Beyond Expropriation Without Compensation

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

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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

https://doi.org/10.1017/9781009380829.004 Published online by Cambridge University Press

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',

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.

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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