

A CRITICAL RACE FEMINIST READING OF THE SOUTH AFRICAN PROPERTY LAW

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‘I can do all things through Christ which strengtheneth me.’

(Philippians 4:13)

1 Introduction

The European colonial invasion that birthed apartheid rule resulted in black women being the most vulnerable group to land dispossession.¹ This vulnerability has been exacerbated by the ineffective measures of the law that, in an attempt to redress these past injustices, fail to afford adequate recognition to the racial, gender and socio-economic marginalisation of black women in the regulation of land issues.² This essay essentially aims to highlight the intersectionality between the oppressions of gender, racial and class based discrimination, which black women in South Africa are afflicted by in relation to land ownership and the security of land tenure. This essay further

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1 South African History Online ‘Land: dispossession, resistance and restitution’ 26 March 2013 <https://www.sahistory.org.za/topic/land-act-dispossession-segregation-and-restitution> (accessed 18 May 2019).

2 K Crenshaw ‘Demarginalizing the intersection of race and sex: a black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics’ (2015) 1989 *University of Chicago Legal Forum* at 141.

illuminates how there is a crucial necessity for the decolonisation of the South African property law system as a whole, in order to address the problem of black women being the most vulnerable group to land dispossession in this democratic era.

This evaluation is conducted by providing a critique of the Extension of Security of Tenure Act 62 of 1997 ('ESTA') in light of the Critical Race Feminist theory and with reference to various South African case law, in order to expose how issues of race, gender and class intersect within the context of land dispossession. Moreover, the essay progresses to explain the manner in which the interpretation of the South African property laws such as ESTA, positively transform legal knowledge. It should be noted that the legal transformation is not enough to address a dispossession of land from black women. Consequently, this essay argues that what is necessary in a South African context is the entire decolonisation of the property law system, which can serve as the appropriate measure for remedying the vulnerability of black women to land dispossession in this post-1994 era.

2 **ESTA as well as the *Klaase* and *Hattingh* cases**

It should be pointed out that ESTA aims to provide measures that facilitate the long-term security of tenure of residents who occupied a landowner's land after 4 February 1997.³ It does this through regulating the conditions of residence and eviction pertaining to land occupation with the main objective of affording female occupiers the same rights as male occupiers.⁴ Effectively, ESTA was promulgated to extend the constitutional right to property as stipulated in section 25(6) of the South African Constitution.⁵ Accordingly, ESTA seeks to protect the security of tenure of both male and female occupants, in order to address the problem of increased unlawful evictions of farm dwellers from the landowner's tenure.⁶

The *Klaase* case addresses whether a female seasonal worker who is a spouse of a permanent farmworker constitutes an 'occupier' in terms of section 9(2) of ESTA.⁷ In order to avoid eviction and secure land tenure upon the termination of her husband's employment, Mrs Klaase, the applicant, contended that she qualified as an occupier in

3 Secs 2(1) & 8 of the Extension of Security of Tenure Act 62 of 1997.

4 PASSOP 'Housing Rights (ESTA)' 2013 <https://www.passop.co.za/your-rights/housing-rights-esta> (accessed 18 May 2019).

5 The Constitution of the Republic of South Africa, 1996.

6 A October 'Farm battlegrounds: between the land and the law' *Daily Maverick* 3 April 2019 1 <https://www.dailymaverick.co.za/article/2019-04-03-farm-battle-grounds-between-the-land-and-the-law/> (accessed on 19 May 2019).

7 *Klaase and Another v van der Merwe N.O. and Others* 2016 (6) SA 131 (CC) para 8 ('*Klaase*').

terms of ESTA.⁸ The applicant argued that despite having no express consent of occupation from the respondent, her contract of seasonal employment on the farm entitled her to become an ‘occupier’ who was subject to the protection of land tenure measures as provided by ESTA.⁹ On the contrary, the respondents submitted that the failure to be a permanent employee on the farm disqualified Mrs Klaase from being an ‘occupier’ in terms of ESTA.¹⁰ The Constitutional Court, after concluding that the applicant qualifies as an occupier in terms of s 9(2) of ESTA, ruled that the applicant’s eviction was unlawful because ESTA facilitated the security of tenure relating to both seasonal and permanent farmworkers.¹¹

