15 June 2018

Chairpersons and Honorable Members
Joint Constitutional Review Committee
National Parliament
c/o Ms. Pat Jayiya
per email: pjayiya@parliament.gov.za

Executive Summary

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.

In this context, LARC makes submissions regarding the necessity 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.

The points that LARC would like to raise with the Committee, elaborated in further detail below, can be summarised as follows:

1. There have been a number of failures in giving effect to land reform as mandated by the Constitution. It is important that the possibility of any amendment to the Constitution is considered in this context. Any amendment or legislative remedies must not entrench and perpetuate these same failures of law and policies since 1994.

2. Will the rights of poor black communities be protected against dispossession by the operation and implementation of laws purporting to achieve land and resource reform? This submission will consider the current position of communities across the country that have had, or are vulnerable to having,

their rights to land dispossessed from them through various laws, policies, and practices.

3. Who will the land go to once it has been expropriated? This submission will consider South Africa's history of black people having their land rights held in trust for them and being prevented from holding them in their own right. It will also consider the trajectory of the democratic government's policies that have moved away from transferring rights to black beneficiaries of land reform processes and instead vesting land rights in the state.

4. Lastly, this submission will embark on a textual analysis of section 25, submitting that on a proper reading of the provision the requirement for 'just and equitable compensation' already allows for the expropriation of land with zero compensation in the public interest. Instead, what is necessary is for Parliament to adopt empowering legislation the fully articulates the parameters of the state's power to expropriate within the bounds of the Constitution.

It is LARC's submission that there is no need to amend the Constitution for the government to expropriate land without compensation for the purposes of land reform. The Constitution has not been an impediment to the achievement of land reform. The failure has instead been on the part of Parliament to adopt legislation that properly gives effect to the constitutional imperative of land reform. Parliament has also failed to adopt legislation that effectively protects and promotes the positive rights provided for in section 25 aimed at achieving land reform. The executive has failed to interpret and implement laws in a manner that respects, protects, promotes, and fulfils rights provided for by the Constitution aimed at achieving land reform. The executive adopts and implements policies that have the effect of violating the rights in the Constitution aimed at land reform, or undermining land reform aims articulated in the Constitution.

Instead, what is necessary is the adoption of legislation that would clearly articulate the parameters of the state's power in determining what 'just and equitable compensation' means. To ensure that such legislation would pass constitutional muster, in other words to ensure it is not the legalisation of arbitrary deprivation and does not violate section 36, principles that accord with the Constitution need to be the premise of the law. Advocate Ngcukaitobi has elucidated these principles in various contexts. Expropriation, even for the purposes of land reform, must remain subject to just and equitable compensation as the general point of departure. It must be made clear that expropriation with zero compensation is possible and under what circumstances this is so. Courts should remain the final arbiters of whether in each case expropriation without compensation is legitimate. To prevent elite capture, expropriation without compensation must be used only to achieve land reform - for

restitution, redistribution, and tenure security. The law must clearly set out the procedures to be followed in expropriation without compensation and these procedures must make clear that it is subject to judicial review.

Many of the issues that will be considered in this submission were dealt with in great detail in the report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change.[1] This Panel was chaired by former President Kgalema Motlanthe and the report released in November 2017. The report makes a number of substantive and practical recommendations for beginning to deal with the challenges that have plagued land reform efforts since 1994. Parliament needs to fully engage with the findings of the report and its recommendations in considering the question of how to move forward and effectively achieve land reform in terms of the Constitution.

However, should an amendment of the Constitution be found to be necessary, expropriation without compensation should not be the only mechanism to give effect to land reform. Any amendment, and resultant legislation, must, adequately address the past failures identified; and protect the rights of vulnerable communities for whose benefit land reform ought to be achieved.

Introduction

One of the overarching aims of the Constitution is to recognise the injustices of our colonial and apartheid past, and put in place mechanisms to deal with, and remedy the effects of that past. A society based on equality, human dignity, and the advancements of human rights cannot be created without addressing the consequences of systems premised on depriving the vast majority of South Africans of those very things. Not only do these consequences remain, but that key features of past systems of exclusion persist today - 24 years after our first democratic elections.

