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Chairperson and Honourable Members
Portfolio Committee on Public Works and Infrastructure
National Parliament
c/o Ms. Nola Matinise
Per email: expropriationbill@parliament.gov.za

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Submission on the Expropriation Bill, 2020

Introduction

The Land and Accountability Research Centre (LARC) is based in the University of Cape Town's Faculty of Law. LARC forms part of a collaborative network, constituted as the Alliance for Rural Democracy, which provides strategic support to struggles for the recognition and protection of rights in the former homeland areas of South Africa. An explicit concern of LARC is power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. It is in this context that we would like to make a submission on the Expropriation Bill, 2020 (Expropriation Bill).

LARC made a submission to the Constitutional Review Committee tasked with considering whether to amend section 25 and other provisions of the Constitution to make it possible for the state to expropriate land in the public interest without compensation. One of the central points in our submission before the Joint Constitutional Review Committee was that it is not necessary to amend any provisions in the Constitution to allow for expropriation without compensation. We submitted that a proper interpretation of the Constitution already allows for the expropriation of land without compensation. Instead, what is needed is empowering legislation that would articulate the parameters of the state's power to expropriate within the bounds of the Constitution. We therefore welcome the Bill. We also made a submission in response to the call for comment made by the Department of Public Works in February 2019 on the then Draft Expropriation Bill, 2019. In that submission we highlighted a number of serious concerns about various provisions and made some proposals about how to improve the Bill in response to some of those concerns. We observe that many of the issues raised in relation to the previous Draft Bill remain. However, we look forward to engaging and working with the Committee to find ways to ensure that the most

vulnerable rights to land, held predominantly by poor Black people, are properly protected in situations where any laws, including future Expropriation laws, apply.

One of LARC's areas of focus relate to the impact of laws, policies, and practices of the state as well as the conduct of private parties on the rights protected in section 25(6) of the Constitution. Sections 25(6) and (9) of the Constitution deal with security of tenure and provide that tenure that is legally insecure as a result of past racially discriminatory laws or practices must be made legally secure in terms of legislation. We work with people and communities whose land rights, while formally recognised by the Constitution and laws such as the Interim Protection of Informal Land Rights (IPILRA)[1] are, in practice, constantly threatened. Their rights are undermined by both the state and private parties through policies and practices that fail to appropriately recognise their rights as property rights enjoying constitutional protection.

This submission will deal with two broad points related to the aspects of LARC's work set out above. They can be summarised as follows:

1. The Bill, in its current form, fails to adequately articulate the extensive pro-active power to expropriate for a public purpose or in the public interest that the Constitution already gives and envisions for the state. The Expropriation Bill does not enable the state to effectively and efficiently achieve its wide constitutional mandate of giving effect to land and related reform. Instead, the Bill circumscribes the powers of the state and imposes excessively onerous and prescriptive requirements and procedures that are not required in terms of the Constitution. These could unduly delay the process of expropriation or invalidate it.

2. The Bill's recognition and treatment of unregistered rights to land and property is an important and commendable step forward. However, the Bill does not recognise the tensions and imbalances of power and legibility that exist between registered owners and holders of unregistered rights. It also fails to take into account the realities faced by the holders of unregistered rights to land, who tend to be the poorest and most vulnerable people in South Africa. They need additional and explicit measures to ensure that their rights are recognised, respected and protected during the process of expropriation.

1. <u>Procedures and requirements in the Expropriation Bill</u>

Our constitutional project is not only aimed at recognising the injustices of our colonial and apartheid past, it also goes further by enjoining us to use the tools it gives us through the Constitution to deal with and remedy the consequences of that history. Section 25, and other related provisions of the Constitution clearly envisage and legitimate

[1] 31 of 1996.

significant intervention in the existing distribution of wealth and property in South Africa. The Constitution's Preamble and founding values require us to remedy the injustices of South Africa's past and create a society based on social justice and fundamental human rights; the achievement of equality, and the advancement of human rights and dignity.[2] This is coupled with the obligations the Constitution places on the government to achieve important social goals for the creation of this society, such as access to housing, healthcare, social security, food and water.[3]

The Constitution's commitment to fundamentally changing how previously sacrosanct property relations are to be treated is illustrated in section 25. In as much as this section prohibits the arbitrary deprivation of property, these procedural protections exist alongside the wide authority the Constitution gives to the state to take action to promote land and related reforms. This wide authority is demonstrated by the positive rights to restitution,[4] redistribution,[5] and security of tenure[6] as mechanisms for redressing the effects of dispossession and the denial of rights to property.

