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2020
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Applied Ethics for Professionals: PHIL7005A
Masters Dissertation
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EXPROPRIATION WITHOUT COMPENSATION IN SOUTH AFRICAN LAND REFORM – WHEN IS IT ETHICALLY JUSTIFIABLE?

Submission: 17 March 2020

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Chapter 1

1. Introduction

In this dissertation I will discuss the question of whether expropriation without compensation (hereafter "EWC") is supported by either principles of rectificatory justice or principles of distributive justice. Specifically, I will consider whether EWC is supported by the principles of rectificatory justice or the principles of distributive justice as a permissible means for the state to bring about justice (as the specific conception of justice might require). I will set my discussion within the context of the current public and political debate in South Africa regarding EWC and the draft legislation relating to EWC as set out in further detail below.

Expropriation involves state interference with private property rights and therefore requires justification. Expropriation is recognised as a sub-category of deprivation. Arbitrary deprivation of property rights is unacceptable. By contrast, non-arbitrary deprivation by the state in the form of expropriation of property rights is considered to be a justifiable limitation on private property rights when the expropriation meets the following conditions: (i) it is in the public interest or for a public purpose, and (ii) the landholder is compensated for their loss. If the state's actions fail to meet the first condition and are not for a public purpose or in the public interest, then the expropriation would be considered to be an arbitrary deprivation. What constitutes adequate compensation for the second condition, and whether expropriation *without compensation* is permissible, is a subject of much debate. The latter is the focus of this dissertation.

International legal norms generally require compensation for expropriation of property.[i] Are there however circumstances in which EWC is justifiable or morally permissible? I will argue that EWC is not justifiable on grounds of rectificatory justice. When property rights are not legitimately held, there are, strictly speaking, no rights to expropriate. In cases of historic injustice, therefore, expropriation will be misplaced as a means to rectify the injustice.

In proposing the amendment of section 25 of the Constitution to expressly provide for EWC, the Ad Hoc Committee on the Amendment of Section 25 of the Constitution appealed to principles of both rectificatory and distributive justice when stating in the Preamble to the draft Constitution Eighteenth Amendment Bill (hereafter the "Constitution Amendment Bill") that: (i) "an amendment [as proposed] will contribute to address the historic wrongs caused by the arbitrary dispossession of land", and (ii) "such an amendment will further enable equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs." The consequentialist reasons given in (ii) for amendment to the existing provisions of the Constitution relating to EWC stand in contrast to the dire consequences warned of by those opposing EWC when referring to economic decline and food insecurity.

Do the principles of distributive justice support EWC as a permissible means to redistribute land? I will argue that they generally do not, given the dire consequences of collapsing the existing system of legitimate land rights. However, redistribution may require a reconceptualization of land rights and ownership, which would mean that EWC would not be required.

[i] When referring to "property" in this dissertation, I intend to use the word in its ordinary sense as applied in the public and political debate on EWC, that is as a description of a thing, rather than the Hohfeldian bundle of rights attaching to that thing. I will refer to property and land interchangeably. I intend to limit my discussion to the expropriation of immovable property or land, rather than to the broader class of property which includes movable property and intangibles. My discussion will consider both agricultural and urban property.

Chapter 2

2. Framing the Question – the Public and Political Debate and Background

General Sketch of Where We Are

A motion in favour of EWC was passed by an overwhelming majority in Parliament in South Africa on 27 February 2018.[1] The African National Congress had resolved at its elective conference in December 2017 to amend section 25 of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter "the Constitution") to enable EWC as a means of "land reform". The term "land reform" will be used in this dissertation to collectively describe land restitution, redistribution of land and land-tenure reform.[2] My discussion will focus on the first two, namely restitution of land as underpinned by the principles of rectificatory justice and redistribution of land as underpinned by principles of distributive justice.

The Constitution (discussed in more detail in Chapter 3 below) currently does not expressly provide for EWC but could be read to be compatible with "no compensation".[3] This has led to public debate and debate amongst legal scholars regarding whether or not the Constitution needs to be amended to *expressly* provide for restitution or redistribution of land through EWC. The state has subsequently published The Draft Expropriation Bill 2019: Bill No. 1409, 21 December 2018 (hereafter "the Expropriation Bill") (discussed in more detail in Chapter 3 below) which specifically provides for EWC in certain circumstances. As mentioned above, the Ad Hoc Committee on the Amendment of Section 25 of the Constitution also introduced into the National Assembly on 12 December 2019 the Constitution Amendment Bill which seeks to amend section 25 of the Constitution to expressly provide that expropriation may be without compensation in certain circumstances. Neither of these documents have been proclaimed into law.

The public and political debate about EWC is based upon many assumptions. These assumptions include, amongst others, assumptions relating to unjust acquisition, legitimate rights, collective responsibility, and the potential consequences of EWC. Those in favour of EWC tend to assume that indigenous African people or communities (hereafter "black people" or described by the adjective "black") had legitimate rights to land in South Africa, and that they were unjustly dispossessed of their land through colonial conquest or the enforcement of colonial or apartheid legislation. This premise is not normally disputed by those who are not in favour of EWC, although they deny that EWC is a legitimate means to rectify the injustice of dispossession. They also dispute the assumption that South Africans, or present-day white South Africans in particular, bear a collective responsibility to rectify historic injustices relating to land.

Those who argue against EWC assume that current landowners have legitimate rights to their land, having acquired it or holding it in accordance with the legal requirements of the South African property system. They argue that EWC constitutes an unjustified interference with existing property rights. Those who argue against EWC also claim that EWC will collapse the system of property rights in South Africa and negatively impact the economy. Zimbabwe's economic decline post its fast track land reform programme is often cited as an example in defence of this claim.[4]

Where We Came From - A Brief History of South African Land Settlement

Having outlined some of the basic assumptions underlying the public and political debate about EWC in South Africa, and in order to provide context to the debate and the discussion that follows, I will now provide a brief overview of the history of land settlement and the colonisation of South Africa, and the segregationist policies which led to the current land distribution.

Prior to the colonisation of South Africa by the Dutch and then the British in the 1600's and 1800's, the land was occupied by the San and Khoekhoen[5] tribes, and then the Bantu-speaking people. The San were hunter-gatherers and nomadic people. The Khoekhoen tribes were also nomadic, although they were differentiated from the San in that they owned livestock.[6] There is evidence that the Bantu people who followed thereafter were farmers and worked the land or mixed their labour with the land, growing crops and grazing their livestock.[7]

The Dutch arrived in what is now the Western Cape around 1652, whereafter the European settlers came into contact with the San and Khoekhoen tribes, and the Bantu tribes. Their interactions with the black tribes were characterized by conflict over livestock, water resources and land leading to numerous battles.[8] The colonial powers sought to occupy and annex land, extending the colonial territory. Segregationist legislation followed as the colonial powers sought to extend their ownership of South African land on the basis of European domination over the black inhabitants.[ii]

The segregationist policies developed by the colonial powers were then extended and employed on a widespread basis from 1913 to 1991[iii] by the white government in South Africa, to devastating effect. Some of the key cornerstone laws relating to land distribution under apartheid included the Natives Land Act 6 of 1913, the Native Trust and Land Act 18 of 1936 and the Group Areas Act 41 of 1950. Collectively, these Acts empowered the apartheid government to restrict black land acquisition and possession and largely confine black people (who made up the majority of the South African population) to occupying so-called "native reserves" which made up only 13% of the land in South

[ii] For example, in what is considered as the forerunner to the Natives Land Act of 1913, Cecil John Rhodes in 1894 in his capacity as the Prime Minister of the then Cape Colony introduced the so-called Glen Grey Act into parliament. The Act sought to address overcrowding in so-called "native" reserves, establish separate areas for white and "native" people, and limit the granting of individual title to "natives". Rhodes said in his speech before the Cape parliament that, "[w]hat I would like in regard to a native area is that there should be no white men in its midst. I hold that the natives should be apart from white men, and not mixed up with them". (Rhodes, 1894)

[iii] In 1991, the majority of race-based legislation governing land distribution was abolished by the Abolition of Racially Based Land Measures Act 108 of 1991.

Africa. They also led to mass forced removals of black people from areas designated as “white only”. For example, “it is estimated that 3.5 million people were forcibly removed from urban areas as a result of … the Group Areas Act.”[9] Land dispossession under these laws was accompanied by what Bernadette Atuahene describes as “dignity takings”.[10] She describes “dignity takings” as being when the state arbitrarily deprives people of their property, without compensation, “as part of a larger strategy to dehumanize or infantilize [them]”.[11] The injustice suffered is therefore far greater than the economic loss associated with loss of property.

Chapter 3

3. Legal Underpinnings

International Law

Having sketched a brief history of land settlement and distribution in South Africa, I will now briefly discuss the legal foundation for expropriation and EWC. I will first establish the international law context for expropriation and then turn to South Africa's legislative regime.

