Tracing Civil-law Property in Land Reform and Housing: Tenacious Traditions and Divides

S-M Viljoen*

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Author

Sue-Mari Viljoen

Affiliation

University of Western Cape, South Africa

Email

suviljoen@uwc.ac.za

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Abstract

Post-apartheid South Africa inherited grave property divisions along racial lines, which constitutionally ordained property and housing provisions set out to redress along egalitarian lines. The article unpacks this property reform imperative from a distinctly civil-law perspective. Civil-law traditions, specifically the concept of property and the public/private divide, are critically reflected on to trace the extent to which the reformation of the property institution included civil-law property as a means for reform, and therefore also altered some of its underlying apartheid-led concepts. The article shows that civil-law property continues to thrive for the minority, whereas several crucial land reform and housing policies and legislative measures created statutory types of rights with "secure tenure" under the public realm. The state opted to create new public-law land reform and housing laws under the auspices of constitutional aims, yet with meager civil-law property elements. In consequence, private property rights with their distinct civil-law heritage remain intact and are mostly left unamended as a distinctly private-law subject. Instead, the *Constitution* as the central text should arguably have led to new levels of civil law meaning. The article reflects on the inadequate extent to which property provisions in the *Constitution* have assimilated with civil-law property rules, principles and practices into one constitutionally-embedded property discourse. The article argues that civil-law property should be deliberately relied on to align the discourse with constitutional property imperatives, thereby changing civil-law traditions that continue to entrench norms and virtues of the previous apartheid-led regime, and replacing them with new, transformative ideals.

Keywords

Property law; land reform; property reform; access to housing; civil-law tradition.

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1 Introduction

Pre-constitutional land law in South Africa consisted of two divergent systems. For the black majority it was structured in accordance with regulated customary law or precarious holding from the state, being of a feudal nature and founded on liberal notions of paternalism, which left it open to governmental control and prejudice.[1] The white minority enjoyed civil-law[2] property rights, held and exercised individually in demarcated areas of exclusive autonomy; the holder could enforce his will in absolutist terms and enhance his well-being throughout this process.[3] When apartheid ended, a new democratic, constitutional order set out to reform this division via distinct land and housing imperatives: the redistribution of land, the reform of insecure tenure and the provision of access to adequate housing. What this meant for civil-law property was unclear.

At the time, Andre van der Walt asked:

> Are real rights still important, and should these still be divided into ownership and limited real rights? What about the other traditional civil-law concepts dealing with real rights?[4]

He cautioned that while the legal system would have to be transformed, not everything would change. The registration of real rights as well as the civil-law distinction between real and personal rights would likely remain intact; the nature, content and remedies for the protection of such rights would possibly remain unaffected;[5] whereas new property rights in land would have to be recognised and registered and change would relate to the relative position of real and personal rights in the traditional system.[6] In the housing context, he anticipated that laws aimed at improving secure tenure would probably convert existing personal rights in housing to ownership or limited real rights, though "this is not necessary – the required security can

* Sue-Mari Viljoen. BComm (Law), LLB LLD. Associate Professor, Faculty of Law, University of the Western Cape, South Africa. E-mail: suviljoen@uwc.ac.za. ORCiD: https://orcid.org/0000-0001-6121-5572.

1 Van der Walt 2001 *SALJ* 276.

2 For the purposes of this article "civil-law" means Roman-Dutch law as it was inherited from Roman-Dutch law. "Common law", which is often loosely used by the courts and in the literature, refers to Roman-Dutch law as it has developed and been interpreted by the courts, therefore including traditional civil law. It should also be noted from the outset that civil-law rights and traditions are distinct. Context-wise, the courts can mold civil-law rights and principles to give way to new traditions and imperatives in line with constitutional demands.

3 Van der Walt 2001 *SALJ* 275.

4 Van der Walt 1995 *SAPL* 313.

5 Van der Walt 1995 *SAPL* 314.

6 Van der Walt 1995 *SAPL* 314.

also be achieved through legislation",[7] thereby preserving the private-law nature of the rights in question.

Thirty years later pressing questions emerge about property reform in South Africa, in the context that land and housing reform have essentially failed. In the 2021 case of *Thubakgale v Ekurhuleni Metropolitan Municipality*,[8] Justice Majiedt for the Constitutional Court held in a minority judgment:

> Sadly, abysmal living conditions which are reflective of the great disparities in wealth in our society persist, manifesting in despair in almost every corner of South Africa. If anything, they have likely worsened over the last two decades … thereby lending a hollow ring to our constitutional aspirations.[9]

This article unpacks property reform from a distinctly civil-law perspective in a transformative setting. It shows how property reform is crippled by the gravity of civil-law traditions and the notions that they continue to impose. The property crisis in the context of land and housing reform is first demarcated, after which two aspects of the civil-law tradition – the concept of property and the public/private divide – are critically reflected on to trace whether the reform imperative included civil-law property (loosely referred to as the common law) as a means for reform, and therefore also altered some of its underlying apartheid-inspired concepts. The article also responds to Van der Walt by showing that civil-law property continues to thrive for the minority, whereas several crucial land-reform and housing policies and legislative measures created statutory property rights with "secure tenure" under the public realm. Private-property rights with their distinct civil-law heritage remained intact and were mostly left unamended as a distinctly private-law subject. Conceivably, at the time civil-law property (specifically ownership and limited real rights) resonated with the segregationist qualities of "white" apartheid land law, prompting the legislature to create new public-law land reform and housing laws under the auspices of the aims of the constitutional yet with meager civil-law property elements. A dual system of land (and housing) rights consequently developed, one underpinned by the civil law, allowing for real rights and exclusionary traditions, while another is nested in the constitutional public-law realm. Failure to draw on and restructure civil-law property rights – i.e. the foundation of South African property law – to give effect to society's constitutional aspirations has resulted in both the entrenchment of the existing apartheid-led traditions and divergent property systems, remarkably similar to what the African National Congress (ANC) inherited.

Instead, the *Constitution of the Republic of South Africa*, 1996 as the central, direction-giving text should arguably have given rise to new levels

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7 Van der Walt 1995 *SAPL* 323.

8 *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 8 BCLR 985 (CC).