The state's power to expropriate is limited by the Constitution and can only be exercised for the purposes of the public interest or public purpose through a law of general application.[7] However, the nature of this power, which is to be articulated through legislation, needs to be considered with reference to South Africa's history, and the clear constitutional commitment to remedy the injustices of our past. This is the lens through which all land reform legislation must be viewed.

Expropriation Bill fails to adequately empower expropriating authority

However, instead of adequately empowering the state to give effect to its constitutional mandate of achieving land and related reform the Expropriation Bill, as it stands, severely circumscribes the power to expropriate land in terms of the Constitution. Instead of expanding the power of the state within the bounds of the Constitution, the Expropriation Bill places restrictions and hurdles in the way of the exercise of that power. These cumbersome procedural restrictions and hurdles are not required by the Constitution and were not present in the previous Expropriation Act 63 of 1975.

For example, Chapter 3 of the Expropriation Bill deals with the process of investigation and valuation that happens when the state considers whether it should expropriate property. This section places an obligation on the expropriating authority to obtain the consent of the owner at numerous points before any investigative activity can be undertaken by the person authorised by the expropriating authority. Consent from the

[2] Preamble and section 1 of the Constitution.
[3] Sections 26 and 27.
[4] Section 25(7).
[5] Section 25(6).
[6] Section 25(5).
[7] Section 25(2)(a) of the Constitution.

owner is required before the performance of any activities necessary to determine the suitability of the property for expropriation, and the owner's consent is required before persons authorised by the expropriating authority can enter the property in question. These requirements could seriously delay or invalidate the process before it has even begun, particularly because the only recourse the expropriating authority has against an uncooperative owner is to approach a court. The expropriation process could be tied up in litigation for years before it has even started.

This is in stark contrast with the 1975 Expropriation Act, which had no such requirements. There the Minister had the power to authorise access to and temporary use of the property being considered for expropriation. He could also authorise the performance of activities necessary to ascertain whether the property was suitable for the purpose for which it was to be expropriated.[8] The only limitation to the power to grant access was that the authorised person had to obtain the consent of the owner should he or she need access to an enclosed building or yard. Even then the requirement to obtain the owner's consent was limited, where the person authorised by the Minister had given the owner 24-hour notice of his or her intention to access an enclosed building or yard this was sufficient to allow him to carry on with his duties.[9]

This Expropriation Bill makes expropriation unnecessarily difficult by imposing requirements such as negotiating with and obtaining the consent of an owner before a decision is made about whether expropriation is appropriate, that could significantly delay or invalidate the process. Neither the pre-negotiation nor the obtaining of consent are required by the Constitution and have not been part of the expropriating process in previous laws that regulate expropriation by the state. As mentioned previously, the Constitution is a radically aspirational and transformative document that seeks to empower the state to, amongst other things, restore the rights and dignity of millions of South Africans. **To that end, legislation adopted to give effect to constitutional provisions and rights should be framed in positive, as opposed to restrictive terms, to ensure that beneficiaries of those rights enjoy the full protection envisaged in the Constitution**.

Sections 25; 33[10]; 34[11] and 36[12] already set out limitations on the nature and exercise of this expropriation power. It should not be for legislation to further limit the exercise of a power granted by the Constitution beyond what is required and envisioned by the Constitution itself. It is our submission that all provisions that require the expropriating

[8] Section 6(1)(a) and (b) of the Expropriation Act.-

[9] Section 6(1)(b).

