Chapter 5

MAKING SPACE FOR SOCIAL CHANGE: PRO-POOR PROPERTY RIGHTS LITIGATION IN POST-APARTHEID SOUTH AFRICA

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5.1 INTRODUCTION
It is common to locate a paradox at the heart of the law: ‘We use the law though we are terrified of it, contemptuous of its Janus face’. We ask the law for ‘what we need, hoping [it] will not kill us before we have finished stating our claims’.1 The law promises emancipation, yet requires obedience. It insists on its own equal application, but can seldom be engaged except by those with the resources necessary to deploy lawyers, their expertise and the money to pay for it. It promises justice, but its institutions, processes and ideology everywhere sustain injustice, in the form of the wrongful deprivation of liberty, the infliction of state and corporate violence and the dispossession of the poor and vulnerable.

This chapter considers the efforts made to address that paradox through pro-poor property rights litigation since the end of Apartheid. The paradox is at its most acute when we consider the recognition and protection of property rights. Property law—and the ‘ownership model’2 on which it is based—shapes the terms on which ordinary people access the basic resources which are essential not only

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to their survival and material comfort, but also to the terms on which they interact socially. In practice, though, the protection of one person’s property rights often means the extinction of another’s. At the same time as it seeks to guarantee one of the most important conditions of freedom—access to the resources that enable the exercise of meaningful agency—law often drives the processes of dispossession that constrain or destroy individuals’ capacity to act autonomously.

Nonetheless, using the law as a means of securing progressive social change remains attractive. We celebrate when the law exonerates the innocent, when it curbs the overweening state and corporate power, and when it compensates those who have been wronged. Over the past fifty years, since at least the birth of the civil rights movement in the United States, we have praised litigants, and their lawyers, as they have sought redress through the legal system—often against terrible odds—even where they have ultimately failed. And, except in perhaps the most particular of circumstances, failure has been the easiest interpretation of what has happened when litigants have pressed for broad social change through the law. The civil rights movement substantially desegregated the US in law, but failed to address the manifold social consequences of structural racism, especially insofar as those consequences mapped on to economic disadvantage. In South Africa, the adoption and enforcement of socio-economic rights may have coincided with greater income inequality. Across the world, even as human rights protections have been enhanced, global poverty and inequality remains overwhelming. In addition, governments and courts have curtailed civil liberties in the name of security against terrorism.

And yet, at least in South Africa, faith remains in seeking change through creating and enforcing legal rights. Our Constitutional Court is celebrated for its decisions on the rights of access to adequate housing, healthcare, freedom of expression, children’s rights, and a slew of criminal procedure rights. Political disputes between parliamentary factions regularly end up in court. The courts

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5 *Government of the Republic of South Africa v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC) [LRC was admitted as amicus curiae].
6 *Minister of Health and Others v Treatment Action Campaign and Others* [2002] ZACC 15; 2002 (5) SA 721 (CC) [LRC acted for the respondents and the WLC].
7 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* [2005] ZACC 7; 2006 (1) SA 144 (CC).
8 *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC).
9 *S v Zuma* [1995] ZACC 1: 1995 (2) SA 642 (CC) and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC) [LRC acted for the applicant and BAFO, LHR, CALS and SADPSA were admitted as amici curiae].
10 *Democratic Alliance v Speaker of the National Assembly and Others* [2015] ZAWCHC 60; 2015 (4) SA 351 (WCC).
themselves are perceived as a key arena of dissent in our dominant-party democracy. Social movements, such as *Abahlali baseMjondolo*, the Anti-Privatisation Forum and the Treatment Action Campaign, together with labour unions, regularly turn to the courts to advance and defend their interests—as do thousands of other individual and group litigants where they can marshal the resources necessary to do so.

Why is this? Are we caught up in a fantasy? Are we profoundly mistaken about the law and its capacity to achieve social change? Or, can struggles about the law, in some non-trivial sense, actually drive social change? In this chapter I want to suggest that we are not mistaken in assigning value to law as an agent of change, but that the available theories of law’s role in social change are not adequate to account for what happens when people—whether organised political groups or ordinary men and women—turn to the law and lawyers to advance their social interests.

The standard accounts of the role of law in social change either reduce law to an epiphenomenon of the balance of political and social forces, or, at best, an instrumentality through which social change is effected by people who have the specialist knowledge necessary to integrate it into an effective political strategy. The ‘law as epiphenomenon’ account simply misconstrues the nature of law and the role it plays in social practice. The ‘law as instrumentality’ account correctly assumes that law is at least partially autonomous from the power relationships to which it can be applied, but fails to ask why this is so, and what flows from law’s status as a structurant of social practice.

Something beyond the standard accounts is required. In this chapter, I offer an account of law as a social structurant that shapes the spaces within which agency is possible. Law constitutes a fundamental form of social practice. It is woven into the background attitudes and constraints within which ordinary people negotiate the terms of their interactions with one another: ‘Inherited legal conventions shape the very terms of citizen understanding, aspiration and interaction with others’. Law also helps shape the contours of possible action. It often places ‘effective inhibitions on power’, whether by direct coercion or by moulding an agent’s perceptions of what is permissible action, and therefore what is possible. Law

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11 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (3) SA 580 (CC).


13 Michael McCann Rights at Work: Pay Equity and the Politics of Legal Mobilisation (1994) 6.

14 EP Thompson *Whigs and Hunters: The Origins of the Black Act* (1975) 266. The distinction between ‘property outsiders’ and ‘property insiders’ that follows was inspired by, but differs from, the distinction drawn between property ‘outlaws’ and ‘property alt-laws’ in Eduardo Penalver & Sonia Katyal Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law (2010).
accordingly plays an important part in defining the spaces within which agency is possible.

But law is also malleable, subject to interpretation and change, and the validity and application of particular laws can be challenged and reshaped in particular circumstances. Law, besides being a key structurant of the spaces within which agency is possible, is also a tool with which it is possible to refashion those spaces.

To illustrate this, I return to the paradox of property rights. I offer an account of the development of South African property law since the end of Apartheid. Property law expresses class relationships that structure some of the most fundamental forms of social and economic inequality in present day South Africa. If property law can be reshaped, then so, in a non-trivial sense, can the class relationships which sustain ongoing inequality.

In this chapter, I argue that this is precisely what is happening in key areas of property law. Litigants, courts, the state and Parliament have embarked on a sustained process of re-imagining the nature and purposes of South African property law. The ownership model has been repeatedly challenged as a way of structuring property relationships, and groups of people traditionally denied rights in the South African property regime have been granted a degree of legal recognition. This recognition has created and expanded the spaces within which it is possible for these ‘property outsiders’—those who lack existing property rights, or whose property rights are subordinated to the will of those who hold stronger property rights—to reshape the terms on which property is distributed. Through everyday practices of negotiation and challenge, property outsiders have begun to interfere with the legal processes of dispossession, which sustain inequality.

