at 159.

<sup>158</sup> Moseneke *ibid* at 317.

<sup>159</sup> Sections 9(2) and (3) of the Constitution. See also Klare (note 151 above) at 153–154; Pieterse (note 151 above) at 160.

<sup>160</sup> These include the right to housing, healthcare, access to basic services and social security. See sections 26–28 of the Constitution; Klare (note 151 above) at 153–155; Pieterse (note 151 above) at 162–163.

<sup>161</sup> Klare *ibid* at 153 and 155; Pieterse (note 151 above) at 160–161.

<sup>162</sup> Pieterse *ibid*.

<sup>163</sup> Sections 8(2) and (3) of the Constitution, as well as s 39(2) of the Constitution.

<sup>164</sup> Section 25(1)–(9) of the Constitution. See also Alexander (note 67 above) at 782 (who states that the Constitution’s commitment to land reform is indicative of a ‘thick social obligation norm’); Viljoen (note 61

both protective and distributional elements, the property clause is self-aware of the historical and constitutional context in which it operates<sup>165</sup> and the centrality of land redistribution and reform mechanisms in achieving ‘the transformational goal of addressing centuries of racial and economic discrimination’.<sup>166</sup> The construction of the property clause itself therefore already brings us closer to a values-based approach to property by recognising the right of an owner to govern how property objects or resources should be used, while simultaneously acknowledging the broader social need for the redistribution of property along egalitarian lines.<sup>167</sup>

Yet the mechanisms contained in sections 25(4)–(9) of the Constitution have only been considered by the Constitutional Court and Supreme Court of Appeal in a handful of cases. Only in recent years are we seeing these issues coming before the courts, largely due to decades of inertia on the part of the state to prioritise land reform and spatial restructuring, especially in the urban landscape.

Some Constitutional Court cases have, however, alluded to a values-based approach to property relations – largely in *obiter* statements. These assertions have yet to translate into impactful change (this is possibly due to the specific facts and issues raised in these cases, and as suggested above, that these cases were not concerned with the provisions in the property clause relative to the property system and advancing redistribution, restitution and tenure security as constitutional mandated programmes for land reform). Some of these cases are discussed briefly below.

In *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (‘FNB’), the Court emphasised that ‘the protection of property as an individual right is not absolute but subject to societal considerations’ and affirmed that ‘property should also serve the public good’.<sup>168</sup>

These notions were expanded on in the *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* (‘Shoprite’),<sup>169</sup> where the Court found:

The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, *the recognition that the holding of property also carries with it a social obligation not to harm the public good*. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially situated individual self-fulfilment.<sup>170</sup>

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above) at 10–11; and Van der Walt & Viljoen (note 46 above) at 1043–1054.

<sup>165</sup> *PE Municipality* (note 14 above) at paras 15–23; Viljoen (note 61 above) at 11; Van der Walt & Viljoen (note 46 above)(the description of *PE Municipality*).

<sup>166</sup> PJ Badenhorst & C Young ‘The Notion of Constitutional Property in South Africa: An Analysis of the Constitutional Court’s Approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC)’ (2017) *Stellenbosch Law Review* 26. See also Van der Walt & Viljoen (note 46 above) at 1043–1054.

<sup>167</sup> For a description of s 25 of the Constitution’s protective and reform imperatives, see Van der Walt & Viljoen (note 46 above).

<sup>168</sup> *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC)(‘FNB’) at para 49. For a general discussion of the case, see Van der Walt (2011)(note 54 above) at 194ff.

<sup>169</sup> *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others* [2015] ZACC 23, 2015 (6) SA 125 (CC)(‘Shoprite’).

<sup>170</sup> *Ibid* at para 50 (our emphasis).

In *Agri South Africa v Minister for Minerals and Energy* ('*Agri SA*') the Court said:<sup>171</sup>

This brings to the fore the obligation imposed by section 25 not to over-emphasise private property rights at the expense of the state's social responsibilities. It must always be remembered that our history does not permit a near-absolute status to be given to individual property rights.<sup>172</sup>

In *Daniels v Scribante*,<sup>173</sup> the Court rooted its findings in a context-laden and values-based approach by carefully considering the legacy of land dispossession brought about by colonialism and apartheid,<sup>174</sup> and expressly linking access to land and housing with the protection and advancement of human dignity. For the Court, the legislation in question, the Extension of Security of Tenure Act 62 of 1997 (ESTA), not only gives effect to section 25(6) of the Constitution, it also plays an important role in responding to the particularly deplorable history of land dispossession in South Africa. As the Court stated:

An indispensable pivot to [the right to tenure security] is the right to human dignity. There can be no true security of tenure under conditions devoid of human dignity.<sup>175</sup>

Finally, in *Port Elizabeth Municipality v Various Occupiers* ('*PE Municipality*'), the Court, in a nuanced judgment that sought to give effect to conflicting land rights with reference to the historical context of discriminatory land law, stated that the 'starting and ending point of the analysis [of giving effect to section 25] must be to affirm the values of human dignity, equality and freedom'<sup>176</sup> and that the Constitution contemplated an 'orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.'<sup>177</sup> These statements from the Constitutional Court hint at a more socially orientated approach to property and leave ample room for the adoption of a values-based approach to property.

As noted above, the most significant developments in property law during the democratic dispensation seem to have been less about the nature of property law and more about the negotiation or balancing of the constitutional right to property with various conflicting rights – in particular the right of access to adequate housing contained in section 26 of the Constitution.<sup>178</sup> However, viewing these cases primarily as a dispute over conflicting rights obscures how they have resulted in a fundamentally different property system – in terms of which ownership and real property rights are no longer sacrosanct but may, in certain circumstances, be required to give way to the rights of others or broader societal interests.<sup>179</sup>

This brief analysis suggests that an alternative conceptualisation of property is possible within the South African constitutional framework, which, through its transformative aspirations not only accommodates, but also mandates considerations about the social function of land as a property object.