[10] Section 33(1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.

[11] Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of the law decided by a court or equivalent forum.

[12] Section 36 of the Constitution is the general limitations clause that sets out the terms within which rights in the Bill of Rights can be limited.

authority to obtain the consent of the owner before being able to access the property in question or conduct investigative activities necessary to ascertain the suitability of the property for expropriation should be revised. Any consent requirements for access to the property in the Bill should be revised to reflect what is currently in the 1975 Expropriation Act as is detailed above, such an approach appropriately balances the owner's rights with the need to have an effective and streamlined expropriation process. It should be enough that an owner is given adequate notice of impending access and activities. A streamlined process is needed that empowers the expropriating authority to conduct a thorough investigation that brings before it all the factors that need to be considered to make a decision. This process cannot be made completely reliant on the consent and cooperation of the owner or right holder for it to even begin, let alone its effectiveness and efficiency. The owner's rights and property can be adequately protected by provisions allowing him or her to claim – within a prescribed period – for any damage to property that may occur as a result of the investigation conducted by the party authorised by the Minister. This is the same level of protection provided for in the Expropriation Act of 1975.[13]

The Expropriation Bill needs comprehensive but truncated procedures

The procedures set out in the Expropriation Bill need to be shortened and simplified. Parallel or overlapping processes need to be removed. Onerous and prescriptive requirements need to give way to guiding principles aimed at reaching a conclusion that appropriately balances the interests of parties, while working to achieve the prescripts of the Constitution.

The procedures could be distilled into four succinct stages:

- comprehensive investigation stage;
- notice of intention to expropriate;
- mediation and determination of a just and equitable compensation; and
- the notice of expropriation.

The **investigative phase** must not in any way be stalled by the consent-seeking process or be solely dependent on the cooperation of the owner or rights holder. Each should be reasonably informed of intended activities, possible timelines, and be given adequate notice for any need to access the property. This is also the stage that submissions and objections to the possible expropriation must be made and considered. This stage will also be crucial in identifying and ascertaining the nature and content of unregistered right holders. The expropriating authority must be appropriately empowered to identify people and their rights, to ensure they are included and treated like all property rights holders in subsequent engagement and negotiation.

The **notice of intention to expropriate** must include the determination of the expropriating authority of what it considered to be just and equitable compensation.

[13] Expropriation Act section 6(2).

This will form the basis of the **mediation and ultimate determination of compensation**. Reasonable time frames must be set to ensure there will be a point that negotiations will end, and determination by a court becomes necessary. If during the negotiation stage any party feels aggrieved and decides that agreement is unlikely to be reached, they are free to approach a court to determine what just and equitable compensation is in the circumstances.

Provisions related to the making of submissions and objections to an intended expropriation

Besides having procedures and requirements that go beyond what is required by the Constitution, the Expropriation Bill has a number of stipulations that will have the effect of drawing out the process. For example, clause 7(2)(g) of the Expropriation Bill provides that in the notice of intention to expropriate issued the expropriating authority needs to invite affected parties to make submissions or raise objections in relation to the intended expropriation. This call for submissions or objections is made after the investigation in terms of Chapter 3 is ostensibly completed. A 30-day period is allocated for this comment process. It seems rather late at this juncture to call for, and consider, submissions and objections to the intended expropriation. Once a notice of intention to expropriate is issued in terms of clause 7(1) of the Bill an in-principle decision would have been made about the appropriateness and suitability of expropriating the property in question.

It would be more appropriate to consider possible submissions or objections as an aspect of **the investigative** phase when determining whether or not a property is suitable for expropriation. This would ensure that the expropriating authority has all the relevant information before him or her – which should include objections and submissions from affected parties – in order to make a fully informed decision about the appropriateness and suitability of the intended expropriation. These submissions and objections from affected parties are important in considering the appropriateness of an expropriation. It is not enough to simply acknowledge receipt of the submissions, consider and take them all into account – as is required in terms of clause 7(5) of the Bill. A call for submissions should be at the investigative stage and form part of a decision determining whether the property in question is suitable and should be expropriated.