The particular areas in which this reshaping has taken place are the law applicable to unlawful occupation of land, landlord and tenant law and debtor/creditor law. In each of these areas, the processes of dispossession which give effect to the rights and expectations of ‘property insiders’—owners, or those whose property rights give them a dominant position in legal relationships about property—have been limited, qualified or challenged by reference to the social needs of the property outsiders who are at risk of dispossession. Evictions that lead to homelessness have been declared generally unlawful.15 Landlords seeking to terminate residential leases have been required to show that the termination is fair.16 Creditors seeking to execute against defaulting debtors must now show that

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15 The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele [2010] ZASCA 28; 2010 (9) BCLR 911 (SCA) para 16; Occupiers, Berea v De Wet NO and Another [2017] ZACC 18; 2017 (5) SA 346 (CC) para 57 [SERI acted for the applicants; the LRC acted for the amicus curiae, the Poor Flat Dwellers Association].

16 Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd [2012] ZACC 2; 2012 (3) SA 531 (CC) [SERI acted for the applicants and Inner City Resource Centre was admitted as amicus curiae].
alternatives to execution have been offered and, where execution would lead to loss of the debtor’s home, that execution is a proportionate response to the default. These legal innovations have often been developed as limitations on a property insider’s ordinary common-law rights to dispossess an outsider. It is within the spaces created by these limitations that everyday challenges to economic power can begin to effect powerful social change.

5.2 THE STANDARD ACCOUNTS

Before developing the argument set out above, it is necessary to consider the standard accounts of law and social change, and their limitations.

There are, it seems to me, two broad traditions in which to locate a theory of law and social change. The first, grounded in a Marxist analysis of law, asserts that legal rules are the super-structural epiphenomena of base economic and political interests. The enforcement of legal rules is made possible by the strength of those base interests. In other words, law, in itself, is incapable of forcing social change, because it is merely reflective of the interests that exercise it. Legal rules change because the balance of political and economic forces requires it. Law has no autonomy. There is accordingly little point in seeking social change through the deployment of legal resources—for example, lawyers seeking remedies which will advantage relatively unempowered litigants—because legal victories are unenforceable without pre-existing political power. And since the acquisition of political power, usually through gaining control of the state, or through revolution, is sufficient to achieve political and economic goals, there is no point in using the law at all. Law reflects rather than animates political change. To be meaningful, political struggle must take place outside the institutions of the law and state power, in direct challenge to them.

This position is normally defended by eliding the distinction between law as a general social form, and the specific role that law plays in a capitalist system of commodity exchange. Pashukanis, the foremost Soviet legal theorist, posited that law emerges out of particular relationships established during commercial exchanges that take place between owners of private property. Legal ideas of freedom, equality and autonomy are therefore only meaningful insofar as they protect the freedom, equality and autonomy of the owners of private property in a system of commodity exchange. Legal concepts and relationships are therefore

17 Sebola and Another v Standard Bank of South Africa Ltd and Another [2012] ZACC 11; 2012 (5) SA 142 (CC) [SERI was admitted as amicus curiae].
18 Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others [2004] ZACC 25; 2005 (2) SA 140 (CC) [LRC acted for the appellants].
19 Karl Marx Critique of the Gotha Programme (1938).
firmly tethered to, and reflective of, economic relationships which can only be transformed, if at all, through state capture or revolution. Pashukanis himself advocated a purely ‘technical’ role for law, as a regulatory instrument necessary to implement the transition from market relationships to an economy based on centrally planned production and distribution.22 This social role for law in a Soviet planned economy was perhaps imagined as the mirror image of the role Pashukanis thought it played in capitalist society—a form of regulation purely subordinate to the economic forms it was needed to implement.

More recently, Rosenberg critiqued the use of law to achieve social change by denying that court judgments can ever be effectively implemented without popular political support, and that the very act of seeking change through legal reform or litigation automatically disempowers ordinary men and women who would otherwise organise to implement strategies of collective action to bring about social change. Here, too, Rosenberg insists that law is merely reflective of motive forces of social change produced elsewhere, rather than constitutive of those forces.23

The problem with this approach is that it adopts too narrow a conception of what the law actually is. Few people would now accept, as Pashukanis suggested, that law serves a purely regulatory purpose. In addition to a means of regulating behaviour, law is, broadly speaking, a set of ideas which constitutes dimly perceived conceptions of the social good and which provides a mechanism for resolving disputes between differently situated groups and individuals. It is the role of law as a source of normative claims, and as a means of resolving conflict, that gives it a degree of autonomy and efficacy in bringing about social change. Rosenberg, too, seems to assume that a particular legal regulation is simply the outcome of a particular social struggle, the success of which is dependent on not deploying law and lawyers because these necessarily disempower grassroots community action. But this ignores the ways in which legal ideas and processes can constitute and empower political claims. If equality and freedom are not just the equality and freedom of commodity exchange, then the forms of equality and freedom that the law offers are matters of debate and contestation which cannot simply be foregone because of the particular ways in which lawyers, as a professional class, might interact negatively with social movements seeking change.

The second tradition, grounded in liberal politics, recognises this. It sees more potential for the law to act as a potentially powerful political resource when used in concert with a range of other strategies, such as community organising, civil disobedience, public advocacy and, occasionally, strategic engagement with electoral politics. While accepting that legal rules are not simply the product of the

22 Fine (note 21 above) 163 and Pashukanis (note 21 above) 131.
balance of economic forces, and that they offer potentially powerful symbolic and
normative advantages in a programme for change, this tradition sees the bite of
legal rules as particularly weak without the backing of, say, a social movement or
an organised political campaign. It follows that the success of change-oriented
litigation, and other forms of legal campaigning, require careful political planning
and co-ordination, in order to ensure that symbolically powerful but practically
fragile legal victories can be made ‘real’ by further political action.

This account of the use of law in implementing social change strategies is the
dominant account of law and social change in South Africa. Law becomes a tool in
the hands of relatively elite political activists, and indisputably elite lawyers, who
plot out carefully planned strategies for change. This approach is evident in much
of the recent South African writing on law and social change. Marcus, Budlender
and Ferreira seek to plot out the necessary pre-conditions for the exercise of a
successful change-oriented litigation strategy, arguing that deploying law as an
instrument of social change requires careful judgment by specialist legal activists,
by reference to a pre-set list of a-contextual criteria. Heywood argues that the
South African left should re-orient itself completely towards the Constitution as a
‘unifying vision’ for social change, which will form the basis of a co-ordinated and
apparently centrally directed struggle for ‘the full gamut of constitutionally-
enshrined human rights which, as they are realised, will create a more socially-just
and politically empowered society.’ Elsewhere, I have myself perhaps over-
celebrated the role of the public interest lawyer as: ‘Something of a game- player,
particularly skilled in the law, but keenly aware of its limitations and the social
conditions necessary for its effective deployment.’

This account reduces the law to instrumentality rather than epiphenomenon. It
overlooks the manifold ways in which everyday struggles about the forms and
content of the law, in and of itself, trigger valuable motive forces with transforma-
tive potential. Law need not only be a tool in the hands of elite actors. It constitutes
forms of social action at the grassroots. It opens, forecloses, and shapes everyday
opportunities for social action. To reduce law to an instrument in the hands of
political activists ignores a whole range of struggles about and within the forms
and content of law at the level of everyday practice.