Expropriation of private property rights by the state is recognised internationally as a means by which a government can compulsorily acquire private property for a public purpose without the consent of the owner. Expropriation is a form of deprivation of property rights. It is considered to be an acceptable form of deprivation on the basis that it generally requires compensation in recognition of the loss suffered by the person from whom the private property rights are being expropriated. For example, Article 1 of the European Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms provides for protection from a deprivation of private property by the state "except in the public interest and subject to the conditions provided for by law and by the general principles of international law". The European Court of Human Rights has confirmed that just compensation needs to be paid in all but exceptional circumstances of expropriation.[12] For further examples of international expropriation legislation, including in former British colonies, see Article 14 of the African Charter on Human and Peoples Rights to which South Africa is a party, sections 19 and 25 of the Canadian Expropriation Act, Article 300A of the Indian Constitution and Article 40 of the Constitution of Kenya.

While the state has the power of eminent domain over the property within its borders, the expropriation of private property rights is considered to be permissible only when appropriate compensation is paid. This recognises the existence of legitimate private property rights and the corresponding loss when the owner is deprived of them. Without compensation, expropriation may be an unacceptable deprivation (depending on the circumstances and determination of what constitutes "appropriate" compensation). In cases where property is unowned, talk of deprivation of rights is misplaced. For this reason, the idea of compensation for deprivation of unowned land, that is, expropriation, does not make sense.

Based on my review of various international expropriation laws, expropriation is considered to be an acceptable limitation of private property rights generally only in instances where transfer of land is required for the benefit of the public at large or it is in the public interest to do so, and compensation is payable. Importantly, by definition, expropriation is a limitation of a right and it therefore only makes sense when there is a right to expropriate. I note however that "expropriation" may be an ambiguous term, capable of referring to "taking when there is a right" and "taking where there is not a right". These are two different things from a moral perspective and so it makes sense to separate out the meanings and to use different terms. It is generally not accepted that expropriation be used to refer to a taking where there is no right.

Most international laws reviewed for purposes of this dissertation do not govern cases of expropriation for the purpose of rectification or taking back that which belongs to another person. By contrast, in Zimbabwe, the legislation relating to expropriation expressly contemplates expropriation without compensation to return agricultural land to those dispossessed of it during colonial rule.[13]

South Africa

The Constitution

The legal concept of expropriation in South Africa exists within a constitutional framework which protects private property rights. Section 25(1) of the Constitution provides for the protection of private property from arbitrary deprivation. There is no equal and opposite right provided for by the Constitution for the landless not to be excluded from private property, nor does the Constitution provide for a guaranteed right to property or access to property. In terms of section 25(2), expropriation is only considered to be a justifiable limitation or qualification of existing private property rights where it is provided for in terms of a law of general application (in other words, a law applying to the public or a section of the public generally), meets the threshold of being in the public interest or for a public purpose, and is made subject to compensation. This generally aligns with the international norms regarding expropriation. Section 25(3) provides that compensation should be "just and equitable, reflecting an equitable balance between the public interest and the interests of those affected". As stated above, the Constitution currently does not expressly provide for EWC.

The Constitution as currently worded can arguably be read as permitting EWC on the basis that no compensation is "just and equitable" compensation in certain circumstances. The draft Constitution Amendment Bill seeks to amend the provisions of section 25(2) and (3) to expressly provide for EWC. This would be a departure from current practice in South Africa, where "just and equitable" compensation has generally been determined by the courts based on market value.[14] When considering expropriation in relation to the redistribution of land in South Africa, I think it is important to note the "irony… that there was no market value [paid] when the land was first taken [by the colonial or apartheid governments]."[15]

Expropriation and Restitution

Expropriation within South Africa is still governed by the Expropriation Act 63 of 1975 (hereafter "the Expropriation Act"). Section 12(1) of the Expropriation Act provides for compensation for the expropriation of property to be calculated on the basis of the aggregate of the market value of the property (which has subsequently been lessened by the Expropriation Bill) and the "amount to make good any actual financial loss caused by the expropriation". It does not contemplate compensation for emotional pain and suffering. This provision has anchored the determination of compensation in South Africa cases to market value, but this approach has been criticized by the Constitutional Court.[16]

By contrast, section 12(1) of the recently published draft Expropriation Bill provides for the determination of compensation on the same grounds as the Constitution "reflecting an equitable balance between the public interest and the interests of the expropriated owner or expropriated holder". Section 12(3) of the Expropriation Bill then expressly provides for circumstances in which EWC may be justified. This is aligned with the draft Constitution Amendment Bill which requires an amendment to section 25(3) providing that legislation must "set out specific circumstances where a court may determine that the amount of compensation is nil."

In terms of section 12(3), EWC may be justified where land is expropriated in the public interest in the non-exhaustive list of circumstances set out in section 12(3), namely where land is: (i) abandoned by the owner (similar to Canadian legislation); (ii) "held for purely speculative purposes"; (iii) "owned by a state-owned corporation or other state-owned entity"; (iv) "occupied or used by a labour tenant (as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996)"; or, (v) "valued at or below the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land". Tembeka Ngcukaitobi and Michael Bishop, when discussing possible circumstances in which EWC would be justified (which include the first four categories above), note

that "the common theme for [the first four] categories is that there is no emotional connection to the land… The owner will suffer, at worst, pure economic loss".[17] I will discuss the Expropriation Bill further in Chapter 6 below when discussing whether principles of distributive justice support EWC as a permissible means for the redistribution of land.

It is important to note that the Bill does not include in the list circumstances where land has been unjustly acquired in the past.[18] Circumstances where land has been unjustly acquired in the past are dealt with to a limited extent only by the Restitution of Land Rights Act 22 of 1994 (hereafter "the Restitution Act").

The Restitution Act gives effect to section 25(7) of the Constitution by providing for restitution of land or "equitable redress" for persons or communities dispossessed of property after 19 June 1913 (the date of commencement of the Natives Land Act of 1913) as a result of "past racially discriminatory laws or practices". The Restitution Act does not address claims for dispossession of land *prior* to 19 June 1913, as would be relevant for persons or communities unjustly dispossessed of their land under colonial rule. The Restitution Act does not explicitly provide for EWC as a means to achieve restitution. The state has however used expropriation *with compensation* as a means to return land to claimants under the land claims process. I will discuss what I perceive to be the misapplication of the concept of expropriation within the framework of rectificatory justice in more detail in Chapter 5 below. [19]

Chapter 4

4. Philosophical Underpinnings

Having provided the historical background and legal context to the EWC debate, I will now consider the philosophical underpinnings for an argument in justification of EWC.

Both the concepts of rectificatory justice (also referred to in the literature as *corrective* justice) and distributive justice are relevant for this paper and have emerged, in part, in the preceding discussion. They are both appealed to in the public debate and draft legislation seeking to amend the provisions of the Constitution to expressly permit EWC. In the discussion that follows, I will examine the philosophical principles underpinning the concepts of rectification and redistribution within South African land reform and explore the extent to which EWC is justifiable within the frameworks of rectificatory and distributive justice. I will consider the question of whether rectificatory justice supports EWC in this chapter, and, in the next, consider whether distributive justice supports EWC. To quote Göran Collste's simple yet effective description of the distinction between the two, "[d]istributive justice deals with the distribution of scarce resources and goods [and bads]. Rectificatory justice on the other hand, … focuses on correction for past misdeeds".[20] Both rectificatory justice and distributive justice are relevant to the South African story, but for different, albeit related, reasons within the framework of land reform. In considering the relationship between the two, particularly for the purposes of this dissertation, it is apt to quote Jules Coleman: "[m]eeting the demands of corrective justice may have the effect of re-creating or sustaining a less than fully just distribution of holdings, but endorsing distributive injustice is not part of the point of corrective justice."[21]

The wording of section 25 of the Constitution relating to land reform suggests principles of both rectificatory and distributive justice. Principles of rectificatory justice are relevant to claims in respect of historic injustices relating to land holdings in South Africa and the concepts of restitution and redress; principles of distributive justice are relevant to the claims relating to the inequality in land distribution in South Africa and the concept of equitable access to land.

It is useful for purposes of the discussion that follows to distinguish further between different forms of "taking" in relation to property. In Chapter 3, I distinguished between unacceptable deprivation of property rights by the state and expropriation, on the basis that expropriation is (it is widely held) an acceptable form of deprivation which requires compensation in recognition of economic loss suffered as a result of the loss of property rights. In cases where no one has a right to the property being taken, there is a "taking" but no deprivation—and hence no expropriation. Taking of private property can be by individuals or the state. If the property-holder has a right to the property being taken, then the taking by an individual constitutes theft; taking by the state constitutes an unacceptable, arbitrary deprivation (and so an illegal taking) unless it is for a public purpose or in the public interest and subject to appropriate compensation, in which case the state's action could be justified as an expropriation. Both theft and an unacceptable deprivation would require rectification. In the case of the property-holder having no rights to the property being taken, there is, strictly speaking, no deprivation, and so I believe it is a misapplication of the concept to speak of expropriation in this context.