In the *Hattingh* case, the applicants were family members of Mrs Hattingh, an elderly poor coloured woman residing on the respondent’s land in terms of section 1 of ESTA. In this case, the applicant sought an appeal against an order of eviction issued by the Land Claims Court.¹² The applicants argued that they were entitled to remain in occupation of the land with their mother, despite the death of their father who was employed by the respondent, because section 6(1) of ESTA entitled their mother the right to a family life.¹³ Conversely, Mr Juta who was the respondent contended that Mrs Hattingh and her family should have been evacuated from his premises because he wished to utilise the cottage to accommodate his new farm manager.¹⁴ The Constitutional Court judges ruled that although section 6(2) of ESTA entitles Mrs Hattingh the right to family life, there must be a balance between the occupants’ right to family life and the rights of the landowner.¹⁵ Therefore, in this case, ordering the eviction of the applicants would result in the just and equitable balance of the respondent’s rights as a landowner with those of the applicants.¹⁶

3 The significance of the interpretation of ESTA in *Hattingh* as well as *Klaase*

The *Klaase* case plays an important role in cognisance of the fact that ESTA aims to secure land tenure for both men and women as discussed above.¹⁷ This is because the *Klaase* case serves as an illustration of how the occupational inferiority of black female farmworkers further

8 The *Klaase* case (n 7) para 18.

9 The *Klaase* case (n 7) paras 57 & 61.

10 The *Klaase* case (n 7) para 17.

11 The *Klaase* case (n 7) paras 62- 65.

12 *Hattingh and Others v Juta* 2013 (3) SA 275 (CC) para 1 (*‘Hattingh’*).

13 The *Hattingh* case (n 12) paras 9-11.

14 The *Hattingh* case (n 12) paras 12-13.

15 The *Hattingh* case (n 12) paras 32-41.

16 The *Hattingh* case (n 12) paras 42-44.

17 October (n 6).

contributes towards the vulnerability of land dispossession for black women in this post-apartheid era.¹⁸ The *Klaase* case illustrates this by highlighting that despite the favourable judgement that ruled that Mrs Klaase qualified as an ‘occupier’ that should be protected by ESTA, black female farmworkers who fail to obtain a written contract of seasonal employment are still in danger of being subject unlawful evictions.¹⁹ In addition, the *Hattingh* case greatly signifies that property laws such as ESTA that seek to secure land tenure can have a limited scope of application when balancing the interests of the occupier with those of the landowner.²⁰

4 The failures of ESTA in light of Critical Race Feminism

The Critical Race Feminism (CRF) theory derives its origins from diverse feminist legal theories, critical legal studies as well as the Critical Race Theory (CRT).²¹ Wing describes it as an;

[An] embryonic effort in legal academia that emerged at the end of the twentieth century to emphasize the legal concerns of a significant group of people those who are both women and members of today’s racial/ ethnic minorities, as well as disproportionately poor.²²

This description enables us to comprehend that the main objective of CRF is to expose and address the intersectionality in the gendered, racial and class marginalisation and suppression of black women in society.²³ CRF theory contends that black women are subject to the most prejudicial oppression in society as they are discriminated against because of being black, female as well as being categorised under the lowest class in society.²⁴ Prominently, a decolonisation approach that centralises CRF in the creation of laws regulating the South African property system such as ESTA, is a crucial prerequisite for the alleviation of black women’s vulnerability to the land dispossession problem, which dominates in this post-1994 era.²⁵

As Modiri explains, CRF is a theory that focuses on anti-essentialism and intersectionality as it was born out of the idea that

18 The *Klaase* case (n 7) paras 55 - 63.

19 October (n 6).

20 The *Hattingh* case (n 12) paras 42 - 44.

21 N Carter ‘Critical Race Feminism: An educational perspective’ (2012) 4 *PowerPlay* at 3.

22 AK Wing *Critical race feminism: a reader* (2003) 1.

23 K van Marle & E Bonthuys ‘Feminist theories and concepts’ in C Albertyn & E Bonthuys (eds) *Gender, law and justice* (2007) 40 -43.

