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A. J. van der Walt, *Property in the Margins*

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This book, which is a comparative study of property rights at the margin of the rights paradigm is elucidating and well-structured. The author pauses from time to time, throughout the work, to explain what he has done, is doing and is about to do, and so the reader knows exactly where s/he is situated in the argument at all times. Nevertheless, each chapter brings its own twists and turns so, for the property scholar, material revealed as the work progresses, comes as a continuous, fresh angle on the core argument. The work is extensively cross-referenced, which greatly aids clarity. Van der Walt has worked closely with experts in the field across different jurisdictions and also draws on his own extensive knowledge of South African land rights.

The importance of the topic of this book is that the author claims that it is not a natural state of affairs not to own or to have property. Those who own property automatically attract a host of other rights. Similarly, those without property suffer a lack of the same. Legislative provisions designed to protect property rights, either at the centre of the paradigm or at its edges, where rights may be more vulnerable, may have different effects in different jurisdictions, depending on what system has gone before.

The book begins by addressing the period of time which saw the end of apartheid in South Africa and talks about the inequality fostered under this regime between people of black and white ethnicities. It relates the concern among whites about anticipated change to their status under the incoming regime, whose predecessor had privileged them in every respect. There was considerable trepidation that the redistribution of land would cause a vast change and so arguments were put forward that economic development, rather than land reform, should be the vehicle of change in society and that this would maintain a stable state. This approach, however, if followed, would have subverted efforts to address

inequality and the legacy of racial discrimination by freezing discussion about, and implementation of, meaningful land reform.

In Chapter 2, the author addresses the issue of property in the rights paradigm and makes it clear that it is the doctrinal framework which is the traditional context of property interests. He notes that there is not a great difference, in practical terms, between civil and common law traditions, given their shared socio-political and socio-economic value systems. Whereas common law systems favour possession as constituting nine-tenths of the law, the civil law has very strong doctrinal protection for ownership, evidenced partly by the fact that eviction of those at the margins is not difficult. An unusual feature of common law systems, therefore, was the potential to privilege squatters over paper title holders, where the latter had not used their land productively for an extended period of time. In civil law systems, the power to carry out evictions was often a reflection of the relative bargaining power of the parties. Racial discrimination was strongly linked to the power to evict and this power was dominated by the state and property owners. This left black land owners in a position in which the rights that they held did not attract strong doctrinal protection and they were classified as temporary occupiers whose rights could easily be terminated – rights holders at the margins, in van der Walt's language. Effectively, the law relating to property rights was co-opted by apartheid politics.

Even where the power to evict does not involve racially discriminatory practices, such as in states where apartheid has not been practiced, it is almost always politically charged as it may be used to maintain and protect the exclusivity of established property rights. The right to property within the rights paradigm favours the protection of existing rights and so resists change, as elucidated in Chapters 2 and 3.

Chapters 4, 5 and 6 demonstrate examples of a variety of property rules, such as protection against eviction, landlord and tenant relations and adverse possession that tend to impinge on such strong rights. These chapters also make it clear that such rules do not often challenge the fundamentals of the rights paradigm and that to effectuate meaningful reform, the rights paradigm will need to be departed from at times. This will lead to clashes between doctrinal reasoning and policy reasoning in areas such as residential use of housing. These chapters also explore a number of different aspects of challenges to the rights paradigm and how it may be circumscribed.

Chapter 5 examines the manner in which the rights paradigm can privilege existing social and economic hierarchies, focusing on squatting as a political engagement, rather than as an activity arising from necessity. When legislation does not initially deliver necessary change, political activity may spur reform on the part of the legislature, which may then enact reforming laws. Examples are proffered of Holland, where legislation was passed to discourage landowners from leaving property unoccupied, and Germany, which introduced social housing legislation, in the wake of activity by squatters. In a similar vein, anti-eviction legislation relating to unlawful occupiers was passed in South Africa after 1994. Therefore, political action may incentivise the legislature to enact reform and to give greater recognition to non-traditional rights.