<sup>171</sup> *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9, 2013 (4) SA 1 (CC) ('*Agri SA*').

<sup>172</sup> *Ibid* at para 62.

<sup>173</sup> *Daniels v Scribante & Another* [2017] ZACC 13; 2017 (4) SA 341 (CC) ('*Daniels*').

<sup>174</sup> *Ibid* at paras 13–22.

<sup>175</sup> *Ibid* at para 4.

<sup>176</sup> *PE Municipality* (note 14 above) at para 15.

<sup>177</sup> *Ibid*.

<sup>178</sup> For example, see *Modderklip* (note 98 above); *PE Municipality* (note 14 above); *Olivia Road* (note 117 above); and *Blue Moonlight* (note 98 above).

<sup>179</sup> For a discussion of how eviction law and the right of access to housing have impacted on the property rights, see Wilson (note 121 above); and S Wilson, J Dugard & M Clark 'Conflict Management in an Era of Urbanisation: Twenty Years of Housing Rights in the Constitutional Court' (2015) 31(3) *South African Journal on Human Rights* 472, 503. See also Alexander (note 46 above).

Although the values attached to public land might appear to be different to those of private land, in practice, public land is often treated in a manner that is informed by private law notions of property with the consequence that public land, in effect becomes quasi-private land. For example, decisions about public land are guided by the dominant theories of property where exclusion is a driving principle, certain public land is governed by private property contractual arrangements with private parties over long periods (such as long-term leases over municipal land) and public land continues to be steeped in an economic or market-related approach to land which entails: priming the market value of land (over social, historical and related societal values and functions);<sup>180</sup> the holding of public land by state actors for speculative purposes; treating and trading public land as a financial commodity; and in the context of municipally owned land, regulating municipal land in terms of legislation and policies concerning the fiscal and financial affairs of local government which favours a market-centric ideological lens in relation to the use public land.<sup>181</sup> This creates barriers to truly accessing and using public land in a manner that would prioritise the social functions of public land. A different approach would thus offer an opportunity to embrace and find meaningful ways to measure and incorporate a plurality of values in decision-making about the uses of public land, and ultimately ‘protect non-property rights and values in their own right’.<sup>182</sup>

## IV THE SOCIAL FUNCTION OF PUBLIC LAND

### A Public land needs to serve a social function

As noted above, Cape Town is facing an acute affordable housing crisis, in terms of which a vast majority of impoverished and low-income earning families remain excluded from accessing urban land and property markets. This social exclusion is manifested in deep and enduring spatial inequalities. The City has primarily attributed this enduring spatial injustice to a lack of available well-located land that could be used for affordable housing.<sup>183</sup> The City is not wrong when it says that suitable land is scarce in central or well-located areas – it is expensive to buy and will only become more so in the future. However, the City has not unlocked the vast tracts of land it owns in well-located areas, of which a large proportion are unused or under-utilised given their potential to be used to redress spatial inequality.<sup>184</sup> By unlocking and releasing well-located state land for the development of affordable housing, the City could alleviate the

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<sup>180</sup> The Western Cape Provincial Government’s decision to dispose of public land, the Tafelberg Property in Sea Point Cape Town, the subject property in *Adonisi* (note 8 above), is an example of the state disposing of public land to the highest bidder in order to generate revenue on the basis of the highest market value, as opposed to centering other societal functions needs for the land – in this case, the development of affordable housing in a well-located area as a means to advance spatial justice.

<sup>181</sup> For example, the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), discussed more fully in part IVB below.

<sup>182</sup> Van der Walt (2014)(note 51 above) at 31.

<sup>183</sup> For example, see P Grobbelaar ‘Cape Town Land Shortage Hurts Housing’ *Property 24* (6 July 2011), available at [www.property24.com/articles/cape-town-land-shortage-hurts-housing/13767](http://www.property24.com/articles/cape-town-land-shortage-hurts-housing/13767).

<sup>184</sup> According to the City’s own policies it owns 87 000 pieces of land, and while not all that land is well-located or suited for the development of affordable housing, a significant portion of this land will be well-located and suited for housing development. See City of Cape Town *Management of Certain of the City of Cape Town’s Immovable Property Policy* (26 August 2010) Ref No C54/08/10, cl 5.2. See also, generally, Ndifuna Ukwazi (note 2 above) at 1.



housing affordability crisis and contribute to reversing the enduring legacy of spatial apartheid in the city.<sup>185</sup>

Rather than utilising the public land it holds to address these key social needs, the City has continued to dispose of large parcels of valuable public land it owns by selling or leasing this land to private entities without considering how current land uses perpetuate inequality, and often without including a condition for land to be used to achieve a social function such as building affordable housing.<sup>186</sup> The City's management of public land has come under the spotlight when activist organisation Ndifuna Ukwazi published a research report that investigated the City's practice of disposing of municipally owned land through medium to long term leases. (While this research report was primarily focused on the City's practice of leasing out public land, many findings apply equally to disposals in the form of sales).<sup>187</sup>

The report delivers several concerning findings. First, many parcels of leased public land in well-located areas are unused or under-utilised given their social function potential.<sup>188</sup> This is due to the fact that much of this public land is being leased out to private organisations or companies for their exclusive use (or for the use of only a few people who are ordinarily required to pay a fee to access the public land), thereby turning public land into quasi-private land.<sup>189</sup> This land includes parking lots, bowling greens with waning memberships, and golf courses that provide enjoyment to a few patrons.<sup>190</sup> The report notes that this is an 'inefficient, exclusive and unsustainable use of well-located public land'.<sup>191</sup>

