

Author

Matthew Kruger

Affiliation

Advocate of the High Court of South
Africa, South Africa

Email

matthew@thulamelachambers.co.za

Date Submitted

12 September 2023

Date Revised

4 December 2023

Date Accepted

4 December 2023

Date Published

11 June 2024

Guest Editors

Prof E du Plessis
Prof K van Marle

Journal Editor

Prof C Rautenbach

How to cite this contribution

Kruger M "Compensation as Radical
Transformation" *PER / PELJ*
2024(27) - DOI
<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16796>

Copyright



DOI <http://dx.doi.org/10.17159/1727-3781/2024/v27i0a16796>

Abstract

This paper draws on the concurring judgment of Froneman J in *Agri SA* to articulate a "new and fresh approach" to the power to expropriate and duty to compensate in section 25 of the Constitution. In *Agri SA*, the Constitutional Court had to consider whether the provisions in the *Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA)* expropriated property and, if so, what form of compensation was required as a result. The answers that Froneman J provides, rooted in his conception of "compensation in kind", offer a framework to enable rational, purposive and wide-ranging transformation of property through legislation. Work, though, is needed to clarify the structure and implications of his approach. This paper provides that clarity.

After an introduction, Part 2 unpacks the transformative, i.e., radical, nature of the change effected by the MPRDA, distinguishing it from reform. Armed with this distinction, it is argued that Froneman J's concepts of expropriation and compensation are rooted in a practical concern for: (a) the good and bad forms of being that Parliament wanted to facilitate and frustrate by way of the MPRDA; (b) the relations constitutive of these forms; and (c) the property that is needed to facilitate or frustrate the relations and forms. Part 3 clarifies the nature of Froneman's approach, by focusing on s 25(3) of the *Constitution of the Republic of South Africa, 1996*, demonstrating that the factors it lists are concerned with maximally facilitating old and new goods, whilst always conscious of the fact that transformation by nature cannot avoid the need to sacrifice some goods for the sake of others. Part 4 offers some concluding thoughts.

Keywords

Expropriation; compensation; section 25; *Agri SA*; Froneman; compensation in kind; radical change; conflict, sacrifice and tragedy; nil compensation.

.....

Large-scale transformational legislation of this nature presents challenges of a special kind. There is no binding precedent of this court that precludes a new and fresh approach to the issue.

—Justice Froneman¹

Our coming was expected on earth. Like every generation that preceded us, we have been endowed with a weak Messianic power, a power to which the past has a claim. That claim cannot be settled cheaply.

—Walter Benjamin²

1 Introduction

In this paper, I draw on the concurring judgment of Froneman J in *Agri SA* to articulate, in his words, a "new and fresh approach"³ to the perennially disputed issues of expropriation and compensation in terms of section 25 of the Constitution.

In *Agri SA*, the Court was faced with legislation that effected an "institutional change to the legal regime" that regulates property, i.e., the liberties, claims, powers or immunities that attach to or obtain in minerals.⁴ The legislation in issue was the *Minerals and Petroleum Resources Development Act 28 of 2002* (the MPRDA). The effect of the MPRDA on the law regulating our relation to minerals was substantial. One class of rights that were affected were the rights of people not exploiting them.⁵ The law froze their power to sell, lease or cede their unused rights, until they converted the rights into a prospecting or mining right. To obtain a conversion, the old right holder had to apply to the state within a year of the MPRDA's taking effect. During that year nobody else could apply. If the unused right-holder did not apply, then their old right lapsed.⁶ But if they did successfully apply, they obtained a right to prospect or mine. Their new right was conditional, however, for if

* Matthew Kruger. LLB (UKZN) BCL (Oxon) MPhil (Oxon) PhD (KCL). Advocate of the High Court of South Africa. Email: matthew@thulamelachambers.co.za. ORCID: <https://orcid.org/0009-0000-0193-126X>

¹ *Agri SA v Minister for Minerals and Energy* 2013 4 SA 1 (CC) (hereafter *Agri SA*) para 91.

² Benjamin "Theses on the Philosophy of History" 254.

³ *Agri SA* para 91.

⁴ The concept of "right" employed is Hohfeldian (Hohfeld *Fundamental Legal Conceptions* and Wenar 2005 *Philosophy and Public Affairs* 223-253). For an excellent, novel application to South Africa's Constitution, see Du Plessis 2022 *SALJ* 577-622.

⁵ Schedule II of the *Minerals and Petroleum Resources Development Act 28 of 2002* (the MPRDA) defines "unused old order right" very broadly. It covers rights in distinct forms and from diverse sources, but what unites them is the absence of their use for prospecting or mining purposes.

⁶ Item 8 to Schedule II of the MPRDA.

they failed to exercise it appropriately it could be annulled.⁷

These changes were profound. Before the MPRDA, a holder of an unused mineral right: had the liberty not to exercise it; had a claim against others exploiting minerals even if they were not; and had the power to transfer their rights to others.⁸ By imposing a time limit on the liberty to convert, and by attaching conditions to the converted right, the MPRDA extinguished the old liberty, claim and power in minerals.

Two issues arising in *Agri SA*, the answers to which separate Froneman J's concurring judgment from that of Mogoeng CJ's majority judgment, was whether the MPRDA entailed an expropriation and, if so, what form of compensation was required as a result. The answers Froneman J provided, I argue, point towards a framework that can enable rational, purposive and wide-ranging transformation of property through legislation—unlike all existing accounts of the nature of expropriation and compensation.

Froneman J's framework has two basic, conceptual pillars: transformation and compensation. Each pillar directs attention to three questions:

1. What good or bad forms of being—e.g., actions, mental states, states of affairs, conditions—do we want to facilitate or frustrate?
2. What relations are constitutive of these forms?
3. What property rights are required to facilitate or frustrate the relations in (2) and therefore the forms in (1)?

After we answer each question, Froneman J's approach suggests, we may effect changes to the existing set of property rights. If these changes make possible the realisation of new goods, like equality and economic growth, whilst also giving rights to the affected parties that will enable them to do what they could do before, like exploit minerals, the resulting scheme of rights will be just and equitable, as required of compensation after expropriation in terms of section 25 of the Constitution. It will be just and equitable as it will respect, protect, promote and fulfil, as far as this is possible in logic and fact, the Bill of Rights. In other words, what Froneman J's concurrence offers us is a concept of compensation as transformation.

Despite the innovative, the "new and fresh", nature of this approach, quite a bit of work is necessary to clarify its structure and implications. Such is my aim in this paper. In part 2, I unpack the transformative, i.e., radical, nature of the change effected by the MPRDA, distinguishing it from reform. Armed with this distinction, I thereafter explain that Froneman J's twin conceptions of expropriation and compensation are rooted in the three questions that I

⁷ Section 51(4) of the MPRDA.

⁸ *Agri SA* paras 39-44, 50-52 and 66.

outlined above. In part 3, I clarify the nature of Froneman's approach, by focussing on section 25(3) of the Constitution. I show how the criteria it lists are essentially concerned with facilitating as many old and new goods as possible, whilst always being conscious of the fact that transformation by its nature cannot escape the need to sacrifice some goods for the sake of others. In part 4, I offer some concluding thoughts.

2 Agri SA: the MPRDA as transformative legislation

In this part, I reveal the MPRDA's transformative nature. Then I explain how Froneman J's recognition of this fact, and his response to it point towards a new framework for effecting expropriation through legislation, in a way that is logically and purposively consistent with the constitutional duty to afford just and equitable compensation.

2.1 Grasping matters at the root

The MPRDA is radical and transformative. To recognise this, it helps to start by clarifying the function or purpose served by its alteration of rights.

Historically, people had a liberty to use minerals to satisfy immediately their desires and ends: to prospect or to mine. The failure to exercise this liberty would not result in its loss. Neglecting to use minerals did not return them to nature or to the state, for others to use or get permission to use. A holder of this right, therefore, was free (productively) to consume them, store them, or not use them at all. Parliament, however, judged that non-exploitation of profitable minerals whilst millions languish in poverty is wrong, and therefore it decided to amend the law regulating minerals.⁹

The MPRDA's purpose helps make sense of the changes it introduced. It insists that we must treat minerals as consumables, by changing the nature of possible relations to minerals. In the past, we could treat them as objects capable of being consumed, stored or let alone. Now just the first is allowed, for we must search for minerals, and if we find them, we must sever them from the ground and carry them away. Our relation to minerals is defined now exclusively by use; and only use of a particular kind. We are no longer allowed not to use minerals; and we may not delay use to a future time we consider best. Old right-holders could exploit or not; new ones are free only to exploit immediately. Instead of a discretion, they now have an exemption to prospect or mine, which they must promptly exercise.