I will argue that there are many cases in which the principle of rectification would legitimate (*ceteris paribus*) a taking back of land *without compensation* to the landholder in order to "[set] things straight in [the transaction]"[22].[iv] As I understand it, and it seems to be understood in international law, the

[iv] I intend to use Aristotle's phrase and variations on it in unmarked form in the discussion that follows.

idea of expropriation would be misapplied in cases where the landholder is not entitled to the land. Thus, the South African state is arguably mistaken in applying the concept to acts of land restitution in proven cases of land theft.[23]

From the perspective of redress, the award of the property itself or compensation in the form of cash payments *in lieu* of return of the property goes some way to restoring the economic loss experienced by a person or community as a result of the illegitimate acquisition of their land during the colonial or apartheid era in South Africa. However, it does not account for the pain and suffering associated with the "dignity takings"[24] referred to in Chapter 2 above—the loss of ancestral land, loss of livelihood (for example, where families who previously farmed on property were evicted and relocated to small so-called "native" reserves where the knowledge of farming was lost and so not passed on to later generations), and, in some instances, loss of life experienced during the unjust acquisition of that property. To set things right, the state should pay an amount as *solatium*[25] for pain and suffering (rather than economic loss) caused by the dispossession on the basis of racial discrimination. As Atuahene writes, "[w]hen a state takes property as part of a larger strategy to dehumanize or infantilize an individual or community, comprehensive redress will involve more than compensation for the physical thing taken."[26]

By contrast, principles of distributive justice would require a systemic redistribution of land or income to achieve a more just distribution in South Africa. I will explore later in this paper whether or not EWC would be supported by the principles of distributive justice.

Chapter 5

5. Rectificatory Justice

Restitution: Successes and Failure of Rectification of Historic Injustices Relating to Land

Before turning to the discussion of whether or not EWC is supported by the principles of rectificatory justice, I want to provide a brief overview of the successes and failures of restitution under the land claims process in South Africa in the 20 years post promulgation of the Restitution Act in 1994. According to the Department of Rural Development and Land Reform, by August 2013 58,990 land claims had been finalised, with a further 12,584 fully settled but not yet finalised and 8,008 partially settled. The majority of the almost 80,000 settled or partially settled claims related to claims for urban land by individuals or families.[27] In many of the cases where land was returned to individuals or communities, the state expropriated the land from the current landholder with compensation at or generally close to market value.

Restitution of land within urban areas has not generally been feasible and is considered to be very costly where compensation is required. As such, the majority of claims for restitution of urban land in South Africa have been settled by way of so-called "standard settlement offers" ranging between R40,000 – R50,000 rather than the return of the land.[28] The cash payments are not always sufficient for recipients to purchase land, nor do they adequately compensate recipients for the "dignity takings"[29] experienced as part of the historic injustices relating to land. The principles of rectification require additional compensation to place the claimants in the position they would have been but for the injustice of dispossession of their land during apartheid. The principles appear straightforward, but there are complications in principle on application as discussed in more detail below.

Land restitution has been slower than desired and this has contributed to the proposal to amend the Constitution to expressly provide for EWC on the grounds that "there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans…"[30]

Principle of Rectification

At its most basic level, rectificatory justice demands that an injustice be rectified or set right.[31] There are different theories regarding whether this means rectifying the wrongdoing itself or making reparations for the loss suffered by the victim of the wrongdoing. In discussing the permissibility of the government policy of EWC on principles of rectificatory justice, I will apply what Coleman refers to as the "mixed" view, namely that rectificatory justice "imposes on wrongdoers the duty to repair their wrongs and the wrongful losses their wrongdoing occasions".[32]

For example, if an individual, A, steals a wallet off a table, rectificatory justice requires that the wallet ought to be returned to the person from whom it was stolen. The wallet is not A's property. A is not entitled to the wallet as it was acquired illegitimately. One would be mistaken to talk of expropriation here, since that would imply that A had some form of entitlement to the wallet, which he does not. It is not that EWC is not justifiable in these circumstances, but rather that talk of EWC in this situation is misplaced. The wallet ought to be taken back rather than expropriated from A. Should A be compensated for the taking back of the wallet? No, as A has no right to the wallet. The wallet ought to be returned to its rightful owner to, as Aristotle might say, set the transaction straight. The principle of rectification seems clear, although it is not absolute.

Is EWC supported by principles of rectification? In many cases, the principles of rectification will trump utility, even where everyone is made worse off by the act of rectification. Justice requires that we ought to set transactions straight. This will mean that the justice of returning the wallet to its rightful

owner will override any hardship caused to A in so doing. However, there are cases (unlike that of the wallet theft described above) where the cost of returning what was stolen may be too high in terms of its consequences for a community or society as a whole (including, perhaps, the person to whom the property is being returned). An example may include severe food shortages as a result of the taking of substantial portions of agricultural land.

"Vindicating" Ownership: Application of Rectification to Stolen Land

To further illustrate the application of the principles of rectificatory justice, I will adjust the facts of the wallet theft example to fit the history of South Africa's land distribution as discussed in Chapter 2 above. This is a loose adaptation of an example given by Göran Collste in his introduction to *Global Rectificatory Justice.*[33] Assume that A is white ("white" is used here to describe people of European descent with light-coloured skin). A's neighbour is a black person. Assume that A's neighbour is a descendant of the first indigenous African inhabitants of South Africa who had acquired ownership of the land they lived on by way of occupation or appropriation (both recognised by the law in South Africa as legitimate forms of original acquisition of ownership of previously unowned land in South Africa). Assume further that A's great-grandfather was Cecil John Rhodes. A's great-grandparents stole land from his neighbour's great-grandparents when they arrived in South Africa as colonial settlers. The theft has not been rectified. The thief has no moral or legal entitlement to the land (see the discussion below regarding legal ownership rights and the *rei vindicatio* action). Would EWC be justified by the principles of rectificatory justice here? Applying the same logic as in the case of the wallet above, the principles of rectificatory justice yield the same result – there is a moral obligation to rectify the injustice and return the land to set things straight. There may be some complexity in determining to whom the land should be returned, particularly in cases where the victim of the original dispossession has died. This complexity does not however affect the strength of the argument that the thief is not entitled to the land.

Is the state permitted to expropriate the land from A without compensation to return it to A's neighbour or A's neighbour's family? This question is not well formulated as expropriation would imply that A is entitled to the land. A is not entitled to the land as it was stolen. The state would therefore be permitted to take the land back from A, without compensation. In this discussion I have deliberately referred to the state as the party which is permitted to do the "taking" to bring about rectification in order to retain the rule of law. Given the race-based, systemic nature of land dispossession in South Africa, I am concerned that private justice could result in anarchy (and might also be a contradiction in terms).

There is a strong case for rectificatory justice in the case of the theft of the wallet. There is a strong case for rectificatory justice in the South African land case too. Like the wallet that A stole, the land stolen by A's great-grandparents ought (*ceteris paribus*) to be returned to its rightful owner. A is not entitled to the land. Do the principles of rectification illustrated by these examples support EWC?

The state would be mistaken in applying EWC as the mechanism to bring about rectification. This does not mean that EWC is not justifiable, nor that it is not justifiable because of the lack of compensation paid. Rather, expropriation is a mechanism to enable the state to lawfully deprive a person of their private property for a public purpose or in the public interest. If the land was acquired unjustly, the landholder (even one who possesses the stolen land in good faith further down the line) is not entitled to it. On the basis of the principles of rectification, it would be permissible in cases of documented theft for the state to take the land to set matters right. And there is no question regarding compensation being appropriate. The question about whether compensation should be paid to the thief is confused.

In applying the principles of rectificatory justice, one also needs to consider who is responsible to rectify the injustice. Given the background of the state's proposed policy of EWC to rectify injustices relating to land, I will discuss the state's responsibility for bringing about rectificatory justice in South Africa. From a strictly legal perspective, however, individuals or communities who had their land stolen, would be entitled to claim their land back through the courts from the thief or subsequent possessors of the property in terms of the *rei vindicatio* action. In terms of this action, an owner is entitled to reclaim her property from anyone else in possession of it without her consent. This includes both those who acquired the property by illegitimate means from the owner and those who acquired it in good faith from the thief or fraudster.[34] This can be done in terms of a legal action known as the *rei vindicatio* action, in terms of which she is able to reclaim her property without compensation to the possessor. This action is distinct from expropriation and rather involves a "taking back" of property to which one has rights.