Second, the renewals of these leases, without critical reflection on the impact of each renewal, has the effect of entrenching and exacerbating spatial inequality.<sup>192</sup> The majority of these leases find their origins in apartheid and colonial spatial planning – which often intentionally sought to prevent Black families from accessing the City.<sup>193</sup> Urban land use specialist, Jane Jacobs, has written about the way in which large tracts of land designated to a particular land use or imposing infrastructure (like train tracks or highways) can function as borders or physical barriers to segregate people. She warns that these 'borders divide up cities into pieces' and 'can

<sup>185</sup> Ndifuna Ukwazi (note 2 above); and M Clark 'Cape Town's Course of Injustice: Subsidising the Rich to Exclude the Poor' *Daily Maverick* (28 January 2020). This is in line with the recommendations to alleviate poverty and inequality in the context of urban land rights issued by the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change and the Mandela Initiative. See *High Level Panel Report* (note 15 above); and M Clark & LR Circolia 'Informalisation, Urban Poverty and Spatial Inequality' *Mandela Initiative Brief* (2018).

<sup>186</sup> The City's Property Management Department has encouraged private organisations to rent public land at particularly low rates, see City of Cape Town *Applying to Buy or Lease Municipal Land* (August 2019) available at [https://resource.capetown.gov.za/documentcentre/Documents/Procedures,%20guidelines%20and%20regulations/PropertyManagement\\_Applying%20to%20buy%20or%20lease%20land.pdf](https://resource.capetown.gov.za/documentcentre/Documents/Procedures,%20guidelines%20and%20regulations/PropertyManagement_Applying%20to%20buy%20or%20lease%20land.pdf).

<sup>187</sup> Ndifuna Ukwazi (note 2 above) at 3–5.

<sup>188</sup> *Ibid.*

<sup>189</sup> We argue that the extensive powers granted to lessees over public land and the long lease periods (that regularly extend to multiple successive 10 year cycles) create a situation that is the reverse to what Van der Walt (note 51 above) at 28–29 and fn 37 calls 'quasi-public' land – that is land that is privately owned but accessible to the public like factories and shopping malls. In the case of long-term rights being granted over public land, the public nature of the land is diminished (at least for the duration of the granting of the rights).

<sup>190</sup> Ndifuna Ukwazi (note 2 above) at 3–5. See also N Budlender 'We Need Bowling Greens and Golf Courses for Affordable Housing' *Ground Up* (12 March 2018); Clark (note 185 above).

<sup>191</sup> Ndifuna Ukwazi (note 2 above) at 3.

<sup>192</sup> *Ibid.* at 3–5.

<sup>193</sup> *Ibid.* at 4–5.

tear a city to tatters'.<sup>194</sup> Large tracts of land dedicated to a single, exclusionary purpose – like playing golf – have the same effect. Spatial regulation was integral to the implementation of colonialism and apartheid, with the executive, law-makers and law-enforcers all collaborating to deny, or forcibly remove, Black people from all parts the city, especially well-located urban areas. In this context, the colonial and apartheid state apparatus frequently used public land to implement racial and economic segregation and exclusion. As such, parcels of public land that have been subject to multiple successive long-term leases act as barriers that discourage passage through them. Many parcels of leased public land are in former White Group Areas that are yet to be 'desegregated'.<sup>195</sup> These parcels of land therefore offer the City a vital opportunity to promote spatial redress through the redistribution of land.

Third, the leasing of public land is often poorly managed by the City.<sup>196</sup> The report points out that according to the City's own reports, money is frequently being lost through the poor administration of leases over public land and that uncertainty about who is responsible for managing its lease contracts continues.<sup>197</sup> The City's inadequate management is further evidenced by the fact that the leasing of public land continues to occur without seeming to follow rational guidelines. There is a level of arbitrariness to leasing decisions. For example, the same sporting rental tariff is often applied to a sports and recreational facility irrespective of the size of the land. At the same time, even the City's leases for other public purposes seem sporadically determined – with rental amounts varying dramatically.<sup>198</sup>

Ultimately, the report highlights a deeply concerning approach from the City in relation to how it views its own property. The City's approach to its own land seems entirely driven by ownership conceptions of property, that emphasise the absolutist, individualist and exclusionary powers of a property owner and conceives of public land primarily as an economic 'asset' that has financial value. In adopting this approach, the City has failed to prioritise the social function of public land by utilising this land for essential public purposes, such as redressing spatial inequality or developing affordable housing.<sup>199</sup> This failure to use well-located public land in a way that promotes the social function of the land, the report argues, is a significant missed opportunity.<sup>200</sup>

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<sup>194</sup> Jacobs (note 20 above) at 257–269. See also A Heckscher *Alive in the City* (1974); and WD Solecki & JM Welch 'Urban Parks: Green Spaces or Green Walls?' (1995) 32(2) *Landscape and Urban Planning* 94.

<sup>195</sup> Ndifuna Ukwazi (note 2 above) at 4.

<sup>196</sup> *Ibid* at 3–5.

<sup>197</sup> City of Cape Town *Asset and Facilities Portfolio Committee Report* (June 2018). See also Ndifuna Ukwazi (note 2 above) at 5.

<sup>198</sup> For instance, in October 2020, the City proposed two municipal properties for lease in the *Cape Argus*. The first was a small 373m<sup>2</sup> piece of land in Scarborough that the City proposed to lease out for parking, storage and gardening purposes for a period of 10 years at a monthly rental of R750. The second, a massive 1.39-hectare piece of land in the prime neighbourhood of Constantia that the City proposed to lease out for horse grazing and gardening purposes for a period of 10 years at a monthly rental of R3000. The City claimed that both rental amounts were 'based on market value'. See 'Portion Erf 754, Hill Top Street, Scarborough to the owner of Erf 68, Scarborough, Jorge Durke or his successors-in-title' *Cape Argus* (9 October 2020) at 15; and 'Portion of Erf 9507 Constantia to AE, PJ, and TM Buchanan or their successors-in-title or to consider alternative proposals' *Cape Argus* (9 October 2020) at 15.