It is thus necessary to bolster the powers of the expropriating authority and expand the scope of what needs to be investigated and ascertained right at the beginning of the process. This will streamline the process and do away with multiple parallel processes that only encumber and protract later stages.

Provisions relating to the determination of compensation

Another process that detracts from the powers of the expropriating body and could prove cumbersome and result in further unnecessary delays is the one set out in relation

to the determination of just and equitable compensation. In terms of clause 7(4) of the Expropriation Bill the owner or holder of an unregistered right responding to a notice of intention to expropriate must submit a statement setting out the amount he or she claims for compensation and the value of any improvements on land. This is the first time that an amount of compensation is claimed or offered. It is not appropriate for the owner or unregistered rights holder to initiate the process of determining compensation. This places too much power in the hands of the owner/ rights holder and allows them to set the terms of negotiations.

In terms of section 25(3) of the Constitution compensation must be just and equitable, and this amount must be the outcome of an equitable balance between the public interest and the interests of all those affected. Regard must be had for all relevant circumstances including those set out in the non-exhaustive list in section 25(3)(a)-(e). The expropriating authority – not the owner or unregistered rights holder – is most appropriately placed to do that balancing exercise and come to a determination of what in the circumstances would be just and equitable – informed by the balancing of interests and the thorough investigation that is to be done at the beginning than an owner or unregistered rights holder.

Legislating a process of claims and counter offers aimed at reaching agreement with the owner obscures and ultimately complicates coming to a determination of what is just and equitable in the circumstances. It instead harks back to the highly criticised policy of 'willing buyer and willing seller', the point of departure and central consideration of which was the market value of the property. The Constitution in section 25(2)(a) gives the state, wide powers of expropriation for a public purpose or in the public interest, section 25(2)(b) makes that power subject to the payment of just and equitable compensation – not subject to the requirement for negotiated consent with the owner or unregistered rights holder. An owner or unregistered rights holder retains their right to either accept or refuse the amount determined to be just and equitable. Should an owner or unregistered right holder not accept the amount offered, then it is for a court to decide or approve what is just and equitable. The state is not obliged to avoid expropriating property by first requiring owner consent before proceeding, it is empowered to do so in terms of section 25(2) of the Constitution. The exercise of this power, once a decision has been made to use it, is subject to the payment of just and equitable compensation regulated by a law of general application and other rights in the Constitution including sections 33, 34, and 36 that also appropriately protect the interests of all parties involved.

It is important that the expropriating authority be appropriately capacitated to authoritatively perform this balancing act and ensure it is not bulldozed into accepting exorbitant claims for compensation. Where necessary the Office of the Valuer-General needs to be appropriately capacitated to ensure it can be a resource for expropriation processes. More will be said below, but the expropriating authority needs to also be capacitated to properly deal with properly deal with the unique context of unregistered

rights. Independent and qualified experts must be used to establish general and flexible processes of appropriately determining just and equitable compensation for many unregistered rights – in many instances this might be significantly above the market value of the land.

The process of negotiation in determining compensation set out in the Expropriation Bill is extremely protracted, requiring overlapping and repeated decisions. There is provision for up to four points of offers and counter offers to be made and the fourth step can seemingly continue indefinitely before a decision on whether to expropriate is even made. Clause 7(4)(a)-(c) allow the owner or unregistered rights holder to claim an amount he or she considers just and equitable. Clause 7(6) gives the expropriating authority 20 days to respond to the claim by either accepting it or making a counteroffer. Clause 7(7) requires that this leg must be concluded in 40 days, after which the expropriating authority must decide whether to proceed with the expropriation, continue with negotiations, or not proceed with the expropriation - no time frame is given for when this decision must be made. Should the expropriating authority decide to continue with negotiations, no timeline is given for when the owner or unregistered rights holder must be informed about this decision, only that it be within a "reasonable time".