24 Mark Heywood ‘Shaping, making and breaking the law in the campaign for a national HIV/AIDS
treatment plan’ in Peris Jones & Kristian Stokke (eds) Democratising Development: The Politics of
25 Steven Budlender, Gilbert Marcus & Nick Ferreira Public Interest Litigation in South Africa:
26 Ibid 110.
27 Mark Heywood ‘Seize power! The role of the Constitution in unifying social justice struggles in
South Africa’ in Vishwas Sagtar (ed) Capitalism’s Crises: Class Struggles in South Africa and the
SAJHR 127–151.
The argument is not that politics do not matter. It is that progressive and radical political projects have underestimated the extent to which law and legal remedies can trigger meaningful social change. No doubt, where amplified by co-ordinated political action, these changes can be made more powerfully, durably or effectively. But, individual litigants, without a consciously political project, can have profoundly political effects because they shape the content of legal rules. By shaping the content of legal rules, they change social practices, and by changing social practices, they affect the distribution of social power.

5.3 TOWARDS A NEW ACCOUNT

Forty years ago, in a now-famous dissent from the standard Marxist analysis, EP Thompson observed that ‘the rhetoric and rules of society are something a great deal more than sham’. In his path-breaking study of the implementation of the Black Act—a piece of legislation which sought to protect the property rights of a prosperous commercial elite against petty crime and civil disobedience, by rapidly and substantially enlarging the use of the death penalty—Thompson suggested that, in clothing the enforcement of their interests in the rule of law, the commercial class had to accept significant limitations on the exercise of what would otherwise have been irresistible force. Although the English propertied class of the early eighteenth century was ‘a political oligarchy inventing callous and oppressive laws to serve its own interests’ it cannot be concluded that ‘the rule of law itself was humbug’. He went on to argue that ‘the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good.’ To overlook this ‘is to throw away a whole inheritance of struggle about law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger.’

Thompson’s observations about the law’s ability to structure the exercise of power were made in the context of a statute that was designed to facilitate the execution of petty criminals. His point was that the law exercised a protective force. Fewer people were sentenced to death, and fewer executions were carried out, because the forms of law restrained the exercise of power.

Thompson’s observations about the way in which legal forms curb the exercise of power in wicked legal systems were absorbed in South Africa under Apartheid as a way of explaining the participation of lawyers and judges in the Apartheid legal system. Apartheid was presented as a legally regulated and sanctioned system of social ordering that was implemented in a fair and predictable manner. Ideas of fairness, freedom and equality embedded in the law could accordingly be turned against the system to ameliorate some of its most pernicious effects in

29 Thompson (note 14 above) 265.
30 Ibid 266.
specific contexts, and, perhaps more importantly, to expose Apartheid as a system of government which was anything but fair, predictable and law-governed.31

However, Thompson’s suggestive remarks on the role of law in unjust societies can be pushed further. For Thompson, law was able to limit and direct power because, at least in modern capitalist societies, law is imbricated in every important social and economic relationship. It exists at multiple levels and is embedded in a range of different social contexts. There is no meaningful separation, for example, between ‘law’ and ‘economics’, because economics can only be studied as a set of pre-defined normative relationships between people, resources, capital, commodity and labour. In other words, social power relationships are ‘simultaneously economic, social and moral’.32 Law plays a vital role in structuring these relationships precisely because it is a set of normative claims about the right forms of social order that is backed up by authority.

If law structures social relationships in the way Thompson suggests it does, then it also shapes the opportunities for action available to ordinary men and women in everyday contexts. Based on Thompson’s insight, I want to suggest that the power of law as an agent of social change lies in its ability to create or destroy spaces in which socially subordinate groups—the poor, racial minorities, women, sexual minorities and indigenous populations—can think and act to give effect to their plans and aspirations.

Conceiving of the law in this way requires us first to recognise the inherent limitations of using the law as a political strategy. If law creates, expands, and/or contracts opportunities for action, then its role in bringing about social change is at best secondary. It is the agents that act within the spaces law carves out that actually change things. However, without the space in which to act, the changes that can follow on an effective legal strategy are not themselves possible. It seems to me that this way of understanding legal strategies for change makes sense of, but places appropriate limits on, the critiques of the law’s capacity to bring about change. It suggests that it is not enough to make the simple (and often irrefutable) observation that changes in the law following legislative reform or progressive court victories have not always been commensurate with changes in practice. That is true of almost all social change lawyering. Judgments and statutes do not magically produce change (although they are often no more or less effective than a range of other more traditional political strategies). At the same time, however, real social change is seldom possible without an alteration in the rules people create to govern their everyday behaviour. Accordingly, while it is correct to point out, for example, that the civil rights movement has hardly succeeded in desegregating the US, it is equally unlikely that such desegregation that has taken place would have been possible without the legal victories of the civil rights movement.

The civil rights struggle and its use of law have fundamentally shaped more modern challenges to racial injustice in the US, such as #BlackLivesMatter.

The second advantage of thinking about the space-creating, agency-enhancing potentials of legal strategies for social change is that it honours our common-sense intuitions about in whose hands social agency actually lies. It does not lie primarily in the hands of lawyers and judges—or even legislators—exercising their legally endowed powers. Law shapes the terms on which agents act, form relationships and adopt social practices. But it does not in itself constitute the changes in behaviour and social practice that it sometimes brings about. This observation is a particularly important antidote to the liberal tradition of social change lawyering, which tends to privilege lawyers, elite activists and their specialist capacities to ‘strategise’ about the law and persuade judges and legislators to adopt particular dispositions. Too much of the writing in that tradition discusses the formulation and execution of elite strategy and stops when a change in the law has been achieved. Little is said, or thought, about how the way in which lawyers and litigants frame their arguments promotes or retards the spaces in which ordinary people will subsequently act, once the law has been changed. However, if we are serious about drawing convincing links between law and social change, we cannot avoid placing this relationship at the centre of our enquiry.

A third advantage of this way of conceiving of law and social change is that it accords with powerful accounts of the conceptual foundations of legal rights. James Griffin’s account of human rights helps illustrate the point. Griffin locates the philosophical justification of rights in their capacity to protect the conditions necessary for the exercise of agency.33 Rights, in other words, create spaces in which humans can act to pursue their goals, to realise themselves and forge a path through life. If, as Griffin urges, rights protect and enhance human agency, then we cannot ignore the extent to which particular laws—through which general rights are protected, limited or realised in particular contexts—constrain or expand the spaces in which ordinary men and women think and act.

It is against this background that we should, in my view, be considering the relationship between law and social change in contemporary South Africa. Law can neither be reduced to the handmaiden of base economic and social interests nor to an instrument in the hands of the savvy activist. Law is embedded in the fabric of everyday social practices. It shapes perceptions, expectations, moral world-views, and concrete action—not just on the operatic terrain of political struggle, but in the mundane interactions that constitute everyday life. Changes in the law shape these everyday practices by helping to define the boundaries of the possible.