9 *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 8 BCLR 985 (CC) para 6.

of civil law meaning. At the time, "public and private law" should have been reinterpreted or rewritten to create "public meaning for private law".[10] The article reflects on the inadequacy to which property provisions in the *Constitution* have assimilated with civil-law property rules, principles and practices into one constitutionally embedded property discourse.[11] Civil-law property must arguably be deliberately relied on to align the discourse with constitutional property imperatives, thereby changing civil-law traditions that continue to entrench the norms and virtues of the previous apartheid-led regime, and replacing them with new, transformative ideals. Property law in South Africa is still underpinned by its civil-law heritage. Civil-law property rights have not been altered to align the discourse with the objectives of the constitution. The article argues that to do so, distinct civil-law property rights, specifically real rights in land, must be established for previously dispossessed groups under the property (section 25) and housing (section 26) clauses of the *Constitution*. To transform the property discourse, civil-law rights would have to be incorporated, reimagined and aligned with broader socio-economic aims. Failure to restructure the civil-law system would likely entrench the existing, exclusionary, absolutist notions and traditions developed under the previous regime.

2 The constitutional property imperative

2.1 Constitutional directives for property reform

A core objective of the *Constitution* is to transform South Africa, a country that was ravaged by apartheid, into one that upholds core values, including constitutional supremacy and the rule of law, whilst aiming to give content to constitutional rights such as human dignity and equality.[12] The Preamble recognises the imperative to amend the divisions of the past, create a society based on fundamental rights, protect all citizens equally under the law, improve citizens' quality of life, and free the potential of all. The transformative ethos of the *Constitution* is committed to redressing the large-scale poverty and inequalities caused by the previous regime, that restricted access for the majority to the material conditions essential for human welfare, specifically land and housing.[13]

When the constitutional dispensation commenced in 1994 it inherited a grave property division between homelessness, unlawful occupation, informal land settlement and insecure tenure, on the one hand, and established civil-law property rights relating to land and housing on the other.[14] Provisions in the Bill of Rights that are intended to address this

10 Van der Walt 1995 *SAPL* 335.
11 Van der Walt 1995 *SAPL* 337.
12 Section 1 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).
13 Bond *Unsustainable South Africa*; Fuo 2014 *Stell LR* 187-189.
14 Muller and Viljoen *Property in Housing* 16.

division are sections 25 and 26, the property and housing clauses, respectively. The property clause authorises deprivations and expropriations of property, provided that certain requirements are met.[15] It also mandates land reform by way of three subclauses: redistribution, tenure reform and restitution.[16] Of interest to this article, the redistribution programme requests that the state take reasonable measures, within its resources, to create conditions that would enable citizens to access land more equitably,[17] whereas in terms of the tenure reform programme, persons or communities whose tenure is insecure due to past discriminatory laws are entitled, as provided by law, either to legally secure tenure or to comparable redress.[18] The housing clause provides that everyone has the right to access to adequate housing, and the state is required to fulfil this right by taking reasonable legal measures, within its accessible resources.[19]

2.2 A mounting property crisis

It is generally accepted that land reform, in its entirety, has proven to be unsuccessful.[20] Improved access to (mainly) rural land through redistributive measures remains beyond reach, whereas tenure reform has not materialised.[21] Multifaceted problems in the redistribution context have been identified, including that the government's egalitarian approach to redistribution has changed to being more libertarian; redistributive measures are detailed in policy documents, instead of statutory directives; and the acquisition of suitable land is market-dependent.[22] The tenure reform programme has brought about various challenges, especially concerning the evaluation and monitoring of existing tenure forms.[23] A number of core reform laws – specifically, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (*PIE*), the *Extension of Security of Tenure Act* 62 of 1997 (*ESTA*), the *Interim Protection of Informal Land Rights Act* 31 of 1996 and the *Land Reform (Labour Tenants)*

15 Sections 25(1)-(4) of the *Constitution.*

16 Sections 25(5)-(9) of the *Constitution*. Restitution entails that persons or a community who were dispossessed of a specific piece of property after 19 June 1913 may claim for the restitution of that property or equitable redress. A shortcoming of the restitution programme is that the number of productive commercial farms has decreased from nearly 120 000 in 1994 to approximately 37 000 in 2013: Zille *Cape Times* 9.

17 Section 25(5) of the *Constitution*.

18 Section 25(6) of the *Constitution*.

19 Sections 26(1) and (2) of the *Constitution*. Section 26(3) prohibits arbitrary evictions.

20 Eight per cent of farmland (commercially used) has been redistributed, but has failed to contribute to the improvement of individuals' livelihoods or production outcomes: Cousins date unknown https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf.

21 Cousins date unknown https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf.

22 Viljoen 2021 *JAL* 15-16; Pienaar *Land Reform* 334.

23 Pienaar *Land Reform* 380.

Act 3 of 1996[24] – permit a gradual process of entitlement or tend to phrase tenure rights negatively; and the entitlement to reside on another's property takes the form of a statutory claim that the occupier has secure tenure, though the content of the right remains elusive.[25]

Improved access to housing and the strengthening of tenure in urban areas are administered in terms of the state's formal housing delivery programme. Even though the state has delivered subsidised houses benefitting more than twenty million people, the demand for housing continues to rise, as do the number and size of informal settlements.[26] At present, housing for vulnerable groups is predominantly offered by way of state-sponsored land ownership.[27] For those facing homelessness, the prohibition of arbitrary evictions has led to some fabrication of tenure through anti-eviction measures or a protracted process, integrally confined to the proficiency of the state.[28] Tenure in informal settlements remains precarious as they symbolise "quiet encroachments".[29]

Land reform and access to housing are administered under different governmental departments and are therefore also regulated in terms of different policies and laws, although from a property perspective their objectives are similar. In all respects property must be distributed to the landless/homeless and (I would add) calibrated, entitlement-wise, to shore up resilience.[30] Where this is done, property acts as an enabling mechanism: it allows dispossessed and marginalised groups to live with security and dignity. Additionally, a legally recognised entitlement to live on land or within a dwelling is critical for poverty alleviation and directly linked with human dignity.[31]

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24 Various laws have also been repealed and not replaced, such as the *Communal Land Rights Act* 11 of 2004.

25 Muller and Viljoen *Property in Housing* 115-125.

26 Thwala, Aigbavboa and Ramovha 2018 http://ieomsociety.org/dc2018/papers/326.pdf.

27 Muller and Viljoen *Property in Housing* ch 2. The provision of housing rests with the state or state-backed institutions such as social housing institutions. See Maass 2013 *SAJHR* 571.

28 See for example *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA).

29 Oldfield and Greyling 2015 *Environment and Planning* 1101.

30 See specifically Fineman 2008 *Yale J L & Feminism* 19; Fox O'Mahony and Roark *Squatting and the State* ch 5.

31 Durand-Lasserve and Royston "International Trends and Country Contexts" 1. In *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 83 the Constitutional Court held that "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter".

