CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

EDITED BY
Olaf Zenker, Cherryl Walker and Zsa-Zsa Boggenpoel

BEYOND EXPROPRIATION WITHOUT COMPENSATION

LAW, LAND REFORM AND REDISTRIBUTIVE JUSTICE IN SOUTH AFRICA

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BEYOND EXPROPRIATION WITHOUT COMPENSATION

Speeding up land reform through a constitutional amendment that would explicitly permit the expropriation of land without compensation has dominated legal and political-policy debates in South Africa in recent years. Taking this politically and emotionally charged issue as its starting point, this volume offers both expert commentary on this issue from a variety of disciplinary perspectives and also fresh ideas on how to advance the redistributive transformation that South Africa so urgently needs. It brings critically important debates around transformative property law, the need for diversified land justice and the possibilities of alternative forms of redistribution into productive conversation with each other. While grounded in the complex realities of South Africa's past and present, the volume speaks to concerns that resonate in many contexts in the Global South and beyond. It will appeal to scholars, students, policymakers and general readers concerned with both the theory and practice of redistributive justice. This title is also available as Open Access on Cambridge Core.

OLAF ZENKER holds a Chair of Social and Cultural Anthropology at Martin Luther University Halle-Wittenberg. His research has dealt with politico-legal issues such as statehood, bureaucracy, legal pluralism, inequality and land justice in South Africa and beyond. His latest publications include *The Oxford Handbook of Law and Anthropology* (co-edited with Marie-Claire Foblets, Mark Goodale and Maria Sapignoli).

CHERRYL WALKER is an Emeritus Professor of Sociology at Stellenbosch University. She has published extensively on land restitution in South Africa, gender and land rights in sub-Saharan Africa and women's political mobilisation in twentieth-century South Africa. She served on South Africa's Commission on Restitution of Land Rights between 1995 and 2000.

ZSA-ZSA BOGGENPOEL is a Professor of Law at Stellenbosch University. She specialises in property law, constitutional property law and property theory. She was awarded a C1 NRF rating in December 2022 and is therefore recognised as an established researcher in her field.

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BEYOND EXPROPRIATION WITHOUT COMPENSATION

Law, Land Reform and Redistributive Justice in South Africa

Edited by

OLAF ZENKER

Martin Luther University Halle-Wittenberg

CHERRYL WALKER

Stellenbosch University

ZSA-ZSA BOGGENPOEL

Stellenbosch University

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WILLIAM BEINART, formerly Rhodes Professor of Race Relations (1997–2015), is an Emeritus Professor at St Antony's College and the African Studies Centre, University of Oxford, UK. He served as Chair of the Board of the *Journal of Southern African Studies*, Dean of the College, Director of the African Studies Centre at Oxford and President of the African Studies Association of the United Kingdom (ASAUK). In 2009 he was elected to the British Academy. His research has focused largely on the history of rural society in South Africa and on environmental history. Publications include *Twentieth-Century South Africa* (2001); *The Rise of Conservation in South Africa* (2003); *Environment and Empire* (2007, with Lotte Hughes); *Prickly Pear* (2011, with Luvuyo Wotshela); *African Local Knowledge* (2013, with Karen Brown); and *The Scientific Imagination in South Africa, 1700 to the Present* (2021, with Saul Dubow). Since the 1990s he has researched on land reform and land restitution cases in South Africa and is currently working on a project with Sonwabile Mnwana and Luvuyo Wotshela of the University of Fort Hare. Publications include: *Rights to Land* (2017, with Peter Delius and Michelle Hay); 'Smallholders and Land Reform: A Realistic Perspective' and 'Next Steps towards Land Reform' (2019, both with Peter Delius).

ZSA-ZSA BOGGENPOEL is a Professor of Law at Stellenbosch University (SU) in South Africa. She currently specialises in property law, constitutional property law and property theory. She has received numerous awards from SU and from universities abroad, including the Henry Arthur Holland Scholarship in Law from the University of Cambridge (2009), a visiting scholarship from the Molengraaff Institute for Private Law at Utrecht University, Netherlands (2009), the Mellon Academic Development Award from the Division for Research Development at Stellenbosch University (2014) and the Vice-Rector Award for one of the researchers who made the biggest contributions at SU in accredited publications, and/or persons who supervised three or more PhDs for

the December 2014/March 2015 graduations. She has published numerous journal articles, book chapters, chapters in leading property law textbooks and one single-authored book since commencing her academic career in 2011. She has also recently edited the publication *Transformation, Law and Justice* (2022) and co-edited *Property and Pandemics* (2021). Zsa-Zsa Boggenpoel presents her research nationally and internationally at conferences on property law. Since 2014, she has supervised to completion eight LLDs, six LLMs and five postdoctoral fellows. In 2016, Zsa-Zsa Boggenpoel was awarded the National Research Fund (NRF) rating in the category Y1 and in 2022 this rating was improved to C1. She was also awarded the South African Research Chair in Property Law (Tier 1) under the NRF: South African Research Chairs Initiative from March 2018 to December 2022.

DANIE BRAND is a Professor of Human Rights and Director at the Free State Centre for Human Rights of the University of the Free State, South Africa. His field is constitutional and administrative law and constitutional theory. His research and publications focus in particular on the relationship between law and poverty and the manner in which law regulates and so both enables and limits access to basic livelihood resources such as housing, food, water, land, medical care and education. This interest extends into legal practice, where he runs an impact litigation practice as advocate, focusing on housing and land issues.

ELMIEN W. J. DU PLESSIS is a Professor in the Faculty of Law at North-West University, South Africa. She holds BA (international relations), LLB and LLD degrees from the University of Stellenbosch and is an NRF Thuthuka grant-holder. Her doctoral research on compensation for expropriation under the Constitution, completed in 2009, demonstrates her expertise in property law issues, particularly in the land reform context. Her other research interests lie in the intersection between customary law and common law notions of property rights. The underlying theme of her approach to law is in the concepts of justice that underlie the Constitution and the role of legal interpretation in concretising the values of the Constitution to achieve this justice. She has published numerous peer-reviewed articles and chapters on these topics, showcasing her commitment to finding the human element in law and her dedication to building a just society in South Africa. Beyond academia, Elmien du Plessis is interested in how law can mediate common

ground in society. Her passion for justice is evident in her commitment to ensuring that her research has a positive, practical impact on the broader community. When not applying property theories at home to mediate conflicts regarding scarce resources between her three offspring, she enjoys relaxing under a tree and watching the blue skies through the branches.

JAMES FERGUSON is Susan S. and William H. Hindle Professor of Anthropology at Stanford University, USA. He has done research for many years in southern Africa, including Lesotho, Zambia and South Africa, and is the author of several books, including *Global Shadows: Africa in the Neoliberal World Order* (2006) and *Give a Man a Fish: Reflections on the New Politics of Distribution* (2015).

RUTH HALL holds the South African Research Chair in Poverty, Land and Agrarian Studies, which is funded by the National Research Foundation. The Chair is located at the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape in Cape Town, South Africa. She has published several books, including *Global Land Grabbing and Political Reactions from Below* (2018, with Marc Edelman et al.); *Africa's Land Rush* (2015, with Ian Scoones and Dzodzi Tsikata); *Another Countryside?* (2009); and *The Land Question in South Africa* (2007, with Lungisile Ntsebeza). She is a co-founder of the Land Deal Politics Initiative, the BRICS Initiative in Critical Agrarian Studies and the Emancipatory Rural Politics Initiative. She is a founding member of the Network of Excellence in Land Governance in Africa (NELGA) and leads training courses for policymakers and professionals on the political economy of land governance in Africa. Ruth Hall served as a member of President Cyril Ramaphosa's Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) and is an editor of the *Journal of Peasant Studies*.

THOMAS ERNST KARBERG is an attorney in Werksmans Attorneys' Land Reform, Restitution and Tenure practice in Sandton, Johannesburg, South Africa. Working under the leadership of Bulelwa Mabasa, he advises on all aspects of land reform, including land claims under the Restitution of Land Rights Act 22 of 1994, labour tenant claims, Communal Property Associations and settlement agreements. He has also advised major stakeholders on mining community

resettlements, informal land rights, community-preferent mining rights and the interplay between the constitutional imperative for land reform and the development of residential, industrial and business infrastructure. He also has extensive experience in evictions, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 as well as the Extension of Security of Tenure Act 62 of 1997. Thomas Ernst Karberg cultivates a personal passion for the role that the law can play in facilitating equitable redistribution of land in South Africa and is interested in reading towards a master's degree on this topic. He has previously published in nationally circulated newspapers on various topics including expropriation, climate change and rights to housing.

HEINZ KLUG is John and Rylla Bosshard Professor of Law at the University of Wisconsin Law School, USA, and Visiting Professor in the School of Law at the University of the Witwatersrand, Johannesburg, South Africa. Growing up in South Africa, he participated in the anti-apartheid struggle, spent eleven years in exile and returned to South Africa in 1990 as a member of the ANC Land Commission and researcher for the chairperson of the ANC Constitutional Committee. He served in the ANC political underground and Umkhonto we Sizwe and was a member of the Medu Art Ensemble in Botswana. He received his BA(Hons) from the University of Natal in 1978, a JD from the University of California, Hastings College of the Law in 1989 and SJD from the University of Wisconsin in 1997. In 2013 he was awarded a Doctor Honoris Causa from Hasselt University in Belgium. His books include *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000) and *The Constitution of South Africa: A Contextual Analysis* (2010). More recently he has co-edited two books on legal realism: *The New Legal Realism: Studying Law Globally* (2016, with Sally Engle Merry) and a *Research Handbook on Modern Legal Realism* (2021, with Shauhin Talesh and Elizabeth Mertz).

BULELWA MABASA is a mother of four based in Johannesburg, South Africa. She is an award-winning admitted attorney, author, writer, columnist and land reform activist who founded a Land Reform Practice Area at Werksmans Attorneys, which she currently heads. With over twenty-one years of experience as a lawyer, Bulelwa Mabasa's curiosity on land reform was planted in her childhood home in Meadowlands,

Soweto. In her postgraduate Constitutional Law studies in 2000, she elected to write a paper on comparing the Zimbabwe Lancaster Agreement with section 25 of the Constitution. Bulelwa Mabasa has represented various land claimant communities across the country in the context of land claims, land redistribution matters, evictions and land tenure-related disputes in various courts across South Africa. She also represents major mining companies on devising land reform strategies that are centred on community engagements, mining resettlements, mining and environmental litigation. Bulelwa Mabasa represents banks, corporates, property developers, renewable energy developers and landowners with a focus on land reform, administrative and constitutional law. She is an author and editor of *Land in South Africa: Contested Meanings and Nation-Formation* and *My Land Obsession.* She was the only attorney appointed by President Cyril Ramaphosa in a ten-member Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) in 2018. Through her written work and public advocacy, she has seen a number of her recommendations make their way into various policies and legislation. Bulelwa Mabasa is a recipient of Best Land Rights Lawyer and Best Woman in Thought-Leadership in 2021 and 2022 from Women in Law Awards. She is a regular writer and columnist for various publications. She holds a BA (Law) and postgraduate LLB from the University of Witwatersrand and Certificates in Mining and Prospecting, Land and Water and Energy Law from the Nelson Mandela Institute.

SINDISO MNISI WEEKS is an Associate Professor in the Legal Studies Program in the Political Science Department at the University of Massachusetts Amherst, USA, and Adjunct Associate Professor in Public Law at the University of Cape Town (UCT), South Africa. She previously worked in the Rural Women's Action-Research Programme at UCT, combining research, advocacy and policy work on women, property, governance, dispute management, and participation under customary law and the South African Constitution. Dr Mnisi Weeks is author of *Access to Justice and Human Security: Cultural Contradictions in Rural South Africa* (2018), co-author of *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2015; 2023), and a contributing author to South African Constitutional Law in Context (2021); *Family Law in South Africa* (2021) and the *Oxford Handbook on Law and Anthropology* (2021). Her current projects include authoring *Alter-Native Constitutionalism: Decolonising*

'Common' Law, Transforming Property in South Africa (forthcoming 2024), co-authoring *The Rule of Law in South Africa* with Heinz Klug and Sanele Sibanda (forthcoming 2024), and guest-editing a special issue of the *South African Journal on Human Rights* titled 'Lost in Translation: Justice and Rights in South Africa's Many Languages' (forthcoming 2024). She is a Co-Editor-in-Chief of the American Anthropological Association's PoLAR: *Political and Legal Anthropology Review*, on whose editorial board she previously served.

JUANITA M. PIENAAR is a Professor in Private Law and Vice-Dean: Research and Internationalisation at the Faculty of Law of Stellenbosch University and Extraordinary Professor in the Research Unit: Law, Justice and Sustainability at the Potchefstroom campus of the North West University, South Africa. She holds the following degrees: BIuris (cum laude), LLB, LLM and LLD – all from North West University. She has published widely in her specialist fields of property law, land reform and customary law, and has received various research-related awards, including the prestigious Stellenbosch University Chancellor's Award for Excellence in Research in 2016.

VISHWAS SATGAR is an Associate Professor of International Relations, editor of the *Democratic Marxism* series (Wits University Press) and principal investigator for Emancipatory Futures Studies in the Anthropocene at the University of the Witwatersrand, Johannesburg, South Africa. He is a veteran activist and co-founder of the South African Food Sovereignty Campaign and Climate Justice Charter Movement. He is the recipient of the 2023 mid-career award, from the Human Sciences Research Council and Universities of South Africa, for scholarship and activism that has contributed to social justice.

CHERRYL WALKER held a DSI/NRF South African Research Chair in the Sociology of Land, Environment and Sustainable Development at Stellenbosch University, South Africa, from 2016 until her retirement in March 2023. She has published extensively on land dispossession and land reform in South Africa, on gender and land rights in sub-Saharan Africa, on women's political mobilisation in twentieth-century South Africa and, most recently, on social–ecological change in South Africa's semi-arid Karoo region. She is a member of the Academy of Science of South Africa and has served on the editorial advisory boards of the *South*

African Journal of Science, *Journal of Peasant Studies* and *Journal of Southern African Studies*. Her career has straddled the academic, government and NGO sectors. Her pioneering research on the women's anti-pass campaign led to her first book, *Women and Resistance in South Africa* (1982, 1991) and an edited volume, *Women and Gender in Southern Africa to 1945* (1990). She was a founding member of the Association for Rural Advancement (AFRA), a land-rights NGO, core researcher in the Surplus People Project's investigation of forced removals under apartheid (1983) and co-author, with Laurine Platzky, of its single-volume synthesis, *The Surplus People* (1985). Between 1995 and 2000 she served on South Africa's Commission on Restitution of Land Rights as Regional Land Claims Commissioner for KwaZulu-Natal. From 2007 to 2009 she was a member of the Economic Commission for Africa's Expert Consultative Team which contributed to the African Union's 'Framework and Guidelines on Land Policy in Africa'. Other publications include *Landmarked: Land Claims and Land Restitution in South Africa* (2008); *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015, co-edited with Ben Cousins), and a special issue of the *Journal of Southern African Studies*, 'Karoo Futures: Astronomy in Place and Space' (2019, co-edited with Davide Chinigò and Saul Dubow).

SIPHOSETHU ZAZELA is a candidate attorney at Werksmans Attorneys, Sandton, Johannesburg, South Africa, and a fellow of the Young African Leadership Institute – Southern Africa Regional Leadership Centre. He holds a Bachelor of Arts (Law) and a Bachelor of Laws from the Nelson Mandela University. Originating from the Wild Coast of the Eastern Cape in the former Transkei, where rural land is highly sought after for its tourism and mineral resource currency, land law, land justice and land reform are conversations that have consistently formed part of Siphosethu Zazela's lived experience, and about which he is passionate. Having worked under the leadership of Bulelwa Mabasa, he has engaged with various aspects of land reform including land claims and settlement agreements, labour tenant claims and communal property associations. Siphosethu Zazela has also been intimately involved in mining community engagement and advising major corporations in the renewable energy space and their applications for long-term leases on state land. He seeks to use the unique skill set obtained from work done on the ground as well as skills and knowledge obtained from constant

engagement with constitutional law and land law in practice to influence policy reform and to contribute to fanning the embers of the conversation around land reform in South Africa.

OLAF ZENKER is a Professor of Social and Cultural Anthropology at Martin Luther University Halle-Wittenberg, Germany. Apart from Visiting Fellowships at the University of the Witwatersrand (South Africa), the University of South Africa/UNISA (South Africa), the University of Cambridge (UK), Harvard University (USA), the Stellenbosch Institute for Advanced Study/STIAS (South Africa) and the Käte Hamburger Kolleg Münster 'Legal Unity & Pluralism' (Germany), he held professorships at the University of Cologne (Germany), the Freie Universität Berlin (Germany) and the University of Fribourg (Switzerland). Focusing on South Africa, Northern Ireland and Germany, his research has dealt with politico-legal issues such as justice, social inequality, land reform, plural normative orders, modern statehood and bureaucracy, the rule of law, conflict and identity formations as well as socio-linguistics and anthropological ethico-onto-epistemologies. His book publications include *The Oxford Handbook of Law and Anthropology* (2022, with Marie-Claire Foblets, Mark Goodale and Maria Sapignoli); *The State and the Paradox of Customary Law in Africa* (2018, with Markus Hoehne); *South African Homelands as Frontiers: Apartheid's Loose Ends in the Postcolonial Era* (2017, with Steffen Jensen); *Transition and Justice: Negotiating the Terms of New Beginnings in Africa* (2015, with Gerhard Anders); *Irish/ness Is All around Us: Language Revivalism and the Culture of Ethnic Identity in Northern Ireland* (2013); and *Beyond Writing Culture: Current Intersections of Epistemologies and Representational Practices* (2010, with Karsten Kumoll). He is the convenor of the annual *ANTON WHILHEM AMO ~~LECTURES~~* at Martin Luther University Halle-Wittenberg and the editor of the eponymous open-access series (Universitätsverlag Halle-Wittenberg).

ACKNOWLEDGEMENTS

This volume is the outcome of a research project that Olaf Zenker proposed to the Stellenbosch Institute for Advanced Study (STIAS), based in Stellenbosch, South Africa, in 2018. At the time, the official process to review the 'property clause' of the South African Constitution had just started and was rapidly gathering pace. Aimed at potentially amending the Constitution to allow for 'expropriation without compensation', this process fanned heated public debates and led to a prolonged legislative process with what were, in many ways, uncertain results.

From the start, the research project planned to interrogate these developments in South African land reform and transformative constitutionalism critically, within a broader framework encompassing redistributive justice more generally. Zenker proposed facilitating a constructive exchange amongst specialists in the fields of property law, land reform and redistributive justice (initially Cherryl Walker, Zsa-Zsa Boggenpoel and James Ferguson), leading to an international STIAS conference, followed by an accessible publication of the results of this exchange. This was envisioned as offering both critical commentary on and policy input for the redistributive transformation that South Africa so urgently needs.

While carrying the project through from beginning to end, Zenker was joined by Cherryl Walker, followed by Zsa-Zsa Boggenpoel, as co-organisers of the conference. Our collaboration was facilitated by a STIAS group residency that was scheduled around the conference, which was finally able to take place, post-COVID, in February 2022. The three of us then constituted the editorial team that jointly took forward the book project thereafter.

The fact that this volume now exists, bringing this project to a fruitful conclusion, would not have been possible without the unwavering support of STIAS – notably its former and current directors, Hendrik Geyer and Edward Kirumira, as well as other STIAS personnel, especially Programme Manager Christoff Pauw, as well as Nel-Mari Loock,

Georgina Humphreys, Noloyiso Mtembu and Elize du Plessis. Many thanks to you all and to STIAS as an institution for your intellectual, logistical and financial support for this project, including the excellent conference and this open-access publication with Cambridge University Press.

In addition to the generous assistance of STIAS, further institutions and people contributed substantially to the success of this project and deserve our thanks. Both the conference and this publication were supported in part by the National Research Foundation (NRF) of South Africa (Grant Numbers 98765 and 64838); we are grateful for this assistance, while acknowledging that the opinions, findings, conclusions and recommendations expressed in this publication are those of the authors alone and that the NRF accepts no liability whatsoever in this regard. We would also like to thank Chantelle Louw for her assistance with the initial copy-editing of draft chapters for the manuscript.

In addition, Martin Luther University Halle-Wittenberg, Germany, provided a sabbatical semester 2021/2022, allowing Olaf Zenker to focus on the organisation and realisation of the conference in the context of the STIAS group residency as well as the substantial reviewing in preparation for this book. In the context of the conference 'After Law: Mobilization, Injustice, and Confrontation in the Post-Juristocratic Transition', co-organised with Mark Goodale at the University of Lausanne, Switzerland, in June 2022, Olaf Zenker profited from spirited discussions with Penelope Anthias, Matthew Canfield, Lynette Chua, Kamari Clarke, Andrea Freeman, Mark Goodale, Arzoo Osanloo, Nitzan Shoshan and Rachel Sieder on the conundrums of South African transformative constitutionalism, as exemplified in the recent debate on expropriation without compensation. More recently, a fellowship at Käte Hamburger Kolleg Münster 'Legal Unity & Diversity' facilitated the co-authored Introduction to this volume as well as the overall book manuscript. Over the years, Olaf Zenker also benefited greatly from many engaging exchanges with his Halle students in the context of seminars on colonial dispossession and post-colonial redress, conflicting property regimes under conditions of legal pluralism, and land justice in southern Africa.

Cherryl Walker's participation in the project was supported by the South African Research Chair in the Sociology of Land, Environment and Sustainable Development, located in the Department of Sociology and Social Anthropology at Stellenbosch University (DSI/NRF SARChI Grant 98765). She is grateful for the many opportunities the Chair has afforded her since 2016, including the camaraderie, collegiality and

intellectual commitments of 'Cosmopolitan Karoo' core team members and of research partners too numerous to list individually here.

Zsa-Zsa Boggenpoel's participation in the project was supported by the South African Research Chair in Property Law, located in the Law Faculty at Stellenbosch University (DSI/NRF SARChI Grant 64838). She is also grateful to the NRF for the opportunities the Research Chair has afforded her, including enriching collaboration with colleagues and postgraduate students.

Last but not least, this extended project would not have been possible without the ongoing support, patience and encouragement of our respective families. Julia, Nele and Max (Zenker); John, Zac and Cai Crumley (Walker); Blake, Zac and Matthew (Boggenpoel): our deep thanks to you all!

Olaf Zenker, Cherryl Walker & Zsa-Zsa Boggenpoel
Halle and Stellenbosch, May 2023

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LIST OF ABBREVIATIONS

AAA	Astronomy Advantage Area
AFRA	Association for Rural Advancement
ANC	African National Congress
ANCYL	ANC Youth League
BEE	black economic empowerment
BIG	basic income grant
CALS	Centre for Applied Legal Studies
CASAC	Council for the Advancement of the South African Constitution
CBO	community-based organisation
CC	Constitutional Court
CJC	Climate Justice Charter
CLARA	Communal Land Rights Act 11 of 2004
CODESA	Convention for a Democratic South Africa
CPA	Communal Property Association
CRC	Constitutional Review Committee
CTLDC	Commission on Traditional Leadership Disputes and Claims
DA	Democratic Alliance
DALRRD	Department of Agriculture, Land Reform and Rural Development
DLA	Department of Land Affairs
DMR	Department of Mineral Resources
DP	Democratic Party
DRDLR	Department of Rural Development and Land Reform
DSD	Department of Social Development
EFF	Economic Freedom Fighters
ESTA	Extension of Security of Tenure Act 62 of 1997
EWC	expropriation without compensation
GDP	gross domestic product
GEAR	Growth, Employment and Redistribution
HLP	High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change
IBMR	Itereleng Bakgatla Mineral Resources
ILO	International Labour Organization
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996

ITB	Ingonyama Trust Board
KRSDF	Karoo Regional Spatial Development Framework
KZN	KwaZulu-Natal
LAPC	Land and Agricultural Policy Centre
LCC	Land Claims Court
LRAD	Land Redistribution for Agricultural Development
LRC	Legal Resources Centre
LTA	Land Reform (Labour Tenants) Act 3 of 1996
LUPO	Land Use and Planning Ordinance 15 of 1985
MPNP	Multi-Party Negotiation Process
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEMA	National Environmental Management Act 107 of 1998
NGO	non-governmental organisation
NLC	National Land Committee
NP	National Party
NWGA	National Woolgrowers Association
OVG	Office of the Valuer-General
PALS	Partnership in Agri Land Solutions
PAPLRA	Presidential Advisory Panel on Land Reform and Agriculture
PFSA	Peoples Food Sovereignty Act, 2018
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
PLAAS	Institute for Poverty, Land and Agrarian Studies
PLAS	Proactive Land Acquisition Scheme
PPM	Pilanesberg Platinum Mines
PTO	Permission to Occupy
RDP	Reconstruction and Development Programme
RET	Radical Economic Transformation
RWM	Rural Women's Movement
SAFSC	South African Food Sovereignty Campaign
SANBI	South African National Biodiversity Institute
SASA	South African Sugar Association
SCA	Supreme Court of Appeal
SKA	Square Kilometre Array
SLAG	Settlement/Land Acquisition Grant
SLLDP	State Land Lease and Disposal Policy
STIAS	Stellenbosch Institute for Advanced Study
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
TKLA	Traditional and Khoisan Leadership Act 3 of 2019
TLGFA	Traditional Leadership and Governance Framework Act 41 of 2003
TRC	Truth and Reconciliation Commission
UCT	University of Cape Town
ULTRA	Upgrading of Land Tenure Rights Act 112 of 1991

INTRODUCTION

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Beyond Expropriation Without Compensation

Law, Land Reform and the Future of Redistributive Justice in South Africa

OLAF ZENKER AND CHERRYL WALKER

Against a backdrop of widespread concern that transformative constitutionalism in general and land reform in particular have fallen short of the goals of redistributive justice, public discourse in South Africa has been dominated in recent years by a debate about 'expropriation without compensation', or 'EWC'. The debate encompasses a range of overlapping political, policy and legal issues around the call to amend the property clause (s. 25) of the Constitution of the Republic of South Africa, 1996 (Constitution) to permit the expropriation of land by the state without financial compensation for the expropriated owner(s), with a view to expediting land reform. Following often heated public consultations and a prolonged legislative process that began in 2018, the National Assembly finally rejected the Constitution Eighteenth Amendment Bill (B18-2021) in December 2021. The politically, morally and emotionally charged issues surrounding the 'EWC debate' provide the starting point for this book. However, this edited collection goes further, to address the broader and, we argue, more compelling issues around transformative constitutionalism and how redistributive justice can best be advanced in South Africa.

The failure of the constitutional amendment to secure the required two-thirds majority in the Assembly in 2021 came as no surprise to many observers. The governing African National Congress (ANC) did not have a large enough majority to pass the Bill on its own, while opposition parties were vehemently opposed to the proposed text of the constitutional amendment, albeit for very different reasons. However, it was clear then and as we write now, in early 2023, that the underlying issues fuelling the politics of land redistribution will not be going away soon. Racially skewed land ownership remains both a symbol and a practical expression of deep-seated inequalities in South African society that are

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rooted in its past.[1] Because of this, 'land' continues to serve as a galvanising force in national and local politics. Public tensions and, at times, outright conflict over the inequitable land distribution, as well as major disagreements over how to give force to constitutional provisions aimed at redressing the inequities, have not eased. Furthermore, legislatively independent of but politically entwined with the failed attempt at constitutional amendment, a revised Expropriation Bill (B23-2020) is currently before Parliament. This Bill engages the specific circumstances in which 'nil compensation' may be considered 'just and equitable' but, unlike the requirements for a constitutional amendment, only a simple majority is required for the Bill to pass. It was approved by the National Assembly in September 2022 and forwarded to the National Council of Provinces, which issued a month-long call for public comment on 6 February 2023.[2] At the time of writing, the Bill had not yet been passed into law, but litigation can be expected to follow once this has happened.

Thus, despite its failure to clinch the parliamentary process in 2021, the call for expropriation without compensation remains an important object of analysis, as many of the chapters that follow show. Apart from the politics it has generated, it has surfaced critical issues about how a more just land distribution may be achieved and what the role of the courts and the law should be in bringing this about. However, as already indicated, this volume goes beyond a review of the morality and modalities of the 'EWC debate', to locate the issues this debate has raised within a more wide-ranging discussion of the scope and direction of redistributive measures in South Africa. Assembling leading experts from law, sociology, anthropology and agrarian studies, this volume brings cutting-edge debates around transformative property law, the challenges of land reform and how to advance redistributive justice into conversation with each other, to chart a pathway through the thicket of issues they raise towards a substantively more just society. Each of these domains – law, land reform and redistributive justice – has generated significant bodies of work in the scholarly and policy-oriented literature. However, much of this work has circulated in separate siloes when what is urgently

[1] As is illustrated by the cover image of the book, displaying an aerial photograph taken in 1985 showing the border between the then KwaNdebele bantustan and white South Africa, near the settlement of Katjebane in KwaNdebele. A glance at Google Earth shows that the spatialised patterns of inequality captured in 1985 persist around this settlement today.

[2] See https://pmg.org.za/call-for-comment/1244/ (accessed 8 March 2023).

needed is the cross-fertilisation of ideas and a more holistic approach to transformative change. Breaching the siloes and provoking these cross-disciplinary conversations are primary aims of this book.

With that in mind, this introductory chapter has three main objectives. The first is to contextualise the discussions in the individual chapters that follow by providing background on the Constitution Eighteenth Amendment Bill. The second is to review the overall structure and content of the book. The third is to use this recent phase in South Africa's difficult engagement with land reform in particular and transformative constitutionalism in general as an opportunity to look beyond the well-rehearsed critiques of both endeavours and to think more synergistically about what is needed to move to a more just society. Accordingly, our discussion is organised as follows. In the next section, we trace the history of the constitutional and political developments that led up to the tabling of the Constitution Eighteenth Amendment Bill and then present a summary account of the parliamentary amendment process itself. In section two, we begin with a brief account of the research project and conference that have led to this volume and then review the book's three-part structure and its individual chapters in relation to each other. While there are important points of convergence regarding the contested assemblage of law, land reform and redistributive justice, there are also divergent views to probe further. In section three, we respond to this challenge by addressing three interlinked issues that emerge from a transversal reading of the chapters, which we regard as central to any project of transformative change. These are, first, the respective roles of the state, popular politics and the private sector in driving this project; second, the relative importance to be attached to productive or redistributive measures as building blocks of change; and third, the scale of the structural changes that are needed.

While different dimensions of substantive justice are canvassed in these pages (social justice, restorative justice and climate justice, to name a few), ultimately, all our authors deal, in one way or the other, with questions around *distributive justice* (von Platz, 2020) – that is, with the principles and strategies that best achieve a fair distribution of the social and economic benefits and the burdens that society, in this case South Africa, affords its members. Given the still grossly inequitable allocation of resources and opportunities that persists in this country, the question of *redistribution* to achieve this fair distribution must be a prior concern. The issues that then arise revolve around the redistribution of what, to whom and how, in ways that are demonstrably just, hence *redistributive*

justice. Drawing on our synoptic overview of the chapters in this volume, we argue that securing redistributive justice in South Africa requires a hard-headed and multi-faceted understanding of transformational change, one that recognises the need for strategic choices and includes but goes beyond land.

Transformative Constitutionalism and Its Discontents

The Constitutional Negotiations

South Africa's 'negotiated revolution' (Waldmeir, 1997) in the early 1990s inaugurated a notable shift towards strong constitutionalism in a country where the rule of law had historically been used against the majority of its citizens. As Heinz Klug (one of the contributors to this volume) noted in 2000, an emphasis on constitutionalism characterised political developments globally in this period (Klug, 2000; see also Hirschl, 2004). After the apartheid government lifted its ban on the ANC in February 1990, representatives of the white minority and black majority entered into a volatile process of public political engagement for the first time since the 1950s. After an initial period of instability, punctuated by outbreaks of violence, bilateral negotiations in 1993 brought agreement on a transition to constitutional democracy that was to take place in two phases. The first involved the drafting of an 'interim' Constitution, under which South Africa's historic democratic elections would be held, and the second involved the drafting of the 'final' Constitution by the newly elected Parliament, constituted as a Constitutional Assembly.

The interim Constitution, Act 200 of 1993, came into force on 27 April 1994, followed on 10 May by the swearing-in of a government of national unity in which the ANC was the majority party, having won an overwhelming mandate in the epoch-marking elections of the previous month. This document included a 'property clause' (s. 28) in its Chapter on Fundamental Rights, but, indicative of how fraught the land issue had been in the preceding negotiations (Walker, 2008: 66), this clause did not refer explicitly to land reform. However, it did declare that the state could expropriate land for 'public purposes only', subject to the payment of 'just and equitable compensation' (s. 28(3)), and detailed a non-exclusive list of 'relevant factors' to be considered in this regard. These were 'the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those

affected and the interests of those affected' – considerations that have been the subject of intense legal and political scrutiny ever since. The interim Constitution also included a specific commitment to land restitution (s. 8(3)(b)) and the mechanisms for achieving this (ss. 121–23). These provisions gave rise to the Restitution of Land Rights Act 22 of 1994, under the terms of which a Commission on the Restitution of Land Rights took office in 1995 to process land claims arising from the unjust dispossession of land rights after 1913. This specific dimension of land reform was thus an outcome of the constitutional negotiations that preceded the democratic transition in April 1994. (For a detailed discussion, see inter alia Chaskalson, 1995; Klug, 2000: 124–34; Walker, 2008: 50–66.)

The second phase involved the duly elected Constitutional Assembly drafting the final Constitution, which was approved as the 'supreme law' of post-apartheid South Africa in December 1996 (s. 2). The 1996 Constitution includes an extensive Bill of Rights (ss. 7–39) that 'affirms the democratic values of human dignity, equality and freedom' and specifies a range of political and socio-economic rights that the state is required to 'respect, protect and fulfil' (s. 7(1), (2)). Included here is a responsibility to foster conditions 'which enable citizens to gain access to land on an equitable basis' (s. 25(5)). The Constitution also established an independent judiciary, headed by a Constitutional Court, and made provision for amendments that, in the case of the Bill of Rights, would require 'a supporting vote' of at least two-thirds of the members of the House of Assembly and six of the nine provinces (voting through the National Council of Provinces) (s. 74(2)).

The 1996 'Property Clause'

Section 25 of the Bill of Rights gives content to and extends the preliminary commitments around land reform contained in the interim Constitution. Given the commitment to socio-economic rights in the new order, it is not surprising that the mandate for a programme of land reform is now enshrined in the Bill of Rights. Significantly, section 25 seeks to strike a balance between the constitutional protection of property rights on the one hand and the right to redress for the race-based violations of past property rights on the other – a balancing act which many commentators have seen as a strategic or political compromise (Kariuki, 2007; Walker, 2008: 67; Dugard, 2018; Klug, 2018, 2000: 136; see also du Plessis, Chapter 3, this volume). Thus section 25(2)

establishes that property may be expropriated but only for a 'public purpose or in the public interest', in terms of 'law of general application' and subject to compensation 'either ... agreed to by those affected or decided ... by a court'. While this has been interpreted as unduly protective of old-order land rights, it is worth noting that this protection is of general applicability and thus also shields land rights gained after 1994 by formerly marginalised individuals or groups against overreach by the post-apartheid state.

Working with the language already crafted for the interim Constitution, subsection 25(3) of the 1996 property clause reaffirms the requirement for compensation to be 'just and equitable', reflecting an equitable balance between the public interest and the interests of those affected, and provides an open-ended list of factors for the determination of compensation that is 'just and equitable'. Expanding on the text already developed for the interim Constitution, the factors that are identified as relevant (but not exclusively so) are current use, the history of acquisition, market value, the history of state subsidies and the purpose of expropriation. Significantly, there are no directives as to the relative weighting of these considerations, which is left to the courts and future jurisprudence to determine. Section 25(4)–(9) then goes on to define explicit constitutional duties designed 'to bring about equitable access to all of South Africa's natural resources', the latter described as including but 'not limited to land'. However, land is the primary focus, with section 25(5)–(7) laying out the constitutional underpinnings of South Africa's post-apartheid land reform programme. Section 25(4)(a) defines 'the nation's commitment to land reform' as being in the public interest. Section 25(5) specifies the need to 'foster conditions to enable citizens to gain access to land on an equitable basis' – that is, institute a programme of *land redistribution* – while section 25(6) addresses the right to secure land tenure through statutory *tenure reform*. Section 25(7) restates the right to *land restitution* already provided for in the interim Constitution.

Finally, section 25(8) reaffirms the power of the state to take 'legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination' but adds a proviso to the effect that 'any departure from the provisions of this section is in accordance with' the limitations clause in the Constitution (s. 36(1)). The latter states that the rights laid out in the Bill of Rights may be limited only to the extent that such limitation 'is reasonable and justifiable in an open and democratic society based on human dignity, equality

and freedom' and after all relevant factors have been taken into account, including 'less restrictive means to achieve the purpose'. The implications of the Constitution's limitations clause have not featured prominently in analyses of land reform policy. However, it could potentially be significant in future litigation around the state's powers of expropriation, where it might be possible to argue in specific cases that 'less restrictive means' are available to achieve the goal of land reform – such as more strongly collectivising rather than unduly individualising the costs of redistributive reform through a transformational tax (see Klug, Chapter 11, this volume).

Making Good on the Constitutional Commitments: From Hope to Disillusionment

The 1996 Bill of Rights was envisioned as offering great possibilities for progressive struggles through 'transformative constitutionalism', which Karl Klare usefully defined as 'an enterprise of inducing large-scale social change through nonviolent political processes grounded in law' (Klare, 1998: 150). This entails 'a transformation vast enough to be inadequately captured by the phrase "reform", but something short of or different from "revolution" in any traditional sense of the word' (Klare, 1998: 150). While the 1996 Constitution precluded a direct and radical transfer of resources from the beneficiaries of the apartheid regime to those previously denied access, hopes were high in the first decade of democracy in South Africa that transformative constitutionalism would yet deliver tangible, measurable gains. (See Roux, 2013 for a review of constitutional jurisprudence between 1995 and 2005.)

As the new post-apartheid order took shape, the ANC government identified a range of plans and policies designed to address racialised inequalities and tackle widespread poverty. Development plans such as the 1994 Reconstruction and Development Programme (RDP) and its fiscally more conservative successor, the Growth, Employment and Redistribution strategy (GEAR), set various service delivery and infrastructural targets. These included a major rollout of low-income housing projects and the provision of free basic services such as water and electricity for households falling below certain income thresholds. (For a comprehensive discussion, see Palmer et al., 2017.) Social grants were progressively extended to vulnerable groups, including children, and have been credited with making a significant dent in absolute poverty – a 2015 assessment found it had 'enhanc[ed] the incomes of the poor',

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blunted poverty and 'lower[ed] economic risks for the most vulnerable in society' (Phaahla, 2015). Other means for shifting resources to the black majority included affirmative action through preferential state procurement and various black economic empowerment (BEE) policies (Klug, 2018: 470–71).

With regard to land reform, the RDP initially set an ambitious target of redistributing '30 per cent of agricultural land within the first five years' (ANC, 1994: 22), a time frame that was subsequently scaled back to 2014 (Walker, 2008: 200). In 1997, the newly established Department of Land Affairs (DLA) published its *White Paper on Land Policy*, which laid out a programme for taking forward the commitments made in the 1996 Constitution that many at the time regarded as eminently attainable, if overly modest. These included a ten-year time frame for the completion of the restitution process. Significantly, it was here that the ANC government's support for a market-based land redistribution programme was made clear, reflected in the White Paper's endorsement of a 'willing buyer, willing seller' model as the state's preferred mode of land acquisition (DLA, 1997: 9).

In 2008, the ANC government's 'Fifteen Year Review' lauded its achievements since 1994 thus: 'almost fifteen years into democracy, much has been done to eradicate the legacy of apartheid and build a new, just society'.[3] However, by the early 2010s, it was becoming increasingly clear that the momentum of the early years was not being maintained, and popular expectations of meaningful transformation were coming up short. In 2017, Palmer, Moodley and Parnell identified three distinct phases in the service delivery record of the post-apartheid state: a first phase of 'freedom and reorganisation' (1994–2000), a second phase of 'growth and implementation' (2001–2008) and a third phase since 2008, which they characterised in terms of a 'slowing economy, disheartened citizenry, and fragmenting ruling party' (Palmer et al., 2017: 13–14). The start of this last phase can be linked to the economic downturn in the wake of the global recession of 2008, but also significant was the ascension to the presidency of Jacob Zuma in 2009 (see below).

Palmer et al.'s (2017) third phase has extended beyond 2017, with many development indicators worsening since then. In 2018, Modiri (2018: 295) noted how 'much of the optimism of the early 1990s

[3] Media briefing notes on the launch of 'Towards a Fifteen Year Review', 1 October 2008, www.gcis.gov.za/content/newsroom/media-releases/media-briefings/launch-towards-fifteen-year-review (accessed 8 March 2023).

concerning the promises of new legal and political order has dissipated'. Unemployment has remained stubbornly high, while poverty levels, which had improved between 2006 and 2011, have worsened since 2015 (*BusinessTech*, 5 July 2021).[4] The provision of housing and basic services has failed to keep up with pent-up demand, amidst ongoing urbanisation and mounting complaints around shoddy service delivery and corruption involving tenders and procurement. In 2019 a Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) (2019: 12) reported that the combined achievements of state-led land reform (covering both land restitution and land redistribution) had led to the redistribution to black beneficiaries of less than 10 per cent of the area devoted to commercial agriculture in South Africa. Meanwhile, secure tenure has remained elusive for most South Africans, as Sindiso Mnisi Weeks (Chapter 7, this volume) shows. Since Palmer et al.'s assessment, the electricity crisis has also escalated dramatically, resulting in a corrosive programme of scheduled blackouts that is crippling small and medium businesses and hobbling the economy overall (see Stoddard, 2023).

Inextricably entangled with these policy failures and shortcomings has been escalating corruption in both the state and private sectors. Evidence of this began to mount during the presidency of Jacob Zuma (Myburgh, 2017; Chipkin & Swilling, 2018; Renwick, 2018). Commonly referred to as 'state capture', after the 'State of Capture' report that then Public Protector Thuli Madonsela (a participant in the conference leading to this volume, see below) published in October 2016 (Office of the Public Protector, 2016), these revelations marked the beginning of the end of President Zuma's term in office. 'State capture' has involved an extensive network of politicians and state officials who, along with their national and international business partners, have engaged in 'the manipulation of state organs for self-enrichment purposes' (Ngwane, 2019: 229). These developments have been accompanied by a profoundly destabilising assault on the rule of law and the erosion of the capacity of state institutions with critical responsibilities to run transport, communications, health, energy and other public services.

While Cyril Ramaphosa, South African president since early 2018, has attempted to repair the state institutions that were 'hollowed out' under his predecessor, he himself has been embroiled in a scandal involving the

[4] https://businesstech.co.za/news/finance/503297/south-africans-have-become-poorer-over-the-last-6-years-government/ (accessed 8 March 2023).

theft of a large sum of money from his game farm.[5] Although he was re-elected party president in December 2022, this scandal has cast further doubt over the readiness of the party leadership to truly address 'state capture and corruption' as one of the critical issues of the ANC's present renewal programme, as its 55th National Conference Declaration proclaims (ANC, 2023). Perhaps more damaging, the mounting evidence of corruption involving members of the ruling elite undermines popular trust in state institutions and the possibilities of transformative constitutionalism. This helps explain the increase in angry and often violent community protests, which Runciman has argued are not solely about 'service delivery' but are also 'an expression of wider concern about the quality of South African democracy' (Runciman, 2016: 422). It is in this broader context of 'anti-constitutional populism' (Krygier et al., 2022), from both above and below, that the call for expropriation without compensation should be situated (Zenker, in press).

Expropriation Without Compensation

The idea of expropriating land for redistributive purposes without the payment of compensation came to prominence as a political rallying call in 2013/14 under the banner of the Economic Freedom Fighters (EFF). The EFF is a political party that was formed by a group that broke away from the ANC under the leadership of Julius Malema, the controversial but charismatic former president of the ANC Youth League (ANCYL). He had been expelled from the ANC in 2012 for 'bringing the movement into disrepute' as a result of various transgressions of ANC policies and protocols (Hanekom, 2012).[6] The EFF rapidly established a reputation for populist performative politics (Mbete, 2015). From its start, it adopted '[e]xpropriation of South Africa's land without compensation for equal redistribution' as one of its 'seven non-negotiable cardinal pillars' (EFF, 2019: 9).[7] Since then it has used this 'pillar' to position itself as the true champion of poor black people (Roux, 2022: 112–18).

[5] At the time of writing this matter had not yet been finally resolved; see www.news24.com/news24/politics/political-parties/phala-phala-raises-legitimate-suspicions-about-money-laundering-says-thabo-mbeki-20230317 (accessed 8 March 2023).

[6] See www.politicsweb.co.za/politics/julius-malema-expelled-from-the-anc–ndc (accessed 8 March 2023).

[7] The EFF Constitution was first adopted by the First National People's Assembly in Mangaung, Bloemfontein (16 December 2014). See effonline.org/wp-content/uploads/2020/05/FINAL-EFF-CONSTITUTION-02.03.pdf (accessed 8 March 2023).

Initially vehemently opposed to Zuma, the party has aligned itself with the former president and his causes since the latter's ouster from power.

The EWC call gained a following within the ANC in the context of growing internal divisions which came to a head at the party's 54th National Conference in December 2017. The organisation was deeply divided over who to elect as its next president and, by extension (given the ANC majority in Parliament), the next president of South Africa. Jacob Zuma, by then deeply mired in accusations and litigation around state capture, was serving his second term as president and therefore was ineligible to stand for re-election. His supporters, who were increasingly self-styling themselves in left-populist terms around calls for 'Radical Economic Transformation' (RET) (echoing some EFF demands), supported the candidacy of his ex-wife, Nkosazana Dlamini-Zuma. A larger and more moderate faction rallied behind Cyril Ramaphosa, then deputy president of both the ANC and South Africa. In this murky contest, the issue of land emerged as a powerful signifier of radical change that the RET grouping used to good effect. Although Ramaphosa won the election for president by a slim margin, intense in-house negotiations saw the call for 'expropriation of land without compensation' approved as ANC policy, allegedly also by a narrow margin (on this see Merten, 2017.) However, the call was qualified by the addition of several caveats intended to ensure that its adoption would not threaten the agricultural sector, food security or economic growth and job creation (ANC, 2017: 11). It was widely perceived at the time that this compromise amounted to a narrow victory for the RET faction, with Ramaphosa himself garnering only conditional support.

Capitalising on the ANC's 2017 resolution, the EFF then tabled a motion in Parliament to open the way for a review of the property clause in the Constitution, with the aim of explicitly introducing the possibility of the expropriation of land without compensation. On 27 February 2018, the National Assembly passed a significantly softened resolution that included the caveats relating to agricultural production, food security and economic investment that the ANC had approved at its 2017 conference. The National Assembly also established a parliamentary 'Constitutional Review Committee' to investigate the matter further. This Committee spent much of 2018 in a public consultation process that garnered a huge response. At a series of countrywide public hearings, the vast majority of people in attendance expressed support for a constitutional amendment. In addition, the Committee received over 600,000 written submissions, a response that was exceeded only by the public

consultations organised by the Constitutional Assembly in 1995 (Hall, Chapter 6, this volume). In contrast to the public meetings, the overwhelming majority of written submissions rejected amending the Constitution. To a large extent, this split in public opinion reflected South Africa's racial divisions, with those on the side of change overwhelmingly black and white South Africans in favour of retaining the status quo. However, black public opinion on the matter was not monolithic, with class differences playing a significant role (Hall, Chapter 6, this volume).

The call for EWC clearly excited the popular imagination and polarised public opinion. Expert opinions diverged regarding both the utility and 'dangers' (Van Staden, 2021) of the change and whether it was necessary to amend the Constitution at all, given a growing consensus in the legal and policy community that, 'properly interpreted, the Constitution does not prohibit the expropriation of land without compensation' (Ngcukaitobi, 2021: 173). (On this, see also Klug, 2018; Roux, 2022; and Chapters 1 by Boggenpoel and 3 by Du Plessis, this volume.) Much technical discussion focused on the question of whether the peculiar wording 'expropriation *without* compensation' contradicted the constitutional obligation to provide 'just and equitable compensation'. In response, proposals favouring the value of an amendment shifted towards speaking about 'nil' compensation, to acknowledge the constitutional requirement around compensation while indicating that there could be instances where giving the quantum a value of nil would meet the criteria of 'just and equitable'. Instances that began to be canvassed (subsequently taken up in the Expropriation Bill) included unused private or state-owned land, abandoned land, land worth less than the direct state investment in it as well as land posing a health, safety or physical risk.

When the Constitutional Review Committee reported to the National Assembly in November 2018, it supported an amendment to the Constitution that would 'make explicit that which is implicit', namely that expropriation without compensation is permissible within the existing constitutional order. On 4 December 2018 the National Assembly concurred (by a vote of 209 for and 91 against) and accordingly framed a mandate for an 'Ad Hoc Committee' to develop the relevant legislation. This Committee was established in February 2019 but, because of the magnitude of the task, compounded by the outbreak of the COVID-19 pandemic and the associated national lockdown shortly thereafter, it only tabled its final report in

September 2021. In the meantime, in May 2019, PAPLRA presented a majority report which, inter alia, gave 'guidance on the possible ways in which Section 25 may be amended in order to make provision for zero compensation in certain instances' (PAPLRA, 2019: vi), with two members, both white, presenting a minority report that opposed this outcome.

The Ad Hoc Committee's final report in September 2021 officially introduced the Constitution Eighteenth Amendment Bill to Parliament. The preamble to the Bill identified two main purposes: 'to provide that where land and any improvements . . . are expropriated for the purposes of land reform, the amount of compensation payable may be nil' and to provide 'the circumstances where the amount of compensation is nil'. A related purpose was to 'enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis'. In this way, the extensive public participation around the principle of a possible amendment in 2018 was separated from the more technical question of the precise wording of such a constitutional amendment.

The development of this Bill dominated proceedings after 2019. Most opposition parties, such as the Democratic Alliance (DA), the mostly KwaZulu-based Inkatha Freedom Party, the Freedom Front Plus, as well as the African Christian Democratic Party, regarded expropriation without compensation as unconstitutional and opposed the amendment. The EFF rejected the Bill's framing, arguing for a more radical amendment that would permit a more broad-based programme of expropriation, leading to permanent state custodianship of *all* land – effectively nationalisation. Its differences with the ANC crystallised around the issue of state custodianship of land. While the EFF saw this as the prize, the ANC envisioned it as a 'temporary' stage between the acquisition and redistribution of land (*Daily Maverick*, 31 May 2021). Riddled with factional infighting, the latter did not espouse a coherent position, instead combining some 'Constitution-blaming with investor-reassuring' in a way that Ruth Hall (Chapter 6, this volume) aptly describes as 'talk EFF, walk DA'. Ultimately, its official position was to limit expropriation without compensation to specific circumstances, without abandoning the principle of private land ownership.

When attempts to reach a compromise around this issue failed in July 2021, the EFF withdrew its support for the Amendment Bill, effectively condemning it to fall short of the constitutional threshold of a two-thirds majority in Parliament. On 7 December 2021, the final vote in the National Assembly was 204 votes in favour of the amendment and 145

against, meaning that it was not carried and the status quo, with all its different interpretations, remained (*Daily Maverick*, 7 December 2021).

Exploring Property Law, Land Reform and the Future of Redistributive Justice in South Africa

The Project on 'Compensation through Expropriation Without Compensation'

In 2021, Advocate Ngcukaitobi asked if 'the project of expropriation without compensation was ... worth it' in relation to the 'emotional, intellectual and financial investments' involved (Ngcukaitobi, 2021: 212). The question, as Ngcukaitobi himself acknowledged, warrants more than a simple yes/no answer. On the one hand, as several of the contributions to this volume attest, the intense engagements with legal texts and practice clarified some important juridical issues, in some cases even beyond the question of compensation for expropriation. These include certain technicalities of South African property law, as well as the actual and potential usages to which the law can be put, the potential spectrum of compensation awards below market value that are already possible in terms of section 25(3), the many reasons why 'market value' has largely determined the quantum of compensation awards to date, and the possibilities for further legal innovation with regard to 'property' more generally. On the other hand, the debate consumed significant amounts of time, money and energy, without improving the property clause or building consensus around what 'just and equitable' land reform should involve – to the contrary, it sharpened divisions. Few, if any, legal and land reform experts see expropriation without compensation as the silver bullet for land reform that its advocates have proclaimed it to be. Thus, despite favouring the idea of a constitutional amendment, PAPLRA (2019: 72) noted that the circumstances justifying nil compensation – though not of awarding compensation below market value – would actually be very limited within the constitutional order.

Noting these limitations, a further question arises: has the EWC debate occluded more than it has revealed? Even if one refrains from a cynical reading of this debate as primarily driven by factional infighting within the ANC (Roux, 2022: 133), or an attempt to distract from government failures, or an example of opportunistic politicking by the EFF, there is still the concern that the excessive preoccupation with this one subsection of the property clause has diverted attention from the much larger

and more significant challenges facing state-driven land reform and the quest for redistributive justice. This intuition was the impetus behind a research project on 'Compensation through Expropriation Without Compensation? Land Reform and the Future of Redistributive Justice in South Africa' that Olaf Zenker successfully proposed to the Stellenbosch Institute for Advanced Study (STIAS) in 2018 (STIAS, 2022a). As he envisaged it then, the primary aims of this project were to 'critically interrogate new developments in South African land reform' and, through a 'constructive exchange' among experts, take forward the discussion on how to advance redistributive justice in South Africa into the future more comprehensively.

In taking the STIAS project forward, Zenker invited three scholars with expertise in the three domains identified as critical focal areas (property law, land reform and redistributive justice) to join him, first in a residency at STIAS and then as presenters and discussants at the international conference that was to conclude the project. In this way, Zsa-Zsa Boggenpoel, Cherryl Walker and James Ferguson joined the project. After a series of delays resulting from the COVID-19 pandemic, the conference took place at STIAS over two days in February 2022 (STIAS, 2022b). The revised timing meant it was possible to reflect on the EWC debate *after* it had formally ended with the failure of the constitutional amendment in Parliament. This volume is an outcome of the stimulating discussions at the conference, as well as the productive exchanges among the project participants, editors and authors that preceded and have followed it.

Chapter Overview

Although this volume is framed around the multi-thematic and trans-disciplinary conversations that defined the original project, it is divided into three parts, each covering one of the three focal areas of property law, land reform and redistributive justice. Individual chapters are thus clustered in these parts in terms of their primary concerns. This structure worked well at the 2022 STIAS conference, and we have retained it here for two main reasons. The first is that we want to ensure that the important domain-specific issues and refinements that individual chapters raise are not neglected but get the attention they deserve. The second is that this sequencing facilitates the progression from a focus on the property clause in the EWC debate to an increasingly broad understanding of redistributive justice that, we argue, should guide commitments to

transformative change. For these reasons, the discussion of the individual chapters that follow is also organised thematically, rather than strictly sequentially in terms of the particular order of the chapters within the three parts.

Part I focuses on 'The Rights and Wrongs of South African Property Law'. The five chapters in this cluster are all concerned with the history and contemporary state of property law in South Africa, as well as the possibilities for transforming the current property regime in order to secure a more egalitarian and just society. The constitutional amendment, in and of itself, is not the most important matter of concern, although both Zsa-Zsa Boggenpoel (Chapter 1) and Elmien du Plessis (Chapter 3) concur that it is not legally necessary to amend section 25 of the Constitution to drive progressive land reform. Instead, the five authors in Part I engage more broadly with the scope and limitations of existing jurisprudence and overarching legal paradigms, which the EWC debate has helped bring into focus.

If, as now seems widely agreed, the Constitution has allowed compensation awards below market value all along (even reaching 'nil' under certain circumstances), then a question that must arise is: why have the courts generally based their determination of 'just and equitable' compensation on the presumption that market value sets the standard? In answering this question, Boggenpoel points to broader issues around legal culture and the power of precedent (dating back to before 1994). Part of the answer lies in a lack of political will and the inherently conservative tendency underlying the 'rights paradigm', as Van der Walt (2009: 221) has noted. However, Boggenpoel also shows that, in practice, courts find it difficult to translate general lists of relevant circumstances into specific awards. This calls, therefore, for a more principled approach to when 'nil compensation' might be appropriate, along with concrete guidelines and a typology of situations and their corresponding compensation awards.

A related concern is the extent to which the transformative thrust many analysts regard as already embodied in the property clause has become a lived reality, and what factors may have circumscribed its transformative potential in actual cases. Analysing two very different outcomes in legal proceedings around the Extension of Security of Tenure Act 62 of 1997, both of which involved vulnerable occupiers of land, Juanita Pienaar (Chapter 4) concludes that securing non-traditional forms of ownership and property rights within a single system of law, which is weighted towards registered property rights, remains a great

challenge. This is because of the persistence of a rights paradigm that favours formal rights, despite the enactment of progressive legislation and an emerging jurisprudence around informal rights. The question of how to reimagine the formal system of property rights and extend the legal security and protection that it affords its beneficiaries to alternative forms of tenure on an equal footing also lies at the heart of Chapter 2 by Bulelwa Mabasa,[8] Thomas Karberg and Siphosethu Zazela. However, they call for an end to what they regard as the present dualistic property regime, under which the informal land sector is afforded lesser legal protection. The authors argue that the foundational values and principles that inform what is referred to as 'property' in section 25 of the Constitution serve to perpetuate the exclusion of the majority of South Africans from the 'property rights' system. They thus question whether land reform objectives are attainable without paying close attention to the understanding of 'property'.

Taking an equally critical view of the current reach of property law, Danie Brand (Chapter 5) challenges readers to break free from the seemingly radical but ultimately limiting assumption that absolute control over land must vest somewhere, whether with private owners or the state. This, he argues, still underlies the arguments for expropriation without compensation and state custodianship. From this perspective, genuinely transformative change requires a true democratisation of property and a legal system which recognises and mediates the multiple and overlapping interests and concerns vested in individual pieces of land. This raises the question of what notion of justice (transitional, restorative, retributive or transformative) should infuse the interpretation of 'just and equitable compensation'. Tracing the twists and turns in the making of the property clause in the 1990s, Du Plessis (Chapter 3) concludes by calling for a transformative notion of justice that places the need to address deep-seated social inequality at the heart of the interpretation of section 25 of the Constitution. This argument points towards concerns that go beyond the confines of property law proper and thus takes us to the successively broader foci of Parts II and III.

Part II reflects on the 'Potentials and Pitfalls of South African Land Reform' against the backdrop of the EWC debate. Here four chapters address a number of important themes, some more directly concerned with the issue of 'expropriation without compensation', others drawing

[8] A member of PAPLRA.

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attention to problems with the land reform programme that the preoccupation with the constitutional amendment has pushed to one side. William Beinart (Chapter 8) focuses specifically on developments in the agricultural sector, bringing to the fore perspectives that are often overshadowed in the debate on land reform in which critiques of large-scale agriculture as hostile to small-scale farmers and the environment are common (Jara, 2021). By contrast, prospects for productive partnerships among farmers at different scales feature prominently in Beinart's contribution. Proposing a 'pragmatic approach' that 'prioritises production, rural livelihoods and partnerships, together with gradual redistribution of land', Beinart draws attention to cases where partnerships are bearing fruit. His chapter highlights conditions under which relative successes of commercial farming and intensified smallholder agriculture are possible, despite policy uncertainties and climate challenges. (For a critique of commercial farming in principle, see Satgar, Chapter 10, this volume.)

The chapters by Hall (Chapter 6) and Mnisi Weeks (Chapter 7) in Part II deal directly with issues occluded by the recent EWC debate that could, if properly addressed, have profoundly transformative consequences on the land dispensation. Expounding the position that since its inception the property clause has provided a constitutional mandate for transformation, Hall (who also served on PAPLRA) offers a critical review of the EWC debate. She argues that an unfortunate consequence of the exclusive focus on the power of the state to acquire property is that its constitutional counterpoint, an enforceable right of equitable access to land that is also set out in section 25(5) of the 1996 property clause, has not received the attention it deserves. Yet this section, she argues, offers significant promise for a renewed emancipatory politics of land that is grounded in real struggles.

In Chapter 7, Mnisi Weeks focuses on a large category of people whose tenure remains insecure: rural South Africans, women in particular, who live on communal land in the former bantustans under the rule of traditional leaders. She shows how the persistent insecurity of tenure and misappropriation of land rights that they suffer are less a consequence of the law and more a result of the ANC's turn towards 'tradition' in its approach to governance in these areas. This has resulted in an interpretation of customary law that entrenches the undemocratic powers of traditional leaders at the expense of rural people and their land rights. Overshadowed by the one-sided public debate on expropriation without compensation, these undemocratic rural dynamics continue to thrive.

In Chapter 9, Cherryl Walker uses the semi-arid Karoo region as a vantage point from which to evaluate the limitations of the emphasis on land redistribution for agricultural production that continues to dominate policy-political debates on land reform. The Karoo, which encompasses nearly a third of South Africa's land area but only 2 per cent of the population, is clearly not typical of the country as a whole, but it is currently seeing major land-use changes that deserve wider attention. These highlight the need to rethink the purpose and content of land reform under conditions of social and ecological change and to direct more attention to other issues of equal, if not greater, concern in advancing social and environmental justice. These include the crisis of social reproduction in the Karoo's small towns.

With the ground thus prepared, the three chapters making up Part III ('Imagining Alternative Futures of Redistributive Justice in South Africa') move the discussion beyond property law and land to address broader possibilities for radical transformation. Vishwas Satgar (Chapter 10) argues for a profound societal transformation that extends the discussion of justice to encompass the call for climate justice as well. His chapter foregrounds a radical critique of both state- and market-centric approaches that are neither socially just nor ecologically sustainable. He thus calls for a new approach to land redistribution and to food systems thinking, which he locates in the food sovereignty commons system. This involves systemic democratic reform and a deep and just transition based on a degrowth commons system. Exiting from a globalised industrial food system that is premised on the destruction of nature, Satgar insists, is essential to bring about land, climate and ecological justice more generally.

The final two chapters shift gear yet again. Here the production of unequal wealth under capitalism is both the starting point for and the actual means to a strongly interventionist moral politics of equalising the distribution of resources. For Klug (Chapter 11), the fact that South Africa remains one of the most unequal societies in the world, while market-led policies have failed to transform land inequities, offers clear evidence that more interventionist steps are needed to leverage redistributive justice. Employing a comparative analysis of wealth taxes that have been successful in several countries not generally known for radical political reforms, including former West Germany, Klug makes a nuanced case for introducing a transformational tax in South Africa. This could simultaneously address the legacies of apartheid and provide the basis for a new non-racial social

contract, thereby furthering the promise of South Africa's transformative constitutionalism.

James Ferguson (Chapter 12) also focuses on the nation's wealth. He returns to a critique of the persistent idea that the central issue for South Africa's redistribution is or should be 'the land'. In place of this, he proposes a reconceptualisation of the nation's wealth in terms of the overall social product, to which all citizens are entitled through their (landed) politics of belonging, an entitlement he describes as a 'rightful share'. Under current conditions, he argues, this entitlement can best be expressed through the institution of a basic income grant (BIG). Building on earlier work (Ferguson, 2013a, 2013b, 2015), he argues that this would combine the righteous demand for ownership of a share in one's own country with a politically pragmatic and economically well-conceived campaign of income distribution.