24 Van Marle (n 23) 41 - 42.

25 P Madletyana ‘Race, gender, class and land reform: a case study approach on the land reform for agricultural development (LRAD) sub-programme’ Master’s thesis, University of Witwatersrand, 2011 17 - 31 <https://pdfs.semanticscholar.org/25db/1a872f4973cb14321876115dd5989ace687e.pdf> (accessed on 19 May 2019).

feminist jurisprudence failed to provide and adequately acknowledge the oppressions of race and gender, whilst on the other hand, the CRT also failed to acknowledge the gender concerns of feminism.²⁶ This quote explains that the exclusion of black women's experiences and gender oppressions from the different types of feminist ideas and race theories gave rise to the CRF theory. Importantly, CRF gives an account for the gender, racial and class discrimination which black women are exposed to in their everyday lives.²⁷ It is therefore remarkable to note that CRF is often referred to as black feminism, as it broadly utilises the term 'black women' as referring to all women of colour who suffer racial, gender and class discrimination including all African, Asian, Indian as well as the coloured individuals.²⁸ According to Wing;

Critical Race Feminism serves as a challenge answer to the invisibility of women of color in laws that are deemed as neutral, and challenges the idea that the law is balanced, when it instead perpetuates race, gender and class hierarchies.²⁹

The above statement plays an important role as it highlights both political as well as representational intersectionality in the marginalisation of black women.³⁰ Intersectionality refers to the overlapping and intersecting social identities that are related to oppressive, dominant and discriminatory systems that affect and inform how individuals operate in a society, and further work together to construct how others perceive black women in society.³¹ Political intersectionality denotes how the exclusion of the prejudicial experiences from the traditional forms of feminism and antiracist political campaigns have contributed towards the marginalisation of women of colour when dealing with their victimisation.³² In addition, representational intersectionality places much emphasis on the ways in which the cultural constructions of black women have greatly influenced the political agendas and creation of legislation such as ESTA, that undermine their prejudicial experiences.³³

One of ESTA's main objectives is to remedy the problem of land dispossession, which farmworkers are subject to, through affording individuals of colour who qualify as 'occupiers' in terms of this Act,

26 J Modiri 'The colour of law, power and knowledge: introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *South African Journal on Human Rights* at 418.

27 B Hooks *Feminism Is for Everybody: Passionate Politics* (2000) 55.

28 A Harris & Z Leonardo 'Intersectionality, race-gender subordination, and education' (2018) 42 *Review of Research* at 14-16.

29 Wing (n 22) 2 - 3.

30 Carter (n 21) 8.

31 B Cooper 'Intersectionality' in L Disch & M Hawkesworth (eds) *The oxford handbook of feminist theory* (2016) 5-25.

32 K Crenshaw 'Mapping the margins: intersectionality, identity politics, and violence against women of color' (1991) 43 *Stanford Law Review* at 1242-1247.

33 Crenshaw (n 32) 1245 - 1248.

the right to security of tenure on the landowner's property with that owner's consent.³⁴ Although this serves as a redress mechanism that seeks to facilitate the land tenure of black people, property laws such as ESTA fail to provide adequate protection to black women who are spouses to those who qualify as 'occupiers' in terms of ESTA.³⁵ This is because its failure to include the spouses of the 'occupiers' in the ambit of its protection has increased the number of black women who are subject to evictions, subsequently worsening the vulnerability of women to land dispossession in this post-1994 era.³⁶ We can therefore investigate that the identification of black women as belonging to the lower class group contributes towards the creation of laws such as ESTA, that fail to place satisfactory emphasis on the need to address the daily struggle of black women pertaining to insecure land tenure problems.³⁷ ESTA is established as;

a measure which recognises and provides remedies for the social and economic vulnerabilities faced by farm dwellers through taking the precariousness and fragility of their lives seriously, protecting their tenure, as well as preserving their well-being when an eviction and relocation is unavoidable.³⁸