Alexander, one of the founding progressive property scholars, argues that the normative foundation for property and the progressive distribution thereof is to enable all to participate in mutually valuable patterns of belonging/being and interaction.[32] Human dignity has to do with flourishing. All persons are equally entitled to what is essential for human flourishing, being the capabilities that are foundational to flourishing and the resources, such as land and housing, required to support those capabilities.[33] Yet in reality everyday governmental decision-making in accordance with the land/property discourse fails to recognise the urgency of the demand for property, while it continues to show signs of resistance.[34] The South African property crisis is scrutinised in the remainder of this article from the viewpoint of its distinctly civil-law heritage. The hypothesis is that most of the post-1994 reform measures that set out to transform the unequal division of property continue to uphold these civil-law traditions. First the civil-law tradition is unpacked, after which property law is traced in transformative land reform and housing measures to determine how and to what extent civil-law property doctrine has been incorporated to leverage property for land reform and housing purposes.

3 The civil-law tradition

3.1 The concept of property

In South Africa the traditional civil-law concept of rights in general and property rights in particular is set in the theory of private-law (or subjective) rights.[35] In terms of the civil-law tradition, ownership is stronger than a limited real right, which is stronger than a personal right. This hierarchical concept of property rights has dominated not only private law thinking,[36] but also the idea of property as an institution. According to the civil-law method, concepts of private-law rights, as well as relations concerning them, would permeate legal reasoning due to the nature of the relation between the concepts themselves.[37] Ownership is considered to be stronger and more valuable than any other type of right in relation to property. It is also complete, comprehensive and exclusivist, allowing the owner to exercise her individual moral autonomy.[38] According to this view, all

32 Alexander 2009 *Cornell LR* 760. Also see Alexander *et al* 2009 *Cornell L Rev*.
33 Alexander 2009 *Cornell LR* 760.
34 Viljoen 2022 *SAJHR* 24-45.
35 Van der Walt 1995 *SAJHR* 178; Van der Vyver "Doctrine of Private-law Rights" 201-246.
36 Van der Walt 1995 *SAJHR* 178.
37 Van der Walt 1995 *SAJHR* 179.
38 Van der Walt 2002 *TSAR* 258. Also see Van der Walt 1998 *THRHR* 416; Van der Walt 1986 *THRHR* 310.

limitations/restrictions placed upon ownership must be specifically justified and restricted to the minimum:

> [T]hey are temporary and exceptional rather than natural and inherent, and they have to be compensated for if they cause harm or a deprivation.[39]

During the apartheid era, an absolutist view of ownership was normatively established and perfectly aligned with the segregationist policies of apartheid, which paved the way for forceful evictions and the holding of land along racial lines.[40]

Even though ownership, and specifically land ownership, was firmly entrenched in the hierarchically structured rights paradigm when the new dispensation commenced, several constitutionally driven post-apartheid initiatives point to at least some reconceptualisation of landownership, and its absolutist virtues. This is specifically evident in the eviction framework. A landowner's right to evict unlawful occupiers is no longer protected in absolute terms.[41] Courts are more readily inclined to approach complex land conflicts from the perspective of the marginalised and to give priority to their constitutional rights, to safeguard them from homelessness.[42]

Over the past thirty years it has become customary, however, for the courts to grant suspended eviction orders from private property and to mandate the state to provide alternative housing.[43] The predisposition for eviction orders[44] arguably signals that private property continues to be protected in a conceptually hierarchical fashion. Except for very few cases,[45] private

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39 Van der Walt 1995 *SAJHR* 197.

40 Van der Walt 2002 *TSAR* 258. The recognition and entrenchment of strong rights for private owners meant that they could protect their land and their homes in an absolutist fashion. For the black majority, rights in land were typically non-existent: Viljoen *Law of Landlord and Tenant* 22-34.

41 Notably, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

42 See for instance *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA). In general, see Van der Walt *Property in the Margins*; Van der Walt 2001 *SALJ* 290.

43 See for instance *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W) para 18; *Occupiers of Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Abahlali baseMjondolo Movement SA v Premier of KwaZulu Natal* 2010 2 BCLR 99 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (Pty) Ltd* 2012 2 SA 104 (CC) para 92; *Occupiers of Portion R25 of the Farm Mooiplaats v Golden Thread* 2012 2 SA 337 (CC); *Grobler v Phillips* 2023 1 SA 321 (CC) para 49.

44 In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) it was decided that once eviction requirements have been met, the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 mandates the court to award the eviction order.

45 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Molusi v Voges* 2016 3 SA 370 (CC); *All Builders and Cleaning Services CC v Matlaila* (42349/13)

owners are expected to tolerate unlawful occupiers temporarily. Where the courts have decided against eviction orders and either awarded constitutional damages[46] to the landowner or compelled the state to purchase the land,[47] this effectively protected the economic interests of the owner. The majority of cases reasserts the civil-law exclusivist logic in that unlawful occupiers are routinely evicted from private land and, where this is unfeasible, damages are paid or the state is ordered to purchase the property.

Decisions during the past couple of decades on eviction law suggest that the civil-law concept of property, and specifically landownership, remains largely intact.[48] Private property rights offer secure tenure rights. They are mostly predictable and enforceable, as well as widely used by those who are affluent enough to acquire them.[49] Under the "private property realm", negligible deviations can be traced at the edges of the civil-law concept of property. In subsequent sections of this article the focus shifts to another civil-law tradition, that of the public/private divide, and constitutionally driven developments that have taken shape under the "public" property realm, i.e. those that were introduced to empower, enable and equip previously dispossessed property rights holders. In comparison to the absolutist/exclusivist character of property,[50] remarkably little has been written on the enduring relevance, operation and effect of the public/private divide, especially in property law discourse.

3.2 The public/private divide

The civil-law method works only when applied to private rights conceived as parts of a universal system of competing, mutually exclusive domains of

[2015] ZAGPJHC 2 (16 January 2015); and *Classprop (Pty) Ltd v Nini Crescent Legode* (NGHC) (unreported) case number 80910/16 of 30 February 2018.

46 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) paras 42 and 68.

47 *Fischer v Unlawful Occupiers* 2018 2 SA 228 (WCC). The Court held that the state had infringed both the applicant's constitutional property right and the occupiers' section 26 housing right by failing to provide the occupiers with housing. The court compelled the state to enter into *bona fide* negotiations with the applicants to purchase the property. Upon the parties' failure to reach an agreement, the City was ordered to report back to court and explain "whether expropriation of the properties in terms of section 9(3) of the Housing Act was considered, and if not, why not" (para 206).

48 Also see Mhlanga *To Remain* 61-63.

49 Private landownership comprises 82% of South Africa's landholding (the total land surface amounts to 114 223 273 ha): Department of Rural Development and Land Reform 2018 https://www.gov.za/sites/default/files/gcis_document/201802/landauditreport13feb2018.pdf.

