4

The endurance of apartheid notions of property law in Bloemfontein and surrounds. What does it mean today, in this place to say: 'This house is mine!'?

Danie Brand

1 Introduction

Central to apartheid's discriminatory system of land law was a Roman-Dutch common law-based (but apartheid-perverted) understanding of property law as a system of rights and related remedies. At its core and apex, was an absolute understanding of ownership – absolute in both scope (it was the most complete right one could hold with respect to a 'thing') and its application (it could be enforced against the whole world). This notion of ownership enabled both the dynamic aspect of apartheid land law (its social engineering side, in terms of which new forms of statutory land rights, invariably precarious and limited, were created for black South Africans) and its static aspect (the creation and maintenance of exclusive spaces for different race groups).[1] This complicity was ironically enabled by the veneer of 'objectivity' that Roman-Dutch property law could lay claim to. This veneer of 'naturalness' rubbed off onto apartheid statutory land law – it could in part be justified as simply an inevitable consequence of a 'natural' state of affairs.

In this chapter I trace, through a reading of the interviews that were conducted for purposes of the research project on which this book is based (see chapter 1 above for a description of the set of interviews), the extent to which apartheid's hierarchical, exclusivity-geared, rights-

1 AJ van der Walt 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 268-270.

based understanding of property law persists in or has newly intruded into people's intuitive understandings of their rights to their homes, whether through an assertion of such absolute notions of ownership or an understanding that rights to a home are determined by its absence. I also wish to trace the extent to which there may be suggestions of a new, transformed understanding of property law as a system of regulation through which in a mediative manner to take account of overlapping rights and interests, and in ways that advance constitutional goals of equality, dignity, democracy and freedom.

I start by sketching the conceptual framework against which to analyse, attempt to understand, and draw conclusions from the interview responses. I rely for the most part on the work of property theorist André van der Walt,[2] against the background of more general work on the relationship between law and transformation[3] to describe the outlines of the apartheid notions of property law and ownership away from which Van der Walt seeks transformation and the transforming understandings of property law and ownership toward which that transformation should be in order to advance equality and democracy. In part 3 I turn to the interviews. I am particularly interested in those answers of respondents that indicate (a) what rights, in their own perception, they have to their homes; (b) how they acquired those rights; (c) how secure they experience themselves to be in their (rights to) their homes; and (d) how they relate to others concerning their homes. Section 4 contains my tentative concluding observations.

2 Framework

The two notions of property I wish to trace in the interviews stand in contrast to one another. That is, the transforming vision of property was

2 Van der Walt (n 1); AJ van der Walt *Property in the margins* (2009); AJ van der Walt *Property and constitution* (2012); AJ van der Walt 'The modest systemic status of property rights' (2014) 1 *Journal of Law, Property and Society* 15-106; see also T Mulvaney & J Singer 'Move along to where? Property in service of democracy (A tribute to Andre van der Walt)' in Muller, G and others (eds) *Transformative property law. Festschrift in honour of AJ van der Walt* (2018) 1; T Ngcukaitobi *Land matters: South Africa's failed land reforms and the road ahead* (2021); S Wilson *Human rights and the transformation of property* (2021).

3 K Klare 'Legal culture and transformative constitutionalism' (1998) 1) *South African Journal on Human Rights* 146; K van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* 239.

developed explicitly to move away from, if not replace the apartheid notion, to ameliorate the excesses of exclusion it gave rise to or was complicit in, and to give expression to the values and goals of the new constitutional order instead of those of apartheid.