This quote illustrates how ESTA focuses on eradicating social vulnerabilities, including racial and gender discrimination, as well as economic vulnerabilities such as the oppression of the lower working class.³⁹ However, ESTA only provides limited remedies in addressing such social vulnerabilities. It could be argued that this is because the Act does not provide redress measures aimed at specifically preventing black women from being unfairly evicted upon losing their employment on the farm or upon the death of their husbands who used to render employment services on the farm.⁴⁰ Subsequently, the failure of black women to benefit from this social and economic security, which laws such as ESTA aim to facilitate, renders black women as members belonging to the working class to be the most vulnerable group that is subject to land dispossession in this democratic era.⁴¹

Accordingly, it is submitted that ESTA seems to provide male farmworkers with more social and economic protection than female

34 Secs 1&3 of the Extension of Security of Tenure Act (n 3).

35 Madletyana (n 25) 24.

36 Madletyana (n 25) 25.

37 Madletyana (n 25) 16.

38 W Stuart 'ConCourt falls short of farm dweller Act's aims' *Mail & Guardian* 19 July 2017 1. <https://mg.co.za/article/2017-07-18-concourt-falls-short-of-farm-dweller-acts-aims> (accessed 18 May 2019).

39 Madletyana (n 25) 21-23.

40 South African History Online 'Land: dispossession, resistance and restitution' 2013 <https://www.sahistory.org.za/topic/land-act-dispossession-segregation-and-restitution> (accessed 18 May 2019).

41 M Hunter & T Hodgson 'Ms. Elsie Klaase and the Constitutional Court's missing women' (2016) 8 *Constitutional Court Review* at 284.

farmworkers.⁴² This may be supported by alluding to the judgement made in the *Klaase* case where the court disregarded the gender and race of Mrs Klaase, and utilised her seasonal employment contract as the basis to identify her as an ‘occupier’ in terms of ESTA.⁴³ In this case, ESTA was used to accommodate the social and economic vulnerabilities of Mrs Klaase’s late husband by using his permanent employment on the farm as a reason to qualify him as an ‘occupier’ in terms of ESTA.⁴⁴ In doing so, the social and economic vulnerabilities of black women such as Mrs Klaase, which made her prone to land dispossession were worsened, because the majority of seasonal farmworkers were and still remain excluded from the protection of ESTA due to their failure to satisfy the definition of an ‘occupier’ which is prescribed by ESTA.⁴⁵ Moreover, this further intensifies the degradation of black women in terms of classism, into the lowest class that merely renders labour services to owners of the means of production, who are mostly farm owners.⁴⁶

The preamble of ESTA informs us that one of its goals is to afford both male and female occupiers equivalent redress measures and protection in order to facilitate long-term security of land tenure.⁴⁷ From reading this, we can deduce that ESTA fails to satisfy this objective by alluding to Carter who states that CRF focuses on exposing the intersectionality in the discrimination that black women suffer because of race, gender and class of race, gender and class.⁴⁸ This is because unlike black men who are only victims to racial discrimination, black women are subject to an intersection of gender, and racial discrimination that is influenced by the socio-economic class with which they are identified as belonging to.⁴⁹ Therefore, it is impossible to provide redress and secure land tenure measures that are of equivalent value for both men and women because women are subject to much greater forms of discrimination as compared to men.⁵⁰ Therefore essentially, ESTA fails to serve as an adequate redress mechanism which can alleviate the vulnerability of women to land dispossession in this post-1994 era, as many farmers often invent deliberate and constructive means of evicting female farmworkers who are in occupation of their land.⁵¹

It is important to understand that ESTA fails to provide adequate redress measures that can remedy the racial and gender