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Chapter 5: Making Space for Social Change

5.4 PROPERTY LAW AND SOCIAL PRACTICE

Nowhere is this account of the relationship between law and social change more obviously illustrated than in the rules and practices of property law. Property law defines the scope of access to material goods. It embodies ‘how we, as a society have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others.’ It not only shapes important terms of social participation; it affects the ways in which men and women exist in space. The rules of land tenure define where ordinary people may live and the terms on which they can stay there. The rules applicable to consumer credit define the extent of the monetary resources they can deploy to meet their material wants and needs. The rules of consumer credit also provide for the forfeit of homes, cars and other goods which are necessary to chart a course through everyday life.

In short, the rules of property law form part of the social fabric. They are deeply immersed in the background noise of everyday life. Often without conscious thought, they shape basic social expectations and behaviour. For that reason, the rules of property law are often thought to be static. But they are not.

We live in the grip of a pervasive ‘ownership’ model of property. This model posits property as tangible goods or incorporeal rights over which individuals or corporations have exclusive control. The world is carved up into domains of ownership—exclusive control of a right or an object, and freedom to do with it as one wishes. We have lived with this ownership model since at least the late Roman Republic. And, although we accept that an owner’s complete freedom to use his property entirely as he wishes is a fiction (ownership of a shotgun does not entitle its owner to use it to kill people), social claims on ownership interests have been carved out as exceptions to a general rule: that property is something controlled, dominated, and from which other social claims are excluded in favour of the personal use and enjoyment of its owner. To be sure, an owner can enter into various contracts alienating one of the incidents of his ownership. He can lease his property to a tenant. He can encumber it as security for a debt. He can sell it. He can even lay waste to it on a whim. But these limitations on ownership rights are granted by the consent of the owner, and are usually revocable, on notice, more or less at the owner’s will.

Redistributive claims, concerns about inequality, poverty and social needs have always been located outside property law. It has seldom been accepted that the structure of property rights itself is affected by concerns about inequality. Rather, it is the distribution of property rights on the ownership model that has traditionally been the concern of the state, not the nature of those property rights. Welfare states

35 Singer (note 2 above) 2–3.
36 David Graeber Debt: The First 5,000 Years (2011) 200.
have generally aimed to enhance the capacity of individual men and women to purchase property rights on the open market through welfare payments, or to provide goods to individual men and women by establishing relationships modelled on traditional property law categories. For example, the state may provide housing by paying out a rent voucher, renting out its own public housing, or transferring ownership of land and a house to an individual. In each case, the ownership model of property rights is reinforced, or at least left unchallenged.

5.5 CONTEMPORARY STRUGGLES OVER PROPERTY RIGHTS IN SOUTH AFRICA

What if that changed? I want to argue that, at least in South Africa, some of the most basic structures of property law have undergone substantial alteration since the end of Apartheid, and that these alterations have created spaces in which ordinary people started to reshape the terms on which they access land, tenure, credit and commercial urban space.

At the end of Apartheid, South African property law was a substantially unreformed artefact of the law of the Province of Holland in seventeenth century Netherlands. Legal concepts and principles dating back as far as the late Roman Republic heavily influenced the property regime inherited from seventeenth century Holland. Apart from planning law, land administration and statutes providing for expropriation\(^{37}\) and limitations on prescription,\(^{38}\) this Roman-Dutch common law of property was largely free from statutory interference. This ‘common law’ of property is a system of largely inflexible rules which created a hierarchy of rights in property. At the top of the hierarchy sits ownership—complete control or ‘dominium’ over a thing, defined as the freedom to deal in one’s property entirely as one wishes. Without limiting the generality of the concept of dominium, common-law writers have sought to develop the concept of ownership as a ‘bundle’ of rights and powers over a thing.\(^{39}\) The usual list includes the right to use, enjoy the fruits of, consume, possess, dispose of, vindicate and defend the owned property.\(^{40}\)

Although the common law does place some internal limitations on the rights of owners, for example through the law of nuisance (governing the circumstances under which a landowner can be interdicted from using his land to the prejudice of his neighbours) and the law of estoppel (which potentially limits an owner’s right to vindicate property he has negligently represented as in fact the property of another), these limits are relatively negligible and highly specific. In particular, except to the extent that an owner chooses to limit or sell one or more of his

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38 Expropriation Act 63 of 1975.
ownership rights, the common law does not limit ownership rights to achieve redistributive ends, or to meet perhaps urgent and pressing social needs of non-owners. So, for example, the *rei vindicatio*, which is the common-law action through which an owner recovers possession of his property from another, does not recognise the social consequences of dispossessing a holder of an owner’s property as a possible reason not to permit the owner to repossess it. Potential homelessness, for example, would never have been recognised as a reason not to allow a property owner to repossess his land from a person living on it. Only the existence of a counter-veiling common-law right is sufficient to defeat an owner’s vindicatory action.41

The common law accordingly parcels the world off into a series of (almost) absolute domains within which, in the absence of his agreement to limit his rights (for example by leasing his property or putting it up as security for a debt), an owner has exclusive rights to possess and deal in his property as he sees fit, without regard for the economic needs or well-being of others.

The common-law regime accordingly lends itself to the creation of at least two classes of person. First, there is the ‘property insider’. A property insider is a holder of a recognised common-law right in property. The ultimate property insider is a common-law owner, with his virtually unfettered rights to possess and use his property as he sees fit. But property insiders are also lessees, mortgagees, holders of servitudes, usufructuaries and so on: people who hold rights against the owner of a thing because the owner has chosen to encumber his property by creating a subordinate right in it. These subordinate rights can sometimes be quite extensive. Leases can be very long. A mortgagee can have extensive rights to sell an owner’s property in execution of a debt. A usufructuary has a lifetime right to use and take the fruits of the relevant property. However, these rights are all conceptualised as a ‘subtraction from the dominium’42 of the owner. In other words, subordinate common-law rights are held from the owner, are always temporary, and will revert to the owner once the conditions necessary for their termination are satisfied.

A ‘property outsider’ is someone who uses property without any common-law rights to do so. Although the common law acknowledges the existence of property outsiders by, for example, recognising precarious occupation,43 and the possibility that prescription may turn an ostensibly unlawful possessor of property into an owner after 30 years,44 it assigns them no substantive rights. The *mandament van spolie* accords thin procedural protection to a possessor—even an unlawful

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41 *Chetty v Naidoo* 1974 (3) SA 13 (A).
42 *Ex Parte Geldenhuys* 1926 OPD 155.
43 *Malan v Nabygelegen Estates* 1946 AD 562, 573.
44 Section 6 of the Prescription Act.
possessor—who is dispossessed of property without due process of law. Before the advent of the Constitution, however, even this protection was fairly easy to oust by statute. Fundamentally, a property outsider is, at best, tolerated, and at worst, subject to prompt dispossession, more or less at the will of the property owner. Property outsiders include people who once had common law rights, but who no longer do so—for example tenants who are holding over and debtors whose loans have been called up. They are outsiders because the common law provides no protection for them from the moment their common law rights have been terminated at the will of the owner—whether by the exercise of what has been called a landlord’s ‘bare power’ to terminate a lease on notice, or because of the consequences that follow on a debtor’s default on a credit agreement. The common law affords property outsiders no positive right to acquire property, and tacitly assumes that property outsiders will have sufficient resource endowments to acquire some form of property right and become an ‘insider’ again.