Van der Walt described apartheid property law as exhibiting three features that enabled its unjust outcomes. The first was the understanding that the objects of property are – with some exceptions – corporeal 'things'. The second was a view of property rights as a limited list of rights, hierarchically arranged with ownership at the apex, followed by a small number of lesser 'real' rights. The third was the notion that the relationship between these rights and the legal remedies that flowed from them was a-contextual and syllogistic: an exclusivist remedy that could be exercised against everyone else followed simply and only from the fact of having the right.[4]

What was problematic for Van der Walt about this understanding of property law was what it enabled. A holder of a recognised property right could, within the scope of the right, exercise absolute, exclusive control over the 'thing' to which it applied against everyone else, regardless of anything else, whether context, other individual interests, broader public goals, or concerns of fairness and justice.[5] Described differently, it was an almost entirely formal and abstract system of law, explicitly divorced of both specific and broader socio-political context (although implicitly, of course not).

As suited as this notion of private property was to apartheid's exclusivist, separated spatial imaginary, so unsuited it is to our society in South Africa, especially in our relationship to land. Land in our context is so peculiarly subject to a range of overlapping, enfolded interests and concerns, many of which are not recognised as legal rights but are nonetheless important. We are also, specifically concerning land engaged in an ambitious collective programme of redress of severe past injustice and transformation towards a more just society. This renders the public good in its broadest possible sense an inevitably overriding concern in our relationship to land.

That apartheid's absolute notion of private ownership is unsuited to our reality of land being subject to different overlapping, intertwined,

4 Van der Walt (2012) (n 2) 113-116.
5 Van der Walt (2012) (n 2) 114.

even enfolded interests and concerns most obviously appears in the context of the reality of communal land ownership. Ngcukaitobi points out that apartheid's notion of 'private title for property is fundamentally inconsistent with communal ownership'. He continues by stating that

> [m]ore than twenty million South Africans live in communal settings. Although colonialism introduced individual title, it was never provided to everyone, particularly Africans. The key distinction with individual freehold title is its exclusionary nature, while on the communal side, the main feature is the coextensive nature of rights. Reforms directed at extending private title to communal settings are self-defeating, as the two are fundamentally incompatible.[6]

However, it is of course a misfit with much larger scope than simply communal ownership. Other questions that apartheid's formal and abstract notion of property is not suited to engage include:

- how we may account substantively instead of simply procedurally for the variety of interests of what the law calls 'unlawful' occupiers of land (those who occupy land belonging in law to another, without any legal right to do so) in the context of evictions and how to give legal form to the position and status of people who remain on land not because they have the right to do so but only because an application to evict them has failed;[7]
- how to make sense in legal terms of long-term, historical use for community purposes by people without any right to do so of land held in private ownership by someone else;
- how to conceptualise different forms of land use, such as in the context of mining, and their coexistence in a transformative way; and
- how to take account legally of the overlapping of different epistemologies and even ontologies over land.

The second element of the concern with apartheid's property law's mismatch with reality – that its absolutist conception of ownership leaves no scope for either our programme of redress or our broader transformational agenda – was recently described thus:[8]

> We live in the grip of a pervasive 'ownership model' of property. This model posits property as tangible goods or incorporeal rights over which individuals or corporations have exclusive control. The world is carved up into domains of ownership – exclusive control of a right or object, and freedom to do with it as one wishes … Redistributive claims, concerns about inequality, poverty and social needs have always been located outside property law.

6 Ngcukaitobi (n 2) 150.
7 L Mhlanga 'To remain' LLD thesis, University of the Free State, 2022.
8 S Wilson *Human rights and the transformation of property* (2021) 10-11.

This reminds of Froneman J's remark in his separate concurring judgment in *Daniels v Scribante*, that apartheid's 'absolutisation of ownership' not only 'confirmed and perpetuated the existing inequalities in personal, social, economic and political freedom',[9] hindering 'the rectification of historical injustice'. It also prevents us appreciating concerning land, that 'the values of the Constitution are not aimed solely at the past and present, but also the future'. That is, it is an obstacle to the transformation of our relationships to land and to one another concerning land.[10]

This makes it clear that – as indeed several scholars have argued[11] – to transform our property law to achieve justice concerning land in South Africa, we should focus on dissembling this idea of absolute and exclusive control. Again, Van der Walt provides the framework for thinking in this respect.

