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Reckoning with Transformative Constitutionalism

Land Reform, Expropriation Without Compensation, and the Iconic Indexicality of Post-apartheid South Africa

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1.1 Introduction: "Hi Mzansi, Have We Seen Justice?"

On January 7, 2022 Lindiwe Sisulu, then South African minister of tourism and high-profile politician of the ruling African National Congress (ANC), published an article in several national newspapers, entitled "Hi Mzansi, Have We Seen Justice?" Using "Mzansi" as a colloquial expression for South Africa, she rhetorically asked whether the nation had experienced justice since the first democratic election in 1994 marking the end of apartheid. Insisting that economic justice had not been achieved – especially the redistribution of land – she argued that the law had done little to really change anything. To the contrary, South Africa's "beautiful constitution" and "the rule of law" had merely functioned as "a palliative." Constituting "foreign belief systems," they required "mentally colonized Africans" in leadership positions and as interpreters of the law who, as "House Negroes," acted as their own oppressors. This, Sisulu claimed, was particularly the case "in the high echelons of our justice system," which needed an overhaul. Drawing an explicit parallel to the January 6, 2021 attack on the US Capitol (exactly one year earlier), Sisulu claimed that the situation was not very different from that in South Africa, seemingly implying that many people on both sides of the Atlantic did not really care for the law and were willing, if necessary, to break it. She ended by forcefully arguing:

> If the law does not sufficiently address the issue of the food fight, the law will fail, and inevitably it will play out in the streets. We have a neo-liberal constitution with foreign inspiration, but who are the interpreters? And where is the African value system of this constitution and the rule of law?

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> If the law does not work for Africans in Africa, then what is the use of the rule of law? (Sisulu 2022a)

Commentators were quick to point out that Lindiwe Sisulu – long-term anti-apartheid activist and daughter of ANC legends Walter and Albertina Sisulu – had been a member of parliament since 1994. A long-standing member of the National Executive Committee (NEC) of the ANC, Sisulu started in government as deputy minister of home affairs, successively serving as minister of intelligence, defense, public service and administration, human settlements, international relations and cooperation, human settlements, water and sanitation, and finally, tourism. Thus, Sisulu was effectively criticizing the government she had been actively serving for several decades (Msimang 2022). Others suggested that Sisulu was preparing, yet again, to run for party presidency at the ANC National Conference in December 2022 (she indeed tried subsequently, but failed), with an eye to the South African general elections in 2024. She was hence mobilizing support within ANC's "Radical Economic Transformation (RET)" faction, still loyal to the ousted former President Jacob Zuma, against the more moderate faction around current President Cyril Ramaphosa. This take was nicely captured, for instance, in a Zapiro cartoon depicting this exchange as a "Game of Thrones 2024" sacrificing "the Constitution," "black judges," as well as the Acting Chief Justice Raymond "Zondo" in the battle against President Ramaphosa (see Figure 1.1). Others regarded all this merely as Sisulu's cynical ploy to distract from the upcoming "State Capture Reports" of the Commission of Enquiry chaired by the Acting Chief Justice Zondo, detailing the perpetrators and their deeds in South Africa's massive wave of high-level corruption (and likely also compromising herself).

Irrespective of the ultimate motives behind the various moves in this public exchange, the latter is indicative of a recent sea change in South African public debates on "the Constitution": While South Africa emerged as the poster child for liberal constitutionalism during the 1990s, in recent years the Constitution is increasingly seen as part of the problem, rather than the solution, of persisting inequalities. How has this change come about and what are the consequences for actually existing transformative constitutionalism, if the latter has to operate within an era increasingly disenchanted and disillusioned with "law's potential" (Dyzenhaus 1992)? This chapter sets out to provide some answers to these crucial questions of our contemporary moment in South Africa and beyond.

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Figure 1.1 "Game of Thrones 2024."
Cartoon by Zapiro, *Daily Maverick* (January 22, 2022).

In order to do so, the chapter first outlines in Section 1.2 the unlikely emergence of strong constitutionalism during the South African transition to democracy during the 1990s, turning South Africa into an iconic case of "juristocracy" (Hirschl 2004), indexically operating as a metonymic exemplar for the proclaimed transformative potential of law at large. This effected a marked shift in the landscape of hegemonic discourses and public perceptions from a rhetoric of revolution to rights talk, entailing a perceptible judicialization of politics. Section 1.3 demonstrates how this process has played itself out in the field of post-apartheid land reform, in which the constitutional duty for a tripartite reform as enshrined in the property clause (Section 25) of the Constitution has ostensibly been processed under the rule of law in contradistinction to the contemporaneous extralegal land occupations in neighboring Zimbabwe. Yet the tide of public perception regarding the effectiveness of constitutionalism slowly started to turn after the first democratic decade, as sketched in Section 1.4. A significant increase in popular insurgencies through disruptive protests, wildcat strikes, as well as xenophobic violence came to coalesce with state-sanctioned violence, epitomized in the Marikana massacre in 2012, an increasingly populist rhetoric, and the multi-sited breakdown of numerous

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state functions under President Zuma's corrupt regime of "state capture," all jointly revealing spreading discontent with the new constitutional order. It is within this broader context that recent debates about an amendment of the Constitution allowing for "expropriation without compensation" should be seen. Section 1.5 charts the dynamics of this latest turn in South Africa's "anti-constitutional populism" (Krygier et al. 2022), pointing toward contestations around the need and effectiveness of such a constitutional amendment: While public hearings revealed enormous support for such an amendment in the hope of fast-tracking economic redistribution and social justice, many experts working in the fields of law, land reform, and redistributive justice do not see the Constitution as the main problem (while differing in their alternative solutions to persisting inequalities). Section 1.6 concludes with a reflection of this complex South African dialectic of juristocratic reckoning, evaluating the potentials and pitfalls of a continued project of transformative constitutionalism in an era in which South Africa's moment of iconic indexicality is deeply contested, if not coming to an end.

1.2 Post-apartheid Juristocracy: Transitioning from Revolution to Rights

The "negotiated revolution" (Waldmeir 1997) in South Africa in the early 1990s inaugurated a marked shift toward strong constitutionalism that also came to characterize this period at a global scale (Klug 2000). After the minority government had lifted the ban on the ANC, white elites and representatives of the black majority engaged for the first time in public. However, the initial negotiations for a democratic transition at the Convention for a Democratic South Africa (CODESA) collapsed in mid-1992, leading to escalating violence and mass upheaval. Bilateral negotiations in 1993 brought about agreement for a transition to democracy in two phases: first, the drafting of the 1993 Interim Constitution, which came into force in April 1994 with the first democratic elections; and second, the drafting of the final 1996 Constitution by the Constitutional Assembly and its approval by the Constitutional Court (Hirschl 2004: 28). This final Constitution adopted in 1996 comprises an extensive Bill of Rights (Sections 7–39), including substantial socioeconomic rights and constitutional obligations for far-reaching redistributive measures, and established an independent judiciary (including a strong Constitutional Court) under the auspices of a new constitutional, rather than parliamentary, supremacy (Klug 2000).