South Africa's history of colonialism and apartheid was largely an exercise of the consolidation of power for the complete subjugation of the black majority to facilitate the dispossession of that majority of their land and their ability to hold rights to land. There have been some undeniable failures since 1994 in efforts to reverse that history and ensure all that South Africans are able to live dignified and prosperous lives. Going forward, these failures must be identified and faced head on, and measures taken to remedy them.

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[1] 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 15 June 2018. (hereinafter, "High Level Panel Report").

In attempts to remedy these injustices, we must be vigilant and ensure that we do not repeat the mistakes of the past, or entrench the very injustices and indignities we seek to eradicate with our constitutional project.

1. Land reform since 1994

The Constitution in Section 25 recognises three approaches to the overall land reform project. Section 25(5) provides for land redistribution. It places an obligation on the state to take legislative and other steps to ensure citizens are able to gain access to land on an equitable basis. Section 25(7) provides for land restitution. It creates a right for people or communities who were dispossessed of their land in terms of racially discriminatory laws after June 1913 to have that land restored to them or be given equitable redress. Section 25(6) provides that a person or community whose tenure rights are insecure as a result of past racially discriminatory laws or practices must be given - through law required by section 25(9) - tenure that is legally secure or comparable redress. The Constitution's founding values,[2] other provisions in the Constitution generally, and the Bill of Rights in particular are also relevant to the achievement of land reform.[3]

In this section we will highlight challenges that have been identified in the context of the land reform process. Many problems were identified through research conducted and commissioned by the HLP. This section aims to highlight that the problems that were identified as having impeded or crippled the achievement of land reform were not necessarily the provisions of the Constitution. Instead they were failures in policies and legislation - whether it was the adoption of appropriate constitutionally mandated legislation or the proper implementation of existing legislation aimed at giving effect to constitutional rights. This was exacerbated by the inability of institutions created for, and government departments tasked with, the implementation of the land reform projects to effectively carry out their tasks. In mapping the way forward, significant problems outside of constitutional provisions must be dealt with. Any amendments to the Constitution, or adoptions of legislation, must be aimed at finding solutions to the problems that have resulted in the constitutional imperative of land reform not having been achieved.

Land redistribution

[2] Section 1 of the Constitution.
[3] Including, section 9 (right to equality); section 10 (right to human dignity); section 26 (right to housing); and section 27 (right to healthcare, food, water, and social security) of the Constitution.

The redistribution of land rights is about reversing the spatial makeup of the country that saw the white minority in the country having virtually exclusive access to the vast majority of land. Through taking steps to foster conditions that allow all South Africans to gain access to land on an equitable basis, past injustices that resulted from racially discriminatory laws could start to be addressed and the basis for more equitable development could be laid.

However, since the adoption of the Constitution this ideal has not played out as it was initially conceived. Relevant to the achievement of section 25(5) are other provisions in section 25. Namely, section 25(1) that prohibits the arbitrary deprivation of property - subject to section 25(8) that prevents provisions such as section 25(1) being used to impede the government from taking legislative and other steps to achieve land, water, and related reform. Necessary to enable redistribution of rights to land is the expropriation of land to make it available for redistribution. Section 25(2) is relevant in this regard, allowing for land to be expropriated in the public interest - which specifically includes land reform. Section 25(3) then sets out some of the factors that would be relevant in determining the question of compensation.

A major issue for the effective application of these provisions has been a lack of framework legislation that guides the general trajectory of the entire land reform programme and how it is to be implemented. Regarding land redistribution, major aspects of the provisions set out above have not been properly defined in legislation and they have not been considered and defined by the courts. What does it actually mean to "foster conditions which enable citizens to gain access to land on an equitable basis"? How is 'equitable access' to be defined and measured? Which citizens are meant to benefit from this programme? How are they meant to benefit? How does one determine that the aim of section 25(5) has been achieved? When considering the use of expropriation for the purposes of land redistribution, outside the considerations listed in section 25(3) of the Constitution - how exactly do officials determine just and equitable compensation?