In chapter 3 of his 2012 book, *Property and constitution*, Van der Walt describes his vision of a transforming property law for South Africa.[12] It is one that has departed from apartheid's common law view of property law as nothing more than a hierarchically arranged system of individual rights to 'things', that are syllogistically linked to exclusionary remedies to be exercised by the holder of one of the rights against all others. He instead conceptualises property law as a system of regulation of the overlap, entanglement or clash of different interests or rights in property, through negotiation or mediation, in ways that advance constitutional goals. The transforming property law he envisions shows three main characteristics: first, a shift of focus from the objects of property law or rights ('things'), to objectives. In his words:[13]

> The primary purpose of the Constitution is not to further entrench or underwrite existing private law protection of extant property holdings by adding another, stronger layer of constitutional protection, but to legitimise and authorise state regulation that would promote constitutional goals or objectives with regard to the overall system of property holdings, proscribe action that would have certain

9 *Daniels v Scribante & Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017) para 136.
10 *Daniels v Scribante* (n 9) para 137.
11 Van der Walt (2012) (n 2) 30, 128; Ngcukaitobi (n 2) 150-151; Wilson (n 8) 10-11.
12 Van der Walt (2012) (n 2); see also Van der Walt (2014) (n 2).
13 Van der Walt (2012) (n 2) 141.

> unwanted systemic effects and bring existing law into line with the promotion of these constitutional goals.

The constitutional goals Van der Walt mentions 'include providing restitution of apartheid land dispossessions, ensuring the long-term sustainability of development and the use of natural resources, promoting equitable access to land and housing, and improving security of land holding and housing interests'.[14]

The second aspect of Van der Walt's vision is a shift from 'property to propriety':[15]

> [A] constitutional notion of property exceeds the narrow private law focus on individual property rights and extends to interests in property that are not traditionally recognised or protected in private law, as well as attention for the limits and the effects of rights, considered in a contextual setting, rather than just the rights themselves considered abstractly.

Stated differently, this entails a shift toward recognising, in addition to the traditionally recognised closed list of property rights, all those other interests that might apply to property that warrant protection in light of constitutional goals.

The third element of this transforming vision is a change in the way in which disputes about property are dealt with – a move away from formal, abstract, conclusory reasoning toward transformative, substantive, mediative logic and reasoning.[16] Van der Walt here has in mind a move away from what he calls the syllogistic reasoning ordinarily applied in property disputes, where the primary purpose was simply in a formal sense to determine which rights operated in favour of which participant in property disputes and, then, once that had been determined, in a syllogistic fashion attributing and applying the remedies associated with those rights to the exclusion of the other interests involved. He proposes instead that the purpose in resolving property disputes should be to achieve a balance, in light of specific, broader socio-political and historical context and in the way that best accords with and promotes constitutional goals.

There are three reasons why this counter-vision of property law attracts me. First, I find it persuasive for our context because it amounts (instead

14 As above.
15 Van der Walt (2012) (n 2) 147.
16 Van der Walt (2012) (n 2) 153.

of a full de-privatisation of property law, such as proposals for abolishing private ownership in favour of full nationalisation or 'state custodianship of land' would entail) to a vision of a 'post-private' property law, similar to how Klare describes the South African Constitution as post-liberal, in that it 'embrac[es] a vision of *collective self-determination* parallel to (not in place of) ... [a] strong vision of individual self-determination'.[17] Van der Walt's vision still recognises the important purpose of property law to protect individual rights, interests and even freedom, but simultaneously finds place for the public implications and purposes of property and requires that individual interests should be given effect to in ways that promote public goals. In Van der Walt's words:[18]

> The Constitution requires a shift from the traditional focus on individual rights in discrete objects to a relational or contextual focus on the features or qualities of the overall property holding system and the position of and relationships between individual rights holders in that system.