The MPRDA effected four structural changes to the legal regime regulating minerals: (1) it extinguished a paired liberty, i.e., a right to exploit or to not exploit minerals; (2) it afforded the person who was deprived of this liberty

⁹ See s 2 of the MPRDA; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 3.

an exclusive paired liberty to apply or not apply for a prospecting or a mining right; (3) if granted a prospecting or mining right, the right was in the form of a conditional single liberty, i.e., an exemption that could be annulled if it was not properly exercised; and (4) it vested a power in the state, which became operative only if the new liberty lapsed or if the old right-holder failed to convert it, to allocate the conditional single liberty to a new applicant.¹⁰

What is important to understand is this: whenever the law effects change of this kind—by altering the liberties, claims, powers or immunities that attach to or obtain in objects—it is radical. By changing rights, it thereby transforms the relations that we can have through and in objects, and thus the possible forms of being constituted through and in these relations. As a result of the MPRDA we can now relate to minerals only as consumables, thereby making possible present profits, but not as objects to be stored or let alone, which, as we shall see below, is necessary for other goods.

To better clarify the radical nature of this structural change let us contrast it with non-radical forms of change.

We must distinguish transformation, which is always radical;¹¹ and reform, which is never radical.¹² Reform is essentially concerned with a quantitative question, namely, "How much must each person or group get?" Within the negative and the positive limits set by the values and rights embodied in the Constitution, the answer to this question is determined through the political process. But always, the form of the change, at least if it is to be reformist, is constrained: it may never alter the structures of what exists. For example, the Constitution contemplates changes that have the effect of transferring or improving access to or control of existing forms of property; or adoption of measures concerning taxation, remedial equality and welfare.¹³ Whatever their merits, these changes are essentially reformist, not transformative, in nature.¹⁴ They are effected by changing the identity of those who hold rights, or by distributing rights more equally—rather than by altering the structural make-up, nature, form of existing rights.

¹⁰ Other changes included that prospecting and mining rights are granted for a limited time (ss 17(6) and 23(6) of the MPRDA), with transfer requiring ministerial consent (s 11).

¹¹ On the "radical" nature of the legal change effected by the *Constitution of the Republic of South Africa*, 1996 (the Constitution), see Ackermann 2004 *NZ L Rev* 633-679.

¹² On the logical distinction between radical change and reform, see Luxemburg *Reform or Revolution*.

¹³ For property, see ss 25(4)(a), (5) and (6), (8) and (9) of the Constitution, and for general rights, see ss 9(2), 26(2) and 27(1)(b) and (2) of the Constitution.

¹⁴ Contrast Pieterse 2005 *SAPL* 161-163. Despite the logical distinction, on reform as a means to effecting radical change, see Luxemburg *Reform or Revolution*. And see also Liebenberg 2006 *Stell LR* 8-10.

Transformation, though, always alters these structures: it is concerned with horizons of possibilities, with what is done, not just to whom or for whom it is done.¹⁵ Not just a quantitative change, it always necessitates a qualitative one. And as Marx explained,¹⁶ this requires grasping matters at the root—meaning, we must alter the logic of the relations facilitated or frustrated by the rights that attach to or obtain in objects, by altering the existing set of rights to some "mutually exclusive",¹⁷ logically different set of rights, i.e., some incompatible set of liberties, claims, powers or immunities.

2.2 *Pointing the way*

Quite predictably, the radical change that was effected by the MPRDA was met with reaction. The reaction took a litigious form in *Agri SA*. There, the applicant argued that because the law expropriated property, the applicant was entitled to just and equitable compensation.

The Constitutional Court split. Whilst Froneman J concluded that there was expropriation, Chief Justice Mogoeng for the majority disagreed. Whilst the law deprived the applicant of rights,¹⁸ the latter said, it did not expropriate rights,¹⁹ since the state did not acquire rights that were 'substantially similar' to what was lost.²⁰

As this paper is not about expropriation as such, I shall deal only briefly with this particular dispute. Whilst I agree with Mogoeng CJ that expropriation by nature requires acquisition, the state did acquire rights. In short, as Marx memorably demonstrated, original acquisition is still acquisition.²¹ There is

¹⁵ Ackermann 2004 *NZ L Rev* rightly talks about "substantive" revolution and "radical" changes, but his gloss that we "turned" the old order "on its head" (Ackermann 2004 *NZ L Rev* 646) is too conservative. We did not just react (Ackermann 2004 *NZ L Rev* 643) to what came before by negating or inverting it. By internalising logical diversity, we substituted for hierarchical separateness a "complex equality" (Walzer *Spheres of Justice* 3-30) that recognises the logical diversity of goodness.

¹⁶ Marx *Critique of Hegel's "Philosophy of Right"* 137.

¹⁷ *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 364 (SCA) para 23.

¹⁸ *Agri SA* paras 50-53.

¹⁹ *Agri SA* paras 67-68.

²⁰ *Agri SA* para 71. Whilst Mogoeng CJ refers to "the state" acquiring rights (para 59), he also writes of "other entities or people" doing so (para 71). We ought to adopt an inclusive interpretation (Roux "Property" 46-31 to 46-33; Van der Walt *Constitutional Property Law* 462-466 and 490-493). Whilst *Harksen v Lane* 1998 1 SA 300 (CC) paras 29-33 and *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) paras 61-64, refer to "state", they were not concerned with the acquirer's identity.

²¹ As famously explained in Marx *Capital*, "systematic colonization" (Marx *Capital* 939) or "expropriation" (932-934, 940), as a method of "original" (714) or "primitive accumulation" (873) was effected by means of "government set[ting] an artificial price on the virgin soil" (938), i.e., by creating a state power to allocate, through sale, exclusive property rights in land over which people had previously held a paired liberty.

an immediate tie between the MPRDA's deprivation of the paired liberty and its grant to the state of a new power to allocate a conditional single liberty. Like Froneman J, it "really seems as plain and simple as that to me".²² Sure, the state's power is not "substantially similar" to the deprived paired liberty, but Mogoeng CJ cites no authority and offers no argument whatsoever for the proposition that similarity is required.²³ More critically, this proposition contradicts the logic of transformation. Transformation by nature alters the structures of existing relations, so it always produces rights not "substantially similar" to what existed before.

Underlying Mogoeng CJ's error is this thought: If compensation is required when we effect structural change, won't the fact of limited resources often frustrate it?²⁴ But whilst this limit should inform our approach to section 25, the solution comes at the matter from the wrong end for we must not shy away from talk about expropriation. The power to expropriate is a critical, constitutionally mandated tool for effecting transformation. As Froneman J explained, rather than any abstract definition of "expropriation" that works to locate certain rights-changes outside sections 25(2) and (3), we must try to accommodate practical concerns about a workable transformative agenda in the concept of "compensation".

Due to the limited precedent on the meaning of "compensation" in section 25, in *Agri SA* Froneman J found himself free to pose a first-order question: Must compensation always be monetary in form? In answering it, he begins by pointing to the words "just and equitable" in section 25(3), which delimits the standard of compensation required when expropriating property. When we fix the compensation awarded, section 25 says, we have to balance the public interest with the interests of the affected party. To do this, we must consider all relevant facts, including the current use of the object, the history of its acquisition and use, and the purpose of the expropriation.

After drawing attention to the MPRDA's aim and to past injustice around the acquisition or exercise of mineral rights, Froneman J turned to the effect of the expropriation. Despite effecting an institutional change in rights, he said, old rights-holders could still act in a way that would facilitate actualisation of certain goods made possible by the old system: if they applied to do so, they could still prospect or mine. Yes, they sterilise the minerals, but given the purpose of the MPRDA and past injustices tied to land and minerals, the

²² *Agri SA* para 81.

²³ Mogoeng CJ appears to have just adopted (*Agri SA* para 58) the applicant's proposition (*Agri SA* para 56).

²⁴ *Agri SA* paras 60-65 and 69. Cf Dugard 2019 *CCR* 135, who argues that this approach is "progressive", for it "means having to draw less on public funds to compensate property owners" (145). Here Dugard, perhaps unwittingly, reveals two deep roots of progressivism: austerity (Adorno and Horkheimer *Dialectic of Enlightenment* 43-80) and self-sacrifice (Dagan *Liberal Theory of Property* 220-227).

provision of an exclusive right to apply for a conditional liberty, i.e., use it or lose it, was just and equitable. This form of compensation was 'in kind',²⁵ i.e., it was not monetary, but was rather in the form of rights which enabled relations like those that had existed prior to the passage of the MPRDA.

Froneman J's approach is ingenious for he tells us that compensation can take the form of non-monetary rights, which, though logically different from the rights that were extinguished by the expropriation, still work to facilitate the realisation of those goods that were the focus of the old system of rights. This approach mitigates Mogoeng CJ's worry about limited resources and it also suggests a more general approach to transformation, for it tells us to ask these three questions. What forms of being do we want to facilitate or frustrate? What relations constitute these forms? What rights are needed to facilitate or frustrate these relations and forms?