Recentring Redistributive Justice

Our chapter overview points to several interlocking arguments that combine to situate the constitutional commitment to land redistribution within a broader conception of redistributive justice, which includes but is not defined by land reform. Recognising redistributive justice as both the descriptive focus and normative centre of this volume helps identify important points of convergence but also disagreement among our contributors around how best to advance the transformative changes they all wish to see. In this section, we note three sets of issues that we regard as particularly in need of further analysis and refinement, if the shared commitment to redistributive justice is to be advanced. Space precludes a full discussion, but this is where key decisions need to be made around not simply the individual building blocks of redistributive justice but, more significantly, how best they can be fitted together.

The Role of the State, Popular Politics and the Private Sector

The first set of issues centres on the relative roles of the state, popular politics and the private sector in setting the agenda and giving effect to commitments to redistributive justice in actual interventions on the ground. Although our contributors offer differently weighted positions to consider, virtually all ascribe an important role to the state, whether it is to advance the socio-economic rights set out in the Bill of Rights in the Constitution (including with regard to land reform), or to

champion a new social compact, or to put in place the legislation that will institute a transformational wealth tax or BIG. Not only is the state required to act under the Constitution – that is, it has a democratically sanctioned mandate to do so – but it is also the institution that is most comprehensively resourced to implement the interventions that are needed at scale.

Yet unpacking 'the state' reveals important differences in terms of the responsibilities of its different branches (legislative, judicial, executive) and spheres (national, provincial, local). While initiatives aimed at strengthening or overhauling the laws of the land involve the legislature, demands for more progressive jurisprudence are addressed towards the judiciary in the first instance, although they may also involve the executive. At the same time, the sobering lessons of the past decade highlight the dangers of not only weak state capacity to deliver on its responsibilities but also, more insidiously, of corruption in diverting key state institutions to service private accumulation. What is essential, therefore, is a sufficiently capable state that is committed to the rule of law and is bound by the principles of transparency, accountability and integrity in the exercise of its powers. To the extent that this does not exist, the task of building or restoring such capacity must go hand in hand with the implementation of any redistributive programme of government.

Also implicit across all chapters is the recognition that popular politics has a critical role to play in bringing about transformative change. However, here too there are important differences that need to be evaluated. In much advocacy around public participation to hold those in power to account, the idea of 'civil society' is commonly invoked to describe the social forces that must be mobilised. Here 'third' or 'voluntary sector' institutions such as non-governmental organisations, community-based organisations, organised labour, an independent media and, potentially, academia are generally, albeit to varying degrees, seen as important. Yet the notion of 'civil society' may be conceptually constraining in the South African context, laden as it is with the accumulated freight of European intellectual history since the eighteenth century (Hann & Dunn, 1996). It thus does not do justice to the recent political history of South Africa, for which 'popular politics' may be a more productive term (Landau, 2010). How to mobilise popular politics and harness that energy effectively within grassroots struggles by social movements, 'insurgent citizens' (Brown, 2015) and 'commoners' (Satgar, Chapter 10, this volume), so as to drive systemic change beyond the limitations of the state, are crucially important questions with which the

chapters by Hall (Chapter 6), Mnisi Weeks (Chapter 7) and Satgar in particular grapple.

While there is broad consensus among contributors that both the state and popular politics are important, the role of the private sector is a more contested issue. Thus, Satgar locates mounting distress around the accelerating ecological crisis within a fundamental critique of global capitalism, which translates into deep scepticism about the credentials of the private sector in any project of genuinely transformative change. This speaks to major concerns (echoing some voices in the EWC debate) that because the private sector is motivated by self-interest, it cannot be trusted to bring about structural change: its focus on profits ultimately seems to increase rather than diminish inequalities. In light of South Africa's poor experience with market-led reforms – from the 'willing buyer, willing seller' approach to land redistribution to corporate flirtations with BEE that only benefit the well-connected few – several authors emphasise the need for more direct state intervention (e.g. Hall, Chapter 6, Mnisi Weeks, Chapter 7, Klug, Chapter 11 and Ferguson, Chapter 12) or for popular politics to drive meaningful change (e.g. Satgar, Chapter 10). However, a strong case can also be made for the significant contribution that commercial agriculture makes to food production and rural livelihoods and for its potential role within a more fairly distributed rural economy (e.g. Beinart, Chapter 8). Rather than advocating one-size-fits-all solutions, we argue that fine-grained, evidence-based analyses are needed for specific sectors and particular concerns, through which the transformative potential for combining public, popular and private sector forces can be evaluated situationally and strategically.

The Building Blocks of Transformative Change: Production and Redistributive Measures

Envisioning the different roles of the state, popular politics and the private sector thus emerges as a key transversal concern in plotting out the path to redistributive justice in South Africa. Closely related to this question of who should be advancing the cause of redistributive justice is the second concern, which deals with the prime objects to pursue in a politics organised around transformative change. Here we focus specifically on the complex relationship between production and forms of (re)distribution, both material and symbolic, as the building blocks of redistributive justice and means for transformative change.

Given that the controversies around 'expropriation without compensation' have focused on how the state can best acquire land for redistribution, it might appear that redistribution rather than production is the primary concern. However, the two are not so easily disentangled. In fact, as Ferguson (among others) has argued, in South Africa 'the land question' is widely equated with the agrarian question, which concerns 'how farming is, or ought to be, organized, and with what role for peasants or other small agricultural producers' (Ferguson, 2013b: 166). In other words, the redistribution of land is often presented as in essence a way of transforming access to and control of the means of agrarian production. The concern with land's productive potential certainly animates several chapters in this volume. These range from discussions about how to improve smallholder production through possible collaborations and partnerships with (white) commercial farming (Beinart, Chapter 8) to demands for a radical transformation of economy and society in terms of a food sovereignty commons system (Satgar, Chapter 10).

Yet, as Walker has pointed out, South Africa is no longer the agrarian country it was at the beginning of the twentieth century (Walker, 2015: 233). Furthermore, as she argues in Chapter 9 on land reform and the Karoo, in a time of far-reaching social and ecological change, our thinking about redistributive justice needs to engage with new land uses and different productive values – for instance, those associated with the production of renewable energy or, in the case of South Africa's major investment in the Square Kilometre Array radio telescope, the advancement of basic science. Moreover, consumptive values can be attached to land, as in the case of the profit made from renting or selling restored land or substituting financial compensation for claimants in lieu of the restoration of land under the restitution programme. Here it is worth recalling that the vast majority of settled restitution cases have been resolved through financial compensation rather than the actual transfer of land (Zenker, 2018: 248).

At the same time, the non-productive and productive meanings and uses of land cannot be neatly separated out, as several chapters reveal (e.g. Mnisi Weeks, Chapter 7 and Walker, Chapter 9). Clearly, land redistribution functions also as a means of redress for historical injustices, as an acknowledgement of valued identities, place-making and belonging, and as a modality for repossessing one's country at large. As Zenker (2022) argues, a landed politics of belonging links up in multiple ways with the politics of individual and collective belongings

and rightful (re)distribution. Through a politics of belonging (that has been profoundly reshaped by the history of land reform since the early 1990s), specific pieces of land can also acquire a distributive value as a 'means of (re)distribution' that enables multiple networks, through which resource allocation can flow to people via wages, remittances, social grants and care, and information sharing can happen. These transactions are all rooted in place (Zenker, 2018).

Beyond land as one important, multifariously productive and (re)distributive plank within a larger framework of redistributive justice, other possibilities for (re)distributive transformation also exist and should be put to productive use. Redistributive potentials may emerge from new social compacting that engages employees, local communities and ordinary citizens in much more profound and meaningful ways than has recently been the case (Madonsela, 2022) or result from a transformational tax that substantially (re)capitalises the state over a prolonged period of time for multiple redistributive purposes (Klug, Chapter 11, this volume). There is also the challenge to rethink both the enduring basis of the nation's wealth and effective ways to distribute it fairly. As Ferguson (Chapter 12) argues, conceiving all citizens as rightful shareholders of the nation's social product through the payment of basic income grants may lead to a much more comprehensive new politics of distribution.

The Scale of Transformative Change

As this discussion suggests, different objects of redistributive justice may be mobilised simultaneously to positive effect. Nevertheless, there are tensions between the focus on incremental reforms in some chapters and the conviction in others that nothing short of radical transformation and system change will work. This leads to the third concern that traverses the contributions to this volume, namely the scale of the structural changes needed to bring about truly transformative change.

In acknowledging that there are tensions around scale, we do not mean to imply that some contributors are content with proposing limited improvements to the status quo, whereas others aspire to deeper and more meaningful change. Rather, what needs careful consideration is the potential for cumulative effects and an assessment of the viability of the proposed interventions over time. Small steps towards principled reform can aggregate and thereby result in significantly comprehensive transformations in key areas of society. An example is Boggenpoel's proposal

for legal guidelines to inform the adjudication of compensation awards in land reform cases, which could advance the commitment in the Constitution to 'bring about equitable access to all South Africa's natural resources' (s. 25(4)(a)). More far-reaching proposals that can advance redistributive justice within the current political order include Hall's call to utilise the under-developed constitutional right to land languishing within the property clause, as well as Mnisi Weeks' (Chapter 7), argument for reining in traditional leaders' disproportionate powers over land and people in former bantustan areas. Beyond land reform, the transformational tax (Klug, Chapter 11) and basic income grant (Ferguson, Chapter 12) could both be harnessed in the service of reversing the inequitable distribution of wealth.

Yet it is also important to engage further with the contributions that insist a more substantial departure from the status quo is needed. A case in point is Brand's analysis (Chapter 5), which argues that property law in South Africa requires a fundamental revisioning or 'democratisation', to go beyond the prevailing rights paradigm that vests absolute control over land in either private ownership or the state; only this, he argues, can achieve a truly transformative break with apartheid law. This stance finds echoes in Pienaar's (Chapter 4) critical discussion of the persistent hierarchy between land ownership and 'lesser rights' in South Africa's legal system, as well as in Mabasa et al.'s (Chapter 2) insistence that there needs to be a profound revisioning of South Africa's land tenure system to end the unequal treatment of forms of tenure under which many black Africans live. The most radical call for structural changes is put forward by Satgar (Chapter 10), who argues for breaking decisively with the socially unjust and ecologically unsustainable capitalist system that liberal democracy ultimately upholds. From this perspective, incremental reformist changes may effectively be part of the problem by shoring up an inequitable system.

Conclusion

As the previous discussion makes clear, although there is strong consensus among our contributors around many of the critiques and strategies canvassed in this volume, there is not agreement on several important matters. This volume is not proposing a seamlessly coherent programme for transformative change, nor is that its purpose. It is not a political or policy manifesto, nor a consensus analysis. Rather, in assembling this cross-disciplinary set of chapters – empirically grounded, critically

reflective and normatively oriented – this collection is aiming a strong light on key issues that need to be critically engaged in mapping out new pathways to redistributive justice in South Africa. While grounded in the complex histories underpinning present conditions, this volume thus speaks to the future of social and economic justice and transformative constitutionalism. In so doing, it is directed not only at fellow academics and legal practitioners but also at politicians, state officials and affected publics across society.

There is, however, a consistent thread relating to land justice running through the chapters: an implicit, if not always explicit, recognition that policy debates on the meaning of 'just and equitable' expropriation in the Constitution must be subsumed within a larger framework, one in which redistributive justice is the overall goal. This leads us back to the point we made at the start of this introductory chapter: that this goal should be understood as including but not defined by land reform. Advancing this goal requires a wide range of mutually reinforcing interventions, many of which are explored in the chapters that follow. This is not an argument for sidestepping land reform – clearly, it is an important constitutional commitment, where much remains to be done. However, conflating redistributive justice with the redistribution of land, as some politicians and activists like to do, fails to appreciate the full complexity of contemporary social, economic and ecological conditions in South Africa. This failure is even more pronounced when the programme of land redistribution gets reduced to single measures, whether 'expropriation without compensation' or 'productive agriculture' or 'land for the landless'.

A further important point that arises is that advancing redistributive justice in practice requires a robust understanding of the multidimensional nature not only of land but also of transformational change. As our discussion has shown, a large arsenal of measures for promoting social and economic justice is available. However, and this is a crucial point, turning the deeper understanding of redistributive justice that we are advocating into an effective programme of action requires a hard-headed approach to the management of transformational change. At the very least, it requires making strategic choices among the plethora of public goods clamouring for attention, as well as negotiating the attendant trade-offs and managing the political fallout that can be expected to follow the setting of priorities. This relates to the thorny issue of a 'transformational triage' (Zenker, in press) – that is, the necessary political process of balancing and weighing various concerns and interests through contested forms of relative prioritisation, under conditions of

severely limited resources: what, in terms of urgency, efficacy and efficiency, needs to be done, in which order, in which time scale and by whom? And here the painful lessons of South Africa's recent history must also be acknowledged: this difficult and demanding task requires not only strong but also principled leadership, across all levels of society, to build a sufficiency of social consensus around the ultimate goal.

Clearly, there is no time to waste if the promise of the Constitution is to be secured. There is a deep pool of commitment to draw on, across all sectors of society, in working towards the broad goal of redistributive justice advocated here. There is valuable experience from other countries to learn from but, more importantly, there is significant experience and expertise in South Africa itself. This collection is a testament not just to the complexities of the task but also to the resources at hand.

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PART I

The Rights and Wrongs of South African Property Law

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1

Politics or Principle?

Making Sense of the Expropriation Without Compensation Debate

ZSA-ZSA TEMMERS BOGGENPOEL

Introduction

It has been argued that the idea behind nil compensation for expropriation is essentially political (Dugard, 2019: 137). The political dimension is driven, in part, by a particular narrative that is fundamentally based on the assumption that providing no compensation for expropriation will pave the way for large-scale, rapid and much-needed land reform in South Africa.[1] It is certainly no secret that in the context of land redistribution, as a sub-programme of land reform in South Africa, expropriation has not been used effectively as a tool to ensure more equitable (re) distribution of land. A number of reasons can potentially be advanced for this state of affairs – some of which are not necessarily linked to the compensation question (Hall, 2014: 659). For instance, the policies and laws to ensure land redistribution are not always clear enough to sufficiently ensure the reallocation of property rights in South Africa (Walker, 2009: 472; Kirsten & Sihlobo, 2021; Kotzé & Pienaar, 2021: 295–98; see further DRDLR, 2017). Questions connected to the issues mentioned above relate to the beneficiaries of land redistribution and the type of rights that should be established in terms of the land redistribution programme. In some respects, there is also a lack of political will to ensure that expropriation is a serious option to effect land redistribution (Dugard, 2019: 158). Not all of these alleged reasons for the slow pace of land redistribution are necessarily linked to compensation. However,

[1] For more on the political dimensions of the land reform debate, see Chapter 6 by Ruth Hall and Chapter 2 by Bulelwa Mabasa, Thomas Ernst Karberg and Siphosethu Zazela in this volume.

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there are also claims that compensation potentially stands in the way of expropriation for land redistribution purposes. The argument in favour of nil compensation speaks directly to these claims. In this regard, I would like to argue that we should not underestimate a principled approach to nil compensation and the potential it has to unlock the hand of the state to ensure that land reform is speeded up. A more principled approach in either legislation or policy may also be required to provide the necessary guidance to courts on when nil compensation is a serious option – if at all.

Lest I be misunderstood, let me say at the outset that I have, on a number of occasions in the last couple of years, joined in on the argument that it is not legally necessary to amend section 25 to achieve land reform in South Africa because of the numerous possibilities that are locked up within a progressive interpretation of section 25, and on the assumption that the tools and mechanisms that are currently in place, or could potentially be developed, are actually used. So, section 25 itself is not necessarily the problem. In *Rakgase* (para. 5.4.1),[2] the court remarked that '[s]ince the birth of democracy in our country in 1994, land reform, despite it being a Constitutional imperative, has been slow and frustratingly so'. Consequently, Pienaar warns that 'if we are to avert systemic failure in the context of land reform, a concerted effort needs to be made to ensure that the programme is "pursued conscientiously and meticulously"' (Pienaar, 2020: 546).

For land reform to work effectively, we need a legal framework that allows for it, but we also need a capable and proactive state and, very importantly, we need courts that are willing to assume the responsibility of interpreting section 25(3) in such a manner that compensation is not a factor that stands in the way of land reform. However, we are now at a point where various concrete suggestions are, or have been, on the table in terms of expropriation laws in South Africa. For instance, we have the suggestions that were made in the Constitution Eighteenth Amendment Bill 18-2021 (as tabled in August 2021), which sought to provide the authority for nil compensation to be paid in instances where property is expropriated to ensure land reform, although this Bill was rejected by the National Assembly on 7 December 2021. We also have the Draft Expropriation Bill B23-2020, which is still on the table. Given these examples and the problems we see in determining compensation for

[2] *Rakgase and Another v Minister of Rural Development and Land Reform and Another* 2020 (1) SA 605 (GP).

expropriation (especially by courts), I would like to posit that this is an opportune time to reflect on whether our legal framework should make room for nil compensation in some form and where and how such accommodation should be made.

This chapter aims to focus on the politics behind nil compensation against the background of some recent judicial developments, which arguably show a conservative trend in awarding compensation that deviates substantially from market value. More specifically, I am interested in the following questions: Why is the narrative in favour of nil compensation so dominant if it is argued that it is already legally possible to expropriate for very little compensation? Stated differently, is there a need for greater clarity about the specific instances where nil compensation is a viable option? I think these are important questions as we move forward with the debate around compensation for expropriation. I hope to provide some thoughts on nil compensation for expropriation in light of the *Msiza* judgments in the Land Claims Court (LCC) and the Supreme Court of Appeal (SCA) (for a critical discussion of the judgment, see Du Plessis, 2019), and I will ask: Do we need to rethink the space that nil compensation occupies in our legal framework?

Are the Calls for Nil Compensation Legally Justified?

Introduction

When considering whether our legal framework should make room for nil compensation, it is valuable to consider the extent to which nil compensation is possible (or not) under the current framing of section 25. It is difficult to conceive of situations where nominal or very little compensation would realistically be possible. The problem is we do not see many examples in the cases that have been presented to courts. In fact, barring some outliers like *Du Toit* that are clearly not reasoned or argued very well,[3] what we do see are courts really struggling to provide compensation below market value and, in fact, moving towards market value, as I will show in the discussion of *Msiza LCC*.[4] Moreover, what we also see is the state either not expropriating for land reform

[3] See my brief analysis of *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) and the arguments why this judgment, indicating that an owner should receive less than market value for the gravel that was expropriated, was wrongly decided in the section entitled 'The Suggested Way Forward: A New Expropriation Bill?'

[4] *Msiza & Others v Uys & Others* (LCC39/01) [2004] ZALCC 21 (16 November 2004).

purposes or offering exorbitant compensation – even above market value. This makes one wonder whether the call for nil compensation to be provided for explicitly in legislation or in the Constitution of the Republic of South Africa, 1996 (Constitution) is not more legally necessary than we initially anticipated.

Let me illustrate by way of *Msiza LCC*. The facts of the judgment can briefly be described as follows: Mr Msiza was a labour tenant on a farm situated in the district of Middelburg, Mpumalanga Province (Rondebosch). In 2004, Mr Msiza was awarded a part of the farm under section 16 of the Land Reform (Labour Tenants) Act 3 of 1996 (Labour Tenants Act). In the earlier judgment on the merits of the case, Moloto J found that Mr Msiza was a 'labour tenant' for the purposes of the Act and was therefore entitled to a specific portion of the land. The landowners sought compensation from the state for the part of the property expropriated in favour of Mr Msiza, but the parties were unable to agree on an appropriate amount of compensation. Consequently, the LCC had to decide the appropriate amount according to section 16(1)(a) and (b) of the Labour Tenants Act (*Msiza LCC*, para. 3). The owners wanted market value according to the development potential of the land, which increased from R1,800,000 (if viewed in terms of agricultural use) to R4,300,000 (if the property was valued according to the township that could be developed on the land).

Section 23 of the Labour Tenants Act authorises the court to determine compensation and states that an owner 'shall be entitled to just and equitable compensation as prescribed by the Constitution'. Therefore, the Labour Tenants Act ensures that compensation is just and equitable as section 25 of the Constitution prescribes. When compensation is determined for purposes of section 23 of the Labour Tenants Act, section 25 should therefore be central to calculating such compensation.

The LCC began by setting out the legal position for assessing and determining just and equitable compensation in terms of the Constitution. The court acknowledged that '[t]he award of land to the applicant by this court in its 2004 judgment is an act of expropriation' (para. 3) and questioned whether the requirements for expropriation were complied with. It disposed relatively quickly of the requirement of the law of general application (para. 11) and proceeded to discuss the public interest/public purpose requirement (paras. 12–15). Having accepted that both these requirements were complied with, the court questioned whether the requirement of just and equitable compensation was met. As was mentioned earlier, the 2004 decision entitled the owner

to compensation, but the amount of the compensation was disputed in the LCC (para. 16). The landowners insisted that just and equitable compensation in the particular case was compensation at market value (para. 29). In this regard, the court held that:

> I must dispense with this argument at this early stage. Market value is not the basis for the determination of compensation under s 25 of the Constitution where property or land has been acquired by the state in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this court installed market value as the pre-eminent consideration. (para. 29)

Interestingly, the court emphasised further that market value would be used as an entry level for determining compensation because it is the most tangible in the list of factors in section 25(3) (para. 30). Therefore, market value should be used as a starting point in determining just and equitable compensation. A two-step approach would need to be followed. First, market value would have to be determined, after which the court would have to assess whether other factors justified adjusting the market value upwards or downwards. In this regard, the court was at pains to emphasise that the two-step approach did not mean that market value was the standard for determining compensation. Compensation must always be determined according to the standard of justice and equity (para. 30). This is especially true in light of the pre-constitutional position, where market value was the central (most important) consideration in terms of section 12 of the Expropriation Act 63 of 1975. The Constitution drew a line through the primacy of market value by allowing for a number of factors to determine just and equitable compensation. Very importantly, no hierarchy exists in relation to the factors, and a balance must be struck between the landowner and the public interest (para. 32).

In *Msiza LCC*, several factors justified a downward adjustment of market value because market value would not (according to the court) reflect just and equitable compensation in terms of section 25 of the Constitution. However, the court emphasised the point made earlier in *Du Toit* that market value is not the single most important element when it comes to determining compensation for purposes of section 25(3). The LCC awarded compensation at R1,500,000, which was R300,000 less than the market value (assessed according to the value of agricultural land at

R1,800,000, which the government was willing to pay for the land awarded to Mr Msiza) (para. 82). Although it is not entirely clear how the factors translated into the exact amount of R300,000, the court purportedly arrived at the reduced amount after considering the factors listed in section 25(3) (paras. 48–76).

In the end, the court provided its reasons for awarding compensation below market value. These included: the difference between the amount paid for the whole property and the market value claimed for the portion of land awarded to Mr Msiza; the fact that the landowners had made no investments in the land; the current use of the property had not changed in fifteen years; the landowners purchased the property with full knowledge of the claim made by Mr Msiza; the claim for the portion of the land succeeded in 2004, after which the landowners were precluded from using that portion of the land; the purpose of the expropriation was land reform, and the landowners should not be able to claim extravagant amounts from the state in this regard; the Msiza family had resided and worked on the land and in line with the objects of the Labour Tenants Act the award of the land serves to compensate labour tenants who worked on the land in exchange for the right to reside there (para. 80).

The SCA's decision in *Msiza SCA* is an appeal against the LCC judgment as outlined earlier.[5] The main thrust of the appellants' appeal was that the LCC had miscalculated the amount of compensation in line with the use of the property as agricultural land instead of its potential future use for development. Moreover, they argued that the amount of compensation had been incorrectly reduced simply because Mr Msiza was a labour tenant (*Msiza SCA*, para. 1). More specifically, the appellants asserted that the reduction of the amount of compensation for land reform purposes was arbitrary. As this chapter focuses mainly on identifying whether a more principled approach to nil compensation, specifically in legislation, is favourable, the first argument is not of specific interest here. Therefore, the focus will *not* be on how the court determined whether market value should be assessed in terms of agricultural or residential property, but rather on how courts are navigating the issue of determining compensation at below market value.

The SCA began its analysis by considering the extent of the land and the labour tenancy agreement to contextualise the determination of

[5] *Uys NO and Another v Msiza and Others* 2018 (3) SA 440 (SCA).

compensation for the land that was expropriated. Regarding the amount of land expropriated, the court highlighted that the entire property consisted of 352 hectares, of which just under 46 hectares had been awarded to Mr Msiza (para. 2). The labour tenancy agreement in favour of Mr Msiza (and his family) had been concluded in terms of the Native Service Contract Act 24 of 1932, and it was clear that the family had exercised the right since at least 1936.

The court set out the wording of section 23(1) of the Labour Tenants Act to essentially emphasise the link between determining compensation under the Act and 'just and equitable' compensation in line with the Constitution (*Msiza SCA*, paras. 7–8). It identified what should be taken into account in determining 'just and equitable' compensation for the purposes of sections 25(2) and 25(3) of the Constitution. Having regard of these constitutional provisions, the SCA considered the judgment in *Du Toit*, where the Constitutional Court reiterated the general principles relating to the requirement of just and equitable compensation. As a starting point, the Constitution provides the appropriate standard even in cases where legislation – such as the Labour Tenants Act (as in *Msiza SCA*, paras. 11–12) or the Expropriation Act (as in *Du Toit*, para. 26) – applies. Therefore, the first step is to consider the list of factors in section 25(3), even if there is direct legislation that regulates the specific type of expropriation in the case, which includes compensation provisions of its own.

Having regard to all the factors listed in section 25(3), the court conceded that market value is usually the one objectively quantifiable factor (*Msiza SCA*, para. 12; *Moloto Community*, para. 59).[6] This reasoning endorses that of the LCC in *Msiza LCC* and the two-stage

[6] *Moloto Community v Minister of Rural Development and Land Reform and Others* ZALCC 4 (11 February 2022). Of course, one could speculate about the presumably objective nature of market value. The SCA in *Msiza* mentioned that 'because it is usually the one factor capable of objective determination, market value is the convenient starting point for the assessment of what constitutes just and equitable compensation in any case, and then the other factors are considered to arrive at a final determination'. Interestingly, Du Plessis provides a critique of the idea that market value is objective. She highlights the various problems with market value, which impact the assumed objective nature of market value as the standard to determine compensation in the context of expropriation (Du Plessis, 2015b: 1729–30). One of Du Plessis' criticisms is that market value is based on what the property would realise if sold in an open market by a willing seller to a willing buyer. However, Du Plessis points out that 'the willing buyer willing seller method of determining market value has also been described as illusory, since the bargaining process is constrained by a compulsory sale, and the seller is more often than not unwilling to sell'.

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approach followed in *Du Toit*. The court in *Du Toit* stressed that this approach might not work in all instances, but in most cases it appears to be the most practical. According to the court in *Du Toit*, this approach can only truly reflect just and equitable compensation if all the factors (where applicable) are accorded equal weight and due consideration (*Du Toit*, para. 84).

In *Msiza*, the dispute centred on whether the compensation should be assessed according to the actual use of the property (which was agricultural and valued at R1,800,000) or the development potential of the land (as residential property estimated at R4,000,000). An expert on behalf of the state estimated the current value of the property at R1,800,000 (*Msiza SCA*, para. 15). Interestingly, according to the 'Pointe Gourde' principle, Mr Msiza's claim for compensation should not be taken into account in determining the market value of the property (*Msiza SCA*, para. 16). This principle (see *Msiza SCA*, paras. 18–19 for its origins) applies in the context of determining the amount of compensation for expropriation and is contained in section 12(5)(f) of the Expropriation Act 63 of 1975, which provides that

> any enhancement or depreciation, before or after the date of notice, in the value of the property in question which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the state may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account.

In this respect, the court considered whether 'a known impediment to the property's development potential when the property was purchased which ha[s] a direct bearing on the price that a willing buyer in the Trust's position would have been prepared to pay for the property' (*Msiza SCA*, para. 19) should be considered when determining compensation. However, the court relied on the earlier decision in *Port Edward v Kay*[7] to conclude that the Pointe Gourde principle does not apply in this case and that the accepted market value of the property should be R1,800,000 (*Msiza SCA*, para. 20). The 'Pointe Gourde principle, therefore, does not apply to the present case as the Trust bought the land knowing of the Msiza claim and the presence of the Msiza family on the land' (*Msiza SCA*, para. 21; see also *Moloto*, para. 86). Nonetheless, the

[7] *Town Board of the Township of Port Edward v Kay* ZASCA 29 (27 March 1996).

question remained whether there were any cogent reasons to reduce the compensation to below market value in this particular case.

The SCA considered the approach adopted in *Msiza LCC* and the reasons for the LCC deducting R300,000 from the market value of R1,800,000. The court found the reasons for reducing compensation as advanced by the LCC unconvincing (*Msiza SCA*, para. 20). It held that most of the factors listed by the LCC had, in any event, been accounted for in the determination of the market value of the property (para. 25). There was also no indication that the amount claimed as compensation by the appellants was extravagant or that the state could not pay it. Moreover, the court commented that the R300,000 had been arbitrarily arrived at as there was no indication of its basis, especially since all the factors that the LCC indicated for the deduction were already taken into account in considering market value (para. 25). In the end, the SCA held that R1,800,000 – in other words, market value based on agricultural use of the land without the deduction as indicated by the LCC – constituted just and equitable compensation (para. 28).

Reflection

If one reflects for a moment on the difference between the Land Claims Court's determination of compensation – where we see some engagement with a reduction of compensation to below market value – and the SCA's difficulty in accepting this reduction, one is forced to consider the question of when (if at all) an amount below market value (never mind nil compensation) would be a serious option, if not provided for on a more principled basis in legislation.

Even though the court followed the two-step approach in the LCC judgment in *Msiza*, the principle that compensation for expropriation must be just and equitable – as opposed to market value – seems, at least in theory, to have been seriously considered. The way in which the factors in section 25(3) were considered and applied could therefore be applauded. However, given that the LCC is still focused very heavily on market value in its determination of compensation, it forces one to acknowledge that it will be very difficult to deviate from this standard (Du Plessis, 2015b).

Jeannie van Wyk argues that the two-step approach that focuses on market value and determines the extent to which the amount must be adjusted, as developed in the majority of cases dealing with compensation for expropriation, is not ideal (Van Wyk, 2017: 27). The problem

remains the risk of making market value the central consideration, as was the case in the pre-constitutional calculation of compensation for expropriation. That is arguably exactly what happened in the *Msiza* judgment. Elmien du Plessis, therefore, asserts that in the end, the owner in *Msiza* received market value compensation as 'just and equitable' compensation (Du Plessis, 2019: 217). Therefore, according to Du Plessis, the judgment 'is a showcase of failed reform with regards [*sic*] to labour tenants and the state's inability to transfer the land to the lawful beneficiary due to disagreement about the compensation amount' (Du Plessis, 2019: 217).

The *Msiza* judgment shows the difficulty courts have in determining just and equitable compensation for expropriation. The obligation is placed on courts to determine just and equitable compensation in each individual case. The task is exacerbated by the fact that the compensation provisions in the expropriation legislation (the Expropriation Act 63 of 1975) and the compensation provisions in the Constitution are (still) not aligned (Iyer, 2012: 74; Van Wyk, 2017: 25). The calculation of compensation in terms of the 1975 Expropriation Act is of course essentially focused on market value (see section 12 of the Expropriation Act; Van der Walt, 2011: 513). Land reform expropriations add a further dimension to the complicated task of calculating compensation for expropriation (see Du Plessis, 2015a: 369–87; Van Wyk, 2017: 35). To what extent does land reform (alone) justify a (significant) reduction in market value?

The decision in *Msiza LCC* directly raises the question of determining compensation for a land reform expropriation in terms of section 25(3) of the Constitution. More specifically, the decisions of the LCC and the SCA engage (to some extent) with the question of when we can expect the amount of compensation to be less than market value in terms of section 25. But where does the decision leave South African law in terms of the appropriate determination of compensation for expropriation, specifically expropriations undertaken for land reform purposes, and even a further stretch in terms of opening up debate about the possibility of ever having nil compensation as a serious option in the absence of dedicated legislation aimed at achieving that goal?

Evaluation of the Msiza Judgment: Some Implications for the Determination of Compensation for Expropriation

The calculation of compensation for expropriation as adopted in *Msiza LCC* seemed sensible and, as stated earlier, could even be commended. The way in which the court engaged with all the relevant factors in

section 25(3) is particularly encouraging considering the criticisms often levelled against courts for focusing too much on market value (see specifically Mokgoro J's comments in *Du Toit*, para. 36). In this regard, the case is a reminder that the Constitution has allowed for the determination of compensation for expropriation on the basis of just and equitable compensation instead of compensation based on market value. According to Du Plessis, this standard of justice and equity should have a direct bearing on the transformative impact of the expropriation clause in terms of land reform (Du Plessis, 2009: 267).

Du Plessis maintains that courts must be aware of what they are protecting in the process of awarding compensation. Compensation may therefore be a way of ensuring redistributive justice. This will create the possibility of moving away from what Du Plessis calls 'market value centred' and 'scientific' ways of determining compensation, based on a particular legal culture, towards the calculation of compensation for expropriation that is based on a transformative, constitutional legal culture within expropriation law. She introduces the idea of a 'transformative interpretation of the compensation requirement in the post-apartheid context' (Du Plessis, 2009: 271) and concludes that there are various considerations that the just and equitable requirement in relation to compensation requires in the new constitutional dispensation (Du Plessis, 2009: 299–300).

The just and equitable requirement may necessitate an inquiry that a narrow market-driven determination of compensation would disregard. Furthermore, determining the amount of compensation requires a contextualised judgement, which should be sensitive to the facts in the particular case and determining compensation cannot be an abstract analysis (Van der Walt, 2011: 509). This should include consideration of the factors listed in section 25, but courts are not limited to considering only those factors. Courts should, however, give special attention to land reform aspirations (Van der Walt, 2011: 509).

The SCA decision in *Msiza* highlights that courts essentially still follow a predominantly 'market value centred' approach when determining compensation for expropriation and find it difficult to deviate from that standard. Stated differently, when considering the factors (other than market value) in section 25, courts struggle to find adequate justification for reducing the value and almost instinctively revert to market value. This conclusion is especially interesting considering the debates around nil compensation. If the practice is to award market value, even in land reform expropriations, it becomes difficult to accept the theoretical

arguments asserting that compensation below market value – never mind nil compensation – is possible within the current constitutional or legislative framework.

A pertinent question arising from the SCA *Msiza* judgment is: Is there a missing link between the rhetoric that expropriation below market value is possible and the actual practice playing itself out in courts? More specifically, the SCA decision calls into question the theoretical argument that compensation below market value is ever possible. *Msiza LCC* certainly purports to be a different approach to the one which singles out market value as the determining factor, especially since the LCC ordered compensation at below market value. The fact that the SCA overturned this decision raises serious doubts regarding the contention that compensation below market value is a serious possibility. The centrality of market value is nothing new and has, of course, been the focus of the courts for decades, before and after the property clause came into effect. Several judgments, even in the constitutional dispensation, have highlighted market value as the starting point in the calculation of compensation for expropriation, making it very difficult to deviate substantially from this standard. In *Ash v Department of Land Affairs*[8] (paras. 34–35), the LCC formulated a two-step approach when calculating compensation. The court indicated that it would determine the market value of the property and thereafter subtract from or add to the amount of the market value, as other relevant circumstances may require (paras. 34–35). A similar approach was, of course, adopted in *Du Toit* (para. 37) – as highlighted earlier. This approach is arguably understandable since the general tendency of courts has been to compensate those expropriated by placing them in the same position they were in but for the expropriation (Du Plessis, 2015b: 1728). This is in line with section 12(1) of the Expropriation Act, which indicates that compensation is determined according to what the property could have been realised in an open market if sold by a willing seller and purchased by a willing buyer. There are several judgments that highlight this point.[9] Recently,

[8] *Ash and Others v Department of Land Affairs* ZALCC 54 (10 March 2000).

[9] see *Du Toit*, para. 22; *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA), para. 21; *Khumalo v Potgieter* 2002 2 All SA 456 (LCC), para. 22; *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC), para. 15; *Ash v Department of Land Affairs*, paras. 34–35; *Haakdoornbult Boerdery CC v Mphela* 2007 (5) SA 596 (SCA), para. 48; *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012); *Florence v Government of the Republic of South Africa*, 2014 (6) SA 456 (CC).

the LCC in *Moloto* had to decide whether the formula of adding the market value to the current use value and dividing the consolidated value by two would constitute just and equitable compensation for purposes of section 25. The court mentioned that this formula is, in fact, similar to the two-stage approach ordinarily adopted by the courts (paras. 20, 63). Although this is a somewhat different approach, market value still plays a key role in that it is used as the starting point from which compensation for expropriation is determined. In the end, the court in *Moloto* concluded that '[i]n the absence of any other information and satisfactory evidence upon which just and equitable compensation can be assessed, this court is constrained to conclude that market value is, in the circumstances of this case, just and equitable compensation as the landowners contend' (*Moloto*, para. 96).

Although recent judgments including *Msiza* and *Moloto* tried to indicate that market value should not be the primary focus when it comes to compensation for expropriation, the judgments fail to provide clarity on the question of whether expropriation below market value can be justified in the land reform context, and if so, how such an adjustment from market value should be made within the current legal framework. The cases prove that it is difficult to justify why a reduction in market value is possible, even though it is often argued that the law allows for such a possibility in theory. Ernst Marais made the same argument, submitting that *Msiza SCA* appears to suggest that a downward adjustment of compensation at market value, purely on the basis of land reform, is impermissible (Marias, 2018).

The difference between the approach to the reduction of compensation in the LCC and the SCA in *Msiza* indirectly invites a conversation about whether land reform alone is sufficient justification for a significant reduction of market value (even a nominal amount of compensation). Interestingly, in this respect, in *Du Toit*, a so-called non-land reform case, the Constitutional Court was willing to recognise a significant reduction in the market value of the gravel because it held that the public interest in the building of roads was important for the economy and the improvement of the road system in general (*Du Toit*, para. 51). This case is clearly an outlier, and the interpretation of the purpose of the expropriation in relation to the determining compensation has been criticised. Van der Walt, for instance, argues that the interpretation of this factor in the calculation of compensation in *Du Toit* is unconvincing from a practical and economic perspective (Van der Walt, 2011: 514). He goes even further to argue that expropriation for land reform purposes

without compensation will, in most instances, be unconstitutional. This is because all the factors have to be considered, and 'land reform should therefore not on its own imply that compensation is not required' (Van der Walt, 2011: 518). These arguments made by leading scholars on expropriation law and compensation for expropriation have huge implications for the assertion that expropriation at nil compensation is already possible under the current legal framework. In fact, it negates entirely any possibility that awarding nil compensation for expropriation is possible within the current framing of section 25 or the current Expropriation Act. This is not because it is theoretically impossible, but perhaps because it is difficult to conceive of examples where this would be possible.

As indicated earlier, the question remains: Can the purpose of the expropriation (alone) justify a (significant) reduction in compensation? Du Plessis asserts that courts dealing with this factor in the determination of compensation tend to confuse the requirement of public purpose/public interest and public purpose as a factor in calculating compensation for expropriation (Du Plessis, 2015a: 369–87). She uses the examples of *Du Toit* and *Mhlanganisweni Community* to argue that the interpretation of public purpose when determining compensation for expropriation is misconstrued in both cases. In *Du Toit*, the court's reasoning is problematic because it would mean that in all cases where the expropriatee has property necessary for the upkeep of national resources (or assets), he can expect compensation that is below market value (even significantly so). The decision in *Mhlanganisweni Community* is disconcerting because it would mean that where property is expropriated for land reform purposes, it should be treated the same as non-land reform expropriations, with the potential that the state may have to pay full market value for those properties in all instances. She considers both interpretations unfair and confusing – *Du Toit* because one individual is unduly burdened with the task of paying for the upholding and maintenance of a national asset that should be borne by the general tax-paying public, and *Mhlanganisweni Community* because 'in view of the history of the privileged land ownership in South Africa and the constitutional imperative to transform, one should acknowledge that market value cannot be treated as a strict requirement' (Du Plessis, 2015a: 379).

An alternative approach to the role of public purpose as a factor in determining compensation may be to distinguish 'run-of-the-mill' or 'business-as-usual' expropriations and land reform expropriations

(Du Plessis, 2015a: 380). In non-land reform expropriations, the payment of market value may reflect just and equitable compensation as market value may strike the most appropriate balance between the interests of the public and the landowner affected by the expropriation. This is if there are no other factors that nonetheless justify a downward adjustment of market value in these instances. In land reform expropriations, where there may be other considerations at play, and the protection of existing property rights must be assessed in light of the promotion of social justice and transformation, a different interpretation of public purpose may be required when calculating just and equitable compensation. Reconciling the opposing claims in a just and equitable manner may require a more contextual, balancing approach that is sensitive to the task of promoting the spirit, purpose and object of the Bill of Rights (Du Plessis, 2015a: 387). A downward adjustment may be more appropriate in the latter case than the former – as is, in fact, illustrated by the LCC in *Msiza*. This may be one approach to determining when compensation below market value would be justified. Another (or perhaps supplementary) approach would be to provide guidance in legislation on more specific instances where compensation below market value is plausible. Either way, what is clear is that courts need some more direction in this regard; otherwise, we may continue to see a natural inclination towards market value compensation.

The Suggested Way Forward: A New Expropriation Bill?

Du Plessis points out that it is time for the legislature to deal with compensation for expropriation in a pertinent manner. She notes that '[t]he legislature can do this by making sure it provides clear guidelines on the calculation of just and equitable compensation, rather than a mere "copy and paste" of Section 25(3)' (Du Plessis, 2015a: 387; and see Du Plessis, 2014). I would agree with Du Plessis and take it a step further. A new Expropriation Bill could potentially provide greater clarity regarding compensation for expropriation in the land reform context. It could do so by providing more indication of how the different factors relate to one another, especially if the Bill is to provide further guidance to courts regarding the relative importance of the factors listed in section 25(3) when it comes to calculating the amount of compensation in land reform expropriations. I think the Bill could even do more than that. It could guide the courts in establishing when nil compensation should be a viable option.

There are relatively few instances in which I envisage that nil compensation can be awarded, especially given the tendency of courts to compensate individuals for their loss experienced as a result of the expropriation, as highlighted in the chapter thus far. However, we do see some examples. Clause 12 of the latest Expropriation Bill aims at replacing section 12 of the 1975 Expropriation Act. The Bill is not perfect, but it does lay down the principles that must be adhered to when determining compensation, and in this respect it is certainly more aligned with the Constitution than the existing legislation. The Bill makes it clear that the compensation standard is just and equitable and not market value, thereby bringing it in line with the Constitution to a much greater extent than the current Expropriation Act does. Of particular interest for the purposes of this chapter are the examples listed in clause 12(3), which indicate the instances where nil compensation is plausible. It is important to note that there is still some discretion in terms of the Bill to determine when it may be just and equitable for nil compensation to be paid. Therefore, clause 12(3) is peremptory but not exhaustive. This provision leaves the discretion to the expropriating authority to determine whether the compensation will be nil. Since the expropriating authority is left with a discretion, I would argue that it may be even more helpful to have guidelines on how such a discretion must be exercised.

Clause 12(3) of the Expropriation Bill is relevant when thinking about instances where nil compensation may be applicable and reads as follows:

> (3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to –
>
> (a) where the land is not being used and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from appreciation of its market value;
> (b) where an organ of state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of state acquired the land for no consideration;
> (c) notwithstanding registration of ownership in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), where an owner has abandoned the land by failing to exercise control over it;
> (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and
> (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property.

These instances are not without criticism but may be the starting point when considering possibilities where nil compensation is envisaged.[10] Clause 12(4) is particularly interesting if one considers some of the issues I mentioned in relation to the *Msiza* judgment. Clause 12(4) states that when a court or arbitrator determines the amount of compensation in section 23 of the Labour Tenants Act, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances. A number of questions arise: First, this section brings claims of labour tenants under the purview or possibility of nil compensation. However, given the difficulty portrayed by courts in even reducing market value, never mind ordering nominal or nil compensation, it is not clear exactly how this provision is going to take us further in terms of assisting courts to deviate from market value. Second, questions may arise about whether a principled or default approach in favour of nil compensation in the context of labour tenants is even the best example or category. In this regard, it is not evident why this group of claimants (namely labour tenants) are included when other groups of claimants, such as restitution claimants, are specifically not included.

These questions, together with those one can equally raise about some of the other categories listed in clause 12(3), are not irrelevant, but they arise only when we are willing to acknowledge that it is necessary to have the conversation about nil compensation in the first place. The point that I would therefore like to make is this: If we are willing to open up a conversation about instances where nil compensation is a possible or valid option, we need to potentially think about the following:

(i) Why do we need to recognise a principled approach to nil compensation?
(ii) How will we demarcate instances or provide categories suited for nil compensation on a more principled basis?
(iii) Should we leave an open-ended discretion, or formulate guidelines that are more specific, like all the instances that are currently listed in clause 12(3)(a)–(e) of the suggested Bill?

This chapter has highlighted at least one reason why it may be important for us to have a conversation about instances where nil compensation should be a more principled possibility. First, expropriation

[10] The author also provided some criticism of these instances in a submission to Parliament on 27 February 2021. Space does not allow the details of this criticism to be discussed in this chapter. The submission to Parliament is available upon request from the author.

assumes compensation. Arguably, whenever you are in the realm of expropriation, there is an assumption of the obligation to pay (an amount of) compensation. The obligation to pay compensation, which ordinarily goes hand in hand with expropriation, is also why there were conceptual difficulties with introducing notions like custodianship (as distinguished from trusteeship or nationalisation) within the realm of expropriation law in 2021. While there is authority to concede that, on the one hand, compensation is not a prerequisite for expropriation in the technical sense of what comes first, and in a legal sense of recognising that expropriation has occurred even though compensation has not been determined or paid, we cannot get away from the fact that compensation is an integral part of expropriation. In the absence of any obligation to pay compensation, one would arguably not be talking about an expropriation but another form of limitation/interference with property rights. We see, for instance, in the Final Report of the Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) that '[t]he words "subject to compensation" and the presence of the word "amount" denote that compensation is indivisible from expropriation' (PAPLRA, 2019: 71). Compensation can therefore be a stumbling block to the full enjoyment of the benefits of expropriation, especially in the land reform context. We see this unfold in the *Msiza* judgment.

The Final Report of the Advisory Panel went on to mention that section 25 is a compensation-based clause and that it is 'highly unlikely and improbable that there could be a plethora of circumstances that would lead to nil compensation' (PAPLRA, 2019: 72). The presence of a clause dedicated to nil compensation would therefore provide clarity on instances where despite the obligation to pay compensation for expropriation, there may be instances of nil rand compensation. Those instances can then be justified and demarcated more clearly, and we should stop trying to insist that it is already theoretically possible when legally it is unlikely. At this stage of the developments in this area of the law, it is no longer controversial. I think that is one of the reasons we have seen various permutations of nil compensation in a number of Bills over the last couple of years (including, for instance, the Bills aimed at amending expropriation legislation and, of course, the various Bills aimed at amending section 25 of the Constitution), all of which contain varied provisions with possibilities for nil compensation.

The fact that expropriation is essentially compensation-based, coupled with the difficulty that courts have in determining compensation that is

not (always) related to market value, suggests that it may be necessary for us to engage more directly with the idea of nil compensation in a much more open, honest and principled manner. I think there is enough evidence to show that this option is not only politically driven but, in fact, legally necessary.

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2

The Legal and Philosophical Dichotomy between Land and Property

A Transformative Justice Approach to the Rights and Wrongs of South African Property Law

BULELWA MABASA, THOMAS ERNST KARBERG AND SIPHOSETHU ZAZELA

Introduction

The premise of this chapter is that since the advent and the promulgation of the Constitution of the Republic of South Africa, 1996 (Constitution), which came into force on 4 February 1997, South African courts have developed a rich body of jurisprudence that has contributed significantly to developing pre-existing notions of common property law, within a constitutional dispensation.[1] It is widely accepted that transformative justice is not a concept that has a finite period for its achievement. It is an elusive endeavour that must mirror the needs and aspirations of a changing and dynamic society. In its preamble, the Constitution contains an express goal to create 'a society based on democratic values, social justice and fundamental human rights' to 'improve the quality of life of all citizens and free the potential of each person'.

This chapter argues that it is incumbent upon South African society to critique, assess and probe whether the provisions embedded in section 25 (with or without an amendment) of the Constitution are in and of themselves adequate tools to deliver the goals of land justice and land reform within the current property law framework. This chapter asserts that it is critical to implement the provisions contained in section 25 of

[1] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) SA 46 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

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the Constitution – but that there are underlying structural, systematic, social, economic and historical legacies, as well as legal impediments that continue to evade justice in its essence, even if the constitutional provisions were to be applied to the letter. To support this contention, the drafters of the Constitution appreciated the need to progressively develop principles of transformative justice beyond the role of the judiciary. The statement by the Department of Justice and Constitutional Development that it has committed to 'co-ordinating a focused national dialogue to review and assess the impact of 25 years of a constitutional democracy' and whether the intention of constitutionalism is realised (Department of Communications and Information Systems, 2020) finds relevance in the context of the call for an effort to develop a system of property laws that finds its expression, grounding and meaning in the South African population.

The Principle of Transformative Justice

The Preamble of the Constitution states that the Constitution was adopted as the supreme law of the country to, among other goals, 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'; lay the foundation for a democratic and open society; and improve the quality of life of all citizens. Evident in the goals laid out in the Constitution is the desire to facilitate the migration from one form of rule or government to another – an example of an incoming government establishing principles aimed at justice during a period of transition.

Transitional justice denotes measures adopted by the government of the day to address a departing regime's legacy of repression and violence during a period of political transition (Gready & Robins, 2014: 340). Such methods include truth commissions, the repeal of old discriminatory laws for the creation of new laws, and the creation of new bureaucratic structures (Daly, 2001–2002: 73). Measures one can note as products of the principles of transitional justice in the realm of land reform would include section 25(1) and 25(7) of the Constitution[2] and the various pieces of statute flowing from these provisions. The

[2] Section 25(1) of the Constitution provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'; section 25(7) of the Constitution provides that 'a person or community dispossessed of property after July 1913 as a result of past racially discriminatory laws or

aforementioned sections of the Constitution indicate a clear transition from deprivation to express protection against it. Transitional justice has also meant selecting legislation deemed useful and non-discriminatory for use in the legal system of the incoming regime. An example of this, as illustrated in the discussions to follow, is the Deeds Registries Act 47 of 1937.

Though necessary for the seamless introduction and establishment of a new dispensation, one can note that transitional justice serves merely to usher and facilitate. Transitional justice lacks the specificity to substantively address the ills that attach themselves to the new dispensation as legacies of the past government. It is in this way, one can opine, that a state finds itself with parallel legal and political realities – the understanding that one has heightened freedoms under the new political dispensation while one's lived reality does not mirror the outcomes envisioned by the new legislation and policy.

In this context, we find the principle of transformative justice. Transformative justice is focused not only on the legal and overarching political framework. The principle of transformative justice emanates from the criticism of traditional approaches to nation formation (for example, truth commissions and criminal trials) for providing forms of justice which 'do not resonate with and are not embedded in communities, cultures and contexts' (Hoddy, 2021: 341). Transformative justice involves 'change that emphasises local agency and resources, the prioritisation of process rather than preconceived outcomes, and the challenging of unequal and intersecting power relationships and structures of exclusion' (Hoddy, 2021: 341). One can thus opine that this is a process that entails the meaningful participation of the polity, particularly those previously marginalised, in the formation and development of the legal and social framework of the country. Transformative justice proposes that 'empowerment and participation' be at the centre of nation formation (Hoddy, 2021: 341). There have been few examples of the application of this principle in practice. This chapter, having had regard to South African political history and the legislative structure of the South African property system, aligns with the approach and uses the principles gleaned from it to provide a critique of the South African property law in its current form as well as propose measures for the achievement of transformative justice.

practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.

Considering this, it is critical that the transformative potential of section 25 of the Constitution is realised and implemented – not only by our courts but also in the realm of policy development. While, as argued later, shortfalls and spaces for greater inclusion remain in section 25, we provide a short overview of the property clause's potential for transformation.

Transformation and Section 25 of the Constitution

Section 25 contains three primary pillars, which are a vehicle for transformation. First, it provides in section 25(3) that where property is expropriated, the compensation payable must reflect an equitable balance between the public interest (that is, the purpose for which the property is expropriated) and the interests of those affected (that is, the landowner's loss as a result of the expropriation). Section 25 lists five factors (which rank equally) in determining what will count as 'just and equitable' compensation. Market value is only one of these factors. The mechanism envisaged in section 25 is a flexible one that permits payment of compensation on a scale which can be adjusted based on the circumstances of each case, ranging from above-market value compensation to below-market value compensation and arguably even nil compensation in certain limited circumstances (Ngcukaitobi, 2021: 184).

Secondly, section 25(5) expressly enjoins the state to enable citizens to gain access to land on an equitable basis by taking reasonable legislative and other measures within its available resources.

Finally, section 25(6)–(9) envisages the creation of a range of statutes aimed at transforming land ownership patterns through restitution, strengthening tenure security, and achieving broader land and water reform measures. Some of these statutes have now been created – including the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the Land Reform (Labour Tenants) Act 3 of 1996 (LTA), the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) and the Restitution Act 22 of 1994.

However, a key provision that has remained under-utilised is section 25(3), which allows for a flexible compensation regime guided primarily by considerations of justice and equity as opposed to market value. The intention of the drafters of the Constitution was clearly to enable a move away from the market-based pre-constitutional approach and to make

land reform more affordable for the state when considerations of justice and equity permitted payment of below-market value compensation.

Historically and for policy reasons, the South African state has implemented what is known as the 'willing buyer, willing seller' principle of compensation for expropriation or acquisition of land, including for land reform purposes. This principle dictates that where property is expropriated in the public interest, the compensation paid for it should be equivalent to the price a willing buyer would have paid a willing seller for it on the open market. The Constitution does not mandate the willing buyer, willing seller principle. It was a policy choice that reflected the post-1994 shift of the African National Congress (ANC) from a radical Marxist-leaning liberation movement focused on expropriation-centred land reform towards a neoliberal and investor-friendly approach (Lahiff, 2007: 1580). The approach has been criticised as a major obstacle to transformation in that it allows land reform to be 'dictated by one of the most conservative elements in South African society [i.e. landowners] and one with a vested interest in maintaining the current – highly unequal – structure of the agrarian economy' (Lahiff, 2007: 1593).

Since approximately 2013, however, the ANC has indicated a desire to move away from the willing buyer, willing seller model towards one focused on payment of below-market value compensation – and possibly expropriation without compensation in some cases. This shift can be demonstrated with reference to recent legislative developments in this area, such as the Property Valuation Act 17 of 2014, which established the office of the Valuer-General for purposes of valuing land identified for land reform and sets out guidelines and factors for such valuations. Planned developments include the (now failed) amendment to section 25 of the Constitution and the Expropriation Bill B23-2020. The constitutional amendment aimed to insert a proviso in section 25 to the effect that compensation for expropriation for land reform purposes may, in certain circumstances, be nil. The Expropriation Bill that is under consideration by the National Council of Provinces at the time of writing aims to repeal the old Expropriation Act of 1975 and to bring the compensation regime in line with the principles espoused in the Constitution.

The question of whether the Constitution implicitly allows nil compensation is beyond the scope of this chapter. However, it is clear that section 25 contains a clear transformative mandate which enjoins the state to pass legislation aimed at land reform and enables it to pay below-market value where that would be just and equitable.

Support for the notion of a concerted and direct effort at reforming property laws finds expression in both the interim and current Constitutions. In other words, beyond the presence of section 25 within the Bill of Rights, it was the intention of the drafters of the Constitution that Parliament and the Executive would, in parallel (with the promise of a constitutional interpretation and application of laws by the courts), contemporaneously seek to either amend and/or repeal laws that work at odds with the constitutional framework after the dawn of democracy.

Schedule 6 of the Constitution is a provision that is hardly considered, debated and applied in the context of property law and land reform, yet it provides a useful lens within which to analyse the role of the law in the discussion on the rights and wrongs of property law in South Africa and how to address the dichotomy between land reform and property laws.

Schedule 6(2)(1)(a) of the Constitution provides that 'all law that was in force when the new Constitution took effect continues in force, subject to any amendment or repeal and . . . consistency with the Constitution'. The drafters of the Constitution, therefore, understood that the promulgation of the Constitution and, in particular, section 25 could not, by its mere interpretation and application by the courts, simply eradicate the oppressive body of common laws and legislation that existed prior to 1996. Schedule 6(2)(1)(a) is, therefore, authority for the proposition that the Constitution necessitates a direct, focused and intentional need to transform, repeal and amend the common law in so far as it is at odds with the Constitution. In other words, it was not enough that section 25 was promulgated. It remained incumbent upon Parliament and the Executive pointedly to develop laws and policies aimed at achieving the goals of substantive justice. The court in *Soobramoney*[3] (para. 8) pointed to the conditions of rampant poverty, racial disparities in wealth and the deplorable conditions in which the overwhelming number of South Africans existed prior to the adoption of the Constitution. In essence, therefore, while the law would be developed and interpreted as provided for in section 39(2) of the Constitution,[4] positive action and conduct in the form of pointed legislation, policy and common-law reform were required. This chapter assesses whether Parliament has exercised its

[3] *Soobramoney v Minister of Health (Kwa Zulu Natal)* 1997 (1) SA 765 (CC).

[4] When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

powers adequately to bridge the dichotomy between property laws and land reform in a transformative and meaningful way.

We have briefly discussed the transformative potential of section 25. While section 25(1) of the Constitution protects against the arbitrary deprivation of property unless, by a law of general application, it is useful and necessary to delve deeper and to assess the transformative potential and aspiration of this protection to have meaning and substance, in a large-scale and intentional way. The constitutional provision must be applied within its historical context, especially in light of widespread inequality and an inequitable and skewed property rights regime. The Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) states that 'an estimated 60% of South Africans have no recorded land or property rights' (PAPLRA, 2019: ii). This endeavour necessitates an assessment of the status of the current property rights regime in South Africa and if the regime, in and of itself, impedes or elevates land reform objectives. It is trite that Roman-Dutch law is a notable source of the South African law of property. The existence of the Constitution does not, on its own, automatically eradicate or dismantle the legacy of inequality which the South African law of property in its current state carries.

Left unchallenged, common-law principles, in their interaction with the structure of South African property law, particularly as they relate to ownership, only serve to perpetuate inequality and the exclusion of the majority of South Africans. Sachs J wrote in the leading *Port Elizabeth Municipality* case:[5] 'complex socio-economic problems . . . lie at the heart of the unlawful occupation of land in urban areas'; and under apartheid *dispossession* was nine-tenths of the law.

Sachs J was of the view that Roman-Dutch law conceptions of the ownership of property may appear neutral on the face of it, but in fact they carry racist notions in their essence (para. 10). This chapter asserts that common-law conceptions of ownership continue to find application in commercial, formal sectors of society and are enjoyed largely by the economically active and white minority,[6] while the black majority has largely remained in the periphery of property law protection, relying heavily on the elusive land reform promise. In 1997, the year that the Constitution came into force, it is estimated that 32 per cent of South

[5] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[6] The Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA, 2019: 43) provides that 'approximately 72% of land is held privately in freehold and leasehold'.

Africa's population lived in the former TBVC (Transkei, Bophuthatswana, Venda and Ciskei) states and that 63.6 per cent of those inhabitants did not enjoy formal property rights protection (PAPLRA, 2019: 69). This statistic is juxtaposed against approximately 72 per cent of land being held privately in freehold and leasehold.

Schedule 6(2)(2)(b) provides that: 'old order legislation that continues in force . . . continues to be administered by the authorities that administered it when the new Constitution took effect'. Schedule 6(2)(2)(b) fortifies the view espoused in this chapter that the mere existence of the Constitution and, indeed, the provisions of section 25 were understood by the drafters of the Constitution not as a means to an end, but rather that there needs to be a revision, reimagining, reworking of common-law principles of property law that continue to permeate and define social and economic relations twenty-six years after the promulgation of the Constitution. In applying the principles of transformative justice discussed earlier, one can thus opine that the transformative endeavour must entail assessment and revision of the private and common-law principles of property which permeate the lived experiences of South Africans. In this vein, an over-reliance on the courts, and in particular the Constitutional Court, to interpret provisions of section 25 of the Constitution would not serve to speed up the slow pace of land reform. This is in the context of an overwhelming majority of historically dispossessed South Africans who have little to no access to the courts to benefit from the development of the common-law notions of ownership and the possible inclusion of indigenous thought systems into South African property law via the judiciary.

With the Constitution being a court of appeal and of final instance and section 25 being a constitutional provision, it bears mention that it would be a hefty burden on the judiciary to single-handedly carry the task and delivery of transformative justice and land reform, without Parliament and the Executive actively undertaking a review of current property laws to bring them in line with South African realities. This would entail South African property law reflecting in policy the values and principles that emanate from indigenous South African systems of tenure (Mabasa, 2021: 67).

This chapter attempts to bring to the fore the inherent, underlying conceptual, legal and philosophical differences between property law and land reform, and ultimately calls for a coherent, purposive upliftment and reimaging of property laws to strengthen land reform objectives.

The Wrongs and Rights of Property Laws

As a member of the Presidential Advisory Panel and the only attorney in a ten-member panel of experts, professionals, academics and business-people, I authored the section dealing with 'what constitutes property in South African law'. Similar to the observation by Sachs J cited earlier in this chapter, I bemoan the fact that despite the superstructure that is the Constitution, Roman-Dutch and English law remains dominant in our legislation in the post-democratic era (PAPLRA, 2019: 69). I point out various examples that include a central piece of legislation in property law which was promulgated in 1937 – the Deeds Registries Act. This Act only recognises the mortgaging of real rights to land and rights of security over leases, servitude and mining rights. The Act is not, on its own, perverse. Its shortcoming is that it only applies to a small formal, commercial and economically active segment of society. Although this Act is blind to which race may rely on it, it presupposes land transactions that have been written down and registered in the Deeds Registry. By virtue of its inherent conceptions derived from common law regarding registrability and principles of ownership and possession, this Act excludes approximately 31 million South Africans who hold and dwell on land outside the formal property system (PAPLRA, 2019: 69).

The Alienation of Land Act 68 of 1981 is another piece of legislation that predates the Constitution, remains valid and does not take into account the property ownership disparities in South Africa. A central feature of the Act is that the purchase and sale of land must be in writing in a deed of sale and signed by the parties. On the face of it, this legislation appears innocuous. However, underneath the lofty concepts of property law is the fact that the overwhelming majority of South Africans cannot benefit from the legal protection of this Act. This is because only the real rights of those whose names appear on the Deeds Registry may seek the protection of the Act. As already mentioned, South Africa remains a divided society which largely has no protection under property laws. As such, I call for the review, assessment and amendment of the legal definition of 'real rights' and 'property' to align with a multi-faceted approach to land holding that is not dominated by individual tenure. As observed by Brits (2018: 363), most transactions in the informal or customary sector are not recorded in writing, which limits the ability of property laws to resolve land rights as they pertain to communities.