42 October (n 6).

43 The *Klaase* case (n 7) paras 55 - 66.

44 The *Klaase* case (n 7 above) paras 3-18.

45 Hunter & Hodgson (n 41) 297.

46 S Veitch *et al Jurisprudence: themes and concepts* (2012) 225-227.

47 Preamble of the Extension of Security of Tenure Act (n 3).

48 Carter (n 21) 3.

49 Crenshaw (n 32) 1242-1245.

50 October (n 6).

51 Stuart (n 38).

subordination that black women are subject to because of belonging to the lower working class in society.⁵² This is because the Act permits the landowner to order the eviction of female farmworkers upon their failure to render employment services irrespective of such failure being caused by circumstances beyond human control, such as aging and illness.⁵³ We can find a demonstration of this in the *Hattingh* case, by observing that the court ordered the eviction of Mrs Hattingh and her family from the landowner's farm due to her inability to render her labour services as she had become old.⁵⁴ This further perpetuates the socio-economic vulnerability of women in society and they are further ranked as the lower class individuals. It can be argued that this is because the court failed to take into account that Mrs Hattingh was an elderly woman who has shown much dedication in working on the farm during her young age, and is now in need of a family that could provide physical, financial and emotional assistance, as well as a secure land tenure.⁵⁵ Consequently, this subjects black women to unfair evictions that also dispossess the security of their land tenure.⁵⁶

We can argue that ESTA fails to centralise the CRF ideas that seek fair and just practices, whilst simultaneously examining and combating oppression relating to gender and race.⁵⁷ This is because despite its failure to enact provisions which specifically address the gender and racial subordination of black women, ESTA further requires the landowner's consent in order to afford any "occupier" in terms of ESTA, the right to dwell on the land.⁵⁸ As a consequence, this can further intensify the vulnerability of black women to land dispossession as most farmworkers often grant tacit, instead of express consent to the spouse of the male farmworker to reside on the farm during the his term of employment on the farm.⁵⁹ This has the effect of worsening the vulnerability of black women to land dispossession as they are often disqualified from accessing the protection measures provided by ESTA due to the lack of obtaining express consent to reside on the land from the farm owner.⁶⁰

Importantly, the failure of ESTA to serve as a redress mechanism that recognises and seeks to remedy the marginalisation of black women because of their gender, race and class inadvertently signifies its inability to address the matrix of domination pertaining to the land dispossession that is suffered by women in this democratic era.⁶¹ This

52 Madletyana (n 25) 40.

53 Sec 8 of the Extension of Security of Tenure Act (n 3).

54 The *Hattingh* case (n 12) paras 27-32.

55 The *Hattingh* case (n 12) paras 34-40.

56 Madletyana (n 25) 41.

57 Carter (n <XREF> above) 3.

58 Sec 3 of the Extension of Security of Tenure Act (n 3).

59 The *Klaase* case (n 7) para 27.

60 The *Klaase* case (n 7) paras 49-56.

is further worsened by ESTA's limited application as explained in section 1 of this Act, which exclusively accommodates individuals residing on farms, in rural areas as well on any land which is undeveloped.⁶² As a result, of this limited application as well as the failure to address the matrix of domination relating to class, gender and race, an increased number of black women are victims of eviction and unfair land dispossession.⁶³ Consequently, the vulnerability of black women to land dispossession violates their right to human dignity.⁶⁴

5 The manner in which an interpretation and application of ESTA in light of the Critical Race Feminist Theory can transform legal knowledge

According to Carter, 'Critical Race Feminism, which originates from critical legal theory, feminist legal theory, and critical race theory, promises to afford legal and academic stratagem for studying and eradicating race, class, and gender oppression in educational institutions'.⁶⁵ This quotation explains that the CRF is as a result of combining the ideas of racial and gender equality that arise from the feminist and critical race theories.⁶⁶ Therefore, CRF appreciates that although identity politics promises to achieve unity and intellectual development in communities, it often disregards the various forms of oppression, which black women residing in communities are subject to on a daily basis.⁶⁷ By analysing the failures of our property law system, using ESTA as aforementioned, it is deductible that the failure of laws governing our property system to promote the values underlying CRF has the effect of depriving black women access to equal opportunities in society.⁶⁸ This is further supported by the reason that ESTA fails to serve as a public instrument of law that can expose the intersectionality in oppressions of race, gender and class that black women are continuously subject to.⁶⁹ As a result, black women cannot rely on ESTA as a means to obtain secure land tenure because of its failure to represent the intersecting gender, class and racial oppression of black women.⁷⁰