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However, at the time it was far from obvious that the South African transition to post-apartheid would lead to a strong constitutional regime. In the context of the armed struggle and mass mobilization of the anti-apartheid movement during the 1980s under conditions of repressive states of emergency since 1985, widespread expectations on both sides envisioned or feared a radical revolution entailing, among others, nationalization of existing land holdings in line with a commitment to the 1955 Freedom Charter emphasizing socialization and redistribution, while marginalizing private property (Klug 2018: 472–478).

Yet neither the white minority regime nor the liberation movement were in a position to bring their stalemate to a conclusive end: the apartheid regime found it increasingly difficult to legitimate its rule under conditions of mass mobilization and growing international isolation, while the armed struggle of the ANC's military wing – *Umkhonto we Sizwe* (MK) – was increasingly drained of military support by the dissolving Soviet Union and deprived of its last Southern African base in Angola as part of the United Nations (UN) brokered independence deal for Namibia in 1990 (Klug 2018: 472–473). Under these conditions, constitutionalism increasingly emerged as a necessary compromise; moreover, it offered a viable strategy for containing profound political differences through constitutionally enshrining and thereby postponing political conflict to be resolved by future legislation and, if needed, by an impartial judiciary.

However, while these pragmatic factors explain how the parties got to the negotiating table, they do not account for the fact that the transition to electoral democracy under a strong Constitution would prove durable in the coming years. As Jens Meierhenrich (2008) argues, this was made possible by a deeply entrenched common legal culture on *both* sides of the negotiation table. This South African legal culture of a "legality of law" entailed shared assumptions about how to act through legal procedures, facilitating "the gradual construction of trust among adversaries, thus accelerating regime formation and government formation" (Meierhenrich 2008: 55).

This was so, as various observers have noted, because the apartheid regime, whatever else it was, was a regime of laws (Abel 1995). Put differently, the apartheid regime gave tremendous importance to "the rule of law," even if it rather operated as a "rule *by* law" (Abel 1995). Since the apartheid state carried out its repression and discrimination through the mechanism of law and simultaneously outlawed most political action, this strong emphasis on legality and alleged respect for the

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rule of law made it promising for some of the anti-apartheid struggle, especially since the 1980s, to shift to the legal battlefield as a form of "politics by other means" (Abel 1995: 12–14). Such legal activism was substantially limited, however, because parliament under apartheid was expressly supreme, unconstrained by a Bill of Rights, and to a great extent exempted from independent judicial review (Abel 1995: 3, 489, 540). Nevertheless, this situation still helped to reproduce a long-standing legal culture in South Africa that – as Meierhenrich argues – opened up a window of opportunity for the emergence of a strong constitutional order.

Within this emergent new order, addressing the economic legacies of apartheid through directly dispossessing the *ancien régime* was precluded. Instead, the new democratically elected government made use of more indirect means. Besides development plans that became increasingly adjusted to globalized neoliberal capitalism, these means have prominently included affirmative action through preferential procurement policies and black economic empowerment (BEE) as well as land reform (Klug 2018: 470–471).

From early on, such measures operating through law and under the new rule of law were envisioned and discussed as offering great potential for progressive struggles beyond law's more conventional roles of (mere) regulation and conflict resolution. David Dyzenhaus (1992) expressed early hopes about "law's potential" if the right kind of legal culture with a strong emphasis on the important role of jurisprudence was put in place. Karl Klare famously defined "transformative constitutionalism" as

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. (Klare 1998: 150)

Having in mind "a transformation vast enough to be inadequately captured by the phrase 'reform,' but something short of or different from 'revolution' in any traditional sense of the word" – as Klare (1998: 150) went on to explain – hopes for transformative constitutionalism to deliver progressive outcomes and, ultimately, social justice were evidently high. As Theunis Roux (2013) argues, the Constitutional Court indeed emerged as a key institution during the first democratic decade, developing a robust and distinctly South African progressive jurisprudence about

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the purposes and possibilities of liberal constitutionalism with the idea of a caring and capable state at its center (see also Roux 2022).

Drucilla Cornell (2014) goes even further: Rather than seeing the transitional shift "from revolution to rights" (Robins 2008) as a failure of the liberation movement entailing a narrowing down of revolutionary possibilities, Cornell argues that, to the contrary, the changes in the nature of the law made South Africa's transition a truly revolutionary achievement. Recoupling law with radical changes fought for during the struggle against apartheid, the new constitutional order has allowed post-apartheid citizens for the first time to go to court in order to seek civil, political, and socioeconomic justice. However, this legal revolution, Cornell insists, has not simply emerged *sui generis*. It has to be continuously fought for and connected to localized idioms of justice, as she shows with regard to the prominent emergence of *ubuntu* – "humanity (toward others)" in isiZulu – as a guide for ethical living within much of post-apartheid jurisprudence. This process evolves both *formally* through the official creation of law within a rights-based constitutional framework and *informally* through extralegal actions of insurgent citizens fighting for justice, thus jointly pushing for a truly revolutionary constitutional transformation.

The historical events of the transition to democracy in South Africa as well as the prominent reading of this new order in terms of the progressive possibilities of a transformative constitutionalism thus ushered in a new era of "juristocracy," as Ran Hirschl (2004) has called it. Juristocracy, in Hirschl's rendition, deviates from a vision of democracy as majority rule governed predominantly by the principle of parliamentary sovereignty, in that

> minorities possess legal protections in the form of a written constitution, which even a democratically elected assembly cannot change. Under this [juristocratic] vision of democracy, a bill of rights is part of fundamental law, and judges who are removed from the pressures of partisan politics are responsible for enforcing those rights. (Hirschl 2004: 2)

This constitutionalization of rights and fortification of judicial review led to a new regime of constitutional supremacy and an active judiciary that Hirschl (2004: 3) defined as the hallmarks of "juristocracy." This hegemonic model of liberal democracy came to dominate post-apartheid South Africa for years to come and turned it into "a model for other transitional democracies" (Smith 2017: 124).

Two observations are relevant in this context that move the analysis of juristocracy beyond Hirschl's more confined usage of the term. First,

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while Hirschl concentrated on the *substantive* specificities of this new model of juristocratic democracy (that is, its insistence on the protected rule of independent judges through inalienable rights), its *formal* peculiarities got somewhat lost: namely, the excessive, almost messianic expectations that came to be vested in "the law" as *the* master modality for all societal transformation. It is this juristocratic reckoning with law *in excess*, its affective investment with seemingly eschatological possibilities to achieve the hitherto impossible, that arguably made South African transformative constitutionalism so special. At the same time, and this leads over to a closely related second observation, transformative constitutionalism in South Africa came to be seen not only as exceptional, but also as exemplary: As noted in the previous paragraph, South Africa turned into "a model for other transitional democracies" as it was increasingly celebrated also internationally as a paradigmatic case – an *icon* – *indexing* a redemptive reckoning with law as *the* tool for social transformation *tout court*. One prominent and emotionally charged domain in which this post-apartheid juristocratic reckoning has been clearly brought to bear in its full iconic indexicality is the contested field of state-driven land reform.