I am attracted to this vision, second, because it democratises property law in two ways. It does so by broadening the range of interests recognised and accounted for by property law, far beyond the limited number of common law-recognised so-called 'real rights', to include even the interests of those who at common law would have no cognisable interests in property. As Van der Walt explains, in his vision property law both grants 'recognition and protection to interests that would not have qualified for it according to private law doctrine' and broadens the range of recognised interests by

> requir[ing] the courts to reduce the potential impact of what may seem like trump rights in private law, in accordance with the propriety of giving some recognition and effect to what may seem like unrecognised and unprotected or systemically weak conflicting interests, or of restricting what may otherwise seem like an unlimited or overbearingly strong right.[19]

It democratises also, most clearly, by reserving for all those holding property interests included in the expanded list, a 'participatory space'[20] within property law. Instead of resolving property disputes through the formal, conclusory reasoning of apartheid property law, Van der Walt's

17 Klare (n 3) 153.
18 Van der Walt (2012) (n 2) 154.
19 Van der Walt (2012) (n 2) 152-153.
20 Van der Walt (2012) (n 2) 151.

envisioned property law requires participants in a property law dispute to account substantively for the assertion of their interests. This they must do while taking account of the specific context of their case, the broader historical context and the context of the overall systemic goals of the property law system. Courts must then decide such disputes by pursuing a balance between competing or overlapping interests, in ways that advance constitutional goals. That is, this vision of property law, in a particular expression of the notion of the Constitution's 'caring' ethos,[21] requires substantive, contextualised *consideration* of and concern for everyone involved in a property-related dispute.

I am drawn to Van der Walt's vision of property law, third, because of how it accounts for marginality, weakness and vulnerability. To describe property law as a system of regulation of property-related interests in light of and with the aim of furthering constitutional goals, rather than a hierarchically arranged collection of rights and remedies, creates in property law and the protection it affords a particular place for the marginal and the vulnerable – those who have no rights. Van der Walt explores this aspect of his vision in his earlier work, *Property on the margins*.[22] Here he points out that in his vision of property law, 'marginality is ... a vital element of property as a legal institution' and that 'although those on the margins usually hold weak property rights or no property rights at all, marginality in itself does not equal weakness – at least in some cases marginality holds a power of its own that is highly relevant for property theory'.[23]

21 Klare (n 3) 153; Van Marle (n 3); Van der Walt (n 1) 303. See in this respect Klare (n 3) 153 ('the South African Constitution ... is *social, redistributive* [and] *caring*' (emphasis in original)); Mahomed DP in *State v Makwanyane* 1995 (6) BCLR 665 (CC) para 262 ('The South African Constitution ... represents ... a vigorous identification of and commitment to a democratic, universalistic, *caring* and aspirationally egalitarian ethos' (emphasis added)'; Sachs J in *PE Municipality* para 29: 'The Constitution requires that everyone must be treated with care and concern' and, at para 37: '[A court in an eviction application in terms of the PIE Act] is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.' For a fuller discussion of the notion of a caring constitution, and its implications for legal interpretation, see Van Marle (n 3); and for a brief consideration of the relevance of this notion in the context of property law, see Van der Walt (n 1) 303.

22 Van der Walt (2009) (n 2).

23 Van der Walt (2009) (n 2) 24.

Van der Walt illustrates all three these features of his vision of property law in the context of evictions law and the way in which there, the right of ownership overlaps and is entangled with the 'home'-related property interest deriving from section 26(3) of the Constitution (the right not to be arbitrarily evicted from one's home),[24] as given expression in security of tenure legislation such as the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE Act) and the Extension of Security of Tenure Act (ESTA).