61 PH Collins *Black feminist thought: knowledge, consciousness, and the politics of empowerment* (2000) 5-25.

62 Sec 1 of the Extension of Security of Tenure Act (n 3).

63 Madletyana (n 25) 40-45.

64 Sec 10 of the Constitution of the Republic of South Africa, 1996.

65 Carter (n 21) 7.

66 As above.

67 Crenshaw (n 32) 1242.

68 Harris & Leonardo (n 28) 8.

69 Harris & Leonardo (n 28) 6-10.

70 Carter (n 21 above) 8.

Legal knowledge refers to the attainment of a deep understanding and conceptualisation of the law as a discipline that encapsulates the ideas of a General and African jurisprudence in society.⁷¹ General jurisprudence refers to utilising laws such as ESTA to gain legal consciousness through analysing how issues pertaining to identities of class, race, and gender influence the justice of those who are the most vulnerable to land dispossession in society, namely black women.⁷² Adding to this, the principles underlying African jurisprudence, which recognise that Africans are human beings who should have equal access to the law's protection, would also assist in protecting the right to secure land tenure, an entitlement black women are not given full access to by ESTA.⁷³ With that being said, one can observe that interpreting ESTA in light of the principles set by the CRF theory enables ESTA to serve as a medium of law that provides for the security of black women's land tenure, and thus alleviate their vulnerability to land dispossession in this democratic era.⁷⁴

Transformation is a social and economic revolution that amongst many other objectives, aims to make provision for an improved access to opportunities and education through making use of diverse means, including affirmative action and redress measures.⁷⁵ This means that redress measures such as the implementation of ESTA should not only aim to improve the security of land tenure of black women, but also serve as an instrument of improving the knowledge of such black women pertaining to their land rights.⁷⁶ Moreover, a decolonising critique of laws regulating our property law system such as ESTA in light of the CRF theory transforms legal knowledge through raising an awareness of the need to implement more radical means that can alleviate the discrimination of black women based on their class, race and gender.⁷⁷ This further transforms legal knowledge through educating individuals about the equal rights and opportunities, which black women ought to obtain in society instead of promoting their marginalisation due to their gender, class and racial identities.⁷⁸ Consequently, this also alleviates the vulnerability of black women to land dispossession in this post-1994 era, in as much as it also protects their right to property.⁷⁹

71 C Douzinas and A Gearey *Critical jurisprudence: the political philosophy of justice* (2005) 4-5.

72 Douzinas & Gearey (n 71) 5-7.

73 R Mogobe 'An African perspective on justice and race' 2001 <http://them.polyog.org/3/frm-en.htm> (accessed 20 May 2019).

74 Carter (n 21) 7-9.

75 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* at 352.

76 Langa (n 75) 353.

77 Langa (n 75) 351.

78 Madletyana (n 25) 43-46.

79 Sec 25 of the Constitution of the Republic of South Africa, 1996 (n 64).

The implementation of ideals underlying CRF into laws that serve as redress methods such as ESTA, is vital for the enrichment of our legal knowledge as explained by Quinot who states that:

[S]ignificantly increased attention to theory (or theories) of legal education is not only imperative in order to improve the quality of legal education in South Africa, but is also a crucial ingredient of constitutional transformation grounded in law in this country.⁸⁰

This can be substantiated by the reason that, raising an awareness of black women's human rights being equal to those of all other individuals in our country does not only assist in educating those involved in legal studies, but it also helps us achieve the outstanding objective of our Constitution, which is healing all wounds of the past and striving to create a better future.⁸¹ In doing this, the main goal of transformative constitutionalism, which is transforming our society in a manner that upholds and promotes our constitutional values, is achieved through promoting the substantive equality, as well as improving the socio-economic conditions of all individuals, including black women.⁸²