1.3 "Putting Land Rights in the Right Hands under the Rule of Law": Land as a Shifting Terrain for Transformative Constitutionalism

Against the backdrop of the iconic indexicality of the new Constitution, "internationally celebrated" (Roux 2022: 100) and widely regarded as one of the most progressive in the world, the South African government immediately embarked upon a massive land reform program in order to address the persisting racial inequalities in access to, and control of, land as well as the historical injustices on which these inequities have been based.

Aimed at "putting land rights in the right hands under the rule of law," as then Minister for Agriculture and Land Affairs Ms Lulama Xingwana aptly put it in 2007,[1] South African land reform has exemplified an ostensive belief in transformative constitutionalism as the preferable way to address and redress persisting landed inequalities. This insistence on the rule of law also needs to be seen in the specific context of

[1] In her Foreword to the *Annual Report 2006/2007* of the Commission on Restitution of Land Rights (2007: 4).

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contemporaneous land policies in neighboring Zimbabwe. Upon Zimbabwean independence in 1980, the Lancaster House Agreement had restricted land reform for ten years in such a way that the new government could only obtain land on the basis of the "willing buyer, willing seller" principle. While the Zimbabwean legislature removed this limitation from its Constitution in 1990, the government, in practice, still continued following this principle afterwards. However, in the late 1990s the ruling Zimbabwe African National Union Patriotic Front (ZANU-PF) adopted more aggressive land acquisition policies beyond the rule of law when confronted with a serious electoral challenge. The shadow of Zimbabwe, with its subsequently collapsing economy, has loomed large in South African land reform debates ever since, explaining the long-term emphasis in government assurances of reforming South African lands exclusively under the rule of law (Klug 2018: 488–489).

Given the overall dynamics behind the emergence of post-apartheid juristocracy discussed above, it is hardly surprising that the mandate for future land reform ultimately became enshrined in the property clause (Section 25) of the final Constitution: A balanced constitutional protection of both existing property rights and the right to redress for race-based violations of past property rights emerged as a strategic compromise during the constitutional negotiations (Klug 2000: 124–136, 2018: 477–488; Walker, 2008: 50–69). Thus, Sections 25(1)–(2) establish that property may only be expropriated for a public purpose or in the public interest in terms of a law of general application and subject to compensation agreed to by those affected or decided by a court. Subsection 25(3) specifies that compensation must be "just and equitable," reflecting an equitable balance between the public interest and the interests of those affected, and mentions an open list of factors for the determination of just and equitable compensation (such as current use, the history of acquisition, market value, the history of state subsidies, and the purpose of expropriation).

Moreover, Sections 25(4)–(9) define explicit constitutional duties to bring about equitable access to all South Africa's natural resources, including a tripartite land reform program allowing for the *restitution* of former land rights, a more equitable access to land through land *redistribution*, and legally secure land tenure through statutory *tenure reform*. Notably, Section 25(8) exempts the state from the protective provisions of this property clause for land, water, and related reforms redressing past racial discrimination, provided that such exemption is in accordance with the limitations clause (Section 36(1)). The latter requires

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that rights in the Bill of Rights may be limited only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The ultimate emergence of these constitutional provisions for both property protection and substantive land reform was to a considerable extent shaped by the work of land activists and lawyers. These activists had met and cooperated during apartheid within a land network incorporating NGOs such as the Surplus People Project or the Transvaal Rural Action Committee (TRAC), as well as human rights lawyers working, for instance, for the Legal Resources Centre (LRC) or the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand Law School (Klug 2000: 128–129; Walker 2008: 59–64). Having been heavily involved in the struggle against forced removals under apartheid, some members of this network formed a Land Claims Working Group in 1991. This group had close connections with members of the ANC Land Commission as well as the ANC Constitutional Committee, involved in the constitutional negotiations at the World Trade Centre in Kempton Park. Members of the group succeeded in influencing negotiations to such an extent that both the constitutional duties for land reform and nonmarket factors in the determination of compensation for existing landowners ultimately became enshrined in the constitutional provisions pertaining to property (Klug 2000: 129–136; Walker 2008: 61).

It is interesting to note that several of those legal and nonlegal land activists, who had first fought apartheid through litigation and then profoundly shaped constitutional and statutory arrangements for future land rights and the emerging land reform program, subsequently became civil servants during Mandela's presidency (1994–99). During this time, the Department of Land Affairs under its minister Derek Hanekom was strongly characterized by a rights-based approach (James 2007: 34–41). A tripartite land reform program, addressing the above-mentioned constitutional duties for *land redistribution*, *land restitution*, and *tenure reform*, was established with a strong welfarist emphasis on benefitting the poor and landless (Lodge 2002: 74).

After the second democratic elections in 1999, the new government under President Thabo Mbeki prompted a significant policy reappraisal regarding land reform. Derek Hanekom, the white Afrikaner farmer, was replaced by Thoko Didiza as the new minister with an African middle-class background – as were many of Hanekom's English-speaking, white, middle-class, left-liberal high-rank officials (Lodge 2002: 74–79; James 2007: 39). Hence, in 1999 and 2000 many of these legal land activists

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again left the civil service (Walker 2008: 14). Many of them subsequently reverted to using the law against the state. Yet under the new juristocratic regime, the situation had changed quite fundamentally:

> Before 1994, the LRC – alongside the land NGOs – had used its legal muscle to challenge the apartheid state on its intent to shift the African population around the countryside. Now, after 1999, some of its members would be using that muscle in contests with the post-apartheid state. They would be doing so, specifically, by holding that state to the laws they had passed whilst briefly occupying positions and portfolios within it. (James, 2007: 37)

In other words: During the transitional negotiations legal land activists who had fought the apartheid state were centrally positioned to shape foundational constitutional provisions for both protected property rights, including land rights, and the constitutional duty for a substantive land reform. After the first democratic elections in 1994, the "developmental" post-apartheid state made possible by these provisions then constituted an ideal environment for many of these activists to put into practice, now as civil servants, their rights-based and pro-poor agenda. The compulsory constitutional provisions for land reform they themselves had helped to institute could now be further elaborated through a cluster of statutes that explicitly recognized more extensive rights. However, after 1999 under President Mbeki the political tide turned away from a rights-based, pro-poor agenda toward neoliberal policies focusing instead on a new class of black commercial farmers as well as toward an "African Renaissance," re-empowering chiefs at the expense of rural citizens-as-subjects. Hence, since the 2000s, many legal land activists have engaged these shifts toward neoliberalism and neotraditionalism through various means provided by transformative constitutionalism, including consultancy and policy advice, parliamentary submissions, public statements (often based on research), as well as public interest litigation.

This can be briefly illustrated with regard to each of the three legs of land reform: Concerning *tenure reform*, legal land activists successfully worked toward a constitutional challenge of the Communal Land Rights Act (2004) which was struck down by the Constitutional Court in 2010. While the Act was declared invalid due to procedural mistakes, activists had additionally argued that the quasi-judicial rights of the minster to determine relevant "communities" as well as the discretion of traditional councils without downward accountability mechanisms put the tenure of communities at risk (Claassens & Cousins 2008; Zenker 2012). A new

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Communal Land Tenure Bill (BX-2017) that was finally introduced in 2017 is still undergoing the legislative process.