He describes how the constitutional prohibition of eviction from a home absent a court order issued after consideration of all relevant circumstances has been developed to establish a new legally cognisable interest that may be asserted against the exercise of ownership rights through eviction, which did not exist at common law. He calls this 'a substantive property right, a competing constitutional notion of property, rather than just a due process qualification or restriction of landowners' common law rights'.[25]

He proceeds to set out what this right entitles one to. This certainly does not include an entitlement to have and to keep a home, despite the existence of the countervailing rights of the owner or the requirements of broader public goals. For Van der Walt, despite the existence of this right, 'it would sometimes be possible and necessary to evict people from their homes, even when they have nowhere else to go'.[26] Instead, this right entitles one, in the resolution of the eviction dispute, to the 'participatory space' referred to earlier – it requires one's home interest to be considered with concern equal to that afforded ownership, informed by the specific context, the historical context and the systemic goals of the property system. In short, it is a right, then, simply (but powerfully), to equal consideration or equal care. Van der Walt describes it in the following terms:[27]

---

24 Sec 26(3) of the Constitution reads as follows: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

25 Van der Walt (2012) (n 2) 161. He relies for this purpose on *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Centre on Housing Rights and Evictions and Community Law Centre, University of the Western Cape, Amici Curiae)* 2010 (3) SA 454 (CC).

26 Van der Walt (2012) (n 2) 157.

27 Van der Walt (2012) (n 2) 162.

> [T]he outcome of a case does not depend purely on the existence, absence or doctrinal force of private law property rights established or acquired in any of the traditional common law ways. Instead, constitutional and statutory obligations and the wide context of the case, including the general social, economic and historic reasons for adopting the new Constitution and promulgating new reform legislation to give effect to it but also more individualised considerations such as the history of ownership and occupation of the land and the personal circumstances of the affected occupiers, have to be considered.

Importantly, this right is at the disposal of only those who occupy marginal positions in terms of traditional property law who, in terms of that property law, have no or relatively weak rights. If an occupier of someone else's property can raise a countervailing right to ownership as defence against the assertion of ownership through eviction, then reliance on the substantive right not to arbitrarily lose your home is precluded. In terms of both the PIE Act and ESTA, this right to a participatory space arises only for those who have no traditionally recognised property right: The PIE Act applies only to so-called 'unlawful' occupiers (that is, occupiers who have no right in law for their continued occupation), while ESTA applies only to occupiers who were occupying with consent (that is, with a weak property right), but where that consent has been terminated.

These, then, are the two contrasting or competing visions of property that I seek to trace in current visions of property as evidenced in the interviews, in Bloemfontein and surrounds. One, the apartheid notion, is characterised by a focus on individual rights that enable exclusion of others, regardless of the impact on them, context, background or broader collective goals – a formalist, abstracted notion. The other, an as yet partly aspirational understanding of property invited by the new constitutional order, decentres rights and instead focuses on the mediation of various overlapping or intertwined interests to property in light of context and in a manner that accords with and advances collective (constitutional) goals. It is, instead, a substantive, mediative and contextualised vision.

Importantly, the democratised vision of property asserted by Van der Walt and others does remain largely aspirational in the practical, day-to-day application of our law. Constitutionally mandated eviction legislation such as PIE and ESTA can and have been read as statutory instantiations of this vision. There have also been important instances of judicial assertion of this transforming vision – cases such as *Port Elizabeth Municipality*, *Blue Moonlight Properties*, *Daniels v Scribante*

and the Supreme Court of Appeal's decision in *Phillips v Grobler*. Nonetheless, these assertions exist alongside several instances where our courts have reverted to the apartheid notion of property with at its core an absolutist and all-determinative right of ownership. I think here of cases such as *Claytile*, *Ngomane* and, most recently, the Constitutional Court's judgment in *Grobler v Phillips*. While there certainly are strong indications of a transformative property law jurisprudence developing especially in evictions law, this jurisprudence exists uneasily next to a stubborn judicial culture of reasserting the centrality of absolute ownership. More about this uneasy co-existence below, in the context of the interviews.

3 Perceptions of property

I read the 80-odd interviews as a complete novice, having no experience in or knowledge of this kind of empirical social-science research. My purpose was to try to trace the extent to which, in a narrative sense, I could see outlines or hints of the two competing notions of property and ownership and how they related to one another – apartheid's formalistic idea of an absolute right of ownership at the apex of a hierarchy of property rights, ineluctably/syllogistically linked to a remedy of exclusion of everyone and everything else; and the vision of a transformed property law as a system of regulation (not rights) intended to mediate overlapping interests to property (that is, relationships concerning property) in light of specific and broader historical context, in a manner that advances public/constitutional goals.