50 See for example Visser 1985 *Acta Juridica* 39-52; Birks 1985 *Acta Juridica* 1-37; Van der Walt 1986 *THRHR* 307. More generally, Merrill 1998 *Neb L Rev* 730-755; Waring "*Ubi Remedium, Ibi Ius*" 374-401.

individual autonomy.[51] Traditionally the privatist logic resists the interests of society as a political entity, as well as state actions that promote socio-political goals. A core characteristic of the civil-law method is a clear division between private and public spheres: individual rights belong to the private sphere where the individual exercises moral independence and autonomy, whereas state action and welfare programmes (nowadays, land reform and housing programmes) belong to the public sphere.[52]

When apartheid land laws were introduced, private-law theory ignored this "foreign" part of the law, since it was generally not considered to form part of private law, let alone property law. The "pure" principles of the civil-law tradition applied between private persons and were isolated from state-driven objectives and politics. Even though apartheid land laws had a direct, detrimental impact on the property rights of the majority, this was not reflected in the property discourse[53] because apartheid laws developed under the public realm. The result was the creation of two diverse property systems: civil-law land law protected the rights of the affluent white minority with absolutist virtues, whilst pioneering new forms of land use to fulfil the needs of the rich in the upper land market;[54] whereas apartheid land laws – public-law property – restricted the property rights of the black majority mostly to permits and licenses.[55] According to Van der Walt:

> [W]hite private property law was an important aspect of private law, but black property law was regarded as part of customary law or public law.[56]

An enormous housing demand subsequently emerged in black urban areas alongside land shortages in rural areas where the black majority lived in poverty without secure tenure.[57]

Even though the *Constitution* is intended to transform the property discourse, it is questionable whether it has infiltrated and changed civil-law concepts and, more distressingly, civil-law traditions such as the public/private divide.[58] In the private-law sphere, the concept of property and

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51 Van der Walt 1995 *SAJHR* 180.

52 Van der Walt 1995 *SAJHR* 180. Public law is treated separately as it regulates relationships between the state and individuals: Cockrell 1993 *Acta Juridica* 227-228.

53 Van der Walt 1995 *SAJHR* 185-186.

54 Van der Walt 1995 *SAJHR* 187.

55 Pienaar *Land Reform* 379. The author further states that "South African tenure is routinely typified as consisting of two main tenure forms, or a 'dual tenure system' – private or 'Western-style' tenure and customary law tenure – being practised alongside each other."

56 Van der Walt 2001 *SALJ* 276. Also see Visser 1985 *Acta Juridica* 46-47. Defining ownership in an abstract manner has the effect that politically inspired laws can be applied with complete disregard for their social impact.

57 Van der Walt 1995 *SAJHR* 186-187.

58 Van der Walt 1995 *SAJHR* 188.

the protection thereof remains locked into the logic of the civil-law tradition: rights are hierarchically structured, limitations must be clearly justified; and arbitrary deprivations customarily result in compensatory relief. Yet it is unclear to what extent this private-property logic has found its way to the other side of the divide. This article posits that in the South African land and housing framework, civil-law property rights – specifically real rights – have not been adequately drawn on to create strong property rights for land and housing beneficiaries.

In *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa*,[59] the Constitutional Court clearly articulated that the common law, which naturally includes civil-law concepts, should not develop as a separate body of law distinct from the *Constitution*:

> There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[60]

The transformation project must therefore permeate property law to fulfil the aims of the constitution and at the same time to reimagine the role of civil-law property for land reform and housing beneficiaries. The abolition of Roman-Dutch law[61] in favour of a novel, codified version of South African law was considered during the first years of the new order and soon dismissed by consensus in favour of retaining and reforming the common law in line with the constitutional objectives.[62]

Deeply embedded divisions along racial lines had to be addressed in a progressive fashion. Previously dispossessed persons who lived in deplorable conditions without secure tenure were meant to reap the benefits of the new order. From a property perspective this meant that the private/public divide had to be dismantled, civil-law property rights could no longer be isolated from socio-political objectives, nor could property be reserved for the private realm. In 1993 Cockrell argued for the "publicization" of private law – to make private law look increasingly public and to stress that all facets of private law carry a profound public charge.[63] Thirty years later, the time is perhaps ripe to take stock of the "privatisation" of public law (or constitutional law and constitutional rights). Has civil-law property made its way into the public realm?

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59 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC).

60 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44.

61 As mentioned, Roman-Dutch law and the "civil law" are analogous. The "common law", a term which is used loosely, includes Roman-Dutch law as it has been interpreted and developed by the courts.

62 Van der Walt 2001 *SALJ* 266.

63 Cockrell 1993 *Acta Juridica* 230.

The remainder of this article examines selected constitutionally ordained developments under the "public-law sphere" – or the constitutional realm – to critically reflect on the extent to which the civil-law divide continues to entrench divisions in the property discourse and how it affects land reform and housing imperatives. From a private property point of view, legislative measures that were introduced to strengthen tenure, redistribute land and provide access to housing are scrutinised to show how slightly the state has incorporated and relied on civil-law property to heal the divisions of the past. Further, suggestions are made as to how property rules and principles can be aligned to radically transform land holding.

4 Tracing civil-law property in property reform

4.1 Land reform

4.1.1 Security of tenure

During apartheid, tenure security was shaped by the race of the occupier and the location of the property.[64] Tenure differed in jurisdictional areas; eleven diverse land control and tenure systems existed across South Africa. In the national states, black spots and self-governing territories tenure rights were either personal or permit-based.[65] The current tenure reform programme (section 25(6)) applies in rural areas and centres on rural dwellers, who are usually labour tenants and farm workers.[66] Tenure reform generally applies to all previously dispossessed households who continue to occupy land with insecure tenure. Insecure occupation can be a direct (or indirect) consequence of apartheid land laws.[67]

Two tenure reform statutes are directed at communities who live in rural areas in terms of a communal arrangement. The *Upgrading of Land Tenure Rights Act*[68] provides for the upgrading and conversion into ownership of certain rights – deeds of grant, rights to leasehold and quitrent[69] – granted in respect of land, and for the transfer of land held under customary tenure

64 Pienaar *Land Reform* 378.

65 Pienaar *Land Reform* 379.

66 Donaldson *et al* "Land Restitution and Land Tenure" 13.

67 Alexander *Global Debate Over Constitutional Property* 291. Van der Walt *Constitutional Property Law* 309 explains that "tenure reform is a technical process through which the legal status and protection of existing land interests and rights are upgraded and strengthened".