However, in the conditions of extreme inequality that characterise the South African economy, this assumption simply cannot be made. A large proportion of the South African population is unemployed, unable to access credit and effectively locked-out of urban rental land and housing markets. In these circumstances, neither the common law of property itself nor the economy provides an easy route from property outsider to property insider status.

Accordingly, models of property law that address the rights and obligations of owners and holders of lesser common law rights have begun to look increasingly anachronistic. Traditional legal analysis tends to be focussed on the relationships between owners, holders of other common law rights and, where relevant, the state. What contemporary property law writing has all but ignored is how the law deals with people who have no common law rights at all. How to regulate the relationships between people with and without common law property rights is one of the most contentious political debates in contemporary South Africa. Yet this debate is not a mainstream concern of property law.

It clearly should be. The study of a system of law that does not ask questions about the interests that system tends to exclude, or subordinate is, at best, incomplete and at worst, unjust. More fundamentally, however, it is important to recognise that, in the last 20 years, there have been many constitutional, statutory and jurisprudential developments that have attempted to address the needs of

45 As Voet famously put it even a thief can bring a spoliation application: see Voet 41.2.16; endorsed by the Constitutional Court in Ngqukumba v Minister of Safety and Security [2014] ZACC 14; 2014 (5) SA 112 (CC) para 21.
46 Prevention of Illegal Squatting Amendment Act 42 of 1975.
47 Maphango (note 16 above) para 10.
property outsiders. In doing so, these developments have not only punctured the ownership model of property law, but they have begun to carve out spaces in which the processes of dispossession that help sustain rampant economic inequality can be challenged.

It is to an outline of these developments that I now turn.

(a) The rights of unlawful occupiers

The most dramatic post-Apartheid reform of property law has perhaps been the way in which s 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) have sought to re-balance the relationship between landowners and unlawful occupiers.

The regime in force before the advent of the Constitution accorded virtually no rights to unlawful occupiers. In 1975, an amendment to the Prevention of Illegal Squatting Act 52 of 1951 had taken away even the most elementary common law protection against eviction without due process of law from occupiers who had never had the landowner’s consent or another legal right of occupation. The situation was not much better for those who once had the consent of the landowner or another right in law to occupy land, or whose right of occupation was unclear. In *Chetty v Naidoo* the Appellate Division (as it then was) (AD) had cast the onus on defendants in eviction proceedings to prove their rights of occupation, unless the landowner had acknowledged upfront that some right of occupation had previously existed. Even then, if there was a dispute, the defendant still bore the full onus of proving the nature of the right and the fact that it had not been validly terminated.

The interaction between Apartheid ‘anti-squatting’ legislation and the common law placed landowners in a position of overwhelming dominance. Most of the time, all the owner had to prove was his ownership and the fact of occupation by the defendant. From those two facts, it was generally presumed that, in the absence of counter-veiling evidence, an eviction order would follow. Few poor people of dubious title who faced eviction from land would have been able to afford a lawyer to challenge their eviction in court by providing that evidence (if it existed). Even those fortunate enough to get into court had almost no substantive rights. The displacement of countless poor black people—almost certainly several million people over the 46 years between 1948 and 1994—has been documented in at least two book-length studies on the subject. It is, however, unlikely that we will ever be able to quantify the human cost of these evictions.

Towards the end of Apartheid, there were attempts to ameliorate the worst aspects of the statutory regime. In *Komani NO v Bantu Affairs Administration*

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40 *Chetty v Naidoo* (note 41 above).

Board, Peninsula Area, the AD declared invalid an influx control measure which precluded a man from living together with his wife in a ‘white’ urban area. In *S v Govender*, the Transvaal Supreme Court ruled that eviction in terms of s 42(2) of the Group Areas Act 36 of 1966 did not automatically follow upon conviction for the offence of living in a group area designated for another racial group without a permit. In that matter, Govender, an Indian, was convicted of residing in a white group area without a permit. Govender was sentenced to 15 days imprisonment or a fine of R50, suspended for three years on condition that she was not convicted of the same offence again. Without being asked to do so, the presiding magistrate also ordered her ejectment from her home. On appeal, Goldstone J held that an order for ejectment need not necessarily follow upon conviction for contravening s 42(2). Whether to order ejectment was a matter of wide discretion. An ejectment order should only be made after ‘the fullest enquiry’ involving ‘many considerations’, including the hardship which would follow upon ejectment, had been conducted. In short, an order for ejectment may only be made after considering all the relevant circumstances.

Despite these exceptions (which attempted to blunt the force of Apartheid legislation rather than the common law), for most people, dispossession, even if proceeded by some legal process, was likely to have been swift, brutal and final. Section 26(3) of the final, post-Apartheid Constitution was an attempt to level the playing field and unseat landowners from their dominant position in eviction proceedings. It provides that ‘no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.’ Its implications, though not immediately accepted by the post-Apartheid courts, were far-reaching. Instead of casting the onus to resist an eviction order on the defendant, s 26(3) places a duty on a court to consider all the relevant circumstances.

At common law, only the existence and relative strengths of the parties’ common law rights were relevant, and the onus to prove the existence of a common law right usually lay with the occupier. On its face, s 26(3) of the Constitution now accorded a court an open discretion and required the court to consider what ‘circumstances’ were relevant to the exercise of that discretion. On a plain reading of the section, a court has a wide discretion to measure the social impact of an eviction and decide what is fair in the circumstances.

There was predictable resistance to this generous interpretation of the way in which s 26(3) of the Constitution changed the relationship between owner and

51 Komani NO v Bantu Affairs Administration Board, Peninsula Area 1980 (4) SA 448 (A) [LRC acted for the appellant].
52 S v Govender 1986 (3) 969 (T).
53 Ibid 971B—J.
occupier. In *Brisley v Drotsky*\(^{54}\) the Supreme Court of Appeal (SCA) held that s 26(3) of the Constitution requires a court to consider only circumstances that are ‘legally relevant’\(^{55}\) to the exercise of its discretion. If the discretion to refuse an eviction order was not specifically conferred on a court by the common law or a statute, the Constitution itself does not authorise a court to decline to order an eviction to which a landowner would otherwise be legally entitled—s 26(3) did not allow a court to decide what was fair in the circumstances.

But, the decision in *Brisley*, while never formally overruled, has effectively been ignored by the Constitutional Court. Just two years later, a unanimous Constitutional Court held that s 26(3) of the Constitution—

imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home . . . . The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.\(^{56}\)

Ultimately, however, the debate about what the direct application of s 26(3) of the Constitution might mean for unlawful occupiers has been rendered academic by the broad application that has been given to the PIE Act. The PIE Act, which came into effect in 1998, set two conditions for the eviction of unlawful occupiers. First, unlawful occupiers must be given ‘written and effective notice’\(^{57}\) of any proceedings for their eviction. Failure to provide effective notice vitiates eviction proceedings.\(^{58}\) Secondly, no unlawful occupier can be evicted unless it is ‘just and equitable’ to do so.\(^{59}\) In other words, unlawful occupiers stay where they are unless they are informed of proceedings for their eviction, and their eviction would be substantively fair.