Clause 16 then applies. The wording of this clause seems to envision a protracted process of negotiation. Each party may from time-to-time request information justifying a claim or offer of compensation, each of these requests must be complied with within 20 days. If a party fails to comply with a request the other can approach a court for a court order to comply. There are no limitations placed on how long this back and forth can go until one of the parties is required to approach a court to finally determine what would be just and equitable in the circumstances.

The above also illustrates the importance of appropriately empowering the expropriating authority to conduct a thorough investigation upfront to ascertain all the factors relevant to determining the appropriateness of the expropriation before any decision is made. Once an in-principle decision to expropriate the property has been made the expropriating authority must have a sense of how much it is willing and able to pay for the property. This should have been taken into account in deciding whether the property should be expropriated.

What is also important to keep in mind is that not every owner or unregistered rights holder will have the skills or resources to accurately determine what he or she can appropriately and fairly claim as just and equitable compensation. Having the owner or unregistered rights holder determine the amount that is to be the point of departure for negotiations could unfairly prejudice that owner or unregistered rights holder, or it could centre the interests of the owner making the starting amount too high for good faith and effective negotiations.

The determination of what just and equitable compensation is, is something that can only be properly ascertained on a case-by-case basis – there is no one size fits all process. The expropriating authority must be appropriately empowered and capacitated to lawfully carry out its function of appropriately balancing the public interest – particularly the achievement of land reform – with the interests of individuals in all situations. Most importantly, the expropriation process must not be susceptible to being frustrated or manipulated by persons with wealth and resources hellbent on thwarting efforts of achieving equitable redistribution of land, wealth, and other resources. Equally, vulnerable people who bore the brunt of past racist laws and policies that dispossessed them of their land or significantly weakened their rights – the majority of whom are holders of unregistered, sometimes unwritten, rights to land, must be proactively protected in expropriation processes and the determination of just and equitable compensation.

2. Provisions related to unregistered rights

The Expropriation Bill recognises and includes unregistered rights including a right to occupy or use land, which is recognised and protected by law, but is neither registered nor required to be registered. This is a step in the right direction towards recognising the array of rights in property that have been ignored or denied since colonialism. The definition is wide enough to recognise rights held in terms of customary law, IPILRA, the Extension of Security of Tenure Act (ESTA)[14], and the Land Reform (Labour Tenants) Act.[15]

However, many of the procedures in the Bill do not respond to the realities of continued subjugation faced by these rights holders despite constitutional and legislative recognition and protection. The Bill's procedures also fail to address the manner in which current practices are inadequately equipped to identify the nature, content, and the value of these unregistered rights.

Continued state disregard for existing unregistered rights

A problem that has dogged land reform in South Africa is the failure of the state to acknowledge the rights of those already living on land targeted for redistribution or restitution. Time and again land that is awarded to redistribution and restitution beneficiaries is already occupied by others with unregistered rights. For example, labour tenants and farm workers on land acquired from white farmers, and people with long-standing IPILRA and customary law rights on land formerly owned by the South African Development Trust.

The state's failure to acknowledge or expropriate these rights creates serious tensions between the beneficiaries of land reform and those with pre-existing rights to the land

[14] 62 of 1997

[15] 3 of 1996.

in question. In many instances both groups are of the view that they have exclusive right to the land. Rather than dealing with such situations properly rights holders are instead advised by officials to accommodate one another and somehow 'get along'. This pits them against one another from the start and hampers attempts to make the land productive.

The people with pre-existing rights to the land are often people with farming experience from both their past and current lives. Many may have previously worked for farmers, and since the farmers left most have continued to be engaged in subsistence agriculture on the land without any form of government support. Their methods of farming are put at risk by groups of new land reform beneficiaries who deny them access to key resources such as fertile land and water, which the new beneficiaries also need for themselves.