68 *Upgrading of Land Tenure Rights Act* 112 of 1991. The Act is currently being amended (*Upgrading of Land Tenure Rights Amendment Act* 6 of 2021). The Constitutional Court in *Rahube v Rahube* 2019 2 SA 54 (CC) declared s 2(1) of the Act unconstitutional on equality grounds because the automatic upgrading of rights was afforded only to men. In *Herbert v Senqu Municipality* 2019 4 SA 219 (CC) the Constitutional Court similarly declared s 25A of the Act unconstitutional because its regulatory framework did not include the former homelands of Transkei, Bophuthatswana, Ciskei and Venda.

69 See specifically Schedule 1 of the *Upgrading of Land Tenure Rights Act* 112 of 1991.

to the community concerned in full ownership. Despite its transformative purpose, its reach is limited to rural areas where deeds of grant, leasehold and quitrent were customarily granted in townships by the apartheid government. The aptness of landownership in communal areas where communities live in terms of customary laws is widely contested, however.[70] The *Communal Property Associations Act*[71] allows individuals who are part of a community to acquire, use and manage property within that community via a written constitution drafted by the association.[72] Members may not be excluded from access to or use of property that has been allocated for either a member's exclusive use or communal use, except in terms of procedures set out in the constitution. The property may also not be sold without the consent of the majority.[73] Rights in relation to the property are therefore communally established and exercised, which resonates with customary practices as recognised in customary law.

In relation to agricultural land, tenure reform is regulated by way of two statutes that aim to strengthen tenure for farmworkers who live on privately held land. The *Land Reform (Labour Tenants) Act* 3 of 1996 offers tenure protection for labour tenants. If a person was a labour tenant[74] on 2 June 1995, he/she "shall have the right with his or her family members to occupy and use that part of the farm in question".[75] The content of the occupation and use right is unclear, however. The remainder of the tenure provisions deal with eviction proceedings.[76] The application of *ESTA* is wider than the *Labour Tenants Act,* as it applies to agricultural and peri-urban land. A *ESTA* occupier's right to occupy land is phrased as follows:

> [A] right to reside on and use the land on which he or she resided and which he or she used on or after 4 February 1997, and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly.[77]

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70 Cousins and Claassens "Communal Land Rights" 139-154.

71 *Communal Property Associations Act* 28 of 1996.

72 Van der Walt *Constitutional Property Law* 315-316.

73 Section 9(4)(d) of the *Communal Property Associations Act* 28 of 1996.

74 The term "labour tenant" refers to a person who resides on a farm with the right to use cropping/grazing land on the farm. In return for such a right he/she provides labour to the owner: s 1(xi) of the *Land Reform (Labour Tenants) Act* 3 of 1996.

75 Section 3(1) of the *Land Reform (Labour Tenants) Act* 3 of 1996.

76 Chapter 3 of the *Land Reform (Labour Tenants) Act* 3 of 1996 enabled labour tenants to apply for property rights, specifically landownership, but the application had to be lodged before 31 March 2001 with what was then the Department of Land Affairs, after which it could be opposed by the landowner. If the claim was opposed and the parties failed to settle, the Department had to refer the matter to the Land Claims Court. Failure to refer the matter meant that the claim was placed on hold. Even though thousands of labour tenants lodged claims, most of the applications have not been processed: *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 6 SA 597 (CC) para 12.

77 Section 6(1) of the *Extension of Security of Tenure Act* 62 of 1997 (*ESTA*).

Balanced with the rights of the landowner (or person in charge), an *ESTA* occupier shall have the right to "security of tenure", other rights related to receiving visitors and mail, and the right to a family life. An *ESTA* occupier may also not be denied (or deprived of existing) access to water, health or educational services.[78] As in the *Labour Tenants Act*, tenure security for *ESTA* occupiers is largely confined to protection against unfair evictions.[79] The substance and strength of previously dispossessed rural occupiers' tenure rights are frequently subject to judicial interpretation[80] or intervention,[81] because they are either of a statutory kind (and therefore notorious for being ambiguous unless they are meticulously drafted and regularly amended to ensure substantive tenure protection)[82] or state-dependent.

Similarly, the *Interim Protection of Informal Land Rights Act*[83] safeguards tenure to the extent that it may not be disrupted; the substance of the rights – the occupiers' entitlements and capabilities – remains indeterminate.[84] The Act was intended to operate until the end of 1997 (pending the introduction of a comprehensive, permanent law), although its application has repeatedly been extended and it is currently still in operation. Even though the underlying purpose of the Act is commendable as it protects the land-use interests of persons whose occupation might have been labelled as unlawful to that of rights in property, it still falls short of articulating the exact content and nature of their rights in property.

From a property perspective it is striking that at present only one statute incorporates a civil-law property right to strengthen tenure for previously dispossessed groups who were dispossessed of, or denied, such rights in

78 Section 6(2) of *ESTA*.

79 See specifically ch IV of *ESTA*.

80 A case in point is *Daniels v Scribante* 2017 4 SA 341 (CC), where the Constitutional Court had to decide whether an *ESTA* occupier might maintain the dwelling that she and her family had occupied for many years and whether the landowner should consent to improvements made.

81 In for instance *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 6 SA 597 (CC), the Land Claims Court appointed a master of labour tenants to assist the Department (Rural Development and Land Reform) to process labour tenants' land claims. In the end, the Constitutional Court had to decide whether the Land Claims Court could "fashion and implement remedies to secure practical justice for claimants who, 25 years into our democracy, still have no secure tenure – even though a statute promised them this more than 20 years ago" (para 3).

82 A typical example is rent control. See Viljoen *Law of Landlord and Tenant* 7-22 for a discussion of the system of rent control that operated in South Africa for the most part of the twentieth century.

83 *Interim Protection of Informal Land Rights Act* 31 of 1996.

84 The *Interim Protection of Informal Land Rights Act* 31 of 1996 s 2(1) protects "informal land rights" (a broad spectrum of legally unrecognised, insecure rights and interests in land) from deprivation.

the first place. Except for the *Communal Property Association Act*, which allows for customary norms and arrangements, tenure reform is confined to the restrictive parameters of statutes that mainly set out to prohibit arbitrary eviction. Even though new rights of a "diverse nature and content can be recognised and created to suit whatever need of a person or community",[85] this has frankly not materialised to the point where the content of such rights is clear. The legislature opted to create land rights relating to their context and functions without questioning whether or how they should fit into the "common-law system of rights".[86] This has been described as the fragmentation of land rights and it implies that the context (and requirements of occupation), rather than the right's assertive position in the common-law system, should determine the characteristics, content, protection and limits of a given land right.[87] Framed against civil-law property that continues to flourish for the white minority, this is problematic, because the civil-law concepts and traditions remain largely intact as they operate alongside the land reform – public-law – sphere.