After we answer each of these questions, Froneman J's approach suggests, we may effect changes to the existing set of rights. If these changes make possible the realisation of new goods such as equality and economic growth, whilst also giving rights to the affected party that affords them the means to do what they could do before, like exploit minerals, the result will be just and equitable. It will be just and equitable as it will respect, protect, promote and fulfil, as far as it is possible in logic and fact, the Bill of Rights.

On this reading of *Agri SA*, what Froneman J articulates is a concept of compensation as transformation,²⁶ meaning that when expropriation alters the rights that attach to or obtain in objects to a logically different set of rights, which set respects, protects, promotes and fulfils the diverse goods that are constitutive of South African life better than the old set,²⁷ compensation will always be just and equitable.²⁸

Despite the innovative, "new and fresh", nature of this approach, quite a bit of work is necessary to clarify properly its structure and implications. As I demonstrate in part 3, we can obtain this clarity by on section 25(3) of the Constitution.

²⁵ *Agri SA* para 88.

²⁶ On traditional theories of compensation, see Du Plessis *Compensation for Expropriation* 214-270.

²⁷ Section 7(2) of the Constitution. This is an example of "institutional consequentialism" (Hamilton *Political Philosophy of Needs* 122-123), which arguably rests on reading s 8 of the Constitution as calling for a "radicalised structural horizontality" of fundamental rights (Van der Walt *Law and Sacrifice* 33-120).

²⁸ The traditional reading of s 25(3) is that it forms part of the "protective" (Van der Walt *Constitutional Property Law* 28-31) or "defensive" (Dugard 2019 *CCR* 144) subsections of s 25, with ss 25(5) to (9) being reformist. See also Van der Walt and Viljoen 2015 *PELJ* 1057. By making "mediation" of diverse conflicting goods its "focal point" (Zimmerman 2005 *SALJ* 403), Froneman J renders the entire clause transformative.

3 Compensation in kind

Froneman J's framework has two pillars: transformation and compensation. Each directs our attention to three questions:

1. What good or bad forms of being—e.g., actions, mental states, states of affairs, conditions—do we want to facilitate or frustrate?
2. What relations are constitutive of these forms?
3. What property rights are required to facilitate or frustrate the relations in (2) and therefore the forms in (1)?

After asking the first question, we may answer: love, play, family, friendship, art, faith, education, competition, etc. If we did, this would require a complex set of answers about the relations that constitute these forms. And after we identify these relations, we will have to identify the liberties, claims, powers and/or immunities necessary to facilitate these relations and forms.

But in asking and answering these questions, we will always be performing the same task that Parliament performed in relation to the MPRDA, just on a more diverse set of goods or bads. As we saw, the MPRDA is structured by goods like economic growth and equality and therefore requires relations of immediate use and a single liberty that is conditional on appropriate use. But if we identified love, play, faith, etc. as desired forms, then we have to identify logically different relations and logically different rights. All the while, the structured, three-stage approach is the same.

When forms and relations, and therefore the rights required to facilitate or frustrate them, are logically different, ranking their importance in the abstract is impossible. It is only in context, situated in the field of particular reasons, that we can ever evaluate their relative merits. Only when historically placed, when possessed of the contingent facts relevant to a particular situation, is it coherent to compare them²⁹ and so decide which good or bad to facilitate or frustrate.³⁰

Enter section 25(3) of the Constitution, which provides:

The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

- (a) the current use of the property;

²⁹ On incomparability, see Raz *Morality of Freedom* 322-334.

³⁰ A point well-recognised by judges, e.g., *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23 and *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 5 SA 540 (SCA) para 13.

- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

Only when possessed with these facts can we determine if transformative change conforms to the Constitution's normative demands. For it is only with this knowledge that we can evaluate whether a radical change in property rights effected through law complies with the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.³¹

To see what all this means, we consider below each category of information. We first look at (a) and (e), then at (c), after which we return to (a) and (e) and consider these again but now alongside (b) and (d). The reason for this division of labour will become clear as we proceed.

3.1 Facilitating old and new goods³²

The function of transformative legislation concerning property is to facilitate better than the existing system of rights the actualisation of diverse forms of being that South Africans judge good, or frustrate better forms that we have judged bad.³³

So, first prize is always to restructure rights in a way that facilitates both old goods and new goods.³⁴ The MPRDA tried to do this, by subjecting rights to a due-use condition. If we tie compensation to these restructuring efforts, then when awarding compensation we must start with paragraphs (a) and (e). We must always start there because they direct us to the "current use" and the "purpose of the expropriation", that is, the functions that old (existing) and new (proposed) rights facilitate.

³¹ Section 7(2) of the Constitution.

³² Compensation can be fixed before or after the expropriation (*Haffejee v Ethekwini Municipality* 2011 6 SA 134 (CC)), so sometimes rather than "old and new", we might instead talk about "existing and proposed".

³³ The only caveat is that where forms are prescribed as bad, e.g., torture (s 12(1)(c) of the Constitution), or good, e.g., basic education (s 12(1)(c) of the Constitution), property rights must, in some form and degree, reflect this fact (s 7(2) of the Constitution).

³⁴ To be clear, because what is necessitated is the facilitation of *goods*, the fact that existing forms have their origin in historical injustice does not change the fact that they are *goods*, and so must ideally be preserved. As I explain in parts 3.3.2 and 3.3.3, however, the fact of historical injustice is relevant when we are concretely ranking conflicting goods, since it bears on the weight we should attach to the good: where a good is the fruit of colonialism, apartheid, etc., we will attach less weight to it than we would if it were the product of just, democratic, etc, procedures. I am indebted to a reviewer of this paper for pointing out the need to make this clarification.

In part 3.3 I explain that facts about functions are also relevant to the ranking of conflicting forms. But initially (a) and (e) concern the forms and relations that are facilitated or frustrated by existing and proposed allocations, for the ideal is always to restructure rights in a way that facilitates both old and new goods. Let us unpack (a) and (e) in turn.

3.1.1 *Current use of the property*

When determining compensation, we must begin by establishing the forms towards which the affected party puts the object that is being expropriated. How does she relate to the object? Is it as a consumable or as an object of capital? Or does she relate to it in a mix of these ways, depending on how she judges the circumstances? Or is the relation not instrumental at all? If not, is the object in which rights attach or obtain an expression of creative energy, or is it perhaps a reminder of past words or deeds?

More concretely, we must first figure out what forms the rights facilitate or frustrate. If the party that is affected by expropriation relates to an object as a consumable, is the consumption for the sake of leisure or for survival? If she relates to the object as capital, is it fixed like a factory or is it interest-bearing like a mortgage held over a home? If it is not an instrument, is it an artwork or memorial? If the object is not used for any particular end, is this because she has not yet identified an end with which she associates the object, or is it because she relates to the object as an area that is protected from human activity? Or because these are all ideal types, is the relation characterised by some mixture of the above?

Identifying the relational forms facilitated through existing rights-allocations is essential to determine the nature of the compensation afforded to affected parties,³⁵ for only with this particular knowledge can we determine whether a proposed set of rights would better fulfil the Constitution's transformative agenda than the existing set of rights.³⁶

Sometimes, this need for particularity can be diminished. The MPRDA is an example of how this is done. There a right to sterilise was extinguished, and the holders of unused mineral rights were afforded an exclusive right to apply for a liberty to prospect or mine. A legislative strategy of this kind has merits, one being its general form. Whilst expropriation must be authorised

³⁵ To avoid crude economic readings of "amount" or "payment" in s 25(3) of the Constitution, I use "nature" and "afforded" or "awarded".

³⁶ To say that the new set of rights will better fulfil the Constitution's transformative agenda does not mean that the existing set of rights does not respect, protect, promote or fulfil this agenda. It means that the new rights will do a better job at respecting, protecting, promoting or fulfilling this agenda. Again, I am indebted to a reviewer of this paper for pointing out the need to make this clarification.

"in terms of" a general law³⁷ so the power will always be general at this level, the MPRDA is also general at the level of compensation. Because the law's expropriation was limited to the right to sterilise, Froneman J could make a general finding about compensation: If an affected party relates to minerals as material to be exploited, now or later, then affording them a right to apply for a conditional single liberty is just and equitable.

Despite this strategy's merits, at most it reduces the cases in which we must ask after the concrete relational forms facilitated by the existing set of rights. It reduces them because it excludes one class of expropriated persons from the requirement to ask after further facts: all persons who relate to minerals as objects are to be exploited. If this is their relation to objects, that is all that we need to know.