Early decisions grappling with what ‘justice and equity’ meant as between owner and occupier resorted to the common law. What was fair, so some of the earlier decisions held, was that the owner be restored to exclusive possession of his property.\(^{60}\) But that attempt to cling on to the common law did not last long. In a series of decisions, starting with *Grootboom* in 2000, the Constitutional Court

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\(^{55}\) Ibid para 42.

\(^{56}\) *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC) para 23.

\(^{57}\) Section 4(2) of the PIE Act.

\(^{58}\) *Cape Killarney Property Investments (Pty) Ltd v Mahamba and Others* [2001] ZASCA 87; 2001 (4) SA 1222 (SCA) [LRC acted for the respondents].

\(^{59}\) Sections 4(6), 4(7) and 6(1) of the PIE Act.

\(^{60}\) *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* 2000 (4) SA 468 (W) para 8.2.
and the SCA developed a careful, structured account of what justice and equity required in relation to both the scope and content of a court’s enquiry, and the substantive result that had to be achieved in eviction proceedings.

The over-riding principle, now firmly established, is that evictions of unlawful occupiers should not lead to homelessness. Where it appears that an eviction might lead to homelessness, a court is required to conduct the necessary enquiries to decide whether and to what extent homelessness would result from an eviction, and to seek input from the state, usually the local authority, on what steps are to be taken to ensure that the unlawful occupiers concerned will have access to alternative accommodation if they are evicted. In rare cases, a court will refuse an eviction order outright. More often, though, a court will make a structured eviction order, obliging the local authority to provide accommodation to the unlawful occupiers before the date on which the unlawful occupiers may be evicted, and specifying the nature and location of the alternative accommodation to which the unlawful occupiers are to be relocated.

The state’s response to the new duties imposed on it has been sluggish. Eviction applications have, in some cases, taken several years to finalise. Depending on the size of the community involved, and the logistical difficulties with providing alternative accommodation, large communities can establish de facto rights of occupation in the years it takes to obtain an eviction order. In Modderklip, the unlawful occupiers were simply left where they were, the state bought the land they had occupied, and a low-cost housing development was eventually constructed on it. In the Ratanang informal settlement case, the local authority entered into a court-sanctioned 36-month lease with the owner of the property on behalf of the occupiers—effectively, if only temporarily, giving

61 PE Municipality (note 56 above) para 28; Shulana Court (note 15 above) para 16 and Mathale v Linda [2015] ZACC 38; 2016 (2) SA 461 (CC) para 50. Occupiers, Berea (note 15 above).
62 City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others [2012] ZASCA 116; 2012 (6) SA 294 (SCA) para 40 [LRC acted for the second to 97th respondents and SERI was admitted as amicus curiae].
63 Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5 [2013] ZASCA 162; 2014 (3) SA 23 (SCA) [LRC acted for the respondents] and All Builders And Cleaning Services CC v Matlaila and Others [2015] ZAGPJHC 2 [SERI acted for the first, second and third respondents].
64 Hlophe and Others v City of Johannesburg and Others [2013] ZAGPJHC 98; 2013 (4) SA 212 (GSJ) [SERI acted for the applicants].
65 City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others [2015] ZASCA 16; 2015 (2) All SA 251 (SCA) [SERI acted for the first to 182nd respondents].
66 Ibid.
legal recognition to the informal settlers’ rights of occupation. In the *Joe Slovo informal settlement* case,6⁹ the conditions placed by the Constitutional Court on the state’s right to evict and relocate the occupiers of the informal settlement proved so onerous that the eviction order could not be carried out, and was ultimately discharged.⁷⁰ The unlawful occupiers in that case are now negotiating the terms on which the Joe Slovo informal settlement will be upgraded *in situ*.

Even where the unlawful occupiers ultimately have to move, this has had significant knock-on effects for urban planning. A series of eviction cases in the Johannesburg inner city has resulted in the creation of a small, but growing, public housing stock created to accommodate unlawful occupiers evicted from buildings in the course of inner-city regeneration initiatives.⁷¹ The terms on which that accommodation is provided have opened up a new front in unlawful occupiers’ struggles to retain access to the city. The courts have directed local authorities to provide accommodation within a reasonable distance of the land from which the unlawful occupiers have been removed.⁷² They have also directed that family accommodation be provided and struck down restrictive rules and conditions placed on residence in the housing stock the state provides.⁷³

Restrictions have also been placed on the legal steps private owners and the state can take to prevent the urban poor from moving onto vacant land. The courts have rejected attempts to obtain land occupation interdicts which permit eviction without a court order where unlawful occupiers have moved onto land for a relatively short period—often because they have been evicted from elsewhere.⁷⁴ The Constitutional Court, in particular, has disapproved of coercive responses to new land occupations, emphasising the need to engage with homeless people moving on to land for the first time, and to deal with their needs on a case-by-case basis.⁷⁵

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⁶⁹ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; 2010 (3) SA 454 (CC) [LRC acted for the applicants represented by the Task Team; the WLC acted for the *amicus curiae*, the COHRE and CLC].

⁷⁰ *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* [2011] ZACC 8; 2011 (7) BCLR 723 (CC) [LRC acted for the applicants represented by the Task Team and the WLC acted for the *amicus curiae*, the COHRE and CLC].

⁷¹ Wilson (note 28 above) 127–51.

⁷² *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC) para 104 [Wits Law Clinic acted for the second respondent and LHR was admitted as *amicus curiae*].

⁷³ *Dladla and Others v City of Johannesburg* [2017] ZACC 42 [SERI acted for the applicants; CALS was admitted as first *amicus curiae*, represented by the LRC and the CCL was admitted as second *amicus curiae*].

⁷⁴ *Zulu and Others v eThekwini Municipality and Others* [2014] ZACC 17; 2014 (4) SA 590 (CC) [LRC acted for the appellants and SERI acted for the *amicus curiae*, Abahlali baseMjondolo Movement South Africa].

⁷⁵ *Grootboom* (note 5 above).
In practice, this new scheme for the adjudication of eviction cases, the execution of eviction orders and the management of unlawful land occupation has opened up a fairly wide space within which unlawful occupiers can shape the terms of their access to land. The Apartheid legal regime, buttressed by the overwhelming power that common-law eviction proceedings assigned to landowners, produced a vast number of eviction orders, which were granted and executed irrespective of the social consequences of suddenly making large numbers of very poor people homeless. The post-Apartheid constitutional and statutory scheme for the management of eviction proceedings has instead sought to create a space in which the competing social claims of landowners and unlawful occupiers can be balanced and reconciled, and in which poor people can negotiate the terms of their residence in urban areas. This has led to resettlement of significant tracts of urban land by poor people, and changes in government policy and practice, increasing the availability of public rental housing stock, and the frequency with which informal settlement upgrades take place.