Land restitution also witnessed a landmark case of cause lawyering: While the Restitution of Land Rights Act (1994) had originally provided only for the official lodgement of claims before December 31, 1998, President Zuma announced during his 2013 State of the Nation Address that the government would reopen the process of registering land claims. On June 29, 2014 he signed the Restitution of Land Rights Amendment Act (2014), which reopened the lodgement period and extended it until June 30, 2019. However, legal land activists were again crucial in supporting a constitutional challenge of the Restitution of Land Rights Amendment Act. On July 28, 2016 the Act was declared invalid by the Constitutional Court from the date of the judgment – (again) because of its improper procedural enactment (Zenker 2018).

Finally, with regard to *land redistribution* activists have mostly concentrated on policy advice, legal consultancy, and public statements – given that parliament, so far, has failed to enact comprehensive legislation enabling citizens to gain equitable access to land. This failure has led to the state relying on a discretionary, unclear, and haphazard application of policies, often producing contradictory outcomes. Prominent examples of such critical activist involvements include participation in the "High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP)," chaired by former President Kgalema Motlanthe, as well as the "Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA)," appointed by President Cyril Ramaphosa, which published their reports with detailed recommendations for land reform improvements in 2017 and 2019, respectively.[2]

Looking back, what becomes evident in the field of post-apartheid land reform is the confident centrality that has been afforded to "the law" as the dominant modality through which to conceive, construct, criticize, or contest specific reform measures with the intention to profoundly transform South African society. However, over the past decade growing criticisms of the limited impact and slow pace of South African juristocracy in general and of law-based land reform in particular have

[2] See The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) (2017) and The Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) (2019).

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substantially altered public discourse, revealing more complex and ambiguous dialectics of juristocratic reckoning at play.

1.4 Insurgent Democracy: Transformative Constitutionalism and Its Discontents

Since the end of apartheid, transformative constitutionalism has evidently made some progress toward more social justice in general as well as toward land redistribution and more tenure security in particular. Nevertheless, popular expectations for substantive and meaningful transformation have clearly not been met (Seekings & Nattrass 2015; Leibbrandt & Pabón 2021). Thus, the combined progress of land restitution and redistribution in 2019 still amounted to under 10 percent of all commercial land, compared to the transfer target of 30 percent that the government had set itself (PAPLRA 2019: 12). Constant delays and shifting deadlines have also characterized the land restitution program (Zenker 2015). Moreover, despite some attempts at protecting informal land rights through various statutory measures, in the absence of an encompassing Communal Land Tenure Act secure rights to land are still the preserve of a small South African minority. Under conditions of land administration failures, corruption, and ineptitude, limited production and post-settlement support, lack of coordination between government departments, and only inadequate evidence on the livelihood impacts, land reform under transformative constitutionalism hardly seems a success story (PAPLRA 2019: 12–13).

Beyond land, the ANC government early on identified a range of plans and policies designed to address racialized inequalities and tackle widespread poverty. Various service delivery and infrastructural targets were set through development plans such as the 1994 Reconstruction and Development Programme (RDP) and its more neoliberal successor, the Growth, Employment, and Redistribution strategy (GEAR). These included a major rollout of low-income housing projects and the provision of free basic services (water, electricity) for households falling below certain income thresholds.[3] Affirmative action measures such as preferential state procurement and various black economic empowerment (BEE) policies have also shifted resources to (some sections of) the black majority. Moreover, social grants have been progressively offered to

[3] For a comprehensive discussion of service delivery, see Palmer, Moodley, and Parnell (2017).

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vulnerable groups, including children, and extended during the recent COVID-19 pandemic. This has clearly helped in denting poverty. However, in light of the dramatic decrease of formal employment in the new millennium as well as the dwindling economy in the wake of the global recession of 2008, the extending system of social grants, more public services, and some ownership of assets have merely ameliorated the simultaneously growing inequality of earnings (Leibbrandt & Pabón 2021: 177, 179, 188). In other words: Despite state interventions and relative improvements the South African Gini coefficient measuring income inequalities has remained relatively stable at around 0.65–0.67 between 2006 and 2015 in the context of a worsening job-scarce economy, ensuring that "South Africa remains one of the most unequal societies in the world" (Leibbrandt & Pabón 2021: 175–176).

As Trevor Ngwane (2019) dryly observes, if we take apartheid society as the benchmark, then everything has improved; but if the aspirations and dreams of the liberation struggle are used as a touchstone, "then to say the ANC has failed is to speak truth to power" (Ngwane 2019: 238). Theunis Roux highlights how persistent inequalities have weakened "public attachment to the ideal of liberal constitutionalism in South Africa" (Roux 2022: 99). Joel Modiri aptly summarizes the conundrums of transformative constitutionalism that have become ever more present, and pressing, in recent years:

> Two decades since the enactment of the present constitution, problems of inequality, poverty, violence and social exclusion persist stubbornly along racial lines, and much of the optimism of the early 1990s concerning the promises of new legal and political order has dissipated . . . The durability and endurance of "past" inequalities and injustices illustrate that the "new South Africa" – lauded as a "miracle nation" with the "best constitution in the world" – can no longer be regarded as an unqualified success. (Modiri, 2018: 295)

Not that dissatisfaction with, and critique of, transformative constitutionalism is only a recent phenomenon: Critical accounts of the failure of the liberation struggle as a "revolution deferred" (Murray 1994) as well as of the economic and social consequences of the negotiated transition emerged early on, pointing to the "limits to change" within the political economy of transition (Marais 1998). Hirschl's own account of "juristocracy" was, of course, also intended as a critique of the constitutionalization of rights which he saw as a means through which threatened elites appropriate the political process and thereby prevent, rather than enable, more social justice (Hirschl 2004: 12, 218). Seen in this light, the

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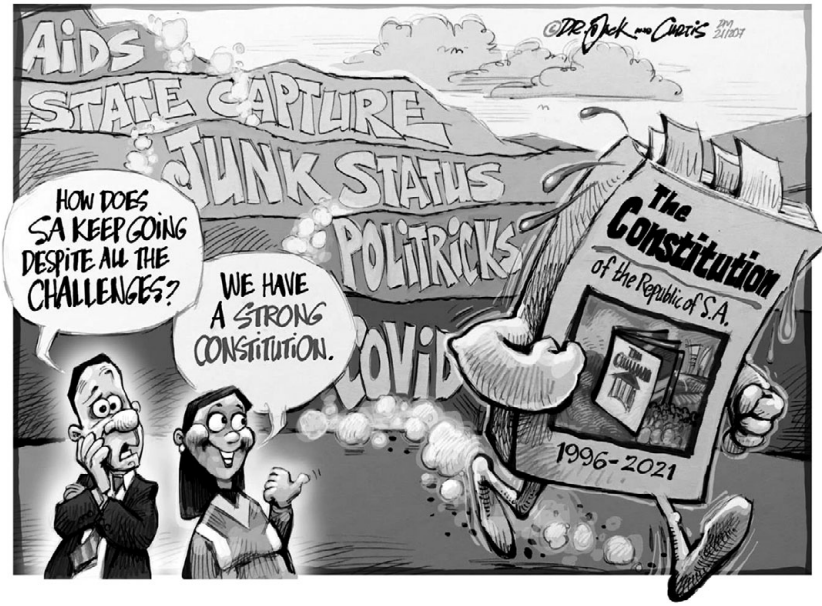


Figure 1.2 "A Strong Constitution,"
Cartoon by Dr Jack & Curtis, *Daily Maverick* (December 10, 2021).

globally increased "fetishism of the law" and the judicialization of formerly political protest, in the course of which "class struggles" metamorphosed into "class actions" (Comaroff & Comaroff 2006: 22, 27) appeared as worrying from early on.