There is nothing blunt in a legislative approach that takes this form. To argue otherwise conflates two levels at which evaluation can occur: the legislative and the adjudicative.³⁸ In passing the MPRDA, Parliament evaluated the interests of an affected class of right-holders, i.e., consumers, and it decided to award them compensation in the form of an exclusive right to apply for a conditional single liberty.³⁹ When a dispute later arose, the award was considered and "approved" by Froneman J as just and equitable.⁴⁰

This approach, however, does not eliminate the need to ask after additional facts, because not every holder of unused mineral rights relates to them as objects of exploitation. Minerals lie in land but not all who have rights in land want to mine. It might be profitable, but money isn't everything. There exist other goods, like visiting graves to pay respect to your ancestors, or sitting at a river fishing with your children just like your dad did with you. To realise these goods, a right not to exploit minerals may well be essential. If it is, by extinguishing this right, which the MPRDA did by a paired liberty with a right to apply for a conditional single liberty, the goods are imperilled. Doing this may be justified, but when we recognise the existence of these goods it is less likely that this restructuring of rights will qualify as just and equitable

³⁷ Section 25(2) of the Constitution. For worries about the constitutionality of expropriations that are effected by statute, which places *a lot* of weight on these words, see Van der Walt *Constitutional Property Law* 433-434.

³⁸ Cf Ngcukaitobi and Bishop 2018 [https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Ngcukaitobi%20Bishop%20Article%20\(FINAL\).docx](https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Ngcukaitobi%20Bishop%20Article%20(FINAL).docx) 11. Conflation also underlies the following claim in Ngcukaitobi *Land Matters* 209: "The power to decide if compensation for expropriated land should be paid lies with the courts, not government."

³⁹ Item 2(b) of Schedule II to the MPRDA, read with *Agri SA* para 6.

⁴⁰ Cf Southwood *Compulsory Acquisition of Rights* 25: "It is difficult to imagine a court approving ... compensation ... other than in circumstances in which these are agreed."

compensation. For the affected party, the exclusive right to apply for a conditional liberty does not facilitate goods that matter to them: respect and tradition. As such, even with an MPRDA strategy, we will often have to enquire after the current use of affected objects. And in doing so, we must construct forms of compensation sensitive to the facts.

This need for context means that it is difficult to articulate anything in general that will always be useful in particular cases yet, whilst context is essential, we might still illustrate how to go about approaching the facts.

Let us continue with our two imperilled goods: respect and family tradition. In effecting transformation the state must try to facilitate old and new goods. Given the aim of the MPRDA, it restructured rights in a way that facilitates the actualisation of access or economic growth. Whilst this is legitimate, we must also strive to facilitate goods like respect and tradition. Doing so requires three rights. First, descendants or families require a liberty to access land: to visit graves or to fish. Second, they require a claim against others frustrating their exercise of this liberty, e.g., a claim protecting them from mining firms that want to erect buildings that would prevent access to the graves or produce pollution that kills life in the river. Third, they must have an immunity against mining firms, or others, annulling their rights. But whilst these rights are each essential to actualising respect and tradition, the power to transfer the rights in the market is not—but they will need this fourth form of right, i.e., a power, if transferring the liberty, claim and immunity to their heirs or family members is necessary to keep these goods alive.

If the outcome of the expropriation reflects a sensitivity to all these goods, such that the rights are restructured in a way that facilitates both the old and new goods, the legislation will afford just and equitable compensation. This is because it will facilitate greater actualisation of the diverse goods that are constitutive of South African life, for the ideal of every act of transformative expropriation is always to facilitate both old goods and new goods. In short, the more the better.

3.1.2 *Purpose of the expropriation*

By directing our attention to the purpose of the expropriation paragraph (e) draws attention to the forms of being that expropriation is meant to facilitate or frustrate.⁴¹

⁴¹ For Van der Walt *Constitutional Property Law* 514, the only rational interpretation of s 25(3)(e) of the Constitution is that it functions to prevent awards of compensation frustrating expropriation aimed serving a pressing social necessity. Whilst limited resources matter (see part 3.2), para (e) is initially and rationally relevant for the purposes of restructuring.

Just as knowledge of current use is relevant when determining what rights are needed to facilitate existing actualised goods, so knowledge of the forms pursued or battled through expropriation is necessary to determine how to restructure property rights to facilitate them. For example, two purposes of the MPRDA are to promote access to resources and to diminish poverty. To facilitate these goods, it was not judged necessary to abolish all existing rights in minerals. Parliament deemed it necessary only to remove the right to sterilise.

Thus, the total deprivation of rights would have been unjust, on this picture of things, for it would have deprived persons of means to actualise existing goods, whilst not further facilitating new goods. In the idiom of section 36 of the Constitution, the purpose of the expropriation was achievable through less restrictive means.⁴² In other words, the legislatively determined content of restructured rights made possible the realisation of more forms of being that South Africans in fact judge good.

To sum up, what is essential is that expropriation always reflects sensitivity to existing and proposed forms. And as Froneman J revealed, this requires us to determine the relations that are constitutive of and the property rights necessary to facilitate or frustrate the forms. Transformative expropriation, in other words, must always strive to facilitate as many goods and frustrate as many bads as possible.

But often, it is not possible to have it all. This may be for contingent reasons, say, if the minerals are under graves. Or it may be for logical reasons, say, if the existing rights facilitate the existence of a protected area that by nature only exists only if not intervened in by humans.

If so, no restructuring of rights will avoid the loss of something good. Whatever our culture's pretences, its talk of "inclusivity", every "pageant" has a winner and a loser.⁴³ When the pageant concerns the diverse and conflicting forms that make life worth living, this fact of loss is tragic. And it is in these cases, when for contingent or logical reasons we "cannot have everything",⁴⁴ that section 25(3) of the Constitution tells us to resort to the market.

⁴² On "less intrusive measures" in the context of property, see Van der Walt *Constitutional Property Law* 499-503.

⁴³ Whilst the diversity of goodness functions to "enrich" life (*MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC) para 107), the price we pay for this manifold meaning is conflict, agony, choice and sacrifice, i.e., tragedy.

⁴⁴ Berlin *Liberty* 215.

3.2 *Markets as substitutes*

We have seen that when equipped with Froneman J's idea of compensation in kind, we are freed from thinking about property in narrow economic terms. So emancipated, we are also now free to conceptualise properly the role of markets in section 25(3). Let us begin by noting the two traditional ways of conceptualising the role of the market.

It is widely accepted by both courts and commentators that the market value of expropriated property is not decisive when fixing compensation; it is only one factor amongst many.⁴⁵ To this extent judges and academics are free from the dominance of economic forms of thought. But following this proper recognition, one of two approaches is proposed. The first says that whilst market value is not decisive, we must start by determining the market value of property, and then consider other relevant factors and adjust the amount payable.⁴⁶ The second approach objects that starting in this way privileges markets, for even if we do not theoretically privilege the market, considering value first tends towards its default use. To avoid this risk, they say, we must adopt a gestalt approach, where we consider all relevant facts, including the market value, together or simultaneously—and from this arrive at an amount that is appropriate.⁴⁷ Whatever their respective merits, both approaches are still captured by an essentially economic framework.

On Froneman J's approach, we structure our thinking about property around forms and their constitutive relations. This is a qualitative, not a quantitative, way of thinking. Rather than numbers, measurements and calculations, we identify and describe the categories, concepts, attitudes, etc. that structure diverse relations and thus constitute diverse forms. This shift in conceptual orientation shifts how we understand the market's relevance. We do not look to the market first, or even consider it alongside other facts. Markets matter and we rely on numbers only if the ideal—respect, protect, promote and fulfil both existing and proposed goods—is impossible.

Here is one example of this impossibility. To provide housing to the millions of homeless or inadequately housed persons, new homes need to be built. But this construction will often be incompatible, contingently or logically, with other goods. When we build homes, this may frustrate goods facilitated by the property's current use. A communal paired liberty over another's land might be necessary to build an access road. The effect of this may frustrate

⁴⁵ Van der Walt 2006 SALJ 26-29.

⁴⁶ *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) (hereafter *Du Toit*) para 37 and *Uys v Msiza* 2018 3 SA 440 (SCA) paras 11-14. For more cases, see Van Wyk 2017 TSAR 24-27. See also Roux "Property" 46-35.

⁴⁷ Southwood *Compulsory Acquisition of Rights* 28-30; *Du Toit* para 84; Zimmerman 2005 SALJ 411; Van der Walt 2006 SALJ 39; Van der Walt *Constitutional Property Law* 506; Van Wyk 2017 TSAR 27; Ngcukaitobi *Land Matters* 182-185.

the realisation of the goods that come with privacy and quiet. Or the mere presence of humans might result in the loss of what exists: unspoiled nature. In such cases, when there is no way to facilitate both goods, we must choose and sacrifice. To choose we need the information in paragraphs (a) and (e) of section 25(3), for it tells us what goods are implicated, with the choice we make reflecting our concrete ranking or evaluation of the conflicting forms. When we act on our choice, a real good is lost, and in these circumstances, but not before, we must resort to the market.