In addition to this, the interpretation and application of ESTA in light of the CRF theory can positively contribute towards the process of transformative constitutionalism. This process 'entails the development of opportunities which allow people to realise their full human potential within positive social relationships' and 'requires a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines.'⁸³ This is because in the process of recognising and addressing the subordination of black women, equal opportunities are developed simultaneously for such women as power is redistributed from the dominant male figures and white supremacy to the lower working class.⁸⁴ As a result, the interpretation and application of ESTA, in light of CRF, also addresses the main challenge of transformative constitutionalism that 'involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality'.⁸⁵

Be that as it may, it is important to understand that interpreting ESTA in light of the CRF theory could also be used to positively influence legal education through transforming our legal culture.⁸⁶

80 G Quinot 'Transformative legal education' (2012) 129 *South African Law Journal* at 412.

81 Quinot (n 81) 413.

82 Langa (n 75) 353-357.

83 Langa (n 75) 352-353.

84 Langa (n 75) 352-355.

85 Langa (n 75) 352.

86 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* at 147.

Langa describes this transformation as shifting from an authoritative culture to:

a culture of justification which is a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command; the new order must be a community built on persuasion, not coercion.⁸⁷

This implies that a transformation occurs in the transition from an authoritative system, with Parliamentary sovereignty as was with the case with apartheid South Africa, into a justified system, with Constitutional supremacy, where every exercise of power is justified by valid reasons.⁸⁸ Subsequently, interpreting ESTA in light of the CRF theory, which is influenced by transformative constitutionalism, results in the need for the justification of any reasons explaining why black women are being excluded from the ambit of ESTA's protection in this democratic era.⁸⁹

6 Decolonising property law to address the vulnerability of black women

Although an interpretation and application of ESTA in light of CRF promotes a justified legal culture and transformative constitutionalism, it nevertheless fails to address the problem of black women being the most vulnerable group to land dispossession in this democratic era.⁹⁰ This is because even though ESTA aims to serve as a means of securing the land tenure of black women as 'occupiers' on the property of the landowner, such security does not transfer ownership of the land from the landowner to the occupiers.⁹¹ Consequently, white supremacy and male domination of the higher class, which owns the means of production pertaining to land ownership, perpetuates through democratisation, while simultaneously worsening the vulnerability of black women to land dispossession.⁹² Importantly, because the dichotomy of white males being the owners of land, and black women being the occupiers of such land is an effect of colonisation, the only solution to address this problem would be the decolonisation of our property law system as a whole.⁹³

Conceptual decolonisation refers to 'the elimination from our thought of modes of conceptualisation that came to us through

87 Langa (n 75) 353.

88 Klare (n 87) 147.

89 Klare (n 87) 148.

90 Mogobe (n 73).

91 Mogobe (n 73).

92 Mogobe (n 73).

93 Mogobe (n 73).

colonisation and remain in our thinking owing to inertia rather than to our own reflective choices'.⁹⁴ This means the South African law of property system, including its products like ESTA, are in need of reformation in a manner that can remove the influences of racial and class inequality as well as patriarchy, as these are the effects of the colonial experience to the ownership of property.⁹⁵ This can be achieved by eliminating provisions from property law legislations such as ESTA, that permit conditional and temporary occupation of black women on the landowner's property. The provisions that provide for the transfer of land ownership from the white and male landowners to black women may replace the eliminated provisions.⁹⁶ This would not only alleviate the vulnerability of black women to land dispossession in this democratic era, but it would also assist in creating a strengthened self-consciousness among black women of their entitlement to equal property rights, despite being black, female and identified by society as belonging to the lower class.⁹⁷

According to Oelofsen, decolonisation is defined as:

a form of transformation that colonised states undergo upon gaining political independence from their former colonisers; however, such independent states need a complete reformation because government structures, the economic structure as well as the intellect of citizens would still remain under great influence of colonisers.⁹⁸

This quote helps us understand that there is an urgent need to reconstruct the entire South African property law regime, in order to remove the culture and material privilege pertaining to the ownership of land by white and male individuals, which it is currently a custodian of.⁹⁹ With this said, the decolonisation of any legislation governing our country's property law should be conducted in a manner which seeks to promote a culture that transfers ownership of land to black women dominating and resist a culture of such black women being restricted to merely occupying land as farmworkers.¹⁰⁰

The decolonisation of our country's property law system would also positively contribute towards decolonising the minds of black women from adhering to the Western cultures into being conscious and taking pride in their African origins.¹⁰¹ This is because the substitution of racially motivated and gender discriminatory laws,

94 K Wiredu 'Conceptual decolonization as an imperative in contemporary African philosophy: some personal reflections' (2002) *Rue Descartes* at 56.