For some years LARC supported a group of restitution claimants in Barberton who formed the Mawubuye CPA. Their claim was ignored for years and the state land they claimed was awarded to others. We assisted them to elevate their claim to the attention of the Chief Land Claims Commissioner. After her intervention the Mpumalanga office identified and acquired alternative land for them. The Commission then took the claimants to inspect the land. On their arrival they were greeted by furious labour tenants who threatened them with violence should they attempt to occupy the fertile land that the labour tenants were farming. The labour tenants had submitted a claim to government in terms of the Land Reform (Labour Tenants) Act, but government had failed to process their claim to the land. This forms part of its systematic failure to process thousands of other labour tenant claims as illustrated by the Bhekindlela Mwelase labour tenant class action which resulted in the *Mwelase and Others; Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another v Director-General for the Department of Rural Development and Land Reform and Another*[16] judgments by the Land Claims Court, the Supreme Court of Appeal and finally the Constitutional Court.

The Mawubuye CPA case is not an isolated example. It is cited only because the disregard for pre-existing unregistered rights occurred even in a matter that had been elevated for special attention. In virtually every instance of land reform people with unregistered land rights are already living on the land earmarked for restitution or redistribution, and their rights are ignored when the land is awarded to others. This established and widespread practice by the Department of Rural Development and Land Reform repeatedly breaches 25(6) of the Constitution and the laws enacted to give effect to it, such as IPILRA, ESTA and the Labour Tenants Act.

Insofar as the purpose of this Act is improve the pace and delivery of constitutionally mandated land reform, it cannot be allowed to simultaneously dispossess people whose

[16] [2019] (6) SA 597 (CC).

tenure is insecure because of past racially discriminatory laws and practices. Their rights need to be identified at the start of the process, during the investigation stage, because the expropriating authority needs to take them into consideration before making the decision to expropriate. If there are people already using the land productively this may mitigate against awarding it to others. It may suggest that the land be awarded to those holding the preexisting unregistered rights. Or it may indicate that the land should be subdivided after expropriation in order to secure the rights of current users whilst a portion of the land could be awarded to others.

Identification of unregistered rights holders

The Expropriation Bill places the onus largely on the owner of the property to identify and give the relevant information about unregistered rights holders to the expropriating authority. 'Owner' is defined, in relation to property or a registered right in property, as the person in whose name the property or right is registered. Clause 5(1) sets out what an expropriating authority is required to ascertain when considering the expropriation of property. A good amount of detail is provided in clause 5(2) about how an expropriating authority should determine the suitability of the property for the purposes for which it is required. The expropriating authority must then also ascertain in terms of clause 5(1)(b) the existence of registered and unregistered rights in the property and the impact of those rights on the intended use of the property. The process is straightforward enough with regard to the identification of holders of registered rights, as is the ascertainment of the nature and content of those rights and thus their possible impact on the intended use of the property.

However, in respect of unregistered rights the Bill seems to require no more than that the owner, a person that seems of be in charge of the property, or the unregistered rights holder him or herself, provide names and addresses of all unregistered rights holders. There is no mention of how the nature and content of those rights is to be ascertained, or how they will impact the intended use of the property. The skewed power dynamics and tensions that exist between some of these unregistered rights holders and the registered rights of owners, and the state is not properly provided for or considered in the provisions related to identifying unregistered rights holders in the Bill.

Vulnerability of farm workers and labour tenants

The starkest example of these material tensions is illustrated by the 'relationship' between farm owners and farm workers, and between farm owners and labour tenants. These rights enjoy legislative protection in terms of the Land Reform (Labour Tenants) Act and ESTA. The Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP Report)[17] by former

[17] Kgalema Motlanthe, Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, retrieved from: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf, last accessed (20 February 2021).

