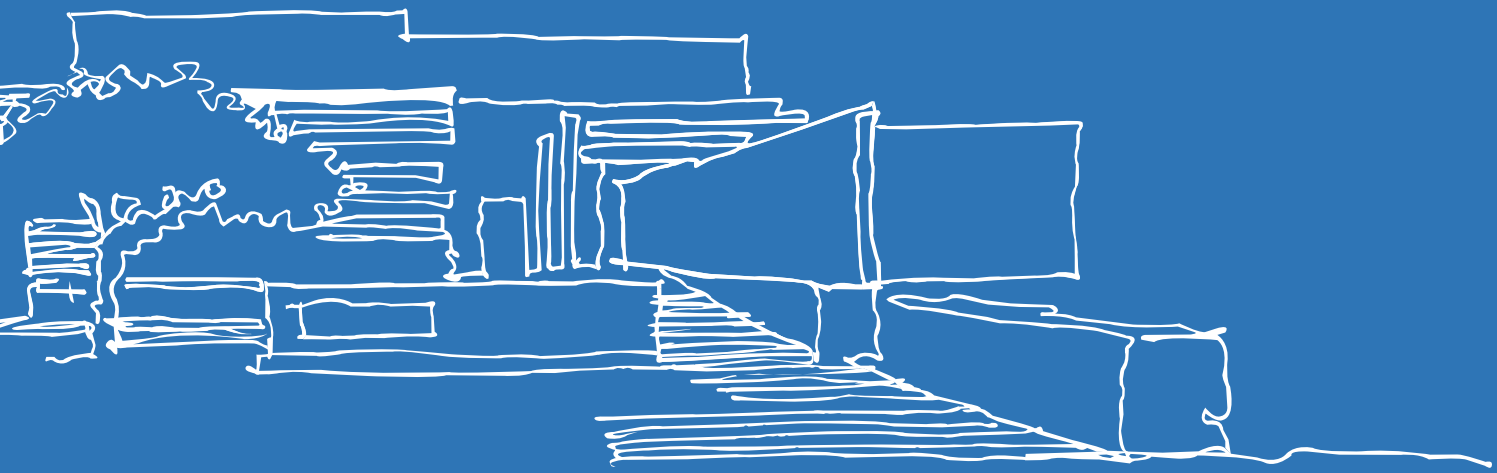
COMPENSATION THROUGH EXPROPRIATION WITHOUT COMPENSATION?

CONSTITUTIONAL AMENDMENT, LAND REFORM AND THE FUTURE OF REDISTRIBUTIVE JUSTICE IN SOUTH AFRICA

17-18 FEBRUARY 2022

PROGRAMME

A CREATIVE SPACE FOR THE MIND



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Science and Innovation
REPUBLIC OF SOUTH AFRICA

NRF National Research Foundation

stias
STELLENBOSCH INSTITUTE FOR ADVANCED STUDY
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INTRODUCTION

Against the backdrop of widespread perceptions that transformative constitutionalism in general and land reform in particular have fallen short of their promises to bring about redistributive justice in substantive and meaningful ways, South African public discourse has been dominated over the past few years by debates about the need to amend the property clause (section 25) of the Constitution to allow for expropriation of land without compensation. After the National Assembly adopted the motion in 2019 to amend the Constitution to explicitly allow for such expropriation, the "*Ad Hoc* Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution" engaged in the legislative process to effect these proposed changes. Given the magnitude of the task but also due to the outbreak of the Covid-19 pandemic, it took the *Ad Hoc* Committee substantially longer than initially anticipated to table its final report (on 8 September 2021) and officially introduce the Constitution 18th Amendment Bill to Parliament.

On 7 December 2021, the National Assembly finally rejected the Constitution 18th Amendment Bill, which did not come as a surprise given the disapproval of its wording among opposition parties. However, irrespective of this failed constitutional amendment, the new Expropriation Bill is still on the table, explicitly specifying circumstances in which "nil compensation" may be just and equitable. And in any case, the contestations over land justice and how to interpret and give force to Section 25 of the Constitution are not going to go away.

Taking these politically, morally and emotionally charged discussions as a starting point, this international conference aims at going beyond narrowly confined exchanges about the pros and cons of "expropriation without compensation" to engage larger debates about constitutional amendment, land reform and the future of redistributive justice in South Africa, in critical, constructive and creative ways. Bringing together leading experts in the fields of South African property law, land reform and redistributive justice in general, the event – taking place on 17-18 February 2022 at the Stellenbosch Institute for Advanced Study (STIAS) – is meant to be both a critically reflective and normatively oriented project. The aim is to take stock of the constitutional amendment (as it will stand at the time) and to use this as a springboard to think productively beyond conventional forms of land reform towards alternative futures of transformative redistribution as well.

In order to achieve this goal, the conference will proceed through three consecutive panels, each involving a confirmed expert in the respective field: on *South African property law* (Zsa-Zsa Boggenpoel, South African Research Chair in Property Law), on *land reform* (Cherryl Walker, South African Research Chair in the Sociology of Land, Environment and Sustainable Development), and on *redistributive justice* (James Ferguson, Stanford University).

The first panel on "*The rights and wrongs of South African property law*" will discuss the nature of property law, the possibilities to use section 25 in its 1996 form and in potentially amended versions for compensation substantially below market value or even nil compensation, the constitutionality of such provisions and the implications for national and international investments (also international property law obligations), food security and banking/the use of land as collateral. The subtext to this panel is that the constitutional amendment might not be the key issue in the failure of state-driven land reform and transformative redistribution, as much more far-reaching forms of transformation might already have been possible on the basis of the original section 25 and amendments to it are unlikely to make a significant difference; rather, political will and the capacity to implement the law as it stands, as well as to think in more creative ways about the possibilities for radical redistribution might be key challenges.