95 Wiredu (n 94) 58.

96 Wiredu (n 94) 59.

97 As above.

98 R Oelofsen 'Decolonisation of the African mind and intellectual landscape' (2015) 16 *Phronimon* at 131.

99 J Modiri 'The time and space of critical legal pedagogy' (2016) 3 *Stellenbosch Law Review* at 516.

100 Madletyana (n 25) 45 - 48.

101 T Serequeberhan "African Philosophy as the practice of resistance" (2009) 4 *Journal of Philosophy: A Cross-disciplinary Inquiry* at 50.

which confine the ownership of land to white and male individuals, with reconstructed laws that promote gender and racial equality in the transfer of land ownership, would enable black women to realise that they are able to own and develop our society's means of production.¹⁰² This further promotes and protects the constitutional rights of black women to freedom of belief, religion, thought, conscience and opinion.¹⁰³ Consequently, such decolonisation also assists in alleviating the vulnerability of black women to land dispossession in this democratic era through protecting their right to property, equality as well as human dignity.¹⁰⁴

Therefore, we can analyse that the decolonisation of laws, such as ESTA which form part of our property law regime is the most suitable and appropriate remedy to address the vulnerability of black women to land dispossession in this democratic era.¹⁰⁵ This is because the mere amendment of provisions contained in such laws will only result in the transformation of how ownership of the land is exercised by the white, male owners of the means of production, instead of actually transferring ownership rights of such land to black women.¹⁰⁶ It is also imperative to articulate that the mere transformation of our property law system fails to address the vulnerability of black women to land dispossession because decolonisation requires a complete reformation of the entire property law system in order to achieve the end of discrimination against black women on the basis of race, gender and class.¹⁰⁷ We can therefore argue that decolonisation is much more effective than transformation as it has the objective of totally removing any effects, influences as well as traces of colonialism that are entrenched in our property law regime, including the dispossession of land from black women.¹⁰⁸

7 Conclusion

In light of this discussion, it is apparent that CRF is mainly concerned with addressing the numerous forms of oppression that manifest in the daily lives of black women due to the intersectionality of class, gender, and race.¹⁰⁹ It is also evident that the interpretation of ESTA, in light of CRF, transforms legal knowledge to a great extent through promoting General jurisprudence as well as using the ideas underlying

102 Serequeberhan (n 101) 48-50.

103 Sec 15 of the Constitution of the Republic of South Africa, 1996 (n 64).

104 Secs 16 & 10 of the Constitution of the Republic of South Africa, 1996 (n 64).

105 T Madlingozi 'Social justice in a time of neoapartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 1 *Stellenbosch Law Review* at 129-130.

106 Madlingozi (n 105) 131-133.

107 Madlingozi (n 105) 134.

108 Madlingozi (n 105) 132-133.

109 Wing (n 22) 2-5.

African jurisprudence, to endorse transformative constitutionalism along with a justified legal culture.¹¹⁰

In closing, with the intention of exposing the failures of our property law regime in this democratic era, this essay has provided an explanation of what the CRF theory entails, and also highlighted the intersectionality of class, race and gender in ESTA's failures. This essay also progressed into explaining how an interpretation of ESTA operates, as it raises an awareness among black women of their equal rights to property and their need to be adequately protected by the law from any form of unfair and unjust land dispossession, including eviction. Lastly an adequate explanation of why the decolonisation of our property law system as a whole is the most legally appropriate remedy to correct the problem of black women being the most vulnerable group to land dispossession in this democratic era has also been discussed.

110 Langa (n 75) 351-354.