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Public property in South Africa: A human rights perspective

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Summary: *This article reviews public property and the distinct role of the state as public land owner within a rich human rights framework. To critically rethink the significance and purpose of this understudied legal subject, foundational observations are shared in the article. From a conceptual perspective, a distinction is drawn between common property that is openly accessible to all, and public property that is exclusively managed by the state for specific governmental purposes. Characteristically, the article suggests that these are two vastly divergent types of property that serve distinct aims; they are also subject to separate regulatory frameworks. The notion and communal significance of common property is unpacked with reference to the use of such property in the city of Cape Town to engage with some theoretical concerns dealing with the gradual degeneration of the public sphere. In the context of public property that is exclusively used and managed by the South African government, the article submits that the accustomed private property discourse is ill-suited to uncover and explore the nature, character, as well as the rights and interests of the state as public land owner. Instead, public land ownership should be approached and repurposed in line with constitutional commitments expressed in relation to property.*

Key words: *public property; public land ownership; common property; housing; land reform; human rights; resilient property theory*

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1 Introduction

Property law is customarily narrated as the rules and principles that regulate the relationship between private persons in relation to things, where the state is depicted as an outsider, or intruder, to this distinctly private law institution. The position of the state consequently is limited to that of regulating private relationships as they relate to property for mostly public purposes. The aim of this article is to reposition the state in the property law discourse, away from its hierarchical position as interferer or regulator, to that of being a distinct legal subject with profuse power to give effect to fundamental human rights objectives. I focus on the state as public land owner to argue that more emphasis should be placed on its role to provide access to property and, specifically land, for destitute groups.

To realign the position of the state as public land owner within a complex human rights framework, I first tease out the different taxonomies of public property to conceptualise and unpack two vastly divergent types of public property, namely, common property and public property that is exclusively held and managed by the state. The former, also referred to as 'inherently public property',[1] is explained as state property that is openly accessible to all and subject to overpowering societal claims regarding the needs-based use thereof. The regulatory control of common property in the city of Cape Town is used to critically reflect on the norms-based, societal use of such property against the backdrop of pressing housing claims. The city faces excessive rough sleeping resulting from the inaccessibility of property where the vulnerable can perform essential private acts. In this context, I reflect on theoretical pitfalls associated with the gradual degeneration of common property to suggest that a dynamic interplay exists between this type of public property and the second category of exclusively-held and managed public property.

The remainder of the article explores the nature and character of public land ownership where the state administers property in close resemblance to that of private ownership. Despite these analogies, I argue that the regulatory framework governing public property/land is patently different from the rules, principles and regulatory measures pertaining to private property. Additionally, the structure of private law rights and entitlements arguably is inapt to reflect on

1 C Rose 'The comedy of the commons: Custom, commerce, and inherently public property' (1986) 53 *University of Chicago Law Review* 720.

the relationship between the rights/interests of the state and human rights, in relation to public land. Instead, I argue that any analysis relating to public land, state actions and the fulfilment of human rights must evidently start with the Constitution of the Republic of South Africa, 1996 and, specifically, the property and housing clauses: State land must serve societal needs and the most important of those needs, by law, is to create access to property for landless/homeless persons. A more resourceful, pressing governmental approach arguably is required to actively repurpose underutilised public properties and ensure that extant land holdings, mostly settlements, as well as land reform and housing programmes are structured to adhere to these constitutional aims.

2 Concept of public property

2.1 A global perspective

From the outset, the law of property is a distinctly private law subject.[2] Property is customarily defined as the law of things and further narrated as exclusionary, individualised, and alienable; it expresses a series of abstract relations among private persons and things.[3] The concept of property remains grounded in the idea that the individual is entitled to deal with their property in an autonomous manner, within the boundaries of the law.[4] The role of the state is limited to that of regulating property for various societal and state-ordained objectives.[5] It is generally accepted that property is a wealth-enhancing commodity, prompting property theorists to argue that sources should ideally be privately held.[6] Strong arguments have also been voiced to suggest that things should not be left to the public realm as they would likely end up wasted.[7] From this perspective,

2 G Muller and others *Silberberg and Schoeman's the law of property* (2019) 6 mention that property law has always been the 'pith and essence' of private law. Property law is also customarily taught as a distinctly private law subject.

3 H Smith 'Property as the law of things' (2011) 125 *Harvard Law Review* 1691; W Hohfield 'Some fundamental legal conceptions as applied in legal reasoning' (1913) 23 *Yale Law Journal* 16. See also AJ van der Walt 'The modest systemic status of property rights' (2014) 1 *Journal of Law, Property and Society* 15.

4 See specifically JW Singer 'Property as the law of democracy' (2014) 63 *Duke Law Journal* 1287. It is widely accepted that property is subject to regulatory control. See also E van der Sijde *Property regulation: An integrated approach under the Constitution* (2022).

5 See sec 25 of the Constitution of the Republic of South Africa, 1996. See also L Fox O'Mahony & ML Roark *Squatting and the state: Resilient property in an age of crisis* (2022) for the account of the state and how property relates to state-backed interests.

6 See, eg, R Posner *Economic analysis of law* (1977) 28.

7 The 'tragedy of the commons' was pinned by G Hardin 'The tragedy of the commons' (1968) 162 *Science* 1243.

public property is recounted as contradictory to what property resembles: public property is the 'antithesis' of property.[8]

The law of property as it is currently developing, therefore, is not only ill-equipped to reflect on the nature and character of public property, but also remarkably silent where public things are concerned. According to Page, '[p]ublic real property is an undeveloped, underthought subject, a doctrinal and theoretical paradox disproportionate to the sheer acreage of public lands'.[9] He further argues that the dissonance between law and public things, as well as the context within which public things are used, burdened, alienated and abandoned, are dilemmas that the law of property – a subject that has developed to regulate mainly private things – is ill-suited to resolve.[10] Public property is an outlier for modern property scholars and peculiarly undertheorised, especially in countries where vast tracts of land are public property. Nevertheless, the notion of 'public property' is commonly used in the law of the Western world,[11] as it was in ancient Rome.[12] The most profound literature on public property divisions is briefly outlined, before I turn to the South African taxonomy to further engage with the nature and character of public land ownership.