Principle of Transfer

In the example above, A's family stole the land. The principle of rectification requires that the land should (*ceteris paribus*) be taken back in order to set things straight.[35] Expropriation is not appropriate or required to bring about the taking as A is not entitled to the land. No compensation should be paid to A on the taking because A is not entitled to the land. The principles are clear, although not absolute. The Roman law rule that one cannot transfer more than what one has rights to oneself[36] is a broadly accepted principle of law. Purported transferors of stolen property cannot transfer title to the land, as the owner has not consented to the transfer of their ownership rights. The historical injustice of theft "taints"[37] subsequent acquisitions or transfers of the land. None of the subsequent landholders in the chain of possession is entitled to the land given the historic injustice in acquisition[38]. This is referred to by William H. Shaw as the "*contaminated origins*" principle.[39] The "taint of illegitimacy"[40] which attaches to land which was unjustly acquired cannot be removed by subsequent legitimate

transfers. As discussed above, the owner (and her successors in title) retains a right to claim her property from anyone found in possession of it without her consent.

The contaminated origins principle seems to be the principle relied upon by many arguing in favour of EWC. According to some members of the public, the historic theft of land in South Africa taints current land entitlement. This is supported by the principles of rectification which require that the injustice ought to be rectified. In the absence of rectification, there remains an injustice (and the owner retains her right to re-take possession of her stolen land from whoever is in possession of it). Is EWC then supported by the principles of rectificatory justice? Even if there is legal entitlement to the land, if there is not genuine entitlement (due to the historic injustice tainting moral entitlement to the land), then expropriation would be misapplied in this case. No compensation would be required to the extent that the existing rights can be invalidated.

The principle of transfer and entitlement, and the argument for no compensation, is complicated by significant improvements on the illegitimately acquired land. If A at his own cost has built significant improvements on the land, such as factories or high-density residential buildings, it is difficult to argue that A is not entitled to the improvements. There is a legal principle called *accession* in terms of which improvements built on immovable property are deemed to accede to the property (assuming various legal tests are met, including the intention for the building to be a permanent fixture).[41] This principle complicates the argument for no compensation on a taking of the land. There should be no compensation payable for the land which was unjustly acquired; however, it seems that A ought to receive some compensation for the cost of the improvements made to the land.

Legal Rights and How the Law Legitimates Historical Injustice

I believe that the taint of illegitimacy discussed above cannot be erased by the registration of legal rights. Is EWC supported by the principles of rectification when there is a legal right to land but it is disputed? I believe that it does not make sense and is not supported by the principles of rectificatory justice in cases where the legal right is invalid. If the legal right is valid, then EWC would still not be supported by the principles of *rectificatory justice* but may be supported by other principles of justice.

There are complications of principle in giving effect to the principles of rectification. Should land to which landholders have a legal right, but which was originally acquired through theft (in particular), be expropriated without compensation? This may be the case where landholders unknowingly bought stolen land or had stolen land handed down to them over generations where land was unjustly acquired during the apartheid or colonial era. The difficulty lies in the fact that, although the current landholders have legally registered rights to land – rights which are protected by section 25 of the Constitution – the rights were arguably illegitimately acquired. This is because, and I think that it is plausible to say, the Khoekhoen or San tribes (or, in some cases the Bantu tribes who settled in unoccupied areas of the Eastern seaboard of South Africa) as the first human occupants of parts of South Africa had legitimate rights to the land they occupied. The plausibility of this claim is independent of the reasons why that might be, whether for reasons of first occupancy or convention or otherwise. The fact that they had these rights remains a datum for explanation, which is outside of the scope of this paper. Their rights were violated when the land was stolen from them by the colonizing powers or advancing Bantu tribes. The law has legitimated this historical injustice by creating registered legal rights to the land for the perpetrators of the injustice and subsequent possessors. This matters from the perspective of compensation. And for the debate regarding EWC. Legal rights do not wash away the stain of illegitimacy nor negate the need for rectification. Equally, legal rights to property do not mean that expropriation is required or justifiable; it could mean that

the state will need to prove the illegitimacy of the rights or amend the Constitution prior to taking the land without compensation to return it to its rightful owner.

Instead of looking to amend the Constitution to provide for EWC to "address the historic wrongs caused by the arbitrary dispossession of land"[42], the state should rely on the argument that current rights to land have in some cases legitimated historical injustice by creating a legal entitlement to the land, notwithstanding moral illegitimacy. To quote human rights advocate Geoff Budlender, "[t]he present pattern of property relations is the result of generations of laws and practices which would not have survived for a minute in a bill of rights society. The beneficiaries of systematic human rights abuses now seek to … rely on a bill of rights to protect what they have acquired". [43] The constitutional protection of private property from arbitrary deprivation has entrenched so-called "white privilege" in South Africa by legitimating the historical injustices relating to land during the apartheid and colonial eras. Does this mean that EWC is supported by the principles of rectificatory justice? The fact that it is legal does not mean that expropriation is required to take the land from the current holder and return it to the rightful owner given the lack of moral entitlement to the land. In the extreme, it could mean that the entire system, or at least a significant portion of the system, of land rights in South Africa is illegitimate or invalid. The difficulty with this conclusion is that it would mean that even rights that were legitimately acquired by black people during the colonial or apartheid eras would be illegitimate by reason of the illegitimacy of the system. The principles of rectificatory justice, by themselves, do not seem to support a revisionist project of this sort.

Some members of the public assume that EWC is required – and justifiable on the grounds of rectification which is in the public interest – if A has a registered legal right to the land notwithstanding the historic theft. Under South African law, a title deed in respect of land is considered the "best evidence of ownership".[44] However, formal land ownership records were only established in South Africa from around 1714 and these were considered largely inaccurate until the system was updated

by the British in 1844.[45] Moreover, the majority of black land ownership, particularly in communal ownership structures, was not recognised or recorded in South Africa's land registries. The delay of the enactment of legislation like the Communal Land Rights Act 11 of 2004 continues to delay the registration of many cases of communal land ownership. As such, from an epistemic perspective, the title deed system could be challenged on the basis of being incomplete due to its failure to record historic ownership in certain cases and black ownership in many cases.

An argument for the illegitimacy of current legal rights is likely to be more easily made in individual cases of documented theft than in relation to the systemic land dispossession which occurred during apartheid, under the Group Areas Act in particular. In specific cases of documented theft, the state may be able to prove that the registered right in relation to that land is invalid as the possessor (even if they acquired the land in good faith and for value) is not entitled to it. This is consistent with the position under South African law, in terms of which ownership rights include the right for the owner "to recover [her] property from any person who retains possession of it without … her consent."[46] The state could therefore arguably prove the illegitimacy of the specific right in such a case without upsetting the entire existing property rights regime. The state would then be permitted to take back the land without having to rely on expropriation as the tool to do so.

Extending this principle to undocumented cases which fall within the grand-scale dispossession that occurred under apartheid or during the colonial era would be more difficult. To establish the illegitimacy of current land rights in the less well-documented cases of land dispossession or theft, the state would be required to invalidate all land rights traced back to the period of dispossession in order to take back land on a grand scale. The state could argue that even in cases where the acquisition or transfer of property during the colonial or apartheid era was procedurally fair, the property rights generated were still acquired illegitimately. This is because the acquisition or transfer of land during colonial rule or apartheid would have been concluded against a background of racial discrimination

where only white people were entitled to acquire freehold title to land in large portions of South Africa.[47] This would not be a piecemeal exercise, and it is not clear that the principles of rectificatory justice support this scale of rights revision. As already acknowledged above, this illegitimacy claim relating to all rights from a certain period may also include some rights of black landholders.

Compensation for Expropriation

The practice of awarding compensation for expropriation by the state and determining "just and equitable" compensation on the basis of market value has arguably further "legitimated" historical injustice. This is because compensation is paid in recognition of economic loss suffered by the current landholder. But in many cases the land was unjustly taken from the previous black landowner without payment of market value compensation. Does this mean that EWC is supported by the principles of rectificatory justice? Based on the discussion above regarding the invalidity of rights, it would be justifiable to take the land without compensation. One would however be mistaken to think that expropriation is required.

Some Challenges to the Precise Application of the Principles of Rectificatory Justice

The normative principle established thus far is that rectificatory justice requires that land in South Africa acquired by illegitimate means ought *(ceteris paribus)* to be returned to its rightful owner to set things straight.[48]

The South African state has to date expropriated land *with compensation* as part of its efforts to return land to identifiable rightful owners as part of the land reform project. As argued above, I believe that the state has been confused in thinking of the project of restitution of land in terms of expropriation in many of these cases. Given the historic injustice, the title to the land is tainted and ownership cannot be transferred by the thief to the subsequent possessors of the land. Rather, where the current

landholder has registered legal rights to the land, notwithstanding the historic injustice, and the theft is well documented, the state would need to prove the illegitimacy of the legal right, and then take back the land without compensation. This does not mean that the state should not be sensitive to the welfare of those from whom land is taken. In many cases, the current landholder acquired the land in good faith either by purchase or inheritance or bequest, and it is unfortunate that they will lose their land given the historic injustice.[v] It is important to make it clear though, that whatever support is provided to the landholder, it would not be compensation (save perhaps for cases of improvements to the land). It could rather take the form of practical support such as assistance with re-settlement.