Yet despite such ongoing critiques, transformative constitutionalism, as a discursive formation, still managed for quite some time to uphold its hegemonic status. Only in recent years have public references to the "Strong Constitution" in an ironic, if not cynical key become more frequent, highlighting its inefficacy in view of "all the challenges" confronting South Africa (see Figure 1.2).

In order to develop a deeper sense of the growing dissatisfaction and disillusionment with post-apartheid juristocracy, a closer look at various forms of insurgent expressions is instructive. To begin with, the rates of public protests have substantially increased over the past decades. As Carin Runciman and colleagues observe on the basis of police-recorded protests, between 2004 and 2012 protests classified as "peaceful" increased by 104 percent, whereas those classified as "unrest" increased by 329 percent (Runciman et al. 2016: 36). Thereafter, there has been a

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steady increase in the total number of crowd-related incidents, but the rise is far more marked with "unrest-related" than "peaceful" incidents (Runciman et al. 2016: 39). Between 1997 and 2013, labor protests were the most common (about 46 percent), followed by community protests with about 22 percent of the total (Runciman et al. 2016: 5). The latter – often also called "service delivery protests" – can be interpreted as a "rebellion of the poor" (Alexander 2010), expressing anger about the insufficient provision of public goods: for example, water, sanitation, waste collection, electricity, education, and public health.[4] Trevor Ngwane (2019: 230) refers to such practices as "insurgent democracy." Through often violently disrupting the normal functioning and ideological assumptions of the existing social order, such insurgency allows us, he argues, to "focus critically on the fundamental limitations of liberal democracy in South Africa from the point of view of the restless masses" (Ngwane 2019: 230).

Labor protests, even more common than community protests (see above), constitute another area where "insurgent citizens" (Brown 2015) have been fighting for their rights, especially in the context of wildcat strikes. South African trade unions had built their power during the anti-apartheid struggle, leading to the tripartite alliance between the ANC, the South African Communist Party (SACP), and the Congress of South African Trade Unions (COSATU) as a hegemonic bloc in post-apartheid times. Yet this intimate relationship has increasingly detached union leaders from their workers' constituency, seemingly focusing primarily on their own upward mobility and personal investment opportunities. Feeling disowned by their own unions, dissatisfied workers have resorted to wildcat strikes. These actions also lay behind the Marikana massacre in 2012, when workers struck over pay and living conditions at the Lonmin-owned platinum mine at Marikana in Northwest Province against the wishes of their union, the National Union of Mineworkers (NUM), a COSATU affiliate. On August 16, 2012 police fired live rounds into a crowd of striking mineworkers, killing thirty-six and injuring seventy-eight others. These killings immediately evoked comparisons to massacres committed by the apartheid state. However, this time violence was committed by a multiracial police force serving a democratic state,

[4] A prominent example of such protests consists in #FeesMustFall, a social movement of university students in 2015–16 campaigning for affordable university education for all (see Booysen 2016).

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which immediately turned Marikana into a deeply troubling signal event of the post-apartheid order (Sinwell & Mbatha 2016).

While community protests and workers' strikes are amenable to a reading along the lines proposed by Drucilla Cornell (see Section 1.2), namely as insurgent, sometimes extralegal events progressively pushing the boundaries of the transformative revolution, the situation is more complicated with regard to the unprecedented wave of intense xenophobic violence in 2008; during two weeks in May more than 60 people were killed, 700 wounded, and 100,000 displaced, with foreign-owned shops and homes being demolished (Landau 2010: 213–214). Given that most victims were African noncitizens, officially categorized as such by the state, some have argued that "the state was implicated in xenophobic attitudes" (Brown 2015: 70); yet ordinary citizens were, of course, immediately involved, claiming that foreigners were "stealing 'our freedom'" (Klotz 2013: 213). Some argue that under conditions of dramatically increased unemployment and inequality, xenophobic violence – that returned in a second wave in 2015 – has functioned as a social commentary on the profound disjuncture between the expansive promise of constitutional rights and their highly uneven fulfilment in practice. Drawing an analogy to Grigory Potemkin who built real villages in the Crimea during the eighteenth century, but simultaneously papered over their highly unequal spread, Stuart Woolman and Michael Bishop thus speak of a "Potemkin Constitution":

> We have a Potemkin Constitution because ... many of our new institutions and new constitutional doctrines are very *real* and a marvel to behold. At the same time, the root causes of the [xenophobic] riots of 2008 can be traced to a failure ... to translate the promise of South Africa's liberation into a substantially better life for the majority of South Africans. (Woolman & Bishop, 2013: 2–3, original emphasis)

Another extralegal practice profoundly challenging and undermining the rule of law in South Africa for more than a decade has consisted in excessive corruption under the presidency of Jacob Zuma (2009–18). Commonly referred to by the label "state capture" – named after the highly critical report "State of Capture" published in October 2016 by the Office of the Public Protector Thuli Madonsela, marking the beginning of the end of Zuma's reign – it has comprised an extensive network of high-ranking politicians and related business partners engaged in "the manipulation of state organs for self-enrichment purposes" (Ngwane

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2019: 229). An earlier report by the same public protector had already revealed the extent to which Zuma had used state funds to refurbish his rural homestead at Nkandla in KwaZulu-Natal Province. Brought before the Constitutional Court, the latter found both parliament and the president to be in breach of their constitutional obligations, condemned the president's behavior, and ordered repayment of all illegitimate expenditure (Roux 2022: 111).

Since the replacement of Jacob Zuma by Cyril Ramaphosa – first as president of the ANC at the party's National Conference in December 2017, and then in early 2018 as the president of South Africa – Ramaphosa has attempted to repair the numerous constitutional institutions incapacitated during Zuma's reign. However, with the Zuma faction powerfully reorganized under the banner of "Radical Economic Transformation (RET)" and still holding substantial power in the party's National Executive Committee (NEC), Ramaphosa has not had sufficient support within the ANC to do so effectively (Roux 2022: 108–112). However, in his attempt at undoing this "state of capture" Ramaphosa was supported by the work of the official Commission of Inquiry chaired by Judge Zondo which investigated between 2018 and 2022 the corruption detailed in the public protector's "State of Capture" report.[5]

In a way, the steadfast work of the public protector, the Constitutional Court, President Ramaphosa as well as the Zondo Commission can be seen as signs of a still functioning and resilient constitutional order, of juristocracy at work. Yet Ramaphosa's difficulties within his own party to effectively eradicate corruption may sound a note of caution, pointing toward a growing popular discontent with the law: When Zuma appeared reluctant to cooperate with the Zondo Commission throughout 2020–21 and repeatedly failed to appear before it despite court orders directing him to do so, the Constitutional Court sentenced him to fifteen months' imprisonment for contempt of court on June 29, 2021. However, the subsequent imprisonment of Zuma on July 7, 2021 sparked a massive wave of civil unrest, rioting, and looting within KwaZulu-Natal and Gauteng Provinces – the "Zuma unrest" – that lasted until July 18, 2021 (Hunter, Wicks & Singh 2021). Whether or not these violent forms of extralegal insurgency can still be seen as part of "the struggle for constitutional transformation" (Cornell 2014) remains an open question,

[5] For an analysis of how and why state capture happened, see Buthelezi and Vale (2023).