The reason that we rely on markets has two aspects: the ethical and the instrumental. Ethically, when sacrificing a good we do not do it justice if we fail to take its loss with the seriousness that it deserves. Rather than indifference, we must respond to the loss of a good with a sense of regret.⁴⁸

Practically, however, this sense of regret is inadequate to do justice to what is lost. To make it real, we should not only "mourn the ruins" that accompany all sacrificial choice,⁴⁹ we also should take steps to "make up" for what is lost in some "second best" way. This is because, in the idiom of John Gardner, the original reasons for facilitating the realisation of the sacrificed good still exert rational force, even after they are defeated by the reasons for realising another good.⁵⁰

Indeed, the experience of this continued force is just what it means to regret. Because the reasons still exert rational force, they have a practical bearing on what we should do. So, even after we sacrifice one good for the sake of another, we still have reason to facilitate the actualisation of the sacrificed good, albeit in an alternative concrete form. Whilst sacrifice is sometimes required, it is only by acting on the originally defeated reasons that we can do justice to what is lost. Only then do we "make amends".

That is the ethical part of the reason to resort to markets. But this reason is able to function only because of the nature of the market. For the market to function, there has to exist a class of objects, which, though instrumental in nature, do not satisfy or realise immediately our existing desires or ends. In Marx's idiom, the instruments must be universal equivalents;⁵¹ or in Amartya Sen's, they must be general-purpose means.⁵²

So, what is required is a set of rights in objects that enable their holders to obtain rights in other objects, which rights in turn facilitate goods or frustrate bads. This is why the market value of expropriated property matters. Under late capitalism, value is usually a good guide when determining how much

⁴⁸ Singer *Entitlement* 39 and 205.

⁴⁹ Van der Walt *Law and Sacrifice* 191-231.

⁵⁰ Gardner *From Personal Life to Private Law* 98-102 and 142.

⁵¹ Marx *Capital* 157-163.

⁵² Sen *Development as Freedom* 14.

money is needed to make up for the sacrificed good—that is, how much we must offer an affected party to achieve an "equitable balance",⁵³ and thereby make amends.

This is a lot. To make it more real, let us now return to our housing example. Often, building conflicts with existing goods, say, respect or tradition.⁵⁴ That the latter goods in their current form will be lost does not mean that we can simply forget about them. The Constitution insists that we strive to facilitate the actualisation of all goods, both old and new. Thus, if the good in its existing concrete form is lost, then we must facilitate it in some other form. It may be possible, for example, for the disappointed family to obtain rights equivalent to those that were expropriated, i.e. new land to (re)bury their dead. Under modern conditions they need money to acquire these rights and actualise these goods, and only with an award corresponding to what rights of this kind go for on the market can they actualise, albeit in an alternative concrete form, the good sacrificed through expropriation.

So it is not just that market value has no special significance. The point is analytical, not quantitative. The market is a tool of last resort. This is what the traditional approaches to section 25(3) fail to grasp. We turn to markets only when we cannot restructure rights in a way that facilitates both old and new goods. And like money, markets are substitutes, second-best tools that we use when concrete relations cannot realise particular forms.

At this stage it is important to recognise a logical feature of this approach to markets. Property facilitates goods or frustrates bads. If what matters are goods and bads, then not all property rights lost through expropriation merit compensation.

We saw when considering the MPRDA that different goods require different liberties, claims, powers or immunities. For contingent reasons, though, an asymmetry can exist between rights and goods, i.e., people have rights not needed to facilitate the ends towards which they put objects.

For example, gift giving is a way in which to express love, respect or honour. To facilitate this practice, we do not need the power to exchange gifts in the market. In fact, we know from that awful feeling we get when we learn about a friend who has returned our gift to the store for credit, that this "exchange" betrays the practice of gift-giving. So, if expropriating the power to exchange would facilitate some other good, we must do so, for this will make possible

⁵³ So, the "equitable balance between the public interest and the interests of those affected" does not, as is often simply stipulated by our academics, seek to strike a balance between "social" and "individual" concerns. Rather, the balance struck is between general / abstract goods or bad and particular / concrete ones.

⁵⁴ For a striking illustration of this, see Shandu and Clark 2021 CCR 1-40.

the actualisation of yet more goods.⁵⁵ Whilst expropriation will often require the consideration of a right's market value, this value is irrelevant here. As loss of the right is not accompanied by loss of a means to some good, monetary compensation is not necessary as a substitute.

But usually market value is relevant, which is not to say that compensation must always correspond with value. As I explain below, this depends on our concrete ranking of conflicting old and new goods, as well as of other goods not immediately implicated in the expropriation.

3.3 Adjusting for concrete rankings

We resort to the market only when we cannot accomplish the ideal: the facilitation of old and new goods. If we can, not only is the value of the property (c) irrelevant, but so is past state investments and subsidies in the property (d), and the history of its acquisition or use (b). Each of these facts becomes relevant only when we cannot facilitate the ideal. And when we do turn to the markets, current use (a) and the purpose of an expropriation (e) become relevant again, albeit for reasons different from those discussed above.

Before unpacking this, let us make clear what these facts have in common. We know that market value is never special. We can have reason to deviate from it. This reason takes distinct forms. Below I group the forms according to whether they concern the past, present or future. Whilst these forms differ in their temporal directions, each is structured by a concern for conflict, choice and sacrifice. This is because (a) to (e) reveal facts relevant to the concrete ranking of incompatible goods, and therefore concern information critical to the allocation of limited resources.

3.3.1 Present and future

Paragraphs (a) and (e) direct attention to the functions enabled by old and new rights. These facts are initially relevant to the effort to restructure rights in a way that will facilitate both old and new goods. In circumstances where this ideal is impossible, though, then the information in (a) and (e) becomes relevant for another reason: concretely ranking goods.

When there is a contingent or logical conflict between the rights required to facilitate both old and new goods, we must resort to the market, and when there we must concretely rank these conflicting goods. Ranking is required

⁵⁵ For state and private regulation of gifts, see the *Political Party Funding Act* 6 of 2018 and rule 4.7 of the Uniform Rules of Professional Conduct (General Council of the Bar Date unknown <https://gcbsa.co.za/wp-content/uploads/2020/03/GCB%20Uniform%20Rules%20of%20Ethics%20updated%202017%20AGM.pdf>).

because in all times and places resources are limited. As they are limited, the award of monetary compensation for an expropriated right will always be at the expense of other possible uses to which this universal equivalent might be put. Every cent that is put towards facilitating the second-best form of the concrete good sacrificed through expropriation reflects a relative ranking of this and other goods that the state has a duty to facilitate through legislative and other measures.

If the use facilitated by the right that is expropriated is judged to be relatively unimportant, the award must be adjusted downwards,⁵⁶ but if the sacrificed good is judged relatively important, it must be adjusted upwards.⁵⁷ Either way, the market value of the expropriated right is not decisive. What matters are the goods and bads we want to facilitate and frustrate, and our concrete ranking of them. Thus, monetary awards must reflect sensitivity to existing and proposed forms and their constitutive relations, as well as their concrete relative rankings.

3.3.2 *Past: acquisition and use*

I now consider three ways that the past is relevant to the determination of awards: acquisition and use in this subsection, and investments or subsidies in the next subsection.

Let us start with the history of acquisition. Immediately, distinctions must be drawn. First, we must distinguish unjust from just acquisitions. When it is unjust, we must distinguish further between general and particular injustice. An unjust acquisition is general if effected through laws that have general application, like the laws regulating property before and during apartheid. An injustice is particular if it is effected absent the authority of law or policy, as is the case with theft, enrichment and contractual breach.

When possible we respond to general and particular injustices by effecting restitution of the affected property but sometimes, for epistemic reasons, say, difficulties in tying present holdings to past injustices, or for pragmatic reasons like large-scale injustice that renders ineffective restitutionary tools,

⁵⁶ Therefore, whilst scarcity matters (Van der Walt *Constitutional Property Law* 512), this fact is logically and thus ethically subordinate to the aim of facilitating goods and frustrating bads.

⁵⁷ Van der Walt remarks that the claim by Southwood *Compulsory Acquisition of Rights* 80, that "purely philanthropic use of property should also allow an upward adjustment in favour of the owner looks questionable" (Van der Walt *Constitutional Property Law* 512 fn 584). Van der Walt does not tell us why he considers this the case. Given the logic of transformation contemplated by the Constitution, however, which demands that we always strive to facilitate maximally that which we judge good, we must side with Southwood over Van der Walt. We must side with Southwood because increased compensation will, at least in theory, better enable the party affected by the expropriation to strive after an alternative, second best form of the sacrificed good.

this response to injustice will not be possible. That is not the end of the road. Despite the frustration of restitution, the fact of injustice can still exert practical force. One form in which it does is when we determine what constitutes just and equitable compensation.