The second panel on "*Potentials and pitfalls of land reform in the shadow of constitutional change*" is intended to reflect on two closely intertwined issues: on the one hand, the direct and uneven impact, if any, that the constitutional amendment, additional bills (such as the new Expropriation Bill) and evolving jurisprudence might have for land reform in all its different forms and varieties and, on the other hand, those aspects and problems of land reform that may have been denied or pushed aside because the discussion of expropriation without compensation has so dominated public debate in recent years. Issues here include questions about redressing historical dispossession; the need for diversification of land holding and production; land reform and poverty reduction; land and gender inequality; the future of traditional institutions; managing different rural and urban demands, and commercial farming, employment and food security. What is also needed is thinking beyond well-rehearsed forms of land usage towards alternative values that land might embody in a context of climate change, along with jobless growth, water shortages and calls for a new energy dispensation.

The third panel "*Imagining alternative futures of redistributive justice in South Africa*" is intended to move beyond the narrow focus on the constitutional amendment and land reform proper, inviting us to conceive broader possibilities for radical transformation under, or possibly also beyond, the rule of law: for instance, how to reconcile productively the necessity for redressing past injustices with urgent societal needs for the future in the fields of public health, poverty reduction, housing, education, employment, economic growth, social security etc.? What are the most promising fields for effective transformational engagements in terms of costs and benefits? What is it that South Africa can and must afford to do, and in what order? How to ensure that all South Africans increasingly benefit from their rightful share in the nation's wealth? Are there possibly more efficient ways to expand the revenue for radical transformation substantially, for instance through a progressive transformation tax, rather than trying to reduce state expenditure piecemeal through expropriation without compensation? What kinds of justice are institutionalised through expropriation without compensation, or through spreading the costs progressively across South African society at large, or through yet other means, and which form(s) of redistributive justice will benefit South Africa in the best possible ways?

The outcome of this thought-provoking exchange will be published as promptly as possible in a high-quality, peer-reviewed, edited volume within the STIAS Series of AFRICAN SUN MEDIA, as both critical commentary on and an innovative policy input for the redistributive transformation that South Africa so urgently needs.

For all enquiries & communication, please contact Olaf Zenker (Martin Luther University Halle-Wittenberg & STIAS project leader): olaf.zenker@ethnologie.uni-halle.de

For further information on this STIAS project see: https://stias.ac.za/events/compensation-through-expropriation-without-compensation-constitutional-amendment-land-reform-and-the-future-of-redistributive-justice-in-south-africa/

COMPENSATION THROUGH EXPROPRIATION WITHOUT COMPENSATION?
CONSTITUTIONAL AMENDMENT, LAND REFORM AND THE FUTURE OF REDISTRIBUTIVE JUSTICE IN SOUTH AFRICA
17-18 FEBRUARY 2022
ORGANISERS: OLAF ZENKER & CHERRYL WALKER

PROGRAMME

THURSDAY 17 FEBRUARY 2022		
OPENING SESSION		**Chair: Christoff Pauw (STIAS)**
8.30 – 8.45	**Opening address**	Edward K. Kirumira (Director of STIAS)
8.45 – 9.00	**Introduction** Constitutional amendment, land reform and the future of redistributive justice in South Africa	Olaf Zenker (Martin Luther University Halle-Wittenberg, Germany)

PANEL 1:	**THE RIGHTS AND WRONGS OF SOUTH AFRICAN PROPERTY LAW**	**Chair: Cherryl Walker (Stellenbosch University)**
9.00 – 9.45	**Paper 1** Politics or principle? Making sense of the expropriation without compensation debate	Zsa-Zsa Boggenpoel (Stellenbosch University)
9.45 – 10.30	**Paper 2** What notion of "justice" informs "just and equitable" compensation?	Elmien (WJ) du Plessis (North-West University)
10.30 – 11.00	Coffee Break	
11.00 – 11.45	**Paper 3** Faster, socially just and people-centred land reform	Thuli Madonsela (Stellenbosch University)
11.45 – 12.30	**Paper 4** The legal and philosophical dichotomy between land and property: the rights and wrongs of South African property law	Bulelwa Mabasa (Werkmans Attorneys)
12.30 – 14.00	Lunch Break	
14.00 – 14.45	**Paper 5** The tale of two women: Transformative thrust embodied in the property clause - in theory only or a lived reality where land reform is concerned?	Juanita M Pienaar (Stellenbosch University)
14.45 – 15.30	**Panel Discussion**	Kick-started by Cherryl Walker (discussant)
15.30 – 16.00	Coffee Break	

PANEL 2:	**POTENTIALS AND PITFALLS OF LAND REFORM IN THE SHADOW OF CONSTITUTIONAL CHANGE**	**Chair: Zsa-Zsa Boggenpoel (Stellenbosch University)**
16.00 – 16.45	**Paper 1** Expropriation without compensation, land reform and justice in South Africa	Ruth Hall (PLAAS/University of the Western Cape)
16.45 – 17.30	**Paper 2** Gendered land reform challenges and opportunities in post-constitutional South Africa: lessons from vernacular law and IPILRA	Sindiso Mnisi Weeks (University of Massachusetts Boston, USA)
19.00	Conference Dinner	