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shimmering in and out of focus within an increasingly complex and ambiguous dynamic of juristocratic reckoning.

1.5 Expropriation Without Compensation: Within and beyond the Rule of Law

The most prominent, explicit, and pervasive expression in recent years of widespread perceptions that transformative constitutionalism in general, and land reform in particular, have fallen short of their promises to bring about substantive redistributive justice has consisted in extensive public controversies surrounding "expropriation without compensation." Dominating South African public discourse and the popular imagination since early 2018, the idea of expropriating land for redistributive purposes without paying any compensation first appeared as a serious option in December 2017. At the time, the ANC declared at its National Conference that "expropriation of land without compensation" should be one of the key mechanisms available to government, as long as it did not threaten agricultural production, food security, and economic investment (ANC 2017: 11). As mentioned before, this was the National Conference during which the Zuma faction lost against the more moderate faction around Cyril Ramaphosa, when the latter – rather than Nkosazana Dlamini-Zuma, the preferred candidate of the more "Radical Economic Transformation (RET)" faction – was elected with a narrow majority as the new ANC president. It was widely perceived at the time that the inclusion of "expropriation without compensation" into the conference resolutions served as a compromise and partial victory of the RET faction, with only lukewarm support from Ramaphosa himself.

In fact, the idea of expropriation without compensation had already been fervently advanced by the left-populist party Economic Freedom Fighters (EFF) founded in 2013 by Julius Malema – the charismatic but highly controversial former president of the ANC Youth League (ANCYL) who had been expelled from the ANC in 2012 because of repeated insubordination. Increasing its support base at every election, the EFF established already in 2014 that "[e]xpropriation of South Africa's land without compensation for equal redistribution in use" is one of the "seven non-negotiable cardinal pillars" of its party program (EFF 2019: 9). Thereafter, the EFF continuously but unsuccessfully pressed for expropriation without compensation (Roux 2022: 112–118).

Against the backdrop of the 2017 ANC resolution, the EFF tabled a motion in parliament to review the need to amend the property clause

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(Section 25) of the Constitution to allow for expropriation of land without compensation.[6] On February 27, 2018 the National Assembly passed a significantly softened version by including the ANC caveats of not threatening agricultural production, food security, and economic investment, and established a parliamentary "Constitutional Review Committee (CRC)" to investigate the matter. This committee spent much of 2018 in a public consultation process that garnered a huge response. At a series of countrywide public hearings, the vast majority of people in attendance expressed support for a constitutional amendment. In addition, the committee received over 600,000 written submissions, a response that was exceeded only by the public consultations organized by the Constitutional Assembly in 1995 (Hall 2024: 144). In contrast to the public meetings, the overwhelming majority of written submissions rejected amending the Constitution. To a large extent, this split in public opinion reflected South Africa's racial divisions, with those on the side of change overwhelmingly black, and white South Africans in favor of retaining the status quo. However, black public opinion on the matter was not monolithic, with class differences playing a significant role (Hall 2024).

When the Constitutional Review Committee reported to the National Assembly in November 2018, it supported an amendment to the Constitution that would "make explicit that which is implicit," namely, that expropriation without compensation is permissible within the existing constitutional order. On December 4, 2018 the National Assembly concurred (by a vote of 209 for and 91 against) and accordingly framed a mandate for an "Ad Hoc Committee" to develop the relevant legislation. This committee was established in February 2019 but, because of the magnitude of the task, compounded by the outbreak of the COVID-19 pandemic and the associated national lockdown shortly thereafter, it only tabled its final report in September 2021. This report officially introduced the Constitution Eighteenth Amendment Bill to parliament. The preamble to the bill identified two main purposes: "to provide that where land and any improvements . . . are expropriated for the purposes of land reform, the amount of compensation payable may be nil," and to provide "the circumstances where the amount of compensation is nil." A related purpose was to "enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis."

[6] See Zenker and Walker (2024) for a detailed reconstruction of the expropriation without compensation process.

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The development of this bill dominated proceedings after 2019. Most opposition parties, such as the Democratic Alliance (DA), the mostly KwaZulu-based Inkatha Freedom Party, the Freedom Front Plus, as well as the African Christian Democratic Party, regarded expropriation without compensation as unconstitutional and opposed the amendment. The EFF rejected the bill's framing, arguing for a more radical amendment that would permit a broad-based program of expropriation leading to permanent state custodianship of all land – effectively nationalization. Its differences with the ANC crystallized around this issue. While the EFF saw state custodianship as the prize, the ANC envisioned it as a temporary stage between the acquisition and redistribution of land (*Daily Maverick*, May 31, 2021). Riddled with factional infighting, the latter did not espouse a coherent position, instead combining some "constitution-blaming with investor-reassuring" in a way that Ruth Hall (2024: 146) aptly describes as "talk EFF, walk DA." Ultimately, its official position was to limit expropriation without compensation to specific circumstances, without abandoning the principle of private land ownership.

When attempts to reach a compromise around this issue failed in July 2021, the EFF withdrew its support for the Amendment Bill, effectively condemning it to fall short of the constitutional threshold of a two-thirds majority in parliament. On December 7, 2021 the final vote in the National Assembly was 204 votes in favor of the amendment and 145 against, meaning that it was not carried and the status quo, with all its different interpretations, remained (*Daily Maverick*, December 7, 2021). However, given that the new Expropriation Bill (B23D-2020) – which was recently passed by both the National Assembly and the National Council of Provinces and sent to the president for assent on March 27, 2024 – also explicitly engages the specific circumstances in which "nil compensation" may be just and equitable, these heated constitutional debates are far from over.

A cross-section of divergent positions on these matters also became apparent among those experts that President Cyril Ramaphosa appointed to the above-mentioned "Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA)" in September 2018. The panel brought together ten South Africans as "a feat of political engineering," as Ruth Hall (herself a member), observes: "five women, five men; seven black, three white; two lawyers; two presidents of national farmer associations; two individual leading farmers (one young black woman and one older white man); two agricultural economists (both men); and two interdisciplinary social scientists (both women)" (Hall 2024: 154). Running in

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parallel to the legislative process, this panel was mandated to provide a unified policy perspective on land reform (restitution, redistribution, and tenure reform) and also to consider the circumstances, procedures, and institutions related to a future policy of expropriation without compensation. Its report published on May 4, 2019 while the amendment process was still ongoing tellingly reflects disagreement on the issue of expropriation without compensation: whereas the majority of the panel supported amending the constitution, the (white) president of the national farmer association AgriSA as well as the older white farmer opposed this policy and any amendment (PAPLRA 2019: 103). While emphasizing that the current property clause (Section 25) of the Constitution already allowed for "just and equitable compensation" below market value (see Section 1.3 above for the factors in Section 25(3) determining such compensation), the panel expressed divergent opinions regarding the question of whether or not the state could already expropriate land without compensation under the current constitutional framework (PAPLRA 2019: 72).