Intergenerational Injustice and Collective Responsibility

In each of the cases described above, the generational divide between the original wrongdoer(s) and victim(s) and A and A's neighbour gives rise to some of the philosophical problems associated with intergenerational injustice. These include the so-called non-identity problem in terms of which A's neighbour's claim may be affected by the fact that, but for the injustice, he may not have come into existence and his grandparents may have had a different life altogether. Rectification is due; however, the non-identity problem challenges the identity of A's neighbour as the person to whom the land should be returned as returning the parties to the position that they would have been in but for the theft would mean that A's neighbour would not exist[49]. In addition, in attempting to determine appropriate rectification for A's neighbour, the number of possible counterfactual situations that need to be taken into account to determine what position he may have been in but for the injustice is almost infinite. This problem is known as the counterfactual problem[50]. It does not change the *prima facie* case for rectification; nor does it change the inappropriateness of EWC to bring about rectification. It does however pose a problem in determining whether such rectification or reparation is adequate or indeed possible to calculate given the myriad possible counterfactual situations which need to be

[v] This would be the same position as that brought about by a claim for vindication under the *rei vindicatio* action.

considered in rectification based on the principle that "the fault be cancelled by restoring the victim to the position she would have been in had the wrongful behavior not occurred".[51]

The precise application of the principles of rectificatory justice also become complicated when the injustice occurred a long time ago and both wrongdoer and victim are deceased. There is then a "double decoupling of wrongdoer/payer and victim/claimant"[52] which makes it difficult to apply the principles of rectificatory justice with any precision. Alternatively, the wrongdoer and victim are both members of larger groups and so it is difficult to determine to whom the land should be returned within the group if it was not the group as a whole that was wronged. The *prima facie* case for rectification remains. The groups do however pose a problem in terms of identifying who is eligible for compensation – the black group is much larger than it was when the grand theft occurred, and the theft occurred over several generations ago. In addition, but for the theft, many or all of the people in that group would not exist today. To whom should the state return the land to rectify the injustice? The white group is also much larger than it was when the original theft occurred. Is the group collectively responsible for rectifying the injustice? This question is important but beyond the scope of this paper. The precise application of rectification principles is again complicated. In such cases, it may arguably be in the public interest for the state to take the land and then either use the land for the settlement of the landless or sell the land and use the proceeds as part of a land restitution or compensation fund such as the one discussed below.

There are a number of clear-cut cases of historic injustice relating to the acquisition of land during the colonial and apartheid eras as discussed in Chapter 2 above. For example, the Dutch wars against the Khoekhoen tribes and subsequent assimilation of the Khoekhoen tribal lands into their own. The forced removals of black people from land in urban areas in the 1950's under the Group Areas Act also constitute clear cut cases of historic injustice relating to land dispossession which demand rectification. Despite the laws of the time, prior to forced removals many black people owned the land

and houses from which they were evicted (see for example the cases of dispossession in Kliptown discussed by Bernadette Atuahene in *We Want What's Ours*). A number of these cases have been rectified relatively successfully by the land restitution programme discussed above. The restitution of land to the Makuleke community in the northern part of the Kruger National Park is a good example of a successful rectification project. The community has been returned to land from which they were forcibly removed in the 1960's. The land awarded to the community in rectification has by agreement been declared a national park and included in the Kruger National Park but subject to agreements regarding how the community benefits from commercial activities on their land.

However, for many of the other less clear-cut cases, rectification of historical injustice becomes increasingly difficult to determine as we move backwards in history – both for reasons of knowledge (as stated above, historical records of land ownership within South Africa are incomplete and unwritten in many instances of black ownership) and for reasons relating to intergenerational justice as discussed above.

Ramutsindela et al provide a good summary of some of the practical constraints relating to the precise application of rectification when saying: "[w]hile restitution is an idea with an almost intuitive moral appeal, carrying it out inevitably forced lofty principles of justice and restoration to confront the messy practicalities of determining ownership, defining legitimate claimants, establishing evidence for claims and overcoming opposition by current land owners"[53]. Notwithstanding that the state has overcome these "messy practicalities" in many cases, issues relating to inadequate historical record-keeping and tracing property transfers back to the original owner have meant that rectification has been slow and, I would add, inadequate in the context of the mass dispossessions that occurred during apartheid in particular. It is also very difficult for the state to challenge current land rights on the basis of these mass dispossessions without bringing down the whole system of property rights.

Compensation for Pain and Suffering

As discussed above, the precise application of the principles of rectificatory justice is sometimes complicated by epistemic challenges or problems of intergenerational justice. This may limit the extent to which restitution of land may be achieved. The state ought to provide monetary compensation to victims of illegitimate land dispossession in cases where return of the land is impossible. This could assist the victims or their families (if identifiable) in acquiring different land or raising their living standards.

South African delict law provides for additional compensation in the form of *solatium* on a case by case basis.[54] Delictual claims are however subject to prescription periods which would mean that the claims of almost all of the victims of historic dispossession would have prescribed long ago. The principles of rectificatory justice do however seem to support a claim for rectification of non-economic loss as a result of the historic injustice. In the case of systemic injustice as was perpetrated by the state under apartheid, and in acknowledging the requirement of rectificatory justice to make good the losses suffered as a result of the injustice, it would seem that the state should be liable for some form of compensation for pain and suffering, especially in cases where the perpetrators of the injustice cannot be identified or have since died. Given that "the state has done more than confiscate property – it has also denied the dispossessed their dignity"[55] during the widespread dispossession of land under colonial and apartheid rule, the government ought to create a *solatium* fund to provide compensation of this form to victims of historic land injustice. [vi]

Precedents for similar compensation funds include the Hardship Fund or Article 2 Fund created by Germany to pay compensation to the survivors of the Holocaust. Payments by the German government take the form of once-off payments in some cases and ongoing stipends or pensions to

[vi] Under South African law, victims of wrongful misconduct have a delictual claim for emotional pain and suffering experienced as a result of the misconduct (subject to proving the necessary elements of the delict).

raise living standards in others.[56] Applying a similar principle of funding for compensation for emotional pain and suffering experienced as a result of historic injustice, the South African state could create its own compensation fund. The fund would make payments to victims of historic injustice to compensate them for the pain and suffering experienced as a result of the historic injustice. Although beyond the scope of this paper, the payment would also constitute acknowledgement of the emotional pain caused by the injustice (as discussed below). It is important to note that this would still be an application of the principles of rectificatory justice rather than distributive justice as the state is seeking to set straight the historic injustices relating to land dispossession (even if systemic).

Prescription

Although beyond the scope of this dissertation, there is a further question or complication relating to whether or not the passage of time limits a claim for rectification;[57] is there a statute of limitation on the moral claim for rectification? Or would or should the claim prescribe like claims for ordinary debts? It seems unlikely that claims for rectification will be limited by time given the contaminated origins principle discussed above. If the historic injustice in relation to the land taints all subsequent holdings, then the claim for rectification does not prescribe and the argument for the misapplication of EWC in these cases remains. I believe that there is a strong case to be made in South Africa that the claims of victims of historic injustices for rectification have not prescribed.

Rectification and Acknowledgement

Before concluding on rectificatory justice and whether or not it supports EWC, I would like to acknowledge one further feature of rectification or reparation that is not often acknowledged and seems to me to play an important part in any rectification project. That is the fact that "[q]uite apart from any attempt to genuinely compensate victims or offset their losses, reparations may symbolize a society's undertaking not to forget or deny that a particular injustice took place, and to respect and

help sustain a dignified sense of identity-in-memory for the people affected".[58] The role of acknowledgement, memory and apology within the framework of rectificatory justice is beyond the scope of this paper and a discussion of the justification of EWC, but I believe it bears noting as it is relevant to the South African situation, the state's responsibility to make good the losses suffered as a result of the injustice, and a portion of the public debate on the restitution of land.

Conclusion on Rectificatory Justice

The discussion above established that EWC is generally not justifiable on grounds of rectificatory justice, not because no compensation is problematic but because expropriation is the inappropriate tool to take land which was illegitimately acquired. No compensation is required due to the illegitimacy of acquisition. I believe that both sides of the public and political debate regarding EWC assume that the existence of legal rights means that expropriation is the appropriate mechanism to take the land to which those rights relate. However, in cases where the land was illegitimately acquired in the past, the current landholder is not entitled to the land and it would be permissible for the state to take the land (rather than expropriate it) without compensation. As such, the push to amend the Constitution to expressly provide for EWC to address historic wrongs is mistaken.