We have an example ready-to-hand. We have seen that past discrimination around the acquisition of minerals was relevant to the justification of the MPRDA and we also saw that it was relevant to the application by Froneman J of his concept of compensation in kind.

It is relevant for the following reason: we attach less significance to goods if the rights facilitating their realisation were acquired unjustly, be the injustice general or particular. It is this basic feature of practical reason that informed Froneman J's finding that discrimination in the matter of the acquisition of minerals rendered the new system of rights just and equitable. The MPRDA deprived people of their capacity to realise economic goods facilitated by the liberty to sterilise, and of goods enabled by market-exchanges. On Froneman J's framework, this would ordinarily entitle them to a monetary award. General historical injustice in connection with the acquisition of minerals, however, diminished the concrete significance of these goods, in fact, for Froneman J so much so that adjusting their value downwards to nil was just and equitable.

Below we touch on injustice again but first we consider how forms of just acquisition can be relevant when fixing compensation.

Some property is the conscious creation of lawmakers, brought into being ex nihilo for some instrumental, policy-based reason. For theorists at least, a standard example of this property type is a licence, say, to sell alcohol. When rights are acquired in this way, we are usually less worried about their later deprivation.

The reason why this is so is not, as is sometimes claimed, that just as the state giveth, it can take away. It is not a question of state largesse nor is it because government ought to be free to adopt new policies. Rather it is because concerns about the security of holdings or expectations appear to us less urgent because ordinarily holders know or can be expected to know that their rights were contingent on government's not later changing the policy that moved it to create the rights. In short, their rights were always relatively insecure. Whilst not decisive, caeteris paribus this fact means that justice and equity require less in these cases. In fact, often if we afford affected parties reasonable notice of, and an opportunity to participate in,

the process that results in the decision to alter their rights,⁵⁸ this will ensure that justice is done.

What about cases where rights were acquired justly, but through relations with non-state actors? Can these facts be relevant to compensation? Yes. The form of the relation will be crucial. If property is acquired through market exchange our response to its later expropriation will be different than if it was acquired as an inheritance, or as a gift, or by donation, or originally. The question that we must ask is: Does the history of acquisition tell us anything about the goods or bads facilitated or frustrated by the existing system? If so, history matters⁵⁹—and as I have explained, monetary awards must be sensitive to this form of use and its concrete ranking relative to other forms and relations with which it conflicts.

Let us now move to the history of use, as contemplated by paragraph (b). What does knowledge of this nature have to do with compensation? It might be relevant from the perspective of right-holders, as evidence of how important this use is to them. For example, a long-standing use may suggest that the old system of rights facilitated a good that has constitutive instead of fleeting importance to their life. Whilst relevant to compensation, we focus here on a different role performed by this use-aspect of paragraph (b).

When (b) asks after the history of use, it is directing our attention to the ends to which a person or a group who once held rights in an object, but no longer does, put them. Doing this displays sensitivity to two facts. First, our past is stained by unjust acquisitions. Second, there will often be epistemic or pragmatic hurdles to restitution. When fixing compensation, though, hurdles of this kind matter less. With section 25(3), the goal is not restoring rights, but facilitating goods and frustrating bads. Establishing direct ties between persons or determining the exact scope of an injustice is unnecessary to fulfilling this function, for what matters are the ends towards which the property was put by those who suffered injustice. If the ends are judged good, facts about this use can be relevant when fixing compensation.

Let us make this more concrete through two examples, the first simple and the second a little more complex. On a family holiday driving through your hometown, you notice your childhood home. You stop, knock on the front door, and ask the current occupiers if you can show your children around, to see where mom or dad grew up. These experiences matter, for they offer even the most detached of us a link to our past. So, if the request is denied you would be disappointed, but you would likely let the matter go, so let us

⁵⁸ For example, see the analysis in *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) paras 65-71.

⁵⁹ On the early significance of history in interpreting the Constitution, which continues today, see De Vos 2017 *SAJHR* 1-33.

complicate the example. For some, ties to property go much deeper, having a constitutive, identity-defining significance. This is often the case with land. A white South African like me is sometimes told by black South Africans that this is what is meant by phrases like, "We want the land" or "The land is ours". If legislation responds to these calls by expropriating land, historical use is relevant to the compensation that is awarded, and it is relevant because it will allow us to rank conflicting goods.

To see all this clearly, consider how an existing right-holder might respond to legislation that expropriates rights to facilitate access to graves. He might complain that granting third parties a liberty to access land will impinge on his privacy, or complain about the risk of damage to the land or its attached property. When *bona fide*, these concerns about privacy or security matter, so for expropriation to be just and equitable we should be sensitive to these goods. Legislation could cater for them by making the liberty to access land conditional on first giving reasonable notice to the occupier of the land and by affording the occupier a claim against persons who cause damage when exercising their liberty.⁶⁰ But even with these efforts, privacy and security will still be diminished, even if not a lot. This is unavoidable, for the goods—access by one, and another's privacy and security—conflict with each other.

In these cases we must consider the market value of the lost rights. At this point the history of use is relevant, for the limited nature of the resources means that we must concretely rank the conflicting goods. When we do that, if we conclude for example that the importance of the sense of belonging, or the practice of respecting the dead exceeds at this point in time the intrinsic value of goods like privacy and security, we must adjust the money paid downwards.

3.3.3 *Past: investments and subsidies*

Paragraph (d) concerns the extent of direct state investment and subsidies in the acquisition and beneficial capital improvement of property. Why is this relevant?

AJ Van der Walt asserts: "Obviously it would make no sense to compensate someone at full market value for land that was originally acquired or subsequently developed with state assistance",⁶¹ but this is not obvious. In fact, it seems quite "obviously" wrong.⁶² Assisting people is the state's job,

⁶⁰ This compromise was adopted by Parliament with the *Extension of Security of Tenure Act* 62 of 1997, albeit in the context of existing property rights.

⁶¹ Van der Walt *Constitutional Property Law* 513.

⁶² In answer to a reviewer of an earlier draft of this paper, let me develop a little this criticism of Van der Walt. For the reasons I outline below, the fact that the state provides in the past does not liberate it to take without compensation in the future. The claim otherwise only seems plausible because we sometimes forget, as Van der

and because the state is not a bearer of section 25 rights,⁶³ when people benefit "twice",⁶⁴ in the past and the present, all the better. In short, as state provision is not largesse but the fulfilment of a duty, when it expropriates it is owed nothing. What the state has historically provided, however, can be relevant when the incompatibility of goods necessitates choice and sacrifice.

To see this we have to recognise that the function of (d) is not restitutionary, nor does it concern retribution or reward. All such issues concern the past. The essential historical question is: "What was done?" Expropriation, contrarily, both reformist and transformative, is always future oriented. It always asks: "What is to be done?"

But to answer this, and so to do right by those living in this world, our thinking must be structured in part by our awareness of wrongs done in a world that is no more. This is not to reverse wrongs nor is the reason for doing this derived from the fact that their legacies endure. When we expropriate and compensate, what matters is not the effect of a wrong but the wrong itself, and even then only derivatively. Wrongs matter because they are always accompanied by the loss of something that is good. This is what makes all wrongs bad. In the context of expropriation, though, this is why its relevance is rooted in the good. Being future-oriented, what is good is analytically prior. Wrongdoing matters because it concerns non-conformity to reasons that we had to bring good into the world. It is to do justice to goods that never came to be that we must, when fixing monetary awards, consider the wrongs that are responsible for this fact.

As is always the case when we turn to markets, the limitation of resources is relevant. It means that the state's investing in and subsidising one good is always at the expense of another. To choose between goods, we know, is not to deny the significance of what is sacrificed, but it does communicate a relative ranking of the goods. Past benefits matter when fixing compensation because these benefits evidence concrete rankings. They evidence past rankings because the deemed "value" of the benefitted object will have been one reason for the investment or subsidy. What matters for

Walt sometimes does (e.g., Van der Walt *Property in the Margins*), that property rights do not merely serve to stabilise existing expectations at the expense of interests, but themselves can often serve a positive, enabling function. When they do, the act of expropriation harms the beneficiaries of past state assistance, for whom these rights are necessary to realise goods or avoid bads of a fundamental kind. Consequently, they must be compensated—but, as I explain above and below, where the past state assistance was rooted in injustice, this bears on the quantum awarded.

⁶³ *Tshwane City v Link Africa* 2015 6 SA 440 (CC) (hereafter *Tshwane*) para 112. In *Tshwane*, Cameron J and Froneman J qualify the proposition with, "in the ordinary course", but whatever this means in practice it does not affect my point here.