FRIDAY 18 FEBRUARY 2022		
PANEL 2:	**POTENTIALS AND PITFALLS OF LAND REFORM IN THE SHADOW OF CONSTITUTIONAL CHANGE (CONTINUED)**	
9.00 – 9.45	**Paper 3** Perspectives of white commercial farmers on their role in the not-so-new South Africa	Michael Aliber (University of Fort Hare) & Paul Hebinck (Wageningen University, the Netherlands)
9.45 – 10.30	**Paper 4** "Setting our transformation sights too low": land reform, "expropriation without compensation" and the entrenchment of orthodoxy	Danie Brand (University of the Free State)
10.30 – 11.00	Coffee Break	
11.00 – 11.45	**Paper 5** Land reform and beyond in times of social-ecological change: perspectives from the Karoo	Cherryl Walker (Stellenbosch University)
11.45 – 12.30	**Panel Discussion**	Kick-started by Zsa-Zsa Boggenpoel (discussant)
12.30	Group photo	
12.45 – 14.00	Lunch Break	

PANEL 3:	**IMAGINING ALTERNATIVE FUTURES OF REDISTRIBUTIVE JUSTICE IN SOUTH AFRICA**	**Chair: Olaf Zenker (Martin Luther University Halle-Wittenberg, Germany)**
14.00 – 14.45	**Paper 1** Rethinking labour and black-owned SMMEs development in the just transitions	Khwezi Mabasa (Mapungubwe Institute for Strategic Reflection – MISTRA)
14.45 – 15.30	**Paper 2** A solidarity economy approach to land redistribution in South Africa	Mazibuko Jara (Pathways Institute)
15.30 – 16.00	Coffee Break	
16.00 – 16.45	**Paper 3** Climate breakdown and commoning the future through food sovereignty pathways	Vishwas Satgar (University of the Witwatersrand)
16.45 – 17.30	**Paper 4** Redistributive justice, transformative taxes and the legacies of apartheid	Heinz Klug (University of Wisconsin-Madison, USA)
17.30 – 18.00	Coffee Break	
18.00 – 18.45	**Paper 5** Redistribution of What? Beyond Land in the Moral Politics of Distribution	James Ferguson (Stanford University, USA)
18.45 – 20.00	**Panel & Closing Discussion**	Kick-started by Olaf Zenker (discussant)
20.00	Wine Reception & Finger Food at STIAS	

SUMMARY OF PRESENTATIONS

PANEL 1: THE RIGHTS AND WRONGS OF SOUTH AFRICAN PROPERTY LAW

1 Politics or principle? Making sense of the expropriation without compensation debate – Zsa-Zsa Boggenpoel (Stellenbosch University)

It has been argued that the idea behind zero (or nil) compensation for expropriation is essentially political. It is driven by a particular narrative that is fundamentally based on the assumption that providing no compensation for expropriation will pave the way for large scale, speedy and much-needed land reform in South Africa. It is certainly no secret that in the context of land redistribution, as a sub-programme of land reform in South Africa, expropriation has not effectively been used as a tool to ensure more equitable (re) distribution of land. A number of reasons can be advanced for this state of affairs. The policies and laws to ensure land redistribution are not always clear enough to sufficiently ensure reallocation of property rights in South Africa. Connected herewith are questions related to the beneficiaries of land redistribution and the type of rights that should be reordered in terms of the land redistribution programme. There is also in some respects lack of political will to ensure that expropriation is a serious option in order to effect land redistribution. Many have furthermore argued that compensation potentially stands in the way of expropriation for land redistribution purposes. The idea of zero compensation speaks directly to this argument. In this regard, one should arguably not underestimate the narrative behind the principle of zero compensation and the potential it has to unlock the hand of the state to ensure that land reform is sped up. While many of us have argued that it is not legally necessary to amend section 25 to achieve land reform in South Africa because of the numerous possibilities that lie locked up within a progressive interpretation of section 25, and on the assumption that the tools and mechanisms that are currently in place are actually used, it is becoming increasingly important (and inevitable) that we engage with the principle of zero compensation, as politically loaded as it may seem. We are now at a point where various concrete suggestions are on the table in terms of expropriation laws in the Expropriation Bill B23-2020 and in the Constitution Eighteenth Amendment Bill (as tabled in August 2021). The aim of this paper is therefore to foreground the politics behind the principle of zero compensation against the background of these recent developments. Why is zero compensation such an inevitable consequence in our specific (political) milieu, if it is argued that it is already legally possible to expropriate for very little compensation? Furthermore, is there a principled need for zero compensation or is this principle purely politically driven? I would like to argue that if we are to begin to make sense of the debates in expropriation at the moment, we are going to have to be honest about the politics behind the principle of zero compensation.

2 The impact of the section 25 amendment process on the understanding of "just and equitable" – Elmien du Plessis (North-West University)

During his trial, Steve Biko was interrogated about his ideas on the redistribution of the wealth. The question was how redistribution of wealth could take place without taking property from someone. Biko made it clear that it is possible to take property from someone, without abolishing the principle of private ownership. During this part of the case, Biko explained that the state can expropriate property which people historically have immorally got, with the Government paying what it thinks it is worth. Various texts preceding the writing of the Constitution and then, looking back at the writing of the Constitution, explains the human rights approach that was adopted for the redistribution of property. A human rights approach usually requires the state to take this responsibility. This means that, when property needs to be taken from one private individual to be transferred to a land reform beneficiary, the state steps in to expropriate the property – usually with compensation – and facilitate the transfer to the beneficiary. This paper will look at the underlying rationale, and the conceptions of justice, that informed the writing of the 1996 Constitution. It will then follow the process of the amendment of the Constitution, to ascertain if those underlying rationales or conceptions changed.