While property laws protect those who have legally recognised and strong property rights, Parliament has perpetuated the exclusion of

people without secure tenure in the way that it has persisted with the introduction and continuation of a weak tenure system – which largely affects the black majority. Next, this chapter assesses how the courts have interpreted legislation as it relates to the existing systems of tenure.

Development of the Common Law towards the Protection of Informal Rights

Baleni v Minister of Mineral Resources

This matter dealt with an Australian company's application for a mining right over communal land in the Xolobeni area in the Eastern Cape. The main issue was whether mining rights could take precedence over informal land rights. The community argued that the granting of the mining right amounted to a deprivation of their informal rights to property in terms of section 2(1) of IPILRA. Considering this, the community argued that its consent was required before the mining right was granted. The mining company opposed the community's view on the basis that section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) only requires consultation with the affected community prior to awarding a mining right and not during the application process for that right. It also argued that the rights in the MPRDA trump IPILRA on the basis that the MPRDA is the chief statute governing mining and that the MPRDA provides in section 4 that the interpretations consistent with its objects must be preferred over interpretations inconsistent with those objects. The court ruled that mining operations interfere substantially with the agricultural activities and general way of life of the community, which constitutes deprivation as espoused in section 25 of the Constitution. Furthermore, the court stated that both IPILRA and the MPRDA are statutes aimed at redressing the South African history of economic and territorial dispossession under apartheid and, as such, should be read together. Moreover, IPILRA places an additional obligation on the Minister of Mineral Resources to seek the consent of affected communities in terms of customary law as opposed to mere consultation as required by the MPRDA. Where land is held on a communal basis, the community must be allowed to consider the proposed deprivation and make a collective decision regarding their custom and community on whether they consent to the proposed disposal of their land. Consequently, the Minister was prohibited from granting a mining right to the mining company until the company had complied with the provisions of IPILRA.

The *Baleni* judgment[7] was a ground-breaking precedent which affirmed the rights and interests of communal and informal land rights holders and emphasised the importance of consultation with such communities. In fact, the rights of such communities have been elevated above common-law landowners in that what is required is their consent as opposed to consultation only (para. 76). The result of this judgment is that a failure to obtain the consent of the community holding informal rights before granting a mining right may expose a mining right holder to judicial review and may ultimately prove fatal to such a mining right.

Maledu v Itereleng Bakgatla Mineral Resources

In this case,[8] Bakgatla Mineral Resources held mineral rights in respect of land that was registered in 1919 in the Ministry of Rural Development and Land Reform and held in trust on behalf of the Bakgatla-Ba-Kgafela community. In preparation for its mining activities in 2008, Bakgatla Mineral Resources concluded a lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister. In 2014, when preparation for full-scale mining operations commenced, these operations badly impacted the farming operations of the community, and they obtained a spoliation order against Bakgatla Mineral Resources. In retaliation, Bakgatla Mineral Resources lodged an eviction application in the High Court to interdict the community from entering the farm.

The community, however, argued that the Tribal Authority did not have sufficient authority to speak for them and that they did not consent to mining on their land – they had not been properly consulted as was required under the terms of the MPRDA. The mining companies had failed to establish that the community had had a reasonable opportunity to participate in the resolution which authorised the conclusion of the surface lease agreement.

The High Court granted the application, and the Supreme Court of Appeal (SCA) refused to grant leave of appeal of the High Court's decision, so Bakgatla Mineral Resources approached the Constitutional Court, which granted the leave to appeal.

The apex court identified the issues for determination as, first, whether the dispute resolution mechanism created by section 54 of the MPRDA

[7] *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).
[8] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC).

was available to Bakgatla Mineral Resources. Secondly, whether section 54 precluded Bakgatla Mineral Resources from approaching the courts for an eviction order without first exhausting this process and, lastly, whether the community had consented to being deprived of their land rights in the farm in terms of section 2 of IPILRA.[9]

The court found that section 54 of the MPRDA employs mandatory language; therefore, this dispute resolution mechanism must be exhausted before approaching the courts for redress. In this regard, the court held that Bakgatla Mineral Resources was obliged to take all reasonable steps to exhaust the section 54 process, which they had already initiated before approaching the court, and while this process is still undergoing, mining operations cannot proceed as this would undermine the independence of the section 54 process. Over and above this, section 2(4) of IPILRA required the community to have been given sufficient notice and be afforded a reasonable opportunity to participate in person or through representation in the meetings where decisions to dispose of their land were taken. In the circumstances, there was no evidence that this process had taken place, so the decision of the High Court was overturned.

Maledu again emphasised the importance of proper consultation with affected communities, particularly those that hold informal rights under IPILRA. It recognised that tribal authorities do not automatically speak for the communities they ostensibly represent and rejected the old approach of concluding agreements with tribal leaders and authorities without consultation with communities themselves. It also highlighted the importance of exhausting the internal appeal process under section 54 of the MPRDA.

Rahube v Rahube

This matter involved siblings, Ms Matshabelle Mary Rahube and Mr Hendrina Rahube, who lived in a property in 1970.[10] When the grandmother passed on in 1978, there was no documentary proof of her ownership. Ms Rahube moved out of the home in 1973 and moved back in 1977 when her marriage broke down. Mr Rahube became the owner of the property by virtue of his land tenure rights having been

[9] Which stipulates that no person may be deprived of their informal right to land without their consent.

[10] *Rahube v Rahube and Others* 2019 (2) SA 54 (CC).

converted to full ownership under section 2(1)(a) of ULTRA, which provides for the automatic conversion into ownership of any land tenure right.

His tenure rights were conferred by a deed of grant, which provided for the issuing of a deed of grant in respect of residential units but limited its issuing to the head of the family who desires to purchase a dwelling for occupation by him and members of his family for residential purposes.

The High Court had declared section 2(1) of ULTRA unconstitutional in that its inherently gendered automatic conversion mechanism was inconsistent with the right to equality in section 9 of the Constitution. The basis for the declaration of invalidity was that a woman could, in terms of customary law, not be a 'head of the family', thus perpetuating the exclusion of women from land rights ownership. To this end, the High Court reasoned that the conversion of tenure rights did not make provision for a dispute resolution mechanism. It defied the *audi alteram partem* principle, and the court accordingly held that it was inconsistent with the right of access to courts in section 34 of the Constitution.

Thereafter, the Constitutional Court was approached to confirm the High Court's order. Here the Constitutional Court held that the Proclamation envisaged a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control. Consequently, a provision in the statute that differentiated between groups of people did so without a legitimate governmental purpose and is irrational and unconstitutional due to its inconsistency with section 9(1). Moreover, it would undermine the purpose for which ULTRA was enacted – as legislation focused on land reform to redress the injustices caused by the colonial and apartheid regimes. On this basis, the Constitutional Court confirmed the order of the High Court.

Mwelase v Director-General for the Department of Rural Development and Land Reform

This decision, which was the last judgment delivered by Cameron J on his last day as a Justice of the Constitutional Court, involved labour tenants who all occupied land on the Hilton College Estate in KwaZulu-Natal.[11] These labour tenants lodged applications under the LTA with the Department of Rural Development and Land Reform

[11] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC).

before the cut-off date of 31 March 2001. However, the Department failed to process the applications submitted before the cut-off dates. This then necessitated the labour tenants approaching the Land Claims Court (LCC), challenging the Department's failure to process their applications in time.

Because of this failure, the LCC ordered the appointment of a Special Master for labour tenants to assist the Department in implementing the LTA. However, the LCC found that the labour tenants had not established that the Minister was in contempt of its order, and the SCA unanimously dismissed the appeal against the LCC's exoneration of the Minister. Subsequently, the labour tenants approached the Constitutional Court for leave to appeal against the LCC and SCA findings.

The Constitutional Court delivered a scathing judgment in which it expressed its frustration with how poorly the government is administering labour tenant applications as well as other forms of land reform. To this end, the court criticised the government's failure to protect and secure the informal land rights of the destitute and to cure landlessness that was created by the apartheid system.

Delius and Bernart (2021: 100) suggest that legislative reform is a route to enhance land rights and that land rights could be converted into privately held titles. This chapter supports the notion of reforming current property laws to recognise and protect land rights and, as such, recognise 'family rights', family grazing land and a multitude of forms of tenure.

Conclusion

As discussed in this chapter, the South African Constitution is the supreme law of the country. Though the Constitution, among other protections, prohibits the arbitrary deprivation of property, a discrepancy exists in respect of who the existing conceptions of ownership in South African property law cater for and protect. South Africans whose property custodianship exists outside the prescripts of what is regarded as 'ownership' and consequently what is regarded as 'private property' are excluded from protection by South African property law. Consequently, one can opine that participation in those sectors of the economy leans on private property ownership. In that respect, this chapter proposes that a transformative justice approach be adopted in developing and promulgating South African property law. As discussed, transformative justice is a novel concept that arose as a critique of transitional justice. The principles emanating from the concept are thus relatively untested.

Despite this, and having had regard to the principles of transformative justice and the South African Constitution, South Africa is well-placed to adopt the principles emanating from transformative justice.

This chapter discusses case law where the court has had to recognise the inequalities emanating from the disparity between land reform and property ownership. This disparity can only be addressed by the legislature taking an active role in the integration of indigenous thought systems, as it relates to the concept of property ownership, into property law as it stands. Such an approach, this chapter proposes, will ultimately serve to remedy the continuous legal battles faced by those on the periphery of the protections of the current conceptions of ownership.

The Constitution in section 34[12] unequivocally provides all with the right of access to justice. Notwithstanding the aforementioned provision, there exist numerous barriers to South Africans' right to access courts. Particularly relevant among these is spatial inequality. In 2020, the South African Department of Statistics reported that the poorest South Africans are located in the rural peripheries of the country (Department of Statistics South Africa, 2020: 18), outside of urban areas where courts are ordinarily located. In 2018, the South African Human Rights Commission reported that 64 per cent of black people in South Africa live in poverty (South African Human Rights Commission, 2018).

Having regard to the above statistics, the costs of legal proceedings and the periods that legal proceedings typically span, it is untenable for South African courts to be charged with the responsibility to lead the transformation of select areas of South African property law, as discussed. Such an approach would perpetuate the exclusion of those who are the subject of transformative justice.

This chapter emphasises that it is incumbent upon the legislature and the executive to lead the transformative justice agenda insofar as it relates to the South African law of property and land reform.

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3

The 'Justice' in 'Just and Equitable' Compensation

ELMIEN W. J. DU PLESSIS

Introduction

During his testimony in the South African Students Organisation trial, Steve Biko was called to the witness stand for the defence of nine black activists. At one stage, the prosecutor asked Biko to explain his stance on expropriation: 'Is there any part of your programme which suggests that all private property must be expropriated, full stop?' 'I am not aware of this', was Biko's reply.

During interrogation, the court intervened: 'I think your counsel is probably afraid to mention it. Isn't it part of the policy to redistribute wealth?' 'That is correct', Biko answered. The court was confused. 'Now, how can you have a redistribution of wealth without taking it from somebody.'

Biko explained that taking from somebody without abolishing the principle of private ownership is possible. Explaining property, he answered, 'my relationship with property is not so highly individualistic that it seeks to destroy others. I use it to build others'. The court seems to have accepted this but was still uneasy: 'What about the White man's property?' Biko answered that it is possible that 'certain people in the country according to whatever values are adopted at the time, own things that they should not have, which historically they have immorally got, to a point which cannot be forgiven'. Continuing this, Biko foresaw the possibility that a time might come when people might be told to '[g]ive it back; we will give you what we think it is worth, you know'. The government will pay the price that the government thinks it is worth (Arnold, 2017: 90). Biko foresaw some form of compensation, even if not full market value.

Years later, section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution) shifted our compensation standard from market value to 'just and equitable' compensation. Our Constitution is thus a culmination of various conversations, compromises and

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contestations of the notion of justice that underlies the Constitution. This has certain implications for how section 25 should be interpreted, specifically our understanding of 'just and equitable' compensation.

The African National Congress' (ANC) Nasrec conference in 2018 opened a conversation to reassess this notion of 'just and equitable' when the party made a policy decision to consider 'expropriation without compensation' (Slade, 2019: 1, 3)[1] as one of the mechanisms to give effect to land reform (ANC, 2017; Du Plessis & Lubbe, 2021). This set a process in motion that eventually ended in the Constitution Eighteenth Amendment Bill (2021). This Bill was not voted on in the National Assembly at the end of 2021 and therefore lapsed.[2] Still, some valuable lessons can be learnt from this process, which will also become important for interpreting the Expropriation Bill (2020), once enacted.

I do not want to focus too much on the technicalities of the conversation or the broader issue of land redistribution – or what must happen to property once it is expropriated. Of course, with expropriation being part of a process to redistribute or return the land, it does not happen in a

[1] It is perhaps from the outset important to talk about terminology. 'Expropriation without compensation' is the terminology used in the ANC conference documents and in the motion, but it is nowhere properly defined. Expropriation without compensation is confiscation. Expropriation with nil compensation refers to the scenario where, after the weighing up of factors and interests as required in s. 25(3) of the Constitution, the state concludes that 'compensation at R0' is just and equitable. The obligation to pay compensation therefore remains, but it is acknowledged that it can be R0. We also accept that 'expropriation without compensation' in the public discourse is sometimes shorthand for a range of other conversations pertaining to land reform and reparations. We will, however, as far as possible, stick to 'nil compensation' and the legal meaning. Slade makes the argument that there should be a distinction between the *obligation* to pay compensation and the *consequences* of a valid expropriation. The argument is that the validity of an expropriation is not dependent on compensation being paid – rather, once the validity requirements that it must not be arbitrary, that it must be done in terms of a law of general application and for a public purpose/public interest are complied with, an obligation rests on the state to pay compensation.

[2] The Bill had a rather long history, all of which can be traced on the Parliamentary Monitoring Group's website https://pmg.org.za/bill/913/ (accessed 21 October 2021). It started with a Constitutional Review Process in a Joint Committee of Parliament, which, after various public hearings, recommended that the Constitution be amended to 'make explicit what is implicit' in the Constitution. This led to the Ad Hoc Committee to Amend Section 25 of the Constitution, which became the Ad Hoc Committee to Initiate and Introduce Legislation amending Section 25 of the Constitution in the sixth Parliament after elections. This committee published a draft Bill in December 2019, calling for public participation, which public participation was hampered by the COVID-19 pandemic. After an extensive process, the Bill was finally introduced on 8 September 2021, but rejected by the National Assembly in its Second Reading. It therefore lapsed.

vacuum. When there is a need to include the 'what after' question, it will be briefly addressed. Instead, this chapter seeks to ask: If compensation must be 'just and equitable', what notion of justice informs our understanding of the clause? The focus is, therefore, on compensation for expropriation in cases where land is expropriated for land reform purposes.

The chapter discusses the various forms of justice: transitional, restorative, retributive and transformative. That is followed by a brief historical discussion on the making of section 25 of the Constitution to evaluate the concept of justice that underlies the provision for compensation for expropriation. I argue that the making of the Constitution Eighteenth Amendment Bill was also about reassessing the justice foundation of our Constitution, albeit in the language of expropriation without compensation.

Through this process, the argument is made that the initial concept of justice was transitional and restorative, but this has now shifted to transformative justice. This might influence our interpretation of section 25 of the Constitution and the legislation promulgated to give effect to it. I therefore suggest a preliminary observation on how to understand 'just' in the 'just and equitable' formulation of section 25(3), which, for the time being, remains unamended in the Constitution.

The chapter is structured as follows: it starts with a cursory overview of the four main types of justice that might apply to section 25. It then discusses the making of section 25 of the Constitution, starting with section 28 of the interim Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution) and ending with the Constitution Eighteenth Amendment Bill. The focus is on the conversations that were had, which can give a glimpse into the type of justice envisioned. Then, focusing on specific submissions, the chapter applies the different notions of justice to ascertain if there is a certain leitmotiv (Du Plessis, 2015) of 'just and equitable'. A case is then made to consider transformative justice as a theory that informs the 'just' in 'just and equitable'.

Notions of Justice

Introduction

Justice does not define itself and is contextual. Different contexts might require different kinds of justice. Different kinds of justice address different needs, and sometimes different forms of justice overlap

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(Villa-Vicencio, 2004: 67). There are also individual and communal demands for justice, and these often compete. To complicate things, political and economic considerations often impact the form of justice required to address a situation. Therefore, the forms of justice listed here should not be regarded in silos and are by no means exhaustive but add to the conversation reflecting on the forms of justice underlying section 25.

Transitional Justice

New regimes often face challenges in redressing victims of state wrongs inflicted by previous regimes. International law obligates successive states to repair harms caused by previous regimes (Teitel, 2000: 119). On a national level, states are often torn between the backwards-looking purpose of compensating victims to address past state abuses and the state's political interests that require it to look forward. This conversation also sits with the complexity of individual and collective dilemmas (Teitel, 2000: 119). With transitional justice, corrective aims are balanced with forward-looking transformation aims. It also mediates individual and collective liability (Teitel, 2000: 119).

Transitional *reparatory* justice plays a complex role in this regard. It tries to mediate the repair needed between victims and communities, ties the past with the present, and lays the foundation for redistributive policies (Teitel, 2000: 119). Reparatory goals often need to be balanced with economic concerns, and this balance of interests is not static (Okun, 2015).[3] This all needs to occur within the rule of law, which, during a time of transitional justice, is also concerned with societal reconciliation and economic transformation (Teitel, 2000: 132).

In this sense, transitional justice deals not *only* with redress. It is also aimed at changing society. Transitional justice not only wants to redress an injustice, it also wants to change society and re-legitimise the law.

Moreover, the passage of time can create problems with the ability of transitional reparatory projects to address intergenerational justice. In conventional justice settings, the direct wrongdoers or the wrongdoers' political generation provide reparations to the victims. Over time, the identity of the beneficiaries of the reparatory system and those who will be held liable changes (Veraart, 2009: 56). It then leads to a system

[3] Okun examines the zero-sum trade-off between efficiency and equality. He states that both are valued, and where they are in conflict a compromise is needed, leading to a sacrifice on both parts.

where the generation that might not have personal responsibility must pay for past wrongs (Teitel, 2000: 139). Ideally, transitional justice needs to be effected as soon as possible after the end of the wrongdoing. Intergenerational justice becomes important when wrongs are not effectively dealt with as soon as possible.

Intergenerational justice also speaks to the problem of the current generation making sacrifices based on other rationales (Teitel, 2000: 140). Successor generations assume the obligations of the past because evil legacies have implications for long-standing societal concerns and therefore have implications for the current and future generations. This is a collective responsibility, not an individual one, and if unaddressed will lead to the sense of injustice being heightened (Teitel, 2000: 140). It seeks to repair the system rather than change it radically.

Thus, over time, in most reparatory projects, the wrongdoers no longer pay; the innocent people do, and the benefits of the reparations do not go to the original victims but to their descendants. This leads to reparatory projects looking more like social distribution and political projects than any form of corrective justice. These distributive schemes are often controversial as people start to question, for instance, the fairness of allocating public and private benefits along racial lines. This much is also true for South Africa, even recently, after democracy (Teitel, 2000: 141). Race-conscious remedies can be justified when the people who suffered the wrongful race-based harm have a right to reparations from those who harmed them. This leaves the question: when there are ongoing effects of prior official discrimination, how do we deal with it if the original wrongdoers are no longer there? In other words, how do we deal with the legacy of unrepaired injustices in a time of unresolved transitional reparatory justice? (Teitel, 2000: 141). Is this the place of transitional justice, or does transitional justice consist of specific mechanisms built for a specific reason, namely transitioning from one (unjust) system to another (just) system? A strong argument can be made in this regard (Evans, 2019: 8).[4]

In this context, one can argue that South Africa is 'post-transition' as far as the traditional, transitional justice mechanisms such as truth commissions, amnesties and reparations are concerned (whether concluded successfully or not) (Evans, 2019: 2). This might then require a move to another form of justice.

[4] I have previously tried to imagine transitional justice bringing about systemic change, but am now more of the view that transitional justice consists of various specific mechanisms, used for specific purposes (transitioning), with a limited timespan.

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Restorative Justice

Restorative justice (Murphy, 2015)[5] also works within the realm of transitional justice. While the two concepts share certain underlying normative values, the two terms should not be used interchangeably. Some scholars argue that restorative justice is unsuitable for transitional problems because it is an underdeveloped concept in such settings and does not necessarily allow for punishment, which might be required in specific transitional contexts (Murphy, 2015). The role of forgiveness in restorative justice, which might not be desirable in transitional justice settings, is also critical.

Restorative justice is context insensitive, while transitional justice is contextual (Murphy, 2015). Restorative justice focuses on the relationship among the offender, the victim and the community in which the offence is committed (Walker, 2006: 383). This means justice is fundamentally about repairing damaged relationships and addressing wrongdoing to restore a disrupted equilibrium. Restorative justice calls for balance, harmony and reconciliation (Pienaar, 2015: 157).[6]

Restorative justice is victim-focused, giving the victim a voice in the restoration process. It asks the victim what he or she requires to make amends. It also requires the perpetrator to take responsibility, apologise, make good (Pienaar, 2015: 157), and thereby restore the offender's dignity and sense of self-worth (Zehr, 1990). The key aim of restorative justice is forgiveness,[7] rebuilding or building bonds and providing for measures such as restitution payments to restore the relationship (Brathwaite, 2002).

The call for restitution focuses on the restoration of dignity (Gibson, 2009; *Dikoko v Mokhatla*[8]). Pienaar (2015: 14) argues that restitution

[5] This stands in contrast with retributive justice, where the core claim is that perpetrators deserve to suffer, and that it is just to inflict suffering.

[6] For instance, in the *Azapo* case, Mahomed J, referring to the truth and reconciliation process and amnesty, remarked: 'If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming, and if it had, the bridge itself would have remained wobbly, insecure, threatened by fear from some and anger from others. It was for this reason that those who negotiated the Constitution made a deliberate choice, preferring understanding over vengeance, reparation over retaliation, ubuntu over victimisation.'

[7] This is not unproblematic and, as was rightly pointed out, in contexts where the relationships are not mutually respectful, asking a victim to forgive can maintain oppression and injustice, and is furthermore a burden on the victims.

[8] *Dikoko v Mokhatla* [2006] ZACC 10.

measures are not exceptions to property guarantees, but rather natural consequences. Redress follows naturally in a new constitutional dispensation from the property clause.

Restorative justice is primarily concerned with social relationships – restoring these relationships, but also establishing or re-establishing socially equal relationships (Llewellyn, 1998: 1, 31, 33, 36).[9] Focusing on social equality means it is important to attend to the nature of the relationship between individuals, groups and communities. This requires a focus on the wrong and the context and causes of that wrong (Llewellyn, 1998: 1).

Since it is about restoring dignity, respect and relationships, the question of what is required to restore relationships will be context dependent. Restoring does not mean restoring the position as it was before the wrong but is focused on working on ideal social relationships (that might have been radically unequal to begin with, before the wrong) (Llewellyn, 1998: 3). Restorative justice, therefore, not only has a strong moral component to it but also is, like transitional justice, oriented towards the future. It offers a relational view of justice (Harris, 1987: 27–38; Nedelsky, 1993: 13; Koggel, 1997; Llewellyn, 1998: 1), aiming to protect the human relationship.

Restitution is an important part of the restorative justice process. However, there are different understandings of what 'restitution' entails in the restorative justice context (Llewellyn, 1998: 22). Restorative justice is also not only concerned with restitution as the ultimate aim of justice (Llewellyn, 1998: 25). Restitution alone will also not bring about the restoration of social relationships. Restoration is thus not an end in itself but rather regarded as part of the requirement of justice. In this context, compensation is required to the extent that it enables restoration without

[9] Note that what is required is not necessarily a restoration of personal or intimate relationships, but social relationships of equality. It requires the possibility of coexisting with equal respect in a community. This is often contrasted with corrective justice that seeks to correct an inequality, also for non-material aspects, and requires a transfer from the wrongdoer to the offender. It therefore advocates that when the wrongdoer is worse off, the victim will be better off. The saying 'two wrongs don't make a right' comes to mind, and goes against the restorative justice idea of moving to the ideal of social equality and the focus on the relationship between the perpetrator and the victim. Retributive justice is the other form of justice often contrasted with restorative justice. It shares with restorative justice the need to re-establish social equality between the wrongdoer and the sufferer, but through punishment. Restoration in this instance is therefore punishment. Retributive justice is also backward looking, focused on what happened, rather than asking what must be done to address it.

creating new harm. While it looks at restoration, it is ultimately not concerned about the structural causes of crime (Coker, 2002: 144).

Retributive Justice

Retributive justice focuses on punishment, and very little is required from the wrongdoer – the wrongdoer merely has to endure the punishment (Llewellyn, 1998: 37). There is no need for a wrongdoer in such a situation to take responsibility for their actions (other than enduring punishment), which often leads to a wrongdoer focusing on the injustice they suffer because of the punishment (Llewellyn, 1998: 37). Punishment should be understood as any negative outcome imposed on a wrongdoer in response to the wrongdoing (Wenzel & Okimoto, 2016: 239).

It places the blame on particular individuals. It does not regard the wrongdoing in the context of a society that might be problematic and that might need social reform (Llewellyn, 1998: 37). Some argue that retributive justice is justified because wrongdoing merits punishment (proportionate to the wrongdoing) and that it is morally better if a wrongdoer suffers punishment than not (Rawls, 1995: 4–5).

Transformative Justice

Like transitional justice, transformative justice is concerned with addressing historical wrongs. But, unlike transitional justice, transformative justice focuses on socio-economic rights issues, is concerned with structural violence (Gready & Robins, 2014: 1; for a detailed argument, see Evans, 2016) and long-term change, and focuses on the participation of affected communities rather than on elite bargains (Evans, 2016: 2).

Transformative justice seeks to understand the deep roots of the symptomatic problems in society and to break away from the traditions or customs that caused the pain. It goes further than transitional justice: instead of focusing on reconciliation and legal accountability, it focuses on the deep social inequalities and class structures (Garnand, 2021: 11). In other words, the focus is on correcting the injustices and transforming societies to overcome inequality and exclusion (Evans & Wilkins, 2019: 140; Gready et al., 2012: 1). It requires 'a more sophisticated understanding of the relationship between past, present, and future, and between continuity and change in post conflict societies' (Gready et al., 2012: 3). More pertinently, it interrogates the structural violence that resulted from historical patterns to avoid repetition. To do this, transformative

justice requires an engagement with the past and the present while establishing how the lingering past shapes the present (and invariably the future) (Gready et al., 2012: 3).

This fills the gap that transitional justice leaves, namely, how to address poverty and inequality as the inheritance of a violent or repressive past, since transitional justice is often more focused on peacebuilding and post-conflict reconstruction through democratisation and market liberalisation (Gready et al., 2012: 4). It goes further than restorative justice in that it does not seek to restore a specific relationship or time but to transform that which caused the injustice in the first place. Its aim is not to punish or retribute but to transform.

I now turn to the making of section 25 to assess what form of justice best describes the various eras of the making and understanding of section 25.

The Making of Section 25

Introduction

The early 1990s was a time of significant change in South Africa as various interested parties contested the transition from an apartheid South Africa to a constitutional dispensation. The first attempt at such negotiations was the Convention for a Democratic South Africa (CODESA I), which set some ground rules going forward and established working groups to prepare for CODESA II. CODESA II, however, collapsed because of a lack of agreement on the size of the majorities necessary in an elected constitution-making body to adopt a new Constitution (Corder & Du Plessis, 1994: 6; see also Cachalia, 1992; Welsh, 1992; Friedman, 2021). Eventually, a joint proposal was reached between the ANC and the government, resulting in a joint proposal for power-sharing and the establishment of a five-year interim government of national unity after electing a Constitutional Assembly. This led to the Multi-Party Negotiation Process (MPNP), tasked with crafting an interim Constitution.

Before briefly discussing the drafting process, it should perhaps be clarified from the outset that I subscribe to the view that Constitutions are living documents that often transcend their original meaning (Strauss, 2010: 1; see also Balkin, 2012, who supplements Strauss' views). When we want to understand and interpret the Constitution, it is useful to understand what was intended when it was drafted. However, the

language of the South African Constitution is open-ended enough not to require courts and the legislature to be bound by one unevolved meaning.

The Interim Constitution

In the late 1980s, the ANC outlined its vision for a Constitution (ANC, 1989; Klug, 2000: 125).[10] These guidelines were contained in a 1990 document that focused on a Bill of Rights for South Africa (Constitutional Committee, 1991), with a revised Bill of Rights produced in 1992 (Sachs, 1992). This Bill protected the right to own private property and did not deal with the issue of land ownership (Mutua, 1997: 78). It did assure the owners that land restoration would be handled by a tribunal and be subject to the payment of compensation (Sachs, 1992: 222). It is with this that they entered CODESA.

Initially, the MPNP was advised against including a property clause in the interim Constitution. However, it was eventually added when it became evident that the National Party and the libertarian parties would not settle unless it was. Property rights were therefore guaranteed, and interference with such rights was circumscribed in detail.[11] Expropriation was limited to 'public purposes' only, and the compensation standard was set at 'just and equitable' to establish a balancing effect (between the vested interests and legitimate claims) (Corder & Du Plessis, 1994: 183).

Section 28 did not make provision for land reform in the property clause (Corder & Du Plessis, 1994: 183). Instead, land reform was included in section 8(3)(b), the equality clause, and provided that '[e]very person or community dispossessed of rights in land before the commencement of this Constitution . . . [as a result of discriminatory legislation that existed before the commencement of the Constitution] . . . shall be entitled to claim restitution of such rights subject to and in accordance

[10] See Klug (2000) for a good account of the politics behind the document.

[11] Sections 28(1): 'Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights'; 28(2): 'No deprivation of any rights in property shall be permitted otherwise than in accordance with a law'; 28(3): 'Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected'.

with sections 121, 122 and 123'. In the interim Constitution, land reform was part of the question of equality.

The question of the type of justice was not articulated in the clause itself or the Bill of Rights, but the postamble of the Constitution focused on reconciliation and provided:

> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans . . . These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

'Just and equitable' must be viewed in this context. The approach is restorative, not retributive. There was a need for substantive corrective justice, juxtaposed with white beneficiaries' fear that transformation would involve material sacrifices. Nevertheless, there was also the knowledge that transformation in the form of restitution and redistribution would inevitably impact the wealth and privilege accumulated during apartheid. As van der Walt (2009: 6) puts it:

> A political settlement could bring about a peaceful transition to a democracy based on human dignity and equality without necessarily destroying existing privilege. A peaceful transition therefore became possible on the basis of agreement that political change, while inevitable, need not be disastrous, but it was clear that such a transition would scarcely enjoy any legitimacy unless it could provide real benefits for poor and marginalised members and sectors of society. A peaceful political transformation thus inevitably had to include very substantial, even dramatic, corrective measures that would change the existing distribution of wealth visibly and substantively.

At the beginning of the democracy, there were firm hopes that such an approach would lead to reconciliation. The Truth and Reconciliation Commission (TRC), founded on the values of restorative justice, played an important role in the transition (Du Plessis, 2017).[12] In its final report,

[12] The TRC was based on the Promotion of National Unity and Reconciliation Act 34 of 1995. The primary tasks of the TRC were (1) to try to sketch as complete a picture as possible of the gross violations of human rights in the past through the hearings and investigations; (2) to start a process of amnesty for the people who met the legal requirements; (3) through a process of establishing what happened to victims, to allow victims to give their own accounts of events in order that their dignity might be restored; and (4) to compile a report on the findings and recommendations. The promotion of national unity and reconciliation, as in the title of the act, was the broader objective of the

the TRC stated that: 'The tendency to equate justice with retribution must be challenged and the concept of restorative justice considered as an alternative . . . focusing on the healing of victims and perpetrators and on communal restoration' (TRC Report, 1999b: ch. 5, para. 55). The TRC did seriously consider the calls for including victims of forced removals (TRC Report, 1999a: vol. 1, ch. 4, para. 54), but the TRC narrowed the mandate to 'human rights violations committed as specific acts, resulting in severe *physical* and/or *mental* injury, in the course of past political conflict' (TRC Report, 1999a: vol. 1, ch. 4, para. 55). It focused on 'bodily integrity rights' (TRC Report, 1999a: vol. 1, ch. 4, para. 56). It did not include questions of distributive justice (Madlingozi, 2007: 116) or consider the effects of the laws passed by the apartheid government. This was because it viewed itself as one of several instruments for transformation (TRC Report, 1999a: vol. 1, ch. 4, para. 55).

Thus, the TRC (s. 3(1)(a)) focused only on gross human rights violations (Lansing & King, 1998; Simcock, 2011),[13] looking for clear, individual victims and providing amnesty for identifiable perpetrators. It was focused on individuals, not on society, and did not address systemic issues. And while the deprivation of land was violent, one would suspect that it was not included in the TRC process due to the lack of physical violence that infringes on bodily integrity rights, where one perpetrator could be identified and victims could be neatly isolated.[14]

It can be argued that the TRC was well aware of its limitations and allowed for other avenues to be used in pursuing justice (Simcock, 2011: 242). In other words, the TRC did not exclude reaching reconciliation through other avenues. There was also a realisation that the TRC could not lead to ultimate justice and, in some cases, might even hinder access to justice (Langa, 2000: 353).[15]

What was, however, left unaddressed was the suspicion that the legal order itself sanctioned the dispossession (Veraart, 2009: 48) and must

process. The discussion on the TRC and land is based on an earlier publication of mine (Du Plessis, 2017).

[13] The Human Rights Violations Committee declared someone a 'victim' only if the person had suffered gross violation of human rights in the form of killing, abduction, torture or severe ill treatment. A lot has been written on the TRC in various disciplines.

[14] This does not mean that some form of remedial action was not necessary, but the purpose of this chapter is to ask whether the absence of property from the TRC process is problematic.

[15] Note also the limitation that, once a perpetrator got amnesty, the family could not sue for damages.

now be trusted to restore it. This dispossession that took place through legislation[16] not only had an economic or punitive effect but was political in that it supported the apartheid project of separate development. It crushed the social fibre of communities and often led to perpetual poverty in once-stable families.[17] This has a generational spill-over that entrenches systemic inequalities unless properly addressed. Restoration of property thus plays a role in restoring dignity as it would enable individuals to participate in social and economic life and show a renewed commitment to human rights (Allen, 2006: 5). Villa-Vicencio writes: '[H]uman security, dignity and political stability occur when basic material needs are met. ... Bluntly put, a simple payment of reparations to victims of Apartheid, as important as this is, is not sufficient to restore the human and civil dignity of Apartheid's victims. Reparation demands more' (Villa-Vicencio, 2004: 76).

The restorative justice model seemed to have limited application, with the government not responding to the Commission's further recommendations on reparations (TRC Report, 1999b: vol. 5, para. 39).[18] This is particularly lamentable since reparations are an integral part of the 'justice' in restorative justice. The relationship between restorative justice and reparations is reciprocal (Llewellyn, 2004: 167). Arguably, in a restorative justice context, the payment of compensation *would* be a requirement. And as the goal is not to punish the wrongdoer (or the descendants of the wrongdoer), the amount must also not impede the restoration or redistribution of the land itself. The amount would be that which helps to strike this balance.

The Constitution

While not as explicit as in the postamble of the interim Constitution, such thinking was still possible in the Constitution. Section 25 (the

[16] A few of these laws included the Native Land Act 27 of 1913; Native (Urban Areas) Act 23 of 1920; Black Administration Act 38 of 1927; Native Trust and Land Act 18 of 1936; Natives (Urban Areas) Consolidation Act 25 of 1945; Group Areas Act 41 of 1950; Group Areas Act 77 of 1957; Group Areas Act 36 of 1966; Prevention of Illegal Squatting Act 52 of 1951.

[17] See, for instance, *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC).

[18] This included wealth tax, levies on corporate and private income, a suspension of land and other taxes on previously disadvantaged people. See also Klug, Chapter 11, this volume.

'property clause') both protects holders of rights in property (s. 25(1)–(3)) and initiates reformist imperatives (s. 25(5)–(8)). In the one-system-of-law view,[19] the two parts do not stand opposite each other but form part of the same constitutional goal and should be read together. This requires a balancing of rights. The court in *AgriSA v Minister of Minerals and Energy*[20] said:

> The approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interests of the wealthy and those of the previously disadvantaged. This tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equitable distribution of land and wealth to all. (para. 60)

Creative tension is visible in the compensation provision that requires balancing the public interest (in land reform) and the interest of those affected (the landowner and the possible beneficiary). This balancing seeks to avoid a zero-sum game, and it is a creative tension that should be balanced and reconciled as far as possible. Notions of justice should play a facilitating role in achieving this balance. But what justice?

Courts' Interpretation

It seems that the courts thus far have given little consideration to the notion of justice underlying 'just and equitable', focusing instead on what *compensation* entails rather than how compensation balances the interests of the parties. For instance, in *Du Toit*[21] (para. 22), it was held that the expropriatee must be put in the same position he would have been in but for the expropriation. In *City of Cape Town*[22] (para. 21), it was held that an owner may not be better or worse off because of the expropriation and that a monetary award must restore the *status quo ante*. *Khumalo v Potgieter*[23] (para. 22) stated that compensation is paid to ensure that the

[19] *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC), para. 44.
[20] *AgriSA v Minister of Minerals and Energy* 2013 (4) SA 1 (CC).
[21] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).
[22] *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA).
[23] *Khumalo v Potgieter* 2002 (2) All SA 456 (LCC).

expropriatee is justly and equitably compensated for his loss, while *Hermanus* (para. 15) ruled that the expropriatee is compensated for the loss of the property. This sentiment was echoed in *Ash v Department of Land Affairs*[24] (paras. 34–35), where it was found that the interest of the expropriatee requires full indemnity when expropriated. Therefore, it is possible to pay *more* than market value.

In *Haakdoornbult*[25] (para. 48), the court ruled that for compensation to be fair, it must be recompense. To the court, compensation must put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken. This compensation might not always be market value, but might be something *more*,

> [b]ecause of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community-held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress. (*Haakdoornbult*, para. 48)

More recently, the court in *Mhlanganisweni Community*[26] relied on several foreign dicta to show that the purpose of compensation is to recompense. In *Florence v Government*,[27] the Constitutional Court, in the context of a restitution claim, opted for the 'generous construction [rather than] a merely textual or legalistic one to afford claimants the fullest possible protection of their constitutional guarantees' (para. 48). The focus moved from recompensing to constitutional guarantees. When calculating compensation, the court warned that the burden on the fiscus was an important consideration, as compensation claims are paid from taxpayers' money and therefore need to advance a public purpose (para. 71). The court, significantly, acknowledged the proportionality or the balance required between the interest of the individual and that of the public.

The one outlier is *Msiza* in the Land Claims Court,[28] where the court stated that '[t]he departure point for the determination of compensation

[24] *Ash and Others v Department of Land Affairs* ZALCC 54 (10 March 2000).
[25] *Haakdoornbult Boerdery CC v Mphela* 2007 (5) SA 596 (SCA).
[26] *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012).
[27] *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC).
[28] *Msiza v Director-General for the Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC).

is justice and equity' (para. 29). The court interpreted this justice as 'redistributive justice, which lies at the cornerstone of section 25 of the Constitution' (para. 15). The court regarded issues of justice and equity as paramount in calculating compensation (and not as a second-level review test) and applied these principles to strike an equilibrium between the different interests (paras. 75–76). This is correct. However, it was overturned by the Supreme Court of Appeal.[29]

What is evident from this summary of cases is that the bulk of these justifications for the payment of compensation place 'property' at the centre of the inquiry without focusing much on the competing claims. Despite the focus on recompensing the individual, the central principle should remain that the amount of compensation should reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances and should focus on the concepts of justice and equity rather than the property itself.

Call for Change

Despite these mechanisms being available to the government, it mostly paid market value in case of expropriation. Thus, the frustration for slow land reform was blamed on the provision that compensation must be paid when expropriating property.

Still, various reports (HLP, 2017; PAPLRA, 2019), experts (Parliamentary Monitoring Group, 2019), courts,[30] and even President Ramaphosa himself (Ramaphosa, 2018), said that section 25 is not an impediment to land reform and does allow for compensation below market value. The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) recorded Justice Albie Sachs saying that:

> Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse. It contains no willing seller, willing buyer principle, the application of which could make expropriation unaffordable. (HLP, 2017: 206)

[29] *Uys NO and Another v Msiza and Others* 2018 (3) SA 440 (SCA).
[30] *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC).

This was echoed by Justice Dikgang Moseneke, who said: 'Everyone, whose property is expropriated, must be for a purpose the Constitution authorises and against payment of equitable compensation. The willingness of the buyer and/or the seller may facilitate a smooth transaction, but does not seem to be a constitutional requirement' (HLP, 2017: 206). If the Constitution does not impede land reform, it is possible that the call for amending the Constitution, in large part, was about our understanding of 'justice', blurring the lines between law, politics and morality (Du Toit, 2018).

This issue of justice and the moral argument is evident in the language often employed in the conversation: current (white) landowners are often referred to as 'thieves' (De Lange, 2011), implying that their land ownership rests on an immoral deed, regardless of whether the land was acquired under valid laws or after apartheid. Some commentators (Grootes, 2018) observe that certain aspects of this debate are more of a demand that white people lose something, that they should pay to some extent for what their ancestors did. On the other hand, some white people admit no personal culpability and claim they acquired the land by lawful means (Oppenheimer, 2020).

This all rests on the centuries of dispossession of land and exploitation (see Desmond, 1970; Walker & Bradford, 1988) that culminated in four decades of apartheid. Thus, when the foundations of the Constitution were negotiated, white political power was intertwined with social and economic privilege (Terreblanche, 2002). The remnants of this institutionalised privilege and disadvantage are evident in South African society today, which is still primarily skewed along racial lines, including land ownership (Sulla et al., 2022: 1, 3).[31] The frustration over slow land reform was fertile ground for a contestation on section 25, specifically the compensation provision.

Constitution Eighteenth Amendment Bill

Thus, on 27 February 2018, Julius Malema of the Economic Freedom Fighters (EFF) introduced a motion in Parliament by stating that 'almost

[31] A recent World Bank report on inequality in Southern Africa lists South Africa as the most unequal country in the world (Sulla et al., 2022). The main drivers of the inequality listed, amongst others, are race, legacy of apartheid, high inequality of land ownership. It should be noted that I support Prof Brand's contention (Chapter 5, this volume) that a transformed property law should not be focused only on ownership, but should rather aim to secure different rights in property.

400 years ago, a criminal by the name of Jan van Riebeeck landed in our native land and declared an already occupied land by the native population as a no-man's land'. People who followed treated Africans as less than human, not deserving land ownership, thereby disempowering Africans 'of the ability to call this place their land was initiated in blood and pain' (National Assembly, 2018: 25–26).

Criticising the negotiation process in the 1990s, he stated that '[t]hose who came in power in 1994 carrying the popular mandate of our people to restore the dignity of the African child . . . building false reconciliation without justice'.

> [The] time for reconciliation is over; now is the time for justice. . . . We would have failed those who came before us if we were to pay anyone for having committed genocide. . . . Those who are saying we must pay for the land are actually arguing with us that we must thank those who killed our people. . . . We must ensure that we restore the dignity of our people without compensating the criminals who stole our land. (National Assembly, 2018: 28–30)

Some argue that framing the conversation in terms of criminal language is done to ensure punishment by confiscating the land (Sishuba, 2017; Van Staden, 2020). Then Minister of Water and Sanitation, Gugile Nkwinti, clarified the ANC's position:

> The ANC unequivocally support the principle of land expropriation without compensation as moved by the EFF. We may disagree on the modalities but we agree on the principle. . . . Land shall be expropriated without compensation. This will be implemented in a way that increases agricultural production, improves food security and ensures that land is returned to those from whom it was taken under colonialism and apartheid. (National Assembly, 2018: 34)

Later, the ANC added that 'expropriation without compensation is our policy', but that this does not mean that 'people must smash and grab, each one for himself and the devil takes the hindmost. . . . We are saying a scientific systemic tool must be developed to ensure that the redress in so far as the land question, the redistribution, is fast-tracked through a scientific means, constitutional means and legislated means' (National Assembly, 2018: 82).

The African Christian Democratic Party acknowledged the historical socio-economic injustices concerning land ownership and forced dispossession and supported 'fair, legal and just reform and land redistribution'. Nevertheless, it did not support the notion, believing it to be another

forced takeover of land, paying evil with evil (National Assembly, 2018: 65), and rejected what it deemed punitive justice.

This summary of the primary debates in parliament and the public arena forms the background of a discussion on the possible future interpretation of the 'just' in 'just and equitable' compensation.

Conclusion: It Is Time for a Transformative Justice Framework

The transition from apartheid South Africa to a constitutional democracy was done with much emphasis on a human rights framework contained in the Constitution (Mutua, 1997). But a rights framework can also freeze hierarchies and preserve the social and economic status quo if it does not actively use the rights to promote social and economic change (Friedman, 2021: 127).[32] If one is not careful, the risk is to transition from one government to another with the hierarchies intact instead of transforming society. Transition happens at the top, while transformation goes to the root (Daly, 2001: 74).

This tension is evident in section 25, where a failure by the state to utilise its provisions fully has, to a great extent, frozen hierarchies and left systemic injustices in place, and where the systemic problems as inherited from the apartheid and colonial past have not been properly addressed.

The law has a role to play here. Markets are not 'self-regulating'. They operate with a regime of legal rules and entitlements in the background (Klare, 1991: 81). Legal entitlements of owners can thus hamper the distribution of wealth, and in the quest for redistribution of such wealth, the law will be confronted with what it deems to be 'just'.

Transformative justice provides an apt framework for interpreting section 25 as we advance. It asks us to focus on inequality and poverty, to require participation from society, to address structural violence, and to emphasise state-building and institutional reforms. As a developing field, it fills the much-needed gap of restructuring society to explicitly address poverty and inequality and the structures that uphold them. Utilising the concept of transformative justice to interpret the requirement of 'just and equitable' in section 25 will enable the courts and decision-makers to address structural violence and socio-economic issues with deep historical roots (Evans, 2019). It serves as a framework to guide actions.

[32] See in this regard Friedman (2021), calling for collective action to put the Constitution into action for change.

Does this require a constitutional amendment? In my opinion, no. But this does not mean that the process of amending section 25, even if it ended with no amendment, was for nothing. This process could have benefited from a more explicit conversation about the notions of justice that should inform section 25. When Mr Malema said 'there can be no reconciliation without justice', he did not specify the type of justice that should inform such a process. This was explicitly done in the interim Constitution with its postamble and during the TRC process.

I would call for a transformative notion of justice, which incorporates redistributive issues by also indicating what we want to achieve with the redistribution, and still retains the elements of transitional and restorative justice in that it recognises that an individual can only truly experience dignity if a society is transformed. The Constitution lays down the possibilities; it is for us to realise it.

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4

The Tale of Two Women

Is the Transformative Thrust Embodied in the Property Clause a Theory or a Lived Reality Where Land Reform Is Concerned?

JUANITA M. PIENAAR

Introduction

> Post-apartheid, the constitutional dispensation has revived debate about the content of ownership. Although the property clause encapsulates the continued existence of the notion of private ownership, its provisions indicate clearly that arguments in favour of the absoluteness of ownership are no longer sustainable, if they ever were. The property clause sets out a framework that regulates the context and manner in which deprivation and expropriation of property can take place, thus indicating the continued relevance of private ownership, but within a new constitutional framework. Accordingly, the property clause explicitly requires reform of access to land, water and other natural resources, which indicates that a more socially responsible form of ownership is envisaged for the future. The constitutional vision for property emerges clearly: it employs property (and its protection) to work towards achieving a society founded on the values of freedom, dignity and equality [footnotes omitted].
>
> (Pope & Du Plessis, 2020: 91)

While the role and function of ownership are directed in accordance with the particular legal and constitutional systems in which it functions, in South Africa, the 'constitutional vision for property' (Michelman & Marais, 2018: 121) is increasingly highlighted. This calls for a 'modest systemic status' (Michelman & Marais, 2018: 121), thereby impacting the overall centrality of the role of ownership.

Although academics and practitioners have underscored the potential of the property clause to transform property rights and, inevitably, also society

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(Van der Walt, 2009: 5),[1] this chapter is more focused on whether specific land reform legislation in South Africa dealing with vulnerable occupiers in particular has given effect to the transformative thrust of the property clause, irrespective of attempts to amend that clause and change its current form. Is it possible that the transformative thrust, integral to land reform endeavours, has remained a concept in theory only and thus elusive, or has it become a lived reality for specific beneficiaries under the land reform programme?

Although land reform is all-encompassing, with three interconnected sub-programmes, the focus of this chapter is specifically on measures regulating the relationship of landowners vis-à-vis occupiers for purposes of the Extension of Security of Tenure Act 62 of 1997, better known as ESTA. Has the transformative thrust of the property clause had any impact, specifically where the relevant relationship continues to be unequal when approached through a lens that endorses hierarchical structures in terms of which ownership is still deemed to be the apex right? (Van der Walt, 2012: 113–15; Wilson, 2021: 11).[2] This is critical, as intended beneficiaries under this particular sub-programme remain vulnerable sectors of South African society, like the two elderly women who form the focus of this exploration: Mrs Phillips and Mrs Malan.

The background to the measures intended to protect the persons in question will be provided first, followed by a discussion of *Grobler v Phillips* and *Nimble Investments*.[3] A reflection follows thereafter, having regard to property law rules and principles. Some ideas regarding the transformative thrust of the property clause are offered, before concluding.

Vulnerable Occupiers and the Extension of Security of Tenure Act 62 of 1997

Background

Decades of focused racial spatial planning and social engineering – apartheid (Van Wyk, 2020: 1–22), succeeding centuries of colonialism

[1] 'Law and social change are most intimately and powerfully linked, not on the grand scale of elite political struggle, but in more modest, everyday struggles about the terms on which ordinary men and women respond to and shape the limits placed on their range of autonomy. Struggles about the scope and content of property law are a paradigmatic example, because they shape the terms on which men and women access the resources necessary to sustain a dignified, autonomous existence.'

[2] For an exposition of the 'rights paradigm', see Van der Walt (2009: 53–70) and for an exposition of the hierarchical paradigm of ownership, with private individual title as the apex right, see Wilson (2021: 11).

[3] *Grobler v Phillips and Others* (446/2020) [2021] ZASCA 100 (14 July 2021) and *Nimble Investments (Pty) Ltd v Malan* 2022 (4) SA 554 (SCA).

and imperialism (Terreblanche, 2002; Ngcukaitobi, 2021) ultimately resulted in a complex (Pienaar, 2014: 141–52), fragmented South African land control system (Pienaar, 2014: 160–62). While an exploratory land reform programme was embarked on under the former Nationalist government in 1991, these initial steps were too few and too superficial, calling for a much more engrained, focused effort. A fully fledged land reform programme followed post-Constitution, embedded in the property clause, in section 25(5) on redistribution (Kotzé & Pienaar, 2021: 278–322), section 25(6) on tenure reform (Hornby et al., 2017) and section 25(7) on restitution (Walker, 2008; Fay & James, 2009). Section 25(8) furthermore provides for the reform of all natural resources to the benefit of all South Africans generally, and section 25(9) refers to legislation to be promulgated for purposes of the tenure reform programme.

Measures Protecting Vulnerable Occupiers

Property law and land reform are inextricably linked (Muller et al., 2019: 675–84). Whether the South African Bill of Rights should embody a property clause, as well as the role and function thereof, was much debated (Chaskalson, 1994: 131, 1995: 222–40; Coggin, 2021). That debate revived, to some extent, when the amendment of the property clause was placed on the agenda in 2018, and a review committee was established accordingly.

A uniquely South African property clause, sculpted to deal with home-bred needs and demands, was confirmed in *Certification of the Constitution*.[4] Notably, this entailed specifically embedding a land reform programme in the property clause. Globally, property clauses are usually employed for one of two objectives: (a) to preserve and protect existing rights and interests or (b) to transform and enhance (Wilson, 2021: 19–20). Given the South African background and the fact that the majority of the sub-clauses in section 25 are indeed aimed at transforming and effecting change, and given that land reform is located in the property clause specifically, it is undeniable that the South African property clause is indeed an example of the second category of clauses (Van der Walt, 2012: 173; Wilson, 2021).[5] Thus, endorsing and promoting land reform and adjusting property constructs and relations are part

[4] *Certification of the Constitution of the Republic of South Africa, In re 1996* 1996 (4) SA 744 (CC).

[5] This highlights that the property clause was not only intended to stop discrimination and inequality, but to go beyond it – to change and to transform.

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and parcel of the national transformation endeavour. Subsection 25(5)–(9) very clearly places specific duties on the state to take reasonable steps to achieve set outcomes, including by promulgating relevant and appropriate legislation. Under section 25(5) and (6), various legislative measures were indeed promulgated to benefit vulnerable persons, persons occupying land that belongs to another, with consent or in accordance with a specific right to occupy (Pienaar, 2014: 305–19; Muller et al., 2019: 498–509; Muller & Viljoen, 2021: 366–77, 380, 486–90; Wilson, 2021: 82–103)[6] including under ESTA (Muller et al., 2019: 751–63; Muller & Viljoen, 2021: 287–96; Wilson, 2021: 57–81).[7]

Extension of Security of Tenure Act 62 of 1997 (ESTA)

The Aim of ESTA

In *Molusi v Voges*,[8] the Constitutional Court (CC) held that ESTA 'was enacted, among other things, to improve the conditions of occupiers of premises on farmland and to afford them substantive protections that the common-law remedies may not afford them' (para. 7). That was necessary as:

> [P]re-reform-era land law reflected the common-law-based view that existing land rights should be entrenched and protected against unlawful intrusions. The land reform legislation – ESTA in this case – changed that view. It highlights the reformist view that the common law principles and practices of land law, that entrench unfair patterns of social domination and marginalisation of vulnerable occupiers in eviction cases, need to change. (para. 39)

At issue was whether the termination of the right of residence and eviction were lawful, as it was granted under the common law on the basis of a lease agreement (para. 2). Nkabinde J highlighted that ESTA

[6] The Land Reform (Labour Tenant) Act 3 of 1996 regulates labour tenancy. Persons falling within the definition of 'labour tenant' would at least be second-generation tenants, whose parents or grandparents provided services to the landowner and in return received certain occupational and agricultural use rights. There are further measures that also protect vulnerable occupiers or tenants within formalised tenancy arrangements, e.g. the Rental Housing Act 50 of 1999. While important for property law purposes, this measure does not, strictly speaking, fall within the ambit of land reform measures as such.

[7] Section 25, combined with section 26(3) of the Constitution, has furthermore impacted greatly on the promulgation of PIE.

[8] *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC).

has a very specific application to particular vulnerable categories of persons, for particular reasons (para. 39). Relying on a 'common law ground' could not force the matter into the (pre-constitutional) common-law paradigm. The finding of the Supreme Court of Appeal (SCA) that the respondents were 'perfectly entitled to rely ... on such common law grounds ... in support of the pleaded claim for eviction' was incorrect (para. 29). Fairness furthermore played an important role in the process as a whole. In contrast, the SCA relied on the common-law principles of the *rei vindicatio* and the reasonableness of the notice of termination (para. 45).

The judgment underlined that common-law evictions are things of the past where rural dwellers are concerned (Pienaar, 2014: 395–417; Muller et al., 2019: 700–15; Muller & Viljoen, 2021: 330–33, 431–41). Instead, *any interference* with occupation, specifically eviction, can only take place in accordance with the provisions of ESTA. Much more is at stake than merely indicating standing or that there is a ground for the application. Eviction orders may only be granted when it is just and equitable in a particular set of circumstances (ESTA, s. 19(3)).[9] Common law and its approaches, rules and implications are explicitly excluded in this context.

Intended Beneficiaries

Occupiers who meet the requirements and fall within the ambit of ESTA stand to benefit. This includes:

(a) 'normal' occupiers, usually farm workers or former farm workers, residing on land which belongs to another and who have or had consent or another right in law to do so;[10] and
(b) 'long term' occupiers (ESTA, s. 8(4)), who have occupied land for a period longer than ten years and who have reached the age of sixty or are employees or former employees of the owner or person in charge

[9] Automatic review proceedings constitute a further mechanism to ensure just and equitable outcomes. This is not a fail-safe mechanism, but when applied correctly, information contained in the probation report should assist the court in deciding whether the granting of an eviction order would be just and equitable.

[10] *Venter v Claasen* 2001 (1) SA 720 (LCC); *Dique v Van der Merwe* 2001 (2) SA 1006 (T). These cases confirmed that marriage partners do not acquire an occupational right purely based on the marriage relationship. Also included in this category are persons who reside on land belonging to another who are self-employed.

> and as a result of ill-health, injury or disability are unable to supply labour.[11]

When a person falls within the ambit of ESTA, procedural and substantive benefits follow (Pienaar, 2014: 395–417). However, for many years, for women in particular, the definitions and categorisations of occupier status remained contentious. 'Indirect' occupier status often referred to women who were deemed to derive their occupier status via spouses. While case law found that a wife could, for example, remain on the land because of the right to family life of her spouse, that in itself did not make her an occupier for purposes of ESTA.[12] This had important implications for joinder and placing women's interests before the court (Pienaar & Geyser, 2010: 248–60). The issue was finally resolved in the Constitutional Court judgment of *Klaase v Van der Merwe*,[13] having regard to Mrs Klaase's fundamental rights, including her right not to be evicted from her home without a court order, made after considering all relevant circumstances, and her right to have her human dignity respected and protected (para. 52).

In light of the main objectives of ESTA and the frequently precarious position of female rural dwellers, the focus shifts to *Grobler v Phillips* and *Nimble Investments.*

The Tale of Two Women

Grobler v Phillips

Grobler v Phillips entailed an eviction application against an eighty-five-year-old widow, Mrs Phillips, who occupied property with her disabled son. Mrs Phillips had been in occupation of the property since 1947, when she was eleven years old. The appellant was successful with an eviction application in the magistrate's court, after which the High Court set aside the eviction order on appeal. On appeal to the SCA, the order of the High Court was confirmed, on the basis that the granting of the eviction order was not just and equitable. That conclusion was reached

[11] Labour tenants: persons using or intending to use the land mainly for industrial, mining, commercial or commercial farming purposes and persons who have an income exceeding R13,625 per month (under General Notice 72 of 16 February 2018 in Government Gazette 41447) are excluded from the definition of 'occupier'.

[12] *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC).

[13] *Klaase v Van der Merwe* 2016 (9) BCLR 1187 (CC).

because of the particular circumstances of Mrs Phillips, including the long period of her occupation, that she would have been protected under ESTA had township development not taken place[14] and because of a verbal promise made to her by previous landowners that she would be able to continue residing on the property for the rest of her life. While that oral right to reside, *habitatio*, was not registered and recorded against the title deed of the property, and thus not enforceable against the current landowner, this factor, considered with the other factors, enjoined the court not to grant an eviction order. That led to the CC judgment, handed down in September 2022, by Tshiqi J.

The CC-decision first relayed the litigation history (paras. 6–20), highlighting that the landowner, Mr Grobler, had already purchased the property in 2008 and had since then been unable to use his land. Justice Tshiqi underscored that eviction applications always raised constitutional matters, in particular with respect to the primary home, and that it was in this light that the interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was critical (para. 22). The court further highlighted that (a) the SCA specifically considered Mrs Phillips' wish to remain on the property and not to be moved; and (b) that the SCA erroneously found that it was the High Court that had to exercise a discretion to grant an eviction order, whereas it was actually the magistrate's court's prerogative (para. 23). A rather formalistic, technical approach to the decision, before focusing on the question as to whether it was just and equitable to grant an order of eviction (paras. 33–47).

Notably, all relevant circumstances had to be considered in deciding whether it would be just and equitable to grant an eviction order. With reference to case law decided under ESTA and highlighting that the same considerations could be considered here as well, within the context of PIE, the CC underlined that the wishes or personal preference of unlawful occupiers were not relevant (para. 36).

Next, the CC dealt with the burden of providing alternative accommodation:

> *Who then bears the obligation* to provide alternative accommodation? Section 4(7) of PIE *clearly states that such obligation lies with a 'municipality, or other organ of state or another landowner'. PIE was enacted to*

[14] ESTA does not apply to towns or urban areas. Township development over a long period of time engulfed the parcel of land, transforming it from agricultural to residential land. Hence excluding ESTA.

> *prevent arbitrary deprivation of property* and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought [emphasis added]. (para. 37)

Regarding competing interests of parties, due regard must be had to the considerations of justice and equity, by striking a balance between the various rights (para. 39), a process that required 'some give by both parties' (para. 40). Over time, Mr Grobler made various offers to Mrs Phillips, including reasonable accommodation in a retirement centre for a period of twelve months provided that costs were limited to R4,000 per month; relocation costs; an upmarket apartment in a secure complex where Mrs Phillips could live for the rest of her life; and a choice from a list of properties in the vicinity constituting a two-bedroom dwelling in a good condition where she would have a lifetime right of residence (paras. 41–43).

Given all of the above, the CC concluded that the SCA had failed to balance the rights of both parties. Whereas Mr Grobler had been struggling to enforce his ownership for fourteen years, since he bought the property, Mrs Phillips would continue to enjoy a decent home:

> Furthermore, the Supreme Court of Appeal placed too much emphasis on Mrs Phillips' peculiar circumstances. A just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored. And it does not mean that the wishes or personal preferences of an unlawful occupier are of any relevance in this enquiry. (para. 44)

Given all of the above factors and considerations, including that Mrs Phillips would not be rendered homeless as the offer of Mr Grobler still stood, the appeal was upheld and the eviction order granted.

Nimble Investments v Malan

After having resided on the farm in question since 1974, Mrs Malan received permission to continue occupying cottage 1 on the farm after her husband died in 2005. A previous attempt in 2006 to evict Mrs Malan was resolved when a lease agreement was concluded with respect to cottage 1. After the appellant bought the farm in 2008, negotiations relating to the evacuation of cottage 1, due to rezoning for purposes of establishing an Agri-Park and the extension of the highway came to naught. Renewed negotiations in 2016 resulted in the respondent agreeing to relocate to cottage 5. On the day of the relocation, members of the

household started removing roof tiles, roof sheets and trusses from cottage 1, despite being ordered to stop by the farm manager in the presence of police. An unlawful structure, built from building materials taken from cottage 1, was constructed alongside cottage 5. Throughout this process, Mrs Malan reacted vehemently. When a letter insisting that the illegal structure be dismantled and the building material returned was ignored, respondents received notices to vacate cottage 5 as their occupation had been terminated on the basis of the respondent's misconduct, which constituted a fundamental breach. At that time the respondent was sixty-eight years old. The Land Claims Court (LCC) set aside the eviction application during the automatic review process.[15]

In the SCA, the minority judgment was handed down per Carelse AJA, with Mbatha JA concurring and the majority judgment per Schippers JA, with Dambuza JA and Eksteen AJA concurring. Carelse AJA was satisfied that Mrs Malan met the requirements for long-term occupation. Two further issues were also dealt with:

(a) whether the termination of the right of residence was just and equitable; and
(b) if the termination was just and equitable, whether the eviction would be just and equitable (para. 12).