One could contest the ownership claims of the original owners in the case above, or challenge the concept of rectificatory justice as a legitimate concept of justice given that it does not adequately account for the complexity of the dispossession and discrimination that occurred in many cases of land dispossession in South Africa during colonial and apartheid rule. However, the principles of rectificatory justice hold – if property has been obtained by illegitimate means, this means that the subsequent landholders are not entitled to the property, and it ought to be returned to the rightful owner to set things straight.[59]

The principles of rectificatory justice can do a lot of the work in justifying the return of land to its rightful owners in South Africa. However, we have seen that the principles of rectificatory justice do not support EWC but rather something different. Do the principles of distributive justice support EWC? This will be my next question for discussion.

Chapter 6

6. Distributive justice

I have discussed the application of the principles of rectificatory justice in relatively simple terms to establish the force of the argument that EWC is not supported by the principles of rectificatory justice. This is because the principles of rectification challenge the legitimacy of current property rights or entitlement to land where the land was acquired illegitimately in the past. In the absence of legitimate rights or entitlement, it is not coherent to speak of expropriation. The South African reform project does however seem bigger than rectification, as expressly stated in the draft Constitution Amendment Bill.[60] And the public and political debate surrounding EWC includes, and possibly conflates, the concepts of rectificatory justice and distributive justice. I will therefore now turn to the question of whether the principles of distributive justice support EWC as a permissible means to bring about the redistribution of land.

The Current Land Distribution in South Africa is Unjust

The current distribution of land within South Africa is unequal between the different races, with the majority of registered land being owned by white people. This is borne out by the data reported in the State Land Audit in 2017.[61] Of the 114.2 million hectares of land registered in South Africa in 2015, approximately 77% is recorded as privately owned. In a further breakdown of the private landholdings, 72% of all agricultural holdings are held by white people and 49% of registered residential holdings are registered to white people.[62] White people comprise only 7.9% of the South African population.[63] The numbers illustrate quite starkly that South Africa's land distribution is grossly unequal, with inequalities falling broadly along race lines. This has contributed to the argument by members of the public and politicians (and as expressly referred to in the preamble to the Constitutional Amendment Bill) that land reform needs to be accelerated. Inequality exists in the amount of land held and in the

location of land held, with large portions of the black population occupying land on the urban edge and in the former "homelands" and "native reserves", further from places of work and economic opportunity. Research has shown that the majority of people surveyed want land for housing and for growing food. Notwithstanding the requirement for land to grow food, the majority of people want urban land or a smallholding on the urban edge, rather than rural land.[64]

It is widely accepted that redistribution to redress (in a sense relevant to distributive justice) the undeserved inequalities in land distribution in South Africa is urgent in order to achieve a more just society. I will discuss below whether principles of distributive justice support EWC as a permissible means to achieve this end. For the purposes of this discussion, I will assume the existence of legitimate land rights for current landholders, as I have already dealt extensively with the case of illegitimate land rights in the section on rectification above. This will mean exploring whether principles of distributive justice would support EWC as a permissible means to achieve redistribution within a framework of legitimate rights, or whether EWC would only be permissible within a different legitimate framework for conceptualizing land rights and ownership.

The land rights currently provided for in the Constitution are strong rights which include the right to protection from arbitrary deprivation (expropriation is an acceptable, non-arbitrary deprivation if it meets the conditions discussed in Chapter 3). Limitation of rights to land (and other property) is only permitted in terms of laws of general application where the limitation meets the threshold of being "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[65] And expropriation is only permitted where it is "for a public purpose or in the public interest". In providing guidance for the interpretation of the provisions of section 25 of the Constitution dealing with expropriation, section 25(4) states that "public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."

As discussed in Chapter 3 above, the draft Constitution Amendment Bill proposes amendments to section 25 of the Constitution to make it clear that parties to an expropriation can agree, or a court can approve, nil compensation for the expropriation. The Constitution Amendment Bill also requires that specific legislation (being laws of general application) be enacted to "set out specific circumstances where a court may determine that the amount of compensation is nil." The Bill is still in draft form and is yet to be commented on by the public. It is not clear if it will be accepted in its current form. However, it does indicate the shift in policy towards enabling a limitation of land rights "where land is expropriated for land reform".[66]

Do the Principles of Distributive Justice Support EWC?

It is unjust that significant inequality in land distribution exists largely along racial lines in South Africa. Race in South Africa is a marker of an unacceptable bias which ought to be "redressed", in the distributive justice sense of rebalancing the distribution to compensate for the inequalities in land distribution as a result of that bias. The bias lies in the distribution of land on the morally arbitrary bases of skin colour, heritage or race.[67] To achieve distributive justice, where greater justice is sensitive to the pattern of past injustice and a more equal distribution of land, land ought to be redistributed. Does this mean that the concept of distributive justice supports EWC as a permissible means to do so?

The rebalancing of the existing land distribution in South Africa to achieve a more just distribution may include redistribution of land ownership, access to land, or payments to the least advantaged in society. Payments here would be to redistribute wealth and so would be different to the payments in rectification of historic injustices relating to land or compensation for suffering as a result of the injustice discussed in Chapter 5. Does the application of the principles of distributive justice in South Africa require that land be taken from white people (or only land-rich white people) and given to black

people (or only land-poor black people), without compensation to the former? The redistribution of land or access to land within the current conception of legitimate land rights and ownership would involve an expropriation of land rights. The question is whether EWC for this purpose would be permissible. I will discuss below whether the principles of distributive justice support expropriation without compensation as a permissible means to bring about a more just distribution in landholdings or access to land in South Africa.

Permissible Means to Achieve a Just Distribution

Expropriation of land without Compensation

If EWC is supported by the concept of distributive justice as a permissible means of redistribution, the state would be permitted, contrary to international norms, to expropriate land to which people have legitimate rights, without compensation for the corresponding deprivation of rights, for purposes of advancing a specific conception of social justice which is deemed to be in the public interest. The proposed amendments to section 25(2) and (3) of the Constitution seek to provide for exactly that, in expressly stating that the amount of compensation which may be agreed upon or approved by a court in respect of the expropriation of "land and any improvements thereon" may be nil. The determination of nil compensation is still subject to the requirements of section 25(3), which requires that the amount of compensation be "just and equitable, reflecting an equitable balance between the public interest and the interests of those affected…"[68] This discussion considers whether it would in fact be just to expropriate land without compensation as contemplated in the proposed Constitutional revision.

The goal of creating a more just society, where greater justice is sensitive to the pattern of past injustice, is very urgent. The goal of reducing poverty and improving levels of welfare is also very urgent. The urgency of the former arguably requires that land be taken from one group of people and

given to another without compensation to achieve distributive justice. If it were justifiable, the lack of compensation would be justifiable on the basis of the urgency and importance of the social goal of reducing inequality in land distribution in South Africa. However, it seems that the existing framework of legitimate rights to land does not countenance a limitation of rights so significant as would be required to permit EWC in respect of *all* redistribution of land or even for redistribution on a large-scale redistribution. If EWC on a large-scale were permitted based on the principles of distributive justice, the existing framework of land rights and ownership would be significantly compromised. The claim that current land rights should be overridden in order to advance distributive justice is not obviously correct. Doing so would likely lead to disinvestment, capital flight and possibly shortages of food, all of which have been witnessed in Zimbabwe since the implementation of their accelerated land redistribution programme. This is in sharp contrast to the positive consequences of land reform appealed to by the drafters of the draft Constitution Bill as discussed in Chapter 1. Even if some of the positive consequences came about, they would likely be outweighed by the negative as seen in Zimbabwe. Economic decline as a result of large-scale EWC would be to the detriment of all, especially the poor in South Africa, and would be contrary to the social goal of reducing poverty and improving welfare.[69] This means that the principles of distributive justice could not support EWC as a permissible means of bringing about large-scale land redistribution within the current conception of legitimate land rights and ownership.

Consequences matter in the determination of justice. Consequences matter to distributive justice, as shown by John Rawls' theory, and in particular, the *difference principle*. In terms of the *difference principle,* the justice of a policy would be dependent on its impact on the welfare of the least advantaged in society (with the principle giving priority to an improvement in the wellbeing of the least well-off).[70] Rawls rejects the utility maximization of utilitarianism and states that in a just society "representative men do not gain at one another's expense since only reciprocal advantages are allowed."[71] For Rawls, then, there is no simple opposition between social justice and welfare – justice

requires an improvement in the welfare of the least advantaged. Based on the consequences of EWC discussed above, EWC would not improve the wellbeing of the least advantaged in society, and so would be considered to be unjust on the basis of the difference principle.