3 Faster, socially just and people-centred land reform – Thuli Madonsela (Stellenbosch University)

Slow progress in advancing equality in land distribution in South Africa, incorporating redress for colonial and apartheid land dispossession, has led to a pinning of hope on restitution without compensation. As a result, Parliament is currently seized with two law reform processes aimed at updating and regulating circumstances under which property, with emphasis on land, may be expropriated by the state without compensation. One of these is a constitutional amendment that seeks to amend section 25 of the Constitution to make it clear that expropriation without compensation is constitutionally permissible and to outline the parameters for such. The second process is a wholesale amendment of the Expropriation Act of 1975, to align its provisions with the Constitution while also regulating the possibility of expropriation without compensation. Will these changes disrupt the snail pace of land redistribution and related redistributive justice? This is unlikely. Firstly, no case has been made for the conclusion that expropriation with compensation is the reason for the slow pace. What has been documented extensively, is that corruption, fraud and collusion, in the valuation of earmarked land, have been key factors. Mpumalanga land redistribution is littered with cases pointing toward this malaise. There are also allegations that point to the prioritization of politicians or politically connected persons as key beneficiaries, with women and farm workers increasingly being left behind. There is currently no theory of change on the table that indicates how the speed of land redistribution will be improved by unlocking what and which persons or communities will benefit. Secondly, no data has been proffered indicating the amount of land that will be unlocked through this process and for whose benefit. Furthermore, both the new constitutional and legislative provisions and their subsequent implementation are likely to end up in court. It could take the whole decade, up to 2030, within which South Africa and the rest of the world must achieve Sustainable Development Goals (SDGs) for the first land redistribution case to be finalized and the redistribution process, unlocked. The SDGs include Goal 10 on achieving equality for which redistributive justice in respect of land is essential. This paper seeks to explore social compacting and social accountability as complementary transformative constitutionalism avenues that can be leveraged immediately to advance speedy land redistribution. The process would have to ensure that redistribution is anchored in fidelity to the constitutional commitment to advance social justice and the related equality duty in respect of all including women and

class-disadvantaged groups. The paper is ultimately about leveraging social compacting and social accountability for swifter and more socially just land reform through meaningful engagement of all groups and communities while maintaining fidelity to constitutional dictates on social justice.

4 The legal and philosophical dichotomy between land and property: the rights and wrongs of South African property law – Bulelwa Mabasa (Werkmans Attorneys)

Section 25 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") and its meaning and import have gripped the attention of academics, commentators, journalists, politicians, legal practitioners, the judiciary, civil society organisations and the broader members of society from various quarters, more so 25 years after the promulgation of the Constitution. To date, South Africa remains one of the world's most unequal societies. There remain divergent views across the societal spectrum, on whether or not the current wording of section 25, if implemented to its letter, is an adequate enabling tool that protects those with current interests in property from arbitrary deprivation on one hand, and the realisation of equitable access to land with legally recognisable and registrable access to land and property for the majority of South African citizens. An assessment of the adequacy of section 25 as a framework within which justice and equality may be delivered in South Africa, necessitates that closer attention is paid into the differences in the legal and conceptual definition of "property" on one hand, and the meaning and import of "land" and by extension "land reform". The protection of property from arbitrary deprivation and the obligation to deliver land reform, beg a couple of questions, which will be addressed later in this summary. It is noteworthy to point out that "property" and "land reform" are not synonymous with one another. Property denotes the underlying commercial and non-commercial arrangements amongst various persons and markets, carrying with it, mainly economic value and legal protection that may be realised and monetised. The South African property regime has developed and evolved through the lens of property law principles that seek to protect real and personal rights, which carry with them, a realm of understanding rooted firmly in Roman-Dutch and English law principles of property and property law. It is important to highlight that there is nothing intrinsically perverse about the South African property system, except for the glaring fact it is built on the exclusion of African value-based systems and how African communities interact and understand the meaning of land, property and livelihoods. It excludes an overwhelming majority of Africans whose interactions with land and property, functions on the periphery and/or completely outside of the South African formal legal structure. The lack of intersectionality between property and land reform in understanding, approach and implementation, without considerations of economy, bulk infrastructure, markets, the property system, legal protection and legal recognition will continue to pervade land reform objectives and perpetuate apartheid spatial planning and the unequal and imbalanced land ownership patterns along race and gender. The focus of this paper is not an interpretation of section 25 assessing whether or not the Constitution is an impediment in the delivery of land justice, rather, it is to delve deeper into the foundational values and principles that inform what is referred to as "property" in section 25 and how such notions persist in the perpetuation of the exclusion of the majority of South Africans, who are mainly Africans, in property rights and the property markets and systems. It is therefore critical to determine whether or not land reform objectives are achievable without seeking to unpack the wrongs and rights of property law and concepts in South Africa and to determine which of these wrongs ought to be addressed and by whom. The writer cautions that this discussion is not about eradicating property rights, but rather seeks to expand the definition of what constitutes "property" and to include within that definition, the reality of how the majority of South Africans interact with land, and how the latter can provide legal protection, recognition and ultimately enabling the majority to have a stake in the economic participation in the formal economy. The discussion is therefore about re-imagining tenure forms and models that will enjoy the same protection as the formal property markets enjoy, as opposed to perpetuating dualistic forms of tenure that provide lesser legal protection for the "informal" sector. It is also about focusing on policy implementation based on evidence-based notions about spatial integration and equitable access to land and property.