The court reiterated the well-established two-phased approach, underlining that the right of residence had to be terminated before the eviction notice could be issued. Before the termination of the right of residence, there were no discussions between the appellant and the respondents, and the respondents were not legally represented (para. 18). The respondents should have been granted an effective opportunity to make representations before their right of residence was to be terminated (para. 22). Accordingly, the minority judgment found it unnecessary to consider whether there was a fundamental breach of trust (para. 23).

The majority judgment highlighted some of the correspondence that occurred, inter alia a notice to Mrs Malan that her right of residence had been terminated on specific grounds, namely:

(a) the unlawful removal of the building materials that constituted a material breach of the relationship; and

[15] On the grounds that (a) the first respondent was a long-term occupier; (b) that the dispossession of the building material did not constitute a fundamental breach; and (c) that Mrs Malan was not granted an opportunity to make representations before her right of residence was terminated.

(b) a further breach when the unauthorised and unlawful structure, to accommodate further members of her family who had not lived with her previously, was erected (para. 37).

Failure to demolish the structure would lead to eviction proceedings. When the eviction proceedings commenced, the founding papers set out that the termination of Mrs Malan's right of residence was just and equitable on three alternative grounds:

(a) failure to pay rent;
(b) if she was an occupier under section 8(5) of ESTA the termination was justified under section 10(1); and
(c) if she was an occupier contemplated under section 8(4), termination was warranted under section 10(1)(a), (b) or (c) of ESTA (para. 39).

Mrs Malan opposed the eviction application, with legal representation, on the grounds that (a) she was a long-term occupier and (b) on a special plea in terms of section 8(5), namely that her right of residence could be terminated only on twelve calendar months' written notice to leave the farm (para. 40).

The first question canvassed was whether there was a breach, which could not be remedied, as contemplated in ESTA (para. 46). This was relevant as it ultimately impacted on whether an eviction order would be just and equitable. Considering all relevant factors, including the history of the relationship of the parties, the seriousness of the occupier's conduct and its effect on the parties and the present attitude of the parties to the relationship, as shown by the evidence (para. 47), the court concluded that it was not practically possible to restore the relationship between Mrs Malan and the appellant (para. 53). The SCA consequently found that the LCC had erred in finding that there was no fundamental breach in the relationship (para. 60).

The issue of whether the eviction order was just and equitable centred on the specific facts (para. 61). Notably, the legislature specifically provided for eviction on the grounds of a fundamental breach (para. 63). The court considered the conduct of both the appellant and the respondent, highlighting that the appellant offered to assist the respondent financially to relocate to serviced plots in the area, that the appellant upgraded cottage 5 with Mrs Malan's approval, that it was only Mrs Malan who qualified as a long-term occupier under section 8(4) (paras. 63–65), and that the other respondents had been occupying property rent-free for many years despite the fact that they were employed elsewhere and received an income (para. 66). The court found that the LCC

had failed to consider the evidence of the appellant's interests in not permitting unlawful conduct, the erection of the illegal structure on the farm and the continued unlawful occupation thereof (para. 67).

Whether the eviction order was just and equitable also entailed the court considering why cottage 5 became prominent in the first place: the appellant was compelled to use that particular portion of the land where cottage 1 was located because of the widening of the road and in order to secure a long-term tenant necessary for its business.

The court was satisfied that no purpose would be served to remit the matter to the magistrate, also having regard to the delay of five years. The appeal thus succeeded, and the eviction order was reinstated.

Reflection

Background

For centuries private individual title – ownership – has enjoyed a prominent position (see Shoemaker, 2021: 1698; Winchester, 2021). Winchester shows very clearly how the centrality of ownership, over centuries, has shaped the modern world: it has dominated approaches to settlement and invasion, demarcation, survey, deeds and registries and the science of mapping, ultimately impacting on all dimensions of daily life: influencing religion, belief, sovereignty, citizenship, franchise, war and peace (Winchester, 2021). Whereas private, individual title unlocked a magnitude of benefits and privileges, common or co-ownership, although still ownership, was just not on a par – as noted by Hardin to constitute the 'tragedy of the commons': 'Common ownership remorselessly generates tragedy' (Hardin, 1968: 1243). Furthermore, it was the ownership of land in particular that was sought after as 'a necessity of all human existence, which is the original source of all wealth, which is strictly limited in extent, which is fixed in geographical position – land ... differs from all other forms of property in these primary and fundamental conditions' (Churchill quoted by Winchester, 2021: 180).

This also resonates with the South African concept of ownership, of private, individual title. Van der Walt highlights that, within the traditional notion of property, especially pre-Constitution, property rights are defined in terms of a hierarchy based on a binary position (Van der Walt, 2012: 114). Accordingly, having a property right entitles the holder to a remedy that will trump the interest of those who have no property rights or who have weaker rights. In the same vein, having a strong

property right (like ownership) gives a remedy that will trump weaker property rights (like limited real rights) of others, just as even a weak property right (like a limited real right) gives a remedy that will trump the holders of non-property rights (like personal rights) (Van der Walt, 2012: 115). Overall, landowners were further expected and entitled to be in undisturbed and exclusive possession of the land, resulting in any interferences – particularly in the form of unlawful occupation of land – to be dealt with harshly and swiftly, in accordance with the 'normality assumption' (Van der Walt, 2012: 56–59). In this regard, common-law property law has prevailed as a rule and, in the process, failed to respond adequately to the needs of persons who do not hold ownership rights over land (Wilson, 2021: 43).

All of that stood to change in a new constitutional dispensation. While protective measures were most certainly embodied in section 25, authorised, focused and considered interferences were specifically provided for, and particular duties were placed on the state in this regard: to interrogate and to question the then-existing paradigm (Pienaar, 2014: 820–22; Wilson, 2021: 57). *Molusi v Voges* underscored that common-law property rules were not relevant within the current eviction paradigm, given the transformative thrust of the property clause post-1994. That is the case specifically where ESTA and PIE are concerned. While both legislative measures were promulgated for particular reasons, providing procedural and substantive protective measures for inherently vulnerable occupiers, each has specific scopes and application: ESTA applies in rural areas, essentially on farmland, and specifically excludes townships, whereas PIE applies nationwide, encapsulating all land in South Africa when unlawful occupation takes place. Thus, depending on the specific location of the land, particular legislative measures would apply, whereas, conversely, others are excluded in principle. Therefore, although a new eviction paradigm emerged, and although land reform legislation would essentially embody the property clause's transformative thrust, the legislation itself had limits, specifically regarding scope and application.

The Case of Mrs Phillips

Township expansion and urban development meant that ESTA, the protective measure specifically promulgated to protect vulnerable persons generally, but specifically after the age of sixty and who had been in occupation of land for more than a decade, was not available to Mrs Phillips.

A previous landowner endeavoured to assist Mrs Philips in providing some form of occupation for her lifetime. While the intention was clear, the arrangement was not formalised. The doctrinal approach to limited real rights and their enforcement against all third parties, including successors in title, meant that an oral arrangement embodied personal rights only in the absence of registration. Common law South African property law rules and principles underscore ownership as the core right, encapsulating a variety of entitlements, including the right to use and enjoy and the right to possess (Muller, 2019: 44–46; Muller et al., 2019: 103–108, 244–54; Pope & Du Plessis, 2020: 51–58, 94–99; Horn et al., 2021: 27–50). While an owner could let go of one or more of such entitlements, thereby subtracting from the *dominium*, the implications thereof were likewise doctrinally determined. Granting a right to live in a house to someone, for a lifetime, would result in a limited real right for that particular individual, enforceable *inter partes*. However, for successors in title to be bound by this arrangement, the subtraction from *dominium* would have to be formalised, recorded and publicised for the world to take note of (Muller et al., 2019: 244–54).

If ESTA did apply, Mrs Philips would have been a section 8(4) long-term occupier with concomitant protective measures. She would ultimately only be evicted in extraordinary circumstances. Under PIE, the Act that was applicable here, Mrs Philips would have had a valid defence if she was *not* an unlawful occupier – that is, if she had consent or another right in law to occupy. As highlighted above, she had neither: consent was specifically revoked by the new landowner and her life right, while relied on for many years, was not formalised and thus not enforceable against the current landowner. Had the life right indeed been registered, the normal common-law property law rules would have prevented this case going forward on an eviction basis. As previous case law has underlined[16] (Boggenpoel & Pienaar, 2017: 321–32), a *habitatio* would then prevail, even and including against the landowner. Presently she was thus in unlawful occupation and stood to be evicted under PIE.

Yet in the SCA judgment Mrs Phillips, as unlawful occupier, was enabled to remain in occupation. Her informal right to occupy was balanced and weighed against the registered right of land ownership and has prevailed. It prevailed because of Mrs Phillips' particular

[16] *Hendricks v Hendricks* 2016 (1) SA 511 (SCA).

personal and socio-economic circumstances, coupled with the particular historical background of the relevant parcel of land. Such a scenario would have been unthinkable pre-Constitution.

But Mrs Phillips' relief was short-lived as the CC upheld the appeal and confirmed the eviction order. That conclusion was reached by essentially highlighting the availability of alternative accommodation and approaching the investigation (and balancing act) from the landowner's perspective. In this regard, paragraph 37 of the CC judgment, quoted earlier, employed by the CC in relation to the duty to provide suitable alternative accommodation, is especially interesting. Two aspects in particular are striking: Firstly, declaring that section 4(7) of PIE 'clearly states that such obligation lies with a municipality, or other organ of state or another landowner' is technically incorrect. Ironically, the CC quotes the whole of section 7(4) earlier in the judgment, in paragraph 28, reproduced here in full:

> If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an eviction if it is just and equitable to do so, *after considering all the relevant circumstances, including*, except whether the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of an unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women [emphasis added].

Accordingly, whether suitable, alternative land had been made available, by the persons or bodies mentioned, is *one of the factors* that could be considered in deciding whether the granting of an eviction order would be just and equitable in the relevant circumstances. Notably, the rest of the section also specifically lists the following factors to be taken into account: the rights and needs of the elderly, children, disabled persons and households headed by women.

Interpreting the specific part of section 4(7) of PIE as only indicating where the duty to provide alternative accommodation lies seems misplaced and specifically ignoring the second part of the section – particularly of relevance to the current facts – is problematic.

Secondly, stating that PIE was promulgated to protect private land ownership against arbitrary deprivation as a starting point is again misplaced. There is a huge body of law dealing specifically with the reasons for and motivations behind promulgating PIE (Pienaar, 2014: 820–22; Muller et al., 2019: 751–63; Muller & Viljoen, 2021: 287–96). PIE

was clearly promulgated for various reasons, including regulating unlawful occupation of land in a fair and humane manner.

The CC focused on the balancing of rights and considering all relevant facts and circumstances and in this process highlighted the various generous offers of accommodation made by Mr Grobler to Mrs Phillips. Mr Grobler is fortunate that he was able to do so – a generous litigant, who owned a variety of properties in single, private title. The CC underlined that Mrs Phillips could not choose where she wanted to live and that her wishes were irrelevant. Ironically, Mrs Phillips never really had a free choice of home and will again not have a free choice in where she is to be settled; and she is not and never will be a homeowner.

The *crux* here is the new eviction paradigm that emerged post-Constitution, which extends beyond formal, official, property law-endorsed rights and interests. The standard of what is just and equitable enables a court's active participation in weighing and balancing rights. Yet, despite the new paradigm, the balancing act is *still* approached from the perspective of the landowner and how other rights could possibly weigh up to those of a landowner. In this balancing act, Mrs Phillips' wishes are irrelevant. Approached in this way, non-ownership rights remain *subject* to landowners' rights. This methodology is endorsed further when an investigation is approached from the departure that the relevant Act, PIE, exists to protect landowners' rights.

The Case of Mrs Malan

Notably, Mrs Malan and Mrs Phillips were both elderly, vulnerable widows with extensive periods of occupation – respectively, just under fifty and seventy years. Insecure tenure prevails when the relationship between a landowner and tenant becomes strained and eventually unsustainable. In these instances, the breakdown of the relationship results in the loss of a home as well. That remains the case so long as tenants, especially vulnerable persons, depend on someone else to provide housing and shelter. In that regard, it is imperative for the relationship to be sustained on a basis of mutual respect and understanding – with both parties having reciprocal duties and obligations.

Essentially, both judgments have shown that whether a particular right or which specific right – be it ownership or an informal right – prevails is determined by the particular facts and circumstances on the one hand and the balancing or weighing exercise on the other. While the outcome of an eviction application may thus remain somewhat unpredictable and

case-specific, because of the particular circumstances, the CC judgment has endorsed an approach that, in principle, continues to subject non-ownership rights to landowners' rights.

Ironically, as in the *Philips* case, the specific legislative measure enacted to assist persons like Mrs Malan did not assist in this particular case. While farm workers routinely enter into lease agreements, problems prevail in that employment remains linked to accommodation. Accordingly, where difficulties are encountered in either of these dimensions, tenure insecurity invariably ensues. Under these circumstances, 'just and equitable' meant that considerations of the public interest in the broadening of a national road and private, commercial interests – by supporting a long-term business lease agreement, outweighed Mrs Malan's occupational rights, particularly when her personal conduct was also taken into account. Despite the latter, for Mrs Malan the crux of the matter remained her relationship with the landowner, which placed an additional burden on the linkage of employment and accommodation.

Transformative Thrust?

> Property law bears a lot of responsibility. At its core, property is society's system for distributing valuable resources. Through property law, we decide who gets what and how our relationships around resources are defined and managed.
>
> (Shoemaker, 2021: 1695–756)

Property law has both constructive powers – in making choices and awarding and distributing rights – and destructive powers – by preventing, limiting, manipulating and taking away. Property law is also inherently linked to power relations. In the South African context, the destructive power of property law was harnessed specifically for purposes of racial domination and the corresponding utilisation of resources. Ownership, and what it entailed with respect to land and immovable property, was restricted to the minority of South Africans, with the majority largely lacking ownership, on the periphery.

Notably, for purposes of the overarching racially based land control system, the precise concept of ownership was further adjusted. In this regard, certain entitlements were highlighted, such as the general point of departure that a landowner should be in exclusive and uninterrupted possession of property, which rights operated in a high-handed fashion in relation to all other 'lesser rights', constituting anything less than ownership. Ironically, given the goal of racial separateness, landowners

could not consent to the occupation of land in contravention of the Prevention of Illegal Squatting Act 52 of 1951 (see Pienaar, 2011: 317–38),[17] thereby further curtailing the specific content and entitlements of landowners – all in pursuit of the overarching goal of racial engineering. Accordingly, within the South African context, the specific concept, content and form of private ownership embodied a uniquely South African-created concept. It is the manipulation and employment of this concept that is embodied in the 'rights and wrongs of property law'. It is also this specific concept and system as a whole that had to be dismantled and reconfigured post-1994 in light of the property clause.

In principle, various avenues were possible:

- dismantling the concept of common-law ownership altogether and providing a brand-new concept in its place;
- keeping the concept basically unchanged, preserving its essential traits and characteristics;
- or finding a midway: retaining some of the essential characteristics and traits of private ownership but ensuring some inroads into its content and effect.

It would seem as if the last option was followed in South Africa by employing two mechanisms specifically:

(a) promulgating legislation that specifically encroaches on and invades the core of private ownership; and
(b) enabling courts to approach and interpret extant law in new, innovative ways and/or to interpret and apply legislative measures – both pre- and post-Constitution – purposively aligned with the Constitution, thus underscoring the transformative thrust.

Regarding the first mechanism, promulgating legislation, the advantages of relying on particular provisions are often also tied to their own limitations. Whereas boundaries may be extended and protective measures enhanced by way of purposive interpretation, the limitations inherent in legislation remain relevant. That is the case where a specific measure only applies in particular instances or only in relation to specific jurisdictional facts, such as the location of the land and property in question. Whereas the

[17] A landowner could not consent to the occupation of a person who did not fall within the ambit of the 'allowed racial groups'. Even if a landowner would want to consent to a black person occupying their property, it was prevented.

protective measures operate generally, it would not cover all land and certain exclusions would result. Therefore, even if the transformative thrust of the property clause is embodied in land reform-related legislation, like ESTA, inevitably not all persons would be assisted by legislation.

For Mrs Phillips, it was precisely new legislation, PIE, embodying a new standard of 'just and equitable' that led to her result, though not the legislative measure that was promulgated and intended to benefit her in the first place. With reference to Wilson's categorisation of 'outsiders' and 'insiders' (Wilson, 2021: 6) and Van der Walt's reference to 'property in the margins' (Van der Walt, 2009: 230), Mrs Phillips became an insider for an interim period only, after the SCA judgment was handed down. When the CC confirmed the eviction order, Mrs Phillips, as an elderly woman living with a disabled son in the only home she had known for most of her life, pursuant of a promise made to her by previous landowners, became an outsider again, living on the margins.

In principle, transformative potential is not limited to legislation. It remains for courts and presiding officials to garner the potential of extant law, searching specifically for gaps or spaces where boundaries can be shifted and protective measures extended (Wilson, 2021: 10).[18]

To date (Coggin, 2021: 1–37),[19] the focus has mainly been on the balancing or negotiation of rights, often within the 'just and equitable' context or in the balancing of competing constitutional rights.[20] As illustrated above, the result is essentially context- and fact-specific, meaning that the transformative thrust, when encountered, is often sporadic, unpredictable and limited. While this approach may have, incrementally, over time, benefited some persons, depending on the actual circumstances, the question is whether this is enough. Is this what the transformative thrust of the property clause and the Bill of Rights envisioned? The balancing and/or renegotiating of rights depend on countervailing rights to be adjudicated on or unpacked, usually in a court of law. In this regard, the playing field is somewhat limited. Furthermore, by focusing on the balancing of rights, the concept of property and what it entails within a transformative framework – specifically transforming

[18] Wilson argues that rights create spaces in which humans can act to pursue their goals. Rights protect agency and law protects rights.

[19] A body of law has, however, developed regarding constitutionality of legislation, tested against s. 25(1) and (2), also impacting on what constituted 'property' for the purposes of s. 25.

[20] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC). In this case, the right to dignity was balanced with ownership rights to effect improvements to a home.

the property system and prevailing power relations, access to and utilisation of resources, specifically land – has largely fallen by the wayside. Notwithstanding endorsing 'one system of law' (*Pharmaceutical Manufacturers*, para. 44; Van der Walt, 2012: 20),[21] *actually* locating non-traditional ownership and non-property rights within the single system of law has remained challenging, for various reasons. First, despite endeavouring to promote a spectrum of rights, courts still approach ownership as the core right, as the point of departure, with all other rights either flowing from or competing with private individual title and where non-ownership rights do prevail, it is seen as an exception, and often only temporary. Secondly, existing recording and formalisation mechanisms remain largely aligned with deeds and registries systems built on formal private, individual title foundations (Pienaar, 2021: 215–44, 235–36). Thirdly, existing conceptions of property and property law continue to influence and inhibit broader societal values from being considered in relation to the utilisation of property and resources (Shandu & Clark, 2021: 39–77). In this regard, economic, commercial and financial considerations routinely overshadow social or basic-needs concerns. Shandu and Clark explain the preference for property rights within an economic paradigm on the basis that they can be measured, are attributed an economic or financial value and are traded in terms of existing markets (Shandu & Clark, 2021: 46). It is in this light that Shandu and Clark instead argue for a values-based approach to property relations in South Africa (Shandu & Clark, 2021: 39–77). With reference to a handful of property theories, including property as a 'web of interconnected rights' (highlighting environmental and sustainability considerations) (Shandu & Clark, 2021: 52–53), property as a continuum of land rights (highlighting recognition of the realities under which people live) (Shandu & Clark, 2021: 53) and property as personhood-theory (highlighting identity, personal connection and flourishing) (Shandu & Clark, 2021: 53–56), the authors argue that, viewed together, these approaches advance a singular idea:

> The current constructions of property are limited due to property's overemphasis on a single set of values – values that are largely economic,

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

> exclusionary and exploitive. Each of the theories aims to realise a more social conception of property law by requiring for current property systems to be radically reconstructed to make room for a more varied set of values, including social, ecological, emotional, and needs-based values. In short, these theories advocate that property should serve a social function. (Shandu & Clark, 2021: 57)

The point of departure is thus: not only are property rights limited externally by way of state regulation (tested against the Bill of Rights) but also limited internally (for example, neighbour law) and, more importantly, *also by their social function*. Ultimately, the authors argue, without unpacking a specific methodology, that the principles underlying the property law system ought to shift and align with the reality of South Africa's historical and constitutional context (Shandu & Clark, 2021: 60).

Such an endeavour would be difficult, but not impossible, under the current unamended property clause (Parliament of the Republic of South Africa, 2021). Constitutional endorsement is found in section 25(5) and (6), requiring reasonable legislative *and other steps* to broaden access to land and improve tenure security, respectively, and in section 25(8), where the reform of all natural resources is provided for. In this regard, two overarching projects are suggested: a land reform legal framework project on the one hand and a reconceptualisation of property law project on the other. Arguably, each would require particular tools and mechanisms and pursue specific objectives. One is not more important than the other. Both are ultimately aimed at a reconceptualised property law system and the protection of wider social (and environmental) interests. Concerning the former, the groundwork had already been laid, to some extent, by way of, for example, the 2019 final Land Panel Report from the Presidential Advisory Panel of Land Reform and Agriculture (PAPLRA, 2019). It is suggested that these recommendations be updated and scrutinised with the transformative thrust objective in mind, as the Report was essentially focused on the amendment of the property clause to enable expropriation with nil compensation. Such reconsideration will impact inter alia on policy, legislation and departmental directives. This could include addressing gaps in land reform legislation dealing with vulnerable occupiers and promulgating mechanisms to de-link employment and accommodation. Proposals in the Report linked to the Land Records Bill (see Kingwell, 2017: 44–93; PAPLRA, 2019), which enables a broad spectrum of land rights, need further urgent attention. The reconceptualisation of the South African property system would need dedicated effort and focus especially from academics, practitioners

and the bench. Some of the groundwork has already been done by scholars in terms of various property theories and approaches that endorse a broader spectrum of the values-based system (Van der Walt, 1997, 2009, 2012; Shandu & Clark, 2021: 39–77; Wilson, 2021). Inevitably, such reconceptualisation would also impact on how property law courses are structured and presented at tertiary education and training institutions. The substantive reconceptualisation of property rules and principles and the land reform legal framework must form a holistic, realigned whole – in general, but especially regarding recognition, enforcement and recording of all relevant rights. Thus *actually* embodying the transformative thrust of the property clause *in a single system of law*.

Conclusion

Property law is bolstered by opportunity and potential and burdened by responsibility. In this light, Van der Walt's earlier work remains pertinent and relevant. By highlighting the fundamental purpose of the property clause, he underlines that existing rights and entitlements can be changed, restricted and subjected to new or stricter controls and limitations. There is further no reason 'why property interests not recognised or protected by private law could be acknowledged and protected by the property clause' (Van der Walt, 2012: 122). The fundamental purpose of the property clause determines whether an entitlement would enjoy protection. This purpose requires a 'just and equitable balance between existing, private property interests and *the public interest in the transformation of the current property regime*' (Van der Walt, 1997: 8). Achieving this balance embodies two components: purposively scrutinising (reading, understanding, interpreting) and applying the property clause 'with due regard for the tensions between the individual and society, between the privileged and the underprivileged, between the haves and the have-nots, between the powerful and the powerless'; and, secondly, doing so in a way that is 'not influenced unwittingly' by 'unsuitable, private-law presuppositions' (Van der Walt, 1997: 13).

While the tale of two women was relayed here, the issue extends beyond Mrs Phillips and Mrs Malan. Ultimately at stake – *in the public interest* – is a transformed property system, where extant hierarchical and binary approaches to property rights are reconceptualised and reconfigured in light of South Africa's colonial and apartheid legacy. Only then can human dignity, equality and freedom become a lived reality for all.

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5

‘Setting Our Transformation Sights Too Low’

Land Reform, ‘Expropriation Without Compensation’ and ‘State Custodianship of Land’

DANIE BRAND

Introduction

Two things are striking about the framework of the political debate over the ‘land question’ that arose from Parliament’s 2018 adoption of an Economic Freedom Fighters (EFF)-introduced motion on land. The first is how, in this debate, the land question was framed as a story only, or at least most importantly, of historical dispossession and the dire need for restoration – how it was exclusively driven by what Cherryl Walker (2008: 11–20) has described as a ‘master narrative of loss and restoration’. The second is the debate’s stubborn focus on one legal issue alone as a solution to the land question thus framed: the power of the state to take land without having to pay compensation for it. In concrete terms, this became the question of whether section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution) should be amended to allow for ‘expropriation without compensation’ or ‘state custodianship of land’.

Both these features of the debate have faced sustained criticism from scholarly and policy development circles. For the first, the criticism remains what Walker raised in 2008 when she identified the ‘master narrative’ as emblematic of the land question. At the time, Walker argued that, although on its own terms the master narrative is undoubtedly and importantly true, it is ‘too simple’, ‘it does not tell the full story, or enough of the story, to sustain a satisfactory resolution of the plotline it sets up’ (Walker, 2008: 16). This is so in three ways. First, it loses sight of a range of problems in landholding that have nothing to do with actual loss and an actual claim for restoration. These are problems such as securing existing landholding for those many who have access to land but

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do not enjoy the protection of the law (security of tenure), and enabling access to land for those who have never had it and so could never – at least not in a particular sense – lose it (redistribution) (Walker, 2008: 16). Second, it fails to account for what happened in the forty-odd years that have passed from the last actual dispossessions until restoration became possible in the early 1990s (Walker, 2008: 16). Thirdly, it fails to depict and deal with the loss and restoration as part of a much broader story of social change – to relate its project of reversal and restitution to 'other programmes of social development' and to 'mesh its own priorities with other constitutional commitments to justice, socio-economic development and equality' (Walker, 2008: 17). That is, it remains locked in a model of restitutory justice, eschewing a broader redistributive or, indeed, transformative notion of justice (Du Plessis, Chapter 3, this volume; Nocella, 2011: 4).

The most cogent response to the second of these features has been that an exclusive or primary focus on the state's power to take land without compensation as the mechanism to address the injustice of current landholding in South Africa and the need to amend the Constitution to create such a power, is simply misplaced.

This is so because whether through deprivation (s. 25(1) of the Constitution – always) or through expropriation (s. 25(2) – under exceptional circumstances), the state has, since the enactment of the Constitution, always had the power to take land without paying any actual compensation. To the extent that the state has since 1996 not taken land without paying compensation[1] it is, in other words, not section 25 of the Constitution that stands in its way. Indeed, section 25 of the Constitution, in the security of tenure and restitution-related provisions of section 25(5)–(8), gives the state far broader powers than only to take without paying in order to bring justice into our relationship with land (Ngcukaitobi, 2021: 206–207).

This is also because our failure to effect justice in landholding so far has little to do with the unavailability of land or the state's inability to acquire land. Instead, it can far more clearly be attributed to acute underfunding; administrative incapacity and, in some cases, maladministration and corruption; and a lack of clear justice-related policy direction and political will (Ngcukaitobi, 2021: 206, 212–13).

[1] It has never *expropriated* without paying compensation, but it has *deprived* land-related rights without doing so.

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I agree in broad terms with these critiques of the framing of the land debate. However, my concern here is not with its technical, doctrinal or policy problems. Instead, I am interested in how this framing relates to our basic understanding and intuitions about how we relate to land in legal terms – the 'codes' that determine what we think and do about our relationship with land and our relationships with one another concerning land (Van der Walt, 2001: 261–62). Does the current framing of the debate, which is so often presented as radical and incisive, indeed break with apartheid/colonial land law? That is, is this framing truly *transformative*?

I suggest it does not and is not. To frame the land question only as a past of dispossession and a present need for restoration, which will be achieved through giving the state sufficient power to take land from some in order to give it to or place it at the disposal of others, fails to break with – still moves within and so, in fact, *confirms and validates* – apartheid land law's basic understanding of land law as determined by an absolute, and absolutely exclusive, notion of ownership. That is, it fails to break with what was apartheid land law's central and most debilitating 'code': the idea that someone or something always, in the final instance, holds absolute, exclusive power over land.

What Was Wrong with Apartheid-Era Property Law?

Several property theorists have engaged the question of what enabled the common law of property to become so easily co-opted and infiltrated by apartheid's racially exclusive social engineering project and what enables that same common law of property to resist post-apartheid efforts at transforming our relationships to land and with one another, relative to land. The touchstone remains the late André van der Walt. Van der Walt identified and described three features of apartheid property law that enabled its unjust outcomes. The first was a narrow understanding of the objects of property as – with only a few exceptions – corporeal 'things'. The second was an equally narrow understanding of property rights as a closed and hierarchical list of rights, with ownership at the apex, followed by a small number of lesser 'real' rights. The third was an a-contextual, syllogistic understanding of the relationship between these rights and remedies, in terms of which an exclusivist remedy that could be exercised against everyone else (within its scope) followed simply and only from the fact of having the right (Van der Walt, 2012: 113–16).

What concerned Van der Walt about this understanding of property law was that it enabled a holder of one of the 'real' rights in the closed list

of property rights, within the scope of that right, to exercise absolute, exclusive control over the 'thing' against everyone else, regardless of context, other individual interests, broader public goals and concerns of fairness and justice (Van der Walt, 2012: 114). Ownership, as the apex property right, enabled this absolute, a-contextual control against everyone and everything else, including the holders of lesser 'real' rights. Van der Walt's critique of the absolute, exclusivist and a-contextual nature of ownership in South African property law was, of course, focused on notions of private ownership in the context of the common law. Nonetheless, he points out that it was mirrored in apartheid's statutory land law by the absolute control it afforded the apartheid state over the lives of black South Africans in their relationship with land. Indeed, he argues that this basic code of the common law of property as establishing zones of absolute and exclusive control enabled apartheid's social engineering project concerning land and its own absolutely exclusivist spatial imagination (Van der Walt, 2001: 266–67).

What bothers me most about this absolutist, exclusive, abstract notion of property that enables the exercise by private property owners of absolute, exclusive control over land is how peculiarly unsuited it probably is to any society, but especially to ours. After all, land in our context is so inevitably subject to a range of overlapping, entangled interests and concerns, most of which are not recognised as legal rights. In addition, we are engaged in an ambitious and overarching collective programme of redress of severe past injustice and transformation towards a more just society – the public good is inevitably an overriding concern in our relationship to land.

The first element of this concern – that an absolute notion of private ownership (and its flipside, absolute notions of state control over land) is unsuited to our reality of land being subject to different overlapping, intertwined, even enfolded interests and concerns – most obviously appears in the context of the reality of communal land ownership. As Tembeka Ngcukaitobi points out:

> The nature of private title for property is fundamentally inconsistent with communal ownership. More 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. (Ngcukaitobi, 2021: 150)

But the problem goes far wider than that, encompassing many other aspects of what Ngcukaitobi calls the 'mystery of tenure' (Ngcukaitobi, 2021: 137). These include:

- how properly and substantively to take account of the varied interests of so-called unlawful occupiers in the context of eviction proceedings and, indeed, what legal form to give to the remaining on land of people against whom an application for eviction has failed (Mhlanga, 2022);
- how to think in law about the long-standing historical use of land in private ownership for community purposes;
- how to think transformatively about different forms of land use, such as in the context of mining, and their coexistence; and, perhaps most intractably,
- how to take legal account of the overlapping of different epistemologies and even ontologies over land.

Stuart Wilson has recently focused on the second element of this concern, that apartheid's absolutist conception of ownership is inimical to both our programme of redress and our transformational agenda:

> 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. (Wilson, 2021: 10–11)

In sum, as Froneman J remarked in his separate concurring judgment in *Daniels v Scribante*,[2] in a poignant tribute to Van der Walt's body of work, apartheid's 'absolutisation of ownership' not only 'confirmed and perpetuated the existing inequalities in personal, social, economic and political freedom' (para. 136), frustrating 'the rectification of historical injustice'. It also stands in the way of realising in the context of land that 'the values of the Constitution are not aimed solely at the past and present, but also the future'; of the transformation, that is, of our relationships to land and to one another concerning land (para. 137).

Against this background, it seems clear – and the consensus is (Van der Walt, 2012: 30, 128; Ngcukaitobi, 2021: 150–51; Wilson, 2021: 10–11) – that in transforming our property and land law to suit the

[2] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC).

demands for land justice in South Africa, the focus should be on addressing in some way this notion of absolute and exclusive control. How can we go about that?

What Must Be Done to Fix That?

In his 2012 book *Property and Constitution*, André van der Walt sets out his vision of a transforming/transformed property law for South Africa. It is a vision of a property law that has moved away from the traditional view of property law as a hierarchised system of rights, syllogistically related to remedies that the right holder can exercise against others in an exclusionary fashion. It is a property law that is instead becoming a system of regulation of overlapping or potentially clashing interests or rights in property, through negotiation or mediation of the overlap or conflict, in a manner that advances constitutional (public) goals. This transforming property law shows three main characteristics. First, it is marked by a shift from a focus on the objects of property law or rights ('things') to a focus on objectives:

> [T]he 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 unwanted systemic effects and bring existing law into line with the promotion of these constitutional goals. (Van der Walt, 2012: 141)

The goals Van der Walt has in mind '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' (Van der Walt, 2012: 141).

The second characteristic is a move from 'property to propriety':

> [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. (Van der Walt, 2012: 147)

In other words, there is a move towards recognising from among the many different interests that may apply to property in each case all those

that warrant protection in light of constitutional goals (the systemic goals of property law), in addition to the traditionally recognised closed list of property rights – an opening up of the canon of rights to property.

The third characteristic is a shift in the way in which property law is developed and applied, and property law disputes resolved, away from syllogistic and towards transformative logic and reasoning. Van der Walt advocates here a move away from the conclusory reasoning traditionally applied in property disputes. There, the focus is on determining the presence or absence of recognised property rights in a dispute and then, once those have been identified, simply mechanically applying the remedies associated with them against and to the exclusion of any other interest. The move is instead towards an approach to resolving property disputes where the focus is on mediating between all the different interests that apply, in light of both the specific context of the dispute and the historical context of property in South Africa and in a manner that best accords with the systemic public goals of property law (Van der Walt, 2012: 151).

This vision of property law is interesting and attractive to me because it amounts to a 'democratisation' of property – a dispersal or diffusion of the absolute power that ownership under apartheid property law afforded over land. This is because, first, it amounts to, if not quite a de-privatisation of property law, then the development of a 'post-private' property law, in the same sense as Karl Klare described the South African Constitution as post-liberal: 'embrac[ing] a vision of *collective self-determination* parallel to (not in place of) . . . [a] strong vision of individual self-determination' (Klare, 1998: 153). While not leaving behind the purpose of property law to protect individual rights and interests, it emphasises the public aspects and implications of property and the fact that individual interests should be given effect in a manner that advances public goals. As Van der Walt puts it: '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' (Van der Walt, 2012: 154).

Ownership is relativised in relation to or contextualised within collective and public concerns. This notion of a 'post-private' property law is echoed in more recent work. Ngcukaitobi, for example, criticising the effect of our land reform programme's fixation on an absolute and exclusionary notion of private ownership on security of tenure, proposes that 'we should reconsider the exclusive and absolute nature of private

title so that the exercise of rights over land is subject to a general public-interest override, provided that such an override is itself constrained by procedural fairness' (Ngcukaitobi, 2021: 150–51).

It also resonates with the burgeoning literature on 'sharing' in property law, in terms of which the absolute and exclusive remedies afforded by rights in terms of traditional property law are softened to take account of collective, intergenerational and other more public concerns (Dyal-Chand, 2013, 2022).[3]

Van der Walt's vision of property law amounts to a democratisation secondly because it opens the canon of recognised property interests far beyond the closed list of property rights recognised in common law, to include those who, in the common-law sense, have no legally recognisable interests. In this respect, this vision of property both grants 'recognition and protection to interests that would not have qualified for it according to private law doctrine' and extends the canon 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' (Van der Walt, 2012: 152). Here, one also hears Ngcukaitobi's concern with unravelling or 'untangling' the 'mystery of land tenure' to decentre what he calls private freehold and extend legal recognition to a range of other rights and interests (Ngcukaitobi, 2021: 150–53).

I see Van der Walt's vision as a democratisation of property law, third and importantly, because it creates for those holding property interests a 'participatory space' within the system of property law. It requires participants in a property law dispute equally to account for the assertion of their interests within the specific context of their case, the broader historical context and the context of the overall systemic goals of the property law system. It then also requires courts to decide such disputes by pursuing an accommodation between competing or overlapping interests in a manner that advances constitutional goals (Van der Walt, 2012: 152). In short, it requires proper, contextualised *consideration* of and concern for everyone involved in a property-related dispute, instead of the mechanical and conclusory application of remedies flowing from

[3] My thanks to Zsa-Zsa Boggenpoel for alerting me to this literature and its relevance to the notion of a 'post-private' property law.

abstract rights (Brand & De Villiers, 2021: 102). This notion has recently been taken further by Stuart Wilson, who advocates a re-envisioned property law within which spaces are created 'in which ordinary people ... [can] shape the terms on which they access land, tenure, and credit' (Wilson, 2021: 13–14, 11).

In this sense of a property law that evinces equal consideration and concern for those involved in land disputes, the democratisation of property law is a particular expression of the notion of the Constitution's 'caring' ethos (Klare, 1998: 153; Van der Walt, 2001:303; Van Marle, 2003; Cornell & Van Marle, 2005). This is, of course, undergirded, finally, by how this vision of property relates to 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 *Property in the Margins*. 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' (Van der Walt, 2009: 24).

This then, is what, in my view, we should be working towards when we think about land and our relationship to it and, more importantly, our relationship with one another in relation to land. We should develop a conception of property and a system of property law that is transformed in the sense that it radically departs from the very foundational features of persistent apartheid-era common-law notions of property and property rights.

The focus should be on apartheid's notion, whether in the context of private ownership or state social engineering, of absolute power over land in favour of someone or some one thing. It is this feature that enabled the common law's complicity in apartheid land law and social engineering. It is this feature that renders the common law of property so peculiarly unsuited to our reality of overlapping, enfolded, entangled interests and concerns in land. It is this feature that impedes the redress of past injustice and the transformation of our living together in relation to land.

The goal should be to disperse and dissemble that absolute power; to democratise property law in the four related ways described above: by

requiring contextualisation of private interests in land within history and within constitutionally mandated transformative goals; by resolving property disputes and developing land law through creating participatory spaces within which mutual accommodation rather than trumping is sought; by opening up the canon of recognised property interests; and by fostering a particular concern for those on the margins and those who are excluded.

To be sure, to focus in this way on dispersing the absolute power that an unreconstructed notion of private ownership and its corollary in state hands affords is not a proposal to do away with individual private ownership or, indeed, more broadly, strong individual rights to land. There are many practical and principled reasons related to land use and development and to important notions of personal freedom, autonomy and equality why strong individual rights to land, capable of resisting interference both from other private individuals and communal or public power, are indispensable to the quest for justice in relation to land and our relationship to it. It is instead thinking about how to relativise private ownership, how to contextualise it within and in relation to the panoply of other individual but also public, common and cross-generational rights, interests and considerations that apply to land and that operate in disputes about land.

In light of this goal, how have we fared over the last four or five years?

The Debate of the Last Four and a Half Years

The debate of the past four and a half years around the land question has, at the political level, given rise to two main proposals for (ostensible) amendment of the Constitution.

First, it gave us the ruling party's notion that was eventually encapsulated in the Constitution Eighteenth Amendment Bill, which was tabled before Parliament and eventually defeated (Gerber, 2021). In short, this proposal sought amendment of section 25 to 'make explicit what is implicit', namely that, where expropriation occurs for purposes of land reform, the amount of compensation paid may be nil (Constitution Eighteenth Amendment Bill (CEAB) 2021, 4). That is, for all its trappings,[4] it was still only a proposal that the state should have the power to

[4] It also required that legislation be enacted to set out circumstances under which compensation for land reform-related expropriation may be nil; declared all land the 'common heritage of all citizens that the state must safeguard for future generations'; and required

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take land from individual owners to give it to others, without having to pay an actual amount of compensation for it (CEAB 2021, 4).

Second, it resulted in the EFF's proposal for 'state custodianship' of all land: that all land be declared the common heritage of the people of South Africa and placed in the custodianship of the state, which will allocate use rights to land through an administrative process, based on need (EFF, 2021: 4, 7).

Although presented by their backers as in some way having important differences (Masungwini, 2021), these two proposals have much in common. As stated in the introduction, they first both clearly move within the same 'master narrative' of the land question, that the only or at least the most important issue is to restore land to those from whom it was taken. I return to this aspect in the conclusion. Secondly, they are the same in that they fail to recognise that the main problem with apartheid property and land law, which enabled colonialism and apartheid's excesses concerning land, was the notion of absolute and exclusive control of land. Indeed, both proposals remain within and, in fact, validate this central 'code' of apartheid land and property law.

This is, of course, most obvious with the African National Congress (ANC) proposal. The method for taking from some to give to others that it has so stubbornly clung to – *expropriation* – is inevitably bound up with the notion of ownership. That is, it is almost nothing other than a proposal of how to enable the state to transfer *ownership* of land from some to others without having to compensate or compensate substantially. That the notion of ownership that this proposal works with is still the unreconstructed apartheid-era notion of absolute exclusive control is borne out by the current government's track record in land reform over the last two decades. As Ngcukaitobi points out in some detail (others have also, see e.g. Cousins, 2020: 9), its efforts at generating access to land have been dominated by a notion of private ownership that affords absolute and exclusive control to the holder and in that sense is no different from apartheid ownership ('our entire "land reform policy" is premised on the idea that land is to be individually owned, in absolute terms, to the exclusion of non-owners') (Ngcukaitobi, 2021: 134), or its complete opposite, through highly attenuated and precarious forms of landholding (such as conditional leasehold in the agricultural context) in which the state retains, and exercises, absolute control (Hall & Kepe,

the state to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable state custodianship of certain land' (CEAB 2021, 4).

2017: 8). In doing so, the government has failed to unravel Ngcukaitobi's 'mystery of tenure'. That is, it has assumed that the 'promise of the Constitution' is for absolute ownership without properly and centrally considering other forms of rights to land, whether 'formal' or 'informal', that would be better suited to our reality of overlapping and enfolded rights and interests in land (Ngcukaitobi, 2021: 150–51). In sum, it has either given land absolutely, or not at all, with nothing in between, staying in this way within the apartheid imaginary of absolute control over land residing exclusively in someone or something, with its absolute absence the consequence for others.

The recurrence of the apartheid-era 'code' of absolute and exclusive control is more difficult to trace in the EFF's proposal for 'state custodianship' of all land. This proposal was consciously presented as a radical departure from apartheid-era notions of private ownership and the idea of absolute control associated with it. It is of course, first, a proposal to abolish private ownership of land in favour of land becoming common heritage and being placed in public (the state standing in for public) custodianship (EFF, 2021: 4). More importantly, care is taken to distinguish the idea of state custodianship from nationalisation by pointing out that while in the latter the state becomes the owner of the land and assumes the control that entails, in the former it does not: 'The difference between nationalisation and custodianship is that nationalisation translates to the transfer of ownership to the State. The State takes some form of management or control of nationalised assets. Whereas custodianship suggests [that] the State acquires rights on behalf of others to facilitate access without either managing, controlling, or exploiting' (EFF, 2021: 2–3).

But this impression is countered by the track record over the last decade or so of the notion of state custodianship of land in the context that the EFF proposal uses as an example: state custodianship of mineral resources in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). Rather than this mechanism affording impoverished communities more control over their land and the mineral resources associated with it it has diminished their control in favour of the state. Even as custodian of mineral resources rather than owner, the state exercises absolute and final control over who gets access to those resources. As, for example, Aninka Claassens and Boitumelo Matlala have shown exhaustively in their study of the record of mineral rights applications in the North-West platinum belt, this, moreover, has failed to displace patterns of control over mineral resources and the land

associated with it in favour of impoverished people and communities (Claassens & Matlala, 2014). The system has instead created a space within which powerful private commercial interests, with influence and political capital, have far better and more effective access, perhaps even than they had at common law. In sum, this record shows that state custodianship neither attenuates absolute control nor effectively de-privatises or equalises access to resources such as land.

This is further illustrated, perhaps more tellingly, in those instances where the state has, in the context of land reform, already assumed the position of 'custodian' of rights, such as through the acquisition and lease of farmland to enable access for impoverished black South Africans in terms of the State Land Lease and Disposal Policy (SLLDP) of 2013. Ruth Hall and Thembela Kepe have argued that this system of affording strongly attenuated conditional land use rights has turned out to be a 'highly prescriptive managerial approach' and 'a key way in which black rural populations can be controlled', with the requirement 'to use land in compliance with official designs ... [often being] the basis for them to lose land' (Hall & Kepe, 2017: 8). This leads them to conclude that 'South Africa's land reform seems to have succumbed to the ingrained scepticism held by officials in successive [apartheid-era] departments of "native affairs" and "bantu affairs" about secure and independent land rights for black people' (Hall & Kepe, 2017: 8; see also Hall & Williams, 2003; Hall, 2015). To this, one must add that this system has in-built vulnerability to elite capture, with political and economic power conditioning access, to the detriment of those on the margins who are the intended beneficiaries of the policy (PLAAS, 2020: 3–4).

In fact, at the risk of taking this point too far, the EFF proposal for state custodianship of all land mirrors apartheid's absolute notion of ownership in much the same way that statutory apartheid land law, which applied only to black South Africans, mirrored the then common-law ownership right in its absoluteness and exclusivity. As André van der Walt has argued persuasively, it was the common-law absolute notion of ownership that enabled the absolute control that the state could exercise over black South Africans' landholding through statutory land law. Once black South Africans were statutorily divested of the capacity to hold common-law ownership or other 'real' rights to land in 'white' areas, they were, in legal terms, at the mercy of the state's absolute control – in a system of absolute rights, the absence of rights renders one absolutely without control (Van der Walt, 2001: 268).

In sum, in its failure to break with the apartheid notion that, whether through ownership or through the state, someone or

something, somewhere, must hold absolute control over land, the past four and half years' debate over the land question has failed to engage Ngcukaitobi's 'mystery of land tenure'. Fixated on who holds absolute control at the expense of whom and on wresting absolute control from some in favour of others, it has failed to grapple with the real land question of how to mediate overlapping rights and interests over land in a democratised manner, that takes account of the public good. To do the latter, rather than focus on the wresting of absolute control from some in favour of others, we should focus on how to dissemble absolute control itself, by thinking of a different system of rights over land, one that is not hierarchical, at least in a fixed linear sense, and where conflict between rights and interests can be mediated in democratic ways.

What Have We, in the Process, Left Behind?

The irony is that, through the courts, there have been various encouraging lines of development concerning this – cases in which, whether through the creation or bolstering of participatory spaces, recognition of previously unrecognised rights and interests or introduction of a 'public interest override' (Ngcukaitobi, 2021: 151), the democratisation of property law has started to emerge. The myopic focus of the political debate on land of the past four and a half years left these developments behind and has diverted attention from the urgent need to consolidate and further the gains so achieved. I give examples of these developments from two areas, although there are others also: contestation about mineral rights and the land attached to them, and eviction.

The clash between mineral rights awarded in terms of the MPRDA and so-called surface rights to the land to which such mineral rights relate is a particularly fruitful context within which to consider ways to dissemble apartheid's notion that somewhere, someone or something must hold absolute control over land to the exclusion of all else. This is because mineral rights such as prospecting or mining rights provide the most acute version of this absolute control: within their scope, they afford their holders the strongest control over the land to which they apply, trumping even the otherwise apex right of ownership.

The notion that a prospecting or mining right within its terms affords its holder absolute control over the resource to which it applies, and the land under or on which it is found, has steadily been dispersed and democratised. This has happened in two ways.

First, cases rendering robust interpretations of statutory requirements that surface right holders be consulted at various stages of the acquisition and implementation of mineral rights have subjected mineral rights holders' ostensibly absolute control to versions of Van der Walt's 'participatory spaces', providing opportunities for achieving mutual accommodation of overlapping rights and interests. On the back of a basic principle established in the early case of *Bengwenyama*[5] that all requirements imposed on applicants for mineral rights or mineral rights holders to consult with the holders of surface rights to the land concerned should be interpreted substantively, to require 'negotiation and . . . agreement' and 'engagement in good faith to attempt to reach accommodation . . . in respect of the impact on the [surface right holder's] right to use his land' (para. 65), potentially robust participatory spaces have been created at various stages of the process of acquisition and implementation of mineral rights. In *Maledu*,[6] for example, it was held that the grant of a mineral right does not simply automatically extinguish informal rights to the land to which it applies, held in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA). Instead, these rights could only be deprived with the consent of their holders, obtained in the case of communally held land at a meeting of which all actual right holders had prior notice and in which they had a reasonable opportunity to participate (*Maledu*, paras. 107–108).[7] It was further held that the grant of a mining right also does not, on its own, entitle its holder to evict surface right holders to the land in question. Before it could apply for an eviction order it would have to show that it had made a good faith and reasonable attempt through mediation to achieve the accommodation of the surface right holders' interests, which had failed (paras. 109–10). Both these holdings are examples of the court subjecting the ostensibly absolute control that mineral rights afford to strong, substantive participatory

[5] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

[6] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another (Mdumiseni Dlamini and Another as Amici Curiae)* 2019 (2) SA 1 (CC).

[7] Some of the implications of Petse AJ's judgment in *Maledu* were shortly after the judgment was handed down illustrated in the so-called Xolobeni matter of *Baleni and Others v Minister of Mineral Resources and Others* (2019 (2) SA 453 (GP)), where Basson J held that the Minister could not grant a mining right to an applicant mine on land occupied in terms of IPILRA rights by the Umgungundlovu community unless the community themselves had given their free and informed consent to be deprived of the informal rights to the land in question. For a discussion of the Xolobeni matter and *Maledu*, see Meyer (2020).

spaces in which interests that overlap or conflict with the mining right can be protected and at least partially vindicated. In doing so, both of course also democratise the mineral rights context in one of the other ways outlined above: through providing strong protection against the exercise of mineral rights to interests not previously recognised in this context, informal land rights.

The mineral rights context has also been significantly democratised in another way than the creation of strong participatory spaces and the consequent recognition of previously ignored individual or communal interests. In *Maccsand*,[8] the Constitutional Court held that the award of a mining right does not divest its holder of complying, before it can start mining, with requirements for environmental authorisation and land use permission imposed, respectively, by the National Environmental Management Act 107 of 1998 (NEMA) and the Western Cape's Land Use and Planning Ordinance 15 of 1985 (LUPO). This judgment is a powerful subjection of the potentially exclusive power that a mining right affords its holder to the broader public interest in environmental protection and orderly land use and planning protected by the NEMA and the LUPO and, importantly, to the participatory spaces that are created in these laws for members of the public to object to applications for authorisation or land use modification. It has since been extended into areas other than environmental and land use regulation.

The other area in which there are hints of the democratisation of ownership and property law is in the law regulating home evictions. In these cases, the progressive recognition of certain checks on the exercise of ownership rights through the *rei vindicatio*, the halting but increasing extension of these into *private* ownership and the recognition of new kinds of rights or at least old kinds of rights applied in new contexts with which to counter ownership have made significant inroads into the absoluteness of ownership.

On the basis of the judgment in *Port Elizabeth Municipality*,[9] Van der Walt pointed out in 2012 that the constitutional requirement given effect in home eviction legislation, that an eviction order from a home may only be granted after a court has concluded eviction would be just and equitable in the circumstances, could develop into a full-fledged substantive rather than only procedural right not to lose one's home arbitrarily. He argued that the 'just and equitable' enquiry during eviction proceedings was a

[8] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).
[9] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

signal space for the destabilisation and dispersal of the previously absolute power that ownership afforded over land (Van der Walt, 2012: 156–58).

His prediction concerning this has, frustratingly slowly but nonetheless progressively, come to fruition in the cases. In the context of the state seeking evictions from homes, the courts have recognised a range of interests and factors as 'relevant' to justice and equity and important enough to qualify the absoluteness of ownership and prevent its absolute exercise through eviction. Of these, the duration of occupation of the homes concerned; the extent of 'settledness' in economic, social and other networks of those whose eviction is sought; their vulnerability to homelessness and other depredations upon eviction; uncertainty about the validity of the title of the owner seeking eviction due to pending proceedings to challenge it; the reason why eviction is sought; the extent to which the owner attempted to avoid eviction by negotiating ('engaging') with those on the land; the use to which the land will be put once eviction is achieved; and the extent to which social instability may arise from an eviction are some examples.[10] These developments in the context of state or state-sponsored eviction have also increasingly been extended to evictions sought by private owners. First, in cases such as *Blue Moonlight*,[11] private property owners were held to have to 'endure' the presence of persons on their land against whom an eviction order has been obtained for as long as it takes the state to find them alternative accommodation. Second, there have been increasing numbers of cases in which eviction orders sought by private owners concerning private property have been denied because eviction was held to be unjust and inequitable under the prevailing circumstances.[12] To be sure, these developments have been stop–start (Brand & De Villiers, 2021); there

[10] See e.g. *Port Elizabeth Municipality; President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Classprop (Pty) Ltd v Nini Crescent Legode* Case no. 80910/16 (NGHC) 30 February 2018.

[11] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

[12] *All Builders and Cleaning Services CC v Matlaila and Others* (42349/13) [2015] ZAGPJHC 2 (16 January 2015); *Classprop v Nini Crescent*, 2018; *Grobler v Phillips and Others* (446/2020) [2021] ZASCA 100 (14 July 2021); *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC). But see Liebenberg and Kolabhai (2022) for a discussion of the nevertheless enduring embrace of the distinction between public and private in evictions case law.

remains unevenness in the actual application in, for example, the Magistrates Courts of the principles so developed (Singh & Erasmus, 2022: 24–25, 27–28); and the development in this direction is certainly not yet conceptually coherent (Liebenberg & Kolabhai, 2022: 258–67). Nonetheless, they represent significant conceptual destabilisation of the apartheid notion of ownership as an apex right, affording absolute power to exclude.

The eviction context has also seen the recognition of new rights and interests or the 'repackaging' of existing rights at common law to erode the absoluteness of ownership. Most obviously, the fact that our new, constitutionally inspired eviction law contemplates refusal of eviction orders sought against 'unlawful' occupiers of land (that is, people who occupy without any recognised right in law to do so), means that a new category of tenure security has been created: an entitlement to remain on someone else's land although you have no 'right' to do so. Much work remains to be done to develop, conceptualise and describe this category, which seems a dramatic and clear relativisation and contextualisation of ownership against concerns and factors other than countervailing rights (Mhlanga, 2022). In addition, long-established common-law mechanisms have been adapted to new circumstances to give effect to constitutionally required security of tenure. One example occurred in the case of *Community of Grootkraal*.[13] In this case, the Supreme Court of Appeal recognised, based on the somewhat obscure common-law evidentiary mechanism of *vetustas*, that a public servitude had arisen in favour of a community of farmworkers to continue their use for religious, educational and social purposes of a portion of a private owner's farm. On this basis, the farm owner's attempt to evict them failed.

Conclusion

In the introduction, I mention two features of the past four and half years' debate about the land question that are striking: the framing of the basic problem as one of loss and the consequent need for restoration; and the notion that the only solution to the problem thus framed is to enable the state to take land from some to place it at the disposal of others, without having to pay for it. In the body of the chapter, I focus on the latter. I argue that the fixation on enabling the state to take land so as to

[13] *Community of Grootkraal v Botha NO and Others* 2019 (2) SA 128 (SCA).

place it at the disposal of those who have none, whether through 'expropriation without compensation' or 'state custodianship of land', has caused the debate to remain caught up in the basic conceptual structuring of apartheid land law, conditioned by an understanding of ownership as an apex property right that affords its holder absolute and exclusive control of the land to which it applies. I conclude that, indeed, the two proposals that have arisen based on this feature of the debate have validated and confirmed the notion of absolute control so central to apartheid land law.

Here, in conclusion, I turn to the former of the two features: the framing of the problem as only one of land having been taken so that it should now be taken and then given back. As already alluded to in the introduction, Cherryl Walker in 2008 expressed her concern about reducing the land question to this 'master narrative of loss and restoration'. Although, so she argues, this master narrative is undoubtedly true and a central and important aspect of the land question, it is only one part of a much broader question. As a lens through which to consider the transformation of our relationship to land and to one another concerning land, she concludes, it is limited (Walker, 2008: 16).

But it goes further than this. Framing the question thus is also limiting – it constricts our transformative imagination and ambition. In an engagement with different understandings of the transformation of our land law, André van der Walt considers the kind of oppositional approach of 'challenge and demand' that the master narrative of loss and restoration and a purely restitutory approach to land reform embody. Drawing on Njabulo Ndebele (2000a, 2000b, 2000c), he points out first that such an oppositional approach inevitably validates that which it is directed against:

> In the confrontational stand-off of challenge and demand the reform process derives its power and its dynamics from its position of confronting and facing the other, waiting for something to be given or done by the other. The inherent recognition of the confronted other as the source of injustice is … understandable in this aesthetic, but the aesthetic and rhetorical implication is that the confronted other is still recognized as the source of power, even at a time when political power has already been wrested away from the other. (Van der Walt, 2001: 292)

Moreover, so he continues, to adopt such an oppositional, restitutory approach to the transformation of our land law means that 'the shadow, the ghost of apartheid land law continues to hover over … land reform jurisprudence, even after the formal demise of apartheid politics and law,

thereby potentially restricting our sources of energy and power to imagine a different future, where change and justice no longer depend on opposition to the denounced other of the past' (Van der Walt, 2001: 292).

Drawing together Walker and Van der Walt, in framing the land question over the past four and a half years as only about taking what was taken unjustly in the past and giving it back we are 'setting our transformation sights [far too] low' (Van der Walt, 2002: 271). It has limited our gaze to only the restitutory aspects of land reform and caused us to lose sight of the real, broader question – the question of how to live together concerning land. It has restricted our transformative imagination and blinded us to the admittedly nascent, halting and interspersed but nonetheless truly transformative developments in our land law jurisprudence towards democratising our relationship to land and the need to nurture, confirm, validate and expand these developments. Perhaps most gallingly, the narrow focus on better enabling the state to take land to 'give it back' has caused us to mirror, and so strongly validate, precisely that away from which we most need to transform: the apartheid notion of land and property law being simply about locating absolute and exclusive control.

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PART II

Potentials and Pitfalls of South African Land Reform

6

The Constitution's Mandate for Transformation

From 'Expropriation Without Compensation' to 'Equitable Access to Land'

RUTH HALL

Introduction

'Expropriation without compensation' (EWC) is a politically potent and simultaneously ambiguous term. It is politically potent not despite but precisely because of its ambiguity, in that it signals a radical departure from a land property regime that is patently illegitimate and unjust while obscuring how it is to be changed. It centres exclusively on the acquisition of land – thus on the nexus between the state and landowners – rather than on the distributive agenda – and thus on the nexus between the state and landless citizens. In this way, the EWC narrative sidesteps foundational questions of who should get which land, on what terms, for what purposes, where, and any wider agrarian reform agenda. These questions, which I have summarised as 'who, what, where, how, why', constitute the real politics of land reform and have been the focus of intense political negotiation, public debate and policy deliberation since the start of the political transition over three decades ago (Hall, 2010, 2015). Their scale and complexity have frequently been contracted into 'the land question'.

The promotion of EWC as the purported silver bullet to 'the land question' is relatively recent, arising from mounting factionalism within the ruling party after its 52nd National Conference at Polokwane in 2007, the emergence of an opposition party to the left of it in Parliament in 2014 and culminating in a parliamentary motion on EWC in 2018. This, in turn, birthed two distinct and overlapping processes driven by the legislature and executive, respectively: a parliamentary constitutional review committee to review and propose whether amendment was justified, and a Presidential Advisory Panel on Land Reform and Agriculture

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(PAPLRA) to advise on precisely the same matter, as well as a broader spectrum of policy questions. I characterise these processes as a form of 'political theatre' in that, while they addressed real issues, they were acted out performatively, for purposes and in ways quite distinct from what was being claimed, and primarily as a substitute for action rather than a precondition for it (Death, 2011). In this sense, the EWC debate that dominated much political discourse for a four-year period, while failing to yield any tangible outcome, legally or practically, arguably produced distinct political benefits. As a concept, EWC deftly obscures profound political differences and has been used to refer to a spectrum of measures ranging from the nationalisation of all land (as in the Economic Freedom Fighters' (EFF) initial formulation) to state custodianship (in the EFF's later formulation) or to selective case-by-case property acquisitions (as proposed by the African National Congress (ANC)).

The well-known story of how EWC moved to the centre stage of South African politics in 2018 is outlined in the Introduction to this volume, and here I rehearse only its headline features. Following the EFF's motion in Parliament to review the property clause, the ANC amended the motion by adding several caveats about the rule of law and national food security, and together they mustered a majority and passed it on 27 February 2018. Parliament then set up a Constitutional Review Committee (CRC), which conducted mass public hearings around the country and received over 600,000 written submissions – more than at any time since the constitutional consultations in 1995. The bulk of written submissions objected to any constitutional amendment, while the overwhelming majority of those attending the hearings supported amendment – this distinction largely correlating with race in a predictable manner. The Committee, reporting in November, concluded in favour of amendment 'to make explicit that which is implicit', namely that EWC is permissible (CRC, 2018: 34). EWC, it affirmed, is a justifiable objective, which is already provided for, but amendment should nonetheless be pursued.

In response, Parliament mandated a new parliamentary ad hoc committee on section 25 (the property clause) to propose and consult on such an amendment. This inter-party committee, predictably hampered by the continued deadlock, took more than two years to propose new wording. The two-stage parliamentary process proved effective in separating the in-principle debate on EWC from its content: hearings provided a cathartic public spectacle as a foil to the political theatre among political parties in Parliament, and the technical work of developing an

amendment which followed was out of public purview and drew less interest, allowing the political momentum to recede. A further bifurcation was achieved by establishing the parallel PAPLRA (see section on PAPLRA below). It all ended with a whimper, rather than a bang, with the amendment bill failing to secure the required two-thirds of the votes in the National Assembly on 7 December 2021 – four years after the EWC debate had emerged as part of the king-making deals across ruling party factions which had secured Cyril Ramaphosa's presidency at the ANC's 54th elective conference in December 2017.

Expropriation is one means by which land can be acquired to be made available for redistribution or restitution. Even once the legal framework is fixed, and policy is developed to determine when expropriation should take place and how compensation is to be addressed in diverse situations, the questions as to who this will help, and how, remain. The popular imagination has been seized by a polarised debate between those blaming the 1996 Constitution of the Republic of South Africa (the Constitution) for the failures of land reform, and those defending it (and incorrectly interpreting it as requiring compensation). But there was a third position, which several academics, lawyers and activists tried to develop and communicate throughout this process. This chapter sets out this third position: that the 'property clause' provides a powerful mandate for transformation and an under-developed right of equitable access to land for landless citizens. In this sense, *the question of EWC occluded the question of redistribution*. Now that the constitutional amendment bill has failed and this red herring lies dormant for now, a more productive conversation could address as its central concern the question of the ways by which and terms on which people can gain access to land.