4.1.2 Redistribution

The redistribution imperative compels the state to introduce statutes and other measures to create conditions that will support citizens to gain access to land, yet the actual redistribution instruments are set in the detail of policy and supporting documents.[88] From a policy perspective, the redistribution programme initially enabled eligible persons to acquire a settlement grant (SLAG) of no more than R16,000 per household to purchase land from sellers.[89] The amount was not enough for beneficiaries to acquire their own land; resulting in their having to pool their resources to purchase land in a collective fashion, which led to their not having enough money to acquire materials and build houses.[90] Even though large-scale, productive farms were in some cases handed to the poor, SLAG soon proved to be unsuccessful.[91] In 2001 it was succeeded by the Land Redistribution and Agricultural Development Policy (LRAD), which allowed for more market-based agriculture (coupled with grants for sustainable agriculture).[92] The

85 Van der Walt *Constitutional Property Law* 316.
86 Van der Walt 2001 *SALJ* 288.
87 Van der Walt 2001 *SALJ* 288.
88 Pienaar *Land Reform* 334.
89 Pienaar *Land Reform* 217.
90 For examples of SLAG projects, see Aliber and Cousins 2013 *Journal of Agrarian Change* 145-149.
91 Lahiff date unknown https://assets.publishing.service.gov.uk/media/57a08c0f40f0b64974000f84/60332_Lahiff_Redistributive.pdf.
92 Lahiff date unknown https://assets.publishing.service.gov.uk/media/57a08c0f40f0b64974000f84/60332_Lahiff_Redistributive.pdf.

SLAG income ceiling[93] was removed, which meant that vulnerable landless persons had to compete with the not-so-poor, allowing the LRAD to assist the "educated, technically proficient and resourced person".[94] Finally, the Proactive Land Acquisition Strategy came into effect in 2006 to redistribute white-owned land (totalling five million hectares) to 10,000 new black land owners, yet the Department of Land Affairs decided to acquire land subsequent to leasing it to beneficiaries for a period of three years. The programme aims to equip commercial farmers to generate profits. It is not intended to broaden access to land for the residential or recreational needs of lower income groups.[95]

A notable concern in the redistribution framework is the lack of tools that enable landless persons to acquire land for residential or recreational purposes.[96] Where poor, vulnerable individuals manage to acquire land, they do so mainly in a collective fashion by way of an unregulated property market. Individual, subjective civil-law property rights are consequently not redistributed from affluent white landowners to the dispossessed black majority.

The principle redistribution law is the *Provision of Land and Assistance Act*,[97] which regulates the designation and subdivision of land, as well as the rendering of financial assistance by way of state grants for the acquisition of land. In practice a developer subdivides land, whereafter the smaller land portions are offered for various needs, such as small-scale farming, residential or business purposes.[98] Once the plans have been approved and filed, redistribution can commence with the alienation (or lease) of the land parcels to beneficiaries.[99]

The operation of the Act should be understood in terms of the mentioned policies and specifically the state-led grant system. This means that a grant recipient can become a landowner if he/she has both enough money to purchase the land and sufficient knowledge of the property market to negotiate terms and enter into an agreement with the seller. The success of the Act (and redistribution in general) is therefore premised not only on considerable grants but also on a private land market that is susceptible to reform landholding – i.e. property rights – in accordance with constitutional

93 Households earning less than R1,500 per month were eligible under s 4 of the White Paper on South African Land Policy (1997): Department of Land Affairs 1997 https://www.gov.za/sites/default/files/gcis_document/201411/whitepaperlandreform.pdf.

94 Pienaar *Land Reform* 223.

95 Pienaar *Land Reform* 219.

96 Pienaar *Land Reform* 224-225; Beinart "Strategies of the Poor" 177.

97 *Provision of Land and Assistance Act* 126 of 1993.

98 *Provision of Land and Assistance Act* 126 of 1993 ss 2, 6 and 7.

99 *Provision of Land and Assistance Act* 126 of 1993 ss 7 and 8.

directives. Even if the size of the state grants were competitive with other offers to purchase, concerns remain as to what would motivate affluent white landowners to sell their land in the first place.[100] The redistribution programme is founded on the assumption that grossly unequal land holding can be overturned by the private property market, without any incentives (or sanctions) for sellers. Ironically, the expectation is that there should be a comprehensive movement of civil-law property rights from sellers to buyers – from those who have, to those who do not have – without any real reliance on entrenched property doctrine. The only reliance is on the market, which is contract-based. The transformation of the entire property landscape must seemingly take place via the derivative acquisition of ownership.[101] From a doctrinal perspective, the approach to redistribution is therefore painstakingly narrow on two fronts: the property mechanisms or principles that convey land, and the spectrum of civil-law property rights allocated.

4.2 Housing

The Department of Human Settlements needs to provide access to adequate housing in a progressive manner.[102] The land reform imperative is seemingly restricted to the rural, agricultural landscape, which somehow places urban property reform under the auspices of the housing realm. From a progressive property viewpoint this divide is illogical, because the normative foundation for property as an enabling mechanism is the same, regardless of where the property is located. If the overarching objective is to provide access to property where previously dispossessed persons can live securely with dignity and gradually develop capabilities essential to a well-lived life, the threshold requirements are access to property and secure tenure. In the urban environment this imperative has largely been facilitated through the delivery of formal housing (newly completed RDP houses),[103] which comprises of newly built houses on vacant land,[104] for homeless persons to acquire ownership.[105] Rental housing has also been offered by the state[106] with little impact due to systemic problems such as increased

100 This principle has been widely criticised. See for instance Lahiff 2007 *TWQ* 1585-1586.

101 The only exception in the land reform framework is where forms of leasehold are granted.

102 Section 26(1) of the *Constitution*.

103 ANC 1994 https://omalley.nelsonmandela.org/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm.

104 State acquisition of land for housing purposes usually takes place via the private land market. See for instance Western Cape Government date unknown https://www.westerncape.gov.za/dept/human-settlements/services/1143/27162.

105 See Muller and Viljoen *Property in Housing* 322-324 for more detail on RDP housing. Housing subsidies in terms of which low-income households can buy an existing house, purchase a house on a plot-and-plan basis or complete an incomplete house are generally also made available.

106 See Viljoen *Law of Landlord and Tenant* 74-75.

construction costs, the slow release of adequate property/land, and insufficient grant funding.[107]

More generally, the objectives of the *Spatial Planning and Land Use Management Act*[108] are set in a generic fashion, and lack distinct rights-based aims.[109] Except for the *Interim Protection of Informal Land Rights Act*, which protects informal rights from disruption, no other overarching law has been introduced to progressively create substantive tenure rights for the urban homeless/landless.[110] PIE protects unlawful occupiers from arbitrary evictions – no imperative exists to improve weak tenure rights. Even though the courts have stretched this anti-eviction objective to force the state to provide alternative housing where evictions are imminent,[111] a rights-based approach to housing remains elusive.