⁶⁴ Van Wyk 2017 *TSAR* 29.

us is how we respond to the fact that a benefit was given. This is because our response will likewise evidence a concrete ranking, albeit what it evidences is how goods are ranked in the present.

Whether past and present judgments diverge is essential. If they do, awards must be adjusted. The quantity awarded can be increased or decreased. It must be increased if the past judgment is now thought to have "undervalued" the relative significance of the good facilitated by the investment or subsidy. If its "extent" was inadequate, if the benefits were too small, or if no benefits were provided, the affected party will be entitled to payment that exceeds market value. Contrarily, if it is now judged that the good was "overvalued", then the compensation must be decreased, with the affected party afforded less than market value.

To make this more concrete, recall the apartheid state's discriminatory laws and policies in this regard. For example, whilst white agricultural areas were recipients of significant state funding, areas zoned for black agriculture were provided with little. This past divergence in state benefits evidences a concrete judgment about the relative importance of the agricultural ends of blacks and whites and of course we now judge this past ranking to be wrong, and this present judgment must feed into how we now determine monetary awards when or if agricultural property is expropriated.

In a world that is constituted by diverse goods, life is necessarily structured by choice and sacrifice. To do justice to the conflicting demands made by these goods, we must rank them. If we fail in the judgments that structure these rankings, and thereby do wrong, this wrongdoing should inform what we do going forward. It is to discover past failures that we look at subsidies or investments. Whenever we find failure, paragraph (d) tells us this: What is done is what remains, but living between the past and the future we must always strive to make amends.

4 Conclusion

Whilst transformation talk often exists at the level of abstraction, employing as it tends to do a "pompous catalogue" of five-dollar words, in legal practice it is rather "modest".⁶⁵

It often entails an originally free legislative choice, say, to extinguish (or not) old liberties to sterilise minerals and to create (or not) a new state power to allocate liberties to exploit the minerals to the first qualifying applicant. That is all. That is what transformation entails. Provided that the exercise of this

⁶⁵ Marx *Capital* 416, writing about the merits of humble legislation which limits the length of the working day, as against grand proclamations about the "inalienable rights of man".

liberty, in the sense of a strong discretion,⁶⁶ to effect structural change is not arbitrary, and provided it is accompanied by compensation that is just and equitable—which evaluative questions, if disputed, we let our judges decide or approve—radicalism and constitutionalism meet.

Reduced to these formal features, we notice that the common claims that a “paradigm of private property” or of “absolute” property dominates South African legal practice, or that South Africans live in the fatal grip of an “ownership model” that privileges “individualism and exclusion”, is not based in reality.⁶⁷ Whilst rightly directing attention to the structures of property, as against only their distribution, lawyers who make these claims are tilting at windmills, for whatever historical truth there might be to these claims, as the MPRDA illustrates they do not reflect our present. Haunted by a past either imagined or real,⁶⁸ it is not us but them who remain captured by these phantom forms of thought.

The problem with mis-describing reality, Marx long ago explained, is that it frustrates the effective use of the tools already at our disposal, or to paraphrase Froneman J.: bad theory makes for bad practice.⁶⁹

This problem manifests in the rhetoric of liberals, progressives and vulgar radicals around the perennially proposed amendment of the Constitution's property clause. For the activism of all these typically second-hand dealers in ideas is mired in conceptual confusion or is structured by anti-democratic elitism. Whilst liberals cannot grasp or refuse to accept the Constitution's radical openness - that South Africans are free politically and legally to choose between incompatible relational forms—their progressive and vulgar enemies unite in their arrogant belief that they already know what should be done.⁷⁰

⁶⁶ See *Florence v Government of the Republic of South Africa* 2014 6 SA 456 (CC) paras 115-117; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd* 2015 5 SA 245 (CC) paras 83-91.

⁶⁷ Singer *Entitlement* is often cited in support of these claims. His contribution, though, was to show that despite professed *ideas* about the ownership model, these ideas did not reflect US *practice*. By missing this and instead balancing or negating what is given, e.g., stability/change, exclusion/sharing, conquest/conquered, etc., theorists operate within and so conserve traditional frameworks.

⁶⁸ On why it is at least partially imagined, see the remarks in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 4 SA 768 (CC) para 52; *Tshwane* para 109.

⁶⁹ See *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) para 4; *Daniels v Scribante* 2017 4 SA 341 (CC) para 115.

⁷⁰ The attitude is captured well in the remark about progressives by Baron 2010 *Hastings LJ* 917: “The only important question is whether we have the right quality of social relations, and if we do not, then property rights must be adjusted” (961). If you already know what is right, you might well be “indifferent to the institution producing ... change” (962).

These severe charges are justified, at least with liberals and vulgar radicals, by the fact that amending the Constitution to allow formally speaking for nil compensation in cases of land expropriation will not have any legal effect. It will not alter Parliament's power to transform property, nor the judiciary's power to evaluate these alterations against the standards of arbitrariness and justice.

Froneman J's concept of compensation in kind, which we clarified in part 3 of this paper, allows for at least two situations in which compensation might be nil.

First, recall the distinction that we drew between a deprivation of rights that accompanies expropriation and the loss of means to actualise a good. We saw that there is sometimes an asymmetry between the rights we have and the purpose towards which we put the object in which we have the rights. If deprivation does not result in the inability to realise the good, then there is no necessity for a monetary award, as no good is forfeited and thus no amends need to be made. Here, it is intelligible to say that justice requires nil compensation. Second, even if the loss of a right corresponds with the loss of a good, we saw how market value can be adjusted. If the relative rankings of conflicting goods, together with limited resources, justifies adjusting the amount awarded downwards to nothing at all, i.e., no new rights and no money as a substitute, it will again make sense to say that justice requires nil compensation.

If we judge Froneman J's framework in *Agri SA* attractive, three points seem to me to follow about a constitutional amendment of this form.

First, the possibility of nil compensation becomes relevant only when we cannot restructure rights so as to facilitate both old and new goods. Like money and markets, nil compensation is a tool of last resort. Failure to grasp this fact hobbles recent writing on the amendment, including by progressives who rightly remark that the Constitution already allows for nil compensation. But even when the markets are relevant, some fact such as a historical injustice must justify letting the loss of the sacrificed good lie where it falls. As is always the case, whether it does requires looking at all relevant facts so that we can determine our concrete relative ranking of conflicting goods, first through Parliament when it designs legislation, and only then if it becomes necessary through the courts.

Second, the possibility of nil compensation is not limited to land. Whilst land matters, if we focus too much on this particular class of objects and goods like belonging, security or independence, the goal of transformation will be frustrated. This is not because focus may be deflected from other forms of

property, nor because we might adopt unduly conservative positions.⁷¹ The problem is more basic. Land redistribution is reformist. It concerns the transfer of, access to, and security of, what exists. It is never concerned with the structural transformation of the rights that we have been given, through law and practice and custom, by those who came before us.

Third, legally speaking, the amendment is unnecessary. At best, it will make explicit what is already so: nil compensation can be just. At worst, it will exculpate our three branches of government for their now generation-long failures. My guess is that it would probably do both. But formal superfluity does not mean that an amendment must not be passed. Formally articulating a latent power can be worthwhile. If the decision-making elites cannot discern the radical potential of the property clause, maybe an amendment will help them to see what it offers; and if they are obscuring it, then they will have fewer places to hide following an amendment.

These practical benefits should not be diminished, nor should the possible symbolic significance. In formalising what can be done, we say to those with ultimate power but no formal authority, what they can rightfully demand from those whom they let exercise their power.

Of course, what drives those who desire an amendment is another matter. As it is with those opposing it.

Here a necessary limit of the Constitution reveals itself. Law by its nature is an authoritative institution: it settles questions that theory cannot. It realises this function by creating rights: liberties, claims, powers and immunities. In doing so, what is good becomes possible. In *Agri SA*, Froneman J gifted us a way of understanding the radical potential of this truth for property. What the majority did not see, though, reveals a related, tragic truth, which is that the practical movement from what can be to what is cannot be guaranteed—and yet more tragically still, the gap that separates them will all too often be an abyss.

But were South Africans to grasp that the property clause embodies the call for a pluralistic radicalism—that is, that it prescribes an ethics that seeks to do justice to all, by making real, as far as possible all the diverse and incompatible goods that constitute South African life—we would come closer to grasping the import of its transformative character.

Section 25 of the Constitution is transformative, which is to say, it is radical. It recognises that the exercise of the power to expropriate will often result in change that is effected by grasping matters at the root—that is, by altering

⁷¹ For example, Ngcukaitobi *Land Matters* 192: "Outside the context of land reform, there would be virtually no scope to justify expropriation without compensation."

the logic of the relations facilitated or frustrated by an existing set of rights, by changing these enabling rights to some mutually exclusive set.