<sup>199</sup> Ndifuna Ukwazi (note 2 above).

<sup>200</sup> While the City itself has acknowledged its approach to the management of public land is misguided, it has been slow to embrace a more socially orientated approach. For example, in 2016, the former Deputy Mayor of Cape Town Ian Neilson, committed to rationalising the use of City-owned land. As he noted: 'The issue is not one of focusing only on golf courses. It is essential that more intensive land use takes place within the urban core area,

Concerningly, these disposals have taken place despite a constitutional injunction to use land to redress spatial inequality, as articulated in the section-25(5) duty on the City to take ‘reasonable legislative and other measures within available resources to foster conditions which enable citizens to gain access to land on an equitable basis’,<sup>201</sup> and legislative obligations not to dispose of parcels of public land that are needed to provide the minimum level of basic municipal services (which includes affordable housing).<sup>202</sup>

The City’s conception of its role as owner of public land is perhaps best illustrated by an example. On 7 May 2021, the City published a notice in the *Cape Argus* newspaper inviting interested parties to comment and/or object to its plans to transfer, by way of long-term lease, approximately 8 478m<sup>2</sup> of City-owned land in the centre of the City to the City’s Human Settlements Department, to be leased at a rental of R150 per year for the development of social housing.<sup>203</sup> According to the notice, the public land which has been used as parking lot, would be rented out for a 30-year period. The purpose of the lease was to use the site for the development of social housing – a use of public land that aligns with conceptions of the social function of property and the use of public land to serve a public purpose (especially in the context of a housing crisis).<sup>204</sup> However, rather than justifying its use of public land for this social function purpose, the City’s rationale for the lease was couched in entirely economic or market-related terms. In its support of the lease, the City said that the land was ‘not required for the provision of a minimum level of basic municipal services’, would allow for the ‘development potential of the site to be maximised’ and that the parking on the site (which would be retained) would ‘generate revenue’;<sup>205</sup> and in describing the main benefits that would flow from the lease the City noted that it would be able to ‘convert unused land into rateable property’ and that the site would ‘catalyse economic growth’.<sup>206</sup> The City’s inability to recognise that leasing this public land to the Human Settlements Department for the development of social housing was fulfilling an important social function and giving effect to ‘community value’ (as is required by asset management legislation),<sup>207</sup> and its narrow focus

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rather than ongoing expansion of the city footprint due to expansion at the edges of the city’. See J Harvey ‘Golf Clubs have Plan B’ *Southern Suburbs Tatler* (28 April 2016), available at <https://www.southernsuburbstatler.co.za/news/golf-clubs-have-plan-b-5152016>. Recently, the City also announced that it plans to proactively assess the public land for its potential usefulness for the development of state-subsidised housing, although many questions remain about how the City plans to implement these plans in practice given its bureaucratic difficulties in managing public land. See City of Cape Town *Draft Human Settlements Strategy* (2020).

<sup>201</sup> The Western Cape Division of the High Court has recently affirmed that the state has an obligation to redress the spatial legacy of apartheid. See *Adonisi* (note 8 above).

<sup>202</sup> See the discussion on the MFMA in part IVB.

<sup>203</sup> ‘Proposed Transfer: Erf 14888 Woodstock Cape Town’ *Cape Argus* (7 May 2021) 17.

<sup>204</sup> It should be noted that the City’s plans to use the public land for the development of social housing were an about turn. Only a couple of months earlier, in October 2020, the City had advertised its plans to lease the same piece of public land to a private company, Growthpoint Properties Ltd, for its exclusive use as a parking lot at a hefty rental. See ‘Renewal of Lease: City Land, Portion of Erf 14888 Cape Town Situated at Newmarket Street, Cape Town to Growthpoint Properties Ltd and its Successors in Title for Parking Purposes’ *Cape Argus* (23 October 2020); and Ndifuna Ukwazi ‘City to Lease Out Newmarket Street Parking Lot Despite Promises to Use it for Affordable Housing’ Press Release (15 December 2020), available at <https://jumpshare.com/v/sVBdtEj7Hl2UdGLbK5o>. After objections from civil society groups like Ndifuna Ukwazi, the City decided to alter its plans for the site.

<sup>205</sup> ‘Proposed Transfer: Erf 14888 Woodstock Cape Town’ (note 203 above) at 17.

<sup>206</sup> *Ibid* at 17.

<sup>207</sup> Refer below to the discussion on the MFMA in part IVB.

on the lease from a purely economic perspective, suggests that the City conceives of its role as owner of public land primarily through economic terms.

This indicates that the City's notions of ownership – that conceive of ownership in absolutist, exclusionary terms – are so deeply entrenched that its decision-making with regard to the conclusion and renewal of these leases is not guided by the principles underlying the obligations imposed upon it, or the imperative to use public land for a societal purposes, in spite of public calls for publicly leased land to be valued and accordingly used differently.<sup>208</sup> An emerging question to give effect to a values-based approach is whether decision-makers can be made to confront a broader set of societal values that support the potential for public land to be unlocked, redistributed and used as property that is necessary for the 'development of the capabilities essential to human flourishing'<sup>209</sup> and serve a broader social function in response to the section-25(5) obligation to broaden access to land by making it available on an *equitable* basis, as opposed to entrenching an unequal state of affairs and benefitting the interest of a few through exercising of the power to exclude. A values-based approach that is rooted in South Africa's historical and socio-economic context and recognises the significance of public land to advance social restructuring and land reform is required to guide the way in which public land is used. The broader social, ecological, emotional and needs-based values to which we refer, and how these might be realised and incorporated into the existing property system, are discussed in part IVC below.