5 Transformative thrust embodied in the property clause: in theory only or a lived reality where land reform is concerned? – Juanita Pienaar (Stellenbosch University)

Post-apartheid, the constitutional dispensation has revived debate about the content of ownership. Although the property clause encapsulates the continued existence of the notion of private ownership, its provisions indicate clearly that arguments in favour of the absoluteness of ownership are no longer sustainable, if they ever were. The property clause sets out a framework that regulates the context and manner in which deprivation and expropriation of property can take place, thus indicating the continued relevance of private ownership, but within a new constitutional framework. Accordingly, the property clause explicitly requires reform of access to land, water and other natural resources, which indicates that a more socially responsible form of ownership is envisaged for the future. The constitutional vision for property emerges clearly: it employs property (and its protection) to work towards achieving a society founded on the values of freedom, dignity and equality. While the role and function of ownership is directed in accordance with the particular legal and constitutional systems in which it functions, in South Africa, the 'constitutional vision for property' is increasingly highlighted. This calls for a 'modest systemic status', thereby impacting on the centrality of the role of ownership. Although academics have underscored the potential of the property clause to transform property rights and inevitably, also society, my contribution is focused on to what extent, if at all, land reform mechanisms – policy, legislation and case law – have, in light of the property clause – contributed to either entrenching or ameliorating the centrality of ownership. Phrased differently: to what extent has land reform in South Africa overall given effect to the transformative thrust of the property clause? Is it possible that the transformative thrust, seemingly integral in land reform endeavours, has remained a concept in theory only and thus elusive, or has it become a lived reality for beneficiaries under the land reform programme? In this light I would like to canvas underlying ideas/theories in support of the transformative thrust of the property clause and explore which mechanisms, measures and tools specifically employ or embody such transformative thrust. As land reform is all-encompassing in that three interconnected sub-programmes operate nationally, the focus of my contribution is more specific, namely on measures regulating the relationship of land owners vis-à-vis occupiers for purposes of the Extension of Security of Tenure Act 62 of 1997, labour tenants for purposes of the Land Reform (Labour Tenants) Act 3 of 1996 and unlawful occupiers for purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, encompassing certain aspects of the redistribution and tenure reform programmes

respectively. These beneficiaries usually comprise vulnerable sectors of South African society, who in principle ought to benefit from the transformative thrust alluded to above. At an overarching level the contribution is inevitably also aimed at considering whether the property clause, in its 1996-version, has lived up to its potential as a transformative measure and whether the potential tools embodied therein had been employed effectively or instead, had been ignored, overlooked or neglected. In that light, final conclusions will be drawn regarding the content of the property clause and its role and function, given the calls being made for an amended property clause, 27 years into a democratic constitutional dispensation.

PANEL 2: POTENTIALS AND PITFALLS OF LAND REFORM IN THE SHADOW OF CONSTITUTIONAL CHANGE

1 Expropriation without compensation, land reform and justice in South Africa – Ruth Hall (PLAAS/University of the Western Cape)

The phrase "expropriation without compensation" has acquired prominence in South African debates about land reform, property right and constitutional amendment. Indeed, the SA Language Board declared the social media hashtag #ExpropriationWithoutCompensation the 2018 "word of the year". This growing centrality of EWC as a political signifier – a meme of sorts – can be traced from the EFF's entry into electoral politics in 2014, gathering pace in 2016 amid political divisions in the ruling party, at the ANC's elective conference in 2017, to the parliamentary vote to establish a Constitutional Review Committee in February 2018, through to an Ad Hoc Committee on Section 25 from February 2019 onwards, leading to the Constitution Eighteenth Amendment Bill as tabled in August/September 2021. In this paper, I set out an analysis of the diverse meanings ascribed to the term, evident in public discourse through these political processes, as well as their historical precursors. In doing so, I draw on parliamentary submissions, media articles, academic papers, and the substantial body of grey literature from policy and political processes, including the Presidential Advisory Panel on Land Reform and Agriculture. On the basis of this analysis, I identify three distinct logics for EWC, each associated with a specific political tradition. The paper discusses how and by whom these meanings of EWC have been advanced, and considers what its role might be in social and economic transformation, post-apartheid redress and redistribute justice.

2 Gendered land reform challenges and opportunities in post-constitutional South Africa: lessons from vernacular law and IPILRA – Sindiso Mnisi Weeks (University of Massachusetts Boston, USA)

The Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) was passed to temporarily defend the rights and interests of people "beneficially occupying" land in which they did not have formal rights (that is, openly occupying land in rural areas as if owners but without permission or exercise of force). The expectation was that IPILRA would shortly be replaced by legislation — such as the Communal Land Rights Act 11 of 2004 (CLARA) — that would provide permanent tenure protection to said informal rights-holders. However, as is known, CLARA was struck down by the Constitutional Court in 2010 while IPILRA has continued to be renewed annually. The Communal Land Tenure Bill (BX-2017) has yet to make its passage into law. The uneasy fit between customary conceptions of land and the cadastral property system, as well as the uneasy fit between customary law and state law systems, has been extensively canvassed in the literature. Less thoroughly explored are the ways in which IPILRA tried to get around these dissonances by taking a bottom-up approach to decisions pertaining to land occupation, use and access under the Constitution, grounded in vernacular normative conceptions, and the unused opportunities that it presents for inclusive land reform. The ways in which IPILRA's objectives have not been realised articulates with the reasons why transformative constitutionalism and its lofty ambitions have been limited in their effect in rural South Africa. This is illustrated by even the landmark 2018 decision on land rights, Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and another (Mdumiseni Dlamini and another as amici curiae) 2019 (1) BCLR 53 (CC). This paper will