From a civil-law perspective, the fundamental right to access adequate housing amounts either to state-sponsored land ownership in the form of a newly built RDP house, or to leasehold. The remainder of the measures that aim to fulfil housing demands are either generically structured in line with broad policy-oriented themes or framed in the rhetoric of anti-eviction measures. If the constitutional goal is to provide property where previously excluded persons can live with security, it is alarming to note that access to such urban spaces is largely confined to the proficiency of local authorities to identify appropriate land for housing development, enter into negotiations with private landowners to possibly purchase the land – mainly for state-built RDP houses – and offer land ownership.

5 A property-centred approach to reform

To transform the property landscape across South Africa and truly redress grave property divisions of the past, greater reliance should arguably be placed on property measures that can accelerate redistributive aims and

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107 Roeland 2023 https://groundup.org.za/article/social-housing-in-south-africa-is-in-trouble-heres-why.

108 *Spatial Planning and Land Use Management Act* 16 of 2013.

109 The *Housing Act* 107 of 1997 also makes provision for overarching principles and objectives. For example, s 9(1) regulates the functions of municipalities, and states that local authorities must take reasonable and necessary steps within the legal framework to provide access to housing.

110 From a policy perspective the National Housing Code regulates various housing arrangements, although it fails to provide clear directives on how distinct housing rights should be offered.

111 See for instance *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 5 and 25; *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA); and *Baron v Claytile (Pty) Limited* 2017 5 SA 329 (CC) para 50.

provide substantive land rights. In the tenure reform context this would mean that tenure should more readily be conceptualised as distinct civil-law property rights, as they have developed and been protected in the private property realm.

If the objective is to provide secure rights in property (land), it is puzzling why civil-law property rights, specifically real rights, are not distributed. Statutory rights require meticulous crafting to address the complexity of issues that may arise between landowners and occupiers, which often calls for ongoing amendments and judicial intervention. This does not mean that statutory land rights or communal types of land rights should be avoided altogether. Instead, transformative laws and measures could more readily rely and build on existing, well-established civil-law doctrine to give effect to constitutional objectives. This is exactly what the development of the common law entails. Civil-law property should offer the foundation for a single, constitutionally ordained property system, one where all landholders and occupiers live with security and certainty. The alternative would be to adopt an abolitionistic approach to Roman-Dutch law.[112] A law such as ESTA could plausibly have had very different, real results, if it brought about limited real rights such as personal servitudes[113] for agricultural farmworkers. The incorporation of such a right in a tenure reform law sets a threshold understanding of the occupier's property right; gives greater legal certainty;[114] allows room for further clarification and alignment by the legislature towards the goal of the statute (and constitutional right); and brings about subtraction from the owner's *dominium*.

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112 See Van Reenen 1996 *Fundamina* 77 for a more detailed explanation of what such an approach would entail.

113 For example, the servitude of habitation (*habitatio*) offers the beneficiary "the right to occupy, together with the beneficiary's family members and servants, the immovable property of another person for residential purposes, while maintaining the substance of the property intact": Van der Walt *Law of Servitudes* 492. Once a servitude is created, the beneficiary acquires a limited real right in land. This means that the holder enjoys a direct right in the property, which is absolute in the sense that it is enforceable and protected by a real remedy (the *actio confessoria*) against the whole world: 90-91. Even though personal servitudes are customarily limited to the lifetime of the beneficiary (492-493), legislation can make provision for exceptions in the land reform framework. Servitudes are usually based on consensus, but they can also be acquired by way of prescription, expropriation and dedicated statutes (ch 4).

114 Servitude law was inherited from Roman law, is firmly entrenched in South African property law, and has developed over centuries. Decades of doctrinal development underpin that which judges, lawyers and the state understand as the law of servitudes. This does not of course mean that all matters relating to any area of law are ever settled in absolute terms, as the law is fluid and adjustable to changing political, socio-economic and ecological demands. Still, a great deal of legal doctrinal knowledge can be relied on to fulfil a pressing constitutional goal if it is aligned properly.

To determine whether a right is real or not, South African courts have developed the subtraction from the *dominium* test; the enquiry sets out to look at the correlative obligation (more so than the "right") and establish whether the effect thereof is to burden the land.[115] The landowner must be constrained from exercising a distinct entitlement integral in the right of ownership or endure some or other restraint in respect of the property.[116] The duty to refrain or suffer must attach to the land itself and not to a single owner. This formulation is based on the logic that a limited real right must amount to an attenuation of or subtraction from the owner's *dominium* over the property to which the right relates.[117] The effect is that of establishing distinct, enforceable rights for beneficiaries. Drawing on this notion of carving real rights out of *dominium*, the argument is put forward that this is exactly what the redistribution of civil-law property – real rights/entitlement– should set out to achieve. The absence of such an approach allows for modest changes at the margins of property as an institution, allowing civil-law, exclusivist traditions to remain intact.

The increased redistribution of land also requires more progressive measures to acquire land. Unsurprisingly, reliance on a largely unregulated private land market has shown to offer minimal reform. A property measure, though not of Roman-Dutch heritage, that could be used to radically fast-track distributive aims is the power of the state to expropriate property. The expropriation of property can target rights (ownership) or distinct property entitlements.[118] Several possibilities exist for the state to acquire property in rural and urban areas, even at minimal cost, for distributive aims.[119]

In the tenure reform framework, tenure rights for land reform beneficiaries should comprise of ownership, limited real rights, leasehold, customary land rights and statutory types of rights, depending on the circumstances,[120] yet, the overall approach to property reform should arguably be property-

115 *Ex Parte Geldenhuys* 1926 OPD 155 162; *Schwedhelm v Hauman* 1947 1 SA 127 (E) 135; *Nel v Commisioner for Inland Revenue* 1960 1 SA 227 (A) 233A.

116 The idea of subtracting a property entitlement resonates with the bundle-of-rights metaphor. Even though more recent property theories have moved away from this idea in favour of property's ends or property's means, I agree with Baron that the bundle-of-rights concept is still useful as it explains legal relations amongst parties in complex property arrangements, such as in a law reform context: Baron 2013 *U Cin L Rev* 57-102.

117 Muller *et al Silberberg and Schoeman's The Law of Property* 92.

118 The entitlement to use property can be expropriated, for instance, in which case the state has to compensate for the owner's actual financial loss only, which is calculated with reference to the extent to which the property was used: Viljoen 2014 *TSAR* 359-376.

119 Where the state is unwilling to resort to expropriations, some cases have compelled the state to enter negotiations to purchase land and, if unsuccessful, to expropriate. See *Fischer v Unlawful Occupiers* 2018 2 SA 228 (WCC).