## **B The Local Government: Municipal Finance Management Act**

An immediate challenge in responding to the emerging question (about whether decision-makers can be made to confront a broader set of societal values) is overcoming the dominance of the explicit economic logic that is supported by the reigning notions of property and ownership. This challenge is compounded by the fact that the legislation and policy framework that governs the lease of municipal land primarily focusses on treating land and property as an economic asset that must be used either efficiently or viewed primarily in economic terms. The framework for the management of municipal property is set out in various laws and policies, with the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) (and the regulations promulgated thereunder) being the primary piece of legislation.<sup>210</sup>

The MFMA is national legislation that aims to regulate and secure the sound and sustainable management of the fiscal and financial affairs of local government, and sets out the requirements for the management of a municipality's assets, including immovable property.<sup>211</sup> In particular, section 14 of the MFMA (read together with the Municipal Asset Transfer Regulations (MATR))<sup>212</sup> regulates the disposal of a municipality's capital assets, which are defined to include its immovable assets. Section 14(1) and (2) of the MFMA provide that a municipality may not transfer ownership as a result of a sale or otherwise permanently dispose of immovable property unless two conditions have been met:<sup>213</sup> The municipal council has

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<sup>208</sup> See the many expert submissions objecting to the Rondebosch Golf Course lease (copies on file with the authors).

<sup>209</sup> Alexander (note 143 above) at 458–459.

<sup>210</sup> Others include the property by-law and policy instruments such as the City of Cape Town 'Management of Certain of the City of Cape Town's Immovable Property Policy' (August 2010).

<sup>211</sup> MFMA s 2(b).

<sup>212</sup> Municipal Asset Transfer Regulations, GNR 878 *Government Gazette No. 31346* (22 August 2008).

<sup>213</sup> MFMA ss 14(1) and (2).

decided ‘on reasonable grounds’ that the land ‘is not needed to provide the minimum level of basic municipal services’;<sup>214</sup> and the municipal council has ‘considered the fair market value’ and ‘the economic and community value to be received in exchange for’ the piece of land.<sup>215</sup> These provisions mean that the City can *only* dispose of property if the property is not needed for a minimum level of basic services and after the municipal council has considered *both* the fair market value and the economic and *community value* received in exchange for the piece of land. The requirements are reaffirmed by section 11 of the Management of Certain of the City of Cape Town’s Immoveable Property Policy (the Immoveable Property Policy).<sup>216</sup>

The Municipal Asset Transfer Regulations govern the transfer and disposal of capital assets by municipalities and municipal entities. Regulation 7(1) provides that a ‘municipal council must, when considering any proposed transfer or disposal of a capital asset, take into account, inter alia, the interests of any affected organ of state, the municipality’s own strategic, legal and economic interests and the interests of the local community; and compliance with the legislative regime applicable to the proposed transfer or disposal.’<sup>217</sup>

As the primary legislation regulating the disposal and transfer of municipally owned land, the provisions of the MFMA (and the MATR) cannot be regarded as a sufficient tool to facilitate access to municipally owned land on an equitable basis. It prioritises the treatment of municipal land in economic terms and is dislodged from the possibility of a values-based system described above. The MFMA simply requires that a municipality must establish that its immovable property, defined as a capital asset, is no longer required for the minimum level of basic municipal services.<sup>218</sup> A basic municipal service is defined as a ‘municipal service that

<sup>214</sup> In *Oranje Water CC v Dawid Kruiper Local Municipality* [2018] ZANHC 42 (*‘Oranje Water’*), the Northern Cape High Court was asked to give meaning to the phrase ‘minimum level of basic services’ in the context of the functions and obligations of local government. In determining what this phrase means, the court at paras 37–43 analysed various pieces of legislation, including s 153 of the Constitution, the Local Government: Municipal Systems Act 117 of 1998 (‘the Systems Act’), the MFMA and the Housing Act 107 of 1997. As the court noted (at para 41):

The legislative framework referred to above, supports such distinction. In this context parks and recreation are in fact a “municipal service” but do not fall under “basic municipal services”. In such context, “basic municipal services” includes the provision of water, sanitation, electricity, roads, storm water drainage and transport. I am fortified in this conclusion by the wording of s 14(2)(a) which is to the effect that the municipality decided that the asset is not needed “to provide the minimum level of basic municipal service.” (emphasis added) In my view “parks and recreation”, in a different and better time in our shared future may well come to be regarded as a minimum level of basic municipal service. However, in our present context of service delivery protests relating to the continued reality of the “bucket system” for sanitation and the lack of potable water, inter alia, being reported on a daily basis in communities all over our country, this is clearly not so.

According to the court, the ‘minimum level of basic municipal services’ is ‘inextricably linked to the requirement to uplift poor and disadvantaged communities that fall under the jurisdiction of local government’ (at para 43). *Oranje Water* therefore indicates that the provision of social or affordable housing constitutes ‘a minimum level of basic services’ in the context of Cape Town’s housing affordability crisis. Accordingly, well-located land that can be used for the development of social or affordable housing should not be disposed of by way of sale or should only be disposed of if such disposal is subject to a condition to develop affordable housing.

<sup>215</sup> N Steyler & J de Visser *Local Government Law of South Africa* (2019) 12–22(8) (Argue that the requirement that the municipal council consider what is received in exchange for a capital asset requires a ‘holistic assessment’, in terms of which the fair market value is ‘weighted against the economic and community value that may be gained’ from the disposal. For Steyler and De Visser this provision means that the City can dispose of land or immoveable property at less than market value if it is receiving an appropriate economic or community value.)

<sup>216</sup> The Immoveable Property Policy s 11.

<sup>217</sup> MATR reg 7(1).

