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The 'Justice' in 'Just and Equitable' Compensation

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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.

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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