(b) The rights of residential tenants
The imbalance of power between landlords and tenants is another example of the way in which the common law of property creates insiders and outsiders. At common law, a landlord is entitled to terminate a residential lease on notice ‘with no let or hindrance’.76 This ‘bare power of termination’77 is an incident of several features of a lease (whether residential or not) that the common-law writers have identified. Unless otherwise specified in the contract, a lease is generally at the will of the landlord, inherently temporary in nature, and terminable on reasonable notice whatever the landlord’s reasons for doing so.78 In other words, unless otherwise agreed, a tenant’s right to occupy his or her home can be terminated at the will of the landlord for any purpose whatsoever. The scarcity of residential accommodation, especially in urban areas, creates an inequality of bargaining power that makes it virtually impossible for a tenant to negotiate extensive lease-based protections for himself.

Common law leases are therefore remarkably easy to form and terminate. This makes some commercial sense where one assumes a plentiful supply of property, reasonable rental prices, and tenants who can pay those prices—in other words, where market conditions are near-perfect. The trouble is that housing markets, especially urban housing markets, are, across the world, often grossly unequal. Left to operate on its own, the residential housing market would exclude a sizeable portion of those in need of accommodation and create abnormally high rents and profits for landlords.

76 Maphango (note 16 above) para 29.
77 Ibid.
78 Johannes Voet The Selective Voet, being the Commentary on the Pandects (1880) 3 413.
These imperfections in residential housing markets have long been recognised. Statutory rent control regimes are still a common feature of most advanced urban economies. In South Africa, the Rents Act 13 of 1920 (Rents Act) provided that a lessee could not be evicted from residential property unless he committed a breach of the lease, caused damage to property or a nuisance to his neighbours, or the landlord needed the rented property for his own personal occupation or the occupation of an employee. The Rents Act also provided for statutory rent boards—which had wide-ranging powers—to fix what it considered to be reasonable rents, and even to reduce rents otherwise agreed upon between landlord and tenant.

These extensive powers to interfere with the landlord-tenant relationship endured, with some amendment, between 1920 until rent control was finally abolished in 1999. At that point, the Rent Control Act 80 of 1976 (the successor statute to the Rents Act), was repealed in its entirety, and replaced with the Rental Housing Act 50 of 1999 (Rental Housing Act). The Rental Housing Act did not replicate specific prohibitions on the right to terminate a residential lease. Nor did it preserve the explicit power of rent boards to reduce rent on application by a tenant. However, the Rental Housing Act does impose one general limitation on the landlord’s rights to terminate a residential lease: a lease cannot be terminated on ‘grounds which constitute an unfair practice’. An unfair practice is behaviour which is proscribed by the Minister of Housing, or which is in breach of the act itself. Any landlord or tenant can complain of an unfair practice to a Rental Housing Tribunal, which is empowered to make any order to discontinue an unfair practice by providing a just and fair remedy. This power expressly includes the power to determine rents between the parties.

While the state’s powers to interfere with the landlord and tenant relationship have been significantly watered down in the Rental Housing Act, the core power to refuse to allow the landlord to terminate a lease and to set exorbitant rents remains in the hands of a statutory tribunal. That the Rental Housing Tribunal has these powers was finally confirmed by the Constitutional Court in \textit{Maphango v Aengus Lifestyle Properties}. In that case, a property developer purchased a rundown building in the centre of Johannesburg. The tenants in the building at the time were paying rent in terms of leases which guaranteed them significantly lower rents

\footnotesize{\textsuperscript{79} WE Cooper, \textit{The Rent Control Act: A Supplement to the South African Law of Landlord and Tenant} (1977) 2.\textsuperscript{80} Sections 2 and 6 of the Rents Act.\textsuperscript{81} The Law of South Africa (2 ed) 3 para 163.\textsuperscript{82} Section 4(5)(c) of the Rental Housing Act.\textsuperscript{83} Section 1.\textsuperscript{84} Section 13 (4)(c).\textsuperscript{85} Section 13 (5).\textsuperscript{86} \textit{Maphango} (note 16 above).}
than the property developer could secure on the open market. The property developer therefore offered the tenants a choice—their leases would be terminated, and they would have to vacate, or they could elect to pay up to twice their current rent to stay in the property. Not surprisingly, the tenants rejected both options and lodged a complaint with the Rental Housing Tribunal about what they said was an unfair rent. In order to avoid the Tribunal’s jurisdiction, the property developer brought an application for eviction in the High Court. The eviction order was granted in the High Court and upheld in the SCA. 87 Both courts held that they had no power to interfere with a commercial decision to terminate a lease. The SCA also held that, even if it did have such a power, it saw nothing wrong with a property owner terminating a tenant’s lease in order to secure a higher rent. 88

The Constitutional Court disagreed. It held that the Rental Housing Act ‘superimposes its unfair practice regime on the contractual arrangement that the individual parties negotiate’. 89 This superimposition means that the Tribunal, and presumably courts as well in appropriate cases, have the power to disallow the termination of a residential lease, and to set rents between the parties.

Because Rental Housing Tribunals are easily accessible, without legal representation, and without any of the fees and formalities imposed on litigants by courts, they constitute a vital space in which tenants can shape the terms of their relationships with landlords. Rental Housing Tribunals have acted as a source of equitable rules for the landlord and tenant relationship, and as an informal dispute resolution space within which landlords and tenants meet on more or less equal terms. One of the most important contributions to the law of landlord and tenant to emanate from the Rental Housing Tribunals is the decision of the Gauteng Rental Housing Tribunal to outlaw the practice of landlords levying service charges on a tenants’ consumption of electricity and water in residential buildings. 90

(c) Debtors
Moneylenders have long been able to rely on courts to recover debts, and interest owing on them, promptly, and to take the property of debtors who cannot afford to pay. Most money lending agreements contain some sort of acceleration clause, which entitles the moneylender, when the debtor defaults, even if only on a single repayment, to recover the entire amount lent, plus interest, or the equivalent value in the debtor’s property. The South African common law has long favoured the rights of moneylenders, and the courts have ruthlessly enforced the strict terms of

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87 Maphango (Mgidlana) and Others v Aengus Lifestyle Properties (Pty) Ltd [2011] ZASCA 100; [2011] 3 All SA 535 (SCA).
88 Ibid para 34.
89 Maphango (note 16 above) para 51.
90 Young Ming Shan CC v Chagan NO and Others [2015] ZAGPJHC 25; 2015 (3) SA 227 (GJ) [SERI acted for the second respondent].
credit agreements, with few exceptions. Execution of a debt against a person’s property was long seen as a purely administrative exercise, in which the money-lender had to show little more than the debtor’s default and the right to accelerate.

However, post-Apartheid legal reform has intervened extensively in the relationship between debtor and creditor. The general effect of these interventions has been to make the debt recovery process more disputatious, and to provide debtors with a wider range of options to stave off acceleration of their debts, and execution against their property. The two main sources of these interventions are the National Credit Act 34 of 2005 (National Credit Act), and a line of cases in which the courts have imported a constitutional principle of proportionality into the enquiry to be conducted before authorising a creditor to execute an unpaid debt against a debtor’s home.