<sup>218</sup> MFMA s 14(1).



is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'.<sup>219</sup>

Notably, the requirement for the disposal of municipal land under the MFMA is not nearly as comprehensive as the requirements for the disposal of provincial and national owned land under the Government Immovable Asset Management Act 19 of 2007 (GIAMA). Section 5 of the GIAMA sets out principles of immovable asset management that have the potential to shape a social-function orientated use of parcels of land owned by provincial and national government. The first principle is that an immovable asset 'becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level'.<sup>220</sup> The second is that when an immovable asset is acquired or disposed of, best value for money must be realised. Importantly, 'best value for money' is defined as the 'optimisation of the return on investment in respect of an immovable asset in relation to functional, financial, economic and *social return*, wherever possible'.<sup>221</sup> The third principle is that before disposing of an immovable asset, the relevant owner of the property and custodian must consider whether it can be used: (i) by another user or jointly by different users; (ii) in relation to the social development initiatives of government; and (iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, poverty alleviation, job creation and the redistribution of wealth.<sup>222</sup>

Together, these principles clearly anticipate that the national and provincial governments' immovable assets must be used in pursuit of a social function – specifically fulfilling socio-economic objectives with land reform as a stated objective. These requirements are omitted from the legislation governing municipal land, including leased municipal land. For example, a municipality is not required to establish that its land has become surplus, and it is not required to consider whether its land can be used for redistributive and related purposes that might foster access to land on an equitable basis as contemplated by section 25(5) of the Constitution.

There is clearly a gap between the requirements for the disposal and transfer of municipal land on the one hand, and the possibilities of achieving values-based, redistributive land reform goals under the MFMA, on the other. Because municipal land is not tied to broader transformative goals, municipal land may be treated in the same way as any other capital assets that do not share the same social and historical significance as land – an aspect contemplated by the property as a web of interconnected interests approach. This approach views land, as more than an economic commodity over which one individual owner alone can make decisions without regard to the wider range of interests beyond the owner.<sup>223</sup>

This gap is unfortunate because access to land, including municipal land, is central to the possibility of restructuring the apartheid city. It is true that not every parcel of well-located municipal land will be suitable for redistributive purposes through, for example, the provision of affordable housing. However, the legislative gap affirms a legislative orientation that favours the dominant ownership and economic value of land.

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<sup>219</sup> Systems Act s 1.

<sup>220</sup> GIAMA s 5(1)(a). A 'user' is defined in s 1 of GIAMA as 'a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives' and 'surplus' means 'that the immovable asset no longer supports the service delivery objectives of a user'.

<sup>221</sup> GIAMA s 1 (emphasis added).

<sup>222</sup> GIAMA s 5(1)(f).

<sup>223</sup> Arnold (note 66 above) at 333–334.

### C Values versus valuations

As the brief analysis of the City of Cape Town's practice of concluding long-term leases over public land illustrates, decisions about the acquisition, use, management and disposal of public land are primarily informed by an economic value system. In terms of this approach, the City views land first and foremost as a capital asset that has intrinsic economic value and has failed to recognise, and act on, the social value that public land holds. This seems to be the approach, even though these decisions are implemented by a public actor, namely the City and its officials. The dominance of this economic logic partially stems from the budgetary and public asset management legislation that applies at the municipal level.<sup>224</sup> The legislative and policy framework governing municipal land management is constructed in a way that gives preference to the economic value system by treating public land in the same manner as other public assets, despite its unique potential to offer redress in the context of spatial inequality and land reform. The management system imposed by the legislative and policy framework view land as 'assets' that require sound financial management. While prudent financial management is important for good governance, the effect of the public finance management legislation has been to prioritise an economic value system over a variety of other (equally important) values.

The economic paradigm is also informed by the City administrators' conception of public land in terms of the income it generates for the City or the costs it imposes on the City.<sup>225</sup> The narrow focus on the economic income potential and costs of public property directly affects how public officials perceive opportunities in relation to how public land can be used. In addition, it limits the ability of officials to utilise public land practically to redress spatial inequality. An example that illustrates how this approach subtly colours the way officials view public land is the ongoing practice of attributing nominal values to, or undervaluing, public land on the City's General Valuation Roll. In its General Valuation Roll, the City lists the public land it owns at values of R1 or R1 000 – values that clearly have no bearing on the economic value of these properties, not to mention the enormous social, environmental and land reform potential this land holds. For example, the City's 2018 General Valuations Roll omits any reference to erf 10840 (a 32 662m<sup>2</sup> property in Belville close to economic opportunities), whereas the 2016 General Valuations Roll provides a more accurate picture, valuing the erf at R15 065 000. Another example is erf 17007 (a vacant property of 7 342m<sup>2</sup> that is in Belville directly adjacent to erf 10840) at a value of only R1 000. This practice means that the City might be completely unaware of the real economic value and potential of specific properties, and suggests that city officials seriously undervalue public land. In addition, it highlights the lack of imagination in relation to proactively identifying properties that could be utilised for public purposes. Another unintended consequence of this practice is a lack of recognition of the value of the land and an overemphasis of the costs associated with public land.

One need only look at the fact that public land falls primarily under the domain and management of the City's Economic Opportunities and Asset Management Department to see how the City's management of public land is premised on the ownership-based model of

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<sup>224</sup> See the discussion of this legislation at part IVB above

<sup>225</sup> This paradigm is also reinforced by the public finance management legislation itself. For instance, the public participation requirements for disposing of public land by way of long-term lease or sale require a municipality to provide information about whether the municipality will receive any 'proceeds', 'benefits' or 'gains', or incur any 'losses' as a result of a disposal. See MATR reg 5(3)(b).

property and an economic value system. The mere fact that these two distinct management fields are grouped together highlights the intrinsic economic approach to asset management.