The Draft Expropriation Bill

Large-scale, "fast track" EWC is problematic for the reasons discussed above. Is it possible that EWC would be permissible in a limited set of circumstances, within the existing framework of legitimate land rights and ownership? As discussed in Chapter 3, the state has introduced draft legislation to amend the Constitution to expressly provide for EWC in certain circumstances and requiring new legislation to stipulate in which circumstances a court may determine that the amount of compensation in the case of an expropriation of land would be nil. Section 12(3) of the draft Expropriation Bill identifies certain land parcels in terms of which, according to the draft bill, it would be just and equitable to expropriate the land without compensation. For example, section 12(3) of the Expropriation Bill lists land belonging to state-owned entities, land held for speculative purposes and abandoned property.

I think that the legislature may be confused in its application of EWC in the case of land owned by state-owned entities as the state is effectively taking land from itself (albeit that it is owned by a distinct entity which is itself owned by the state). Ownership includes an exclusive right to control and transfer property that is owned and so the state may arguably be said to be acting under its rights as owner should it take land owned by state-owned entities and redistribute it to black people in need of land. Land for speculative purposes is a bit more complicated. The land may be held for future development or sale depending on its location and estimated value. Either way, it would have some value for the owner. Without further information regarding the assumptions of the drafters, one could perhaps assume that the legislature has included land held for speculative purposes in the draft Expropriation Bill on the basis that it could be put to better use and/or that is not just to hold land

speculatively when there are people in dire need of land in the same country. The relationship between the concept of ownership and need as a principle of distributive justice is complicated. The permissibility of EWC in this case is not clear, particularly given the existing framework of legitimate rights and threshold required to be met in order to justify a limitation of these rights.

By contrast, it would seem that as abandoned land is no longer owned by anyone, it could be appropriated by the state without the need to compensate anyone (although justice requires that the previous owner have the right to approach a court to challenge the expropriation should he have had an intention of returning to or using the property).[72] The state would not need to expropriate the land here as it is, *ceteris paribus*, unowned and so subject to appropriation (a form of original acquisition of ownership recognised by South African law).[73] Here, EWC would not be required or correctly applied as a means to acquire the land as the state may simply appropriate or take the land. There is no owner to compensate.

It seems then that EWC is not clearly permissible or correctly applied in the narrow set of circumstances provided for in the Expropriation Bill and discussed above. The urgency of the need to reduce the inequality in land distribution on the basis of the principles of distributive justice remains, but it does not seem to support EWC within the current framework of legitimate land rights given the potentially dire economic conditions which may ensue as a result of large-scale EWC. I believe this would be so even on implementation of the proposed Constitutional revision, as a determination of nil compensation remains subject to the threshold of it being *"just* and equitable".

The urgency of redistribution rather seems to support a reconceptualization of legitimate land rights to allow for the scale of redistribution required. Budlender, in his discussion of what is required to enable more equitable access to land in South Africa, argues that the state should weaken existing property rights "to achieve a true balance between … the rights of property-holders and property-

less".[74] He recognises that this is a matter of political will and policy. The reconceptualization of a legitimate framework of land rights and ownership to allow for greater distribution seems to be contemplated in the Constitution in section 25(4) and seems to be within the parameters of current political discourse, as suggested by the wording of the Memorandum to the Constitution Amendment Bill which states that "the right to property may be limited in such a way that where land is expropriated for land reform, the amount of compensation payable may be nil. Further to clarify that such limitation is a legitimate object for land reform..." However, the limited cases where EWC is deemed to be permissible or "just and equitable" as provided for by the state in the Expropriation Bill, support the conclusion that EWC (and a reconceptualization of land rights) beyond these circumstances is likely beyond current policy parameters. The proposed limitation of the property rights protected by section 25 of the Constitution would also have to pass the threshold of section 36 of the Constitution which requires that it be "reasonable and justifiable". Considerations of consequences and justice may mean that it is not justifiable.

Within the existing framework of strong property rights as provided for in the current wording of section 25 of the Constitution, EWC seems to be an impermissible means to achieving land redistribution. Could redistribution of land be achieved by better or less invasive means?

Taxation

EWC does not seem to be supported by the principles of social justice. However, if it were supported by the principles of distributive justice as a permissible means to bring about redistribution of land in South Africa (perhaps in a more progressive and controlled process of redistribution which may reduce the negative consequences of EWC), then EWC would still not be permissible if there were better means, or less invasive means, to bring about justice in land distribution as required by the concept of distributive justice. I will deal only briefly with the comparative argument here as I think that the

consequentialist argument against EWC as a means of land redistribution is a powerful one, meaning that it is likely not permissible regardless of there being better or less invasive means of redistribution available.

Would taxation constitute a better or less invasive means of redistribution? The redistribution of physical land or access to land without compensation to the existing landowner as discussed above seems to require a different understanding of land rights and ownership. Taxation, by comparison, seems to be widely accepted as a justifiable limitation on existing property rights in the pursuit of the public good (although I note that libertarians would in general be resistant to taxation given the inherent interference in private property rights and would prefer to rely on voluntary contributions). Depending on one's conception of rights to income (for example, whether one has rights to all pre-tax income on the basis of desert)[75], taxation may be viewed as a deprivation by the state of a person or corporation's rights to their income, without compensation. This form of deprivation is, however, different to expropriation as understood and applied by international law in relation to property:

> [t]here is a big difference between suddenly expropriating half of someone's savings and attaching monetary conditions in advance to activities, expenditures, and earnings – the usual form of taxation. The latter is a much less brutal assault on the person. Whether this kind of limitation of individual liberty should be permitted, to acquire resources for the promotion of desirable ends, is a function of the gravity of the violation and the desirability of the ends.[76]

Taxation does not deprive a person of their rights to their fixed property (land or house or other buildings) or underlying investments or machinery or human body which generate the income which is then taxed. There are instances of international investment law dealing in particular with foreign investment which regard taxation as a form of *indirect* expropriation[77] as the rights to the underlying assets or investments are not taken, but the fruits of the investment are taxed. For purposes of the

discussion that follows, I too will regard it as a form of indirect expropriation. One could argue that, although the principles of distributive justice do not support EWC for the reasons discussed above, they support *indirect* EWC as a permissible means of redistribution. Indirect EWC is compatible with our current conception of legitimate land rights and ownership. Taxation is a means of redistribution which can be employed without severely limiting or overturning existing legitimate property rights – at least not in the sense that expropriation of land without compensation would do – and so does not pose a significant risk to the welfare of the least advantaged. It therefore seems that EWC (of a sort) may be permissible as a means of redistribution of income (and income from land), but not of land.

Property Rights

EWC does not seem to be permissible on the principles of distributive justice as it cannot be countenanced within the existing framework of legitimate land rights and ownership. The existing land rights and ownership regime protects private property rights from interference (save for in limited circumstances provided for in the Constitution and subordinate legislation) and creates enduring rights in respect of land. There therefore remains an inherent tension between the protection of individual rights and liberties relating to land and the promotion of "desirable ends like the general welfare",[78] particularly when a portion of society has no land rights to protect in the first place. I have argued above that the redistribution required by the concept of distributive justice to achieve a just distribution which is sensitive to the pattern of historic injustice may in fact require a reconceptualization of these rights.

If land rights were reconceived as weaker (as recommended by Budlender) or made conditional on a social minimum or use-based condition being met[79], then it seems that at least some portion of the land held by current landholders would no longer be capable of expropriation (with or without compensation) as it would not be owned in the sense that we currently understand the concept of

ownership.[80] As discussed in Chapter 3, expropriation is a justifiable exercise of the state's power of eminent domain. It only requires justification because of the strength of existing land rights and, in particular, the right to non-interference with private property rights. If land rights and ownership are reconceptualized as weaker in order to give effect to the redistribution required by the principles of distributive justice, then expropriation would not be required. It is not clear that the proposed changes to the Constitution as contained in the draft Constitution Amendment Bill significantly reconceptualize the framework of legitimate land rights and ownership in South Africa, although they propose a significant limitation of such rights within certain parameters. Section 25(4) of the Constitution does however refer to "the nation's commitment to land reform" and "reforms to bring about equitable access to all South Africa's natural resources". To the best of my knowledge, it has not yet been suggested by the policymakers that this provision be employed to bring about a significant reconceptualization of land rights and ownership for South Africa.

Conclusion on Distributive Justice

The discussion in Chapter 5 established that EWC is not supported by the principles of rectificatory justice. The discussion in this chapter established that EWC is generally not justifiable on grounds of distributive justice either, because expropriating land without compensation within the current framework of legitimate land rights and ownership (including the proposed amendments to the Constitution) is likely to lead to a significant worsening of the economic situation of most South Africans, including the least advantaged. Those members of the public and politicians arguing against EWC have done so, in large part, on the basis that dire economic consequences could follow widescale implementation of EWC. This argument has significant weight given that economic deterioration would worsen the extent and levels of poverty in the country, which is contrary to what social justice requires.