Actors on the Stage

Who were the protagonists in the EWC debate? The EFF and the Democratic Alliance (DA), for their own respective political reasons, consistently equated section 25 with a requirement of compensation for expropriation. On that, they agreed. The DA considered any deviation from a compensation-based approach to expropriation, and therefore any amendment, as tinkering with the terms of political settlement reached in the 1990s and vociferously opposed it (Democratic Alliance, 2018). A spectrum of business interests and think tanks, such as the Institute for Race Relations and Centre for Development and Enterprise, expressed similar sentiments, warning of mass disinvestment and

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financial collapse. Yet in my numerous encounters with international financiers, South African banks, foreign embassies and trade missions during this period, my distinct impression was that they could absorb possible losses associated with the forcible confiscation of specific parcels of land, which could be factored into risk calculations, and therefore absorbed. Rather, their concern was about predictability: what they sought was clarity as to when compensation would be paid, when it would not and how this would be determined. This is the clarity that the ANC refused to provide.

The EFF, for its part, depicted the property clause as being the primary impediment to meaningful transformation of land relations and the culprit for the perpetuation of the legacy of colonial theft – a political manoeuvre that, paradoxically, allowed the ANC to abdicate from responsibility for its own failure to use the constitutional provisions to expropriate in the interests of land reform. It called for nationalisation as a decisive reversal of colonial land theft – the term 'expropriation' being misleading, as, in fact, what it meant is confiscation of all property, later clarified as a form of state custodianship. In its view, the Constitution has a presumption of compensation: 'The Constitution as it is currently written does not allow either for expropriation without compensation or for the narrow, piece-meal expropriations advocated by liberals' (EFF, 2018: 15). In their interpretation that the property clause presumes, even assures, compensation, then, the DA and EFF agreed. In contrast, the ANC's perspective can only be described as incoherent. Combining some Constitution-blaming with investor-reassuring, its responses to the evolving debate could be described as 'Talk EFF, walk DA'.

Actors in this public discourse not only took different positions on EWC but also meant different things by it. The ostensible convergence, when the ANC and EFF voted together in Parliament in February 2018, was illusory; they were not agreed on what EWC means, let alone how it would be applied. The ANC resolution at its 2017 conference declared that EWC should be 'one of the key mechanisms available' to government (ANC, 2017: para. 15). It did not say that the property clause would need to be amended to achieve this. It had *not* called for any change to the Constitution, nor did it say why EWC was needed or what problem it would solve. It insisted on caveats such as that land reform must not damage agricultural production or food security and specified unused and under-utilised land, or land held speculatively or indebted, as targets for EWC (ANC, 2017: paras. 16–17) but omitted any mention of expropriating productive farms or urban land.

The 'property clause' is a mandate for transformation. By this, I mean that it affirms the rights of individuals, communities and society at large to the transformation of property relations through constitutionally mandated land reform and related reforms. This is not to say that it is sacrosanct or could not be improved. Indeed, a compromise was certainly struck over property rights in the 1990s, but this is most starkly evident not in the new Constitution, but rather in the interim Constitution of the Republic of South Africa, Act 200 of 1993. It is worth returning to these moments where the parameters for the status of (inherited) property rights, and the terms of their taking, were established. It was in this early period of negotiations that the ANC rapidly shifted course and abandoned its (always ambivalent) promise of nationalisation. Questions of land justice were framed on the one hand as being central to transitional justice and simultaneously as a shared responsibility of the whole society, with the costs to be carried by the wealthy, including property owners, via the tax system and the national fiscus.

The Compromise in the Interim Constitution

The status of property rights under a new dispensation was among the most contentious issues in negotiating the terms of political transition in the 1990s. The 1993 'interim' Constitution (Act 200 of 1993) protected existing property rights through the time of the first democratic election while providing for land restitution, paving the way for a Restitution of Land Rights Act shortly after the first democratic elections. In July 1991, the ANC's National Conference adopted guidelines developed by its Land Commission which rejected any constitutional protection of property rights (Klug, 2000: 127; see also Klug, Chapter 11, this volume). Yet a mere few months later, when formal negotiations commenced, the ANC had abandoned nationalisation as a policy goal, acceded to compensation being paid for expropriated property and considered options to fund a programme that would now involve substantial capital costs to the state (ANC, 1992; Hall, 2010). A proposed tax on landowners to fund a 'compensation account' earmarked for land reform purposes was quickly abandoned (Klug, 2000: 128).

Back in the early 1990s, as the details of the interim Constitution and Bill of Rights were debated (and again four years later in 1995 when debating the final Constitution), divisions between the ANC and the National Party (NP) government centred on whether expropriation of property should be allowed for public purposes only or also in the wider

public interest; whether or not compensation would be set at market value and whether it would be defined by a court; and the status of the right to restitution of property rights (Chaskalson, 1995; Klug, 2000: 132–33). The NP argued for unconditional protection of all private property, while the liberal and business-aligned Democratic Party (DP) agreed with the ANC that this should be tempered with the right to expropriate property not only for public purposes (such as infrastructure) but also in the public interest, including for land reform, subject to the payment of compensation as determined by a court (Klug, 2000: 127).

By February 1993, the ANC had acceded to the payment of 'just compensation' for land acquired by the state based on an equitable balance of public and private interests and subject to legal review – and therefore to the principle that the costs of land reform would be largely carried by the state. Unlike its earlier guidelines, the ANC's proposals for the interim Constitution drew no distinction between personal and corporate property. The debate on property rights at the Convention for a Democratic South Africa (CODESA) focused on the mines and industry, together with land, a conflation of forms of property that again proved convenient in 1995 for the farming lobby, which was less influential in the negotiations than big business (Dolny[1] interview, 2005; own observation). As Mandela told businessmen in London, '[w]e have issued an investment code which provides there will be no expropriation of property or investments. Foreign investors will be able to repatriate dividends and profits' (Kimber, 1994, cited in Hall, 2010: 153).

As part of its 'Back to the Land' campaign in June 1993, the National Land Committee (NLC) supported a protest march of 500 rural community representatives, drawn from all provinces, at the CODESA negotiations, demanding the removal of the property rights from the draft interim Constitution and the confirmation of a right to restitution. This did not work. Agreement on the property clause on 26 October 1993 was the last item on which the interim Constitution turned, in lengthy and late-night debates described as both fierce and chaotic (Chaskalson, 1995). The final agreed text set out an explicit right *to* property – a positive freedom for landowners to acquire it, hold it and dispose of it. No such right exists within the final Constitution, which instead opens with only a *negative* property right to govern the way in which those holding property may be deprived of it.

[1] Helena Dolny was an advisor to Derek Hanekom, the ANC's first Minister of Agriculture and Land Affairs, and later was head of the Land Bank.

In all the contestation between rural community groups and the ANC, the focus was squarely on the right to restitution and securing the tenure of farm workers and labour tenants (Klug, 2000: 133). Throughout this period, the constituency for wider land redistribution was not clear. While landlessness was a popular topic at workshops and central to the rhetoric of land non-governmental organisations (NGOs), it lacked a clearly defined constituency. The NGOs worked with communities that had been forcibly removed or threatened with forced removals in the preceding period. From 1993 onwards, as the restitution process was separated from the development of policies for land redistribution, the claims process was taken forward by the Centre for Applied Legal Studies (CALS), the Legal Resources Centre (LRC) and the Land and Agricultural Policy Centre (LAPC)[2] in a technical approach that favoured the input of lawyers. Dolny (interview, 2005) observed that, by the early 1990s and with the start of formal negotiations, 'this was a legal liberation struggle'. Its corollary, of course, was that the shaping of land redistribution policy and agricultural policy, in particular, became the domain of agricultural economists, largely the '*verligte*' (enlightened) academics working for state institutions who favoured small-scale farming options but within a deregulated and liberalised economy and were contracted to the World Bank (Hall, 2010). This bifurcation between lawyers and economists continued to beset land reform.

The Mandate for Transformation

The 'final' Constitution (Act 108 of 1996) mandated land reform, setting out rights for the dispossessed, landless and those with insecure tenure. In relation to each property right – the right to access on an equitable basis; the right to restitution; and the right to secure tenure – the duty-bearer is the state (s. 25(5), (6) and (7)). The state is empowered to expropriate property, including land, in the public interest as well as for public purposes (s. 25(2)), and a special status is given to those expropriations carried out in pursuit of 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources' (s. 25(4)). Expropriation is subject to the payment of 'just and equitable' compensation, taking into account five criteria, of

[2] The LAPC was the think tank established with ANC support and with World Bank advisors, to channel donor funding to land and rural development NGOs, agricultural economists and other academics to support policy development.

which market value is one, the others being the history of its acquisition, past state subsidies in its development, its current use and the purpose of the expropriation (s. 25(3)).

As in the negotiations at CODESA, the question of property rights again became one of the 'unresolvable lightning rods' in the Constitutional Assembly (Klug, 2000: 134). At stake was whether property – already regulated through statute and common law – should be given constitutional protection in a Bill of Rights and, if so, how the powers of the state to enact land reform and the rights of citizens to claim land rights would be balanced against the rights of existing property owners. When the NP failed to garner support for any form of group rights (such as a veto for whites or other minorities on certain kinds of legislation), it focused on the defence of individual rights, specifically property rights, as the last bastion of white protection against the redistribution of wealth (Klug, 2000).

At hearings on property rights in August 1995 held by Theme Sub-Committee 6.3, three options compiled by the Working Group on Property Rights were presented and debated: two draft versions of a property rights clause and the option of not including a property clause in the Constitution (own observation). Among those who opposed the inclusion of a property clause at the hearings were academics and lawyers who, drawing on experiences in Canada and New Zealand, argued that embedding property rights in the Constitution would 'insulate' property owners from redistribution efforts and so 'institutionalise or entrench imbalances and injustices in the distribution of property' (Constitutional Assembly, 1995: 26–55; own observation). The most vociferous objections came from the Pan Africanist Congress, based on its own alternative policy vision, rather than from the ANC (Van der Walt, 1999: 112). Although the debate was framed as one about land and land reform, the provisions would extend to all types of property. Arguments for the constitutional protection of property rights came not only from farmers' associations and political parties representing white interests (the NP and the DP), but also big business and the mining houses, some of which had brokered 'talks about talks' with the ANC in the 1980s (own observation; Klug, 2000). As a postgraduate student writing my first thesis on land reform, I attended sessions of Theme Committee 6 and was struck that the vociferous demands for a clause to insulate private property from expropriation came not only from the farming lobby but from mining companies. The insistence on property rights did not turn exclusively or, perhaps, even primarily on questions of agricultural land.

The compromise proposal to the Constitutional Assembly for a way forward was that the Constitution should provide for expropriation for land reform purposes, alongside support for all land reform measures. Whereas the interim Constitution's limitation of expropriation to public purposes meant that land reform could proceed only with the cooperation of existing landowners, this was not the case with the final Constitution of 1996. What Lahiff (2007) has termed a 'landowner veto' has persisted in practice due to the policy choice not to expropriate – leading to deadlocks in negotiations over price. This veto is a core feature of market-based land reform as a policy paradigm. And yet, later, while mineral rights were indeed nationalised under the Minerals and Petroleum Resources Development Act 28 of 2002 and, similarly, water was nationalised under the National Water Act 36 of 1998, land was not.

A Right of Equitable Access to Land

The ANC's proposed constitutional principles included explicit protection of property rights subject to certain limitations, among them provision for the taking of property in the public interest, according to legal prescriptions and subject to payment of compensation. The notion of a right of 'equitable access to land' was the least debated of all the clauses. It originated from a small group of ANC-aligned lawyers who argued in favour of a regime of 'property rights for the property-less' to counterbalance:

> the property rights debate [which] centres on the right of those who hold property, to retain it . . . A constitutional package would place the landless and homeless in the position where they could make *a claim of right* rather than *a petition for largesse* . . . The only way to achieve a true balance between . . . the rights of property-holders and property-less is to weaken existing property rights, as a matter of deliberate policy. (Budlender, 1992: 303–304, emphasis added)

In this way, even among those who had argued against a property clause, the idea was born of using a constitutional rights framework to impose a positive obligation on the state to provide suitable land and housing for the landless and homeless; it would empower them to press their claims, and shape the behaviour of state officials to facilitate a responsive land reform. The 'property clause' would grant limited safeguards to existing property owners while mandating transformed property relations between the landed and the landless and between owners and tenants. Agreement between the political parties was reached at midnight on

18 April 1996, and President Mandela signed the final Constitution into law in December of that year.

A right of equitable access to land is not, of course, an unfettered right to land. But it is a right to have the state demonstrate that continued denial of access to land is the necessary outcome of a fair and reasonable policy and implementation mechanisms that weigh up the competing needs of and interests in land. In other words, the state is answerable to the landless. Like the right to restitution, the right of equitable access should be able to trigger an expropriation when the rights of the landless directly contradict and are impeded by the exercise of the property rights of the propertied. Where this is the case, the imperative of equitable access takes precedence. I argue this on the basis of two clauses, read together: first, what I characterise as the 'national interest' clause refers to 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources' (s. 25(4)(a)), and second, what I characterise as the 'override clause' confirms that '[n]o provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination' (s. 25(8)). This latter clause is the oft-ignored trump card, which – should the other provisions impede the state – explicitly exempts land reform from the constraints of any other clauses.

Parliament's High Level Panel

The question of equitable access to land, and the role of expropriation in making it possible, was considered in the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP, 2017), established by the speakers' forum of the National Assembly, National Council of Provinces and provincial legislatures, and chaired by former President Kgalema Motlanthe. In our commissioned report on land redistribution for the HLP, Thembela Kepe and I made the point that there was no framework to trigger expropriations in the public interest to make possible access to land on an equitable basis (Kepe & Hall, 2016). But few expropriations had been attempted even in cases of restitution, where the constitutionally recognised rights of the dispossessed to specific parcels of land could not be realised due to the effective 'landowner veto' that the state's refusal to expropriate ceded to the current owners of claimed properties.

Three points from the HLP merit emphasis. First, the law is insufficiently developed: the Provision of Land and Assistance Act 126 of 1993 is an insufficient guide to give effect to section 25(5), as it empowers a Minister to

acquire and/or allocate land but does not prescribe the rationale or manner in which this must be done. Predating the Constitution and considering redistribution as a matter of 'largesse' rather than 'right', to use Budlender's (1992) terms, it is permissive rather than prescriptive. Second, eligibility, prioritisation and selection are among the parameters left unspecified. To align with the right of access to land on an 'equitable basis', legal or policy prescription is needed to indicate:

(a) who should benefit;
(b) how prioritisation of people should take place; and
(c) how rationing of public resources should take place.

Third, the categorisation of applicants needs to be linked to a baseline survey and longitudinal studies to track change over time to show the benefits of land redistribution to people's livelihoods.

The meaning of section 25(5) has not been interpreted legislatively or judicially. The vast majority of South Africans are eligible for land reform, but very few are actually getting access to land. Based on delivery data to date, and prospects for scaling up, even a very substantially expanded land reform programme would be likely to benefit only a minority. The question, then, of *who* should be selected as beneficiaries and what they are eligible to get is of central importance. On the one hand, 'decision-making about who actually gets land through redistribution is opaque' (HLP, 2017: 212), and on the other, there is growing evidence of elite capture by the wealthy, non-farmers and politically connected (Hall & Kepe, 2017; SIU, 2018; Mtero et al., 2019).

The legal provisions for making a claim for restitution clarify *to whom* the state is responsible for the realisation of the right – the claimants – and what manner of state action would constitute adequate realisation of the right – the content of the right. But for land redistribution, the holder of the right is not specified beyond 'citizens' and the content of the right of 'access . . . on an equitable basis' is not defined in any way. The HLP, therefore, concluded in favour of a Land Reform Framework Bill (or Redistribution Bill) to spell out the nature of the right of equitable access and to provide the basis for citizens to pursue their claims against the state for access to land as a constitutional right. An 'indicative draft' of such a Bill was even appended to the HLP report.[3] Yet the bulk of the

[3] The Bill is available at www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf (accessed 11 March 2023).

far-reaching implications of the HLP proposals were studiously ignored amid President Zuma's forced resignation, Ramaphosa's ascendancy and, just a fortnight into his tenure, the EFF proposed its motion in Parliament to review section 25 of the Constitution, which the ANC supported, amending it with several caveats to placate critics. Four years elapsed without any official process towards further development of this proposal.

The Presidential Advisory Panel on Land Reform and Agriculture

While the Constitutional Review Committee was embroiled in hearings, President Cyril Ramaphosa constituted the PAPLRA. The terms of reference covered largely the same terrain as the HLP yet were broader, including the question of EWC along with agricultural development and farmer support, institutional arrangements and financing. The composition of the Panel was a feat of political engineering, bringing together ten South Africans: five women, five men; seven black, three white; two lawyers; two presidents of national farmer associations; two individual leading farmers (one young black woman and one older white man); two agricultural economists (both men); and two interdisciplinary social scientists (both women).[4] In many respects it must be considered a success in establishing a process that would hold at bay the political demands in an election year and keep some momentum within the presidency, as opposed to the parliamentary process, at a time when the EWC issue served as a proxy for internal factional battles within the ANC.

The formation of the PAPLRA followed a frantic period from March to August 2018, during which a sequence of internal ANC processes attempted to enlist allies from outside the party – including groups traditionally excluded and cast as government critics. A set of related strategies, both explicitly articulated and implied, emerged during this period among a network of land activists, academics and lawyers. The first was to support the call for the state to override the interests of property owners for the benefit of land reform by using its expropriation powers. The second was to affirm the principle that compensation should not be presumed and, indeed, that no compensation is an acceptable principle. The third was to draw attention to the scope already available

[4] Both Advocate Bulelwa Mabasa, one of the authors of Chapter 2, and I served on the Panel.

within the Constitution – and, therefore, to the centrality of the political choices made by the state rather than the Constitution itself being the binding constraint. Fourth was to offer the option of a 'compensation spectrum' as a way of operationalising the 'just and equitable' requirement, recognising that people affected by expropriations are not, and will not always be, wealthy or privileged – indeed the state regularly and mostly expropriates the property rights of poor people, even if these are not rights of private ownership. Fifth was to use this rare opening of space into party and government processes to foreground other neglected and urgent issues, including tenure rights for farm workers and former labour tenants, communal tenure, restitution claims and communal property associations, and agrarian reform. What also became clear was that the message carrier mattered. The ANC clearly wanted academics and lawyers who would affirm the first two points, not least to quell the reaction in the international media and among investors and to give credence to its position that EWC could be done responsibly and was respectable in global terms, while also wanting authoritative, especially black, voices to undermine the EFF's position.

From the outset, as a Panel, we conducted a reality check: in contrast with the proclaimed importance of land reform, redistribution had ground almost to a halt, making all proposals moot. Expropriation had been effected in respect of twenty-seven land claims – but not in redistribution. The Office of the Valuer-General (OVG) explained that its adopted practice was to take an average between 'market value' and 'current use value' as the level of compensation, ignoring the other constitutionally specified criteria.

In our first allocation of work packages in the Panel, we allocated matters of land acquisition, beneficiary selection and land allocation to Advocate Tembeka Ngcukaitobi and myself. Together we wrote an initial outline position which was debated within the Panel, later refined and presented at colloquia held in December 2018 and March 2019, and the gist of it incorporated into the final report (PAPLRA, 2019). We suggested a compensation formula on a sliding scale across four categories that would require definition as part of a spectrum of 'just and equitable' compensation: zero compensation, partial compensation, market-related compensation and above-market compensation. We emphasised that the purpose of EWC was not primarily to speed up land reform – indeed, as we conceded, it would likely be slower, at least initially. And while it may have the advantage of limiting the cost of acquiring land, it would probably not be entirely free. In our view, the decision not to compensate

for expropriated properties was a matter of principle; the question was, therefore, when this principle should apply – a consideration on which the courts had not had the opportunity to rule. Du Plessis' contribution to the Panel, which we summarised, clarified that a deprivation of property – via nationalisation or state custodianship – would be distinct from an expropriation and would not attract compensation (PAPLRA, 2019: 73–75). The requirement of compensation was, therefore, only a consideration if EWC were enacted on a case-by-case basis rather than through a systemic change in property regime. Ironically, this meant that despite being the primary proponent, the EFF's proposals did not require a constitutional amendment.

Our proposal within the Panel was for an expedited, primarily administrative process, with recourse to the courts and with the rapid development of a body of jurisprudence as a guide. The extent of compensation is not the only consideration. Section 25(3) requires not only that the amount of compensation is just and equitable but also that 'the time and manner of payment must be just and equitable'. In *Haffejee*,[5] the Constitutional Court held this does not mean that compensation must be determined and paid prior to expropriation. Yet the determination of the amount could occur after expropriation. In Latin America, government bonds offered a mechanism to provide some compensation while deferring the cost (Cliffe, 2007). The anticipated delays pending court challenges would otherwise stymie reform and incentivise landowners to drag out disputes. Expropriation can, though, proceed separately from the determination of compensation, which in turn would be 'bifurcated': initially, compensation should be administratively determined by a state valuer by applying a formula defined in policy and, if the property owner was dissatisfied with the compensation, this could be appealed and a court could review and approve or set aside the compensation – but without stopping the expropriation from proceeding.

The PAPLRA proposed ten circumstances where EWC may be considered: abandoned land; hopelessly indebted land; land held purely for speculative purposes and a clarification of what constitutes 'speculative purposes'; unutilised land held by state entities; land obtained through criminal activity; land already occupied and used by labour tenants and former labour tenants; informal settlement areas; inner-city buildings with absentee landlords; land donations; and farm equity schemes (where

[5] *Haffejee NO and Others v Ethekwini Municipality and Others* 2011 (6) SA 134 (CC).

the state has purchased equity and no or limited benefits have been derived by worker shareholders). These were more expansive than the categories in the draft Expropriation Bill and would be subject to review and determination by the courts. The two white commercial farmers on the Panel, AgriSA President Dan Kriek and Nick Serfontein, distanced themselves from all our recommendations on expropriation and compensation, among other matters.

The majority view of the Panel was that the Constitution is 'compensation-based' in that its provisions entail a presumption that compensation of some kind must be paid. At the same time, during our deliberations, Parliament voted to amend the Constitution and appointed a committee to develop a proposal to amend section 25. Cognisant of the political imperative of an amendment 'to make explicit that which is implicit', and drawing on Du Plessis (in PAPLRA, 2019), we offered a suggestion for a constitutional amendment to clarify that compensation does not need to be paid in each case, and insisted that framework legislation is needed to guide compensation, among other matters. We proposed this addition to the property clause: '(c) Parliament must enact legislation determining instances that warrant expropriation without compensation for purposes of land reform envisaged in section 25(8).'

In contrast to outward appearances, EWC was not the most controversial or difficult matter debated within the Panel, or at the consultations we convened to engage more broadly with people. The main sticking points were the purpose of land reform, the nature of agrarian reform and the class agenda of land reform. In our consultations, most contested were the powers and roles of traditional authorities in general in land administration and specifically the status of the Ingonyama Trust. (On this see Mnisi Weeks, Chapter 7, this volume.) Skirmishes also emerged over the rights and entitlements to land of farm workers and dwellers, climate change and the notion of a 'just transition' towards a low-carbon future.

Insights from Cases on Redistribution and Compensation

An irony throughout the EWC debate has been the privileging of the question of acquisition over that of redistribution. Acquisition might be a precondition for redistribution, but the state has consistently shown that it is more proficient at the former than the latter. Whether acquiring land through the market or compulsorily, the state has been unwilling and/or

unable to redistribute it effectively, in a coherent manner and with secure tenure rights. A range of situations have been documented: redistribution beneficiaries who have been unable to acquire either title or long-term leases to their land, even a decade or more after acquiring permission to occupy (Hall & Kepe, 2017); the poor capacity of the state to collect rents owed by its tenants on state-owned land (Auditor-General reports); and many others (Mtero et al., 2019). An illustrative example is *Rakgase*,[6] in which the High Court found that the state had failed to comply with the Constitution by not converting the tenuous land rights (under a long-term lease) of a black farmer, David Rakgase, into ownership when it was able to do so and he qualified for a grant; this, it found, constituted a breach of a constitutional obligation. This failure of administrative justice flags the limitations of state trusteeship in the absence of capacity to redistribute rights to citizens. Trusteeship was patently no guarantee of access to land on an equitable basis, as required in section 25(5).

If completing the work of redistribution involves securing tenure, the initiation of redistribution requires serious engagement with demand for land; between the two sits the question of how to get the land. The PAPLRA's report urged that the most urgent needs for land be prioritised, to resolve the outstanding land restitution claims, to give the land that the state has and to identify much more effectively privately owned land needed for redistribution. Resolving the chaotic, conflictual and insecure tenure arrangements on redistributed land requires either state capacity to manage leaseholds or an exploration of alternative models. The state's ongoing attempts to extract rents contradict the proclaimed intention of EWC: under the current leasehold model, beneficiaries are to pay rent to the state for fifty years, before being given an option to purchase the 'redistributed' land. So, even if the state were to acquire it without paying compensation, this does not translate into its being given out for free. The 'market-based' approach remains in the broader conception of land reform, as being about redistribution for production for the market and payment of a rent. The irony is that some of the political formations that promote state trusteeship have also been fighting against the state for evicting people.

One labour tenant case illustrates both the legal possibility of using the constitutional parameters to drive down compensation for land reform – though whether this could extend to no (or 'nil') compensation was not

[6] *Rakgase MD and Rakgase MA v Minister of Rural Development and Land Reform and Member of the Limpopo Provincial Legislature* 2020 (1) SA 605 (GP).

tested. Acting in *Msiza* at the Land Claims Court,[7] Ngcukaitobi set compensation at a level 16.6 per cent lower than the estimated market value, using the criteria of section 25(3). Mr Msiza and his family had, from 1936, resided on and farmed land in KwaZulu-Natal, but never owned it. Owners had come and gone, taking with them the rising value of the land over the intervening sixty years, and even after Msiza's claim was lodged, the property had again changed hands. As Ngcukaitobi observed,[8] the appreciation in the value of the land should have accrued to Mr Msiza and his family. Had the state better executed its obligations, they would have been the owners by the time the Trust had acquired the farm, several years after the claim. And further, had the LCC been deploying the constitutional criteria of 'just and equitable' compensation as set out in section 25(3) over the past twenty years or so, and determining compensation on this basis in diverse cases, a body of jurisprudence would by now be established.

Overturned in the Supreme Court of Appeal,[9] the time allowed for a further appeal to the Constitutional Court elapsed, and the opportunity to test 'just and equitable' compensation in court was lost. Inadequate precedents exist precisely because, by choosing not to use these powers or to test the constitutional requirement of 'just and equitable' compensation, the state has over time created a situation in which the meaning of this phrase remains uncertain. When compensation should be set below market price and under what circumstances it could be zero has never been determined by a court, except in *Msiza*. Deputy Chief Justice Dikgang Moseneke admitted in 2018 that it was a matter of disappointment for him and others on the bench that no cases had been brought to test these provisions.

Beyond the Caricature: Land and Inherited Privilege

Certain contradictions and paradoxes arise, some of which are distinctly uncomfortable. First is the question of the land as a *signifier of privilege* as opposed to being the *repository of privilege*. While it is arguably the most potent signifier, 'land' is not the main repository of wealth or privilege. Substantial wealth is of course still bound up in land, including but not

[7] *Msiza v Director-General for the Department of Rural Development and Land Reform & Others* 2016 (5) SA 513 (LCC).
[8] *Msiza MP v DRDLR and Others* (LCC133/2012) (5 July 2016).
[9] *Uys NO and Another v Msiza and Others* 2018 (3) SA 440 (SCA).

primarily agricultural land, but much of the wealth built up and accumulated on the land, from conquest, through settler colonialism, to segregation and grand apartheid, has since migrated off the land. The land is no longer the repository of all the wealth that it produced. Yet, unlike Bantu education, cheap labour and the suffering of separated families, the land remains a relic, a physical remnant of what was lost and can conceivably be restored. The equation of landed property now with inherited privilege is both correct but also incomplete, given the extent to which the capital accumulated through cheap land and labour is now held in urban residential property, in financial instruments, on the stock market, in global financial markets and in intergenerational investments in education, rather than in the land.

A second angle is that, while most property owners are white South Africans, the vast majority of the nearly 5 million white South Africans do not own agricultural land – which is the focus of the call for EWC. The majority of the approximately 30,000 commercial farming units are owned by South Africans, overwhelmingly white, yet even by generous calculations, these landowners likely constitute less than 0.6 per cent of the white population. This also raises the question of the beneficiaries of colonialism and apartheid and how those who benefited should contribute to transformation and redress.

Third is a temporal dimension, given the lapse of so much time not only between dispossession and a constitutional democracy but also between a constitutional democracy and the realisation of rights to redistribution, restitution and security of tenure. Between 1995 and 2008, over 5 per cent of agricultural land was transacted through the market annually (Aliber, 2009: 13). And given the significant restructuring in the sector through the 1990s, triggered by deregulation, drought and trade liberalisation, the majority of private property owners holding agricultural land parcels by 2018 had *not* owned these properties in 1994. As a corollary, the vast majority of white South Africans who had owned farms in the early 1990s no longer did so. The very limited intergenerational transfers of commercial farms, the active land market and rising property prices during the late 1990s and especially the early 2000s, prior to the crisis of 2008, meant that a certain generation of white farmers were able to sell properties acquired and developed with state support, realising the full improved prices for these, and invest the proceeds elsewhere.

In view of this, a striking silence in the debate about the property clause is any discussion of the expropriation of property other than land.

Of all the forms of property that underpin inequality and injustice, land has been singled out, although even the category or categories of land that should be subject to EWC have been rather limited in the arguments of many of the protagonists. The EFF, for instance, started by calling for the nationalisation of all land, but later clarified that EWC should apply to farmland only and not to residential land, after an outcry from within its support base. Expropriation of intellectual property or financial assets have been largely undiscussed.

Further, the determination of compensation has to date been highly discriminatory, with an asymmetry between the calculation of compensation to the dispossessed and compensation to the possessors. Land restitution claimants opting for cash compensation have not received the current market value but rather a historical value inflated to current values using a consumer price index. Almost invariably, this discounts the difference between general inflation and property values; it also ignores the forgone opportunities of having been denied property rights for the intervening period. To the extent that compensation is treated differentially, then, it demonstrates a system of affirmative action in favour of the current possessors of property rights over those dispossessed in the past, and in favour of private title holders over those holding informal property rights.

Conclusions

The insistence on a constitutional amendment and blaming the Constitution for the failures of land reform runs far deeper than any literal reading of the law. Instead, it is a political act – in part political theatre, in part restorative dignity-claiming. The call for the decolonisation of landed property relations deserves wider debate, as does what it means to dismantle the hierarchy between property owners and the landless. Missing in the debate so far has been the crucial question of the commons and of defending and expanding access to land as common property, alongside or instead of redistribution within the private ownership or private leasehold model. Attention to the property clause is productive only insofar as it spurs on this broader debate, rather than fixating on the Constitution as the site of resolving the intransigence of the state.

The core problem is not the state's powers to acquire land – which are well established, if seldom used – but rather the ability of citizens to claim access to it on an equitable basis. Any battle that targets the state's

expropriation powers in isolation from the question of the onward redistribution of the land that the state acquires in this manner is likely to yield a Pyrrhic victory. Rather, the 'redistribution' clause in section 25 provides the basis for precisely this: a framework to guide how citizens can make claims on the state and in whose interests the state should expropriate. While a 'redistribution bill' and 'area-based planning' for 'inclusive people-driven land reform' and other models and guides have proliferated, missing among these initiatives are organised formations of landless and land-poor people making their own plans for which land and where should be redistributed to whom, for what and on what terms. A right to land for the landless, on an equitable basis, in both urban and rural areas, and for diverse purposes and with flexible tenure, throws open more useful and more liberatory possibilities than the convergence of neoliberalism and authoritarian populism that we have seen to date; it could serve as a strategic focal point for socio-legal activism, urban and rural social movements, human rights lawyers, NGOs and allies in academia.

The conditions for such struggles to find purchase and for claims to have traction are many and will doubtless continue to be debated and tested in practice. They will stand a better chance if, in the interim, the state is claim-ready with a new Expropriation Act, a revived and capacitated Land Court and a Compensation Policy that operationalises the criteria in section 25(3) of the Constitution. But such measures should not be confused with moving ahead with land reform; they are just yet more mechanisms, illusory until used. While the state steadfastly refuses to instigate significant (let alone pro-poor) land reform 'from above', such legal and policy reforms cannot be seen as advancing land reform in themselves. However, they could serve as frameworks against which political movements, communities, families and individuals might at times assert their claims 'from below'.

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7

Land Reform Opportunities Meet Democratic Challenges in Traditional Areas

Gendered Lessons from Vernacular Law and IPILRA

SINDISO MNISI WEEKS

Introduction

Lomhlab' uyathengwa ungaboni sihleli kuwona:
njalo ngonyaka s'khokh' imal' yamasim' enduneni . . .
Njalo njena k'khon' imbizo . . .
S'hlala sibizw' emakhosini;
S'hlala sibizwa phezulu;
S'hlala sifunw' esikoleni
bathi k'khon' imbizo. . . .
'Ngaboni siphila kulomhlaba; siyaw'khokhela . . .
Nithi siyithathaphi imali?'

(This land is purchased; don't see us living on it [and think that it is free]:
every year we pay money for the fields to the headman . . .
[And] there are always meetings . . .
We're constantly being called to the chiefs;
We're constantly being called above;
We're constantly wanted at the school [where meetings are held];
they say there's a community gathering [where we must contribute money]. . . .
Don't see us living on this land [and think that it is free]; we are paying for it. . . .
Where do you think we get the money from?)

These are the bleak and regrettably timeless words of the catchy *maskandi* 'protest' song released by Phuzekhemisi NoKhethani in 1992. This music of the people (of KwaZulu-Natal, at least) spoke to the democratic aspirations of millions of South Africans in the countryside who had experienced the imposition of traditional leadership and deprivation of secure rights – mainly to what was characterised as 'tribal' land in so-called communal areas – as a profound aspect of apartheid's oppressive

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design. Their hope was that with democracy would come 'freedom accompanied by full citizenship [and] equal rights' (Mnisi Weeks, 2015: 124). Those dreams are yet to be realised.

More than a quarter of a century after the struggle for equality under the law technically succeeded with South Africa's entrance into democracy in April 1994, and the finalisation of the Constitution of the Republic of South Africa in 1996 (the Constitution), land reform and redistributive justice continue to elude the majority of South Africans (Ntsebeza & Hall, 2007; Zenker, 2014; Cousins, 2016; Beinart, Kingwill & Capps, 2021). This is especially true if one takes a gendered view of the many challenges and poorly used opportunities to realise equitable land reform that rural women have experienced since South Africa's establishment as a constitutional democracy. With this in mind, this chapter approaches the much-debated, alleged need for amending the Constitution from the perspective of rural women (and, by extension, children)[1] living under traditional governance; how have their hopes for land reform and redistributive justice fared in South Africa as a purportedly constitutionally transformed democracy? Although that is the focus, the chapter situates women's struggles within the wider context of the insecure land rights of rural communities generally (involving men as well as women) and thus sheds light on broad concerns with rural democracy and governance and how they impact land matters. The chapter therefore asks, with reference to land and rural people's social and economic security, how significant local political rights are for redistributive justice in the former bantustans.

The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) was passed to temporarily defend the rights and interests of people 'beneficially occupying' land to which they did not have formal rights (that is, they were openly occupying land in rural areas as if owners but without permission or the exercise of force). The expectation was that IPILRA would shortly be replaced by legislation – such as the Communal Land Rights Act 11 of 2004 (CLARA) – that would provide permanent tenure protection to informal rights holders (Zamchiya, 2019; Tlale, 2020). However, the Constitutional Court duly struck down CLARA in 2010,[2] while IPILRA has continued to be renewed annually. It has now been over a quarter of a

[1] There is clear evidence that most black and rural children in South Africa live with their mothers, many of them in households that do not include their fathers (most of the year) (see Statistics South Africa, 2019, 2020; Van Heerden et al., 2021).

[2] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC). Had the Act been implemented, it would have severely undermined the tenure rights of millions of black, rural South Africans.

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century since South Africa gained its independence, yet legislation to strengthen tenure security and related institutions in the former homelands is yet to be implemented. The Communal Land Tenure Bill (BX-2017) (Department of Rural Development and Land Reform (DRDLR), 2017) has yet to make its passage into law and is likely to meet the same fate as its predecessor. As the World Bank (2018: 44) correctly summarises, '[a]t the heart of the long-standing stalemate regarding tenure reform in communal areas is the significant power given to traditional leaders'.

The uneasy fit between customary conceptions of land and the cadastral property system, as well as between customary law and state law systems, has been extensively canvassed in the literature (Kingwill, 2013; Cousins, 2016; Beinart et al., 2021). Less thoroughly explored are the ways in which IPILRA tried to get around these dissonances by taking a bottom-up approach to decisions pertaining to land occupation, use and access under the Constitution, grounded in vernacular normative conceptions and the unused opportunities that it presents for inclusive land reform. The ways in which IPILRA's objectives have not been realised articulate with the reasons why transformative constitutionalism and its lofty ambitions have been limited in their effect in rural South Africa.

This chapter asks whether the 'transitional justice'[3] arrangements in the Constitution, professed to be deeply transformative, positively yielded (especially gendered) restorative and redistributive justice on the ground. Answering in the negative, the chapter demonstrates that the problems of ongoing tenure insecurity and the misappropriation of people's land rights in 'communal areas' may not lie predominantly with the Constitution per se, or with the way the constitutional and other courts have interpreted section 26(6) and (9) as well as legislation such as IPILRA. Rather, they appear to lie mainly with the ruling party's turn towards an interpretation of 'tradition' and 'customary law' that entrenches the undemocratic governmental powers of traditional leaders at the expense of rural people. Hence, this chapter goes beyond concerns with the property clause to highlight the centrality of political rights, especially in local government, thus emphasising that the quest for redistributive justice certainly includes, but also extends well beyond, rights to land.

The chapter thus highlights the complicity of traditional leadership institutions in historical and contemporary land dispossession as evidenced by

[3] This points to the fact that part of the Constitution's purpose was to transition South Africa from apartheid into democracy peacefully. This is especially evident in the interim Constitution of the Republic of South Africa Act 200 of 1993 and the process of confirmation that the Constitution had to undergo.

the residential lease programme of the Ingonyama Trust Board (ITB). It also reflects on how this complicity may sometimes put vernacular law in conflict with itself: on the one hand, some traditional leaders elevate to the level of (official) customary law self-serving values such as the centralisation of land ownership and control vested in the institution (which is rhetorically conflated with the traditional leader as an individual), in order to aid in their personal enrichment (Buthelezi et al., 2019; Ubink & Duda, 2021; Wicomb, 2021) and, on the other hand, this centralisation campaign is vehemently defended against the 'alter-Native'[4] values embodied in living customary law (that is, vernacular law) that argue in favour of the necessary diversification *and diffusion* of land-holding and decision-making power (Mnisi Weeks & Claassens, 2011; Tlale, 2020). Perhaps surprisingly to some, as potential levers, these values offer greater chances of achieving widespread poverty reduction in communities that desperately need it.

The backdrop is the recognition in the Constitution of the status of customary law (ss. 39(2) and 211(3)), rights to property (s. 25), political participation (s. 195(e))[5] and access to justice (s. 34). In this chapter, the transformative impact that these protections were meant to have is read alongside the provision in section 211(1), that '[t]he institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution', and in section 212(1), that '[n]ational legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities' (Nkhwashu, 2019). The valorisation of the institution of traditional leadership independent of a democratic following, which is what has been produced by the legislature's interpretation of the latter provisions, is explored through two recent cases that have clearly revealed the threat that uncritical and unbridled, government-backed traditional authority and power have yielded for South Africa's constitutional promise. The first is *Ingonyama Trust*[6] and the second is *Maledu*.[7]

[4] The chapter builds on ideas and arguments that are explored further in Mnisi Weeks (2021: 165–205) and my larger project, Mnisi Weeks (2024).

[5] See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

[6] *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* 2021 (1) SA 251 (KZP). The Ingonyama Trust was established in terms of the KwaZulu Ingonyama Trust Act 3KZ of 1994 by the then government of the KwaZulu bantustan for the purposes of holding all the land formally owned and/or belonging to it. The Trust is mandated to manage the land for the 'benefit, material welfare and social well-being of the members of the tribes and communities' that live on the 2.8 million hectares of KwaZulu-Natal under the Trust's administration. Key to note is that the sole trustee is the Zulu paramount (until his death in 2021, King Goodwill Zwelithini).

[7] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another (Mdumiseni Dlamini and Another as Amici Curiae)* 2019 (2) SA 453 (GP).

The Preamble to the Constitution articulates the lofty vision of 'the supreme law of the Republic', undergirding the striving of '[w]e, the people of South Africa', to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person.

Yet the cases of *Ingonyama Trust* and *Maledu* show that the cumulative impact of the socio-economic and politico-legal realities in post-apartheid South Africa have yielded limited land rights protection for traditional peoples and, consequently, not altered the conditions of material and social precarity that affect these groups. The fact that the recognition and development of customary law has to pass constitutional muster has been largely ignored (Budlender, 2021).

Two Cases in Point: *Ingonyama Trust* and *Maledu*

Following the release of the Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) in October 2017 (HLP, 2017), former President Kgalema Motlanthe publicly observed that the ITB in KwaZulu-Natal (KZN) was taking advantage of residents on land registered to it. In the lead-up to the report, Motlanthe had heard hundreds of rural South Africans, especially in mineral-rich areas like the Platinum Belt in the northern territory and land under the ITB's jurisdiction, testify to their experiences of land confiscations, insecurity and destitution. At a May 2018 land summit, he said of the ITB, '[p]eople who have lived there for generations must pay the Ingonyama Trust Board R1,000 rent, which escalates yearly by 10%' (Nhlabathi, 2018). This was after the ITB had advertised to the people in its jurisdiction (many of whose families had lived there for generations) that they have insecure tenure and should 'upgrade' their apartheid-era 'Permission to Occupy' (PTO) certificates by entering into long-term leases with the ITB.[8] This, it was

[8] PTOs were an apartheid construct of quasi-tenure for 'tribal' residents of land that was subsequently registered to the Ingonyama Trust in KwaZulu-Natal and administered by the ITB.

claimed, would provide them with the proof of residence needed to register to vote, open bank accounts, register cellular phones or obtain rural allowances from employers.

For instance, in November 2017, the Ingonyama Trust advertised in a number of KwaZulu-Natal newspapers saying it was 'inviting' PTO holders to come to the ITB 'with a view to upgrading these PTOs into long term leases in line with the Ingonyama Trust tenure policy'. Contrary to the Trust's claims, the PTO certificates held by many of the people who 'voluntarily' took the Trust up on its widely publicised policy-based offer (some of whom were later to become the applicants in the case against the Trust and ITB), were in fact upgradeable to ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991. Alternatively, for those who did not have PTOs, their informal land rights established by long-term occupation were likely to be considered customary ownership and thus entitle the people to compensation under IPILRA. The ITB had thus deceived people holding rights that are more akin to ownership into trading them in for the status of tenants and then going on to extort escalating annual rents from them.

At the time that Motlanthe was speaking, the ITB was allegedly continuing to issue this solicitation via its Facebook and Twitter accounts and advertisements, despite the fact that in March 2018 the Chair of the Portfolio Committee on Rural Development and Land Reform had directed the ITB to stop this practice, and a senior official of the Department had confirmed that the Trust's income-generating scheme was unauthorised and violated both the Constitution and the Public Finance Management Act 1 of 1999. These flagrant and defiant actions were what ultimately led to the lawsuit against the ITB and the relevant Minister, to which discussion I now turn.

The Ingonyama Trust Case

Ms Hletshelweni Lina Nkosi was one of several thousand women stripped of their land rights by a traditional leadership institution. Following the Ingonyama Trust's 2007 launch of its 'PTO Conversion Project', she was notified by Trust officials that her PTO certificate no longer had validity in law. IPILRA says that '[t]he holder of an informal right in land shall be deemed to be an owner of land' for various purposes (IPILRA, s. 1(2)(b)). By contrast, the Trust told community members that to have a *more* formal and secure title deed under the Upgrading of Land Tenure Rights Act, they had to sign a lease agreement with the

Trust, which resulted in a *down*grading of their property rights to those of rental.

Ms Nkosi was led to believe that she *had to* sign the lease. Yet when she tried to sign the agreement, she was further informed that single women were not permitted to do so. Fearing eviction and the loss of her home, Ms Nkosi co-signed the Trust's lease with her partner. These allegations formed part of the application brought against the Ingonyama Trust, the ITB and the Minister of Rural Development and Land Reform (the Minister) by the Legal Resources Centre (LRC), acting on behalf of the Council for the Advancement of the South African Constitution (CASAC), the Rural Women's Movement (RWM) and seven informal land rights holders. In this case, CASAC and RWM were acting in the public interest; Ms Nkosi and the other six informal land rights holders represented a class of people whom the Trust had swindled.

The applicants requested that the court declare the actions of the Trust unlawful and in violation of the Constitution. The ITB persisted in arguing that the leases it had fraudulently persuaded the parties to enter into provided stronger tenure rights than those they already had and would help the residents secure financing from banks and enable them to establish businesses. The truth of the matter was that converting their strong informal land rights into formal but weak land rights under the guise of leases would diminish their tenure security.

On 11 June 2021, Madondo DJP (with Mnguni and Olsen JJ concurring) issued a landmark decision in the applicants' favour. As the LRC had argued,[9] the unlawfulness and unconstitutionality of the Trust and ITB's actions lay in concluding, under false pretences, residential lease agreements with residents on the land held in trust – some, if not all, of whom had PTOs or other informal rights protected by IPILRA. Thus, the resultant leases over 'residential land or arable land or commonage on Trust-held land' were invalid, and the Trust or ITB has to refund all money received pursuant to these invalid agreements to the people who had made lease payments.

Given the Minister's assigned responsibility to ensure adherence to property rights,[10] she was in breach of her duty by 'failing to exercise, or

[9] *Igonyama Trust*. See also https://lrc.org.za/11-june-2021-lrc-and-casac-welcome-landmark-ruling-declaring-actions-of-the-ingonyama-trust-unlawful-and-in-violation-of-the-constitution (accessed 30 October 2023).

[10] Sections 25(1) and 25(6) of the Constitution, read with section 7(2) of the Constitution, and, specifically, compliance with IPILRA vis-à-vis the land held in trust.

failing to ensure the exercise by her delegate, of the powers conferred by chapter XI of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy)'. The decades-long failure of the DRDLR to 'implement an alternative system of recording customary and other informal rights to land of persons and communities residing in Trust-held land' necessitated the implementation of PTOs under chapter XI of the KwaZulu-Natal Land Affairs Act in the interim. The Minister was therefore ordered to report to the court on how her department had fulfilled this obligation.[11]

The Maledu Case

Nearly three years prior, the Constitutional Court had confronted a different yet similarly predatory assault on rural residents' 'informal' customary land rights in the *Maledu* case. The first applicant of thirty-seven in this case was Ms Grace Masele Mpane Maledu, a resident of Lesetlheng village, which formed 'a community-based organisation consisting of persons claiming to be owners of the farm' in the Rustenburg district of the North West Province (para. 10). She and the other applicants asserted occupancy and ownership of the farm on which they conducted farming operations following their forebears' purchase of the land in 1919, in accordance with a decision made by their community in 1916 (para. 12).

In 2004, the Department of Mineral Resources (DMR) granted the first respondent, Itereleng Bakgatla Mineral Resources (Pty) Limited (IBMR), a prospecting right over the farm. Later, on 19 May 2008, the DMR awarded IBMR a right to mine for platinum group metals and associated minerals on the same farm. IBMR then contracted the second respondent, Pilanesberg Platinum Mines (Pty) Limited (PPM), to do the actual mining. IBMR applied to the DMR to excise from its mining right the Sedibelo-West portion of the farm which IBMR was to cede to PPM. In 2014, IBMR and PPM began preparations to undertake full-scale mining operations on the farm, which the applicants resisted by applying to the courts. IBMR and PPM challenged them on the grounds that the

[11] The ITB's application for leave to appeal was denied by the Supreme Court of Appeal on 23 August 2022. Legal Resources Centre (LRC) (2022). 24 August 2022 – Supreme Court of Appeal dismisses Ingonyama Trust Board application for leave to appeal. Available at https://lrc.org.za/24-august-2022-supreme-court-of-appeal-dismisses-ingonyama-trust-board-application-for-leave-to-appeal/ (accessed 30 October 2023).

Lesetlheng Community were not the owners of the land and had not been entitled to special consultation, consideration or consent.

However, the reason joint ownership of the Lesetlheng village farm had not been registered in the purchasers' names was the existence of pre-1994 racist legislation. The farm was registered as held in trust by the designated Minister. Furthering the Lesetlheng Community's legal disadvantage and dispossession was the fact that the community was not legally 'recognised as an autonomous and separate entity by the government of the day'. Instead, the farm's title deed 'reflected that the Minister held it in trust on behalf of the entire Bakgatla-Ba-Kgafela Community', of which the Lesetlheng Community was a subunit (*Maledu*, para. 12). This was not an unfamiliar scenario. The drafters of IPILRA had pre-empted such situations resulting from apartheid's messy history. While the Lesetlheng Community could legitimately fall under IPILRA's definition of a 'community',[12] the government entirely disregarded the law and its statements on the nature and interpretation of vernacular law pertaining to land 'held on a communal basis' (*Maledu*, paras. 12–13).[13]

The Court answered the crucial question, 'did the surface lease deprive the applicants of their informal land rights?', quoting section 2(2) and (4) of IPILRA, which provides the consultation requirements as follows:

> (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community. . . .
> (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given

[12] IPILRA, s. 1(1)(ii) defines 'community' as 'any group *or portion of a group* of persons whose rights to land are derived from shared rules determining access to land held in common by such group'. This reading could be reinforced with application of s. 1(1)(vi) of IPILRA's further definition of the 'tribe' under which the 'informal right to land' protected by the legislation could be registered and collectively held in trust 'includes (a) any community living and existing like a tribe; and (b) any *part of a tribe* living and existing as a separate entity' (emphasis added).

[13] The community's arrangement aligned with IPILRA's definitional provision in section 1 that 'informal right to land means: (a) the use of, occupation of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe; (ii) the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in ... [the South African Development Trust or the government of Bophuthatswana, as had that occupied by the community]'.

> sufficient notice, and in which they have had a reasonable opportunity to *participate*. (*Maledu*, para. 107, emphasis added)

In response to the applicants' claim that the *kgotha kgothe* – the traditional meeting of the Bakgatla Ba Kgafela – had deprived them 'of their informal land rights in terms of the customs and usages of the Bakgatla', the respondents sought to show that the resolution adopted by the Bakgatla Ba Kgafela at that same meeting fulfilled these requirements (*Maledu*, para. 108). However, given that 'this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick' (para. 108),[14] the court found that 'there is no shred of evidence to substantiate the respondents' assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section 2(4) of IPILRA' (para. 108).

It was central to the Constitutional Court that the rightful owners of the farm – albeit as 'informal' rights holders under IPILRA and thus, by extension, under the MPRDA – were not consulted and did not give approval for any of these undertakings. Even though they were evidently the active occupiers and users dependent on the property, they were dispossessed and stripped of their primary source of livelihood and subsistence by the signature of Kgosi Pilane, following the approval of whoever had gathered to approve the transaction on behalf of the Bakgatla Ba Kgafela Community as a whole. The disregard of the requirements stipulated in IPILRA was used defensively by the applicants to ensure appropriate recognition and advanced protection of the rights of customary residents such as Ms Maledu, although these requirements were actually intended to be used proactively by bodies such as the DMR and the DRDLR.

From these two cases, it is evident how the higher courts have applied the Constitution to protect and advance customary rights to land in the face of the clear determination of the government and traditional authorities to shield and/or push the interests of traditional leaders. The political economy and land reform challenges that are revealed are that the ITB is more interested in rents than the productive use of the land or the

[14] As the court's footnote 95 explains: 'IBMR partnered with a company called Barrick Platinum SA (Pty) Ltd (Barrick) for purposes of conducting prospecting, because IBMR did not have the necessary capital and expertise. The Bakgatla Ba Kgafela Community transferred 15% of its shares in IBMR to Barrick in the process. The farm was successfully prospected. Barrick later withdrew and the Bakgatla Ba Kgafela Community then bought back the 15% shareholding.'

security of its dependants, while the *Maledu* case is fundamentally about the traditional institutional leaders' focus on extracting profits from mining. This tells us that land is a primary site of politico-economic contestation between ordinary people and their leaders – contestations that centre on the control of assets and the extraction of value from the land on which rural people (and especially women) depend for their material security or, in the case of traditional leaders, their prosperity.

Discussion

In the remainder of this chapter, I argue that the *Ingonyama Trust* and *Maledu* cases show that the cumulative impact of the socio-economic and politico-legal realities in post-apartheid South Africa has yielded limited land rights protection for people in traditional areas and, consequently, the conditions of material and social precarity that affect them have not been altered. The main reason for this failure is the disproportionate power given to traditional leaders in our democracy. As intimated by Phuzekhemisi NoKhethani, the *maskandi* musicians quoted in the introduction to this chapter, these powers are exercised under the guise of 'tradition', in ways that further deprive an already impoverished 'subject' population, with land tenure the primary site of contestation.[15]

Land as Primary Site of Contestation

In terms of section 25(6) of the Constitution, '[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. Section 25(7) goes on to prescribe that '[a] person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.[16] In 2004, in *Alexkor v Richtersveld Community*

[15] Phuzekhemisi reiterated these sentiments when he participated in a musical seminar and panel discussion on rural democracy on 22 February 2023: www.customcontested.co.za/invitation-musical-seminar-in-preparation-for-the-constitutional-court-legal-challenge-to-the-traditional-and-khoi-san-leadership-act/ (accessed 30 October 2023).

[16] 19 June 1913 is the date given for when the Natives Land Act 27 of 1913 came into operation.

(paras. 36–37),[17] the Constitutional Court affirmed that traditional communities' land is included under section 25 (paras. 50–64).[18] That being so, 'Parliament must enact the legislation referred to in subsection (6)' of section 25 of the Constitution (ending tenure insecurity). The government also bears the obligation, under section 25(5), to 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'. However, as described in the brief discussion of IPILRA, CLARA and the CLTB earlier, the government has not fulfilled this constitutional obligation.

A detailed look at the land distribution statistics for the country demonstrates the persistent impact of apartheid's discriminatory land policies. In 2019, the Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA), which drew on the 2016 Agricultural Households Survey by Statistics South Africa and the DRDLR's Land Audit of 2017, reported that white people owned 72 per cent of South Africa's individually owned farming and agricultural land – precisely 26,663,144 hectares of the total 37,031,283 hectares (PAPLRA, 2019: 43). People classified as 'coloured' owned 15 per cent, Indians 5 per cent and the African majority owned the smallest amount of this land, at 4 per cent. The DRDLR's Land Audit (2017: 2)[19] also found that men owned 72 per cent of the total farm and agricultural land it audited, in marked contrast to the mere 13 per cent owned by women. A 2022 report by Statistics South Africa, *Women Empowerment, 2017–2022*, confirms the gender imbalance, noting that in 2007 and 2018 South African men 'recorded the highest percentage of owners who farm for themselves full-time or part-time in both years (80,9% and 79,5%) compared to their female counterparts' (Statistics South Africa, 2022: 59). Yet while the extent and persistence of racial inequity are well established, the gendered dimensions are less so, this imbalance complicated by the fact that there is an assumption that men are the farmers and their female partners not, even though the latter may be very active in the actual farming on male-owned land.

Of course, individual land ownership is not the only consequential category of private ownership, since some land is also owned by

[17] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460.

[18] In para. 103, the Court 'declared that . . . the first plaintiff [the Richtersveld Community] is entitled in terms of section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof'.

[19] As the DRDLR website advises, '[t]he land audit provides such private landownership only on the basis of land parcels registered at the Deeds Office as of 2015'.

communal entities such as community-based organisations (CBOs) and trusts. Referring to doctoral research by Donna Hornby (2014), the Institute for Poverty, Land and Agrarian Studies (PLAAS) described what appears to be a 'successful redistribution project at Besters in KwaZulu-Natal, where 21% of the district's commercial farmland, along with tractors and beef cattle herds, have been redistributed to 13 Communal Property Associations made up of 170 former labour tenant and farm worker households' (Hornby, 2014, cited in PLAAS, 2016: 28). Yet still, the rate of delivery in land reform is far from satisfactory. Indeed, by March 2017 less than 10 per cent of commercial farmland had been redistributed, well short of the government's proposed target of delivering 30 per cent of this land by 2014. According to a 2018 World Bank report, '[a]lthough 80 percent of land claims had been settled by 2016, the amount of land transferred is still small. The target of transferring 30 percent of arable land to black landholders by 2014 was not achieved, and there is limited information on the current level of transfer' (World Bank, 2018: 43–44; but see also Sihlobo & Kapuya, 2018).[20]

As the World Bank accurately notes, IPILRA continues to govern tenure security in South Africa. Although when it was passed a quarter of a century ago it was envisaged as stop-gap legislation, it has since had to be renewed annually. IPILRA is aimed at securing 'the rights of people occupying land without formal documentary rights, such as rights to household plots, fields, grazing land, or other shared resources' (World Bank, 2018: 44). However, its effectiveness is limited by the absence of a robust, supportive land administration system that is run by a well-staffed department whose employees enable extensive community consultation. Rather, based on the prevailing presumption that only consultation with traditional leaders is required, the formal administrative processes needed to identify and record rights properly and resolve disputes are currently lacking. This is despite the fact that the Department of Land Affairs (as it was named at the time IPILRA was passed) has internal policies aimed at clarifying the process for systematically documenting rights and thus preventing disputes, as required under the Act. These policies are not

[20] Sihlobo and Kapuya concluded that, in total, 17,439 million hectares of white-owned land have been transferred since 1994, under the 'willing buyer, willing seller' policy. This is 21 per cent of the 82,759 million hectares of South African farmland that is in freehold. Of this, 11 million hectares had been transferred via restitution and redistribution programmes, with an additional 4,027 million hectares being due to state procurement. The remainder is accounted for by private land purchases.

often implemented. Given the scale and public nature of the Ingonyama Trust and Itereleng Bakgatla land rights violations, this leads one to suspect that the political will is wanting.

Like the World Bank, Songca (2018) concludes that the unresolved apartheid-instituted role of traditional leaders in rural land holding and management is also part of the problem. The World Bank aptly observed that '[a]n important provision of the act [IPLRA] is to ensure proper community consultation in cases where external investors wish to access communal land' (World Bank, 2018: 44). The fact that the DRDLR has mostly failed to enforce these protections (due to an apparent lack of political will, a shortage of trained personnel and the absence of comprehensive legislation) has led to some external investors violating them, especially in the case of the exploitation of mineral resources by extractive industry. The World Bank also describes the 'best'-case scenario, where some potential investors have declined to invest due to uncertainty on how to negotiate leases on communal land or a lack of confidence that they can trust that the arrangements will be respected.

As demonstrated by the *Maledu* case, the violation of communal land rights protections can be observed from internal investors too; after all, the IBMR was an entity established by members of the Bakgatla Ba Kgafela traditional community. Indeed, as the Parliamentary Monitoring Group reported following a parliamentary committee briefing by the Deputy Minister of Mineral Resources on 14 November 2018: 'The Ingonyama Trust and Itireleng [sic] Bakgatla Mineral Resources cases have been challenging because the traditional rulers played double roles. DMR is working on how the Ingonyama Trust and local chieftaincies affect land but it has to be thorough.' The flagrancy of the persistence of 'chieftaincies' with their exploitation of the informality of ordinary rural people's land rights, even ignoring multiple warnings, was striking – but so was the government's relative inaction when it came to protecting these rights and people. In the end, it was a lawsuit that got the government to adopt a just position in both *Ingonyama Trust* and *Maledu*. In both cases the government seems to have left the options it had available to it, especially in terms of IPILRA, all but entirely unimplemented. This is despite the abundant encouragement and advice it has been offered on how to do so.[21]

[21] For instance, in 2011 I was involved in efforts to help the Department develop a way to implement IPILRA effectively; unfortunately, nothing ultimately came of this.

Traditional Leaders Stand in the Way

As the *Ingonyama Trust* and *Maledu* cases show, some traditional leaders have exploited the weak regulatory and enforcement environment to acquire more land through the further dispossession of the already dispossessed people in their areas. In his comments on the ITB situation of May 2018 quoted earlier, Motlanthe was speaking in his capacity as a member of a team established by then still new President Ramaphosa to 'clear existing confusion' on the African National Congress' (ANC) position on 'the land question' (Madia, 2018). Motlanthe's remarks received some negative attention, particularly from traditional leaders (Staff Reporter, 2018; see also Friedman, 2018) as well as allies of traditional leaders such as Mangosuthu Buthelezi, who criticised him for making the following comments:

> The people had high hopes the ANC would liberate them from the confines of the homeland system. Clearly now, we are the ones saying land must go to traditional leaders and not the people. . . . some [traditional leaders] pledge their support to the ANC. Majority of them are acting as village tin-pot dictators to the people there in the villages. (Motlanthe, quoted in Madia, 2018)

Motlanthe's comments were, of course, not unwarranted, and not only with reference to the ITB. The fundamental issue is who owns the land. Is customary land owned by the traditional leaders and/or kings or by the people who have lived on the land (burying their ancestors, grazing their cattle, gathering grass, wood and water), often for generations? As Motlanthe boldly observed, thus far it appears that – whether by commission or omission – the ANC has come down on the side of traditional leaders in this debate. One measure of this is that the legislation passed on governance and land tenure since the ANC took over in 1994 has been built largely on the foundations of preceding apartheid-era legislation. The ANC has thus preserved structures that were invented by the Native Administration Act 38 of 1927 and the Bantu Authorities Act 68 of 1951 and then branded 'tribal' by South Africa's past segregationist regimes. The rhetoric of the government and traditional leader lobby seeks to persuade the public that these legislative actions are protecting and continuing ordinary rural people's culture and traditions. However, close examination of the evidence reviewed by the courts in the *Ingonyama Trust* and *Maledu* cases clearly shows that they are not.

Organisations such as PLAAS, the Land and Accountability Research Centre and the LRC have worked on this for decades.

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'Citizens' with No Consultation and No Choice are 'Subjects'[22]

While the rights claimed by traditional leaders over so-called communal land are allegedly premised on a version of customary law, they are based on a distorted and/or opportunistic version. Within a dominant political economy framework that privileges individual and exclusive forms of ownership and decision-making over property, this version exploits the fluidity and ambiguities of customary law's distributed power model and its system of nested and overlapping land rights (Cross, 1992: 305–31; Okoth-Ogendo, 2008: 95–108). This results in communal land tenure processes that, especially at the intersection between informality and formality in South Africa's pluralistic legal system, effectively amount to 'no consultation and no choice'. The consequence is that people who are already vulnerable are left even more tenure-insecure than they were previously. As the hunger for the commercialisation of land and minerals in traditional areas grows, the dehumanising processes and dispossession of property that follow set up what can be experienced as an intimate relationship between selling land and selling people (many of them women) – in the haunting words of one elderly woman featured in *This Land* (2019), a documentary about the struggle of black, rural people to protect their rights on communal land in KwaZulu-Natal: 'They want to sell us.'[23]

The practical implication is that the oft-repeated aphorism *Inkosi iyinkosi ngabantu* or *Kgosi ke kgosi ka batho*, which can be translated as 'a traditional leader is a traditional leader in, through and because of the people [who follow him]', is effectively replaced by a problematic inversion. This says that 'a community is a community because of having a senior traditional leader' or, even more troubling, that 'people are (a) people in, through and because of (being under) a senior traditional leader'. In this way the process is not just one of dispossession but also one of dehumanisation.