Reliance on an economic value system of land is closely linked to the concept of the market value of the property, which, in turn, is ‘strongly anchored by the philosophy of private ownership rights’.<sup>226</sup> Market value may, at first glance, seem like an objective standard that some may even argue incorporates or takes into account certain social values, however, there are various issues with using this as a dominant approach for attributing value to public land. First, the notion of market value is directly linked to the ideas of a ‘functioning market’ – made up of buyers and sellers that each attribute a certain economic value to a property object which ultimately determines the market value of the object. But market value only takes into account the factors that the majority of buyers and sellers deem relevant.<sup>227</sup> In a deeply exclusionary market – like South Africa’s land and property market – this means that the factors that determine market value ignore a host of alternative values that the citizenry may place on public land and only prioritises the values of those who will be able to access and participate in the market. Second, some scholars have raised doubts about the appropriateness of using a market value determined in terms of real estate valuation theory in the context of public land or land earmarked for infrastructure projects.<sup>228</sup> Mooya critically reflects on the limitations of the real estate valuation system by showing that the standard approach to real estate valuation is determined by transaction activity and is only suitable for highly competitive markets.<sup>229</sup> He writes that in ‘thin or absent markets’, as is often the case in the context of public land which is rarely valued and transacted, a different framework or alternative value system is necessary.<sup>230</sup>

The ideological lens through which municipalities apply the legislative and policy framework looms large here – as it informs how municipalities understand and interpret the legal and policy framework. The interpretation of the legislative and policy framework is to some extent affected by the political party that is in power in a particular municipality. In Cape Town, it is not difficult to see the influence of the ruling party, the Democratic Alliance (DA), with its neo-liberal and market-based economics in the City’s decisions about public land.<sup>231</sup> In this context, it seems unsurprising that the City views land primarily as a capital asset that has intrinsic economic value and fails to recognise the social value public land holds even in instances where a contextual or purposive reading of the legal framework offers considerable opportunity for a different approach.

Perhaps the most surprising aspect of the City’s paradigm that prioritises economic value is that in the majority of leases the City also fails to realise the economic value the land could offer. This is most apparent in cases where prime state land is leased out at nominal amounts for land uses that are rarely the most efficient or effective use of land, such as the public land

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<sup>226</sup> WT de Vries & W Voß ‘Economic Versus Social Values in Land and Property Management: Two Sides of the Same Coin?’ (2018) 76 *Raumforschung und Raumordnung / Spatial Research and Planning* 381, 385

<sup>227</sup> Ibid at 383.

<sup>228</sup> MM Mooya *Real Estate Valuation Theory: A Critical Appraisal* (2016) 128. See also De Vries & Voß (note 226 above) at 384.

<sup>229</sup> Mooya (note 228 above) at 128; De Vries & Voß (note 226 above) at 384.

<sup>230</sup> De Vries & Voß (note 226 above) at 384, citing Mooya (note 228 above).

<sup>231</sup> The DA’s outspoken resistance to the Eighteenth Constitutional Amendment (which allows for the expropriation of land without compensation in certain circumscribed instances), and criticism of the national government’s land reform programme, may also play a role in how the City approaches its obligations in terms of the legal and policy framework.

leased to the Rondebosch Golf Club. These examples are also a far cry from other economic based models such as leasing of public land in Hong Kong, where rental for leased property is used to fund a significant proportion of the city's public infrastructure.<sup>232</sup> In these cases, no apparent logic can be ascribed to the City other than a seeming desire to maintain the exclusionary status quo.

The City's approach to public land is therefore premised on a single value system based on financial and economic factors that seem incompatible with alternative value systems based on social, ecological or societal needs. In elevating economic values above other values, the City has failed to recognise that its treatment of public land does not address pressing social needs in any meaningful way and has over the years led to the failure to act on commitments to use land for redistributive purposes. It has also failed to take account of who benefits from the City's actions and who is excluded.

The primacy of economic values system is also directly linked to the ease with which economic value can be ascertained, measured and predicted. As De Vries and Voß note, '[e]conomic values gain meaning through a basic assumption that one can predict and measure the (financial) effects of choices in (economic) transactions.'<sup>233</sup> In contrast,

social values are much more intangible and qualitative. There are higher margins of error assumed, and acting upon the values is much more based on shared acceptability and a shared idea of rightfulness.<sup>234</sup>

Social values are often considered to be in direct opposition to economic logics. Where economic values are believed to be certain, measurable and predictable, social values are viewed as 'highly dynamic and rather fluid, and most importantly ... rely on interactions and reactions between the various types of subjects'.<sup>235</sup> In other words,

what an actor 'values' as relevant and important here and today may differ from what that same actor 'values' as relevant and important somewhere else and tomorrow ... social values are socially and politically shaped and constructed. They highly depend on time, location, context and framing.<sup>236</sup>

This discomfort with understanding and giving effect to societal values lies at the root of the dissatisfaction with existing property law systems. The main challenge in shifting from a paradigm based on a single value system to one that incorporates multiple value systems is therefore to find ways to give expression to the varied set of intangible values – social, ecological, emotional and needs-based – into decisions about public land.

In recent years, various scholars have offered some suggestions about how to give effect to these alternative value systems. Moore argues that the best way to ensure that societal values are incorporated into decision-making about land management is to make social values measurable and manageable for public officials.<sup>237</sup> In other words, developing analytical approaches to capture and measure a variety of social values. This can be done in three possible ways, each of which offers potential for a South African values-based property law system.

<sup>232</sup> Y Hong *Can Leasing Public Land Be an Alternative Source of Local Public Finance?* Lincoln Institute of Land Policy Working Paper (1996).

<sup>233</sup> De Vries & Voß (note 226 above) at 390.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.* at 387.

<sup>236</sup> *Ibid.*

<sup>237</sup> MH Moore 'Public Value as the Focus of Strategy' (1994) 53(3) *Australian Journal of Public Administration* 296, 296–303.