It is unlikely that one could contest the economic consequences of large-scale EWC within a framework of legitimate land rights and ownership given the empirical data available from Zimbabwe post the implementation of its fast track land reform project. Justice requires the redistribution of land and wealth in South Africa. However, it seems that the concept of distributive justice does not support EWC within the existing framework of legitimate land rights and ownership given the potentially disastrous economic effects.

If the land rights and ownership framework were reconceptualized to accommodate the significant redistribution required by the urgent social goals of distributive justice, then EWC would likely not be required as some land or parts of land would no longer be "owned" and as such may be capable of redistribution without expropriation. Constitutional revision to limit land rights may be within the parameters of current political discourse but for now reconceptualization of land rights and ownership on a grand scale seems to remain beyond the parameters of current political policy in South Africa. And the detail of possible reconceptualization of land rights and ownership is beyond the scope of this dissertation.

The principles of distributive justice support the redistribution of land in South Africa. However, they do not seem to support EWC (save for perhaps taxation as a form of indirect EWC) as a permissible means of bringing about redistribution on a large scale given the potentially negative consequences for all.

Chapter 7

7. Conclusion

In the preceding chapters I discussed the question of whether EWC is supported by either principles of rectificatory justice or principles of distributive justice. Specifically, I considered whether EWC is supported by the principles of rectificatory justice or the principles of distributive justice as a permissible means for the state to implement land reform. The discussion was framed by the public and political debate and draft legislation relating to EWC.

I concluded in Chapter 5 that EWC is not supported by the principles of rectificatory justice as a permissible means to rectify the historic injustices related to land dispossession in South Africa. The principles of rectificatory justice can do a lot of the work in justifying the return of land to its rightful owners in South Africa, however I concluded that they do not support EWC but rather something different. Expropriation is mistakenly applied in cases of rectification of historic injustice.

Thereafter, I established in Chapter 6 that EWC is generally not supported on grounds of distributive justice either. This is because expropriating land without compensation within the current framework of legitimate land rights and ownership is likely to lead to a significant worsening of the economic situation of most South Africans, including the least advantaged. On both general principles of distributive justice and specific principles like Rawls' *difference principle*, EWC would not be supported as a permissible means to bring about significant redistribution of land. The extent of land distribution required by the principles of distributive justice may instead require a significant reconceptualization of land rights and ownership.

Therefore, in answering the question of this dissertation, I conclude that EWC is not supported by the principles of either rectificatory or distributive justice as a permissible means for the state to implement land reform in the form of restitution or redistribution of land. Further, there seems to be some misunderstanding of the principles of justice underlying EWC and the urgent requirements for land reform in South Africa, both at the level of political policy and public debate. The discussion above hopefully provides food for thought in re-thinking how we conceive of land rights and ownership, and the rectification of significant historic injustice in South Africa.

[Wordcount (excluding footnotes and endnotes): 15, 581
Wordcount (including footnotes and endnotes): 16, 727]

[1] https://www.timeslive.co.za/politics/2018-02-27-national-assembly-adopts-eff-motion-on-land-expropriation/
[2] Final Report of the Presidential Advisory Panel on Land Reform and Agriculture, 2019: 67
[3] See discussion in Chapter 3 regarding draft Constitution Eighteenth Amendment Bill
[4] In 2002 Zimbabwe enacted legislation enabling land to be seized from white farmers without compensation in order to return it to indigenous Zimbabweans who had been dispossessed of their land under colonial rule.
[5] "Khoekhoen" is regarded as the correct name for the Khoekhoen people or tribes. See Nienaber, 1990: 43
[6] www.khoisan.org
[7] Smith, 1993: 98 – 101
[8] Oliver & Oliver, 2017: 2 - 5
[9] Atuahene, 2014: 14
[10] Atuahene, 2014: 21
[11] Atuahene, 2014: 21
[12] Van der Walt, 1997: 143
[13] See section 72(7) of the Constitution of Zimbabwe
[14] Ntsebeza, L. in Ntsebeza and Hall, 2007: 122
[15] Jaichand, 2018:
[16] Langa ACJ in *Du Toit*: para 84
[17] Ngcukaitobi & Bishop, 2018: 20
[18] It also does not deal with circumstances where land or a portion of land is not utilised by the owner or is under-utilised and owned by a state-owned enterprise. Ngcukaitobi & Bishop propose these as additional categories of land in terms of which EWC may be permissible on the bases that: (i) "the land is not being used productively", and (ii) the owner would not have an "emotional connection to the land" and would likely only suffer economic loss. (Ngcukaitobi & Bishop, 2018: 20)
[19] There are various other pieces of legislation which address the various pillars of land reform in post-apartheid South Africa. These include, amongst others, the Land Reform (Labour Tenants) Act No. 3 of 1996, the Extension of Security of Tenure Act No. 62 of 1997, and the Communal Land Rights Act No. 11 of 2004 (yet to be proclaimed into law).
[20] Collste, 2015: 11
[21] Coleman, 1992: 305
[22] Aristotle, N.E.: 1131a2
[23] An additional point of complexity in many cases is that the law has legitimated an historical injustice by providing the current landholder with legal rights to the land notwithstanding the historical injustice in acquisition of the land. In order to take back the land, the state would need to prove that the right is invalid or illegitimate. If the right is invalid, then EWC would be misapplied in such a case. This is a point of complexity to which I will return in more detail in my discussion below.
[24] Atuahene, 2014: 21
[25] Legal term referring to payments as "solace" for emotional pain and suffering.
[26] Atuahene, 2014: 21
[27] Land Commissioner's presentation to Parliament, 2013 as reproduced in Ramutsindela et al, 2016: 18
[28] Ramutsindela et al, 2016: 11
[29] Atuahene, 2014: 21
[30] Preamble to the Constitution Amendment Bill
[31] For a discussion of different theories of corrective justice and whether they require a duty to rectify a wrong or make good the losses, see Coleman, 1992
[32] Coleman, 1992: 324
[33] Collste, 2015: 10 – 11
[34] Badenhorst et al., 2006: 51
[35] Aristotle, N.E.: 1131a2
[36] Badenhorst et al., 2006: 73
[37] Shaw, 2003b: 83
[38] Nozick, 1974*:* 151
[39] Shaw, 2003b: 83
[40] Shaw, 2003b: 83

[41] Badenhorst et al., 2006: 141 - 156
[42] Preamble to the draft Constitution Amendment Bill
[43] Budlender, 1992: 302
[44] Badenhorst et al., 2006: 244
[45] Badenhorst et al., 2006: 204
[46] Badenhorst et al., 2006: 242
[47] Drawing on discussion by Shaw, 2003a: 221
[48] Aristotle, N.E.: 1131a2
[49] Perez, 2011: 155
[50] Perez, 2011: 155
[51] Miller, 2017: section 2.2
[52] Perez, 2011: 155
[53] Ramutsindela et al., 2016: 76
[54] *Hermanus v Department of Land Affairs* 2001 (1) SA 1030 (LCC) at 1044 C - E
[55] Atuahene, 2014: 3
[56] https://www.jewishvirtuallibrary.org/holocaust-compensation-and-restitution-by-country; http://www.claimscon.org/what-we-do/compensation/
[57] Collste, 2015: 12
[58] Waldron, 1992: 6
[59] Aristotle, N.E.: 1131a2
[60] See preamble to draft Constitution Amendment Bill: "whereas such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs."
[61] Based on 2015 findings, being the most recent published audit findings
[62] Department: Rural Development and Land Reform, 2017: 5 – 6, 8
[63] Stats SA midyear estimate, July 2019
[64] See Jeffery, 2016 and AfricaCheck factsheet, 2018
[65] Section 36(1) of the Constitution
[66] Section 2 of the Memorandum to the draft Constitution Amendment Bill
[67] Murphy & Nagel, 2002: 48; Rawls, 1971: 100 - 101
[68] Constitution Amendment Bill
[69] As seen in the decline in the economy in Zimbabwe after the accelerated land reform programme was introduced in 2002 (see Zimbabwe's Land Acquisition Act 1992 (as updated in 2002)
[70] Murphy & Nagel, 2002: 47
[71] Rawls, 1971: 104
[72] See section 21 of the Expropriation Bill for the right to approach a court
[73] Badenhorst et al., 2006: 139
[74] Budlender, 1992: 304
[75] Murphy & Nagel, 2002: 49 - 50
[76] Nagel, 1975: 145
[77] Nikièma, 2012
[78] Nagel, 1975: 146
[79] See the discussion by Ngcukaitobi & Bishop regarding EWC of unused land or land owned by state-owned enterprises which is underutilized. Ngcukaitobi & Bishop, 2018: 20 – 21

[80] I note that there is an additional question of whether the reconceptualization of rights might itself constitute a form of expropriation, as it could lead to the loss of property rights for some property owners. I think the answer to the question is no: expropriation would again be misapplied here despite some people losing a portion or all of their property. It would however be a form of deprivation.

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