focus on those (a)symmetries related to the political economy of traditional leadership and land under customary management, paying particular attention to their gendered implications, which it argues are central to debates. The paper highlights the complicity of traditional leadership institutions in historical and contemporary land dispossession as evidenced by the Ingonyama Trust Board's (ITB's) residential lease programme. It also reflects on how this complicity may sometimes put vernacular law in conflict with itself as, on one hand, some traditional leaders elevate to the level of (official) customary law self-serving values such as centralisation of land ownership and control vested in the institution (which is rhetorically conflated with the traditional leader as an individual) in order to aid in their personal enrichment and, on the other hand, this centralisation campaign by the traditional leader lobby is vehemently defended against the 'alter-Native' values embodied in living customary law (that is, vernacular law) that argue in favour of the necessary diversification of land-holding and decision-making power. Perhaps surprisingly to some, as potential levers, the latter values present greater chances of achieving widespread poverty-reduction in communities that desperately need it. In the end, the paper argues that, amidst the sensational deliberations about expropriation without compensation of white-owned land, it is essential for the public to pay keen attention to the politics of traditional leadership and the transactions taking place concerning land that is already beneficially occupied by ordinary rural people, a majority of whom are women and children. It argues that such politics and transactions are essential — if largely ignored — dimensions of substantially failed efforts to reform land in South Africa for they have thus far renewed the very foundations on which apartheid was built.

3 Perspectives of white commercial farmers on their role in the not-so-new South Africa – Michael Aliber (University of Fort Hare) and Paul Hebinck (Wageningen University, The Netherlands)

For almost three decades, South Africa's commercial farming sector, which remains predominantly white, has carried on under the uncertainty of land reform. With the public debates erupting regarding expropriation without compensation, followed by movement towards a constitutional amendment to facilitate such expropriation, this uncertainty has arguably reached new heights. This paper reflects on interviews conducted with white commercial farmers in the Eastern Cape, which explored two main themes, namely farmers' perceptions of their place in South Africa, and the tangible and intangible aspects of their reactions to proposals regarding expropriation without compensation. Farmers tend to believe that they make a significant, positive contribution to South Africa in terms of food production and employment, but this contribution is generally taken for granted by both government and the population at large. At the same time, farmers have an acute sense that their social milieux are disappearing around them – which indeed they are – which only adds to the sense of estrangement. On the other hand, commercial farmers are heterogeneous, with the family farm slowly giving way to larger-scale agribusiness ventures for which one's place in the local community is not a consideration. There is a common perception that in the face of uncertainly, farmers do not invest. While this may be the case for some farmers, the growth of the sector is driven by those farmers who do indeed invest. But even while such farmers do continue to invest in agriculture, interviews reveal that they are also paying close attention to their exit plans, which among other things involve investing in urban property and moving savings overseas. At the same time, farmers seek to minimise their dependence on labour and, especially, 'exposure' to farm dwellers. On the intangible side, the paper explores farmers' perceptions regarding the rationale for expropriation without compensation. By and large, commercial farmers appreciate the need for land reform, but are critical of what they regard as an incapable state, while dismissing calls for expropriation without compensation as the political posturing of leaders either seeking to build or maintain popular support. The worry however is not simply about the possibility of a constitutional amendment, but of a deteriorating political climate in which tacit support is given for informal, spontaneous land grabs. By and large, white commercial farmers reject the suggestion that their ownership is illegitimate, in part on grounds of historical possession, but more so – in an ironic echo of customary tenure principles – by virtue of maintaining the land in production.

4 "Setting our transformation sights too low": land reform, "expropriation without compensation" and the entrenchment of orthodoxy – Danie Brand (University of the Free State)

Our 'land question' in South Africa has over the last several years been reduced to the single issue of whether the state can take land from private property owners without paying compensation. The proposals in this respect – whether 'expropriation without compensation' or 'state custodianship' of land – are invariably in political and public debates presented as radical, either as heralding the end of private property and a market economy, or as an incisive break with racially determined patterns of land ownership. Drawing on Cherryl Walker's notion of a master narrative of loss and restoration as negatively dominant in land discourses in South Africa and Andre van der Walt's related warning that the absolutist common law notions of ownership that were such an enabling fit for apartheid land law may persist in current efforts at land reform, I argue that they are decidedly not. Instead, in their failure to break with the notion that in our relationships with land, a single person or entity must exercise absolute and exclusive control these proposals echo and resuscitate apartheid's notions of absolute and exclusive ownership as the only 'real' legal relationship with land. This, I conclude, comes at the cost of the development of Van der Walt's notion of a property law that is a system of regulation of overlapping interests in and relationships with land in a manner that advances constitutional goals of equality, dignity, democracy and freedom. I illustrate this with reference to a number of recent decisions of the Supreme Court of Appeal and Constitutional Court in which land disputes were resolved in a manner that moves away from the notion of single and absolute control over land.

5 Land reform and beyond in times of social-ecological change: Perspectives from the Karoo – Cherryl Walker (SARChI Research Chair in the Sociology of Land, Environment & Sustainable Development, Department of Sociology & Social Anthropology Stellenbosch University)

This paper explores land reform and redistributive justice from the perspective of South Africa's Karoo region: a large but sparsely populated and marginalised area that is currently witnessing major land use changes and is extremely vulnerable to the consequences of climate change. A crippling drought has put agricultural livelihoods based on extensive small-livestock farming under extreme pressure while state and corporate investment in astronomy, renewable and non-renewable sources of energy and mining is reshaping not only local landscapes but also the significance of this semi-arid region in external calculations about its utility for variously constituted national and global 'public goods'. The region comprises some 30% of South