Broadening the focus on public(ized) opinions by legal and land reform experts beyond the Presidential Advisory Panel, several observations are worth mentioning. First, although the panel seemed divided regarding the existing possibilities under the current constitutional framework to expropriate land for reform purposes without compensation, many legal experts have insisted that such a constitutional amendment is, in fact, not legally necessary. Thus, Advocate Tembeka Ngcukaitobi argues that "properly interpreted, the Constitution does not prohibit the expropriation of land without compensation" (Ngcukaitobi 2021: 173); while Roux equally regards an amendment as "legally unnecessary" (Roux 2022: 99; similarly Klug 2018: 490–491). Much technical discussions seemed to center on the question whether the peculiar wording "*without* compensation" contradicted the constitutional obligation to *always* provide "just and equitable compensation." Therefore, proposals for the constitutional amendment as well as the new Expropriation Bill shifted toward speaking about "nil" or "zero" compensation in order to suggest that there can be "just and equitable" circumstances in which the amount of compensation is actually zero. This can also be seen as one of the main reasons behind the peculiar wording used by the CRC for its proposal to amend the Constitution in order "to make explicit that which is implicit" (see above).

Second, the specific circumstances under which the state could carry out expropriation with zero compensation have dominated much of the

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technical discussions. The new Expropriation Bill in Section 12(3) offers an open list of circumstances potentially allowing for "nil compensation" – such as unused private or state-owned land, abandoned land, and land worth less than direct state investment.

Third, while many experts support, in principle, the possibility of zero compensation in circumscribed circumstances (irrespective of whether they regard a prior constitutional amendment as necessary), there is broad agreement that the actual number of such cases will be very small and that the transformative potential of expropriation without compensation is thus limited (e.g., PAPLRA 2019: 74; Ngcukaitobi 2021: xii). This is so because Section 25(3) of the property clause, and the limitations clause (Section 36) of the Constitution require striking an equitable balance between the public interest and the interests of current landowners, without imposing undue hardships and thereby disproportionately individualizing the costs for societal transformation. For this reason, many legal experts agree that while zero compensation will be very rare, many more cases of expropriation with partial compensation are, and always have been, possible. But these already existing constitutional possibilities have not yet been tested, let alone reached. For this reason, the presidential panel recommended a "compensation spectrum," ranging from "zero compensation" via "minimal compensation" and "substantial compensation" to "market-related compensation," against the backdrop of a typology of situations indicating how compensation should be approached in each case (PAPLRA 2019: 94).

Fourth, in light of the enormous public attention that expropriation without compensation has attracted over the past years and the emotional, intellectual, and financial investments that went into the project of the ultimately failed constitutional amendment, Ngcukaitobi rightly asks: "was the exercise worth it?" (Ngcukaitobi 2021: 212). He answers both in the positive and negative: to him, the debate was worthwhile because it "brought home the reality that land reform must be anchored in the rule of law," and, he claims, "many now accept this as true" (Ngcukaitobi 2021: 212). In another sense, however, Ngcukaitobi sees the true challenges of land reform as actually sidelined and occluded by the extensive and exclusive focus on "expropriation without compensation," namely:

> the structural flaws of the system, weak and dysfunctional institutional structures, corrupt officials, greedy landowners, the absence of people-centred ethics in the political class, and failures of the legislature to translate the Constitution into tangible laws. (Ngcukaitobi, 2021: 212–213)

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Put more strongly, he argues that "the Constitution is the wrong target. Post-liberation politics and the adoption of market-friendly policies have failed the Constitution's ambitious socially redistributive and inclusive goals" (Ngcukaitobi 2021: 206). This aptly summarizes a widespread perception. Hence, hardly any expert working in the field of land reform sees the constitutional property clause, as it stands, as the primary obstacle for South Africa's urgently needed radical transformation.

This leads to a last concern that was also the main driving force behind the conference "Compensation through *Expropriation Without Compensation*? Constitutional Amendment, Land Reform, and the Future of Redistributive Justice in South Africa" that I co-organized with Cherryl Walker in February 2022 at the Stellenbosch Institute for Advanced Study (STIAS), South Africa, namely the attempt to recenter the expropriation without compensation debate within a broader conception of redistributive justice, which includes but is not defined by land reform (Zenker & Walker 2024: 22–27). Assembling leading experts from law, sociology, anthropology, and agrarian studies, the workshop brought debates around transformative property law, the challenges of land reform, and how to advance redistributive justice into conversation with each other, charting different pathways toward a substantively more just society.[7]

As this brief sketch indicates, many legal experts and land activists empirically studying, theoretically reflecting, and politically intervening into land reform and the transformation of property relations in South Africa have supported an extensive expropriation of land with just and equitable compensation below market value (including zero compensation), while insisting that a much more radical transformation can still thrive – and could have thrived all along – under the rule of law. In other words, following Ngcukaitobi's dictum that "the Constitution is the wrong target," a more radical decolonization of South Africa's massively skewed rights landscape can still be achieved, so it seems, under the banner of transformative constitutionalism. However, while this might be a plausible analysis with regard to the legal technicalities of expropriation without compensation and land reform more generally, such a stance has to reckon with the fact that South African public culture has increasingly become disenchanted with the transformative potentials of "the law" as such.

[7] The results of this exchange were published in an open access volume – see Zenker, Walker and Boggenpoel (2024).

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1.6 Conclusion: Reckoning with Transformative Constitutionalism after Iconic Indexicality

How to make sense of the rapid rise and fall of South Africa's enchantment with the law, of the complexities of its dialectics of juristocratic reckoning as exemplified in recent debates of expropriation without compensation, and of a temporal consciousness, in which South Africa's moment of iconic indexicality seems to be withering away?

According to Hall, the insistence on a constitutional amendment and blaming the Constitution for the failures of land reform runs deeper than a literal reading of the law, constituting instead a political act of criticizing the state for its failure to actually achieve substantial land redistribution (Hall 2024: 161). In other words, this has been a "call for the decolonisation of landed property relations" (Hall 2024: 161) rather than for abandoning transformative constitutionalism as such. In an important sense, this is indeed the case. After all, the entire expropriation without compensation debate has been about the legal – *juristocratic* – process of amending the Constitution toward a more progressive framing, making explicit that which has so far been only implicit in law.