Eviction tends to affect unlawful occupiers and certain ethnic groups, such as gypsies, more than lawful occupiers or, indeed, occupiers whose presence was once lawful. Examples of the latter would be tenants who held over after a lease had expired. Certain legislation, such as the European Social Charter, the European Convention on Human Rights, and the South African Protection from Illegal Eviction legislation offer some protection but often, delays in eviction are due to due process and are temporary. Change may be inspired by focusing on vulnerable and marginalised occupiers, whose occupation is tenuous due to social and economic considerations.

Chapter 6 looks at features of challenges to the exclusivity usually associated with property in the rights paradigm, especially in England where prior possession of land denoted a superior right and, indeed, at adverse possession, which provides for the extinguishment of legal title where land has not been occupied, although recent legislation has brought about significant change in this area. This chapter also explores other rights, such as the right to roam - a right to recreational access, which has arisen from legislation. Other rights which subvert exclusive, strong property rights can arise in a number of ways, such as through voluntary grants, licences and legislation.

In South Africa, laws under apartheid bolstered strong property rights for the privileged white owners and property rights of black people were marginalised and, thus, weaker. Now, in post-apartheid South Africa, absolute rights are not so entrenched as to be inviolable in all circumstances. For instance, courts have a discretion to compensate the owners of unauthorised buildings before demolition, although to date, reform has not been radical. Even where the actions of the marginalised have been unlawful, however, landowners may, on occasion, have to sacrifice some of the exclusivity associated with their use and enjoyment of land, so some balance is being brought to the situation.

Curiously, even where black people possessed western style land rights – which should have proven very secure and resistant to encroachment, under apartheid, these rights were often ignored, as racial discrimination trumped these strong property rights. Therefore, one's social or political status could dilute one's right to land and hence ownership was affected by the identity of the owner rather than the quality of the right. Strong rights would have to have strong owners in order to be recognised and enforceable. This subverts the central tenet of the rights paradigm where strong rights should be upheld, regardless of who holds them and change comes to such a regime slowly. This privileging of the holder of the right rather than the right itself is also a feature of other jurisdictions. For example, in Australia, Aboriginal land rights have been denigrated in the face of competing interests. Likewise, the rights of property owners on land earmarked for economic development, such as regenerated land chosen for the London Olympics site, may be sacrificed. The profit from such transactions ultimately, may benefit other private parties.

Property is central to the establishment and maintenance of social, political and legal structures and change may be resisted where injustice and inequality are enshrined by these structures. In South Africa, the state has intervened to address social inequality and to change the regime but this has generated tensions. Different ways of effectuating change can be attempted through constitutional change, legislative and policy change and alterations to legal doctrine and theory. Doctrine and theory tend to resist change the most as they are at the theoretical core of the system. In order to appreciate their limitation, one must focus one's attention at the margins of rights.

Van der Walt asserts that property is not exclusively about owners but, necessarily, also includes non-owners and there is a dichotomy between legal doctrine regarding property rights and the rights which exist at its margins. Heretofore, these latter rights have not been afforded equal treatment as their holders are often disadvantaged in some way. Focusing on the strong property rights ignores weak rights and to do so is to exclude one half of the equation. Property should not be just about privilege but should also be about obligations, both social and environmental. We could choose to focus on a property model based around stewardship rather than dominion. To deal equitably with the property rights of those who traditionally have not fitted into the rights paradigm, we have to shift our focus and change our culture, rhetoric, logic and assumptions, if we are serious about enacting meaningful legal change.

Van der Walt not only critiques traditional property rights which favour the privileged and entrench the disadvantage of those who lack access to these rights: he also offers a way forward by concentrating on instances where such marginalised rights assume centre stage and, so, dilute somewhat the rigid boundaries of the rights paradigm. This informs his thesis for reform: that in order to change the status of the excluded, those at the margins should not be ignored and that we have to broaden the ambit of our focus so as to include the heretofore excluded. This cannot be achieved solely by working within the rights paradigm which, in the author's view, is limited in what it can offer those at the margins.

This book was a profound insight into the problems faced by those minded to bring about reform where a society, rife with inequality, was faced with competing challenges: how to maintain stability in society whilst eradicating gross inequality and, clearly, this is an aim which has not yet been realised in van der Walt's South Africa.