Given that *Inkosi iyinkosi ngabantu* is part of the popular discourse of most South Africans, one might think that it would form the foundation of the recognition accorded traditional leaders in legislation. However, the Traditional Leadership and Governance Framework Act 41 of 2003

[22] The distinction between citizens and subjects, discussed further below, comes from Mahmood Mamdani (1996).

[23] *This Land* (2019), directed by Miki Redelinghuys, www.afridocs.net/watch-now/this-land/ (accessed 4 March 2023).

(TLGFA) disregarded it. Its replacement, the Traditional and Khoisan Leadership Act 3 of 2019 (TKLA), also does not describe 'traditional' structures as dependent upon consultation with the people who are to be governed by them.[24] With this legislation in place, the government has ensured that the holders of informal land rights on rural land need not be consulted on issues involving their land (Manona, 2012; Mnwana, 2014: 21–29; Beinart et al., 2021; Ubink & Duda, 2021). The power granted by the government to traditional leaders – converting cultural and political power into economic and legal power, encapsulated as 'Ethnicity Inc.' by Comaroff and Comaroff (2009) – is demonstrated in both the *Ingonyama Trust* and *Maledu* cases described earlier.

The insistence of the Portfolio Committee on Justice and Correctional Services on embracing the recommendations of traditional leaders in its deliberations in 2017 on the Traditional Courts Bill (B1D-2017) must be read against this background.[25] Specifically, the Committee insisted that permitting people to opt out of the jurisdiction of traditional courts would undermine the power of these courts, thereby dangerously re-enacting apartheid's repressive principles of depriving rural residents of choice – choice that sections 30 (on 'Language and culture') and 31 ('on Cultural, religious and linguistic communities') of the Constitution assure them. The Portfolio Committee's direction to the Department of Justice to remove the explicit right of people to opt out is a rejection of the fundamental customary law principle of *Inkosi iyinkosi ngabantu/ Kgosi ke kgosi ka batho*. Implicit in debates on traditional governance has been the question whether ordinary rural people are, in the words of Mamdani (1996), 'citizens' or 'subjects'. This move highlighted the extent to which they remain subjects (women even more than men).

IPILRA tried to stake a claim for ordinary rural people as citizens worthy of consultation in all matters pertaining to the land that they

[24] Ignoring protests and petitioning by ordinary rural community members and organisations, President Ramaphosa signed this Act into law on 20 November 2019, with 1 April 2021 set as its commencement date (Gerber, 2019). However, on 30 May 2023 (after this chapter was finalised) the Constitutional Court declared the Act invalid, following a procedural challenge to the legislation's constitutionality. The order of invalidity was suspended for twenty-four months to give Parliament the opportunity to remedy the deficiency.

[25] This Bill to 'provide a uniform legislative framework for the structure and functioning of traditional courts' was passed into law and signed by President Ramaphosa (after this chapter was finalised) on 16 September 2023 and published as the Traditional Courts Act 9 of 2022 on 27 September 2023. The date when the Act will come into operation remains to be announced.

'occupy', 'access' or 'use', arguably with consent required in the case of land which they 'occupy'. However, this was completely ignored in the case of *Maledu* and fraudulently violated in the case of the *Ingonyama Trust*. The result is the exacerbation of rural poverty.

Poor Democracy Makes Vulnerable People Poorer

In the most unequal country in the world, poverty remains strongly racialised and gendered. Ninety-three per cent of the 30 million South Africans declared poor (55.5 per cent of the total population) are black (Sulla & Zikhali, 2018). The 2019 General Household Survey found that 16.2 per cent of rural residents had inadequate access to food and 12 per cent experienced severe inadequacy (compared to 11.7 per cent and 6.4 per cent, respectively, in urban areas) (Statistics South Africa, 2021: 92). The rural figures are based on 'an under-representation of poor rural households' (Statistics South Africa, 2021: 93), meaning that the extent of rural poverty is likely greater than they reflect. Against this backdrop, women, in rural areas especially, have remained at a substantial disadvantage, even as rural men (especially those in traditional provinces) have experienced significant hardship as well. While roughly 41.6 per cent of South African households were female-headed in 2021, the prevalence of female-headed households is highest 'in provinces with large rural areas such as the Eastern Cape, KwaZulu-Natal, Free State, Mpumalanga and Limpopo' (Statistics South Africa, 2022: 14). These households have seen a slight reduction in very high unemployment rates (56.2 per cent in 2021 versus 57.6 per cent in 2017), but a higher proportion of female-headed than male-headed households continue to be without a single employed household member (Statistics South Africa, 2022: 13–15).

Women's labour force participation is highest in Gauteng and the Western Cape and lowest in the rural provinces with substantial traditional leadership presence (Statistics South Africa, 2022: 20–21), while men's labour force participation rates are generally higher than those of women (Statistics South Africa, 2022: 22). This is explained by the reality of differentiated responsibilities and concomitant obstacles, specifically: 'childbearing, lack of affordable childcare, gender roles and work–family balance', resulting in '[l]abour force participation rates by sex and the presence of children in the household . . . showing a linear relationship between the number of children in the household and participation rates irrespective of sex' (Statistics South Africa, 2022: 21). In sum,

unemployment rates for women are higher than the national average and increase with the number of children in the household (Statistics South Africa, 2022: 34).

While COVID-19 worsened every group's unemployment and poverty rates, once again the rural provinces (especially Eastern Cape, Limpopo and Mpumalanga) were generally hardest hit (Statistics South Africa, 2022: 48). In both 2017 and 2021, women's primary sources of income were social grants and remittances while men's were business and 'salaries/wages/commission' (Statistics South Africa, 2022: 47). Nearly double the proportion of women in rural areas (51.8 per cent) depended on social grants than in urban areas (26.9 per cent), reflecting the higher 'unemployment rate in rural areas and the fact that women are more likely than men to be unemployed' (Statistics South Africa, 2022: 47).

Looking at the facts of the *Ingonyama Trust* and *Maledu* cases (which demonstrate material dispossession without informed consent and due consultation), one might justifiably argue that the two problems of endemic poverty and impoverished democracy for traditional communities are deeply related. Both reveal how traditional leaders' and institutions' relatively unchecked powers are depriving poor, rural people of resources, resulting in deepening poverty for the most marginalised people in society. The impoverishment of democracy is enabled by prevailing legislation. Traditional communities are still defined by apartheid boundaries while the TLGFA's 'transitional arrangements' extended recognition to pre-Constitution traditional leaders, 'tribes' and 'tribal authorities', subject to democratising conditions that have not been fulfilled.[26] The historical continuities with the apartheid era are further entrenched by the 'transitional arrangements' set out in section 63 of the TKLA of 2021. This provides for the continued recognition of the 'traditional leaders', either by the TLGFA, prior to its repeal, or 'in terms of any applicable provincial legislation which is not inconsistent with the Framework Act, as the case may be', 'subject to a recommendation of the CTLDC, where applicable'.[27] The TKLA gives these same structures another two years to comply with requirements (in s. 16(2)) that their councils be reconstituted to include elected

[26] TLGFA, 2003: ss. 28(1)), 28(3), 28(4).

[27] The CTLDC 'means the Commission on Traditional Leadership Disputes and Claims established in terms of section 22 of the Framework Act [the TLGFA]' (TKLA, 2021, s. 63 (23)).

representatives (40 per cent of members, as against the 60 per cent appointed by the leader), and for one-third of their members to be women.

Conclusion

In this chapter, I have shown the intimate relationship between impoverished democracy and the material poverty of vulnerable rural people that began under colonialism and apartheid and persists today. As the chapter has sought to demonstrate, the main reason for the failed transformative and redistributive impact of the country's democratic Constitution in the realm of land tenure security and gender equality is the disproportionate power given to traditional leaders.

My argument is that IPILRA has provided the tools to address both these issues simultaneously and that utilising them would likely result in positive effects in traditional communities in both the political and economic spheres. Indeed, as demonstrated in the *Ingonyama Trust* and *Maledu* cases, fidelity to IPILRA would have gone a long way towards shoring up both the physical and the cultural survival of the affected communities. The corollary is also true: the government's failure to enforce IPILRA is costing lives and denying communities their tenure security. These two cases show the cumulative impact of the socio-economic and politico-legal realities in post-apartheid South Africa that have yielded limited protection of land rights for people living under traditional governance. This has left the conditions of material and social precarity that affected these groups under apartheid fundamentally unaltered and, in some instances, even worse than before.

It would be possible to enact legislation that secures people's customary rights in land and extends rights to women where these are being denied without having to resort to a constitutional amendment. The enforcement of already existing legislation such as IPILRA would accomplish much the same result. This chapter has detailed these missed opportunities that are in keeping with the Constitution. It therefore contends that amidst the sensationalist deliberations about expropriation without compensation of white-owned land, the opportunities for effectively advancing tenure security as well as other redistributive justice objectives that are already present in the Constitution have been obscured. Ultimately, it is essential for the public to pay keen attention to, and effectively address, the politics of traditional leadership and the transactions taking place concerning

land that is already beneficially occupied by ordinary rural people, a majority of whom are women and children. This is because these politics and transactions have thus far renewed the very foundations on which apartheid was built. They are thus essential if largely ignored dimensions of the substantially failed efforts at land reform in South Africa.

As the *Tongoane* case reminds us (in para. 79), rather than being complicit with apartheid-era structures and processes that, while labelled 'traditional', were re-engineered as instruments of domination and dispossession (Mandela, 1959; Luthuli, 1962: Mbeki, 1964), it is essential that laws promulgated to regulate customary communities take seriously the 'living' laws that predate them. These include fundamental principles of governance such as *Inkosi iyinkosi ngabantu/Kgosi ke gosi ka batho*, which give expression to democratic values and rights to choose that are also protected in the Constitution. That is partly what IPILRA sought to achieve. Although it has been ignored, it tried to ensure that the processes of consultation and consent that are embedded in vernacular law are respected in rural communities that were previously dispossessed under apartheid, in ways that are expressly inflected by the protection of rights enshrined in the Constitution. Of course, IPILRA is not enough on its own. Yet adherence to it might at least curtail the ongoing undermining of the slight gains that ordinary rural people have made through the country's transition from apartheid to democracy. The failure to do so is preventing both transitional and restorative justice from being realised in South Africa's traditional areas.

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8

Land Reform and Rural Production in South Africa

WILLIAM BEINART

This chapter offers a pragmatic approach to land reform in South Africa that prioritises production, rural livelihoods and partnerships, together with gradual redistribution of land. My vantage point is not that of an agricultural economist or practitioner but a historian who has been studying agrarian change and rural society in the country for nearly fifty years. The chapter attempts to understand and interpret evidence about recent changes in agricultural production and offer ideas about their implications for land reform.

Land reform remains important to address past injustice. Black people were legally prevented from owning or purchasing land in much of the country under apartheid. But in a context of economic stasis and persistent poverty, income is central for rural households, as is economic growth for the country – especially after the COVID-19 pandemic. The report of the Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA), perhaps the most significant recent policy overview, argued that 'the success of land reform must be linked to South Africa's productive and sustainable use of land, and the vibrancy and competitiveness of the economy, open to all to participate and benefit at all levels' (PAPLRA, 2019: 6). A Treasury document of the same year reinforced the point that 'land reform must be oriented around growing the agricultural sector to foster economic development, and not purely be an endeavour to transfer land' (National Treasury, 2019: 39). My aim is to explore a few developments that are aligned with this approach, which may facilitate production. While cautious about increasing the pace of land reform, I suggest an increase in state expenditure from which beneficiaries can generate income, and improved support for partnerships between the state and private sector.

In the space available, this chapter has a limited focus. I do not discuss historical injustice, the meaning of land, or land tenure, water and environmental issues. Expropriation without compensation is analysed in other chapters. Urban and peri-urban issues, which should be

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considered in the same frame of discussion as agricultural land reform, will also not be addressed here, except to say that given the continuing movement from rural areas to cities and towns, provision of secure rights to land and housing in urban and peri-urban areas is a priority. Land reform should follow the people.

Context: Economic Stasis and the Current Scale of Land Reform

The context of land reform has changed after a decade (roughly 2012–2021) in which economic growth has stalled, corruption has become endemic, divisions have immobilised the African National Congress (ANC) and inequality seems to have become intractable. The country experienced something close to economic stasis during the five years from 2015 to 2019, with growth averaging less than 1 per cent a year (Macrotrends, n.d., citing World Bank data).[1] Recent socio-economic travails have been framed by COVID-19, with a nearly 7 per cent gross domestic product (GDP) contraction in 2020 – perhaps recouped by the first quarter of 2022 (Macrotrends, n.d.). The civil disorder in KwaZulu-Natal (KZN) and parts of Gauteng in July 2021 directly reflected both political tensions in the ANC and the inequalities exacerbated by COVID-19.

Figures differ but it may be fair to say that GDP per capita peaked briefly at $7,500–$8,000 in 2010–2011, after a period of rapid economic growth during Thabo Mbeki's second term as president, and then declined to about $5,500–$6,000 in 2020–2021 – the same level as 2004 (World Bank, n.d.). Most South Africans, including the poorest, experienced significant growth in their standard of living during the first decade of the twenty-first century. However, this has since been reversed, and it is likely that the poorest, and women especially, bear the brunt. Perhaps two-thirds of jobs lost were lost by women in the early phases of the pandemic (Spaull et al., 2020). Unemployment increased to about 34 per cent in 2020 – and considerably higher according to the expanded measure and for younger people. In early 2022 it remained at this level. South Africa fell in global GDP rankings from about twentieth in 1960 to twenty-sixth in 1994; some tables now place it around thirty-sixth (Wikipedia, 2023). In this context, income generation for poor rural people in South Africa is a priority.

[1] Figures used in this chapter are indicative, providing rough quantities and trends rather than precise calculations.

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Figures on the area of land transferred from white owners to black occupiers since 1994 are difficult to find and interpret, especially in light of the range of agricultural potential in different areas. The PAPLRA (2019: 12) recorded that by March 2018, 9–10 per cent of agricultural land had been transferred through state schemes of redistribution (around 6 per cent) and restitution (around 4 per cent). This amounted to 8.4 million hectares or 350,000 hectares per year. In addition to further transfers during 2018–2019, the Department of Agriculture, Land Reform and Rural Development (DALRRD) accelerated the distribution of state land, aiming at 700,000 hectares in 2020–2021. Some of this, however, was probably occupied already. In a recent calculation, Sihlobo and Kirsten (2021a), two of the best-informed commentators, reckon that 17 per cent of agricultural land, or 14.5–15 million hectares, were transferred, including by private purchase, by 2021. Government figures are not released for the extent of land transferred through the market.

The issue of ownership further complicates the picture. Initially, beneficiaries acquired land ownership through the restitution and redistribution programmes. With regard to rural land, this has usually been collective title through trusts and, after 1996, Communal Property Associations (CPAs). But following the Proactive Land Acquisition Scheme (PLAS), introduced in 2006, and especially since 2011, the state has given leases for most redistribution land, with an option to purchase at a later stage.

It is thus very difficult to arrive at a clear estimate of the total extent of black land holding in South Africa because the forms are so diverse. If the roughly 14 per cent area of the former bantustans is added, then it would amount to well over 30 per cent of agricultural land, but this is by no means all 'owned' in private tenure. A majority is in the wetter, eastern half of the country. While whites probably still own over 65 per cent of agricultural land, a substantial area has been transferred – a significant achievement by the state and unusual on a global scale. Zimbabwe's ambitious and relatively successful land reform programme in the twenty years before the 'fast-track' (1980–2000) resulted in the transfer of less than half this amount of land.

Agricultural Production over the Last Decade

Establishing large white-owned farms was a central and violent project of the settler colonial and apartheid states as well as white ruling groups. The question is: Would a rapid unravelling of the relatively large

commercial farms now be economically destructive? I will look at evidence about production on commercial farms and smallholdings to suggest that it would. My initial motivation for engaging directly in this debate was, in part, the result of calls for more radical action in South Africa, which did not seem to take sufficient account of the difficulties faced by smallholders (De la Hey & Beinart, 2017; Beinart & Delius, 2018). Different, sometimes linked, prescriptions were offered: a fast-track land reform, emulating Zimbabwe after 2000; nationalisation of land; and an end to the 'willing seller, willing buyer' policy through expropriation without compensation (see Introduction to this volume). A related concern has been the future of land tenure in the communal areas, especially in light of the ANC's increasingly sympathetic approach to chieftaincy (Beinart et al., 2017; Buthelezi et al., 2019).

Commercial Agriculture

Despite the uncertainties resulting from land reform policy and public debates about expropriation, large-scale commercial agricultural production has increased significantly in value and volume, especially over the last five or six years (DALRRD, 2021). Maize remains the most important crop in the Southern African region as a whole, still central to consumption for poorer people. The last six years (2016–2021) have seen four of the six largest maize harvests on record in South Africa, and the downturn in 2017–2018, largely because of drought, was less severe than in earlier years (Figure 8.1). Gross value reached R40 billion in 2020 (DALRRD, 2021) and has probably increased because of a sharp rise in international prices. Commercial farmers have widely adopted genetically modified seed, and an increasing percentage of maize is irrigated – marked by large circular fields. This expansion has been reflected in unusually high demand for new agricultural machinery over the last two years.

Maize was outstripped by poultry in 2020, with a gross value of over R60 billion, including eggs and smallholder production (DALRRD, 2021). This represented nearly 20 per cent of the value of agricultural production as a whole, supporting domestic consumption of by far the most popular meat. Livestock and animal products have grown rapidly in value, but so too has a wide range of crops: soya, grapes, deciduous fruit, citrus, avocados, macadamias, vegetables and berries. Sugar and wheat have contracted, but even the latter, which fell after subsidies were removed in the 1990s, has picked up over the last couple of years. Larger-scale commercial agriculture is increasingly diverse.

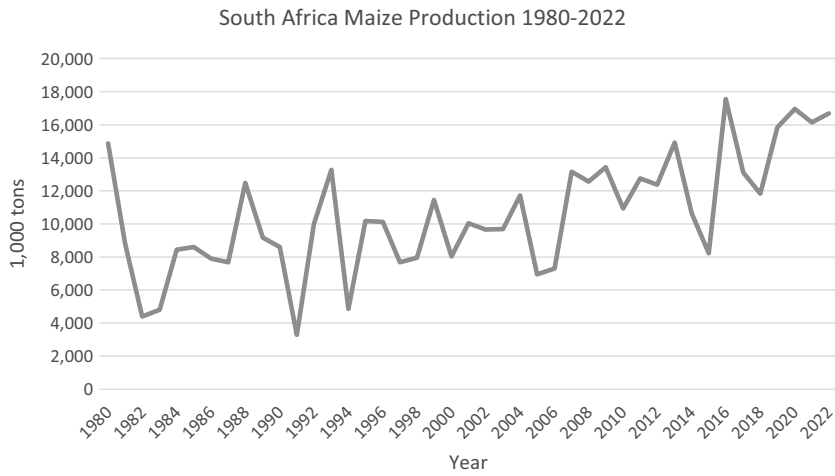

Figure 8.1. South Africa maize production, 1980–2022
Source: Indexmundi (n.d. a)[2]

Citrus is an important indicator of investment and diversification. Tree crops that require high start-up costs and long-term commitment may seem counterintuitive ventures for landowners because of uncertainties in climate and policy. Nevertheless, the area planted expanded by about 9 per cent in 2020 and 5 per cent in 2021, with similar predictions for 2022. Exports, juice processing and domestic consumption are all increasing. Well-capitalised and innovative farmers are alert to new cultivars that extend the season and meet shifting global market demands. Although around 65–70 per cent of the crop is exported, which is most profitable for growers, expansion also provides cheaper fruit for juice and local consumption. Citrus provides over 120,000 jobs (though many are seasonal), and is the single biggest agricultural export commodity, at about R25 billion for 2021 (Citrus Growers Association, 2022).

The gross value of agriculture, growing at over 2 per cent per annum in recent years, increased 10 per cent to R308 billion in 2020 (DALRRD, 2021) – more rapidly than the economy as a whole so that, unusually, agriculture's contribution to GDP may be climbing. Generally, it is given as around 2.6 per cent of GDP, but this figure is narrowly defined to

[2] For consistency I have taken these numbers, as well as those for Malawi and Zimbabwe, from this source on the web; generated by the US Department of Agriculture, they are very similar to the DALRRD figures in the 2021 Abstract of Agricultural Statistics.

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include only the value of farm products or 'primary agriculture'. Some estimates that extend the figure to agricultural inputs, downstream products, processing and transport go up to 9.3 per cent for 'Agricultural Food Systems' (Meyer, 2021) and higher for all 'secondary agriculture' (PAPLRA, 2019: 84). This is similar to the contribution of the mining industry.

Land prices have generally increased over ten years. Agricultural employment has declined since 1994, when it was over a million, but remained stable since 2015, when the measurement was altered, at around 800,000, and increased in 2021 (Sihlobo, 2022). The number of farm dwellers, however, declined as landowners attempted to evict tenants and families (PAPLRA, 2019: 49). Most large farms in South Africa are white-owned, but an increasing number are corporate or black-owned. Commercial agriculture is still vulnerable to many uncertainties relating to rising input costs, markets, environmental issues and climate; certainty in respect of policy would be valuable. Skills and capital are being kept on the land, and they can provide the spine for new initiatives.

Smallholder Agriculture

It is more difficult to analyse smallholder agriculture, either in the former homelands or on recently transferred land, because the government does not provide adequate figures – a major omission, given the importance of land reform and post-transfer support. Government figures published on the web for 'non-commercial' maize production show a declining area of cultivation, from an average of 380,000 hectares in 2013–2017 to 332,000 hectares in 2018–2022, but an increasing yield per hectare (Figures 8.2 and 8.3). According to these estimates, production of 'non-commercial' maize nevertheless declined a little, from about 635,000 tons (average for 2013–2017) to 600,000 tons (2018–2022) – although the last two years show promising growth. According to these government graphs, smallholders contribute less than 5 per cent of national maize production with yields of about 1.8 tons per hectare, compared with 6 tons per hectare on commercial farms.

These figures combine local surveys to record output and digital maps that allow an estimate of area cultivated. In one respect, they appear reasonably convincing. Village-based surveys, particularly in the Eastern Cape, indicate that cultivation of arable fields in the former homelands has diminished sharply in the last two decades (Manona, 2005; Hebinck & Lent, 2007; Brooks, 2017; Blair et al.,

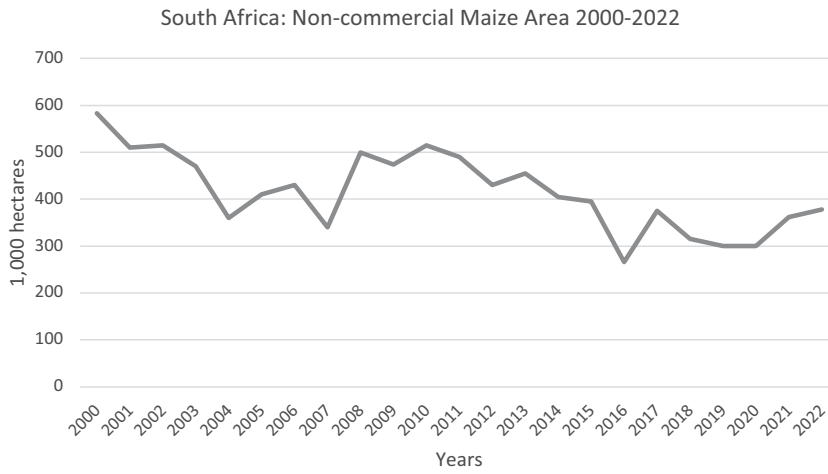

Figure 8.2. 'Non-commercial' maize: area planted, South Africa, 2000–2022
Source: DALRRD, Crop Estimates Committee (2022).

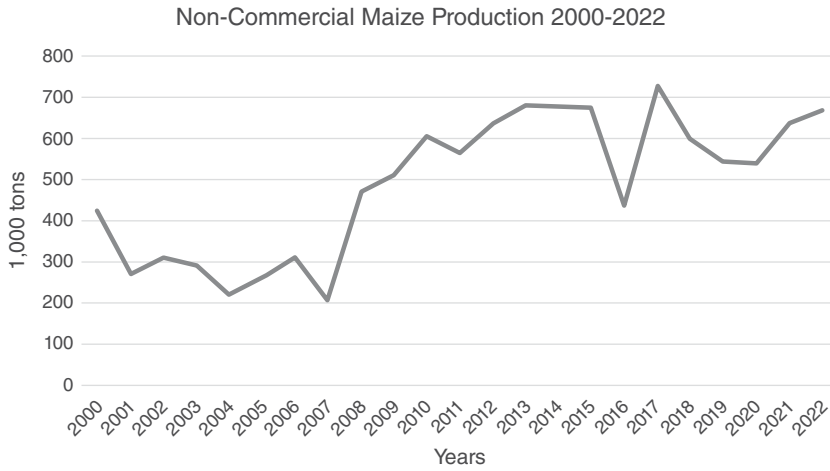

Figure 8.3. 'Non-commercial' maize: production, South Africa, 2000–2022
Source: DALRRD, Crop Estimates Committee (2022).

2018). In Mbotyi, a high rainfall area on the coast of former Transkei, villagers largely ceased to use their fields in a fertile alluvial plain (Beinart & Brown, 2013; De la Hey & Beinart, 2017); this finding was confirmed in the nearby village of Cutwini (Hajdu et al., 2020).

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Recent fieldwork in KwaZulu-Natal suggests a similar process even in communal areas with rainfall of 1,000 mm. Land reform farms in the same area around Weenen, they note, 'are now large-scale, extensive cattle and goat farms, with very few, if any, cultivating crops. They are rapidly undergoing bush encroachment related to climate change' (Alcock et al., 2020: 1).

Many reasons are recorded in these surveys. Smallholders see the costs and risks of dryland farming on 1–2 hectares, without irrigation, as high relative to the benefits when staples such as maize, ready for cooking, can be purchased. There are bottlenecks for ploughing – few households have sufficient cattle to use ox-drawn ploughs, and they are dependent on the small minority with tractors. Families are smaller, and it is difficult to find sufficient labour; both women, who used to do most of the cultivation, and the youth are reluctant to prioritise such work. Access to child labour has diminished, particularly for herding, and as a result, some livestock are left to themselves for periods during the day. As one informant noted: '[T]he major problem that is affecting the people when they are growing mealies is the cattle. The cattle are just walking about everywhere . . . There is no control . . . You will be planting for the cattle' (De la Hey & Beinart, 2017: 762). The layout of most betterment villages, where homesteads are separated from the fields, diminishes control and creates opportunities for theft.[3]

Government figures likely reflect this process on the arable fields. However, they may underestimate the extent of cultivation in smaller gardens adjacent to residential homesteads, recorded in studies mentioned above, of both maize and vegetable production. In the Eastern Cape, Mtero (2014) found the proportion of village households with gardens to vary from 25 to 75 per cent, even in neighbouring villages. Brooks (2017) found that about 50 per cent of 120 households cultivated an average area of about 400 m^2. This is substantial for vegetables and green maize, yielding perhaps 20 per cent of household maize and more of vegetables. The significance of gardens, difficult to record, suggests that government figures for smallholder production may be underestimated. Vegetables have increased in importance, although markets may have been temporarily restricted by COVID-19 (Wegerif, 2022). But even if 2 million households planted this much in gardens, which is unlikely as

[3] Betterment was a government policy introduced in the 1940s and gradually implemented through the apartheid years, that pushed African rural settlements into villages, where houses had restricted garden plots, and separated the arable fields from the settlements.

Figure 8.4. Zimbabwe maize production, 1980–2022
Source: Indexmundi (n.d. b).

many live in dense settlements, it would amount to only 80,000 additional hectares, or another 20 per cent in smallholder maize output.

Resilience is also evident in the smallholder livestock economy. Sihlobo and Kirsten (2021b) estimate that while black farmers contribute 4.7 per cent of the value of maize, they account for 34 per cent of the value of beef. Livestock is the major enterprise on transferred land, and it may be that black people now own over 40 per cent of cattle, a figure last recorded in the 1930s. Some of these are slaughtered and consumed in villages or sold in informal markets for customary ceremonies. Poultry, pigs and goats are also widespread in villages, while the gathering of wild plants and fruits, including exotics such as prickly pear as well as plant medicines, make some contribution to rural livelihoods (Mugido & Shackleton, 2019; Leaver & Cherry, 2020; Beinart & Wotshela, 2021).

It is difficult to calculate the value generated by smallholders through informal markets and local consumption overall, but the evidence is that a rapid transfer of land from large-scale farms will likely result in a substantial loss of agricultural production. The key issue for smaller-scale grain and horticulture in customary areas and on transferred land is not primarily a lack of land but a lack of capital, investment, support and access to adequate water.

Zimbabwe provides some evidence of the possible consequences of fast-track land reform on overall output (Figure 8.4).

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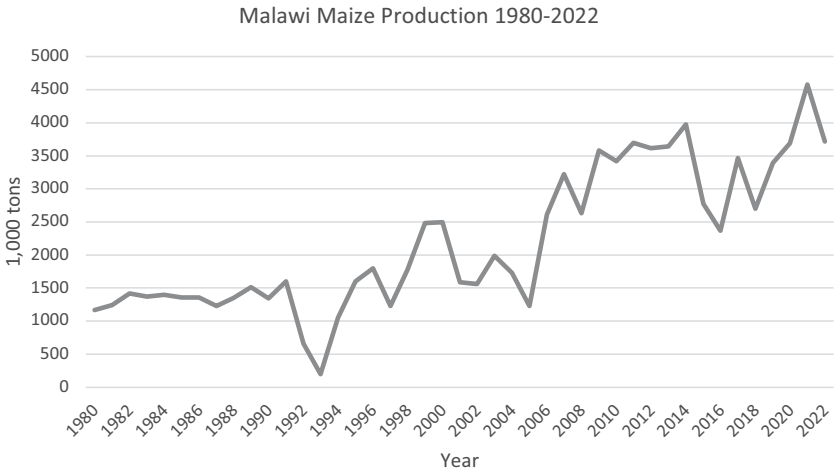

Figure 8.5. Malawi maize production, 1980–2022
Source: Indexmundi (n.d. c).

It is clear that fast-track land reform from 2000 had a major impact on maize production and food security for over fifteen years. The average for 1991–2000, around 1.7 million tons, was similar to that for the previous decade and included an exceptionally poor drought year in 1991. Production was maintained over a period of twenty years in which about 30 per cent of the large farms were transferred to smallholders in schemes that were generally well-supported. This was a relatively successful gradual land reform and could have been sustained. The average for 2001–2010, during the fast-track expropriation of most remaining large farms, was probably less than half at around 0.7 million tons annually.

Production of maize in Zimbabwe is now largely in the hands of smallholders, with some recovery in output. This did not, however, reach pre-2000 levels in the subsequent decade (2011–2020) or even in the five years from 2017 to 2021, which included a big harvest in 2021 (average of 1.6 million tons). By contrast, total South African production increased from an average of 8.5 (1991–2000) to 15 million tons (2017–2021). Malawian maize, largely grown by smallholders, provides another valuable comparison and has more than doubled since the 1990s (Figure 8.5). A major reason was the introduction of input subsidies in 2006, which enabled the country to recover from near-famine conditions in the early years of the twenty-first century and achieve relative food security (Chirwa & Dorward, 2013).

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It is worth noting that Malawi is about the same size and has roughly the same population as the former South African bantustans but is producing six times more maize than these areas and double the quantity of maize produced in Zimbabwe, which is far larger. If South African smallholders residing in the former homelands and on transferred land produced the same amount of maize (or alternative crops) as Malawi in 2021, the value generated, at international prices, could have been in the region of R12 billion, equivalent to half a million pensions. Clearly this, together with the associated economic activities, would make a significant difference in South Africa's rural areas. There are important environmental and social differences between South Africa, Zimbabwe and Malawi that help to explain such figures, but input subsidies and effective extension are part of the picture.

The same point may be drawn from the resurgence of tobacco in Zimbabwe (Mazwi et al., 2020). Before 2000, tobacco was largely grown on commercial farms, and production dropped from an average of 220 million kilos in 1996–2000 to lows of 60 million kilos after fast-track land reform. In 2006, a Chinese company established an input, extension and purchasing scheme for smallholders; British companies also invested. Connectedness to capital, inputs and markets made the difference, and by 2019, about 160,000 growers rivalled the output of the best earlier years. The value of Zimbabwe tobacco rose to about R10 billion and accumulation from this source led to investment elsewhere in the rural economy, including food crops. Zimbabwean smallholder tobacco exports were nearly half those of South African citrus in 2019, bringing perhaps an average of R50,000 to producers. This is an important base for rural recovery in Zimbabwe – again, it could have been achieved without fast-track land reform because tobacco does not take a great deal of land. Malawian tobacco fetched R7.5 billion in 2019.

Facilitating Smallholder Production: Partnerships and Joint Ventures

Input subsidy strategies have also been developed in South Africa, and I will focus on these as one potential route to facilitating connectivity and agricultural output. Since Thoko Didiza first took over as Minister of Land Affairs in the Mbeki presidency of 1999, the government departments dealing with land reform have increasingly recognised the problems of production on transferred land. Their strategy, though not unidimensional, has been to shift away from transferring land to multiple beneficiaries and towards assisting a more restricted number of

'emerging farmers' who may be able to succeed as commercial producers. The original formula for assisting redistribution, through the Settlement/Land Acquisition Grant (SLAG, 1994–2000), favoured communities that could pool their grants to purchase land through trusts and CPAs. This was largely replaced by the Land Redistribution for Agricultural Development (LRAD) from 2000 to 2006 and then increasingly by the PLAS, which tended to award bigger farms to those with business plans in the hope that they would establish successful agricultural enterprises.

In all of these schemes, as well as in restitution awards, inadequate post-transfer finance and support have been a problem. PLAS has been criticised for favouring relatively few beneficiaries with land and recapitalisation funds and abandoning the redistributive aims of the early land reform projects (Hall & Kepe, 2017). Gugile Nkwinti, then Minister, reckoned in 2010 that production had declined on 90 per cent of transferred farms, which was one reason for the departmental focus on PLAS. But outcomes on PLAS farms have been uneven, as have government attempts to facilitate production on highly capitalised restitution land (see below).

Large-scale commercial agriculture, dominated by white farmers, was initially defensive and attempted to keep land reform at bay. But some of the key commodity organisations, such as the South African Sugar Association (SASA) and National Woolgrowers Association (NWGA), have worked with smallholders since the 1990s, and an increasing range of non-state agencies have engaged with the issues. The resulting outgrower and partnership schemes are highly diverse in their form, involving existing and new individual smallholders and new collective owners in CPAs. They have drawn on farmers, private companies, commodity organisations, agricultural consultants and NGOs, as well as government departments. Most have been organised around specific commodities such as sugar, wool, forestry, dairy, beef, maize and fruit. I estimate that over 80,000 smallholders have participated overall, perhaps more than 100,000, but not all have been active at the same time.

Sugar

The sugar scheme launched by SASA and milling companies in KwaZulu-Natal in the 1970s was perhaps the first, and for many years the most ambitious, outgrower scheme, providing credit, inputs, extension and marketing (Dubb, 2016, 2020). They had multiple motivations: to keep marginal mills going; to maintain or expand production on land

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being bought for homeland consolidation; and to develop political links with the KZN government, which facilitated the project through its development agency. Small-scale growers were also supported at the Nkomazi irrigation scheme in Mpumalanga. Around 50,000 growers were registered by the end of the twentieth century.

Large-scale South African sugar producers relied on protection in the domestic and regional markets because they found it difficult to compete internationally, and they came under pressure after the political transition. Complex new marketing arrangements in the early twenty-first century dampened sugar production as a whole, which fell 20 per cent from an average of 21.5 million tons in 2001–2005 (with a peak of 24 million tons in 2001–2002) to 17.1 million tons in 2015–2019. Some major companies, in part, moved their operations northwards to countries where costs are lower. Smallholders, particularly in Zululand, bore the brunt of the decline, from about 4 million to about 1.8 million tons; registered small-scale producers have declined to about 18,000, with 12,000 actively producing (https://sasa.org.za/facts-and-figures/; Dubb, 2020).

However, production as a whole has stabilised at 19 million tons over the three years since 2019, with a value of R11 billion in 2021. SASA reports that 24 per cent of cane is now delivered by black producers (Department of Trade, Industry and Competition, 2020: 4), a higher percentage than for any other major agricultural commodity except perhaps for beef (which includes non-marketed consumption). They are, however, differentiated by the size of the undertaking. Milling companies that used to be major growers have transferred land to medium- and large-scale African owners; some have benefited from the PLAS scheme that capitalises new producers. African contractors, who have been important in facilitating smallholder schemes, assisting in inputs and planting, also produce sugar themselves. Those with irrigated plots, largely men, achieve better returns and profits. A survey of 127 growers at Nkomazi found that they averaged 201 tons on 6 hectares – to a value of perhaps R80,000–100,000 per annum (Metiso & Tsvakirai, 2019).

Small-scale growers were recorded as delivering a substantial amount, 11 per cent of cane in 2021, worth about R1 billion. They also get support – for example, from Tongaat-Hulett, in association with the KZN government, in a scheme of over 2,000 members supported by extension officers. But Dubb (2020) suggests that those at the lower levels can barely break even and depend on subsidies. Over 60 per cent of

growers with non-irrigated plots on customary land are women with little education. Typically, a grower on 2 hectares might manage 30 tons, which would fetch R15,000 before costs. Nevertheless, a significant number of smallholders find it worthwhile to remain engaged with sugar, and an additional R225 million subsidy was being distributed to black growers in 2022 (SA Canegrowers, 2022).

Wool

A similar scheme was started in 1997 by the National Wool Growers Association for sheep owners in communal areas in the Eastern Cape. It was funded by the Wool Trust (which inherited the assets of the old Wool Board), by the provincial government and with occasional donor money (Kenyon, 2020; De Beer, 2019; Mbatsha, 2019). The central aim was to improve the quality of wool produced by smallholders based in the former Bantustans and to provide access to formal markets. The NWGA decided on a strategy of releasing stud rams, purchased from white farmers, on a mass scale – reaching 3,000 a year and perhaps 50,000 in all. In a context where it is difficult to control breeding because grazing lands are largely communal and rams cannot be segregated, this seemed the most effective route for reaching the widest number of small-scale owners. The NWGA also provided an extension service, training, wool sheds in villages and channels for marketing. Wool is very largely exported, about 70 per cent to China.

By 2018, income through this scheme had increased to R383 million, about 8 per cent of the value of the national wool clip. With 25,000 participants, this amounted to an average of R15,000 per owner. Prices peaked in 2018 and then gradually fell so that overall income declined to below R300 million over the next two years. Stock theft has also reduced income, and the number of stud rams released has declined because the Eastern Cape Department of Agriculture curtailed its subsidy for ram purchase (De Beer, email 16 February 2022). This is a small investment for the state, contributing to demonstrably high returns for rural communities, but the government is concerned about long-term subsidies. A levy of 4 per cent on wool sales from participants would fund the purchase of rams.

The scheme is open to all sheep owners; income is highly variable, depending on wool clips by individuals, with some earning more than R50,000 a year, well over the average. Proceeds as a whole come initially to those living in rural villages and are widely distributed. A detailed

survey in 2020 showed that in addition to the average income of R15,000 for wool, participants made a similar amount from other agricultural sources, particularly meat (NWGA, 2020). On average, about 50 per cent of household income came from agriculture, considerably higher than in other recent rural surveys (Hajdu et al., 2020).

With sugar peaking at 50,000 participants and wool at 25,000, participant numbers have been high. Forestry and citrus organisations and companies run similar programmes. They are, in some respects, more like outgrower schemes than partnerships; the commodity organisation or company involved has the major responsibility for making the rules and for providing input subsidies, extension services and marketing routes. The benefits have been highly variable, but that is also because they have encouraged relatively wide participation. Both sugar and wool, it should be emphasised, have at various stages drawn on state funding, and most of the extension officers in the NWGA scheme moved from government employment (De Beer, 2019; Mbatsha, 2019). The Zimbabwean smallholder tobacco initiatives provide a linked example, reaching an even wider range of participants and focusing on inputs, training, connectivity and marketing.

Perhaps there could be lessons for South Africa if, as now seems government policy, *dagga* (cannabis) cultivation is to be made legal. Thoko Didiza (Minister again) announced a Cannabis Master Plan in 2021, and President Ramaphosa thought this sufficiently important to mention in his 2022 State of the Nation speech (SAnews, 2021). But the shape of the scheme seems to make it difficult for the many existing smallholder growers to participate. Growers will have to be registered and regulated, apparently with a particular focus on medicinal supplies. If this is to benefit smallholders, then the state should work with the private sector to set up input supply lines and marketing routes.

Dairy and Fruit

There are many smaller-scale projects that more closely resemble partnerships. The Grasslands Development Trust, near Jeffreys Bay, was generated by an experienced, successful dairy company with twelve farms (Elliot, 2019). They extended their production model to an additional 485-hectare farm, purchased under the LRAD formula, with the state subsidising 35 per cent of the original transfer to forty-nine black dairy workers. The latter are 100 per cent owners through a trust, and therefore in a position to sell. Farmworkers retained their jobs, and the trust also

received a 60 per cent share of profits; the company, as share-milker, gets the rest but supplies cows, certain inputs, skills and labour, as well as access to the market. Each trust member gained a share of profits, in addition to wages from farm employment. Beneficiaries of the trust are restricted to retired or present employees of the company, Grasslands Agriculture. In recent years, the members, now reduced to thirty-five, have received around R150,000 a year, with variations. This kind of partnership clearly requires a large-scale enterprise to provide capital, expertise and a secure marketing route. Grasslands wanted to expand the relationship with another group of workers but could not secure government assistance for the land purchase.

A different form of joint venture was developed at Ravele in the Levubu valley, Limpopo (Manenzhe, 2015; Nematswerani, 2020). This was rooted in the restitution in 2005 of a number of intensively developed sub-tropical fruit and macadamia nut plantations. Ownership of the farms passed to seven CPAs or Trusts, and the state attempted to set up partnerships with private sector farming companies to maintain production. The first arrangements were poorly conceived and failed, leaving the department to bail out the communities that found themselves in debt. But the government decided to recapitalise the farms because it was committed to the success of this flagship restitution programme. Ravele CPA, in particular, secured a workable new arrangement with an experienced white manager, who also ran his own farm growing similar tree crops. In 2012, Mauluma Farming, the operating company, was awarded a prize for its macadamia nuts. They were able to expand turnover and secured a series of profitable years, reaching R9,700,000 in 2016.

CPA members, numbering about 300, decided not to move back onto the farm so that it could be focused on agriculture. The great majority had re-established themselves in surrounding settlements. They derived their main benefit from employment at Ravele, making up 70 per cent of the 193 full-time employees (Manenzhe, 2015). Nevertheless, they have faced major decisions about reinvesting or redistributing profits. All CPAs involved in production face similar dilemmas in that members hope that restitution will bring them some income. In this case, redistribution of profits could have resulted in a payment of around R30,000 to members in 2016, but they decided to reinvest (Nematswerani, 2020: 35). The Ratombo CPA, which – after similar financial travails – found a stable management and mentoring arrangement in 2015, also resisted payouts (Kirk-Cohen, 2020).

A linked tension at Ravele resulted from the role of the local chieftaincy, which lodged the initial land claim on behalf of the community.

At first the chief's family dominated the CPA committee, and in 2012 a group accused them of receiving unfair benefits and favouring their relatives for employment (Manenzhe, 2015). These tensions were partly resolved in 2015, but recent reports suggest that they still simmer (Nematswerani, 2020). They have been partially contained by separating the farming enterprise into a different company and by the relationship of trust that has developed between the community and the farm manager, ensuring that the bulk of revenues are reinvested.

A further example of joint ventures originated in the deciduous fruit farming areas of the Western Cape. A land transfer in 2006 by a local farmer to farmworkers, subsidised by the Department's LRAD formula, established a partnership. The farmer provided infrastructure, mentorship and marketing routes, while the farmworkers, with shared ownership, provided the work and operational farming inputs. This was followed by a more ambitious project at Donkerbos Estates in 2012, a large mixed farm with 200 hectares of irrigated land shared between a company and a worker trust (Staal, 2019).

In 2014–2015, the Witzenberg Partnership in Agri Land Solutions (PALS) was formalised to expand such private sector land transfers with the backing of major fruit farmers in the area, administered in part by a local legal firm (Van Vuuren & Van Staden, 2022). The model has developed in different forms and shares, generally around the provision of land to a small group of farmworkers with a maximum of ten beneficiaries. Financing has largely been from the private sector, relying on donations and loans to buy land and establish crops, with profits used to pay off the interest. The partnerships involve close mentorship by established fruit farmers, who remain as part owners. PALS believes enterprises are more likely to succeed if the farmers retain 'skin in the game' (Van Vuuren & Van Staden, 2022). Government funding has been drawn on for some projects, such as R40 million from the Jobs Fund to develop 100 hectares of new citrus orchards.

The majority of the around thirty projects by 2021 involved new plantings of fruit rather than a share in existing orchards. As irrigation is essential, this also involves negotiation with the state for water rights and sometimes construction of farm dams; applications are more likely to be successful if they involve black partners. Access to water is an underlying theme in a range of joint ventures. The key element in the PALS approach is to build successful agricultural enterprises that can achieve export and 'Woolworths' (high-end supermarket) quality in such fruits as nectarines and apples that flourish in the area. They see themselves as operating on

'business principles, solid legal structures, mentorship, and training' (Van Vuuren & Van Staden, 2022). In addition to a share in the profits for the black partners, the PALS project promises wider employment and, for those who do not become co-owners, employee share schemes. PALS has wider ambitions in leading private sector land reform, with projects in other provinces (Van Vuuren & Van Staden, 2022).

Elsewhere, many other developments have been launched, some on customary land, some on restitution land, some on land subsidised by LRAD and PLAS redistribution grants, and some – as in the case of PALS – focusing on privately funded transfers. It is difficult to get a national overview, but other organisations include Amadlelo in dairy; Wiphold in maize and vegetables; Sernick in beef; Old Mutual Masisizane Fund in crops; ZZ2 in tomatoes and other vegetables; Westfalia in avocados; Vumelana in providing funding and inputs; and Casidra in project management in the Western Cape.

The variety and scale of these developments have not, to my knowledge, been adequately recorded and analysed (see Mabaya et al., 2011; Okunlola et al., 2016). There are many unfavourable outcomes, including some of the Trusts and CPAs involved in the Limpopo restitution transfers of fruit farms (Kirk-Cohen, 2020; Newatswerani, 2020). Solms-Delta, a wine estate in the Western Cape that planned to devolve land and production to an additional farm run by workers, is often cited as a failure. Here a great deal of capital was invested in social welfare and educational projects that could not be sustained by the income from wine (Spaull et al., 2020; Payi, 2021).

The state has limited funding and capacity for mentorship and knowledge transfers. Outgrower schemes and partnerships offer the opportunity to leverage private sector funding, knowledge and skills. From the vantage point of commercial farmers and commodity organisations, they have an interest in maintaining production, winning support for private land ownership and private enterprise, as well as including former farmworkers in a thickening web of relations around shared enterprises and income generation. Belatedly, they are attempting to open up ownership across boundaries of race and class.

Some Concluding Points

The overview and examples presented illustrate diverse processes and new networks that are developing in the agricultural sector. The gains that can be made to rural livelihoods in outgrower and partnership

schemes may seem quite limited when compared to incomes generated from wages in other sectors. The agricultural minimum wage was increased to about R45,000 per annum in 2022, but mineworkers get at least four times that amount (SA Facts, n.d.). Nevertheless, amounts that accrue through some of the schemes discussed, ranging from about R15,000 to R50,000 a year (and probably more in some dairy and fruit projects), are significant for people living in impoverished areas of the country with limited employment opportunities. Many rural families are partly dependent on grants, sporadic remittances and informal sector engagements. The state pension, a significant contribution to the income of households in the former bantustans, is a little under R24,000 a year (August 2022). In this context, amounts from agricultural intensification are valuable.

I have focused on relatively successful projects, mostly led by commodity organisations and the private sector. The evidence is that non-state agents are taking an increasing variety of initiatives in land reform and smallholder agriculture. I have not seen an overarching attempt to quantify such developments, but it is possible that these now engage more people than state-led projects. This is not an argument against the state, not least because the state is still a major instrument of finance and land transfer; many partnerships involve both public and private funding. Nor is it an argument against other routes of facilitating production. Rather, my emphasis is on how best to generate investment in agriculture and rural livelihoods. The examples presented above suggest some promise in diverse partnerships between state agencies, private sector interests and rural communities. These potentially take the pressure off state finances for all the costs of land reform and address some of the weakest elements of state-led land reform – implementation and agricultural skills.

Partnerships are not without tensions. White farmers, commodity organisations and associated agencies sometimes frame their engagements within a critique of the failure of the state. They also perceive economic and political gains, including a conviction that an intensive, technologically innovative, commercial agricultural economy is in the national interest; they hope that such strategies will win more general support nationally among black as well as white, and desire to defuse local tensions in their districts. In some cases, partnerships can contribute to meeting government policy. The NWGA scheme initially grew out of a requirement that the financial resources inherited from the Wool Board in part be committed to redistribution; elsewhere, a sector code

called AgriBEE has been developed for black economic empowerment (BEE) in agriculture. Some projects can involve (a relatively small) self-imposed tax, which has socio-economic purposes as well as a political rationale.

The evidence suggests a relatively buoyant commercial agrarian economy in South Africa, increasingly diverse and innovative, with relatively high levels of investment in both domestic food production and export commodities. The data on existing smallholders is inadequate, but despite limited arable agriculture in the former bantustans and on transferred land, there may be small increases in maize yields in communal areas, as well as expanding horticulture and some successful partnerships across a wide range of commodities. A priority for land reform should be more intensive development of existing African land holdings, including on transferred land. There is certainly scope to increase state financial support for non-governmental agencies of the kind discussed. New patterns of production and co-ownership may facilitate such developments – landowners increasingly draw on experts and consultants for a range of services and inputs.

With regard to expropriation without compensation, analysed in other chapters, my key question is whether it will act as a disincentive to investment. Commercial agriculture would greatly benefit from certainty. My focus is on promising non-governmental and private sector initiatives that include input subsidies, access to markets, as well as connectivity and knowledge transfers between established farmers, smallholders and new participants in commercial agricultural production. It would take little extra government expenditure to enhance current programmes, working with the private sector, and maintain gradual land transfer. As noted, roughly 350,000 hectares a year has been transferred in state schemes; the scale of privately funded purchases and transfers is uncertain. At present the state cannot adequately provide post-transfer support for those moving onto the amount of land it has transferred. This should be a key area of land reform.

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9

Land Reform and Beyond in Times of Social–Ecological Change

Perspectives from the Karoo

CHERRYL WALKER

Introduction

Land reform remains a potent challenge in contemporary South Africa, one that demands attention. This much has been confirmed by the strong passions the issue of expropriation without compensation has aroused, as well as the political currency the debate on amending the 1996 Constitution of the Republic of South Africa has gifted idealists and opportunists of all colours and stripes. The issue cannot be dispatched to the margins of public life with more commissions of inquiry or retooled business plans for the beleaguered Department of Rural Development and Land Reform (DRDLR) (now folded into the Department of Agriculture, Land Reform and Rural Development (DALRRD)). Nor can the visceral power of land as a symbol of dispossession and inequality be tempered through sober analysis alone, whether of actual land demand or changing patterns of settlement, land use and land ownership. Nevertheless, the staleness of contemporary policy debates, the extent of the political impasse in the state, and the urgency of other challenges facing the country – not least corruption and climate change – demand fresh ways of thinking about the contribution of land reform to redistributive justice in the third decade of the twenty-first century. How far fresh thinking will impact on the politics of land is hard to say; however, engaging anew with not only the discourse and practice of land reform but also the broader social–ecological contexts in which it must operate is critical for more effective policy development.

Underpinning this chapter is a concern with what I see as the overly narrow framing of current policy–political debates in terms of land *as*

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redistributive justice in South Africa, rather than land – actual land – as one plank in a larger framework *for* redistributive justice. I explore the need to reframe the issue from the vantage point of South Africa's Karoo region. This large, sparsely populated, arid to semi-arid region is not commonly thought of as a land reform hotspot, but looking at land from this perch offers pertinent perspectives on land use and related matters. For one thing, the Karoo's significant share of South Africa's commercial farmland in terms of gross area – some 40 per cent – should give pause to those who regard the 'white' countryside as the main prize in the struggle for social justice. Here, land-based livelihoods are visibly vulnerable to the consequences of climate change while, against the grain of popular conceptions of this region, most residents are scrabbling to make ends meet not on farms but in small, struggling urban settlements.

The Karoo is, furthermore, at the forefront of developments that are impacting what we have come to think of as the established land order in the South African countryside. New land uses, notably major investments in astronomy and renewable and non-renewable energy, are recalibrating the significance of farming in this region in a time of major social–ecological change and, in the process, reprising old questions about social justice and the equitable distribution of national public goods in changing contexts. The Karoo is also beset with deep-rooted social problems that are not receiving the urgent, focused policy interventions they require, including extremely high levels of alcohol abuse, which can be fairly described as constituting a largely unremarked national emergency. The roots of this crisis may well lie in land injustices in the past, but much more than land reform is required to break the cycle of substance dependency and build local resilience and well-being.

In developing these points, I am not suggesting the Karoo is typical of the country as a whole – this is decidedly not a one-size-fits-all approach. Nor am I arguing that the time for land reform is past. Rather, I am using the Karoo to tease out significant issues that intersect in particular ways in this region and, in that intersection, prompt new ways of thinking about land and the land question. In a nutshell: the Karoo pushes one to scale down expectations of what land reform can deliver while foregrounding other issues that require more sustained attention.

This chapter develops that argument across five cross-cutting themes: the scale of the Karoo; its demanding – some might say stark – environment, which makes it a particularly challenging area for farming; contemporary land-use changes and the threats and opportunities they bring; the small-town character of the Karoo; and the region's

multi-layered history, a history which confounds simplistic notions of restorative justice through handing land back to its assumed original, singular and only true owners. The discussion draws on a body of research conducted since 2016 on land-use changes and sustainable development in the region.[1] It is structured as follows. The next section provides a brief overview of the Karoo that draws attention to the intersection of scale, environment and history in the current land dispensation and what this means for a land reform programme still conceptualised primarily in terms of land for farming. This is followed by reflections on the major land-use changes underway in the Karoo and then a review of socio-economic conditions in small towns and their development priorities. The following section before the conclusion provides a case study of land issues in the small Karoo town of Loeriesfontein to show how the five themes play out on the ground. Here land claimants and small-scale farmers have found themselves competing for rights to the town's extensive municipal commonage, while investments in wind and solar farms in the municipality signal other contested development priorities nationally and hint at new possibilities for local people.

Scale, Environment and History

In terms of scale, the first point to emphasise is the significant geographical extent of the Karoo. What can be considered its core districts cover some 30 per cent of South Africa – even more, 40 per cent, if one accepts the extended boundaries that the Minister of Agriculture, Land Reform and Rural Development approved in 2020 in preparation for setting up a Karoo Regional Spatial Development Framework (KRSDF) (Republic of South Africa, 2020). Furthermore, as already indicated, the core Karoo contains some 40 per cent of all commercial agricultural land in South Africa, the land that sits at the heart of the most bitter conflicts nationwide over spatial justice, redress for the past and agrarian policy. Yet the Karoo is home to only 2 per cent of the country's population, a very small proportion of which comprises actual or aspiring farmers. As I have noted elsewhere (Walker, 2019), the Karoo's share of the total area of South Africa mirrors the 30 per cent target for land redistribution that the post-apartheid government set for itself in the mid-1990s. This is a

[1] Much of this work has been conducted under the 'Cosmopolitan Karoo' research programme of the DSI/NRF Research Chair in the Sociology of Land, Environment and Sustainable Development at Stellenbosch University.

provocative, if coincidental, correspondence with which to embellish my central point: that thinking about land from the vantage point of the Karoo today reveals the limits of redistributive land reform as the default remedy for past land injustices.

The Karoo is not a tightly bounded region. Its boundaries have always been porous and, as reflected in the two divergent estimates of its extent reported above, determining where its borders lie depends on how one weighs the biophysical, socio-economic and more narrowly politico-administrative considerations at play. Its arid to semi-arid environment is, however, a defining feature. Within these drylands, natural scientists have grouped smaller bioregions into two biomes, the Succulent Karoo and the Nama Karoo, which together define the ecological parameters of what can be considered the core Karoo. Severely complicating their holistic management, the two biomes straddle four provinces, with the Northern Cape having the lion's share. However, sizable areas fall in the Western and Eastern Cape provinces, while a smaller area merges with the grassland biome in the Free State.[2] Figure 9.1 shows the distribution of the two Karoo biomes, along with an overlay of twenty-six local municipalities that fall entirely or largely within these biomes and comprise what colleagues and I have described as the 'social Karoo' (Walker et al., 2018).

In terms of demography, people classified and/or self-identifying as 'coloured' predominate in twenty-one of the twenty-six local municipalities in this core Karoo, with Afrikaans the predominant language in twenty-two (see Walker et al., 2018: table 1). In these respects, the Karoo differs significantly from South Africa as a whole. The national census of 2011 put the combined population of these local municipalities at just under 1 million, thus 2 per cent of the total population of South Africa at the time (Walker et al., 2018: 160). As already indicated, the great majority of Karoo residents live in small towns, many of them facing economic stagnation or decline. Poverty levels in these settlements are generally extremely high. By way of example, a household survey conducted in Loeriesfontein in 2019 found fully 59 per cent of residents had a per capita monthly income at or below the national upper-bound poverty level. State grants were the main source of income for 46 per cent of households, while 30 per cent of people with paid work had monthly earnings of R1,000 or less (Vorster, 2019).

[2] The two Karoo biomes also stretch into Namibia. The DALRRD's Karoo Regional Spatial Development Framework extends the eastern boundary to include the Mangaung Metropolitan Area around Bloemfontein in the Free State.

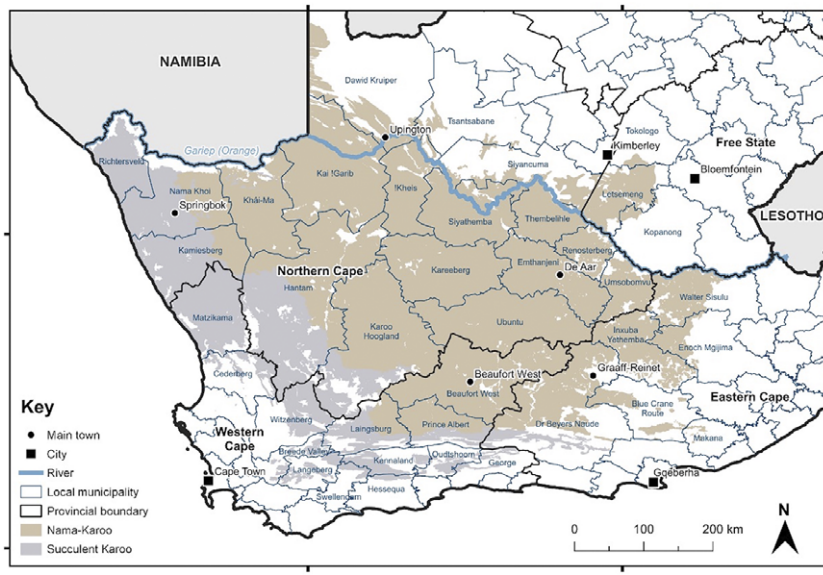

Figure 9.1. The Karoo, showing provincial and local municipality boundaries
Source: Walker and Hoffman (in press).

This is an area where the environment cannot be taken for granted. The ecology of the Karoo sets it apart from the far more densely settled eastern and northern reaches of the country that dominate most analyses of land reform. Average annual rainfall is under 400 mm per year, decreasing as one moves west (see Figure 9.2). The past decade has seen a series of crippling droughts which brought many farmers to financial ruin (Conradie et al., 2019). An emerging consensus among climate change scientists sees the region becoming warmer overall in coming years. The west is expected to become even drier than is currently the case (with severe consequences for the Succulent Karoo's unique biodiversity), while total rainfall in eastern districts is likely to increase. In the central Karoo, rainfall levels are likely to remain constant (that is, low) but 'increasing aridity would still be expected owing to increasing temperatures' (Walker et al., 2018: 171).

Commercial Farming and Land Reform

As a result of its aridity, over 95 per cent of the Karoo comprises 'natural land' (Hoffman et al., 2018: 212) – uncultivated rangeland that is not

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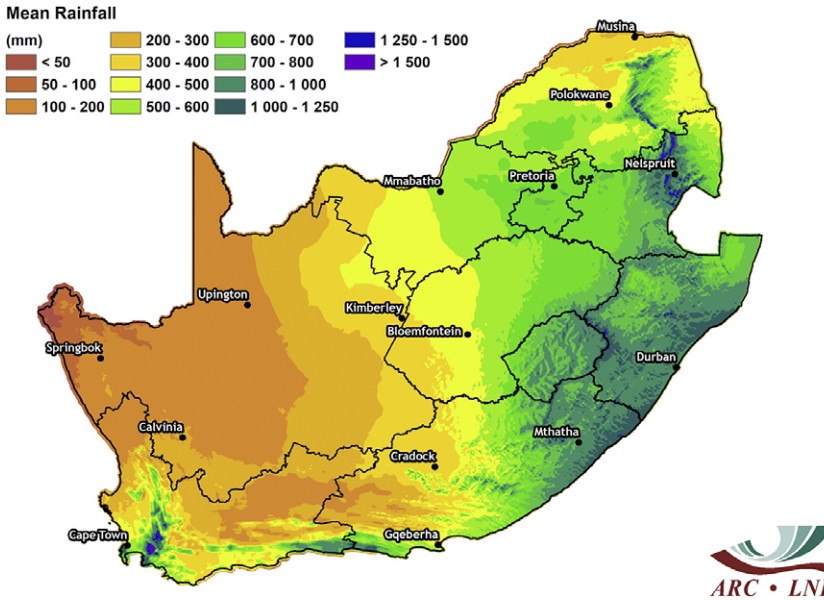

Figure 9.2. Distribution of rainfall in South Africa
Source: Agricultural Research Council.

suitable for intensive agriculture but can support extensive livestock farming, mainly with small stock (sheep and goats). Most of this land is dedicated to commercial agriculture on very large, predominantly white-owned farms, with land reform making an even smaller dent in the racialised ownership patterns inherited from the past than in other parts of the country. Significantly, there is no history of 'native reserves', hence no former bantustans in the Karoo (although there are some pockets of communal tenure in the far west, in the former 'coloured reserves'). Currently, agricultural land outside the former bantustans amounts to approximately 63 per cent of the total area of South Africa, of which an estimated 20 per cent had been transferred to black owners/beneficiaries by 2019, mainly through the state's land reform programme.[3] In the Karoo, however, privately owned commercial farmland

[3] According to Vink and Kirsten (2019: 23–24), by 2018 some 17 per cent of commercial farmland had been acquired by the state for redistribution to black beneficiaries (although not necessarily transferred), with another estimated 3 per cent acquired by black

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constitutes an even larger proportion of the total area than in the rest of the country, and most of this land is white-owned.