Some of the most extensive interferences with creditors’ rights to call up a debt are set out in s 129 of the National Credit Act. Section 129 specifies a range of procedures that a moneylender must follow in order to enforce repayment of a debt, or execution against property on which a debt is secured, through the courts. Section 129(1) of the National Credit Act requires a moneylender to draw a debtor’s attention to a range of options, such as debt counselling, restructuring, or alternative dispute resolution, to which a debtor may divert a moneylender seeking execution against his property, or a judgment on the debt. Section 129(3) of the Act provides a debtor with an even more drastic remedy: the right to reinstate a credit agreement simply by repaying all outstanding arrears, together with the costs the moneylender incurred trying to collect the debt up to the point the arrears were repaid. At common law, only the repayment of the entire debt plus interest could stay enforcement proceedings. But s 129(3) of the National Credit Act allows the debtor to reinstate the money lending agreement merely by bringing his repayments up-to-date.

Arguably, greater interferences in a moneylender’s rights spring from the principle of constitutional proportionality, first developed and applied by the Constitutional Court in *Jaftha v Schoeman*. In that case, the Constitutional Court decided that the execution of a debt against a person’s home constitutes an infringement of the right of access to adequate housing in s 26(1) of the Constitu-

91 See the Usury Act 73 of 1968.
92 *Ledlie v ERF 2235 Somerset West (Pty) Ltd* 1992 (4) SA 600 (C).
93 In the Act’s terminology a ‘credit provider’.
94 The Act defines debtors as ‘consumers’ of credit. The steps required to draw the attention of a ‘reasonable’ consumer to these options are set out in *Sebola* (note 18 above) and *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) [SERI was admitted as amicus curiae].
95 *Nkata v Firstrand Bank Limited and Others* [2016] ZACC 12; 2016 (4) SA 257 (CC) [SERI was admitted as amicus curiae].
96 *Jaftha* (note 18 above).
tion. Although the Constitution might permit an infringement in terms of its limitations clause, the infringement always has to be justified. An infringement of the right of access to adequate housing to recover a debt secured against a home is only justified when it is ‘proportional’. In other words, the moneylender taking and selling a debtor’s house to recover the debt must be a proportionate response to the debtor’s default. This principle is generally parsed to mean that alternatives to execution, if they exist, must be explored before the sale of a debtor’s home is authorised, and that execution will not be permitted for ‘trifling’ or relatively small arrears.

Taken together, s 129 of the National Credit Act and the constitutional principle of proportionality open up important spaces in which debtors can challenge unfair lending practices and even blunt a moneylender’s rights to execute against their homes where—a debtor’s failure to repay notwithstanding—it would be disproportionate to do so. Section 129 and the proportionality principle differ from other ways of monitoring corporate compliance with the law because, unlike ‘watchdog’ agencies or media shaming, they link a moneylender’s right to recover or execute on a debt in every case to the debtor’s option to seek alternative dispute resolution, to make good on his arrears, and/or to the overall fairness of executing against a person’s home.

5.6 CONCLUSION

Law does not, in itself, produce or constitute social change. Its role is more complex than that. It shapes the spaces in which ordinary people act. It does so not only by regulating the circumstances under which one person may coerce another, but also by shaping what differently situated social actors consider to be the courses of action open to them, and being one constituent, through its ideological power, of the normative limits of social action.

Changes in the law adjust the boundaries of human agency. They therefore, albeit indirectly, lead to social change, whether or not anyone immediately changes his or her behaviour. It is enough that spaces of possible action are opened up or closed down. Over time, new spaces will be occupied and acted in, and old spaces will be abandoned, either as a result of coercion, or voluntarily, as individuals and groups adjust their behaviour in light of what the law says about the boundaries of socially acceptable action.

Property law is one of the most important sources from which spaces of social action are constructed and reshaped. It sets the terms on which people may access and exploit material goods. Through reforms to property law, South Africa has

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97 Section 36 of the Constitution.
98 Jaftha (note 18 above) para 57. See also Gundwana v Steko Development and Others 2011 (3) SA 608 (CC) [SERI acted for the applicant; the LRC acted for the amicus curiae, National Consumer Forum].
embarked on a fundamental re-imagining of those terms. Unlawful occupiers of land have gained temporary, limited and circumscribed rights to remain where they have no common law entitlement to be. Tenants can insist that their landlords act fairly, even where their leases specify otherwise; and can hold out against a landlord who wants to repossess his property by arguing that the landlord has acted unfairly. Debtors who have failed to repay their debts can stave off debt recovery, restructure their obligations, and even prevent some forms of execution altogether, even though they have borrowed money that they have not given back.

These important amendments to South African property law are reshaping social and economic relationships across a wide range of geographical and social contexts. They are driving social change. But the change that is being wrought is subtle, complex, contingent and takes time to reveal itself. It is also taking place against the background of deeply entrenched social and political norms that are fundamentally hostile to it. Changes in legal rules do not automatically lead to revision of the moral and political value systems in which the law is embedded. Still less do they have any immediate impact on the structures of economic power to which they are addressed, or may inadvertently alter over time. It is only when legal rules are acted upon by the state, or, more importantly, by ordinary men and women who make millions of decisions everyday about the way in which they relate, for example, to banks, landlords, or landowners, that the content of a legal rule passes into the social world.

The mechanism through which this occurs is the way in which changes in legal rules influence individual and group behaviour. But this influence is seldom straightforward. For example, an unlawful occupier may simply be unaware that he cannot lawfully be evicted if his eviction would lead to homelessness. If he does know this, he may or may not act on that knowledge by resisting his eviction. Many unlawful occupiers do not act on that information because they lack the legal resources necessary to contest a court application; because they are afraid of violent reprisal by the landowner or the state; because they are isolated, and unable to draw on the solidarity of a broader community in resisting eviction; or because they genuinely believe that the landowner ought to be able to remove them from his property, even if that means they will be left homeless, and the law affords them the right to remain in occupation, at least until alternative accommodation becomes available to them. Other unlawful occupiers may use the knowledge of the content of legal rules, not to resist eviction, but enhance their bargaining position in a negotiation for more time, or for some other benefit, such as money, to be given to them before they vacate.

Conversely, the principle that evictions should not lead to homelessness may drive, and has often driven, widespread community-based legal resistance to eviction. If every community under threat of homelessness by eviction responded in this way, there can be little doubt that property relations in South Africa would be transformed overnight. Not every community responds to a threat of eviction in this way. However, to detect and begin to describe a relationship between law and
social change, it is enough that some communities do respond in this way, and that the law creates, expands or helps protect the space in which this is possible. All of this is to underscore the common sense, but often overlooked, notion that the intent of a law does not translate neatly into practice, and why a theory for the relationship between law and social change cannot hope to draw a straight line between the intent, or even the plain language, of a legal rule and its social impact. Laws shape the conditions under which people act, but they do not determine that action. That is why it is best, as this chapter argues, to theorise the relationship between law and social change as the creation or destruction of spaces in which ordinary men and women can act for themselves. Property rights litigation in South Africa is doing just that.