Africa by area, almost all of it privately owned commercial farmland: the provocation of this percentage in its invocation of 1994/95 land reform targets provides a useful entry point for addressing larger questions about the contribution of land reform to redistributive justice more than twenty-five years on from South Africa's transition to formal democracy. In the Karoo land reform outside the municipal commonage programme lags behind already sluggish national achievements in terms of meeting aggregated land targets; in large part this reflects the region's particular history of colonial dispossession, which predates the 1913 Natives Land Act and does not fit neatly within the nationalist narrative of restitution that that notorious piece of legislation underpins. Furthermore, despite the importance of commercial sheep farming for local economies, today most residents live in small towns that are struggling with major social problems, including extreme levels of alcohol abuse that constitute a largely unremarked national emergency. What does redistributive justice mean in this context and what is the contribution of land reform to this broad goal? This is a critically important question for local residents grappling with uncertain futures, but the Karoo also serves as a useful vantage point for rethinking the contribution of land reform to redistributive justice nationally, in times of major social-ecological change. In this paper I draw on a range of research projects, including in the small Karoo town of Loeriesfontein, to explore these difficult, cross-cutting issues.

PANEL 3: IMAGINING ALTERNATIVE FUTURES OF REDISTRIBUTIVE JUSTICE IN SOUTH AFRICA

1 Rethinking labour and black-owned SMMEs development in the just transitions – Khwezi Mabasa (Mapungubwe Institute for Strategic Reflection – MISTRA)

South Africa is ranked as the most unequal country in the word in various comparative studies on inequality. These socio-economic disparities have deepened long-standing class, race, and gender disparities in society. Consequently, several stakeholders are advocating for a different approach in macro-economic and social policy areas to reorientate South Africa's development path. There is no clear consensus amongst influential social partners such as business, labour, and government on an inclusive model for economic restructuring. But it is widely accepted that the country's growth, income, sector configurations, and investment patterns need to be altered. South Africa's political economy structure, which has been anchored around the fossil fuel powered Minerals-Energy-Complex (MEC) for decades, has not substantially decreased socio-economic inequalities or led to substantive redistribution. Thus, it is salient to introduce a different political economy structure that addresses historic socio-economic inequalities and improves South Africa's global competitiveness. A restructured South African political economy needs to be embedded in the ongoing digital and low-carbon economic transitions. Researched evidence illustrates that these two macro-shifts in global and domestic policy contexts will shape the extent of inclusiveness in the economy. The concept of 'justice' has been elevated in debates on the transitions, highlighting the need for society-wide redistribution in a restructured economy. This presentation specifically discusses how the two transitions can contribute towards decreasing inequality, poverty, ecological degradation, and joblessness in South Africa. It explores the just transition theme by discussing important human development areas like employment creation, the changing nature of work, Small, Medium and Micro Enterprises (SMMEs) and livelihoods. I draw from two case studies (which I co-authored) in the Mapungubwe Institute for Strategic Reflection's publications. The first one examines Uber's business operation in South Africa and its impact on labour markets, passenger taxi market structures, and state regulation. And the second explores black-owned SMMEs trends within the context of low-carbon energy technologies in the renewable and hydrogen sectors. The primary aim is to highlight the main insights emerging from the two case studies mentioned above, which illustrate how society can design appropriate policy interventions for decreasing socio-economic inequality and achieving inclusive economic development in the digital and low-carbon transitions.

2 A solidarity economy approach to land redistribution in South Africa – Mazibuko Jara (Amandla!)

We need a new direction in South Africa's land reform. For this, the core approach has to based on an a fundamentally different, overarching transformative political economy logic and framework. Such a framework has to depart fundamentally from the neo-liberalism that has dominated land reform to date. This will require a move away from the prevalent assumptions in ANC and government policy formulations that capitalist property relations should persist unchallenged even after widespread land redistribution. The required political economy foundation must inform and shape the detailed

provisions of the technical and policy solutions/models required. Land redistribution is primarily political and not technicist. A narrow, apparently "concrete", technicist modelling approach may end up reinforcing the very same political economy of inequitable land ownership. A decisive resolution of these essentially political, social and economic questions in practice will not be possible without a radically transformative approach that goes to the root of the problem. The required approach must necessarily include building new institutional capacities in the state for effective land and agrarian reform, sectoral interventions in the agricultural value chain, a conducive macro-economic policy framework, and ensuring sufficient fiscal allocations. All this will require some significant encroachment into the inordinate power of private capital in particular the rolling back and transformation of the market in land and associated agricultural value chain. Further, even the combination of the strategic and the concrete will not be enough to ensure transformative land redistribution without breaking new ground with regards to the centrality of regenerated agency and power of the landless, transformative power and action from below so to speak. Thus, the main approach to land redistribution to be advanced in the paper combines these three dynamics: a transformative political economy framework, effective policy solutions and mass power. This approach is framed as the solidarity economy approach applied to land redistribution. This solidarity economy approach is about what Ntsholo (2018) describes as being about "the reconstruction of society, about rethinking power and how power is held, by whom and for whom, for what purposes" instead of reducing land redistribution to "a stale process concerned with technicalities around meaning of legal words, and technical possibilities such words grant to society" (Ntsholo, 2018). From this approach, the land redistribution should contribute to four transformative outcomes: historical redress, wealth (asset) redistribution, decent livelihoods and transformation of local economies.

3 Climate breakdown and commoning the future through food sovereignty pathways – Vishwas Satgar (University of the Witwatersrand)

This input will focus on the systemic vulnerabilities of the current globalised, mono-industrial, fossil fuel driven, food system. It will also highlight how climate shocks are destroying such systems, using the South African drought, as an example. The limits of such food systems will also be engaged with through current climate science. Moreover, this input will bring to the fore the importance of redistributive justice through the biotic commons (land, seeds, water, labour and peoples science) alternative. A brief historicization and conceptual approach to understanding the biotic commons in South Africa, from a decolonial perspective, will be provided as part of situating food sovereignty pathway building in South Africa. The translation of food sovereignty and its claims for redistributive justice in South Africa will be highlighted with reference to the Peoples Food Sovereignty Act championed by the South African Food Sovereignty Campaign.