President Kgalema Motlanthe goes into significant detail about the challenges faced by farmworkers and labour tenants in trying to protect their rights.[18] This is despite the existence of the Constitution and laws aimed at increasing their security of tenure. Farm workers and labour tenants continue to be evicted by farm owners despite measures intended to mitigate this.[19]

Bodies such as the South African Human Rights Commission (SAHRC) have pointed to issues of non-compliance with laws protecting these rights. Also widespread is a lack of knowledge or awareness that these rights exist, are recognised and protected by those who hold them.[20] The HLP Report makes it clear that there is a widespread disregard for the rights held by farm workers and labour tenants by farm owners and a lack of political will to implement the law and provide services.[21] Farm owners or people in charge of farms cannot be solely relied upon to ensure holders of unregistered rights are appropriately identified. The reality is that farmworkers and labour tenants are too vulnerable to be expected to unilaterally assert their rights.

Vulnerability of customary and IPILRA rights holders

Holders of rights in property in terms of IPILRA and customary law also face significant challenges in ensuring their rights are recognised and protected. Section 2(1) of IPILRA provides that the consent of the holder of an informal right must be obtained before he or she can be deprived of that right subject to the current Expropriation Act of 1975, and other laws that regulate expropriation of property. In this regard, it is crucial for the Expropriation Bill to make appropriate provision to ensure that the Constitution is not violated in the expropriation of these rights.

The HLP Report and 2018 Human Rights Commission Report[22] on issues affecting mine-hosting communities have described the vulnerability to dispossession and disregard for their property rights that holders of rights in terms of IPILRA have to deal with on a daily basis. Parliament has failed to enact a comprehensive proactive law that will secure these rights as required by section 25(6) and (9). In addition, the Department

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[18] HLP Report *ibid* at 279 *ff*.

[19] South African Human Rights Commission, Final Report on the Inquiry into the Human Rights Violations in Farming Communities, retrieved from: https://www.sahrc.org.za/home/21/files/farming_inquiry_2003.PDF, last accessed (20 February 2021) and South African Human Rights Commission, Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003, retrieved from: https://www.sahrc.org.za/home/21/files/Reports/Farming%20Inquiry%20Report_2008.pdf, last accessed (20 February 2021).

[20] HLP Report *supra* note 15 at 285.

[21] *Ibid*.

[22] South African Human Rights Commission, National Hearings on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa, retrieved from: https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf, last accessed (20 February 2021).

of Rural Development and Land Reform has failed to enforce the basic protections required by IPILRA against private parties or other government entities.[23]

Community Property Associations, community land holding trusts, and the Ingonyama Trust are also entities that have land registered in their names but have in many instances ridden roughshod over unregistered rights holders within their areas of jurisdiction. The reality is that most holders of unregistered land rights remain structurally vulnerable.[24] Many of these trusts and entities came into being as a result of government aggregation of people and their rights to property, and are largely dysfunctional making it increasingly difficult for people to assert their specific land rights or enforce accountability.[25] Individual and family rights within groups are often disregarded by those in charge of these institutions, and individual holders of rights are largely unable to hold them accountable. History and current experiences have shown that reliance cannot be placed on these institutions to accurately identify holders of unregistered rights.

To place reliance almost solely on the actors set out in clause 5(5) fails to take into account the reality and continued impact of South Africa's history of colonialism and apartheid on the property rights of vulnerable poor black communities. It also ignores the current failures and dysfunctionality that characterise institutions, including state institutions, tasked with the protection of these rights.

In order to begin to address existing shortcomings we recommend that a comprehensive rights enquiry of all occupants of the land targeted by the expropriating authority be a mandatory requirement in terms of clause 5(2)(a) of the Expropriation Bill. Given the widespread failure of the Department of Rural Development and Land Reform to uphold and protect unregistered rights the expropriating authority should be required to appoint a person with the necessary skills or expertise to identify and record each person that holds an unregistered right over property. The person must be tasked with identifying the nature and content of these rights, as well as the applicable law, be it IPILRA, ESTA, the Land Reform (Labour Tenants) Act, or another tenure system that would be recognised in terms of section 25 of the Constitution. **This inquiry must inform the determination of how these rights will impact the intended use of the property after expropriation. This process must be part of the investigation stage and be concluded before any notice of intention of expropriate is issued.**

The reality is that the 'registered owner' of the land, including the state, may often have interests that are directly in conflict with those of the holders of unregistered rights. Placing reliance on the registered owner to identify unregistered rights holders ignores

[23] HLP Report *supra* note 15 at 257 *ff*.
[24] *Ibid* at 254.
[25] *Ibid*.

the reality of unequal power relations, unequal property rights, and unequal access to resources and expertise that has played out for decades.