The lack of definitive legislation giving effect to the obligations relating to redistribution and the dearth of judicial precedent has resulted in ambiguities that have become some of the most significant obstacles to the proper implementation of the redistribution process. Various iterations of policies purporting to give effect to redistribution have not achieved the aims set out early in our democracy, to make land available to poor people and ensure that women are able to access land. The initial approach to the land reform process was nuanced, in that it recognised that land needs to be made available to the poorest rural citizens to drive development and encourage use of land for a variety of uses including residential and agricultural purposes. The first policy Reconstruction and Development Programme (1994) (RDP) sought to transfer ownership of agricultural land in white commercial farming areas to poor

black South Africans. It aimed to transfer 30% of commercial farming land within five years.[4] What followed was the White Paper on South African Land Policy in 1997, which made available, through the Settlement/Land Acquisition Grant, money, to both urban and rural households whose income was less than R1 500 a month, to buy land and settle on it.[5]

The Land Redistribution for Agricultural Development (LRAD)[6] was a revised policy to give effect to redistribution that was introduced in 2001. This new policy removed the pro-poor and inclusion of urban land approach in previous policies, and instead prioritised making agricultural land available to black people to become commercial farmers. The size of the grant given to a beneficiary increased depending on the size of their personal contribution in kind, cash, or labour; with a required base contribution of R5 000. The result was that poor people were either excluded from being able to take part in this programme or forced to go into potentially crippling debt. Nevertheless, it was still possible under this policy to have the land transferred to the beneficiary. This changed when the Proactive Land Acquisition Strategy (PLAS) replaced LRAD. Through it, the government bought land and instead of transferring the land to beneficiaries leased it out through long term leases. This approach was later confirmed in the State Land Lease and Disposal Policy where it is stated that the method of redistribution of land would be through long-term leases.[7]

The lack of comprehensive legislation to create a framework to guide the achievement of land reform has resulted in the adoption of policies that cannot really be said to be working towards the substantive achievement of land redistribution. What is illustrated through these various policies is a move away from making land available for poor people for multiple purposes; it is not clear who the actual beneficiaries of land reform programmes are, if they are the intended beneficiaries, and if their lives are actually being improved by taking part in the programmes. There have been damning official reports about poor outcomes and opaque beneficiary selection criteria that disproportionately benefit the wealthy.[8] A complete lack of coordination by the responsible government departments, Rural Development and Land Reform and the Department of Agriculture Forestry, and Fisheries means it is not clear who is meant to benefit and if they are accessing these benefits.[9] PLAS, currently the only process of redistribution, prioritises those able to continue commercial farming and evicts tenants not able to successfully farm commercially. It gives wide discretionary

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[4] African National Congress (1994), *The Reconstruction and Development Programme*, Johannesburg: Umanyo Publications at paragraph 2.4.14.
[5] Department of Land Affairs (1997), *White Paper on South African Land Policy*, Pretoria: Government of the Republic of South Africa
[6] Department of Forestry and Fisheries, *Land Redistribution for Agricultural Development*, Pretoria: Government of the Republic of South Africa.
[7] High Level Panel Report at 54.
[8] High Level Panel Report at 211-4.
[9] *Id*.

powers to officials that implement it, capture by elites has been rife, with corruption by officials being a huge issue continuously raised by participants.[10]

The failures of efforts at land redistribution are illustrated by its numbers, since 1994 less than six percent of commercial farmland has been redistributed to black South Africans.[11] Decreases in budgetary allocations for the purposes of redistribution are not helping, coupled with the ad hoc and piecemeal approach to it, all of which is exacerbated by the lack of a broad guiding framework to guide its implementation and its integration with the other two 'legs' of land reform being restitution and tenure security.[12]

No law has been passed by the democratic government to govern land redistribution. The Provision of Certain Land for Settlement Act 126 of 1993, is the only law that empowers the Minister to make money available to implement the land redistribution programme.[13] This Act is inadequate to give effect to this constitutional imperative. It provides no general guidelines of how land redistribution is to be achieved, it does not define 'equitable access', and it provides no guidance on how beneficiaries are to be identified, how to acquire land, or how to provide support for beneficiaries.[14]

Land restitution

The land restitution process was aimed solely to restore the land of that small sub category of people who could show that they were dispossessed of land rights after 1913 as a result of racially discriminatory laws or practices.[15] The Land Claims Commission and Land Claims Court were created in terms of the Restitution of Land Rights Act of 1994 to implement the land restitution programme.