Rose identifies two types of public property: one owned and actively managed by a governmental body, and the other collectively 'owned' and 'managed' by society at large. In the case of the latter, also termed 'inherently public property', societal claims are independent and superior to those of the state.[13] This does not mean that the public owner is 'disorganised'; norms of usage and settled practices often ensure peaceful, yet regulated ordering of such public resources, such as beaches or foreshores.[14] 'Inherently public property' is explained as follows:[15]

8 Rose (n 1) 712.
9 J Page 'Public property' in N Graham and others (eds) *The Routledge handbook of property, law and society* (2022) 362. See also J Page *Public property, law and society* (2020).
10 Page 'Public property' in Graham and others (n 9) 362.
11 Rose (n 1) 713.
12 In Roman law, *res communes* referred to communal natural resources, including the air and sea, which was accessible for use by citizens and non-citizens; *res publicae* were reserved for citizen use only and were premised on rights of public use/purpose. It included rights of trade and rights to fish. *Res universitatis* were the corporate, income-producing property of public bodies, such as theatres and race courses: C Rose 'Romans, roads and romantic creators: Traditions of public property in the information age' (2003) 66 *Law and Contemporary Problems* 89.
13 Rose (n 1).
14 Page 'Public property' in Graham and others (n 9) 367.
15 Rose (n 1) 720.

> There lies outside purely private property and government-controlled 'public property' a distinct class of 'inherently public property' which is fully controlled by neither government nor private agents … this category of 'inherently public property' has provided each member of some 'public' with a bundle of rights, neither entirely alienable by state or other collective action, nor necessarily 'managed' in any explicitly organised manner.

Waldron makes a similar distinction where he unpacks the private/public property divide in the context of homelessness. He makes the apparent, yet overlooked, point that all humans are embodied beings, which means that all human-related performances must be done somewhere.[16] Of course, private persons cannot select any location to perform activities, or simply seize whichever space they prefer. Apart from physical inaccessibility, a significant percentage of the earth's surface is off bounds. A core function of property rules is to set these boundaries, either for the benefit of one or a selected group of people (private property) or for the use of the state.[17] Waldron classifies rules of state property as a sub-category of the rules of collective property.[18] The other sub-category of collective property is common property, which he defines as a place that is openly accessible to all.[19] Examples of common property include streets, sidewalks, parks and bus stops. Even though these spaces are held and intended for a rather indeterminate range of uses, they are not unregulated.[20]

The public property categorisations by Rose and Waldron are similar to the extent that they make a distinction between what is essentially state property – public property not only owned but also actively managed by a governmental body that is properly authorised to exercise such control for a public purpose – and all other forms of public property that is commonly, or collectively, used by society at large. In relation to the former, the authors seemingly recognise the broad powers of the state to manage its property as it sees fit, closely resembling the rights and entitlements associated with private ownership. Likewise, state ownership is also regulated: All property is subject to regulatory control, yet the logic for doing

16 J Waldron 'Homelessness and the issue of freedom' (1991) 39 *UCLA Law Review* 296.

17 In the case of the latter, the property usually serves a specific state function and citizens are denied access. It follows that 'if a person is in a place where he is not allowed to be, not only may he be physically removed, but there is a social rule to the effect that his removal may be facilitated and aided by the forces of the state'. Waldron (n 16) 297.

18 The use of collective property is determined by the state that acts in the community's interests.

19 Waldron (n 16) 297-298.

20 Waldron (n 16) 298.

so differs. Extensive scholarly analyses have been dedicated to the regulatory nature of private property,[21] whereas the regulation of state property remains largely unexplored. In relation to the latter category of common property, limited academic engagement has been undertaken, especially from a property perspective in the context of a complex human rights framework.[22]

More recently, and specifically in the context of land, Page adopts the term 'public real property' to refer to interests in land that the public may use/enjoy; this includes 'publicly held interests in land where the public's use or enjoyment of those interests is subsidiary to an overriding public purpose'.[23] Public real property ostensibly is vested in the state,[24] yet this does not mean that the question of public ownership is uncontested. Page argues that the boundaries that divide the public and the private are porous and less binary in the context of public land ownership than when dealing with private ownership. He suggests three answers, or divisions, to the public proprietary conundrum: 'the state as absolute owner, the public trust, and the "unorganised public at large"'.[25] The unorganised public at large is based on and similar to what Rose defines as 'inherently public property'. According to Page, the state as sole legal and beneficial owner is an uncomplicated and workable depiction as the state's relation to property replicates that of private ownership – the state holds the key bundle of sticks,[26] including control over access. The disadvantage of the 'government as owner' mentality, however, is that it weakens a shared sense of propriety about public assets, and it often simply is inaccurate due to the overpowering public purpose served by some public property.[27] Some state properties do not have a shared propriety component and are legislatively protected and off bounds, for sound reasons.[28] The second classification of public trust is doctrinally evolving; in the United States it initially applied to land beneath navigable waters (or washed by tides) and later expanded

21 See, eg, Singer (n 4) 1287; AJ van der Walt *Constitutional property law* (2011) 102; G Muller & S Viljoen *Property in housing* (2021) 34; BD Barros 'Property and freedom' (2009) 4 *New York University Journal of Law and Liberty* 50-51; AR Amar 'Forty acres and a mule: A Republican theory of minimal entitlements' (1990) 13 *Harvard Journal of Law and Public Policy* 37.

22 Recently published, see S Viljoen 'Regulating public property: The account of the homeless' (2024) *Social and Legal Studies* 1.

23 Page 'Public property' in Graham and others (n 9) 363.

24 As above.

25 Page 'Public property' in Graham and others (n 9) 366, quoting Rose (n 1). Page argues that '[e]ach is a gradation on yet another continuum – one that starts with a clear legal owner, then sits astride a split legal/beneficial ownership in the middle, and ends with a vague beneficial-only ownership at the other spectral extreme'.

26 Page 'Public property' in Graham and others (n 9) 366.

27 As above.

28 Eg, property used for military purposes, state residencies or conservation protected areas.

to land onshore.[29] The arrangement offered by Page aligns with what is suggested by Waldron and Rose, except for the distinctive public trust class. I briefly reflect on the most recent classification of things in South African property law, before turning to the untheorised position of the state as public owner.