Thus in the Northern Cape (here used as a proxy for the Karoo), fully 82 per cent of the province was classified as commercial farmland in 1996 (Walker, 2008: 245)[4] while, as of 2018, just some 6 per cent of this land had been acquired by the state for land reform purposes. A third of this was through the municipal commonage programme whereby local municipalities rent the often extensive townlands attached to Karoo towns to small-scale black farmers, primarily for grazing; these townlands date back to the establishment of these towns in the colonial era.[5] The KRSDF does not provide hard data on land reform but does note that 'much like in the rest of South Africa' the process 'has been restricted by slow progress and a limited reform budget' (DALRRD, 2022: 91). Usefully, the KRSDF also highlights the challenges of land reform in this large, arid and sparsely populated region, emphasising the importance of locating projects strategically, 'in spatial areas where the necessary social and economic support services can be accessed' (DALRRD, 2022: 107).

The prevailing land dispensation is a consequence of the interplay of ecology and history. The history of colonisation in this region stretches back to the early eighteenth century, long before the contours of what would become the Union of South Africa in 1910 were beginning to emerge. A critical factor in the colonisation of this region is that until ways were found in the second half of the nineteenth century to tap into groundwater through windpump technology, this arid region could not support settled agriculture. The Karoo could not, therefore, sustain the larger, militarily stronger polities associated with the mixed-farming, Bantu-speaking communities of the pre-colonial and colonial highveld and eastern seaboard. Rather, the region was home to small, mobile groups of hunter-gatherers (the |Xam) and Khoekhoe pastoralists, whose collective footprint on the landscape was light (Morris, 2018). Although

landowners through private transactions; this total excludes farms owned by companies with black shareholders.

[4] The percentage would have declined somewhat since then, with land acquired for conservation and other developments.

[5] This discussion draws on data I presented at a 2018 workshop on land reform in the Karoo, at which time land redistributed through land reform in the Northern Cape totalled 2,210,307 hectares, of which 726,436 hectares were for the commonage programme (DSI/NRF SARChI Research Chair in the Sociology of Land, Environment and Sustainable Development, 2018: 17). On the municipal commonage programme see, inter alia, Atkinson and Ingle (2018).

there is evidence of their fierce resistance, these Khoisan societies were unable to withstand the intrusion into their lands of the colonisers – white *trekboers* in the main, also pastoralists but armed with guns and, in the nineteenth century, the might of imperial Great Britain behind them. By the end of the nineteenth century, the patches of farmland that remained in 'non-white' hands were mainly attached to mission stations (the nucleus of the subsequent 'coloured' reserves) or the result of colonial land grants to black settlers that were increasingly under threat.[6]

This has always been a challenging environment in which to farm, a point that recent droughts have driven home. This does not make farming impossible – some districts are well suited to extensive livestock farming, and committed farmers with strong reserves and support systems, including from the state, can generally ride out periods of drought and adapt to changing conditions. But it is impossible to ignore the imperative of respecting environmental limits in farming (and other land uses) in this part of South Africa (Musakwa, 2018). In this regard, the Karoo is something of an exemplar for the rest of the country.

The environmental constraints have major implications for how we think about land reform. Ecologist Tim O'Connor has calculated that at what he considers environmentally sustainable stocking rates, the two Karoo biomes together can support a total herd of a little under 6.5 million sheep or goats ('shoats' as he calls them collectively), which, if equitably distributed in herds of 600, could provide some 10,600 farming families with sufficient income for 'basic survival'.[7] According to his calculations, a farming family needs a minimum of 800 shoats to support a 'lower middle-class income' while a herd of 400 shoats or fewer would mean the household would need a second income. Thus, assuming an average of five people per farming family,[8] the number of people able to

[6] On the history of Xhosa, Baster and Griqua colonial land grants in the Karoo, see Anderson (1985), Amschwand (2018), Chinigò (2019) for Carnarvon, and Marcatelli (in press) for Prieska.

[7] O'Connor's calculations were presented at the 2018 workshop on land reform cited in footnote 5 above. For comparison, commercial farmers in the Ubuntu Local Municipality reckoned that an average-sized farm of 6,000 hectares could support a herd of between 700 and 1,000 sheep (Manyani, 2020: 121). O'Connor also pointed out that to manage the rangeland optimally, farmers need to be able to move their stock seasonally between winter and summer rainfall areas and, at times of drought, 'follow the rain' and move livestock from worse to less affected areas – that is, practise pastoralism across individual farm boundaries.

[8] This is higher than the average household size in the Northern Cape in 2011 of 3.7 members.

eke out a living through livestock farming without damaging the environment on which their livelihoods depend works out at some 53,000 people – in the region of 5 per cent of the population of just under a million in the Karoo in 2011. In other words, the number of people who could benefit from a strictly equitable redistribution of rangeland in the Karoo is very low if the environment is respected.

One can argue with O'Connor's assumptions around stocking rates, herd size and returns, and adjust the household numbers up or down accordingly. However, the conclusion is surely inescapable: assuming not only an equitable but also an environmentally and economically sustainable distribution of this land, only a small proportion of Karoo households can make an adequate living from farming in this region. Given the scale of farming land in private ownership in the Karoo, achieving land justice measured in terms of the aggregated area in black ownership would go quite some way to meeting national land redistribution targets. Indeed, if one were to redistribute all of this land, it would go all the way to meeting the target of the late 1990s. Redistributing the 40 per cent of South Africa's commercial farmland located in the Karoo to some 10,000 or even 20,000 black farming households (with or without compensation to current landowners) would not, however – and this is the critical point – advance substantive redistributive justice for most Karoo households.

This is not to deny the potential significance of transferring this land to the direct beneficiaries, or the disruption of still entrenched racial hierarchies in the region that it would represent. It might even give the state some much-needed breathing room in which to refocus its land reform programme. But it would do little for the livelihoods and hopes for a better future of the overwhelming majority of Karoo residents, and it would do even less for the 98 per cent of South Africans living in the rest of the country. Without massive state support, the transfer of far--flung Karoo farms to aspirant black farmers could also end up tying many of them to marginal livelihoods, far from markets as well as health, educational and other services for themselves and their households, their prospects increasingly vulnerable to the environmental consequences of climate change.

It is important that the point made here is clear. This is not an argument against redistributive land reform but one about recognising the limits of actual land's redistributive reach, particularly when tied as closely to agriculture as current policy continues to promote. It is an elaboration of my point about the limitations of focusing on land *as*

redistributive justice, the implicit starting point for many in the debate on expropriation without compensation, rather than recognising land as just one plank in a larger (and sturdier) framework *for* redistributive justice. In some parts of the country, agricultural land could and should be a substantial plank – perhaps a cornerstone. In the drylands of South Africa, however – which, as I have pointed out, constitute a sizable chunk of the country – its contribution is much more limited if eradicating poverty and inequality is a serious policy goal. Insisting that the actual number and future welfare of black beneficiaries do not count, only the number of hectares redistributed to farmers who are black, is surely a variant of what Jeremy Cronin described in 2006 as 'representative redistribution':

> 'Transformation' has come to mean *not* transformation but the elite redistribution of some racial, class and gendered power ... Representative individuals from formerly disadvantaged groups are the beneficiaries. Informing this politics are three buttressing paradigms – an individualistic liberal rights politics[;] ... an identity politics that posits relatively fixed and pre-given identities[;] ... and a paradigm of democratic transformation that tends to reduce democracy to 'representation'. ... In the new South Africa, a small number of 'representatives' enjoy powers and privileges on behalf of the historically disadvantaged majority. This gives us an elite politics of racialised self-righteousness. (Cronin, 2006: 50–51)

New Land Uses

The new land uses dominating national and regional plans for the Karoo provide further impetus to the call to reassess the contribution of land reform to redistributive justice in the current conjuncture. Notable here are major investments in astronomical research (both radio and optical) and energy generation, the latter targeting not only renewable but also non-renewable sources of energy. Today, powerful external players, both state and corporate, are keen to exploit the natural resources of the Karoo for non-agricultural purposes, thereby greatly expanding the significance of long-established investments in mining and conservation in its economy. The resources being targeted now include the Karoo's clear night skies and low population density (good for astronomy), its abundant solar and wind power (good for renewable energy), its still uncertain shale-gas potential (heralded by the Minister of Mineral Resources and Energy as a 'transition fuel' – see, for instance, Omarjee, 2022) and its

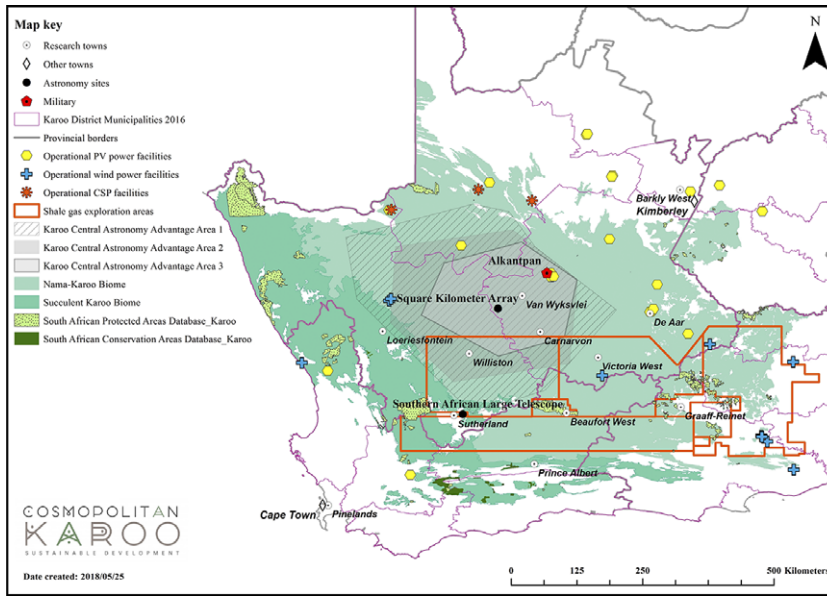

Figure 9.3. New land uses in the Karoo: astronomy and energy (2018)
Source: DSI/NRF SARChI Chair in the Sociology of Land, Environment & Sustainable Development (2018).

uranium deposits. The investments aimed at capitalising on these resources are not only redefining the local landscape where individual projects are being staked out but also reconfiguring the significance of the Karoo for variously constituted national and global 'public goods'. These include the move away from coal-fired electricity and advancing basic and applied science. The latter has been the primary justification for South Africa's participation in the globally networked Square Kilometre Array (SKA) radio telescope project, the core site of which has been taking shape since 2008 on a cluster of former commercial sheep farms to the north-west of the town of Carnarvon (on this, see Walker et al., 2019). Figure 9.3 shows the extent of these cross-cutting initiatives as of 2018.

Of particular significance from a land-use perspective are the Astronomy Advantage Areas (AAAs) that have been proclaimed around the SKA core site and the optical South African Astronomical Observatory outside Sutherland to the south. What is not widely known is that the whole of Northern Cape Province, bar the Sol Plaatje Local Municipality around the provincial capital, Kimberley, has been declared

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an Astronomy Advantage Area in terms of the Astronomy Geographic Advantage Act 21 of 2007. This Act grants the Minister of Science and Innovation extraordinarily extensive powers to regulate developments in the province to protect the national investment in astronomy within its borders. The regulations are particularly stringent in the districts around the SKA core site, where three nested Central AAAs were proclaimed in 2014, encompassing some 12 million hectares (fully 10 per cent of the country). This is because of the extreme sensitivity of this radio astronomy project to 'radio frequency interference' that will disrupt the array's reception of cosmic radio waves. Disruptors that require regulating range from mining and aviation to everyday items such as cell phones, petrol-driven cars and microwave ovens. One consequence is that plans for shale-gas mining have now been ruled out in the AAAs. This has not, however, stopped the continued high-level interest in fracking in the region but diverted it to the Western and Eastern Cape Karoo (Walker, 2022).

Since 2018, more renewable energy projects have been launched while the state has concluded its major land acquisition programme around the SKA core site. The 135,000 hectares of former farmland the state now owns around the SKA was officially designated the Meerkat National Park in 2020. The primary purpose of the new park is to insulate this international astronomy project from external threats to its functionality; environmental conservation is a by-product. Individually and collectively, these cross-cutting land uses suggest very different development possibilities, as the DALRRD's (2022) Spatial Framework for the Karoo recognises. All of them, however, raise similar concerns about who will benefit from these possibilities. A growing body of research points to the disconnect between the national gains these projects herald and local development needs. In the words of the KRSDF, '[w]hile the large scale current and potential future regional economic activities make an important contribution to a sustainable national economy, *the challenge is to ensure greater and more direct benefit to the small and isolated communities at a very local scale*' (DALRRD, 2022: 108, emphasis in original). With reference to the SKA – which it acknowledges as a 'ground-breaking project' – the Framework notes:

> The introduction of this development into the Karoo landscape and the promulgation of the Astronomy Geographic Advantage (AGA) Act of 2007 ... has had a significant impact on the development proposals of towns such as Carnarvon, Calvinia, Kenhardt and Williston, which has hindered their economic development and growth. The SKA has also

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> limited the future of space and technology tourism as there are concerns around the possible impact on eco and other recreational tourism forms. (DALRRD, 2022: 82)

For the new land uses to advance redistributive justice in the region, much more creative thinking is needed around how they can be leveraged to benefit host communities in meaningful ways. In most cases, the local jobs that are frequently touted as a significant benefit occur during the construction phase and are low-skilled and short-term. The community development projects required of investors by the state are not necessarily aligned with municipal development plans, even less with residents' expectations of the developments they need. Projects tend to be designed by outside experts to meet quantifiable targets, with tangible deliverables, for corporate reporting purposes – computer centres, laptops, sports equipment for schools and the like. The benefits they bring are unevenly distributed and vulnerable to local elite capture. (On the SKA, see Butler, 2018; Gastrow & Oppelt, 2019; Vorster, 2022; Walker, 2022; on the renewable energy sector, see Malope, 2022; Borchardt, 2023.)

Also telling is the disconnect between these new land uses and national commitments to land reform. Thus the highly efficient land acquisition programme of the SKA was conducted with little if any regard for state land reform objectives (Chinigò, 2019). National debates on the meaning of 'just and equitable compensation' in the property clause of the Constitution passed this programme by. Most farmers were reluctant to sell their family farms (Terreblanche, 2020) but were reportedly reasonably to well compensated at market-related prices. Affected farm workers were not identified as potential beneficiaries of land reform projects but were offered general worker jobs with the SKA on a case-by-case basis. Gastrow and Oppelt (2019: 721) describe the SKA's approach to this process as exhibiting 'an arguably paternalistic concern' that the workers 'would fall into the all too familiar trap of alcohol and drugs' once living in town. The San Council was brought from distant Upington to bless the core astronomy site, but the local descendants of those dispossessed of land rights in the very large area impacted by the AAAs were never primary stakeholders in determining how and for whom this land should be used (Parkington et al., 2019).

Similar disconnects can be observed around the community development projects that the 'independent power producers' participating in South Africa's renewable energy procurement programme are required to undertake in their 'host' communities (the latter defined as

communities within a 50-kilometre radius of the wind or solar farm in question). However, these projects are far less restrictive in their operational requirements than astronomy, meaning that opportunities for redistributive justice through community-based initiatives can be more readily imagined with this new land use. Wind farms can coexist with livestock farming, while solar and wind farm developers are prepared to pay lucrative rentals for land on which to site their projects – rentals that at this stage are flowing primarily to commercial farmers and local municipalities, not those most in need (Borchardt, 2023). Furthermore, although current projects are locked into supplying electricity to South Africa's embattled national grid, there is untapped potential for decentralising renewable energy generation and serving energy-poor communities via 'distributed energy resources' and mini-grids (GIZ & IRENA, 2020: 52).

There is also significant potential in the community development trusts that the independent power producers have established to meet state requirements for local shareholding in their projects. Malope (2022: 198) has noted in his dissertation on the contribution of renewable energy to sustainable development in Loeriesfontein, where two wind farms began operations in 2018, that once the two community trusts have paid off the loans that financed their initial share acquisition, they could find themselves responsible for managing capital sums of between R214 million and R509 million each – quite extraordinary amounts for a community as poor and marginalised as this one. I return to the possibilities that these funds hold for reimagining redistributive justice in this town after a more general consideration of the development needs of Karoo towns.

Urban Karoo

As already noted, today, over three-quarters of the population of the Karoo lives not on farms but in widely dispersed small to very small towns. The percentage of the population classified as urban is thus higher in the Karoo than in South Africa as a whole (around 68 per cent in 2022; Macrotrends, n.d.). Counterintuitively, then, the Karoo can be seen as at the forefront of an increasingly urbanised South Africa, once one ceases to conflate urbanisation with the major metropolitan centres. The small-town nature of the Karoo also calls into question the appropriateness of a land reform programme still measured primarily in terms of the hectares of commercial farmland redistributed to small- or large-scale black farmers.

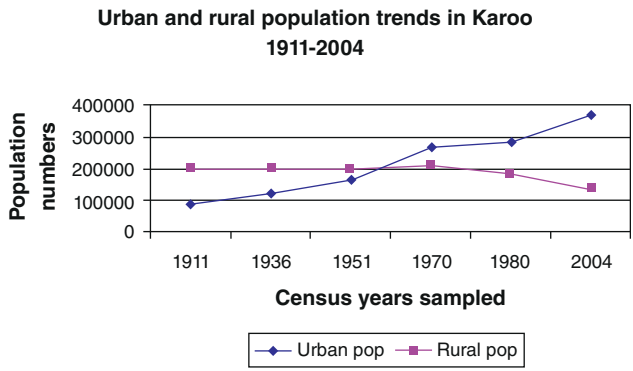

Figure 9.4. Karoo population trends, 1911–2004
Source: Hill and Nel (2018: 205).

Karoo towns developed historically as service centres for local agriculture and, in some areas, mining. The urban population of this region overtook the rural over fifty years ago, in the 1960s (see Figure 9.4). Worth noting is that the upward urban trajectory in the Karoo coincided with a downward trajectory for the segment of the population classified as 'white', from some 44 per cent of the total in 1911 to 12 per cent by 2004 (Hill & Nel, 2018: 207) and still smaller today. These shifts reflect major social changes involving the upward mobility of this group in the twentieth century, as white families moved off-farm and younger members migrated to centres beyond the Karoo in pursuit of better educational and economic opportunities. This trend is continuing. In her doctoral thesis on changes in commercial agriculture in the Ubuntu Local Municipality, Charmaine Manyani quotes a livestock farmer as follows:

> Technology has brought the world closer to our children. They are realising there are better opportunities for them through education that don't require burning in the sun the whole day. This has been worsened by the variable economic pressures and consecutive droughts with little or no support from the government. All these and other factors have made farming very unappealing. (Manyani, 2020: 132)

Of course, the towns of the Karoo are mostly very small settlements (*dorpe*), many of them facing economic decline, not growth (see Hill & Nel, 2018: 206). Nevertheless, these settlements are 'urban in form and social functioning, albeit on a distinctively limited scale' (Walker &

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Vorster, 2023). In the words of one respondent interviewed in Sutherland in 2019, '[e]veryone knows one another and lives closely together'. Another respondent noted, '[p]eople gossip, but if someone dies, everyone grieves together' (Vorster & Eigelaar-Meets, 2019: 52). It is this small-town environment that shapes most people's development priorities and aspirations for the future. In response to an open-ended survey question about what could be done to develop Sutherland, the five most frequently identified needs were, in order of frequency: affordable housing; job creation; recreational facilities for the youth; tarred roads; and flush toilets to replace the pit latrines in the overcrowded, apartheid-era township where most people still live (Vorster & Eigelaar-Meets, 2019).

Effective investment in social services is desperately needed. Socio-economic surveys conducted in the towns of Vanwyksvlei, Sutherland and Loeriesfontein between 2016 and 2019 found education and skill levels to be generally very low and the school dropout rate among teenagers alarmingly high (Walker & Vorster, in press). Respondents in all three towns identified alcohol and drug abuse and associated crime as major problems – as already noted, rates of alcoholism and foetal alcohol spectrum disorders are extremely high in this region (Olivier et al., 2016; De Jong et al., 2021). Worth noting is that these surveys did not find widespread interest in farming as a serious option, although some households expressed varying degrees of interest in accessing commonage land for grazing small herds, and a few individuals indicated an interest in land reform opportunities. In Sutherland, 7 per cent of households in the survey sample of 253 had some livestock, but most respondents did not identify land for farming as a key concern (Vorster & Eigelaar-Meets, 2019: 47). In Loeriesfontein, where, arguably, a stronger culture of small stock farming prevails, respondents identified only 12 individuals across 201 households as likely to want to farm full-time if given a chance (Vorster, 2019: 60).

There is, however, an under-appreciated need for urban land reform in these towns, one that will not make a dent in the state's overall hectarage targets for land reform but could make a significant difference to people's sense of belonging and ease of access to services. The Group Areas Act 41 of 1950 hit hard in the Karoo in the 1960s and 1970s, but the post-apartheid state's investment in much-needed low-income housing is entrenching, rather than dismantling, the spatial segregation enforced under apartheid. In both Loeriesfontein and Vanwyksvlei, the rollout of new 'RDP' (Reconstruction and Development Programme) housing projects has resulted in tiny houses, on tiny plots, in extensions of the former

group-area townships, the undeveloped 'buffer zones' put in place in the apartheid era to separate the town centre (*die dorp*) from the township on its periphery still in place.

Land and Redistributive Justice in Loeriesfontein

Given its history and current identification as a host community for renewable energy projects, the small town of Loeriesfontein (population around 3,000) offers interesting insights into the question of land and redistributive justice in the Karoo. Its municipal commonage provides a useful entry point.

The commonage covers some 20,000 hectares around the town. It consists of three colonial-era farms: the original Louries Fontein farm, which the Cape government first granted via a Ticket of Occupation to a group of fifty-nine so-called Basters in 1860, plus two adjoining leasehold farms that the state added to this land in the 1890s when the town was formally proclaimed.[9] The Baster group, who were the recipients of the 1860 land grant, were settled in the area by the early nineteenth century. From the point of view of the indigenous Khoisan groups in this area, then, they would have been settlers, much like their white, *trekboer* counterparts with whom they competed for grazing land but also sometimes cooperated in subjugating the Karoo's 'first people'.

After the land on which they had settled became crown land, the Basters petitioned the colonial government for recognition of their land rights, which was granted in 1860. In 1892, however, the land grant was revoked because of sustained pressure from white farmers who objected to their Baster neighbours, and a new town was planned for this land. Although the rights conferred on the Basters in 1860 were withdrawn, fifty-two Baster families who were identified by the colonial state as beneficiaries of the original Ticket of Occupation were given rights to 'a building plot, a garden plot, plus grazing rights on the commonage' in the new town.[10] In the twentieth century, this group was merged into the apartheid-era category of 'coloured', their second-class status in the town increasingly reinforced. In 1968, legislated racial segregation came to Loeriesfontein under the Group Areas Act; this forced all 'coloured'

[9] The 'Basters' were a social group of mixed Khoi/European ancestry that occupied an intermediary position between the white *trekboers* and indigenous Khoisan groups in the Northern Cape.

[10] Amschwand, personal communication, 17 January 2022.

residents to live in the small area designated for them on the western outskirts of the town.

The history of the townlands in the twentieth century needs more research but it is evident that black access to the commonage for grazing and some dryland cropping was progressively curtailed. In the post-apartheid era, the local municipality reversed the town's discriminatory commonage by-laws by entering into lease agreements with members of a Farmers' Association representing 'coloured' small-scale farmers, the *Loeriesfontein Opkomende Boerevereniging* (Emerging Farmers' Association). These farmers were mostly older men, including pensioners, none farming full-time but all keen to use the commonage for grazing their small herds. In 2019, the Association had between thirty-seven and forty members, 'depending who one speaks to' (Davids, 2021: 68).

By this time, however, their continued use of the land was a source of tension in the town. This was because of the settlement of a land restitution claim on the commonage, which had been running on a parallel land reform track since 1996. In that year, a committee representing 240 claimants lodged a land claim over all the townlands and various residential plots. The official claim form is regrettably not in the public domain, but it can be assumed to have centred on the loss of land rights by 'coloured' residents during the twentieth century, inter alia under the Group Areas Act.[11] The history of the 1860 Ticket of Occupation might also have been invoked, although that predates the 1913 cut-off date and would raise difficult questions about redress for the descendants of the original Khoisan people whose rights the Ticket had extinguished.

The claim was formally gazetted in 2004, then adjusted and re-gazetted in February 2008, shortly before being declared 'settled' at an official ceremony a few months later, once the local municipality had agreed to transfer ownership of the commonage to the DRDLR for free.[12] It appears that the land reform potential of this land as a municipal asset was not carefully considered. Davids (2021: 64) notes that the Regional Land Claims Commissioner's office praised this transfer of land to the national government as a contribution towards the state's 30 per cent target for land reform; however, 'the Hantam Municipality was unhappy

[11] On unsuccessful attempts to access the official claim form from state agencies and get details of the claim from local gatekeepers see Davids (2021).

[12] This account draws on Davids (2021).

with the lack of compensation and seemed to have been "bullied into the transaction"' (here citing the Legal Resources Centre, a champion of the commonage programme in the Northern Cape at the time). Claimants were also offered financial compensation, raising questions about how many may thereby have formally forfeited their rights to the restituted land.

The formal settlement of the claim was followed by a protracted period of uncertainty and confusion in the town over who actually owned the commonage, who could still use it, and who was responsible for its day-to-day management. A Communal Property Association (CPA) was established to represent the claimants in 2008, but it took six years for the title to the first of the three commonage farms to be transferred to it, in 2014. In December 2019, the Minister of Agriculture, Land Reform and Rural Development acknowledged in Parliament that the CPA needed 'regularisation' and there were 'disputes regarding access to the land' (National Assembly, 2019). She put the number of restitution beneficiaries at 800. The state had still not transferred ownership of all the commonage to the CPA, and it was not clear how the new landowners intended to utilise their land. According to the list of claimants the Minister made available in Parliament, 27 of the original 240 claimants were not living in Loeriesfontein but elsewhere (mainly in the Western Cape), while 91 were deceased (meaning that their heirs needed identification). At the time, the drought was biting hard, and oversight of fences, water pumps and stock numbers on the commonage had crumbled, none of this boding well for its sustainable use.

It is a familiar story of the misalignment between promise and outcome that has bedevilled so many land reform projects since 1995. Yet as the previous discussion has brought to the fore, in Loeriesfontein other land-use options are pointing to new possibilities, along with new challenges. In addition to the two wind farms already in operation, a solar farm is under construction in the district, and further renewable energy projects are on the drawing board. Might one be considered for the former townlands? Could the local community development projects that these schemes are required to support be planned with stronger community participation and complement, rather than compete with, each other? What of the capital sums accruing to the community development trusts, which hold out such significant financial prospects not only for the town but potentially for the wider Hantam Local Municipality, provided strong, accountable institutions are put in place? Malope, for instance, has proposed that the trusts could finance direct

cash transfers to households in need (thus bypassing local patronage politics) – a local dividend from the national investment in renewable energy that could be modelled along the lines of a basic income grant. (On the developmental and moral logic of a basic income grant, see Ferguson, Chapter 12, this volume.)

Space precludes discussion of the many issues to consider, but what is clear is that direct cash transfers would make a significant difference to household income and community well-being. As already noted, in 2019, before the COVID pandemic, per capita income was below the country's 'upper-bound' poverty line for 59 per cent of Loeriesfontein residents. A modelling exercise that calculated the impact on household incomes of the state's top-up to social security grants during the COVID pandemic showed what a difference even this very modest cash injection could make in the town. Working with data from the 2019 household survey, Jan Vorster has calculated that if the top-up grants were fully disbursed, a third of Loeriesfontein households trapped below the food poverty line would move into the 'upper-bound' poverty band while over a quarter of households in that band would be pushed above the official poverty line (Vorster & Walker, 2020).

Conclusion

Using changing dynamics in the Karoo as evidence, this chapter has argued that it is time to decentre the place accorded land reform in the quest for redistributive justice in South Africa – not to abandon it but to place its contribution in perspective and pay more attention to other mechanisms that are better attuned to current conditions and the challenges they are laying bare.

As the country struggles to come to terms with climate change, the Karoo provides an instructive reminder that the environment matters. So too do regional and local histories, which are usually more complex than the land restitution programme has been designed to handle. The story of the Loeriesfontein commonage shows that simply restoring land to legitimate claimants may not necessarily advance either justice or livelihood opportunities for those most in need. At the same time, the new land uses in the Karoo signal new opportunities for reimagining multiple pathways towards a more just and sustainable future. The call for a 'just transition' that is animating the debate on renewable energy is instructive here.

Land reform still has a place, but its limitations need to be recognised and its objectives realigned with the regionally inflected social and

ecological changes that have unfolded since 1994. The extent of commercial farmland transferred to black ownership is an inadequate measure of redistributive justice in the Karoo and, given its extent, in South Africa more generally as well. The racial disparities in land ownership are particularly extreme in this region but, as the discussion has shown, land redistribution in the Karoo will not contribute significantly to reducing poverty and inequality here or nationally, despite the spatial extent of this region. Policies intended to advance redistributive justice need to be designed keeping in mind where people live and what they aspire to. In the Karoo, this means focusing far more imaginatively on prospects for small-town regeneration and how to harness the natural resources of the region to benefit its people in ecologically sustainable ways.

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PART III

Imagining Alternative Futures of Redistributive Justice in South Africa

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10

Ecological Justice, Climate Shocks and the Challenge of Re-Agrarianising South Africa through the Food Sovereignty Commons

VISHWAS SATGAR

Introduction

South Africa's globalised food system is based on a history of violence, dispossession and accumulation through ecocide (the mass-scale destruction of human and non-human nature), which has been devastating for the natural commons (land, water, biodiversity, creative labour, energy and the earth system).[1] Land redistribution, which is essential, cannot be separated from how the natural commons have been abused, polluted and damaged by a mono-industrial agrarian structure and the implications this has for socio-ecological relations. After the first democratic elections, the African National Congress made commitments to redistribute 30 per cent of land, but instead it globalised the food system, further concentrating the agrarian structure. Deracialising agrarian capitalism, as part of a deep globalisation class project, has not been transformative. In this context, the land question has become increasingly polarising in South Africa. Land justice is crucial for South Africa, but expropriation without compensation, even through a new law to create a new class of monopoly black capitalist farmers locked into a globalised and ecocidal agrarian structure, reduces redistributive justice to a farce, is not transformative and perpetuates inequality.

Moreover, in the context of the worsening climate crisis, South Africa's redistributive land discourse must be rethought. This chapter argues the land question in South Africa has to be located in the context of the emergence of climate famines and the risk of more intensive climate shocks (extreme droughts, floods and heatwaves, for instance). Agrarian thought and redistributive land justice must be shaped by climate justice

[1] The chapter is derived from a larger research project on climate famines.

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and vice versa. Given the systemic risk posed by the worsening climate crisis, we have to ask what the most appropriate food system is, as part of a deep and just transition, to ensure we meet the needs of all in the country. How do we ensure that the right to food and water, ecological justice and ethics of care inform the making of such a food system? Ecological justice in this chapter is conceived to include climate, land and social justice; it straddles social and natural relations by recognising the intrinsic worth of human and non-human life forms. In this regard, ecological justice stands for the defence of the natural commons (land, water, biodiversity, creative labour, energy and the earth system) as the basis for the reproduction of life.

In the post-apartheid period, land redistribution policy discourse has been about either a state- or market-centric approach. A third approach, centring the commons in local spaces and on a macro-scale, and based on building a food sovereignty commons system through a politics of democratic systemic reforms, central to climate justice politics, is a crucial alternative to be considered. Such a bottom-up transformative approach to the land question has been pioneered by food sovereignty campaigning in South Africa across variegated interstitial spaces, both urban and rural. This approach is based on a conception of claiming the constitutional right to food and water, championing ecological justice, and practising non-anthropocentric ethics of care. To appreciate the ecological justice underpinnings of this perspective, this chapter delves into four crucial aspects of food sovereignty thinking in South Africa.[2] First is the critique of globalised agrarian capital's ecologies and its connection to the larger general crisis of socio-ecological reproduction. Second, the place of the commons in understanding the making of South African capitalism and historiography is examined in order to learn critical lessons from this past for food sovereignty commons system building and ecological justice. This is also a decolonial imperative. Third, the ecocidal logic of South Africa's globalised industrial agricultural food system is laid bare by highlighting its role in constituting several dangerous ecological rifts. Finally, the chapter returns to the challenge of re-agrarianising South Africa through food sovereignty, with an emphasis on its normative, systemic and agential practices.

[2] In this regard I draw on various intellectual resources developed by the South African Food Sovereignty Campaign (2015 to the present).

Globalised Food Systems, Systemic Shocks and the General Crisis of Socio-ecological Reproduction

The ecologies of globalised, carbon-based, mono-industrial agricultural food systems go to the heart of the contemporary and general crisis of socio-ecological production in the world. The agricultural sector is one of the most exposed and vulnerable in terms of climate shocks such as droughts, floods, cyclones, heat waves and wildfires. Transboundary agricultural trade is revealing major risks. Amid the COVID-19 pandemic, the globalised food system displayed acute stresses in terms of problems with supply lines, logistics and changing food habits. Food prices have also been edging upwards. However, in 2021 to early 2022, globalised food markets were reeling from a multi-dimensional shock (Hodgson & Bernard, 2022). In 2021, Brazil experienced severe frosts in its coffee belt, sending prices to a seven-year high, while heat waves and drought in Canada hit pea production hard, more than doubling the prices of plant-based meat alternatives. The prices of Belgian potatoes surged after flooding devastated large swaths of Europe during the continent's summer. In the United States, oat production was its lowest since 1866 due to heat and dry weather sapping the yield potential in major growing states (Hirtzer & Carey, 2021). In this context, the Stockholm Environment Institute issued a report which stated climate change would: 'dramatically impact agricultural production all around the globe' (Adams et al., 2021). The report goes on to caution that with warmer temperatures, the 'risks are greater than the opportunities'. From its risk assessment, it highlights maize and rice, important staples, as facing a major risk. The Russian invasion of Ukraine compounded the famine conditions in Africa, pushing up food prices, including staples and input costs (Kroll, 2022). Africa imports about 40 per cent of its wheat from Russia and Ukraine. In this context, many United Nations (UN) and food aid organisations have publicly asserted that Africa is set to face increasing hunger due to worsening climate conditions (RFI, 2022).

However, the 2021–2022 multi-dimensional shock on the globalised food system fits into a pattern that has occurred repeatedly over the past two decades. As food systems have been restructured, financialised and externalised to integrate with global circuits, severe vulnerabilities have been revealed as various shocks have hit. For instance, in 2006–2008, 2009–2011, 2014–2016 and 2018, shocks have impacted the globalised food system (Satgar & Cherry, 2019). In each of these moments, multiple

causal factors have been identified, ranging from climate impacts, biofuel production, the geopolitics of oil price increases to financial speculation, amongst others. In 2018 it was the price of crude oil, which spiked at US$80 a barrel with ramifications throughout the global economy, including the food system (Vaughan, 2018). The 2014–2016 shock was regionalised and impacted Southern Africa dramatically, with almost 40 million in food stress due to an El Niño-induced drought. This was the first major climate shock in the region after a 1°C increase overshoot on a planetary scale in 2015. The second shock (2009–2011) fed into the revolutions of the 'Arab Spring', with calls for 'bread, freedom and justice' reverberating through the streets. The first shock (2006–2008) led to food riots in various countries.

Besides the fragilities of a deeply globalised food system, the carbon emissions of this system paradoxically create their own climate shock feedbacks. As a major source of greenhouse gas emissions, such a globalised food system generates its own systemic risk and is locked into a 'climate crisis trap'. It is the second largest contributor to greenhouse gas emissions in the world. Some estimates suggest that the global food regime contributes 20–30 per cent of all human-associated greenhouse gas emissions (Garnett et al., 2016). While emissions from agriculture and associated land-use change account for 24 per cent of human-made emissions (IPCC, 2014), 14.5–19 per cent of this comes from livestock alone (Herero, 2016; Reisinger & Clark, 2018). Packaging, retail, transport, processing, food preparation and waste disposal contribute an additional 5–10 per cent of global greenhouse gas emissions (Garnett et al., 2016).

In this context, world hunger is on the rise. Current UN estimates suggest 811 million people in the world are food deprived. As a concept, famine refers to food deprivation followed by hunger and mortality in a particular context, such as a community or parts of a country. Essentially, almost 1 billion human beings on our planet are facing famine despite the vaunted abundance of the corporate-controlled global food system. From 2015, when the world overshot a 1°C increase in planetary temperature since prior to the industrial revolution, the risk of climate-induced famines increased. Several places on the planet, including Zimbabwe, Honduras, Madagascar, Ethiopia (particularly the Tigray region), Mozambique and Puerto Rico, have faced this challenge. Madagascar makes for a tragic example, with its globalised food system heavily reliant on the export of monocrops such as vanilla, cloves, fruits, cocoa, sugarcane, coffee, sisal and cotton. In mid-2021, a severe drought

in the southern part of the country placed an estimated 1 million people in famine conditions. On top of this, and more recently (late January and early February 2022), within two weeks of each other, cyclones Ana and Batsirai smashed into the island, washing away villages and exacerbating famine conditions (United Nations, 2022). In general, these situations have upended the conception of famine in the academic and humanitarian literature in three respects. First, climate extremes (cyclones, droughts, heatwaves, wildfires and floods) have impacted these countries sometimes in combination, within short periods of time, forcing their globalised and mono-industrialised food systems to collapse or climate extremes have been a serious contributory factor to socio-ecological collapse and conflict. Second, climate famines in the Global South, particularly Africa, are a direct result of the climate apartheid of the Global North, with its historical emissions and continued use of oil, coal and gas. Third, climate famines are one of many symptomatic expressions of the larger crisis of capitalist civilisation (circa 2007 to the present). This is the fourth general crisis of capitalism, and it brings to the foreground from within the deeper structural divides of capitalism – production/reproduction, nature/society, polity/economy – dangerous systemic crisis tendencies, including globalised food system collapse, worsening hunger and famines.[3] The ecologies of globalised, carbon-based and mono-industrial agrarian capital are directly implicated in this crisis.

The Commons Mode of Production, Farming and the Making of Capitalist South Africa

The concept of the commons refers to (i) a commonwealth of life enabling socio-ecological systems; (ii) governed together by a community of commoners (iii) to ensure their lives are reproduced and that such systems thrive; as a mode of production, it seeks the general good through organising human labour and natural relations.[4] In world history, the natural commons have been at the centre of the relationship between humans and nature for about 200,000 years. The oldest

[3] Capitalism has been through three general crises (later nineteenth century, inter-war years – referred to as the Great Depression – and early 1970s). Methodologically, it is important to study each crisis on its own terms.

[4] In this definition I move away from referring to the commons narrowly as instrumentalised resources. See De Angelis (2019: 124) for this kind of usage.

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commons relationship is in Africa, the origins of our species, and it demonstrates a coeval relationship between humans and ecosystems. In this context, cooperation also marked social relations; humans were not *homo economicus* (the embodiment of a colonial and imperial conception of what it means to be human). Even with settlements, there were communal and marine tenure systems to ensure that socio-ecological relations thrived (Ricoveri, 2013). In Rome, a distinctive role was provided for *res communes* (or property held in common); in the 1300s in medieval Europe a Forest Charter was adopted to ensure co-governance; and, in general, custom played an important role in providing rules for the commons in Europe.[5] Unlike Europe, in which there was a transition from feudalism to capitalism, South Africa followed a different historical sequence, from the commons mode of production to militarised mercantile slavery and then settler capitalism.[6]

What follows is not a history of farming in South Africa and its relationship to capitalism but rather a few critical views on how to rethink the history of South Africa, farming and the making of capitalism from the standpoint of the food sovereignty commons. The concept of the commons mode of production is used as a heuristic to engage in informed conjecture based on academic evidence (Lowy, 2005).[7] At stake is how we overcome the last great dispossession of the natural commons so we can take commoning to a new level to sustain life. Moreover, revisiting the historical archive about the commons mode of production is crucial for how we decolonise South African history but also think about emancipatory ecologies in the present, in the context of advancing food sovereignty and ecological justice. Three crucial issues need to be foregrounded in this regard.

First, most of the historiography on South Africa provides cursory insights into hunter-gatherers (San), nomadic herders (Khoikhoi) and then, over the past 2,000 years, pastoralists and cultivators (Bantu) made

[5] See Linebaugh (2008) for a history of the Magna Carta and the Forest Charter in the 1300s in Europe.

[6] I use the commons mode of production to differentiate it from the 'lineage mode of production' utilised by Anthropologists and the 'peasant mode of production' gestured to in the work of Colin Bundy ([1979] 1988).

[7] I utilise the commons mode of production to disrupt notions of social transitions from one social order to another as part of linear modern progress, including capitalist modernity, but in a specifically South African context. Walter Benjamin's thesis inspired this intervention, 'On the concept of history', which utilises the past (pre-capitalist cultural and historical references) to critique the present and find a way into the future.

an appearance as they moved into the southern part of the continent (see Feinstein, 2005; Pampallis & Bailey, 2021).[8] What is not fully appreciated in the historiography of South Africa is the 'commons mode of production' that existed before the colonial encounter. The commons mode of production expresses the first attempts by the human species to establish a human-in-nature relationship. The palaeontological and anthropological record is developing and giving us glimpses of the most intimate human relations with nature: our first diets, the importance of indigenous biodiversity, eco-spiritualities, adaptation to difficult environmental conditions, complex renderings of rock art, fishing, farming practices and conceptions of human–nature relations that were opposed to conquering nature.

Second, a gaze back is not romantic but about trying to think critically about the materialities of the past – a straight line from the commons mode of production to present struggles for food sovereignty – to learn critical lessons about adaptation, subsistence and survival.

The role of the natural commons features in the history and reproduction of San, Khoikhoi and Bantu peoples. This was the first food sovereignty commons. The San lived with an eco-spiritual ethic in nature as hunter-gatherers. They were egalitarian, shared food and did not seek to dominate nature. Ocean fish traps, hunting and gathering happened in the context of natural abundance. The Khoikhoi herders utilised pastoral spaces with healthy grazing, carrying capacity and accessibility. If they lost their livestock due to theft or drought, the Khoikhoi easily resorted to hunting and gathering. Bantu mixed farmers were allowed land for households and for agricultural cultivation by chiefs but land, in general, was commons, not owned by anyone and 'usufructory rights' (rights of use) were conferred. While cattle was an important source of wealth, and control of female and unmarried young adult labour played a crucial role in organising households, land, pasture, forests, wild veld, rivers, wetlands and, in some instances, the oceans were all part of the commons.[9]

[8] More recent history calling itself 'New History of South Africa' by Giliomee, Mbenga and Nasson (2022) provides a historicisation from first peoples to iron age farming communities. However, all these developments are placed within a historical chronology with an implicit bias towards linear progress and occludes a deeper understanding of ecological relations.

[9] Guy (1987) provides an important analysis of how household female labour and unmarried young adult labour was controlled and served as the basis to organise Bantu mixed farming. However, he does not explore how natural relations were organised as a source of use value to meet needs.

While stratification existed in the latter form of commons-based subsistence societies, these were not static societies, and agricultural techniques changed over time to also work with ecological conditions. The incorporation of maize production is one instance. Moreover, chieftain control of such social orders was unstable, given that land and the commons were available beyond the aggregated household group.

Hence, in a climate crisis world, it is important to appreciate that the early commons mode of production informs us that:

(i) millet is a drought-resistant crop;
(ii) indigenous botanical knowledge is crucial to inform the science of agroecology to ensure resilient polyculture practices;
(iii) customary land (about 20 per cent of South African land is still considered customary) should be used in a manner that is more ecologically sustainable;
(iv) retrieving practices to protect seeds and biotic resources, developing more localised diets ('eating what's there') and more conscious water use practices in a water-scarce country, are some crucial areas for further research and decolonial knowledge production to ensure commoning is taken to a new level.

These are concerns of the South African Food Sovereignty Campaign.

Third, working with a commons mode of production approach to South African history also provides a more ecologically centred perspective on the genealogies of oppressions and the making of capitalism in South Africa. Most histories on the making of capitalism in South Africa, including liberal and Marxist, while successfully highlighting the connections between race, class and capitalism have occluded ecological relations. For instance, the original colonial encounter, 'frontier wars', land dispossession, the making of agro-industrial farming and ruling class projects (imperial, white nationalist, apartheid and globalising African nationalism) are all about historical waves of dispossessing the commons mode of production, instrumentalising natural relations as a 'thing' and entrenching a logic of ecocide (Satgar, 2021). Frontier wars were actually wars of defending the commons mode of production, from a subaltern perspective. As Marx (1976: 873–942) highlights in *Capital*, appropriation, racism, theft and domination are central to processes of primitive accumulation. Accumulation through ecocide in South Africa has happened through four waves of enclosure, with each being destructive for human and non-human life:

(i) the first wave is militarised Dutch mercantile imperialism;
(ii) British imperial expansion constitutes the second wave, also for about a century and half;
(iii) Afrikaner nationalism with its racist, religious and modernising imaginary is the third wave; and
(iv) globalising and financialised African nationalism from 1994 to the present is the fourth wave.

These historical waves of enclosure and destruction of the commons mode of production have serious implications for ecological justice and its place in contemporary struggles.

The Ecological Rifts of Globalised Industrial Agriculture in South Africa

The non-productivist Marx, particularly in *Capital* (in relation to the destruction of soils) and his *Ecological Notebooks* (with regard to concerns for the destruction of forests and robbery from soils), recognised more clearly the antagonism capitalism develops against nature (Saito, 2017). Marx critiqued capitalist agriculture in its 'second agricultural revolution' from 1830 to 1880, with the growth of the fertiliser industry and soil chemistry (Foster, 1999: 373). Marx's awareness of the nature–society divide was already present in his early conception of alienation in the *Economic and Philosophical Manuscripts*. For John Bellamy Foster (1999), the metabolic rift Marx was concerned with assists in recognising how labour mediates the relationship with nature – the flows of energy and resources – and how this rift is implicated in a structural divide between capitalism and nature. This has evolved into ecological rift theory and analysis. As Holleman (2018: 97) points out, the conditions under which ecological rifts are engendered entail the following:

> Inequality in a capitalist society – a class-based socio-economic system with its social metabolic order based on accumulation and the privatized, racialized, and gendered control of the vast majority of the land and productive infrastructure – results in an elite minority having more power to determine how production is organized, under what socio-ecological conditions we labor, and to what ends. (Holleman, 2018: 97)

South Africa, with its history of colonialism, segregation and apartheid, has produced a farming system with concentrations of racialised and gendered control of land. In the post-apartheid period, the liberalisation and financialisation of farming concentrated power even more. From about 64,000

commercial farmers in the early 1990s, today, after almost three decades of neoliberal restructuring, farming is concentrated in 40,122 units, with a few big farms (2,610) with incomes over R22.5 million, constituting 6.5 per cent of the total number of farms in the commercial agriculture industry, and accounting for 67.0 per cent of total income and 51.4 per cent of total employment. The agro-industrial farming system, with its concentrated power dynamics, in the context of one of the most unequal countries in the world, has generated several ecological rifts:

- *Super-exploitation of humans and non-human nature* (*soil and water*) – Agriculture in South Africa has a long history of slave-like conditions on farms, going back to colonial society. Race, gender and class shape this reality. Today, there are about 769,594 farm workers (461,693 permanent and about 295,934 seasonal). Recent attempts to mitigate the working conditions for farm workers through minimum wages has met with fierce resistance from farmers. In a recent study, Deedat et al. (2020) highlight that the agricultural sector has an 82 per cent share below the national minimum wage (second to domestic work), non-compliance was highest in agriculture at 76.4 per cent in 2019 and, in some instances, farmers withdrew non-wage benefits (such as food, transport, hospital fees and accommodation) to adjust for minimum wage compliance.

  Soil is absolutely crucial for most food consumed in South Africa and the world. Half the topsoil in the world has already been lost over the past 150 years in a context in which soils take decades and sometimes centuries to revitalise. Around the world, ploughing and chemical fertilisers, which are short-term fixes, have contributed to serious soil degradation and the loss of 30 per cent of the world's arable land (Holleman, 2018: 21). Moreover, planetary boundary scientists have demonstrated that industrial agriculture, through its use of phosphorous and nitrogen, has contributed to an overshoot of these boundaries and to changing the chemistry of our planet. The disruption of land ecologies by industrial farming has prompted a global debate about the return of 'dust-bowlification'. South Africa has dry and poor soil in most areas, with our most arable soils in Mpumalanga (46.4 per cent), but this is being destroyed by coal mining (Smallhorne, 2018). The degradation of soils is a major challenge, with erosion, ploughing and chemical fertiliser use. According to Le Roux and Smith:

> In quantitative terms, the average predicted soil loss rate for South Africa is 12.6 tons/ha/year, while the average soil loss rate under annual

> cropland (grain crops) is 13 tons/ha/year, which is much higher than the natural soil formation rate of fewer than 5 tons/ha/year. This simply means that we are losing much more soil than we gain. (Le Roux and Smith, 2014)

Under British colonialism in the nineteenth century, imperial science contributed to dam building in South Africa and on farms. Furthermore, to enhance industrial agriculture in South Africa, from the depression in the inter-war years to the 1960s, there was massive state investment in farming irrigation systems. As a result of this, agriculture is responsible for 61 per cent of water use in South Africa and 5 per cent of water storage capacity due to private dams. In a drought-prone country with acute water inequalities that are further exacerbated by climate shocks, water control by agro-industrial farming is a recipe for conflict.

- *Unequal ecological exchange*[10] – This relates to the larger ecological implications of trade relations. Occluded from immediate monetary valuation are other forms of value.

  Agricultural exports from South Africa, including forestry and fisheries, was valued at R177.25 billion in 2018 (primary products were R85.91 billion and secondary products R91.34 billion). The export destinations for these products were mainly Europe, Africa and parts of Asia. Imports for the same year amounted to R129.45 billion, mostly made up of imported secondary products such as books. In monetary terms, this was a net gain and a positive in terms of trade. What these figures do not measure is the energy used (including the carbon footprint of transportation), the topsoil degraded, the biodiversity loss and even water. If these costs were priced in, South Africa's positive terms of agricultural trade would likely become negative. The narrow monetary value of exports does not give a real measure of ecological value. A full cost accounting of ecological value remains a challenge to understanding the real exchange dynamics of agricultural trade.
- *Biodiversity loss* – Industrial agriculture's contribution to gross domestic product has been declining since the 1960s, from 11 per cent to 1.8 per cent in 2020. Before and during the time span, this food system has been implicated in the destruction of biodiversity loss. The extinction of various animal species from the Quagga and the elephants in the

[10] The concept of unequal ecological exchange is approached in different ways. I have chosen to focus it on the connection to the ecological rift related to global trade. Due to the lack of data on these issues, I have also gestured towards the wider implications.

Western Cape is linked to colonial expansion and early farming settlements. More recently, farmers have gained notoriety for killing cheetahs, honey badgers and leopards. According to the South African National Biodiversity Institute (SANBI), out of 23,331 species facing the risk of extinction in South Africa, 48 of these species are now extinct. Further, in the National Biodiversity Assessment of 2019, 14 per cent of South Africa's plant species and 12 per cent of animal species are threatened with extinction (SANBI, 2020). SANBI's 2018 National Biodiversity Assessment Report delves deeper into the various structural forces contributing to species extinction in South Africa (Skowno et al., 2019). In this regard, the agro-industrial food system features prominently in relation to abstracting water for dams, with negative effects on ecosystems, bio-chemical run-off into riverine systems, cultivation of crops, plantation forestry and land degradation.[11]

- *Carbon emissions* – According to the National Greenhouse Gas Inventory Report, in 2017 agriculture contributed 48,641.80 gigatons of CO2e, 9.5 per cent as a sector. This was second to the energy sector at 80.1 per cent. Methodologically, it is unclear how government calculates these indicators and whether carbon emissions across whole value chain activities, including carbon footprints for exports, are measured or government data just points to emissions on farms. Nonetheless, the agro-industrial food system in South Africa is locked into the climate crisis trap and its deadly feedback loops. As a drought-prone country, compounded by planetary heating, South Africa's recent drought lasted about seven years and broke the three-year cycle. According to climate science, the next drought is likely to be longer; heatwaves will also impact soil conditions, while wildfires and higher-than-average rainfall will also bring challenges.[12]
- *Hunger* – In the first half of the twentieth century, at least half a dozen famines impacted the African majority, while modern white capitalist farming thrived, including through feeding the white population, provisioning mines, accessing international markets and through state support. Wylie (2001: 59–90) provides crucial insights about three famines impacting the African majority: Pondoland (1912–1913), Lembombo Flats (1927) in the former eastern Transvaal and the Eastern Cape in 1946. We will never know the full impact of these

[11] These SANBI reports do not deal with the loss of honeybees in South Africa and the role of industrial agriculture in this regard.

[12] Too much rainfall in parts of the Free State and North West, in 2021, were reported as a problem for farmers in the media.

famines, but they give us a sense of the racist and ecocidal logic of modern capitalist farming. This continues into the present. Before COVID-19, about 14 million South Africans went to bed hungry. In the midst of the pandemic, with job losses and precariousness, about 30 million South Africans faced hunger. According to the Pietermaritzburg Economic Justice and Dignity Group (PMBEJD, 2021), since the start of the Household Affordability Index in September 2020 the average cost of the Household Food Basket increased by R416.10 (10.8 per cent) from R3,856.34 in September 2020 to R4,272.44 in November 2021. This is higher than the National Minimum Wage for a General Worker, which in November 2021 was R3,643.92. Moreover, the Child Support Grant of R460 is 26 per cent below the Food Poverty Line of R624 and 38 per cent below the average cost to feed a child a basic nutritious diet of R744.96. Besides exporting food in this context and being implicated in large amounts of food waste (WWF, 2017),[13] the agro-industrial food system has a built-in irrationality. While people starve, the bulk of yellow maize (89.4 per cent of about 5.1 million tons per annum) and soybean production (only 7 per cent produced in the country is used for human consumption) ends up as animal feed (National Agricultural Marketing Council, 2011; DALRRD, 2020).

Re-Agrarianising South Africa through Food Sovereignty

Food sovereignty is a counter-hegemonic concept championed by La Via Campesina, the largest social movement on earth. It was first articulated in 1996 as a counter to the food security paradigm. Today, across the planet, food sovereignty alliances, platforms and campaigns are advancing food sovereignty at different scales. In South Africa, the discourse has travelled into agrarian, food justice, solidarity economy and environmental justice spaces over the past few years. In 2014, the Cooperative and Policy Alternative, together with NGOs, small-scale farmers and activists, hosted dialogues on the food system crisis in all nine provinces. This culminated in a food crisis conference in late 2014, at which it was resolved to build a national platform of convergence for social forces wanting a food sovereignty alternative for South Africa. In 2015 the South African Food Sovereignty Campaign was launched, and it embarked on a journey to

[13] Fruits, vegetables and cereals account for 70 per cent of the wastage and loss primarily throughout the food supply chain – from farm to fork. When energy and water are included the food waste is an ecological disaster.

translate the concept of food sovereignty for South African historical conditions and challenges. Generally, food sovereignty is understood as a critique of capitalist agriculture, a systemic alternative and movement-building process. In the preceding analysis, I have provided some insights into the emancipatory ecology critique evolving in the South African context. Below I deal with the politics of advancing food sovereignty as a systemic alternative and movement as part of the deep and just transition to achieve climate and, more generally, ecological justice.

Right to Food and Water, Ecological Justice and Ethics of Care

In section 27 of the Constitution of the Republic of South Africa, 1996 provision is made for sufficient food and water for the citizens of the country. As argued, this is a formal right to food that will not be realised through the existing food system. Ecological rifts and the ecocidal and profit-making logic of the current system mitigate against the constitutional right to food. In its essence: food as a commodity is central to food inequality, and this challenge cannot be resolved through capitalist agrarian relations and narrow liberal constitutionalism. Hence the right to food has been claimed as the basis of an alternative food sovereignty commons system by the South African Food Sovereignty Campaign (SAFSC) (COPAC, 2015). Such a claim is about transformative constitutionalism, which seeks to challenge shallow 'food security' thinking about the right to food and which merely affirms the existing agro-industrial power structure. Taking this further, the SAFSC has developed the Peoples Food Sovereignty Act, 2018 (PFSA) through three food sovereignty festivals, research and a people's parliament. The PFSA is a political hack to incite the imagining of a new food system paradigm as part of the deep and just transition to survive and prepare for worsening climate shocks. In other words, the SAFSC demonstrated that both transformative policy and legal thinking are required to end the systemic food crisis in South Africa and build the next food system. Around water, the SAFSC has worked with drought-affected communities and developed bottom-up approaches to claiming water rights as part of the water commons (COPAC, 2017).

The SAFSC conception of justice challenges liberal philosophies of justice from three perspectives:

(i) the legal subject is not just human beings but also non-human nature. There is a recognition that social and natural relations are

interconnected, such that humans are socio-ecological beings while non-human life also has intrinsic value;
(ii) positive freedoms and the transformative role of the state is crucial for historical redress and addressing legal harms; and
(iii) communities and collectivities matter.

Deriving from this emancipatory ecology philosophy is a strong commitment to ecological justice within the imaginary of the SAFSC as expressed in its *Climate Justice through Land Justice* activist tool, which states: 'Ecological justice goes one step further than environmental justice (which looks at justice for people). Ecological justice includes justice for all living animals, plants, humans and the ecological systems within which they exist' (COPAC, 2019: 2). In this sense, the human is decentred and coexists amongst other life forms.

Moreover, this comes through in how the SAFSC understands both land justice and water sovereignty. In terms of land justice, the discursive framing is grounded in a premise that replacing white farmers with black farmers is not transformative, and nor is it just. In its *Food Sovereignty for the Right to Food* activist tool, it states:

> Agrarian reform means more than land reform: to change relations in the countryside and in the farming sector, we need to do more than just hand over existing land from white capitalist farmers to new emerging black capitalist farmers. Agrarian reform means that we should question whether it is just and feasible for only a few people, whether black or white, to own vast amounts of land, while millions more lack access to land and the means of production. Agrarian reform means that we should increase the number of people that have access to land as well, and increase their rights and control over it. This means looking at smaller farm sizes rather than the massive farms we are used to in South Africa and which on each farm only a very small variety of crops are actually grown. (COPAC, 2015: 23)

Through its elaboration of land justice discourse, the SAFSC has married the land question to addressing historical injustice in a transformative manner and as part of a new food sovereignty commons system. Such a commitment is expressed powerfully through the PFSA and the plurivision of the Climate Justice Charter (CJC): Feeding Ourselves through Food Sovereignty.[14] The CJC is committed to a commons approach to

[14] The SAFSC together with partners like the Cooperative and Policy Alternative Centre gave birth to the Climate Justice Charter (CJC). The CJC developed through deep dialogues in 2019 and was handed over to South Africa's Parliament on 16 October

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climate and, more generally, ecological justice. These positions stand against merely reproducing the existing agro-industrial food system, which in turn replicates its existing ecological rifts, as well as its profit-making and ecocidal logic. Moreover, within such an ecological justice approach, land is located within life-enabling commons systems. Hence, the SAFSC advances a perspective on the 'eco-social function of land' (SAFSC, 2018: 8). Land is not conceived as a thing, an object, that humans can just exploit. Still, it is part of larger living ecosystems and must be utilised in a manner that enhances life in these relations. Similarly, water justice is located as part of water sovereignty. The SAFSC espouses the following conception: 'water sovereignty is about people preserving the water cycle and controlling water storage, use, access, and supply in a manner that realizes people's rights to water while meeting the needs of nature and defining the path towards a sustainable water commons' (COPAC, 2017: 2). In short, justice in this framework is about meeting human and non-human nature's needs, while ensuring the agency for affirming rights and claims lies with citizens, as socio-ecological beings.

The SAFSC was born at the onset of the first climate-induced drought (2014–2021) in South Africa. A strong praxis of ethical care came to the fore through a Hunger Tribunal in 2015 (together with the Human Rights Commission and faith-based communities), drought speak-outs and a bread march through the streets of Johannesburg in 2016, food sovereignty festivals (2015, 2016, 2017), the development of the PFSA, several tools for grassroots pathway building and the CJC process. The care for human and non-human life coalesced around three strands of thinking. First, a realisation that radical humanism, which had its hegemonic moment with the rise of the organised working-class movements of the nineteenth and twentieth century, had been pushed back by the neoliberal class project and the post-modern rejection of universals. In this context, the SAFSC attempted to reforge a non-anthropocentric but radical humanism, appreciating that humans are socio-ecological beings. A subaltern eco-humanism was being validated, recognising our imbrication in natural relations, human dependence on nature and the limits of nature. Second, eco-socialist-feminist thought highlighted the crisis of socio-ecological reproduction in households. Many women from

2020, World Food Day, to demand its adoption as per section 234 of the South African Constitution, which provides for charters to be adopted. The CJC is endorsed by over 270 organisations.

rural and working-class communities (although not self-identifying as eco-socialist-feminists) gave testimony at the Hunger Tribunal about depredations of hunger, the powerful role of women as seed savers and educators, and their frontline commitments to advancing food sovereignty placed care labour and its ethics at the heart of the SAFSC. Third, the suffering of drought-affected communities and the development of the CJC elaborated a South African conception of climate justice, which is centrally about preventing harm to the most vulnerable in our society and ensuring systemic transformation to preserve life. This praxis of care was easily extended into the COVID-19 pandemic as many food sovereignty activists rose to the challenge of feeding their communities and demanding the 'food commons be unlocked'.[15] The latter was an act of solidarity with informal traders, small-scale farmers, micro-gardeners and subsistence fishers. Grassroots women activists have been central in providing leadership in this conjunctural moment (Morgan & Cherry, 2023). Ultimately the food sovereignty system the SAFSC is reaching for is about preventing the destruction of human and non-human life; it is about creating an ecologically conscious and caring society.

The Peoples Food Sovereignty Act, Democratic Systemic Reform and the Deep and Just Transition

For the SAFSC, food sovereignty is defined as follows: 'the right of people to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define and control their own food and agriculture systems. It is an alternative to the corporate food system' (SAFSC, 2018:8). Such a conception, vision and articulation is a direct challenge to the African nationalist globalising class project and seeks to re-embed the food system in socio-ecological relations and to transform it. This is grounded in reimagining the governance of the commons for soil, water, biodiversity, energy, creative labour, the earth system and the cybersphere, so grassroots power from below prevails. It is about resetting the economy–nature divide. In this regard, the PFSA seeks to entrench new forms of subaltern class power – systemic, movement, direct and symbolic – that are constituted from below, not above, as part of remaking the food system.[16] In less abstract

[15] At the onset of COVID-19, the SAFSC convened the National Food Crisis Forum.