4 Redistributive justice, transformative taxes and the legacies of apartheid – Heinz Klug (University of Wisconsin-Madison, USA)

Twenty-five years after South Africa's first democratic election the country remains the most unequal society on earth according to the Organization of Economic Co-operation and Development (OECD). This reflects in part the continuing legacies of apartheid, from access to land, education and employment opportunities through to the inability to address the spatial design of apartheid cities and towns. While most agree that this reality continues to detrimentally shape the life opportunities of the majority of South Africans, there is increasing evidence that it is also undermining the post-apartheid settlement – whether in the form of public protests, corruption or simply increasing disillusionment with the political and constitutional order. Even as the courts, civil society and other institutions have been praised for their resistance in the face of 'state capture' there is a growing challenge to the constitution, manifested most clearly in the demand to amend the property clause to clarify that land may be expropriated without the payment of compensation. Since market-led reform policies – whether in land reform, housing or employment creation – have clearly failed to produce the necessary redistributive justice required to address apartheid's legacies, it is time to explore more interventionist options. The question this paper will address is whether a transformation tax to address the legacies of apartheid might provide the basis for a new social contract that will further the promise of South Africa's 1996 Constitutional order? In exploring this question, the paper will review the history and use of wealth taxes around the globe to reflect on the forms and purposes a proposed transformation tax may take and serve.

5 Redistribution of what? Some problems with the current state of discussion on distributional issues in South Africa – James Ferguson (Stanford University, USA)

In recent years, discussions on "redistribution" in post-apartheid South Africa have too often been repetitive and unproductive. This paper traces this impasse to a lack of fit between the way that wealth or economic value is represented or imagined as an object of "redistribution," on the one hand, and the way that such value is actually produced in South Africa's current economic system. Chief among such inapposite images, of course, is the idea that the fundamental or paradigmatic form of wealth is land – an image that has long shackled much thinking about issues of distributional justice to a kind of "master narrative of loss and restoration" (as Cherryl Walker has put it) in ways that are becoming ever-more unhelpful. But it is not just the fetish of land. More broadly, the moment we start talking about "redistribution" wealth seems to start to be figured as a pile of material stuff produced by a "real economy" rooted in traditional (and traditionally masculine) industries such as mining, agriculture, and manufacturing. And before long, the issue of distributive justice is again turned, if not necessarily to land reform, then to other modes of restructuring those traditional industries (e.g.nationalization). The evocation of a national wealth imagined in a form that can be claimed as a kind of common possession has always been politically attractive for good reasons, and the examples of agricultural land and mining have always, understandably, been the most convenient ones for such a politics. But under contemporary conditions, a convincing and non-anachronistic picture of a truly common wealth requires not the resuscitation of an outdated and nostalgic picture of the economy, but rather a radically expanded conception of the social basis of both ownership and production. Such a conceptual shift (one lineage for which, as I have written elsewhere, can be found in the work of Peter Kropotkin) might allow us to arrive at two useful conclusions: first, there is no such thing as "redistribution", just a continuous, and always-already "political," process of distribution; and second, that – contrary to an old Marxist prejudice – the right target for an effective contemporary politics of distribution is precisely income (and not the distribution of so-called productive assets).

PARTICIPANTS

Name	Affiliation
Michael Aliber	University of Fort Hare
William Beinart	University of Oxford
Zsa-Zsa Boggenpoel	Stellenbosch University
Danie Brand	University of the Free State
Aninka Claassens	University of Cape Town
Ben Cousins	PLAAS, UWC
Annelize Crosby	Agbiz
Elmien du Plessis	North-West University
Andries du Toit	PLAAS, UWC
James Ferguson	Stanford University
Nkanyiso Gumede	PLAAS, UWC
Ruth Hall	PLAAS, UWC
Mazibuko Jara	Pathways Institute
Johann Kirsten	Stellenbosch University
Edward Kirumira	Stellenbosch Institute for Advanced Study
Heinz Klug	University of Wisconsin-Madison, USA
Tina Kotze	Stellenbosch University
Claire Lester	Stellenbosch University
Nolundi Luwaya	University of Cape Town
Bulelwa Mabasa	Werkmans Attorneys
Khwezi Mabasa	Mapungubwe Institute for Strategic Reflection – MISTRA
Thuli Madonsela	Stellenbosch University
Boitumelo Malope	University of Stellenbosch
Harry May	Surplus People Project
Farai Mtero	PLAAS, UWC
Nomfundo Ntloko-Gobodo	Chief Land Claims Commissioner
Knut Nutstad	University of Oslo
Juanita Pienaar	Stellenbosch University
Marius Pieterse	University of Witwatersrand
Katlego Ramantsima	PLAAS, UWC
Maano Ramutsindela	University of Cape Town
Steven Robins	Stellenbosch University
Igshaan Samuels	University of the Witwatersrand
Vishwas Satgar	University of the Witwatersrand
Cherryl Walker	Stellenbosch University
Sindiso Mnisi Weeks	University of Massachusetts Boston, USA
Michelle Williams	University of the Witwatersrand
Matthew Wingfield	Stellenbosch University
Mzingaye Xaba	Stellenbosch University
Olaf Zenker	Martin Luther University Halle-Wittenberg