120 For instance, leasehold is apt where low-income households can afford some rent and prefer to move regularly.

centered in that civil-law property rights should be established for those previously dispossessed of such rights, i.e. the civil-law rights that they had in the first place. This means that land reform beneficiaries should preferably become landowners or holders of limited real rights in land. A transformative property regime requires comprehensive property-led measures to distribute property rights. Securing *dominium* (or limited real rights) out of the resource base requires property tools to do so with the distribution/allocation of such real property rights. Alternative, lesser rights have proven to maintain apartheid-led absolutist concepts, inequality,[121] the public/private divide, and an untransformed, resistant property system.

The combination of greater access to property and the provision of civil-law property rights is also lacking in the housing framework. Very few property measures have been relied on by the state or occupiers to acquire land/dwellings for the purpose of housing. The power to expropriate land and buildings specifically in urban areas is a valuable yet underutilised measure that could facilitate wide-spread access to the urban landscape and repurpose vacant, dilapidated properties for housing purposes.[122] Another powerful civil-law property measure that could radically change land holding for millions[123] of marginalised occupiers is acquisitive prescription. Most informal settlements were established during the 1970s and 1980s, which means that residents who do not have property rights in relation to such land may be eligible for acquisitive prescription to have taken place.[124] The only deterrent is a pre-constitutional law that prohibits the prescription of state land;[125] which should arguably be amended to allow for exceptions.

Informal tenure, or interim forms of protection for residents in settlements, as well as for evictees, are arguably not conducive to establishing secure tenure for vulnerable groups. The legislature and courts are arguably called upon more readily and innovatively to create civil-law property rights such as ownership and limited real rights for evictees and those living with

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121 "The Constitution contains a pervasive and overriding commitment to equality, specifically comprehending a substantive (redistributive), not just formal, conception of equality … [it] envisages equality across the existential space of the social world, not just within the legal process": Klare 1998 *SAJHR* 153-154.

122 Viljoen 2022 *Journal of Law, Property and Society* 1-43.

123 It is estimated that 24% of South Africa's urban population lives in slums: World Bank date unknown https://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS.?locations=ZA.

124 Viljoen and Strydom "Tenure Security" 109-114. This proposition is in line with the notion that "progress toward the Constitution's goals requires transformation, not only at the level of society's overarching legal principles, but also of the countless, quotidien background rules that structure social and economic life, many of which are located in remote recesses of the common law": Davis and Klare 2010 *SAJHR* 410.

125 *State Land Disposal Act* 48 of 1961.

precarious tenure, especially where it is expected that they will remain on the land or in the dwellings for considerable periods of time.[126] Apartheid land law was structured to provide the majority with informal land rights foreign to property law. A property rights-based approach is arguably required to overturn and transform the legacy of an insecure, diversified land-rights system. This forms an integral part of the development of the common law with its embedded civil-law rights (inherited from Roman-Dutch law). Davis and Klare explain that:

> [This] is not about tinkering of consistency – it connotes a long-term project of fashioning common law foundations for a just and egalitarian society.[127]

Civil-law property doctrine contains a toolkit of measures that could address the grave race-based divisions of the past. Instead of proposing the creation of new, statutory rights for land and housing beneficiaries, this article posits that land reform and housing laws and policies should rely on and progressively incorporate this toolkit of measures to create one system of law and should in the process expunge previous civil-law traditions such as the public-private divide. Such civil-law traditions could arguably be undone only when we actively work within the civil-law system to create better, more egalitarian, welfare-oriented norms.

6 Concluding remarks

Property is institutionally flexible, socially embedded and politically structured. It is open to manipulation by the state for the goals that it sets out to achieve. The apartheid government used Roman-Dutch property law to divide an entire nation along racial lines, to oppress some and enable others. There is no reason why the same Roman-Dutch property law system cannot be moulded to undo what it did.[128] Crucially, in the absence of doing away with civil-law property, it ought to entangle the ideological, political, and legal aesthetics of the constitutional order, specifically for land reform and housing demands, to truly rework unchallenged inapt civil-law traditions and methods, such as the public/private divide.

Even though the Roman-Germanic tradition is influenced by a conceptual and analytical paradigm in terms of which private law protects private

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126 Van der Walt 1995 *SAPL* 319 notes that unlawful occupation of land cannot amount to rights in property. If such occupation is protected as rights via legislation, it transforms into lawful holdership, with legal implications. More is required to move away from an overly cautious interpretation of legal materials, which may discourage judges from taking robust steps to give way to constitutional transformation: Klare 1998 *SAJHR* 171.

127 Davis and Klare 2010 *SAJHR* 411.

128 Roman-Dutch law is a flexible and just system capable of transformation, though substantive legal reasoning is required to change the content and concepts of private-law rights and the relations between them in terms of the constitutional order: Froneman 2005 *Stell LR* 8.

interests against private threats, while public law protects it against the state – neither protecting the public interest – it has also been shown that there is more to property than the protection of private interests. Indeed, there are public aspects of property which are concerned with broader common interests, interests that advance democracy, humanity and civility. Conceptually, the notion of "propriety" must permeate property as "the material foundation for creating and maintaining the proper social order", i.e. the private source for the public good.[129] The propriety view of property is the civic conception of property in terms of which property rights are social (as opposed to natural creations). Because society creates property rights it also continually controls them.[130] Politics defines the personal sphere. Individual property rights are not only dependent on state power, they are created by it.[131]

The social origin and civil nature of property as a social construct is easily hidden from view when it is portrayed as a natural, pre-societal power of the human individual.[132] Indeed, property rules are

> doctrinal artefacts by means of which the state regulates and coerces all civil society, and as such might equally qualify to be categorized as a matter of 'public law'.[133]

Property reform in the South African *Constitution* was mistakenly set apart from the civilian tradition of property as a distinctly private law subject. The result was the creation of public-law rights in relation to land, operating alongside not only this civilian tradition but also civil-law rights. To gradually reform the property discourse and its traditions, this article argues that more emphasis should be placed on the common law, with its civil-law heritage, to reconfigure its new constitutional, public law role.

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List of Abbreviations

ANC	African National Congress
Cornell L Rev	Cornell Law Review
ESTA	Extension of Security of Tenure Act 62 of 1997
JAL	Journal of African Law
LRAD	Land Redistribution and Agricultural Development Policy
Neb L Rev	Nebraska Law Review
NYU L Rev	New York University Law Review
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
RDP	Reconstruction and Development Programme
SALJ	South African Law Journal
SAJHR	South African Journal on Human Rights
SAPL	Southern African Public Law
SLAG	settlement grant
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
TWQ	Third World Quarterly
U Cin L Rev	University of Cincinnati Law Review
Yale J L & Feminism	Yale Journal of Law and Feminism