[16] See, Satgar (2014) and Bennie and Satgoor (2018) for conceptualisations of power from below and how this links solidarity economy, food sovereignty and climate justice.

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terms, this is about the democratic planning of the food system. Such an approach is not about state-centric agrarian transformation and top-down technocratic rationalities. Instead, the organic and tacit knowledge of small-scale farmers, informal traders, the landless and communities is crucial for democratic planning. In chapter 9 of the PFSA, provision is made for crucial institutional mechanisms to enable such a democratic planning approach: a national food sovereignty fund, a national food sovereignty council, a national food system democratic planning commission and local communal councils.

Central to the PFSA is utilising a democratic planning approach to the land question and, more generally, the construction on a national scale of a food sovereignty commons system anchored in local food sovereignty commoning pathways and practices. This is an alternative to a market-led approach or an authoritarian, state-centric, populist and nativist approach. Moreover, this is located within the large-scale socio-ecological transformation required for the deep and just transition and, as envisaged in the CJC, to ensure we have a food sovereignty commons system that can feed South Africa and break out of the climate crisis trap. Hence it is worth looking more closely at what the Act specifies in terms of the role of government in securing the right to land in section 10:

> (1) The government shall ensure regular land audits and maintain a proper land registry to prevent land theft and ensure fast-track redistribution to small-scale food producers.
> (2) The government shall utilize participatory mechanisms provided for in this act (in Sections 26, 27, 28, 29) to undertake proper spatial planning to ensure the development of a food sovereignty system in rural and urban areas.
> (3) The government shall deconcentrate all large farms and pass on ownership to small-scale food producers over the next 20 years. Every 5 years, 10,000 commercial farms must be deconcentrated in accordance with the Constitution.
> (4) The government shall recover costs and do what is necessary to rehabilitate land that has been damaged through pesticides, industrial farming and mining and other types of pollution.
> (5) The government shall prohibit land speculation for agricultural land.
> (6) The government shall ensure that land regulation in towns and cities does not hinder or prohibit agroecological food production, farming and food sovereignty pathways.
> (7) All these actions by government shall be informed and determined by the national food sovereignty council envisaged in this Act. (SAFSC, 2018: 13–14)

Essentially, the vision of the PFSA is not to have a state-centred and -led approach to food sovereignty but to ensure South Africa creates a small-scale farmer food sovereignty commons system to feed communities, villages, towns and cities, that is democratically planned and driven from below as part of the deep and just transition. The Act is framed as a citizen-driven process constituted from below to ensure the state is not the main actor defining, determining and constructing a food sovereignty commons system across urban and rural spaces, as part of accelerating and deepening the just transition. With this approach, the state is being transformed to think and act like a commoner. This disrupts two types of typical agrarian thinking that have informed land reform in post-apartheid South Africa (Cochet et al., 2015). The first is about the state transforming the agrarian structure through land distribution to address historical dispossessions, supporting farming practices in rural areas, defining a place of 'peasantries' in social change and state policy support. The second, mainly informed by World Bank thinking, reduces agrarian transformation to ensure the security of legal title to land, liberalisation of the agricultural sector and the establishment of a market for agrarian property transactions. In the main, these have been top-down reform practices reproducing the same food system with high ownership concentrations and numerous ecological rifts.

In contrast, the PFSA is conceived as a democratic systemic reform that can transform the entire food system as part of repositioning South Africa to address the general crisis of socio-ecological reproduction, specifically the worsening climate crisis, while addressing historical injustices (Satgar, 2019). The strategic logic of this non-state-centric concept is about constitutive forms of agential class and popular power deepening the process of transformation and ensuring the state embodies a democratising logic from below, and it in turn strengthens such a logic. Moreover, it specifies an emancipatory, utopian horizon for change while recognising that such reforms can be calibrated to be ameliorative, stronger and transformative over time. In other words, transformative change is never arrested, and its potential is kept alive even when facing historical contingencies. In relation to the land redistribution question in South Africa, such a democratic systemic reform is crucial as the basis for building consensus about a new food system and deepening transformation in a just manner. For instance, most commercial farmers in South Africa are not going to be able to handle climate extremes such as a ten-year drought or too much rain. They are going to have to embrace the deep and just transition out of necessity. In this context, the

deconcentration of big farms in South Africa can be part of a process involving subsidies to commercial farmers and as part of the deep and just transition to stabilise commercial farming as it is transformed.

Such subsidies, informed by the PFSA, would entail the following minimum conditions:

(i) rehabilitate all land involved in chemical-based mono-industrial farming and transition all farming practices to agroecology and permaculture regeneration systems;
(ii) ensure decarbonisation of all farming processes;
(iii) all commercial farmers to participate in the national food sovereignty council and local communal councils as part of the just transition;
(iv) all large-scale commercial farmers to provide a deconcentration plan, through engagement with local food sovereignty communal councils, to the national food system democratic planning commission to bring in small-scale farmers, including ensuring they have water rights.

Farmers will be compensated fairly through a Food Sovereignty Fund for land allocated to small-scale farmers. Commercial farmers in South Africa, like the state, have to become commoners. The worsening climate crisis and the more general crisis of socio-ecological reproduction requires a politics requisite to the challenges. Democratic systemic reform politics is necessary and appropriate for our times to ensure ambitious transformation can happen in limited time horizons while strengthening and deepening the democratic project.

Commoning through Food Sovereignty Pathways in Communities, Villages, Towns and Cities

The PFSA has been ignored by South Africa's Parliament and key government departments, notwithstanding the debilitating impacts of South Africa's drought on commercial agriculture and hunger (2014–2021). Despite a state and power structure indifferent to the food sovereignty alternative for South Africa, in 2017 the SAFSC made a strategic decision to build the SAFSC as a grassroots movement through localised food sovereignty alliances in communities, villages, towns and cities (SAFSC, 2017). In this process, several food sovereignty activist tools were developed to build capacities for pathway building, the Act served as an overarching compass, and the idea of food sovereignty hubs as localised

support mechanisms to advance pathway building was experimented with. Initially, this rich undergrowth of pathway and hub building began with thirty sites in urban and rural spaces. In the context of COVID-19, additional pathway and hub-building sites emerged. The difficult work of consolidating these sites and scaling them up institutionally through local food sovereignty alliances, forums and hubs, as part of the deep and just transition, looms large. To assist this process, the SAFSC, together with partners, released a set of case studies covering food sovereignty pathway-building practices in three rural areas, three peri-urban areas, four towns and cities, three universities and one general case study (SAFSC et al., 2022). From these case studies, two examples of successful pathway building, institutional development and commoning the future are crucial to share to understand where these processes are tending.

Wits University, since 2015, has been a crucial site of food sovereignty pathway building. An academic supported students in setting up a food garden, and links were made with the Wits food programme, attempting to feed hundreds of students on a daily basis.[17] In 2016, this relationship led to a petition calling on Wits to provide a space of dignity for food-stressed students to receive their meals and for the university to become a zero-hunger, zero-waste and zero-carbon institution. With over 8,000 signatures, the petition was well received by the university leadership, and the Wits Food Sovereignty Centre was established with its own building. This serves as a hub, which is an eco-demonstration space (including agroecology gardens), and houses a food bank, a communal kitchen for students to use to prepare meals, convenes a monthly inner-city small-scale farmers market, hosts cultural events to promote slow food and healthy local food alternatives and is linked to six agroecology gardens and an experimental food forest. The success of this pathway-building process has led to Wits agreeing to build a food commons at the university, with more fruit trees and agroecology gardens on the campus, and it has committed to setting up a second food sovereignty hub, also involving community participation. Many of the agroecology gardens at Wits have been established with campus and public involvement, such that participants have been encouraged to found pavement, backyard and community gardens as part of food sovereignty pathway-building processes. Over 150 people in and around the inner city of Johannesburg

[17] I have been involved with this process since 2015 and encouraged students in one of my classes to set up a food garden, which became the springboard for food sovereignty activism on the campus.

have been involved in this learning process. The food sovereignty pathway-building work has been shared with and has had knock-on effects for the University of the Free State, Stellenbosch University, the University of Cape Town and the University of Pretoria.

A second example of food sovereignty pathway building is the hub-building work of Ukuvuna, a grassroots NGO and partner in the SAFSC. It is a powerful example in a rural part of Limpopo Province. Ukuvuna was established in 2005 and has trained over 8,000 households to grow their own food through regenerative permaculture methods. One of the key food and knowledge hub sites that Ukuvuna has built up over the years has been in the Hamakuya community in Thulamela Local Municipality in the Vhembe district, where the local hub works with 165 smallholder farmers, mainly women. In this district, there are over 1.2 million people, 54 per cent of them female, and with a 37 per cent unemployment rate for women. Through the hub, Ukuvuna has, over the past eight years, developed a smallholder support system. The system encourages indigenous knowledge sharing, food sharing, seed saving, shorter food supply chains in the community, regenerative agroecology training, networking and local trade expos.

With this food and knowledge hub as a support system, all participants have been encouraged to establish successful household food schemes. In this process, clusters of 10–15 communities have been organised. These are led by elders, women and youth to ensure knowledge transfer. Cluster leaders encourage exchange visits and skills transfer. Hub-linked clusters also work with local schools and community organisations to encourage community involvement. Throughout the cycle of farming activity, the hub provides support and training. Through its participatory action research methodology, it has also been involved in climate literacy. This process has further grounded the links between agroecology knowledge and skills around water management, soil conservation, indigenous seed revival, seed saving and plant nurseries for regenerating biodiversity.

Conclusion

Redistributive land justice in South Africa needs urgent political resolution, and it also needs a paradigm shift away from state- or market-centric approaches. A third alternative in the South African context is a food sovereignty commons approach based on strengthening existing food sovereignty pathways from below, a people- and worker-driven democratic systemic reform such as a PFSA, including democratic

planning, and ensuring South Africa has a food system with adaptation and regeneration capabilities that can ensure worsening climate shocks are mitigated. Food sovereignty is crucial for a deep and just transition process and building a food commons system in local spaces and on a macro-scale. The SAFSC has been pioneering such an approach in South Africa. Its normative praxis has been grounded in claiming the constitutional right to food as the basis for building a food sovereignty commons system, advancing ecological justice and an ethics of care. The PFSA it has developed is an invitation to think about another way forward for South Africa's ecocidal food system. It is the product of a subaltern imaginary, affirming aspirations for a future based on defending and enhancing life-enabling commons systems. Underpinning this is a rethink of the place of the commons in South African history and its crucial role in decolonising our present and future. The food sovereignty alternative is about confronting the last great dispossession of the commons, globally and in the country. It is a direct challenge to the post-apartheid state and commercial agriculture to become commoners, committed to ecological justice, to ensure we all break out of the climate crisis trap and the global crisis of socio-ecological reproduction.

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11

Redistributive Justice, Transformational Taxes and the Legacies of Apartheid

HEINZ KLUG

Introduction

Three decades after South Africa's first democratic election, the top 10 per cent of the population owns more than 90 per cent of the total wealth (Davis Tax Committee, 2018: 4), and the country remains one of the most unequal societies on earth (Sulla et al., 2022). Unequal access to land, education, employment opportunities and the spatial design of cities and towns continue to reflect the legacies of apartheid. Prominent among the sources of continuing economic and political inequity has been the failure of post-apartheid land redistribution (Ngcukaitobi, 2021). While most agree that inequality detrimentally shapes the life opportunities of the majority of South Africans, there is increasing evidence that it is also undermining the post-apartheid settlement – whether in the form of public protests, corruption or simply increasing disillusionment with the political and constitutional order. It is in this context that land has once again become a central focus of political and legal conflict (Klug, 2018).

Since market-led reform policies have clearly failed to produce the necessary redistributive justice required to address apartheid's legacies, it is time to explore more interventionist options. This raises an important question: might a transformational tax provide the basis for a new social contract that will further the promise of South Africa's post-apartheid constitutional order? To address this question, I explore a comparative history of wealth taxes to reflect on the forms a proposed transformational tax may take. This comparative approach explains in part why recent debates about an annual wealth tax in South Africa failed to see the potential such a tax presents to address inequality in South Africa. The Davis Tax Committee, appointed in 2013 by then Finance Minister Pravin Gordhan to advise on tax policy, investigated the idea of a wealth tax, focusing its attention on an annual tax, which the Committee found

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would not offer a significant advance on the existing tax system and would be difficult to implement.

This was not the first proposal for a wealth tax in South Africa. That came from the African National Congress (ANC) in October 1991 in a report from a commission on land at a conference on affirmative action organised by the ANC Constitutional Committee in Gqeberha (then Port Elizabeth). The commission reported to the conference that to address the history of colonial dispossession and apartheid forced removals, as well as the exclusion of Africans from the land market since 1913, there would need to be a significant redistribution of land. In this context, it proposed a wealth tax to serve as a source of funding to compensate those whose land would be expropriated to enable restitution or redistribution. Compensation would ensure that individuals would not bear the brunt of a process designed to address historical legacies. At the time, the ancien regime and the establishment press vociferously rejected the idea of a wealth tax (Krige, 1991). It is worth noting that while often rejected as either utopian or unworkable, the idea of a wealth tax in South Africa is not (now or then) an outlandish idea. In fact, in the immediate aftermath of the first democratic election, a small one-off 'transition levy' of 5 per cent 'on individuals and companies with an income in excess of 50,000 rands' a year was successfully used to cover the costs of the democratic transition (Carlin, 1994). Now, after over a quarter of a century in which the legacies of apartheid persist, and the country has experienced economic, political and pandemic disruptions, the need for a new social compact is being recognised. In this new context, compensation for necessary expropriations will be one among many needs a transformational tax might address. In fact, identifying specific needs, including rural and urban land reform, would be an important aspect of any new social compact. It is also clear that while a relatively moderate threshold exemption on wealth would exclude the vast majority of black South Africans from the tax, it would apply to all with wealth over the defined threshold, regardless of their earlier status among the oppressed. The burden of the tax could be moderated by imposing a sliding scale so that a higher rate applies to the very wealthiest 1 or 2 per cent of the population.

Before describing a proposed transformational tax, this chapter first presents a brief historical survey of different forms of wealth taxes in several countries. This comparative analysis demonstrates that capital levies have been a more effective means of ensuring redistribution compared to annual wealth taxes. The conclusion to be drawn from this is

that any plans for a transformational tax to address the legacies of apartheid and gross inequality must consider the imposition of a capital levy. The final section of this chapter applies the analysis of former experiences with capital levies to imagine the outlines of a transformational tax for South Africa.

International Experience with Wealth Taxes

Over the twentieth century, there were distinct periods in which wealth taxes were proposed and implemented in various countries. The first period, around World War I, saw wealth taxes used as a means of reducing public debt. The second period occurred in the aftermath of World War II, when wealth taxes of different forms were introduced in many countries, including France, West Germany and Japan. Finland resorted to a capital levy twice in the 1940s, once to address the plight of Finish citizens who were expelled from the Karelia Peninsula, which the Soviet Union took in 1940, and then again in 1944. A third period followed the 2008 financial crisis, while the economic impacts of the COVID-19 pandemic have produced new proposals for wealth taxes.

Within this history, it is important to distinguish between annual net wealth taxes and one-off wealth taxes or capital levies, as each form has distinct goals and means of implementation, with significant consequences for the idea of a transformational tax in South Africa.

Annual net wealth taxes are what are most regularly considered when reference is made to a wealth tax. The prime examples include the Swedish wealth tax introduced in 1910 and taken up in various European countries in the 1970s and again after the global financial crisis in 2008. Many of these annual net wealth taxes were ended in the 1990s, and while some were reintroduced post-2008, others have faced constitutional and other challenges. In the case of Germany, where wealth taxes of various forms have been repeatedly used and are provided for in the Basic Law, the failure to regularly update real property values led in 1995 to a Constitutional Court challenge, which struck down the annual net wealth tax as unconstitutional for violating the Basic Law's equality clause. Annual net wealth taxes, as well as the utopian idea of a global tax on capital suggested by Thomas Piketty in his 2014 book, *Capital in the 21st Century*, are quite distinct from the idea of a capital levy or one-off wealth tax like the German *Lastenausgleich* or equalisation of burdens tax that was adopted in the wake of World War II. A capital levy may be 'defined simply as an extraordinary tax which is assessed on capital

owned at a given date' (Robson, 1959: 23). If we focus on these one-off wealth taxes, or capital levies, which sought to achieve more than debt relief, we encounter a few very particular historical cases from the period after World War II. In the case of France, the levy served both to raise public finances and also to punish those who had profited by collaborating with the Nazi occupiers. The levy was 25 per cent on capital as of 1945, plus 100 per cent on additions to capital during the occupation from 1940 to 1945 (Carroll, 1946). Four countries – Germany, Japan, Finland and Korea – adopted versions of capital levies whose overall goals were reconstruction, equalisation and democratisation. The German case was initiated by the process of financial reform imposed by the occupying powers in 1949 and was incorporated into the sharing of burdens law or *Lastenausgleich* (Equalization Law of 1951) in 1952. In the case of Japan, the occupying forces imposed a 90 per cent capital levy on the top 2–3 per cent of the population, who were considered beneficiaries of Japanese militarisation and aggression. Finally, Finland and South Korea introduced programmes linked to land redistributions that effectively served as forms of one-off capital levies.

Sharing the Burdens of Reconstruction: The German Equalisation Tax

One of the more significant and ambitious capital levies in world history came out of West Germany immediately following the end of World War II. Most post-war levies were intended to combat inflation or supplement ordinary public spending (Robson, 1959: 28–32). The German levy, however, was, from its start, intended to distribute the harms of war as equitably as possible (Robson, 1959: 28–32). Hitler's regime intentionally ran up German war debt during the war with the promise of compensating citizens out of the plunder of conquest (Hughes, 1999: 1). The defeat of the Nazis left the nation, like most of Europe, physically and economically destroyed. German cities suffered extensive destruction. Hamburg alone took more damage than all the bombed cities in Britain. In Western Germany, over 20 million people were homeless when the war ended (Botting, 1985: 123–25).

The destruction was not, however, uniform across Germany. Where some were left completely destitute, with homes and businesses destroyed, others escaped largely uninjured (Hughes, 1999: 2–3). While all war-damaged countries implemented some level of post-war aid to citizens, Germany is largely unique in its attempt to distribute wealth so that pre-war levels of property ownership were restored (Hughes,

1999: 2–3). However, the money for this rebuilding could not come from everyone equally, as many had nothing to give (Berghahn & Poiger, 1945–1961: 7). The solution became known as a *Lastenausgleich* or 'equalisation of burdens'. The burden of rebuilding the country would fall upon each German proportional to their own needs and surviving property (Berghahn & Poiger, 1945–1961: 2). Social justice would be the driving factor, with those least harmed by the war being levied to compensate those most harmed (Heller, 1949: 227).

The *Lastenausgleich* represented not only a shift away from Nazism but also a break from the pre-war German republic. The programme sought both to balance out the harms of the war and assist the nation in becoming more prosperous for all. Article 20 of the newly adopted Basic Law (Constitution) mandated that German society maintain itself as a 'democratic and social federal state' (Berghahn & Poiger, 1945–1961: 7). Beyond the immediate social benefits of the programme were also geopolitical concerns. The perceived threat of the Soviet Union in East Germany pressured the Western Allies to ensure that a quickly rebuilt Germany could play a part in its own defence (Berghahn & Poiger, 1945–1961: 9; Hughes, 1999: 168), especially in the emerging ideological struggle of the Cold War.

Taking the asset base of 1948, the Equalization Law set a 50 per cent tax rate on surviving post-war assets and spread the tax debt over the next thirty years, which saw the tax being collected quarterly until 1979 – raising, it is claimed, 42 billion Deutsche Mark (DM) over this period (Bach, 2012: 6). Additional features of the Equalization Tax include the fact that it was mainly assessed on property and business assets (including state-owned enterprises), while financial assets were granted a relatively high exemption of 150,000 DM. In addition, a tax allowance of 5,000 DM was granted for natural persons with leviable assets up to 25,000 DM, with a gradual decline to zero exemption for those with assets over 35,000 DM. To place these numbers in context and demonstrate their nominal value, the average annual pensionable income in post-war Germany in 1952 was 3,850 DM. As Stefan Bach concludes, '[d]ue to high growth rates of national product and income, [the] ... economic significance and burden gradually decreased in subsequent decades. At the same time, it was possible to mobilize significant resources for reconstruction and the integration of displaced persons and refugees. In this respect, burden sharing was a financial, economic, and sociopolitical success' (Bach, 2012: 6). In its implementation, the *Länder* (German states or provinces) were directed to 'devote 85 percent

of the income for *Lastenausgleich* purposes, such as housing construction for war damaged individuals', and the *Länder* were required to transfer 15 per cent of the income to the central authorities for 'supra-regional balancing out' (Hughes, 1999: 74).

The *Lastenausgleich* proceeded in two distinct phases. Recognising that a comprehensive levy and distribution would take years, the German government first rushed out a smaller levy intended to provide more immediate aid to those facing imminent harm due to the destruction (Hughes, 1999: 73). Taking effect in 1949, this levy imposed a 2 per cent tax on the value of real property with an exemption of 3,000 DM, increasing to 3 per cent for property with a value of more than 15,000 DM. This levy also distinguished between 'necessary' and 'excessive' material assets, taxing the former at 4 per cent and the latter at 15 per cent. The proceeds of 2.75 billion DM were used to great effect as a welfare-like entitlement (Heller, 1949: 229). Those who had been expelled from their homes, who had had homes destroyed, who had lost their money in the currency revaluation and who had been politically persecuted were eligible for payments even if they demonstrated only a relatively low threshold of loss. For example, a person expelled from their home could get monthly aid for showing a loss of 300 DM in assets. This levy also provided support for those who could not work due to disability or age as well as supplements for the worker's dependants (Hughes, 1999: 77). Most importantly, this levy established as precedent the principle that future levies would be calculated using the value of a person's property on 21 June 1948 (Hughes, 1999: 78).

The second phase saw a major levy of assets meant to assist in the rebuilding of German society and economy. At its core, the levy was a one-time tax on the value of an intact property. The *Lastenausgleich* law imposed the tax at a rate of 50 per cent on real property. The payments to discharge this levy were to be made over a period of thirty years (Robson, 1959: 31). This number came from an analysis done in 1950, which concluded that the German economy could not afford to levy more than 1.5 billion DM a year (Hughes, 1999: 151). The government decided to apply the 50 per cent rate on the theory that it would demonstrate the equal nature of the levy. Amortising payments over thirty years would result in a yearly revenue of about 1.5 billion DM (Hughes, 1999: 151). Further exemptions for the first 5,000 DM of leviable assets ensured that lower and middle-class German citizens would not be overburdened. Exemptions on the first 150,000 DM were available to Nazi victims whose property had been restored after the allied victory. Complete

exemptions were available for property given to successor organisations when the true heirs could not be found (Hughes, 1999: 153). This was clearly in the interest of not taxing the victims of war for the costs of those defeated.

The second capital levy raised a total of 42 billion DM, around twenty times the amount raised with the first and 60 per cent of the nation's 1952 gross domestic product (GDP) (Bach, 2012: 6). The money raised was distributed based on a number of criteria. First, those with recognised legal claims for things such as property loss and damage were given direct compensation (Hughes, 1999: 155–56). Others without legal claims were allowed to make use of generous loans to support economic reintegration (Hughes, 1999: 156). Those who had lost goods rather than real estate were also entitled to payments. Persons who had lost at least 50 per cent of their household goods were entitled to graduated yearly sums of at least 800 DM for twelve years based on the amount of income they had at the time of the payment (Hughes, 1999: 157). Importantly, the claims of those who had lost money in the currency reform were not recognised under the second levy; this was on the theory that the other forms of compensation would be available to them anyway (Hughes, 1999: 158). Furthermore, the final law placed no maximum on the amount of compensation a single person could get, though the amount they received was proportionally reduced the more their claims rose (Hughes, 1999: 163).

One of the most surprising aspects of the entire programme was how relatively few barriers to implementation it faced. The elites of Germany had stood firmly against similar attempts at reform following World War I. The disaster of World War II, however, seemed to leave a bad taste towards any kind of war or post-war profiteering. Simply being rich in post-war Germany might indicate a failure to make or at least appreciate the sacrifices made by the populace. The *Lastenausgleich* was seen to be a part of the general denazification of the state where the immoral profits of the past would be collected and used for the public good (Hughes, 1999: 113). The result was mass popular support by most sections of West German society and among the Western Allies (Hughes, 1999: 81, 113).

Building Democracy: Capital Levies in Post-War Japan

The Japanese case saw a one-off capital levy imposed in 1946–1947 as one component of a sweeping political and economic overhaul that

included tax reform, land reform and constitutional reform. The levy's first objective was to reduce the internal debt burden inherited from wartime. The second objective was to provide finance for the recovery programme, and the third was to reduce income inequality. The goal of this last objective was to reduce the wealth holdings of a small minority of exceptionally rich individuals – the *Zaibatsu* – owners of the great holding companies who were considered responsible for promoting the war and had profited well from it. The wealth tax was imposed on families whose property was worth at least 100,000 yen as of 3 March 1946. The rates of the tax rose from 10 per cent on the lowest bracket to 90 per cent on estates worth more than 15 million yen. As a result of the existing inequality, the levy was only imposed on 2–3 per cent of the richest families.

World War II left the country physically and economically destroyed. The Japanese government had insured nearly every private war enterprise and guaranteed numerous loans from private banks (Shavell, 1948a: 133). Indeed, some 80 per cent of the total expenditure for the war came from borrowing. By the end of the war, Japan had accrued over 100 billion yen in debt, more than twice the total capital reserves of all Japanese businesses combined (Kurihara, 1946: 844). Many capital levies in the post-war world were intended to address these staggering levels of debt. Like other nations, Japan's economy underwent extreme restructuring at the behest of the occupying United States (Bisson, 1954: 1).

A capital levy was but one part of this post-war reform. Simple economic improvement was not, however, the primary justification for the levy itself. Imperial Japan was a stratified society with massive wealth inequality and an ingrained aristocracy (Shavell, 1948b: 131; Bisson, 1954: 11–13). This old guard stood in the way of the American occupiers who sought to rebuild Japan into a peaceful and democratic partner in the Far East (Shavell, 1948b: 131). To accomplish this, the occupiers made it their primary objective to distribute the concentrated Japanese wealth widely among the population (Shavell, 1948a: 127). The primary design of Japan's capital levy was, therefore, not primarily a means to pay for government expenses (though this was an element) but, rather, a targeted attack on the richest and most powerful of Japanese society (Shavell, 1948b: 130).

The *Zaibatsu*, literally 'financial clique', was the chief target of the occupation administration (Bisson, 1954: 1). The clique was an interrelated cartel of family businesses that represented just the top 3 per cent of Japanese society but controlled the majority of commercial and

financial interests (Shavell, 1948a: 127). Made up primarily of four large organisations, the *Zaibatsu* exerted almost plutocratic power over Japan and were occasionally even delegated some government functions, such as tax collection and currency distribution (Bisson, 1954: 7). For example, the Mitsui corporation, one of the largest of the *Zaibatsu* organisations, employed nearly 3 million people within Japan and East Asia in 1945 (Bisson, 1954: 11). Naturally, this kind of power led to extreme concentrations of personal wealth among the families that controlled them. Nineteen families in 1930 had yearly incomes of at least 1 million yen compared to the 84 per cent of the population who made less than 800 yen per annum (Bisson, 1954: 19). Only the Imperial Household itself had personal wealth comparable to these families.

Even after the war, this distribution of economic resources had not changed, and indeed had worsened. By the time the valuation of leviable assets was completed, only 269 households had sufficient assets to be placed within the levy's top two tax brackets, with combined taxable assets (6.9 billion yen) well above that of the 58,000 households in the lowest taxable bracket (Shavell, 1948b: table 5). The interrelated nature of this clique, representing the executives of practically every major company in the country, drew the attention of the American occupiers, who demanded its dissolution. Indeed, the firms were one of the main drivers of the overall Japanese economy. For example, in 1944 just four *Zaibatsu* banks lent out 6.7 billion yen or 74.9 per cent of all private money lending (Yamamura, 1964: 540–41). Changing this system would be necessary if the Allies were to successfully rebuild Japan as a democratic nation.

To that end, the levy attacked only those with the highest levels of personal wealth in Japan. This strategy meant that the *Zaibatsu* would end up paying most of the levy. Real and intangible property starting at a value of 100,000 yen was subject to a graduated one-time tax. This increased from 10 per cent of the first 15,000 yen above the 100,000-yen exemption to a full 90 per cent of assets worth over 15 million yen (Shavell, 1948a: 132). For perspective, the average monthly household income in 1956, well after economic recovery began, was between 5,000 and 6,000 yen (Yamamura, 1965: fn. 21). Household furnishings, clothing and other necessities were exempted from the levy, meaning that only genuinely wealthy landowners ended up contributing to the overall levy. Indeed, over half the total levy was eventually collected from the value of real estate. Critically, however, the final levy specifically excluded taxation of corporate assets on the grounds that this would

result in unfair double taxation of those already subject to some of the highest levels of the levy (Shavell, 1948a: 132). Despite their exemption, the old corporate structures were faced with significant regulation by the occupation administration, which intended to break the power of the companies themselves (Bisson, 1954: 120–21).

The greatest problem faced by the levy was from post-war inflation of the yen, which occurred while the government was still attempting to establish the total property value to be taxed (Shavell, 1948b: 132). Between the surrender in August 1945 and May 1946, the average cost of living rose 850 per cent (Kurihara, 1946). Inflation was not truly brought under control until 1949, by which time prices in Tokyo were over 200 times their 1934 level (Bisson, 1954: 94). The government originally intended that the levy be imposed in mid-1946. However, despite the massive inflation in prices, it was not until December of that year that collection actually began. In total, more than a year was allowed to pass between the time that taxable assets were valued and the time of actual collection. This delay resulted in a significant loss to the potential amount of revenue that could have been collected (Shavell, 1948b: 132). However, the levy was recognised as having an overall deflationary effect on the Japanese economy (Shavell, 1948b: 133; Kurihara, 1946: 851–52), thus slowing inflation.

The levy was an overall success, as shown by the absence of significant attempts to dodge the tax, the total amount generated and the reshaping of the economic system. Those subject to the levy voluntarily declared 39 billion yen in total liability by the original deadline (Shavell, 1948b: 133). The finance ministry attributed the success of this portion of the levy to one particular method of enforcement: the government retained the option to mandate the sale of any piece of land at the value originally assessed if it determined that that valuation was inadequate (Shavell, 1948b: 132). The final amount raised was roughly equal to the target yield of 43.5 billion yen, or 120 per cent of total tax revenues for 1946–1947, and 9 per cent of Japan's total private national wealth in March 1946 (Shavell, 1948b: 131). The *Zaibatsu* continued to exist and shared in the overall economic recovery, but the concentration of wealth in only a few companies was largely replaced with a much more open and competitive economy (Rotwein, 1964: 263; Yamamura, 1964: 552–53). The top family members saw their personal wealth greatly reduced and were largely excluded from the operational control of their companies (Bisson, 1954: 202). Indeed, some families saw their personal assets decrease by as much as 95 per cent (Bisson, 1954: 93). Most importantly, the control

structure of the firms changed dramatically, with many shareholders controlling small portions of the firms where once one family might control an entire industry (Bisson, 1954: 201; Rotwein, 1964: 266).

Funding Land Reform and Industrialisation: A Capital Levy in South Korea

Where most taxes on wealth are intended to raise money for debt relief or extraordinary spending, the South Korean Land Reform Bill of 1950 sought to change property ownership in Korea from its historical, semi-feudal, tenant economy to a more egalitarian system (Morrow & Sherper, 1970: 25). At the end of the war, some 70 per cent of all farmers in South Korea were tenant farmers paying more than half of their overall crop to aristocratic landlords (Pak, 1956: 2). The American occupiers and newly installed government, like their counterparts in Japan and Europe, feared the growing threat of the Soviet Union and its influence on the working classes. Ending widespread tenant farming was believed to be necessary to curb class conflict. By pursuing an aggressive policy of land redistribution, the US-allied South Korean government sought to retain the support of the tenant class (Morrow & Sherper, 1970: 25). The new Korean Constitution thus mandated land reform to improve the condition of the farmers and increase overall agricultural productivity (Pak, 1956: 2).

In addition to the overall political aims, the programme sought to benefit both the agricultural and industrial economies by the transfer of and compensation for land (Pak, 1956: 2). A farmer who merely rented the land, it was argued, had little incentive to invest his savings in its improvement. More productive land would likely only be met with increased rent. Ideally, by giving the tenant direct ownership, clear incentives for land improvement would be created, resulting in an overall increase in agricultural output. By compensating former landlords for the loss of their land, the Korean government hoped that the new capital would be invested in the industrial sphere (Pak, 1956: 26). In this way, the level of agriculture would be maintained while emerging Korean industry would be funded.

The Final Bill was passed in March 1950 and contained three main features. First, owners of agricultural land were required to cultivate the land themselves. Secondly, the maximum amount of land a single person could own was set at just under 3 hectares. Thirdly, tenancy and the renting of agricultural land were permanently prohibited. The land

reform itself was relatively simple. After completing a nationwide survey of agricultural land in June 1949, land was purchased from the landlords with redeemable bonds and sold back to the cultivating tenants for payments in kind, usually unprocessed rice (Jeon & Kim, 2000: 3). The 'survey' was completed in less than a year as the size and value of most pieces of land were taken from the records of the Japanese colonial government. The final price of the land was determined by averaging annual crop yields, discounted by 40 per cent to account for decreases in productivity since the Japanese occupation (Morrow & Sherper, 1970: 28).

Those chosen to receive land under the programme were selected by a priority list (Shin, 1976: 9). The first to receive land were those who had actually been cultivating it at the time the law was enacted. They were followed by freeholders of small land plots and citizens with agricultural experience. In practice, most of the land ended up simply being given to those who were currently working it. In just the first two years, a total of 331,766 hectares of farmland was redistributed to 918,548 households (Morrow & Sherper, 1970: 30). Redistribution of the land was completed by the 1960s with most compensation for landlords being completed by 1962 (Jeon & Kim, 2000: 3). The final bond payment took place in 1969, about twenty years after the land reform process began (Morrow & Sherper, 1970: 30).

Perhaps the largest difference between the Korean experience and other countries was the immediate influence of the Cold War. The nationwide survey of landholdings for redistribution began in mid-1949, with the official budget being passed on 27 April 1950 (Morrow & Sherper, 1970: 27). Less than two months later, the Korean War began. However, while the loss of the capital city of Seoul forced a postponement of the programme until its recapture in September 1950, the programme was implemented during the conflict and likely had a major effect on the outcome. Buyers of the redistributed land were required to pay the government back in kind, rice being the primary staple of Korean military provisions (Morrow & Sherper, 1970: 28). Repayment from the new landowners amounted to 1,158,780 metric tons of rice by 1952, a time when the new Korean government was fighting for its survival (Morrow & Sherper, 1970: 29). The land reform programme was thus an immediate success in terms of its political objectives. Land redistribution resulted in a total of 577,000 hectares, or one-third of all Korean arable land, being taken from landlords and sold to the tenants (Morrow & Sherper, 1970: 30). The number of

freeholding farmers increased to 1,812,000 in 1950 from 349,000 in 1949 (Jeon & Kim, 2000: 3), with farm tenancy becoming virtually non-existent.

The Comparative Advantage of Capital Levies over Annual Wealth Taxes

For most of the twentieth century, the central goal of the wealth tax in Europe was to repay state debts (most commonly war debts), alternatively to address either economic inequality more broadly or a specific economic, political or social crisis, such as the needs of displaced war refugees and those who lost their property due to war – the *war-damaged*. In Asia, wealth taxes in Japan and Korea served quite different purposes, although they were also imposed in conflict or post-war contexts. In the case of Japan, the decision to impose a high capital levy on the *Zaibatsu* was justified both on economic grounds and, perhaps more significantly, as a means of securing democracy. In Korea and Taiwan, the land-to-the-tiller land reforms of the 1950s served to redistribute wealth (granting opportunities to tenant farmers to own land) and to direct capital investment into industrialisation. Despite these diverse histories, capital levies have shared a common set of goals – debt relief, sharing the burden of significant economic and social crises, constraining inequality and securing democracy.

Annual wealth taxes seem, by comparison, to be mostly geared towards raising revenue and reducing inequality. Implicit is an assumption that the expenditure of this revenue will be for the benefit of the less fortunate through the funding of social welfare programmes. While this general assumption may have justified annual wealth taxes in European social democracies, the diffuse nature of the benefit has meant that unless left-leaning political parties were in power and defended the programme, governments found it relatively easy to abandon annual wealth taxes, especially if the revenue stream was rather modest.

An alternative approach, more common in the case of capital levies, was to tie the income stream to specific expenditures or spending goals. Thus, the Finnish capital levy was directly tied to compensation for refugees, while the German *Lastenausgleich* both provided aid to the war-damaged and created a significant fund for reconstruction, particularly for housing. Thus, when considering the objectives of wealth taxes, it is important to distinguish between the different revenue goals as well as plans for the expenditure of the revenue raised by the tax.

While justification for many of the capital levies imposed in the early twentieth century was to address public debt, the imposition of annual wealth taxes was often justified in terms of constraining inequality and raising revenue. Significantly, however, the comparative history demonstrates that annual net wealth taxes do not manage to collect large amounts of revenue as compared, by percentage, to other taxes collected in the jurisdictions studied. Furthermore, annual wealth taxes do not seem to have any significant impact on the distribution of wealth (Wijtvliet, 2014), although if continued over decades, there is some evidence that the degree of inequality may be moderated. In comparison, the imposition of capital levies does seem to have addressed some of the articulated goals justifying the use of wealth taxes as opposed to other fiscal mechanisms.

To secure their goals, the legal frameworks for different wealth tax programmes address a similar range of administrative and legal issues. Among the most ubiquitous issues facing the implementation of wealth taxes are defining the tax base, the valuation of wealth and the relationship to other forms of taxation. There are also concerns about the cost of administration and the likelihood of evasion or tax avoidance. Finally, there is a question, especially in the case of capital levies, whether the revenue should be earmarked for specific purposes or simply be used to pay down the public debt. By exploring the comparative historical experience, we can identify the issues and modalities that need to be considered in constructing and adopting a proposed transformational tax for South Africa.

A Transformational Tax for South Africa?

Instead of focusing on an annual net wealth tax – which has been shown internationally not to produce much income, or reduce inequality, and possibly increases capital flight and tax avoidance – this proposal is to adopt a one-off post-apartheid capital levy or transformational tax to address the continuing legacies of colonialism and apartheid. Furthermore, when considering the adoption of a transformational tax in South Africa today, we need to be very clear about both its purpose and normative basis. There are four main justifications for adopting a transformational tax or capital levy in South Africa. First, there is agreement that South Africa remains a highly unequal society, particularly when it comes to wealth. While the top 10 per cent of earners may now include 40 per cent black Africans and 48 per cent whites (using the

standard South African government categories), when it comes to wealth, the distribution is even more skewed, with the richest 4 per cent earning over R750,000 per annum in 2014 and the top 1 per cent controlling 95 per cent of personal financial assets (Makgetla, 2018). Second, despite the Truth and Reconciliation Commission concluding that apartheid was a crime against humanity, the question of reparations for that crime has never been addressed. Third, the notion that the market for land, and hence market value, is neutral belies the fact that since at least 1913, this market was reserved for less than a fifth of the population. While the Constitution of the Republic of South Africa, 1996 (Constitution) provides for land restitution for those who were dispossessed, it is the constitutional duty to engage in land redistribution that must address this broader process of economic exclusion from the land. Finally, since 'a tax is always more than just a tax: it is also a way of defining norms and categories and imposing a legal framework on economic activity' (Piketty, 2014: 520), the effect of a significant surcharge on income (which would result from the imposition of the tax on wealth, since payment of the tax will come primarily from income), should produce a change in lifestyle choices that will reduce the conspicuous consumption that only highlights inequalities in the society.

With these explicit premises, it is now possible to imagine a one-off transformational tax to build a legitimate post-apartheid economic foundation, one that addresses two significant questions: who should be compensated, and who should pay? While there has been increasing discussion of the need for a new social compact, there is unlikely to be willing agreement on the imposition of a wealth tax. Instead, we need to understand the imposition of a transformational tax three decades after the dawn of democracy as a 'democratically imposed social compact' designed to address the specific legacies of apartheid that are undermining the very legitimacy of the constitutional breakthroughs of 1994 and 1996. While overall inequality in access to income, education, employment and other social criteria need to be continually addressed using the regular budget, it is the failure to advance both land redistribution and urban reconstruction that this proposal targets. With the poorest South Africans still locked in the former 'bantustans' and the provision of Reconstruction and Development Programme housing seen to be exacerbating geographic apartheid in our towns and cities, there is a clear need for a dedicated process to fund and address these sources of inequality. Especially in urban areas, the need for investment in infrastructure must be tied to overcoming the legacies of geographic apartheid

and the lack of affordable housing that continues to shape, undermine and erode the sustainability of our system of democratic and constitutional governance.

While the informal ANC proposal of 1991 for a wealth tax on existing landowners to cover compensation for land expropriation for the purposes of land redistribution is too constrained to serve present conditions, existing levels of inequality mean that the tax would still fall primarily on the beneficiaries of apartheid. Even if there is now a small group of black South Africans whose wealth would reach beyond the proposed threshold for the tax, adopting a strictly racially based tax would be inconsistent with the country's constitutional vision. Given the very small number of black South Africans who have actually accumulated significant wealth and the growing concern that entrenched and increasing inequality will undermine the democratic and constitutional project, it seems only just that a transformational tax should be based solely on a criterion of net wealth. Given both the need to address the legacies of apartheid and to create a more equitable and sustainable society, it does seem possible that we might today, in the aftermath of the great recession, state capture, COVID-19 and the attempted 2021 insurrection, achieve greater agreement or at least acceptance of the need for a transformational tax.

Imagining a Transformational Tax

How may we use the comparative experience with wealth taxes over the last century to best design a transformational tax for South Africa that addresses both the problem of inequality and the concerns of those who, like the Davis Tax Committee, argue that wealth taxes are not really effective? Comparing the historical experience of annual net wealth taxes with those situations in which significant capital levies were imposed demonstrates that one-off capital levies are significantly more effective in raising revenue, breaking concentrations of wealth and promoting democratic goals. There is, however, an important caveat, and that is the fact that significant capital levies have only been imposed in circumstances in which the political opposition to such an intervention is cowed either by the extent of the crisis or by a foreign force, such as the occupation powers in Japan and West Germany, which were in support of the tax. Lacking such circumstances, the only means of securing a significant capital levy, even if there is real democratic support, will be for the wealthy to accept that solidarity in the face of social and economic

catastrophe will be the best means of maintaining a social compact that will secure their futures as well as those of the community more broadly. COVID-19 and climate change, as well as the continuing challenge to the legitimacy of the post-apartheid constitutional and economic order, like the collapse of the Iceland economy in 2010 (Philip et al., 2011), may provide just such a circumstance.

If this is the case, what are the modalities of a transformational tax that will ensure an effective capital levy that can be used for the reconstruction of the physical and social infrastructure and economy that will address the legacies of apartheid? From a review of the historical comparative cases, there seem to be six crucial design elements. First, any transformational tax will need to define the tax base to include all forms of wealth measured globally in the same way the present US tax system includes all individual income from whatever source. Secondly, while a transformational tax should set a high exclusion amount, for example, over R5 or R10 million, it should not create categorical exclusions as to forms of wealth.

Thirdly, when it comes to valuation, the great benefit of the one-off capital levy is that there is no need to conduct continuing processes of evaluation since the law can designate a date – for example, 27 April 2019, the twenty-fifth anniversary of the 1994 election or any date prior to the adoption of the tax – and use the market value as of that date. To ensure honesty and prevent the hiding of wealth, there are two interesting legal mechanisms derived from past experiences. One is that any property not declared would be forfeited to the state if discovered. The other is that if the owner of property declares a value that is later discovered to be significantly below market value, the state would be free to either purchase the property at the declared value or place the property on the market at the declared value.

The tax should be imposed on a sliding scale on all wealth as recorded on the date selected. The record of wealth may be based on submissions from the taxpayer (a tax form that offers the opportunity to record all assets as of the relevant date) and checked against the existing government and private data, including property values contained in local government rates records, banking information on mortgages and accounts, insurance company records and prior tax returns. Since this data is already in the system, there is little room for either capital flight or the hiding of assets. The tax would apply to both family wealth and legal entities, thus avoiding the difficulty of capital being distributed through various legal entities such as trusts, shares or other forms of capital

holdings. The potential resources from such a tax will not be insignificant since, for example, in 2015 the Annual Financial Statistics reported by Statistical Services South Africa indicated that total company assets in the formal sector amounted to R8 trillion with a GDP of R4 trillion per annum.

Fourthly, to ensure the two central goals of a transformational tax, a significant revenue stream and the liberating of democratic politics from gross inequality and the influence of wealth, the tax rate will also need to be high. In the case of the German *Lastenausgleich*, it was set at 50 per cent, while in Japan, the rate was set in relation to overall wealth and reached as high as 90 per cent for the top bracket. In Finland, where the tax was indeed an act of solidarity, it was set at 40 per cent. Under present conditions of extreme inequality, it seems that a graduated scale would be most effective since the top 1 per cent now holds extreme amounts of wealth and economic power.

Fifthly, another benefit of the one-off capital levy over the annual net-wealth tax is that there is little opportunity for either tax avoidance or evasion. Capital flight is less likely in a situation in which the amount owed has already been defined, and the only question is how it will be collected. Some economists have argued that the threat of repeated 'one-off' capital levies will mean that there is a decline in savings and thus a threat to future economic prosperity; however, there is little evidence of this in the historical record.

Finally, any design of a transformational tax will need to consider whether the revenue generated will simply flow into government coffers or whether it will be effectively earmarked for specific needs. As already indicated, among the continuing legacies of apartheid the obvious target for spending these funds will be, on the one hand, to promote agrarian reform and, on the other, to address urban reconstruction to transform the geographic and social order of our cities and towns. Exactly how these resources will be allocated and whether they should be used as no-interest loans or grants are choices to be considered. While treasury departments across the globe argue that earmarking limits government expenditure choices and is thus to some degree undemocratic, it is important to consider two aspects of this debate. On the one hand, a transformational tax will not be the only source of government funding since it will not replace regular forms of taxation that need to be progressive to prevent a recurrence of the gross inequalities the tax is designed, in part, to address. To this extent, regular government expenditures will remain subject to regular democratic and constitutional

procedures. On the other hand, the legitimacy of a transformational tax and the renewed social compact it seeks to establish is that expenditures will address the social and economic conditions that justified the imposition of the tax in the first place.

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12

Redistribution of What?

Beyond Land in the Moral Politics of Distribution

JAMES FERGUSON

Introduction

My knowledge of the debates on two of the core themes addressed in this volume – the issue of 'expropriation without compensation' and that of the transformative potential of constitutional law in South Africa – is limited.[1] Instead of engaging directly with these concerns, this chapter focuses on the third theme: redistributive justice in contemporary South Africa. It is written as a think piece that is aimed at extending the discussion beyond the issue of land per se. It does so by raising some general issues regarding the nature of distributive justice and distributive politics and probing how they can best be advanced in a society that has not been primarily agrarian for many decades. While my focus is on how to reimagine redistributive justice in terms of what I describe as 'the rightful share', I also consider that the perspective on distribution I offer here can usefully inform our understanding of land justice and the question of compensation for privately owned land that is targeted for land reform purposes. At the same time, I recognise that what I describe as the moral politics associated with the 'land question' in South Africa can, in turn, invigorate campaigns for 'the rightful share', such as that around a basic income grant.

In the first section, I point out some of the limitations of taking land as a kind of general paradigm for issues of justice and redistribution, noting (as others have done before me) some of the specific features of the land question that make it a misleading analogy or model for the larger distributive challenges that South Africa faces today (on this, see also Walker, Chapter 9, this volume). In the second section, I go beyond this

[1] With apologies to Amartya Sen; see his lecture entitled 'Equality of What?' (Sen, 1979).

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fairly familiar critique to identify some points of commonality between recent land politics and other distributive struggles in the region that have targeted income rather than land. Notable here is the campaign for a basic income grant (BIG). While I am most familiar with developments around this in Namibia, I recognise the significance of the BIG campaign in South Africa, which gained significant traction in 2023 (Ndenze, 2023). In concluding, I suggest that while the long and unfinished struggle over land redistribution offers only a very flawed paradigm for distribution in general, broader distributive struggles may yet be able to learn from the powerful moral politics surrounding 'the land question'.

Land as 'the Nation's Wealth': An Anachronistic Model of Distribution

Viewed from the larger perspective of distributional politics that I have been working with for some years now (Ferguson, 2015; Ferguson & Li, 2018; see also Loher et al., 2016), the heavily land-focused debate on 'redistribution' in South Africa often seems to cloud rather than clarify the key questions that an effective distributive politics in the region needs to confront. The most visible way that this happens is when land (and especially agricultural land) is taken as a kind of fundamental or paradigmatic image of the nation's wealth – offering a 'master narrative of loss and restoration' (Walker, 2008: 27) which becomes the principal interpretive frame for distributive politics. The ambition and reach of such thinking are in some ways admirable in that they boldly imagine a 'putting right' of a centuries-long history of injustices that have culminated in a grotesque maldistribution of land, which can be seen as one of the root causes of poverty and inequality today. But the conception of the relationship between land and the nation's wealth on which such formulations are based is over-simplified and out of date. Increasingly, it obscures more than it reveals. If we are not able to develop richer and more imaginative conceptions of what societal wealth is and where it comes from, we will continue to struggle – not only with the politics of land reform but also with the broader politics of distribution, of which land constitutes only a small and, as I and others have argued, not particularly representative part.

The evocation of a nation's wealth that can be claimed as a kind of common possession has always been politically attractive, for understandable reasons, and agricultural land and mining have long been the most convenient exemplars for such a politics in southern Africa.

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However, under contemporary conditions, a more convincing and non-anachronistic picture of a truly common wealth requires not the resuscitation of nineteenth-century pictures of the economy but, rather, a radically expanded conception of the social basis of both the ownership and the production of that national wealth. Such a conceptual shift would allow us to recognise that the sort of distributive politics that is most urgently needed today is less a matter of an epochal act of seizure involving a lump of valuable stuff ('land' or 'gold') and more a continuous and 'always-already political' process that involves the distribution of the whole social product. One useful lineage of ideas for informing such a conceptual shift can be traced back to the work of the Russian anarchist and communist Peter Kropotkin (1842–1921), as I will further discuss briefly.

But, one may ask, what is wrong with the use of land as a conceptual paradigm for thinking about the politics of distribution in South Africa? Is it not really the perfect symbol of the nation's wealth and its historic and continuing maldistribution? It is a powerful symbol, to be sure. But the economic realities of the present matter too – and here we have to remember that South Africa is no longer the predominantly agrarian country that it was in the nineteenth and early twentieth centuries. Today agriculture makes up only a small proportion of the national product, considerably smaller than the contribution of industry and the service sector. In 2021, according to the Statista website, agriculture 'contributed around 2.47 per cent to the gross domestic product (GDP) of South Africa, whereas industry and services had contributed 24.5 and 63.02 per cent of the total value added, respectively' (Statista, 2023). As Beinart notes in Chapter 8 (this volume), the total value of agriculture within the economy is larger than the GDP figures convey on their own, once forward and backward linkages and the size of the agricultural labour force are taken into account. Nevertheless, agriculture is still dwarfed by the service sector, while over two-thirds of the population (68 per cent in 2021, according to World Bank, 2018) is urbanised. Thus, a commitment to redistributive justice must start with the stark reality that even the most far-reaching programme for confiscating and redistributing farmland would leave the overwhelming bulk of the national economy untouched. The objection to such a programme should, therefore, not be that it is too radical. Rather, the objection should be that it is not nearly radical enough!

However, as I suggested at the start of this chapter, the emphasis on wealth as land is really a symptom of a larger problem – a problem in the

first instance of the imagination. How do we imagine the way that wealth is created and distributed? The picture or image of wealth that we hold in our heads necessarily shapes how we imagine any move to 'redistribute' it. One way of picturing the national wealth of a country like South Africa is to think of the whole of society as, in some fundamental way, like a very big agricultural estate. No doubt, this metaphoric picture captures something important, especially by foregrounding the question of who owns the estate and how they came to own it. It is thus a picture that has clear implications for understanding and addressing the contemporary maldistribution of 'the nation's wealth'.

But what plan of action for a fair(er) distribution of the nation's wealth does this picture suggest? If the current distribution of this wealth is not only unequal but also, given the history of how it was acquired, unjust, what is to be done about it? And here the understanding of societal wealth as essentially lying in land offers a ready solution to its unequal and unjust distribution: confiscate the big estates, divide the land into small pieces and hand out these pieces to the landless and/or those historically denied access to land. Agricultural experts and economists may argue about the wisdom of such reform, but it is fairly easy to visualise how such a rearrangement of land holdings might look and also to imagine how at least some poor and historically oppressed people might benefit from it. Indeed, it seems likely that the ease with which such 'redistribution' can be imagined surely helps to explain its persistent appeal.

The image of land as the quintessential expression of national wealth that the dispossessed might simply 'take back' shares key features with another persistent object of redistributive fantasy, that of mineral wealth. In both cases, we have a picture of societal wealth as a tangible 'thing' (commercial farms or gold and other mines) which can be physically seized and then redistributed to the state and/or those considered to be deserving (such as mine workers or 'local communities'). But modern economic productivity does not correspond with this understanding of wealth as constituted by physical resources; contemporary wealth certainly does not take this simple form in South Africa. Today, as already indicated, service industries enjoy an increasing share of the economy (both when measured by GDP and, even more overwhelmingly, when measured by employment numbers). Can this economy still be conceptualised primarily in terms of chunks of wealth that can be physically seized and cut into pieces? Can it be nationalised? What exactly is being produced anyway, and how do we reckon its value? Once one has

accepted this perspective, the primary question becomes not 'How do we redistribute an agrarian economy of farms or even an industrial one of mines?' but, rather, 'How do we ensure that the members of society receive their rightful share of the national wealth in a predominantly service-based economy, one that in South Africa is mostly urban, increasingly informal and characterised by exceptionally high levels of unemployment?' What, in short, does redistribution look like in a service economy?

I have said that we need different ways of imagining what wealth is (or maybe many different ways) and also where it comes from. But we also need new ways of imagining what redistributive justice means in a world where fewer and fewer people are able to subsist by working the land or by selling their labour for wages. The old agrarian social reformers dreamed of fixing mass poverty via land reform – 'Give them all land!' Later, industrial modernisers (both on the left and on the right) demanded 'Jobs for all'. At the same time, while it may be the case that these dreams and demands have become anachronistic, the hunger for a much more equitable distribution of wealth and opportunities that they reflect has not. If the modern service economy of South Africa cannot deliver land, or, as is becoming increasingly apparent, formal jobs for all the region's poor and dispossessed, that cannot mean that these people are owed nothing. It only means that we must reconceptualise what it would mean for them to receive what I have called their rightful share – rightful because this share is a consequence not of charity or welfarism but of how wealth is a social creation.

It is here that new ways of thinking about direct and universal income distribution could help us see our way to a very different approach to distributive justice than the one that comes so readily to mind when we habitually think of societal wealth in terms of the model of land.

Beyond Land: A Moral Politics of Distribution on the Societal Level

I have elsewhere explored in more depth alternative images of national or societal wealth that are very different from the land-centred images that feature so prominently in the South African distributive imagination (see Ferguson, 2015). In the current conjuncture, one of these alternatives involves recognition of those who are partly or wholly excluded from the world of productive labour but who nonetheless could make strong distributive claims by styling themselves as members of a collectivity that

is obliged to grant them recognition as also rightful or ultimate 'owners' of the nation's wealth.

Marxism, with its labour theory of value and its fundamental understanding of the oppressed as workers, has always struggled with the politics of the non-worker, the so-called 'lumpen' masses excluded from the putatively revolutionary class of wage labourers. But progressive intellectuals are heir to a rich set of alternative Left traditions that have more to offer those excluded from having a role in today's production system. The anarcho-communist Peter Kropotkin, for instance, always insisted on starting with universal claims of distribution and advocated a notion of distributive justice that is ultimately rooted in societal membership and not just labour. In his 1898 essay on 'Anarchism: Its Philosophy and Ideal', he laid out an alternative 'conception of society ... in which there is no longer room for those dominating minorities':

> A society entering into possession of the social capital accumulated by the labor of preceding generations, organizing itself so as to make use of this capital in the interests of all, and constituting itself without reconstituting the power of the ruling minorities. It comprises in its midst an infinite variety of capacities, temperaments and individual energies: it excludes none. It even calls for struggles and contentions; because we know that periods of contests, so long as they were freely fought out, without the weight of constituted authority being thrown on the one side of the balance, were periods when human genius took its mightiest flight and achieved the greatest aims. Acknowledging, as a fact, the equal rights of all its members to the treasures accumulated in the past, it no longer recognizes a division between exploited and exploiters, governed and governors, dominated and dominators, and it seeks to establish a certain harmonious compatibility in its midst – not by subjecting all its members to an authority that is fictitiously supposed to represent society, not by trying to establish uniformity, but by urging all men to develop free initiative, free action, free association. (Kropotkin, 1898: 9–10)

Where does our vast societal wealth come from? Why are we so much more productive than our great-grandparents? We are not better people than they were. We certainly do not work harder. Instead, we (all members of society) are able to produce vast riches far beyond what our forebears could have dreamt of only thanks to a massive, worldwide industrial apparatus of production – an apparatus built up through generations of work, sacrifice and invention, across centuries and even millennia of human history, in a process that generated massive suffering for millions all across the globe. Here the case of mining in South Africa

and its historical dependence on the migrant labour system that was enforced throughout southern Africa (and rested in turn on the unpaid work of rural households and rural women in particular) is instructive. So once this history is acknowledged, to whom does the vast wealth-producing apparatus of the present era really belong? Surely not only to the corporations and the holders of stocks and shares who now (outrageously) claim to own this wealth outright, but also, and more compellingly so, to the descendants of all those who worked and imagined and suffered and bled to create it – in short, to all of us.

In this conception, the whole system of production must be regarded as a collective inheritance. And it was from this universal claim of common ownership that Kropotkin derived a universal distributive claim. This is that, surely, at least some portion of the entire output must be due to all who are heirs to this inheritance and hence the rightful owners of the collective apparatus of production. Everyone, that is, must receive a share. (Defining the quantum then becomes a matter of politics; what is critical is that the principle should first be accepted.)

Note that it is not the worker (as worker) whose claims are prioritised here. It is the members of society – collectively the inheritors of a great common estate in which each and every one of us has a rightful share. In this view, it is not just labour that is the foundation of that inheritance but also contributions like suffering, bloodshed, care, ingenuity and shared experience. It is thus the entire society that is the source of value. And it is all the members of that society, not only those currently employed as workers, who, as inheritors and co-owners of the whole, are entitled to a share of society's proceeds.

Such arguments, I have shown elsewhere (Ferguson, 2015), are not only of academic interest. Indeed, remarkably similar arguments have been put forward by advocates for Namibia's BIG Campaign, which has proposed that each and every Namibian should be entitled to a monthly cash payment precisely because they, as the nation's citizens, are the real owners of the country and its mineral wealth, and therefore ought 'to share in the country's wealth' (Ferguson, 2015: 179–83).[2] In these arguments, receipt of a modest monthly state payment is rendered as simply the receipt of a share that is properly due to an owner. The most basic citizenship right is thus understood not as the right to vote, but as the

[2] For more information, including on the positive impact of the BIG pilot project in Namibia in 2008/9, see the website of the BIG Coalition Namibia: www.bignam.org/ (accessed 24 April 2023)..

right 'to partake in the wealth of the nation'. Direct grants from the state, in this understanding, need not bring with them the shame or stigma of receiving charity or getting a 'handout'. In receiving a rightful share, Namibian citizens, in this conception, are simply 'partaking in the wealth' that rightly belongs to the whole nation. And in doing so, they (as rightful co-owners of that wealth) are not receiving a gift or being offered 'help' – they are claiming what is already rightfully their own, their 'rightful share'. Similar arguments are being advanced in South Africa, where advocacy around BIG stretches back into the late 1990s (Mahafu, 2022); these arguments have gathered momentum in the wake of the COVID-19 pandemic and, at the time of writing, are under consideration within the government.[3]

Note that the argument that is being made here is not about welfare support but about recognising the rightful share of the nation's wealth that belongs to all of society's members. Significantly, it is the whole economic system and not just 'the land' that is understood here as society's collective inheritance. Furthermore, wealth is not imagined as a fixed substance that might be 'taken' from those who currently have it and divided up among those who do not but as the product of a fast and ever-changing global apparatus of production that is rightfully the inheritance of us all. The universalism of this diagnosis fits well with the universalism of the recent thinking about social protection in the region in the BIG campaigns in both Namibia and South Africa. The assurance of a basic income may offer a particularly appealing way of thinking about how to distribute universalistically in what has become a predominantly service economy. As already noted, the mechanisms of how this could be funded and the level at which the amount should be set would need to be determined through the political process. Here one avenue to explore further could be the wealth tax proposed by Klug in Chapter 11 (this volume).

Conclusion

What I want to emphasise, by way of closing, is that, in their focus on sharing income rather than land, BIG activists are not giving up claims to

[3] In December 2021 a Panel of Experts put together by the International Labour Organization (ILO), the United Nations Sustainable Development Goals Fund and Department of Social Development (DSD) reported that 'an entry-level version of the BIS [basic income support] can be safely implemented using a mix of financing approaches' (see South African Government, 2021).

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a historic loss linked to colonial conquest or to the idea of a country that rightfully belongs to all. However, the fundamental redress they call for lies not in a share of the land, but in a share of everything – at least some portion of the whole social product must be shared. This shift in argument allows for a demand that is not, in economic terms, backwards-looking – 'Return the land to us, and we will return to farming!' – but is very much forward-looking and attuned to current economic realities: 'Give us reliable cash incomes and this will flexibly empower a huge range of viable rural and urban livelihoods!' The result is an expression of universalism (everyone is due a rightful share), but it is a universalism that holds onto the powerful moral image of a historic dispossession under colonialism and apartheid and of a people who lost their rightful ownership of their country. It thus does not in any way preclude the commitment to land reform laid out in section 25 (the property clause) of the 1996 Constitution of the Republic of South Africa, the promise, potential and pitfalls of which are reviewed in Parts I and II of this volume.

What needs to be explored in more depth than is possible here is how to connect the kind of powerful moral reasoning historically associated with land injustices and land reform to the broader societal discussions around what I have termed the moral politics of distribution. While seeking concrete and universalistic remedies via programmes of income distribution and monthly cash payments (as in the BIG campaign), these discussions can still draw on histories of colonialism and historical dispossession (including the role of mining and migrant labour in the development of the nation's wealth) to inform, legitimate and animate this campaign.

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