Yet, in another sense, Ngcukaitobi seems right in pointing out an evident weakness of such juristocratic reasoning: "[i]f the Constitution allows, implicitly, for the compulsory expropriation of land without compensation, then why amend it rather than enforce it?" (Ngcukaitobi 2021: 207). In other words, *amending* transformative constitutionalism appears, once again, only strong on yet another round of progressive legal promises, but remains weak on finally delivering on them. And the fact that not even the constitutional amendment process itself was ultimately successful surely has not increased popular support for the juristocratic order either. Thus, it remains an open question whether Ngcukaitobi's positive reading of the expropriation without compensation debate as at least making many accept that "land reform must be anchored in the rule of law" (see Section 1.5) is ultimately not too optimistic. Whether or not oneself believes – *normatively* – in the compatibility between decolonization and transformative constitutionalism, it seems increasingly evident – *descriptively* – that more and more people in South Africa no longer do. Many are deeply skeptical that post-1994 constitutionalism has adequately responded to the fundamental contradictions generated by colonization and apartheid (Modiri 2018: 295). This is the reason "[w]hy decolonisation and not transformative constitutionalism" (Sindane 2021) – increasingly construed as mutually exclusively alternatives – seems to be gaining popular support.

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And yet, as an act of mobilization, confrontation, and refusal, it is important to recall the discussion above, differentiating between Hirschl's *substantive* notion of juristocracy, defined in terms of the constitutionalization of rights and the fortification of judicial review, and a *formal* notion of juristocracy, entailing a redemptive reckoning with law *in excess* as *the* master modality for all societal transformation. It is precisely because South Africa's (substantive) shift toward constitutional supremacy with a strong judiciary was simultaneously (formally) vested with strong messianic expectations regarding law's potentials for realizing radical change that South Africa could become an icon indexing (also internationally) law's alleged eschatological possibilities at large. In other words: post-apartheid South Africa not only shifted toward a new juristocratic model of transformative constitutionalism – the latter was simultaneously freighted with unrealistic juristocratic demands and expectations overflowing law's normal carrying capacity, and was thereby set up for (relative) failure that is more and more becoming evident. Law in general, *as law*, arguably has the ironic, if not paradoxical potential, to increase intrinsically the probability of revealing its own failures *by itself*, of inviting having its bluff called given the stark contrast between its explicit promise and usually wanting practice. This general tendency of the law toward exhibitionist self-debasement becomes massively aggravated, however, when simultaneously coupled with exalted juristocratic expectations regarding law's allegedly infallible centrality.

Seen in this light, the current passing of South Africa's moment of iconic indexicality, understood as a growing disenchantment with law's proclaimed excessive potentials, might actually be a good thing. It may allow apprehending transformative constitutionalism more realistically as only one possible means, besides others (political, social, economic, religious, cultural etc.), for achieving more transformational change in all its multidimensional complexity. Reckoning with transformative constitutionalism after iconic indexicality may, therefore, make possible a more sober, nuanced, and contextual analysis of the relative potentials and pitfalls of concrete legal measures, as compared to other transformative modalities, than was previously possible under conditions of exalted legal apotheosis. By transcending a false binary of, in principle, either defending or opposing transformative constitutionalism, such a move possibly facilitates engaging in a much-needed process of what could be called a "transformational triage."

Taking inspiration from medicine, where triage refers to a process of determining the order of priority for treating multiple sufferers under conditions of limited supplies, transformational triage equally highlights,

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under conditions of severely limited resources, the necessity for a political process of balancing and weighing, on the basis of evidence, various concerns and interests in the management of transformational change through contested forms of relative prioritization: What, in terms of urgency, efficacy, and efficiency, needs to be done, in which order, in which time scale, by whom and – importantly – through which transformative modality? Given that a large arsenal of political, legal, social, economic, and other measures for promoting transformative justice is readily available and that a plethora of public goods simultaneously clamor for attention, this requires making and justifying strategic choices as well as negotiating the attendant trade-offs, and managing the political fallout that can be expected to follow such setting of priorities. Conceptualizing these necessary negotiations in terms of a transformational triage has the benefit of keeping the obvious in focus – namely, that under conditions of limited resources not everything can be done at the same time and that sequence, the order of priority, does make a difference.

Reckoning with transformative constitutionalism in terms of a transformational triage also has the added benefit of allowing the evaluation of the potentials and pitfalls of a continued project of transformative constitutionalism both *internally*, with regard to how actually existing legal practices have fared vis-à-vis their actual potentials, and *externally*, when compared to alternative modalities at hand. In light of the above discussions of South African land reform in general and the expropriation without compensation debate in particular, it seems as if, after all, transformative constitutionalism in South Africa has not yet fully exhausted its possibilities. Generally speaking, transformative constitutionalism has been rightly criticized because its practice, rather than its potential, has been found wanting: an increasingly inactive and corrupt executive has not sufficiently implemented and enforced the law as it stands; the legislative has failed to pass consistent and constitutionally required transformative legislation (e.g., on land redistribution, tenure security, or expropriation); and the judiciary could equally have been more transformative and less conservative, in terms of its jurisprudence, contributing to what Sindiso Mnisi Weeks (2022) calls the "dis/empowerment paradox" of South African legal culture.

More specifically, refocusing the expropriation without compensation debate in terms of a transformational triage, three issues deserve highlighting with regard to their contribution toward more redistributive justice. First, given the profoundly transformed economy and ecology of land in contemporary South Africa, future land reform needs to

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venture substantially beyond a narrow focus on land redistribution for agriculture (see Walker 2024). Second, rather than trying to reduce state expenditure piecemeal through cumbersome and excessively litigation-based expropriation without compensation and thereby make only some contemporary landowners pay, it might be more efficient as well as more just to expand substantially the revenue for radical transformation through a transformational tax (in the form of a capital levy) that progressively spreads the costs across South African society at large, thereby also charging colonial beneficiaries across the scale who happen not to own land today (see Klug 2024). Third, given that land and agriculture is no longer the motor of the nation's wealth, it might be more productive to first and foremost effect radical transformation through direct cash payments – for instance, through a Basic Income Grant (BIC) – rather than locking capital into increasingly unproductive land for the relatively few (see Ferguson 2024). These are all measures – faster, more effective, and more radical in profoundly affecting far more people than currently the case in land reform – that, based on a transformational triage, can still become operative within the framework of transformative constitutionalism.

This is so even though, thirty years into its new democratic dispensation, South Africa's earlier excitement with its own iconic status indexing the proclaimed transformative potential of law at large, has increasingly given way to substantial disillusionment with law's actual possibilities. As has become clear, South Africa too (like any other place) is subject to the ebbs and flows of juristocratic reckoning. However, this has evidently not led to an unambiguous move into post-legality, once and for all. In her article discussed at the beginning of this chapter, Lindiwe Sisulu dismissed the rule of law *tout court* as a foreign belief system and fundamentally questioned its use, if the law did not work for Africans in Africa. Yet less than a week later, after stirring a hot debate, Sisulu somewhat backtracked in another article (Sisulu 2022b), putting again stronger emphasis on the need to truly deliver on the rights promised *in the Constitution*. It is this ambiguous oscillation back and forth, into and beyond the rule of law, that increasingly characterizes, and complicates, the dialectics of juristocratic reckoning in South Africa today.

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