First, alternative value systems can be translated into the dominant economic value system, for example, alternative values can be expressed in the ‘language’ of economics. An example of how this could occur in the context of public land is by considering the potential of the land or the potential impact of the intervention in relation to the land. This lens often enables practitioners to view social values in measurable economic terms. For instance, the socio-economic impact, quality of life improvement, or measurable social or ecological benefits of a land-use decision.<sup>238</sup>

Second, alternative value systems can be manifested by developing independent analytical tools that enable practitioners to measure, manage and incorporate them into decision-making processes about land. De Vries and Voß argue that there are many different examples of systems that have incorporated social values into land management decisions which fit alongside the existing economic logic of land management.<sup>239</sup> The most compelling example they offer is land tenure security and the land rights continuum.<sup>240</sup> For De Vries and Voß tenure security is a measurable value that is not solely dependent on economic values. Instead, it blends economic, legal and social values that combine to offer measurable ways to protect a wide array of different rights or interests in land.

Third, alternative value systems can be articulated and made visible through discussion, debate and negotiation between different disciplines involved in decision-making processes about land. De Vries and Voß believe that cross-disciplinary collaboration is essential to ensuring that different values are incorporated into decision-making about land. As they write:

Currently, integrating value systems using different logics requires an extensive blending of disciplines along with a reformulation of optimisation measures. If each discipline keeps advocating its own models as the most relevant, the resulting scenarios, predictions and recommendations for land-use interventions may remain difficult to reconcile and might even be mutually contradictory. However, if logics are combined in such a way that social scenarios and interactions are respected, one may reach a certain degree of reconciliation of value logics.<sup>241</sup>

Although some of this legislation attempts to incorporate various other measures of value (such as social value), the legislation does not set out clearly how this can be achieved or manifested – meaning that municipal entities are often unwilling or unable to grapple with how to give expression to these alternative value sets. For example, the need to determine whether land could be used by a different department to provide for minimum level of basic services and addressing social objectives.

## V CONCLUSION: TOWARDS A VALUES-BASED APPROACH

This article has focused on the City of Cape Town, and the continued spatial inequality that has resulted from an inability to move towards a values-based approach, as well as the decision-making processes in that municipality. However, the examples and issues raised are illustrative of broader challenges and barriers that must be overcome across municipalities in South Africa that are similarly grappling with deepening wealth and income inequalities, and the inability to unlock and access land as a primary solution to addressing urban inequality. We argue that a different approach is required to ensure a property system that is not unfairly weighted in

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<sup>238</sup> De Vries & Voß (note 226 above).

<sup>239</sup> *Ibid* at 389.

<sup>240</sup> *Ibid*.

<sup>241</sup> *Ibid* at 390.



favour of ownership and economic interests only, but that also gives appropriate recognition to the layered social, ecological and emotional values that should be inherent in the access and use of public land. We propose a multi-pronged approach towards beginning to achieve this.

First is the recognition that the Constitution's redistributive and related land reform goals will ring hollow if the current absolute owner property system is not actively challenged,<sup>242</sup> and ultimately disrupted by a broader values-based system that provides meaningful ways for the property rights system to give expression to social values, prioritise basic needs, give effect to ecological concerns, and recognise the emotional connection and identity in property systems. This is especially necessary in relation to land as a property object, and in light of South Africa's socio-economic context.

Second, and in relation to municipal land as the public land example in this article, is rationalising pieces of legislation and related policy that have implications for the treatment, prioritisation and use of public land. We have argued that the narrow focus of viewing municipal land as a capital asset under the MFMA (and its regulations) limits the possibilities for municipal land to serve a societal function, such as affordable housing, and that this has the effect of maintaining an unequal status quo. The demands by housing activists<sup>243</sup> for golf-courses on well-located parcels of public land to be redistributed is illustrative of the need to interrogate the systems and decision-making processes that protect and reproduce spatial inequality through, among other things, the economic value paradigm. An appropriate rationalisation would entail establishing a comprehensive set of principles<sup>244</sup> to guide the use of public land so that decision makers are required to objectively consider broader values (that are informed and shaped by history and the current reality of unequal access to land), and to justify their decisions about a municipality's immovable property portfolio against these principles.

Third is finding a common, inter-disciplinary language for a values-based approach with a view to establishing a mutually acceptable and recognisable paradigm that the different disciplines dealing with land can buy into.<sup>245</sup> We note, for example, that this paradigm shift has been observed by the Constitutional Court in its recognition that 'property should also serve the public good'.<sup>246</sup> However, this has not necessarily translated into objective shifts in decision-making processes on the use of land, particularly public land. The rationale behind this is that the mutual approach may result in overcoming interdisciplinary differences and value systems, and promoting inter-disciplinary decision-making in the context of public land.

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<sup>242</sup> This article has primarily investigated public land (at the municipal level). However, as noted elsewhere in this article, many of the arguments we develop about the need to re-consider the value system that underpins property are equally applicable to private property relations as a contribution to the constitutional goal, in terms of s 25 of the Constitution, to promote the redistribution of land through making both public and private land available on an equitable basis.

<sup>243</sup> Reclaim the City (note 1 above) at 1.

<sup>244</sup> Under the MFMA, or more appropriately, in terms of a new overarching legislative framework that gives effect to s 25(5) of the Constitution. The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was established by the Speakers' Forum in December 2015 to, inter alia, to 'review legislation, assess implementation, identify gaps and propose action steps with a view to identifying laws that require strengthening, amending or change.' One of the key findings in relation to land reform was that there is no 'law on land redistribution to give full effect to s 25(5) of the Constitution'. See *High Level Panel Report* (note 15 above) at 223.

<sup>245</sup> De Vries & Voß (note 226 above) at 389.

<sup>246</sup> *FNB* (note 168 above) at para 49.