My hope and expectation, I must admit, was that I would see strong hints of the second, constitutionally leavened, transformed and relational notion of ownership and property operating. In this, at least at first glance, I was disappointed. With really only a handful of exceptions, almost all of the interviewees, when asked what right they had to their homes, asserted ownership, and when asked how they acquired that ownership (why they said they had that right) related it to a title deed (in most cases), or some other form of official legal document (site permit, permission to occupy). See, for example, this response:

Interviewer: Do you own this property?

Respondent: Yes[,] I bought it with R300 in the 1960's, it is mine.

Interviewer: Why do you think you own it?

Respondent: I have a title deed.

This extends to the answers to the questions about security of tenure. Almost all of those interviewees who said that they feel secure in their tenure of their homes, asserted as one of, if not the primary reason for that feeling of security, their possession of some form of 'title deed' (that is, some form of official document), with their name on it. The following response is representative:

Interviewer: How secure is the tenure you have on this stand?

Respondent: I am secure because I have a title deed.

Interviewer: Why do you think it is secure?

Respondent: I don't think you need many documents to prove a house is yours, you just need a title deed and I have it.

The converse is also true: Almost all those who said that they feel insecure said so at least in part because they do not (yet) have a 'title deed' in their name, as in the response that follows:

Interviewer: How secure is the tenure you have on this stand?

Respondent: I am still waiting for the papers from the municipality so I will say I am insecure.

Interviewer: Why do you think it is insecure?

Respondent: Because I am still waiting for the papers from the municipality.

In sum, in other words, although in many cases it is unclear exactly what this formal legal instrument is that they assert as the embodiment of their ownership (in many cases, the 'title deed' referred to cannot really be a title deed but must be some more attenuated form of official proof of right), and although in many cases this 'title deed' was not (yet) in their own names, but (still) in their parents' name, or brother's or aunt's, the fact is that for almost all of the interviewees the formal, blunt instrument of a title deed seems to be the embodiment of their right to occupy their homes, with which they can in the final instance, absent anything else, protect themselves against all comers.

However, at second glance, the prominence of the formal legal instrument of a 'title deed' as exclusionary trump card is clearly dissembled, contextualised, eroded – in two related, prominent ways. First, it was interesting to look at the responses on how those that asserted ownership

and as proof of that ownership, a 'title deed', say that they acquired that ownership and 'title deed', or answered the related question of why they have the right to the house that they claim to have. In only very few cases was ownership or a title deed acquired in a non-relational, transactional manner (that is, through buying it from an unrelated other). Except for those few cases in which 'ownership' and a 'title deed' were acquired 'originally', (that is, by grant from the municipality), in almost all the cases, the ownership/title deed was acquired either through inheritance, or through grant from a family member such as an aunt, grandparent or sibling.

In addition, it is interesting to note the confidence that is placed in this mode of acquisition of ownership in itself as establishing ownership and its proof. In very many cases – in fact in almost all – where ownership was acquired on this family or relational trajectory, there is a decidedly *laissez faire* attitude to formalising the acquisition of ownership by registering the transfer or changing the names on the title deed. Although all the interviewees involved are clearly aware of the formal need to do so, they equally clearly do not regard it necessary in practical terms and are content to rely on the simple fact that 'everyone knows' a parent/grandparent/sibling/aunt/friend had granted or passed on ownership. Of course, this can in part be attributed to the practical difficulties (money, access, time) of formalising title, but even so, the fact that, for whatever reason, the title so acquired has not been formalised, does not seem to bother the interviewees, who appear content to rely on and feel secure in their title acquired in these informal ways.

Second, although ownership as evidenced by formal title is asserted by so many of the interviewees as set out above, it clearly operates and is asserted against the background of another, different and more relational understanding of home and one's right to one's home. This appears in a variety of ways.

When asked why they say that they have ownership, almost all the interviewees who answer that they have a title deed also offer other reasons why they say they have the right of ownership to their homes. One says he has the right to live in his home, because, apart from the title deed, 'I have nowhere to go[,] this is my house'; another because 'I arrived on this stand when there was no one on this stand'; another that he is owner because 'I am the only one living here'; and yet another, because 'I was born here and grew up here'. In most of these cases, these

informal, other reasons for right are offered, in the first place, as primary indications of the existence of ownership, with the 'title deed' offered only as a fall-back, or afterthought, or evidence of the right held for another, substantive reason, or indeed irrelevant. Here follows a particularly stark example. When first asked whether she owns her home, this respondent answers that she does 'because the family has made the ... [decision] that the house is mine'. Then, when asked why she thinks she owns it, her answer is:

> Because from the time it was just a field here[,] I fought to get this stand. We are the first people to come here at Freedom Square[.] [W]e fought a lot with the then municipality to get th[ese] stands and we ended living [i]n the informal settlement till the municipality decide[d] to give us the stands and numbers and then it was formal. This is my house Ntate.

She is then asked whether she thinks she has the right to stay in the house. She answers yes; and when asked why she thinks so, she answers: 'Because the materials ... used to build this house, I am the one who bought it.'

The understanding of what ownership – however it was acquired – entails that emerges is also interesting. It seems not to be the understanding of ownership as an absolute right, linked syllogistically to a remedy of exclusion of all others. Instead, there emerges from the interviews hints of an understanding of ownership as embedded in familial and community relations. When asked whether anyone else than they had rights to their home, almost all the interviewees answered that their family members – their children; siblings – also held rights. This is true in both a positive and a negative sense. When asked about their security of tenure, interviewees, on the one hand, would answer that they are secure, because their family/community have decided, or 'know' that they hold the rights to their home; but, on the other hand, the threat to security of tenure for those who experience themselves as insecure very often is perceived from other family members who hold rights to the home and may attempt to exercise them. This also extends to what interviewees perceive their ownership of their home entitles them to do concerning their home. When asked, for example, whether they contemplate selling their home, most interviewees respond that of course they do not, because the house is a family home and should be available to other family members when they need it, whether children, through inheritance or broader family.

4 Conclusions

I never expected to get an either-or answer to the question I posed at the outset (whether and, if so, to what extent I could see traces of the two competing visions of property in the interviews). Not surprisingly, my reading of the interviews showed that there are strong hints (sometimes even strong positive assertions) of at least elements of both notions of property and property law operating in the imaginaries of the interviewees about their homes. Nonetheless, there are some interesting observations that I draw from the interviews.

First, apart from a very few clear exceptions, all the interviewees asserted aspects of both visions of property, sometimes in answer to different questions but often intertwined in one answer. One can only speculate as to the reason(s) for this. It can be strategic: Respondents steeped in having to deal with the impact of a formal and mostly hostile state law on them while in fact operating within a different, part customary, part *ad hoc* community practice-based system, having become adept at navigating between the two systems as circumstances require. It is a form of cunning or 'savvy' at play, exploiting the potentially productive tensions and the overlaps between the two systems. It can also be simply a reflection of a practical reality: Many respondents find themselves in the interstices of a gradual move away from the precarious, attenuated existence in relation to land that apartheid foisted upon them, toward a more formalised and secure position, and their answers reflect that. In this sense their answers show the uneasy co-existence of the two contrasting visions of property in our legal system to which I briefly referred above. However, I prefer to read it differently (although there is nothing in the actual interviews that validate my preference). To me the enfoldedness of the two visions of property in the answers of the interviewees shows something about the nature of transformation. Several scholars have pointed out that transformation decidedly is not a revolution, or a replacement of one system or vision with another, or a crossing of a bridge from one place to another.[28] Instead, it is fundamental change of a system *from within*, into something entirely new. This necessarily entails traces of some of that which the transformation is away from, remaining. The notion of 'post' referred to above comes to mind: The Constitution is 'post-liberal'