Issues identified in various official reports over the years[16] and the HLP report reflect a system that is broken and incapable of achieving complete land restitution in the lifetime of many, if not all, claimants. There are currently 27 000 claims outstanding before the Commission and Court combined, that were lodged before the initial cut off date of 1998. Should the Court and the Commission continue to settle matters at

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[10] *Id* at 208.
[11] *Id* at 209-10.
[12] *Id* at 215-7.
[13] *Id* at 219
[14] *Id*.
[15] Section 25(7) of the Constitution.
[16] Kepe T and Hall R, *Land Redistribution in South Africa Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa*, September 2016, retrieved from:https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf, last accessed 15 June 2018; Genesis Analytics, *Implementation Evaluation of the Restitution Programme*, Evaluation Report Commissioned by the Department of Planning, Monitoring, and Evaluation, February 2014.

their current rate, it would take 35 years to settle these initial claims. The Restitution Act was amended in 2014, but the Amendment Act was thereafter declared unconstitutional on procedural grounds in 2016, for lack of adequate public participation by the National Council of Provinces.[17] However, before it was successfully challenged more claims were lodged, and to deal with those claims would take 143 years. Should the claims lodging process be reopened and all the expected claims lodged, it would take 709 years to complete land restitution.[18] The Commission and Court were not capacitated to deal with the sheer scale of claims they would be required to settle.

Issues of capacity manifest and play themselves out in ways that have contributed to the crippling of the entire system. These issues include, evidence that the Commission's staff does not have the requisite skills to deal with the claims lodged; corruption being exacerbated by the wide administrative powers given to the Commission to settle claims out of court; and the Commission taking on the provision of post settlement support that it was never equipped for. These structural issues have resulted in claims being improperly or incorrectly settled.[19]

The above issues can be linked to the inadequacy of the Restitution Act. There are no eligibility criteria for staffing the Commission; the Commission is not given enough clarity of role and function to fulfil its purpose; the Act says nothing about what the other arms of state are obliged to do to contribute to the achievement of land restitution; and the Commission was not sufficiently capacitated to deal with the number of claims lodged.[20]

A key burden for restitution has been the failure of the redistribution programme. Because people have been unable to access land through redistribution they have reframed their claims as restitution claims, often in circumstances where they cannot meet the burden of proof required by the Restitution Act. Most dispossession took place prior to 1913. The Land Acts served to formalise the outcome of prior dispossession and to provide for farm evictions and forced removals. The majority of South Africans do not have documentary proof of how their families were dispossessed prior to 1913. They should not be subjected to court processes requiring proof of past rights, and of dispossession. They should qualify for redistribution of land on the basis of need and equity, not be directed to a court process requiring evidence. The only way to deal swiftly with many of the invalid claims that are clogging restitution is to reframe them as claims to redistribution.

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[17] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) at 35.
[18] *Id*; High Level Panel Report at 233.
[19] High Level Panel Report at 241.
[20] Above note 17.

Security of tenure

Reform of security of tenure is necessary for the achievement of the other areas of land reform, regardless of whether land is held through restitution, redistribution, or tenure reform, all laws and policies need to ensure that once land is held it can be defended against dispossession.

In conjunction with dispossessing people of their rights to land, the apartheid regime created a discriminatory tenure system making a second-class set of off register rights and forms of land occupation that were informal in nature. Rights derived from customary law that involved group based or social land tenure systems in the former homelands were relegated to this status.

Section 25(6) of the Constitution requires that insecure rights be made legally secure, section and 25(9) requires that laws be adopted for this purpose. Illustrative of the break from colonial and apartheid approaches to the lands of black people the Constitution expressly recognises customary law and rights, including property rights, that derive from it.[21] Later, the Constitutional Court confirmed that customary rights to land amounted to ownership.[22]

Rightly, the government saw that for sections 25(6) and (9) to be properly given effect to, extensive enquiries would need to be made on the nature of rights that people actually had to land. These enquiries would have to take into account the realities and effects of forced removals; the layered rights resulting from overcrowding on land because of the consolidation of the homelands; and the actual content of customary and group rights to land that had previously been distorted or ignored. As a stopgap measure to maintain the status quo and protect people against further dispossession, the Interim Protection of Informal Land Rights Act (IPILRA)[23] was adopted. This is the only law that purports to protect the rights of people living on communal land. No comprehensive legislation exists that gives effect to section 25(6) in the former homelands, despite the fact that the lives of approximately 17 million rural residents are affected because they live on land with no recorded rights to land.