2.2 The South African portrayal

In its latest edition, *Silberberg and Schoeman's the law of property*, one of South Africa's most authoritative property law sources, things are classified with reference to Grotius[30] and, specifically, property's relation to persons.[31] In Roman law, public property consisted of four categories, which were distinctly different from things that could be privately held. Things are classified as either out of commerce – things that cannot be privately owned – or in commerce (things capable of private ownership).[32] The authors remark that this classification largely is 'a matter of principle' and 'a matter of convenience'; instead the function of a thing is determinative of its classification.[33] Yet, the remainder of the discussion on the classification of things is founded on the classic taxonomy as pinned by Grotius:[34] Things outside of commerce are characterised as common things (those things that by natural law are common to everyone, such as the air and sea);[35] public things; things belonging to corporate bodies (theatres, race courses and 'all common property of a city');[36] and religious things (things dedicated to the gods, such as temples and graves).[37]

For contemporary scholarly analyses, reliance on this traditional arrangement raises conceptual challenges as some categories have transformed (for example, religious things, such as churches, currently are considered private property and subject to alienation),[38] whereas

29 Page 'Public property' in Graham and others (n 9) 367, referring to C Rose 'Joseph Sax and the idea of the public trust' (1998) 25 *Ecology Law Quarterly* 351. In South Africa, property held in trust is regulated by distinct laws, such as the National Water Act 36 of 1998. Each of these laws regulates the use of the property for specific purposes.
30 2.1.4.
31 Things may also be classified according to their nature, yet this categorisation is irrelevant for purposes of this article as it relates to things being corporeal or incorporeal, movable or immovable, etc. Muller and others (n 2) 30.
32 The former is further divided into common things (*res communes*); public things (*res publicae*); things belonging to a corporate body (*res universitatis*); and religious things (*res divini iuris*). Muller and others (n 2) 30.
33 Muller and others (n 2) 30-31.
34 Muller and others (n 2) 30-52.
35 Muller and others (n 2) 31-32.
36 Muller and others (n 2) 35.
37 Muller and others (n 2) 36.
38 See, eg, https://www.remax.co.za/property/for-sale/south-africa/gauteng/johannesburg/la-rochelle/-commercial-property-for-sale-in-la-rochelle-4305782/ (accessed 12 March 2024) as well as https://www.remax.co.za/property/

others nowadays overlap (for instance, 'all common property of a city' is likely to fall under the realm of 'public things').[39] Of particular interest to this article is the conceptualisation of public things:[40]

> Public things (*res publicae*) are things which belong (though not in private ownership) to an entire civil community and are often also referred to as state property … a distinction should however be made between things intended for public use, that is to say, things which directly benefit the members of the community concerned, for example public roads, and things belonging to the state which only indirectly benefit the individual members of the community, such as buildings used merely for administrative purposes. Only the former … things intended for public use, can be classified as public and, therefore, out of commerce. Things not intended for public use are in commerce, falling within the sphere of private law.

According to this definition, public things are generally classified as state property, with a distinction drawn between public things that are directly used by the public and public things that indirectly benefit members of the community. Property that directly benefits the public, such as a public road or sidewalk, is truly public and out of commerce, whereas the remainder, for example, an administrative building, is in commerce, open to trade in terms of private law principles and, therefore, not public. It seems contradictory to claim from the outright that public things are state property, and later qualify that those things that are actively used and managed by the state are not public. If an administrative building is not public, because it is not directly used by the public, can it be classified as private property, based on the (false) assumption that it can be dealt with in terms of private law rules and principles? Perhaps more confusing is the example of a residential block of flats that is leased by the state as public landlord to low-income occupiers. Some members of the public draw substantial benefit from the exclusive use of the property, while the remainder of the community is prohibited from using it (let alone having any use of it); the state is actively involved in the management of its property, it can deal with it within the bounds of the law. The regulatory framework arguably is distinctly different from the common law rules and principles, in addition to the landlord-tenant laws that regulate private tenancies.[41] Theoretically,

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for-sale/south-africa/north-west/rustenburg/rustenburg-central/-commercial-property-for-sale-in-rustenburg-central-4250965/ (accessed 12 March 2024) where church property is listed as commercial property and offered for sale.

39 This is particularly true when working with the above-mentioned taxonomies offered by Radin, Waldron and Page.

40 Muller and others (n 2) 32-33.

41 Social tenancies are regulated by the Social Housing Act 16 of 2008, whereas private tenancies are regulated under the Rental Housing Act 50 of 1999. For more detail on these vastly different sectors, as well as the nature of public tenancies, see S Viljoen *The law of landlord and tenant* (2016) 67-75.

the governmental approach to public property, for what it should be used and the objectives that it should serve, also is fundamentally different from what private owners usually set out to achieve.

Muller and others further state that public roads, national parks and the sea are things intended for public use. With reference to the National Water Act 36 of 1998, they mention that 'public trusteeship of the nation's water resources is vested in the state'[42] and, according to the National Environmental Management: Integrated Coastal Management Act 24 of 2008, coastal property, including the sea, is 'owned by citizens of the Republic of South Africa and are held in trust by the state as public things'.[43] To streamline these taxonomies, Muller and others finally submit that the classification of things as they relate to persons should be rationalised by simply distinguishing between public and private things: 'Public things should be seen as things belonging to the state, municipalities or state organ but directly benefit members of the public, such as the sea … Whether private or public things indirectly benefit members of the public is determined by the appropriate legal rules.'[44]

Overall, the arrangement as suggested by *Silberberg and Schoeman's the law of property* is structured according to the use or benefit obtainable by property: If it benefits the public, it is public, provided that it 'belongs' to the state, a municipality or state organ. Contrarily, property that does not directly benefit the public is not public, although it is state property and, therefore, also not entirely private. A more workable categorisation arguably is offered by Rose, Waldron and Page, noting minor divergences amongst their work. As a point of departure, it should be emphasised that public property vests in the state.[45] The state, mostly the government of the day, is the sole owner of the property, although some or an unlimited number of community members may directly or indirectly use and enjoy the property. The distinction between public property that is actively and, often exclusively, used by the state for specific governmental purposes and public property that is open to the public for mostly unlimited, shared usages offers a valuable stepping stone to further explore doctrinal and theoretical approaches to these inherently opposing types of public property. Property held in trust arguably is also public property, although it does not fit under either of these two categories. In South African law, public trusteeship arguably

42 Muller and others (n 2) 33.
43 Muller and others (n 2) 34.
44 Muller and others (n 2) 51.
45 Page 'Public property' in Graham and others (n 9) 363.

should be understood within its distinct regulatory frameworks as each law is geared to achieve different outcomes.[46]

3 Common property

Before I turn to public property that is exclusively held, used and administered by the state, this category is juxtaposed with public property that is openly accessible to all, also referred to as common or inherently public property; here termed 'common property'. Even though common property is state property, societal claims in relation to the use, and even appropriation, of such property are instrumental when theorising the nature thereof. The state as public owner is neither absent nor impartial as it has a distinct stake in the peaceful, norms-based use of common property, which is why it is usually regulated.[47] This does not mean that the regulatory framework is normatively neutral, uncontested, let alone homogeneous.

For example, in the city of Cape Town, the Streets, Public Places and the Prevention of Noise Nuisance By-Law, 2007[48] regulates the use of common property, as well as individuals' behaviour in the public domain.[49] A 'public place'[50] includes a public road;[51] parks and squares; beaches; vacant municipal land; and all public land. In terms of this law, no person may in a public place use abusive language, fight, urinate or defecate, bath or wash themselves, perform any sexual act, appear nude, consume any liquor or drugs, be drunk or under the influence of drugs, start or keep a fire, or sleep overnight or erect any shelter.[52] Any person who contravenes the by-law shall be guilty of an offence.[53] The by-law forms part of distinct policy

46 Compare sec 2 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 with secs 2 and 3 of the National Water Act 36 of 1998.
47 Page 'Public property' in Graham and others (n 9) 367.
48 Western Cape Provincial Gazette 6469 28 September 2007.
49 Preamble.
50 See sec 1 of the by-law for the definitions.
51 A 'public road' includes any road, street or thoroughfare as well as the verge of any such road. Any bridge, ferry or drift traversed by such road is also included.
52 Sec 2(3). Some of these acts are permitted when specifically authorised.
53 Sec 23(1). Noting some exceptions, the perpetrator will be liable to a fine or imprisonment for a period not exceeding six months, or to both a fine and such imprisonment. Most of the offences as regulated in the Public Places By-law may be described as 'petty offences'. In terms of the Principles of the Decriminalisation of Petty Offences in Africa (2017) 10, to which South Africa is a state party, the criminalisation of petty offences contributes to 'discrimination and marginalisation by criminalising poverty, homelessness and unemployment, and impact the poorest and most marginalised persons in our communities'. See also T Walsh 'Poverty, police and the offence of public nuisance' (2008) 20 *Bond Law Review* 198.

framework that supports social order,[54] yet the socio-economic reality of the city – specifically the profile of its homeless population – is in direct conflict with this vision and the utilisation of common property. The extent of homelessness in the city (also known as the Mother City) has turned into a rough sleeping disaster where thousands occupy common property.[55] The by-law, as part of the regulatory scheme, is rendered partly obsolete[56] as its enforcement conflicts with the human rights framework as underpinned by the Constitution.[57] More unsettling is the normative framework that has at least partly been established in relation to rough sleepers.

Even though the state can and should control behaviour in public spaces for various objectives, such as public safety, 'to provide a fair basis on which all citizens could make use of the public spaces of their city'[58] or ensure recreational activities, the state cannot enforce a detached, run-of-the-mill approach to the regulation of common property when rough sleeping is excessive, and the state fails to provide the requisite land/dwellings as dictated by the Constitution. Waldron correctly argues that 'the less the society provides in the way of public assistance, the more unfair is its enforcement of norms for

54 Viljoen (n 22) 9, referring to AM Gossar 'City of Cape Town's "broken windows" policy demands more than a criminal justice response' *Daily Maverick* 7 December 2021.

55 In 2020 it was estimated that 14 357 people live on the streets of Cape Town: J Hopkins, J Reaper & S Vos 'The cost of homelessness in Cape Town – Summary report' (2020) 7, https://homeless.org.za/wp-content/uploads/2021/02/THE-COST-OF-HOMELESSNESS-CAPE-TOWN-_Full-Report_Web.pdf (accessed 13 December 2022). In comparison, 2 000 rough sleepers are estimated in Darwin, Australia; 2 648 in New York City; 12 977 in Los Angeles City; and 446 in London: C Parsall & R Phillips 'Indigenous rough sleeping in Darwin, Australia: "Out of place" in an urban setting' (2014) 51 *Urban Studies* 191. Cape Town, therefore, has a very high percentage of rough sleepers.

56 Most magistrates are reluctant to issue warrants and 'where warrants of arrest are issued and executed, street people appearing before a court seldom face any consequences'. The Inkathalo Conversations 166, https://www.groundup.org.za/media/uploads/documents/Inkathalo-2021-compressed.pdf (accessed 13 December 2022).

57 In South Africa, two fundamental rights underscore the regulation of property when the housing interests of marginalised persons are involved. The property clause mandates the state to progressively foster spaces where landless persons, and specifically previously-dispossessed persons, may reside (sec 25(5) of the Constitution), whereas the housing clause confirms everyone's right of access to adequate housing (sec 26(1) of the Constitution). These rights are directed at persons who are destitute, homeless, and desperately in need of a space to live. It is generally accepted that property (land or a dwelling) should be distributed to landless/homeless persons or realigned entitlement-wise, to shore up resilience: S Viljoen 'Resistance to reform property: A "resilient property" perspective' (2022) 38 *South African Journal on Human Rights* 24. Even though the realisation of these rights is challenging, they are embedded in a network of rights and values that aspire to create a more egalitarian society, one in which human dignity and equality serve as the cornerstone of the constitutional order. The Constitution sets a distinct culture for all communities that is founded on human rights. Adherence to this culture and the maturity thereof, however, is dependent upon actions of the state and the way in which it regulates property.

58 J Waldron 'Homelessness and community' (2000) 50 *University of Toronto Law Review* 373.

public places that depend on complementarity that simply doesn't apply to a considerable number of citizens'.[59] The use of common property in the city of Cape Town serves as a typical example of where the norms-based, societal use of such property outweighs the state-ordained objectives of the law. It shows that the use of common property can shift at a radical pace when societal claims and needs in relation to property, in general, are not prioritised and addressed by the state.

This is regrettable for various reasons, including the sheer disregard of the rule of law, as well as the gradual degeneration of common property. The presence of thousands of rough sleepers in public spaces forces all other residents to share in their company as the homeless perform private acts in areas that should preferably be used for exercising civic rights and social pursuits. In effect, the state not only sanctions an undignified way of living – for individuals to conduct private acts in public as private alternatives are unavailable – bit also sets the groundwork for

> an impoverishment of the public dimension of culture and civil society, as those who have a choice flee the downtown streets and parks and take refuge in cyberspace, suburban malls, or gated communities, leaving public places to the mercy of those who have no option about remaining there. But it is important to see that this is not the sort of dilemma that we can solve by simply adjusting the regulations.[60]

Traditional policies, or even some adjustment thereof, will grapple to address socio-economic challenges, such as rough sleeping, if the regulatory framework is at variance with what is normatively accepted – social norms include informal customs and practices, to which state law often takes second place,[61] and property remains inaccessible for welfare-orientated, human rights objectives. More generally, Page argues that public things represent public wealth. Public things serve authoritative, symbolic and fundamental ends.[62] In the context of public wealth, Page engages with three overlapping public ideals: 'the democratic nature of a public thing; the public estate's (uneven) capacity for spatial justice; and its fostering of human flourishing,

59 Waldron (n 58) 399. At 301 he explains complementarity as follows: 'Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land.' See also C Capozzi 'Hiding the homeless' (2022) 5 *University of Central Florida Department of Legal Studies Law Journal* 109.

60 Waldron (n 58) 399, referring to RC Ellickson 'Controlling chronic misconduct in city spaces: Of panhandlers, skid rows, and public-space zoning' (1996) 105 *Yale Law Journal* 1172.

61 Waldron (n 58) 400.

62 Page 'Public property' in Graham and others (n 9) 369.

happiness, and the well-lived life'.[63] It is generally accepted that the public terrain – I would argue, specifically common property – is the place for democratic deliberation and engagement; it is the focal, physical anchor where democratic citizenship takes shape. It follows that the fall of democracy arguably lies in the neglect of common property, which represents communal life.[64]

Related to this ideal of property for democracy is spatial justice in the sense that property should not only be distributed more equally for private gain, but also for the public. Sufficient public land – common property – arguably is required to counterbalance private property holdings for the sake of spatial equality and inclusivity.[65] Finally, with reference to the social aspect of property, Page relies on the notion of human flourishing, as developed by Alexander and Peñalver, to argue that the public realm is integral to the well-lived life.[66] Access to public places (common property) and the ability to perform activities in public is constituent of living a fulfilled, civic life. Public property values also reflect communitarian commitments, such as 'environmental stewardship, civic responsibility, and aggregate wealth'.[67]

These claims mostly relate to common property, rather than public property that is exclusively held and used by a governmental body. As suggested in *Silberberg and Schoeman's the law of property*, the publicness of common property truly sets it apart from the latter category of public property. The public at large must have unconstrained access to use the property within the bounds of the law. If this is unfeasible due to private acquisition, which effectively is what ensues when public parks, sidewalks or bus stops are occupied by the homeless, detrimental civic consequences will follow.[68]

63 As above.

64 Page 'Public property' in Graham and others (n 9) 370, referring to D Brooks 'The heart and soul of the Biden project: It's daring revival of the "American system"' *The New York Times* (New York) 8 April 2021.

65 Page 'Public property' in Graham and others (n 9) 370, referring to J Boughton *Municipal dreams: The rise and fall of council housing* (2019).

66 J Page *Public property, law and society: Owning, belonging, connecting in the public realm* (2021) 69, referring to G Alexander & E Penalver *An introduction to property theory* (2012) 87.

67 Page (n 66) 69. 'Public wealth is the dividend of a robust, vibrant public estate, one that, it is hoped, adds to the democratic fabric, militates against spatial injustice, and maybe even makes us happy.' Page 'Public property' in Graham and others (n 9) 371.

68 M Keuschnigg & T Wolbring 'Disorder, social capital, and norm violation: Three field experiments on the broken windows thesis' (2015) 27 *Rationality and Society* 100-101 argue that non-compliance with antisocial behaviour laws creates the impression that there is social disorder. The outright manifestation of disorder – the observation of illegal activities, without any consequence – suggests that rules may be violated. Such governmental sanctioning is in conflict with the basic premise of the rule of law, namely, that rules will be applied without preference, not only by courts but the local authority; the rule of law

Arguably, to prevent the misdirected use of common property, public property that is exclusively used (or not used at all), managed and controlled by the state, should be earmarked, or repurposed to fulfil the requisite needs. Stated differently, the inadvertent use of common property signals the mismanagement of the latter category of public property, which of course is also subject to regulation, albeit of a completely different kind.

4 Public property, exclusively managed by the state

4.1 Original narratives

In South Africa remarkably little has been written on the nature and extent of the rights, or entitlements, that rest with the state as public owner. In 1964, Wiechers originally contended that the state has a 'public law right' regarding property that fall under its territory.[69] He argued that the state's capacities on account of this right are largely similar to those of private persons: 'The legal rules with regard to public property form, as a rule, no exception to those of private law.'[70] The rules governing public property, however, are different from those relating to private property when the state enters into legal relationships with private persons in respect of state property since administrative law relationships are consequently created and the rules of administrative law would apply. At the time, it did not appear to be incorrect to say that in this respect – in the administrative law context – the state would defend its rights, and act in its best interests, in the 'subjective' sense, which can only be understood and conceptualised within the public law realm.[71] Wiechers fiercely criticised the contention that the state can only exercise its rights in the common interest, meaning that it cannot have rights in the 'subjective' sense.[72]

demands fair and democratic exercise of public power, grounded in fundamental rights: R Kruger 'The South African Constitutional Court and the rule of law: The *Masethla* jugdment, a cause for concern?' (2010) 13 *Potchefstroom Electronic Law Journal* 469. The duty to uphold human dignity and to progressively ensure that all persons have access to adequate housing are aspects of the rule of law (*Chief Lesapo v North West Agricultural Bank* 1999 12 BCLR 1420 (CC)). Property rules – such as by-laws that regulate the use of public spaces – set behavioural boundaries. If they are not enforced or, even worse, unequally enforced, uncertainty, social disorder, community resentment and compassion fatigue are likely to ensue.

69 M Wiechers 'Die sistematiek van die administratiefreg' LLD thesis, University of Pretoria, 1964 162-163.

70 P van Niekerk 'The "stronger position" argument and public-law rights of the state: A methodological problem?' (1992) 7 *Southern African Public Law* 269.

71 As above.

72 M Wiechers *Administratiefreg* (1973) 79; M Wiechers *Administratiefreg* (1984) 86.

The relationship between 'public law rights', including the interests of the state, and 'human rights' is explained by Van Niekerk as 'not one of either/or but one of "and" because the existence of the former without the latter [including mechanisms to curb the exercise of state power] would indeed, amount to nothing but state absolutism'.[73] The state as public law legal subject does bear public law rights and interests, but the nature of its rights and interests cannot be narrated by merely projecting 'the structure of private-law rights onto the state-citizenship relationship' as this would disregard the foundational structural difference between civil private law and public law.[74] Beyond the state-citizen relationship, I argue that the state as public land owner is a distinctly different legal subject than the private owner, because of its definitive regulatory context underscored by constitutional demands.

The above-mentioned remarks are unpacked and reevaluated in the context of constitutional supremacy where the state has an outright objective to redistributive land and make housing available. I acknowledge that the state as public owner is entitled to deal with its property in ways that resemble private ownership. In the context of land it can, of course, use, alienate and burden its land. Yet, Wiechers is correct to argue that the regulatory framework governing public property/land is patently different from rules regulating private property. This pertains to relationships between the state and private persons in respect of public property[75] as well as all other governmental decisions made when managing or disposing of such property.

4.2 *Adonisi*

A case in point is that of *Adonisi v Minister for Transport and Public Works Western Cape; Minister of Human Settlements v Premier of the Western Cape Province* (*Adonisi*)[76] where the state's decision to sell public property (Tafelberg Properties) was challenged. The Minister of Transport and Public Works: Western Cape (the MEC) was the official responsible for the disposal of immovable assets. Those functions were exercised in terms of the Western Cape Land Administration Act 6 of 1998 (WCLAA) and the Government Immovable Asset Management

73 Van Niekerk (n 70) 272.
74 As above.
75 See, eg, *Rakgase v Minister of Rural Development and Land Reform* 2020 (1) SA 605 (GP) para 5.2.3.
76 [2021] 4 All SA 69 (WCC).

Act 19 of 2007[77] (GIAMA). The applicants challenged the sale of the land[78] and argued that the way in which the state as public owner dealt with its property ultimately infringed the constitutional duty to redistribute land an make housing available,[79] to redress spatial apartheid in Cape Town.[80] The applicants contended that the public property in question presented a unique opportunity for the city and province to promote social rental housing, arguably outweighing the state's economic interest in selling the property to a private entity at considerable gain.[81] For the province, the sale presented an ideal opportunity to 'supplement its coffers' as income generation is restricted and the offer of R135 million (for property valued at R108 million) was a 'no-brainer'.[82]

It was acknowledged that the acquisition of private land in the inner city had become prohibitively expensive. The parties also agreed over the 'shortage of state-owned land in or near the inner city which is available for the development of affordable housing'.[83] The Court held that the state 'enjoys all the rights customarily afforded to private land owners',[84] but such powers/duties in relation to state land are subject to the constitutional property clause in addition to any applicable laws.[85] Accordingly, the state must attend to its 'broader societal obligation' – in this case, the past perversity of the unequal distribution of land – and exercise its individual property rights. The Court held that a balancing act is subsequently required, for which the approach as described in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*[86] (*FNB*) was relied upon. In terms of this approach, the Court contextualised the commitment to redress the unequal distribution of land (sub-sections 25(4)-(9)) as a core consideration whenever section 25 is

77 Para 10. Various other officials were cited in respect of their duties, including the Minister of Public Works in the National Government as the custodian of immovable assets in the national sphere of government under GIAMA. The Social Housing Regulatory Authority (SHRA) was cited as the ninth respondent as the custodian of social housing.
78 The sale was attacked based on illegality, alleging that the state failed to comply with various statutory obligations. The reasonableness of the state's actions was also contested as it failed to consider the rental housing option: para 49.
79 Para 26 .
80 Para 27. See para 33 for an account of the city's segregated residential landscape. At para 35 in Prof Susan Parnell's affidavit, she states that '[g]overnment's constitutional duty to progressively realise the right to physical housing structures cannot be divorced from its responsibility to advance spatial justice'.
81 Paras 36 and 37. The location of the property in central Cape Town and the suitability thereof to provide social rental housing were central to the applicants' case: paras 42 and 46.
82 Para 52.
83 Para 102.
84 Para 111.
85 The laws in question were GIAMA and WCLAA.
86 2002 (4) SA 768 (CC) para 49.

construed because these provisions 'emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal consideration'.[87] The High Court's reliance on this description and weighing of societal and individual interests arguably is misplaced as the Court's approach in *FNB* relates to the protection of private property, not public property.

Public property is not protected under the property clause. Instead, it has a profound purpose in terms of the land reform (and housing) provisions. With reference to the constitutional duty to redistribute land (section 25(5)), the High Court interpreted this justiciable socio-economic right via the reasonableness standard, 'to be assessed with reference to context'.[88] An assessment of the context was subsequently done in terms of the regulatory framework and, specifically, GIAMA.

The objects of GIAMA include to provide of a uniform immovable asset management framework that promotes accountability and transparency in government; to effectively manage immovable assets within government; to coordinate the use of immovable assets with service delivery objects of a national or provincial department and ensure the efficient utilisation of such property; and to optimise the cost of service delivery by, for instance, disposing of immovable assets.[89] Section 4 of the Act regulates the powers of the state in relation to public property: Executive organs of state are defined as custodians/caretakers of such property and they may acquire, manage and dispose of public property, subject to the law.[90] Section 5 of the Act sets out statutory principles relevant to the management and disposal of public property.[91] Of importance to *Adonisi* are the following:

> (a) An immovable asset must be used efficiently and becomes surplus to a user if it does not support its service delivery objects at an efficient level and if it cannot be upgraded to that level;
>
> …
>
> (e) when an immovable asset is acquired or disposed of best value for money must be realised;

87 Para 111, citing para 49 of *FNB*. See also T Coggin '"They're not making land anymore": A reading of the social function of property in *Adonisi*' (2021) 138 *South African Law Journal* 697.
88 Para 113.
89 Sec 3 GIAMA.
90 See also para 117 of the case. Sec 4(2) defines the role of the public owner as a custodian, which is further described as a caretaker.
91 See also secs 6-8 of the Act for the preparation of plans relating to public property.

> (f) in relation to a disposal, the custodian must consider whether the immovable asset concerned can be used –
>
> (i) by another user or jointly by different users;
> (ii) in relation to social development initiatives of government; and
> (iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth.

A surplus immovable asset – an asset that no longer supports the service delivery objectives of a user – can only be disposed of to a private entity if it is established that the asset in fact is surplus, that it cannot be upgraded to that level and that the asset cannot be allocated to another user or jointly to different users. Throughout this inquiry, the state must have regard to its social development initiatives and socio-economic objectives, including land reform and housing delivery.[92] In *Adonisi* the MEC was the custodian/caretaker of the property and, therefore, entitled to dispose of it,[93] although only after having gone through the legislative process to confirm that the state no longer had any use for it. In addition, the province must have adhered to WCLAA[94] as it regulates the disposal of land in the Western Cape. The premier must coordinate the management of public property with other spheres of government with a view to realising land reform objectives and rationalising the custody, administration and disposal of such land.[95] The WCLAA Regulations set out additional, cumbersome processes to be followed in order for the province to dispose of public land, including a notice-and-comment public participation process.[96]

Gamble J provides an in-depth account of what transpired when the MEC decided to dispose of the property, and concludes that throughout this process the option of social housing never featured, nor was the constitutional commitment to redistribute land truly considered.[97] With reference to *Government of the Republic of South Africa v Grootboom*[98] and the state's commitment to create conditions that would enable all persons to gain access to adequate housing,[99] Gamble J held that the province failed to introduce any policies or legislative measures to reverse apartheid spatial planning or

92 Sec 13(3) GIAMA; see specifically also paras 120-127 of the case.
93 Sec 4(2)(b)(ii) GIAMA. See also para 118 of the case.
94 Relevant provincial land administration law as stated in sec 4(2)(b)(ii) of GIAMA.
95 Secs 3 and 4 WCLAA; see also para 130 of the case.
96 See para 131 of the case for details on the process.
97 Paras 174-175.
98 2001 (1) SA 46 (CC).
99 Para 474, referring to *Grootboom* (n 98) para 35.

promote social housing.[100] The province decided to sell the property, secretively, without any documentary record of this decision, and failed to apply GIAMA.[101] The province outrightly failed to discharge its constitutional obligations by side-stepping or redesigning policies.[102]

To remedy the situation, the Court decided that the province and city should be subjected to a statutory interdict to allow for the proper 'design and implementation of a comprehensive, inclusive social housing policy in the context of the use of both state-owned and municipal land in and around central Cape Town' that adheres to the Social Housing Act.[103] The Provincial Cabinet's decision to sell the land, and later not resile from that decision, was held to be unlawful and set aside.[104] Finally, prayer 12 of the draft order for declaratory relief reads as follows:[105]

> The Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, is directed to take into account, and have due regard to, the legal obligation to provide, and the need for, affordable social housing in central Cape Town, and the suitability of the Tafelberg Properties for social housing, in any decision in respect of the use or disposal of the Tafelberg Properties.

This and similar prayers were dismissed on the basis of it requiring the Court 'to tell the province (at various levels) how to do its job', amounting to an impermissible intrusion into the executive arm of government.[106] Similar to *Grootboom*, the Court opted for a less intrusive order: for the state to introduce a policy that would promote social housing. It is questionable whether yet another regulatory measure will make any difference when the local authority, tasked with taking everyday, bureaucratic decisions that would promote land reform and housing, shows scant interest in pursuing these human rights objectives.

The regulatory scheme pertaining to public property – specifically land/buildings that are managed by the state for countless public pursuits – evidently is instructured to work against the disposal of state property. Various, complex loopholes must first be overcome before the state can get rid of its property, although the laws are inexplicably silent when it comes to the effectual utilisation of

100 Para 480. See also Coggin (n 87) 702.
101 Para 482.
102 Para 491.
103 Para 493. See also *Thubakgale & Others v Ekurhuleni Metropolitan Municipality & Others* [2021] ZACC 45 paras 108-109.
104 Para 507.
105 Para 27.
106 Para 510.

state property. GIAMA merely states that property must be used 'efficiently' and, if the use thereof does not support the state's 'service delivery objects at an efficient level', it becomes surplus. The meaning of 'efficient use' is open to interpretation. *Adonisi* clearly shows that the courts are reluctant to prescribe how and for what purposes the state should make its property work, let alone delve into a purposive interpretation of 'efficient use'. The extent of the High Court's averseness manifests in its decision to dismiss prayer 12 of the draft order, which merely requested that the state 'take into account, and have due regard to' its constitutional obligations, and the need for, social housing.[107] For the state to *consider* its constitutional obligations when deciding how to put public property to use arguably is the least of what society, including other spheres of government, can ask.

4.3 Preliminary remarks on the public land owner

Adonisi brings into question the nature and character – as well as the rights, interests, and obligations – of the public land owner as legal subject at a time when thousands of households (mostly previously dispossessed) live in deplorable conditions against the backdrop of a rich human rights framework. The judgment confirms Wiechers's contention that the state does have rights in the 'subjective' sense;[108] the state as legal subject can deal with its property to serve its own, state-backed interests. States are not unbiased intermediaries when having to deal with complex land claims. Resilient property theory reveals the realities of state action in response to complex property problems: 'that states are required to negotiate their "other-regarding" responsibilities – adjudicating and allocating resilience to individuals and institutions – against the backdrop of their own "self-regarding" need for resilience'.[109] The 'other regarding' role of the state, which is concerned with property interests, the protection of private property, and property allocations (distributions), has garnered extensive scholarly work,[110] whereas the 'self-regarding'

107 Pragmatically, social housing seemed like the most obvious housing option due to the structure and location of the property.
108 Wiechers (n 72).
109 Fox O'Mahony & Roark (n 5) 216. They further argue that '[t]he insight that states are simultaneously both "self-regarding" – that is, motivated to shore up their authority and legitimacy (the state's own resilience), particularly in periods of crisis – and "other-regarding" in the discharge of governance functions, opens up a new frame for property theory'.
110 Underkuffler, eg, has argued that the relationship between the government and its citizens is grounded in a 'fiduciary relationship' – the state, therefore, acts under an obligation to take account of the needs of all, all citizens are beneficiaries of the state's power and the government must engage with everyone's needs: LS Underkuffler 'Property, sovereignty, and the public trust' (2017) 18 *Theoretical Inquiries in Law* 330, 348.

interests of the state – and the measures that states implement to bolster its own resilience – have received limited scholarly analyses, especially in the context of resource allocation.

Resilient property also shows that it is highly problematic when the state's individual interests fail to align with what is envisioned, and democratically demanded, in the Constitution.[111] Some balancing of the public land owner's rights and societal needs as explained by Gamble J suggests diverse commitments, namely, that for the state and the public. Even though the state as public land owner is an autonomous subject with the legal capacity to exercise 'individual' property rights, broader societal obligations should form the core of the state's pursuit. Constitutional commitments must be prioritised when the public land owner exercises its property rights.

For the city of Cape Town, the monetary gain when selling the property – supposedly to allow the state to fulfil other societal obligations – outweighed the option of making social housing available, despite the aptness of the property for this specific constitutional goal. Logically, the state is tasked to serve common interests as it represents the interests of all persons within the state,[112] yet this is no easy task as budgetary constraints curb the state's ability to fulfil mounting needs and obligations. A matter that perhaps precedes the issue of whether courts can or should scrutinise the way in which the public land owner deals with its property, is some description of the relationship between the rights/interests of the state and human rights, *in relation to public land*. As pointed out by Van Niekerk, the structure of private law rights/entitlements falls outside this inquiry.[113] Instead, inquiries relating to public land, limited resources, state actions and the fulfilment of human rights evidently must start with the Constitution and, specifically, the property and housing clauses.

Sections 25(5) and 26(2) mandate the state to take proactive steps to ensure that people have access to property; by no interpretation is public property exempted from this obligation. The Bill of Rights foregrounds all governmental decisions to align the state's approach and vision for society in pursuit of the fulfilment of fundamental rights. A unique, complex relationship, therefore, exists between the state as public land owner and vulnerable, homeless groups because the state controls their means to emerge from desperate, inhumane

111 Viljoen (n 57).
112 Van Niekerk (n 70) 270.
113 Van Niekerk (n 70) 272.

conditions.[114] Public property comprising open, vacant spaces, informal settlements[115] or inner-city buildings constitutes central means that can be unlocked by the state to serve as a stepping stone for marginalised groups to not only access spaces where they may legally reside, but also to live with dignity and security.

The nature and character of public land ownership, therefore, are vastly different from private ownership as state land must serve societal needs and the most important of those needs, by law, is to create access to property for landless/homeless persons. Of course, this does not mean that the state should convert all public property to achieve this goal as public property serves endless public purposes. Instead, a more resourceful, pressing governmental approach arguably is required to actively repurpose underutilised public properties and ensure that extant land holdings, mostly settlements, as well as land reform and housing programmes are structured to adhere to constitutional goals. It is unsettling to see that the existing governmental approach is pushing quite strongly in the opposite direction.[116] *Adonisi* shows that the state not only is unaware of the importance of the demands laid bare by sections 25(5) and 26(2), but it also acts in direct conflict with it. Where vulnerable groups live on state land, and have done so over decades, some laws (continue

114 Property – land or a dwelling – should either be distributed to the landless/homeless or aligned, entitlement-wise, to strengthen resilience. Once successful, the institution (property) can act as an enabling mechanism: allowing the previously dispossessed to take their rightful place in society, live with dignity, without fear of eviction, and shore up their own resilience: MA Fineman 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law and Feminism* 19; S Viljoen 'Property and "human flourishing": A reassessment in the housing framework' (2019) 22 *Potchefstroom Electronic Law Journal* 1. A legally-recognised entitlement to reside on land (or within a dwelling) is critical for poverty alleviation and directly linked with human dignity: A Durand-Lasserve & L Royston 'International trends and country contexts – From tenure regularization to tenure security' in A Durand-Lasserve & A Royston (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (2002) 1; *Grootboom* (n 98) para 83. The normative argument, as famously put forward by progressive property scholars, for property and the distribution thereof is to allow all persons to actively participate in objectively valuable patterns of existence and interaction: GS Alexander 'The social-obligation norm in American property law' (2009) 94 *Cornell Law Review* 760, referring to M Nussbaum *Women and human development: The capabilities approach* (2000); A Sen *Development as freedom* (1999) 70-86. As a matter of human dignity, individuals are entitled to flourish: 'Every person must be equally entitled to those things essential for human flourishing, ie, the capabilities that are the foundation of flourishing and the material resources required to nurture those capabilities.' Alexander 768. The acquisition of limited, natural resources, specifically land, therefore is a prerequisite for human flourishing, which justifies distributive justice. Social transformation is subject to the dispersal of access to land/dwellings and strengthening of tenure.

115 S Viljoen & J Strydom 'Tenure security and the reform of servitude law' in G Muller and others (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 98.

116 Viljoen (n 57).

to) inhibit tenure reform.[117] In the redistribution context, recent policy measures and case law confirm unyielding state directives for beneficiaries to acquire leasehold, not land ownership.[118]

5 Way forward

The purpose of this article is to rethink public property and the distinct role of the state as public land owner within a complex and rich human rights framework. To critically delve into the importance and purpose of this understudied legal subject, some preliminary observations are made in the article. From a conceptual perspective, a distinction is drawn between common property that is openly accessible to all, and public property that is exclusively managed by the state for specific governmental purposes. Characteristically, these are two vastly-divergent types of property that serve distinct aims. Common property is inherently structured to serve societal needs, it is inclusionary and essential for political, civic and recreational pursuits, whereas the regulatory position of the state is to ensure that these interests are safeguarded. Public property that is off bounds to the public at large and managed by the state for distinct public purposes resembles rights and entitlements customarily associated with private property. Yet, it should be acknowledged, from the outset, that the accustomed private property discourse is ill-suited to uncover and explore the nature, character, as well as rights and interests of the state as public land owner. Instead, public land ownership should be approached and repurposed in line with the Constitution and the commitments expressed in relation to property.

From a constitutional viewpoint, I argue that the progressive realisation of access to land and housing should start with the state and its position as public land owner; a remarkably understudied legal subject with sweeping powers and responsibilities. An innovative, urgent governmental approach in relation to public land ownership arguably should consist of three divisions: the repurposing of public property that is not efficiently utilised; a comprehensive privatisation drive relating to public land, specifically informal settlements, that already house thousands of vulnerable groups to secure tenure and formalise housing rights; and a complete overhaul of land reform policies and laws that continue to entrench public land ownership

117 Viljoen & Strydom (n 115) 113-114.

118 See, eg, R Hall & T Kepe 'Elite capture and state neglect: New evidence on South Africa's land reform' (2017) *Review of African Political Economy* 1; *Rakgase v Minister of Rural Development and Land Reform* 2020 (1) SA 605 (GP); S Viljoen 'The South African redistribution imperative: Incongruities in theory and practice' (2021) 65 *Journal of African Law* 403.

(with leasehold) instead of private land ownership for land reform beneficiaries.