28 Van der Walt (n 1); Van Marle (n 3).

because it shows a significant departure from but not a complete break with liberalism;[29] a new property law would be 'post-private' in that it moves away importantly from a purely private system of rights, without completely jettisoning the notion of private rights. This is not less but more radical change than revolution or replacement, both of which are inherently oppositional, thus to some extent at least mirroring or mimicking in what is new, that which is replaced.[30] In this sense, then, the co-existence of the two notions of property in the answers of the interviewees might suggest something of what a truly transformed property law in operation may look like.

The second interesting feature of the interviews is the extent to which the contexts within which the two different visions of property appear in the answers closely track the distinction I make above between them on the basis that one (the apartheid notion) is formal and abstract in its application and operation and the other (the transforming vision) is substantive, mediative and contextualised. As a rule, the formal and abstract notion of property as ownership is asserted where the respondents explain how they would protect their homes against intrusion from others or where they are asked for proof of their rights to their homes. Aspects of the transforming vision appear in turn in those contexts where the respondents were asked to justify their rights to their homes. Here, most of them relate substantive, mediative and relational reasons for why they hold the rights they assert: that they fought for their home; that they built it; that they were given it by a family member, or inherited it; or that they have lived there since childhood or since they were born. This does suggest to me something about the status of the one vision relative to the other in the minds of the interviewees.

29 Klare (n 3) 152.

30 NS Ndebele 'Iph'Indlela? Finding our way into the future – First Steve Biko memorial lecture' (2000) 26 *Social Dynamics* 43; NS Ndebele 'We are more than dumb victims' *SA Mail & Guardian* 15-21 September 2000, https://mg.co.za/article/2000-09-15-we-are-more-than-dumb-victims/ (accessed 26 August 2022); NS Ndebele 'Reaching out to the world. Inaugural lecture as Vice-Chancellor of the University of Cape Town' 2000, http://www.njabulondebele.co.za/wp-content/uploads/2015/11/Reaching_out_to_the_World.pdf (accessed 26 August 2022).

References

Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146

Mhlanga, L 'To remain' LLD thesis, University of the Free State, 2022

Mulvaney, T & Singer, J 'Move along to where? Property in service of democracy (A tribute to Andre van der Walt)' in Muller, G, Brits, R, Slade, BV & Van Wyk, J (eds) *Transformative property law. Festschrift in honour of AJ van der Walt* (Juta 2018) 1

Ndebele, NS 'Iph'Indlela? Finding our way into the future – First Steve Biko memorial lecture' (2000) 26 *Social Dynamics* 43

Ndebele, NS 'We are more than dumb victims' *SA Mail & Guardian* 15-21 September 2000, https://mg.co.za/article/2000-09-15-we-are-more-than-dumb-victims/ (accessed 26 August 2022)

Ndebele, NS 'Reaching out to the world. Inaugural lecture as Vice-Chancellor of the University of Cape Town' 2000, http://www.njabulondebele.co.za/wp-content/uploads/2015/11/Reaching_out_to_the_World.pdf (accessed 26 August 2022)

Ngcukaitobi, T *Land matters: South Africa's failed land reforms and the road ahead* (Penguin Books 2021)

Van der Walt, AJ 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258

Van der Walt, AJ *Property in the margins* (London: Hart 2009)

Van der Walt, AJ *Property and constitution* (Pretoria University Law Press 2012)

Van der Walt, AJ 'The modest systemic status of property rights' (2014) 1 *Journal of Law, Property and Society* 15-106

Van Marle, K 'Law's time, particularity and slowness' (2003) 19 *South African Journal on Human Rights* 239

Wilson, S *Human rights and the transformation of property* (Juta 2021)