Whilst this transformation will always involve the movement from what exists to something incompatible with it, this movement will not entail any embrace of extremes. Nor could it be a function of hubris, "the political temptation par excellence".⁷² Transformation, properly understood, obliges South Africans to do justice to all sides of ultimate conflicts, to keep each incompatible good within bounds. And this does not merely mean recognising all involved and facilitating a fair decision-making process., for it also means striving, all too often unsuccessfully, to make up for the goods that will always be lost when law performs its authoritative, allocative function.

The burden of this tragic yet still hopeful commitment, it seems to me, makes itself felt nowhere more compellingly than in the context of the original power of Parliament to expropriate property and its correlative duty to compensate all affected parties when it does.

Bibliography

Literature

Ackermann 2004 *NZ L Rev*

Ackermann LWH "The Legal Nature of the South African Constitutional Revolution" 2004 *NZ L Rev* 633-679

Adorno and Horkheimer *Dialectic of Enlightenment*

Adorno T and Horkheimer M *Dialectic of Enlightenment* (translated by J Cumming) (Verso London 1997)

Arendt *The Human Condition*

Arendt H (with Canovan M and Allen D) *The Human Condition* 2nd ed (University of Chicago Press Chicago 2018)

Baron 2010 *Hastings LJ*

Baron JB "Contested Commitments of Property" 2010 *Hastings LJ* 917-967

Benjamin "Theses on the Philosophy of History"

Benjamin W "Theses on the Philosophy of History" in Arendt H (ed) (translated by H Zohn) *Illuminations: Essays and Reflections* (New York Schocken Books 1969)

Berlin *Liberty*

Berlin I *Liberty* (edited by H Hardy) (Oxford University Press Oxford 2002)

Dagan *Liberal Theory of Property*

⁷² Arendt *The Human Condition* 191.

Dagan H *A Liberal Theory of Property* (Cambridge University Press Cambridge 2021)

De Vos 2017 *SAJHR*

De Vos P "A Bridge too Far? History as Context in the Interpretation of the South African Constitution" 2001 *SAJHR* 1-33

Dugard 2019 *CCR*

Dugard J "Unpacking Section 25: What, if Any, are the Legal Barriers to Transformative Land Reform?" 2019 *CCR* 135-160

Du Plessis *Compensation for Expropriation*

Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD-thesis University of Stellenbosch 2009)

Du Plessis 2022 *SALJ*

Du Plessis Q "A Hohfeldian Analysis of the Bill of Rights" 2022 *SALJ* 577-622

Gardner *From Personal Life to Private Law*

Gardner J *From Personal Life to Private Law* (Oxford University Press Oxford 2018)

Hamilton *Political Philosophy of Needs*

Hamilton L *The Political Philosophy of Needs* (Cambridge University Press Cambridge 2003)

Hohfeld *Fundamental Legal Conceptions*

Hohfeld WN *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press New Haven 1923)

Liebenberg 2006 *Stell LR*

Liebenberg S "Needs, Rights and Transformation: Adjudicating Social Rights" 2006 *Stell LR* 5-36

Luxemburg *Reform or Revolution*

Luxemburg R *Writings of Rosa Luxemburg: Reform or Revolution, the National Question, and Other Essays* (Red and Black Publishers St Petersburg 2010)

Ngcukaitobi *Land Matters*

Ngcukaitobi T *Land Matters: South Africa's Failed Land Reforms and the Road Ahead* (Penguin Random House Cape Town 2021)

Marx *Capital*

Marx K *Capital: A Critique of Political Economy* Volume I (translated by Fowkes B) (Penguin Books London 1976)

Marx *Critique of Hegel's "Philosophy of Right"*

Marx K *Critique of Hegel's "Philosophy of Right"* (edited by O'Malley J) (Cambridge University Press Cambridge 1970)

Pieterse 2005 *SAPL*

Pieterse M "What Do We Mean When We Talk about Transformative Constitutionalism?" 2005 *SAPL* 155-166

Raz *Morality of Freedom*

Raz J *The Morality of Freedom* (Oxford University Press Oxford 1988)

Roux "Property"

Roux T "Property" in Woolman S and Bishop M (eds) *Constitutional Law of South Africa* 2nd ed (Juta Cape Town 2013) ch 46

Sen *Development as Freedom*

Sen A *Development as Freedom* (Anchor New York 2000)

Shandu and Clark 2021 *CCR*

Shandu M and Clark M "Rethinking Property: Towards a Value-Based Approach to Property Relations in South Africa" 2021 *CCR* 1-40

Singer *Entitlement*

Singer JW *Entitlement: The Paradoxes of Property* (Yale University Press New Haven 2000)

Southwood *Compulsory Acquisition of Rights*

Southwood MD *The Compulsory Acquisition of Rights* (Juta Cape Town 2000)

Van der Walt *Constitutional Property Law*

Van der Walt AJ *Constitutional Property Law* (Juta Cape Town 2011)

Van der Walt *Property in the Margins*

Van der Walt AJ *Property in the Margins* (Hart Oxford 2009)

Van der Walt 2006 *SALJ*

Van der Walt AJ "Reconciling the State's Duties to Promote Land Reform and to Pay 'Just and Equitable' Compensation for Expropriation" (2006) *SALJ* 23-40

Van der Walt and Viljoen 2015 *PELJ*

Van der Walt AJ and Viljoen S "The Constitutional Mandate for Social Welfare – Systemic Differences and Links between Property, Land Rights and Housing Rights" 2015 *PELJ* 1034-1090

Van der Walt *Law and Sacrifice*

Van der Walt J *Law and Sacrifice* (Wits University Press Johannesburg 2005)

Van Wyk 2017 *TSAR*

Van Wyk J "Compensation for Land Reform Expropriation" 2017 *TSAR* 21-35

Walzer *Spheres of Justice*

Walzer W *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books New York 1983)

Wenar 2005 *Philosophy and Public Affairs*

Wenar L "The Nature of Rights" 2005 *Philosophy and Public Affairs* 223-253

Zimmerman 2005 *SALJ*

Zimmerman J "Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible?" 2005 *SALJ* 378-418

Case law

Agri SA v Minister for Minerals and Energy 2013 4 SA 1 (CC)

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd 2011 4 SA 113 (CC)

Daniels v Scribante 2017 4 SA 341 (CC)

Du Toit v Minister of Transport 2006 1 SA 297 (CC)

First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service 2002 4 SA 768 (CC)

Florence v Government of the Republic of South Africa 2014 6 SA 456 (CC)

Haffejee v Ethekwini Municipality 2011 6 SA 134 (CC)

Harksen v Lane 1998 1 SA 300 (CC)

Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd 2011 1 All SA 364 (SCA)

MEC for Education: Kwazulu-Natal v Pillay 2008 1 SA 474 (CC)

Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape) 2007 5 SA 540 (SCA)

Mkontwana v Nelson Mandela Metropolitan Municipality 2005 1 SA 530 (CC)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 6 SA 391 (CC)

Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC)

Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd 2015 5 SA 245 (CC)

Tshwane City v Link Africa 2015 6 SA 440 (CC)

Uys v Msiza 2018 3 SA 440 (SCA)

Legislation

Constitution of the Republic of South Africa, 1996

Extension of Security of Tenure Act 62 of 1997

Minerals and Petroleum Resources Development Act 28 of 2002

Political Party Funding Act 6 of 2018

Internet sources

General Council of the Bar Date unknown <https://gcbsa.co.za/wp-content/uploads/2020/03/GCB%20Uniform%20Rules%20of%20Ethics%20updated%202017%20AGM.pdf>

General Council of the Bar of South Africa Date unknown *Uniform Rules of Professional Conduct* <https://gcbsa.co.za/wp-content/uploads/2020/03/GCB%20Uniform%20Rules%20of%20Ethics%20updated%202017%20AGM.pdf> accessed 26 March 2023

Ngcukaitobi and Bishop 2018 [https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Ngcukaitobi%20Bishop%20Article%20\(FINAL\).docx](https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Ngcukaitobi%20Bishop%20Article%20(FINAL).docx)

Ngcukaitobi T and Bishop M 2018 *The Constitutionality of Expropriation without Compensation* [https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Ngcukaitobi%20Bishop%20Article%20\(FINAL\).docx](https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-review-program/Ngcukaitobi%20Bishop%20Article%20(FINAL).docx) accessed 17 October 2023

List of Abbreviations

CCR	Constitutional Court Review
Hastings LJ	Hastings Law Journal
MPRDA	Minerals and Petroleum Resources Development Act 28 of 2002
NZ L Rev	New Zealand Law Review
PELJ	Potchefstroom Electronic Law Journal

SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg