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***Property in the Margins.* By A.J. van der Walt.  
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Emma Waring

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## BOOK REVIEWS

*Property in the Margins*. By A.J. VAN DER WALT. [Oxford: Hart Publishing. 2009. xxiv, 247 and (Bibliography and Index) 24 pp. Paperback £35.00. ISBN 9781841139630.]

IT HAS BEEN SAID that the “concept of ‘property’ is a gateway and, like most gateways, is just as important for what it keeps out as for what it lets in.” (K.J. Gray, “Property in Thin Air” (1991) 50 C.L.J. 252, 304). Recent property scholarship focuses predominantly on the relational nature of privately-held property and the social values served by protecting property rights in a stable and well-accepted property regime (p. 14). *Property in the Margins* moves property discourse forward in a different and significant direction by focusing instead on the property experiences of people who exist on the “margins of society” (p. 24) and are outside the threshold of the property “gateway”.

Chapter 1 examines the post-apartheid South African experience of land reform and introduces the recurrent tension between protecting existing property interests and effecting socially-approved reforms (p. 9). Understandably, some changes to a property regime may be so “fundamental that they cannot be accommodated within or explained in terms of the current doctrine”, instead they require a root and branch “rethink of the system ... the language, the concepts, the rhetoric and the logic” which dictate whether stability will be favoured (p. 15). It is particularly valuable to focus on the stark and difficult problems created when property rules and institutions are stretched “to the limit ... in the sense that they do not function ‘normally’” (p. 21); it is here that searching questions can be asked about what *should* be viewed as “normal” in a property regime.

As van der Walt acknowledges, questioning the “validity and justifiability of mainstream legal dogma from the unfamiliar vantage point of the margins” is not only novel but also “threatening” (p. 23) in challenging the basis for accepted norms. This approach sets the scene for the original, searching and theoretically fertile discussion about property contained in the rest of the book. Chapter 2 examines the so-called “rights paradigm” (p. 27), an “abstract and hierarchical” (p. 28) system existing in both civilian and common law systems that confirms the centrality of ownership and strong property rights. Specific examples from several jurisdictions provide convincing support for the argument that courts are inherently reluctant to give full effect to marginal rights that challenge the traditional rights paradigm (pp. 43–52).

One of the key strengths of this work is van der Walt’s evident mastery not only of the theoretical issues raised by a “margin-sensitive” (p. 25) analysis of property, but also of the black-letter law (including eviction law, landlord and tenant relations and adverse possession, amongst others) considered throughout the book. The rigorous comparative element of *Property in the Margins*, which draws predominantly on examples from South Africa, England and Germany, will not surprise readers already familiar with van der Walt’s previous meticulous comparative property writing. The breadth of this work emphasises the general applicability of the arguments made and deserves to provoke a reassessment of property concepts.

The analysis in chapter 3 of eviction law focuses on an owner’s traditional right to “undisturbed and exclusive possession” (p. 53). An absorbing account

of the abuse of eviction rights under the apartheid regime confirms that successful evictions “secure existing property rights and ... stabilise the current regime of property holdings as a matrix of social, economic and political power” (p. 73). Even where eviction is unsuccessful, “mainstream lawyers tend to preserve the ... paradigm” by viewing restrictions as temporary aberrations (p. 72). In practice, policy arguments supporting the protection of marginal interests are subordinated to the continuing strength of the traditional property rights paradigm.

This theme continues in chapter 4 which undertakes a comparative assessment of eviction in landlord and tenant law. Here again, the rights paradigm generally remains strong despite tenant-friendly legislative changes. The analysis of the shifting approaches taken by English landlord and tenant law is especially worthwhile. Detailed examination of potentially significant challenges to the rights paradigm, including the Human Rights Act 1998, indicates that the rights paradigm remains surprisingly strong nonetheless due to shifts in housing policy and conservative judicial approaches (p. 114). Chapter 5 moves from the previous chapter’s discussion of “normal” residential evictions occurring in the context of some prior authorised occupation, and instead considers occupiers (such as politically inspired urban squatters, gypsies and travellers) who lack legal cause for their initial presence on land owned by others. Here, a major change *has* occurred to the rights paradigm in the context of South African anti-eviction protection legislation, since the context and circumstances of the occupier are taken into account rather than decisions being based predominantly on the owner’s stronger property right (p. 161). One of the most interesting discussions in this engaging book is that contained in chapter 6 which considers a miscellany of situations (adverse possession, public accommodations law and building encroachments) where the rights of owners are qualified. These categories do not fit easily with the rights paradigm set out in previous chapters (p. 208). Here, the rules counterintuitively challenge the rights paradigm to facilitate the wider efficiency and utility of the regime as a whole, and operate to “undermine the value of supposedly strong property interests held by weak owners” (p. 209).

Throughout the work, van der Walt succeeds in highlighting the tension inherent in property regimes between stability and change, and in distinguishing between the conceptual impact of different types of change (small, large-scale, incremental, systemic, reformist) to the rights paradigm (pp. 215–221). This book opens up a new focus for property discourse. Taking an outsider’s view of property provides a valuable opportunity for “[i]maging radical transformation of the law” by revealing a “theoretical manoeuvring space that is either denied or invisible within the rhetorical and logical confines of the paradigm” (p. 226). *Property in the Margins* succeeds in paradoxically establishing the centrality of the margins and demonstrates that property law is “not exclusively or even primarily about owners and holders of rights”, but rather about “those who do not own property and whose lives are shaped and affected by the property holdings of others” (p. 238).

EMMA WARING