Furthermore, the persons and entities in whose name the land is registered, or persons in charge of the property, must be obligated to fully cooperate and take part in this process as they are in this version of the Bill. In taking part in this process owners that purposefully or negligently frustrate the process must be held liable in terms of clause 27 of the Bill.

It is also important that the Bill explicitly recognise and provide for the fact that unregistered rights present in many different ways. The Bill must expressly recognise this and provide for mechanisms to ensure that holders of rights that are not formally recorded are not prejudiced in the expropriation process. For example, in clause 10(1) of the Bill, provision is made for the holder of an unregistered right to claim compensation after the date of expropriation if he or she was not included in the process and compensated when expropriation happened. The point of departure is to require the holder of an unregistered right to provide a written instrument evidencing or giving effect to the unregistered right. No explicit recognition is given that many of these rights are unwritten and no process is given to guide holders giving them different options on how else they might prove their rights.

Determination of just and equitable compensation for unregistered rights

The formal cadastral system and mechanisms of property valuation are not entirely suitable for determining the true value of unregistered rights. The Expropriation Bill, as it stands, does not seem to recognise and make provision for this. It is important that the point of departure recognises that for many holders of unregistered rights land is not just for commercial interests or a place to live. Rights to land are directly linked to their – and future generations' – ability to survive. Land can have cultural and spiritual significance. All of this must be taken into account in the determination of just and equitable compensation, in these cases any market value is wholly insufficient to properly compensate people for what they lose.

The expropriating authority must be appropriately empowered to appoint qualified persons to properly determine the appropriate compensation for the unique context of unregistered rights holders at the investigative stage before a decision to expropriate is made. There cannot be a blanket burden placed on unregistered rights holders – who are likely not going to have access to the expertise or resources – to determine the just and equitable compensation for their rights.

Communicating and information sharing with holders of unregistered rights

Throughout the Bill most, if not all, engagement and communication between rights holders about compensation and related matters must be in writing and delivered through the post or fax. The dissemination of information by the expropriating authority

is primarily in writing through the Gazette or newspapers. Adequate provision is not made for rights holders, particularly unregistered rights holders, that cannot engage with these forums either because they are illiterate, or they do not have access to the mediums through which information is disseminated. Many people that live in rural communities on land governed, for example by IPILRA, rent a P.O. Box in the nearest town. Because of the distances involved, and the costs of transportation, P.O. Boxes are not regularly checked. Such persons are prejudiced by the mediums of communication envisaged by the Bill. Provisions for meetings to convey information such as those in IPILRA or by customary law, need to be included in the Bill to ensure that unregistered rights holders are able to participate fully through advertised and properly convened meetings.

Conclusion

In conclusion LARC welcomes the Bill and we welcome the inclusion and recognition of unregistered rights holders as equal stakeholders. We are concerned that, as currently worded, the Bill would make expropriation more, rather than less, cumbersome. In this regard we recommend that the processes in the Bill be simplified and re-organised into 4 discreet stages.

In respect of unregistered rights holders, we recommend that part of the initial investigative stage, the proper identification of unregistered rights holders should be part of the activities envisioned in the process. Like with the other activities during the investigative stage, the expropriating authority must appoint appropriately qualified and skilled persons to ensure that every person living on the land is identified and has their rights ascertained. This is necessary to ensure that past and present prejudices against these rights are recognised and protected against. In the remaining 3 stages the holders of unregistered rights must be accorded extra and proactive protection in the determination of just and equitable compensation, fully taking into account the unique position and nature of many of these rights.

We would welcome the opportunity make a presentation to the Committee on the matters raised in our submission and answer any questions.

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