IPILRA recognises informal rights to land on the basis of the use, occupation and access to land where the land was previously held by one of the various organs of the apartheid state.[24] It recognises that these informal rights are held by both individuals and communities. It defines community as a group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in

[21] Section 39; and sections 211- 2 of the Constitution.
[22] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).
[23] Interim Protection of Land Rights Act 31 of 1996.
[24] Section 1 of IPILRA.

common by such group.[25] It provides that no one can be deprived of these rights without their consent, subject to expropriation.[26] It allows for a person that holds land in terms of custom, to have their rights deprived in terms of that custom, provided that the decision to dispose of the right be taken by a majority of the rights holders during an appropriately convened meeting.[27] To give effect to this Act, the Department of Rural Development adopted a number of procedures to be used when decisions are made with regard to land held by the Minister on behalf of a community as contemplated in IPILRA. The procedures recognise that the *de facto* ownership of this land vests in the occupiers and users of the land.[28]

Failures in the area of security of tenure have been the fact that no comprehensive legislation exists that provides for the recognition, strengthening, and protection of the property rights of black individuals and communities that have been treated as non-existant since colonialism. IPILRA is routinely abrogated, including by the Minister responsible for it and it is an interim law that has to be renewed every year; IPILRA's wording permits community override where the right is being regulated in the interests of the wider community - this has been criticised for potentially allowing for uncompensated deprivation of property. IPILRA has also largely been ineffective at protecting the rights of communities because the Department of Rural Development has consistently failed to enforce its provisions, and the processes set out in the procedures.[29] The provisions of the MPRDA have been interpreted to override or implicitly repeal IPILRA. This interpretation has been challenged in two recent court hearings where judgments are still outstanding.[30]

2. The current dispossession of land from black communities

Despite the stated aims of land reform to take steps aimed redressing the injustices of the past, today the same poor black communities living on communal land that bore the brunt of forced removals and those that live on land that falls under the jurisdiction of traditional leadership continue to have their land taken from them. They continue to be powerless to protect themselves against dispossession that is sanctioned by the law, or by the operation of laws with a complete disregard for their land rights and constitutional rights. The operation of two laws is of particular

[25] Section 1 of IPILRA.
[26] Section 2(1) of IPILRA.
[27] Section 2(2), 2(3), and 2(4) of IPILRA.
[28] Department of Land Affairs (1997), *Interim Procedures Governing Land Development Decisions Which Require the Consent of the Minister of Land Affairs as Nominal Owner*, Pretoria: Government of the Republic of South Africa.
[29] High Level Panel Report at 260-6.
[30] *Duduzile Baleni and others v Minister of Mineral Resources and others* No. 73678/16 in the High Court of South Africa Gauteng Division, Pretoria; *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Limited and another* No. CCT265/17 in the Constitutional Court of South Africa, Johannesburg.

concern, the Ingonyama Trust Act[31] and the Mineral and Petroleum Resources Development Act[32] (MPRDA).

Ingonyama Trust:
The Ingonyama Trust Act was adopted in the twilight of apartheid as the result of a deal between the Inkatha Freedom Party and the National Party, mere days before South Africa's first democratic elections. The Act transferred all the land that had been held by the KwaZulu government to the Ingonyama to hold as the sole Trustee on behalf of, and for the benefit and well being, of the members of the tribes and communities that lived on the land. After the elections, this land did not vest in a state institution as did other communal land after the reincorporation of the homelands into a unitary South Africa. In 1997 the Act was amended to establish the Ingonyama Trust Board - with the Ingonyama remaining the Trustee and being made the Chairperson of the Board - which was tasked with administering the land that had been vested in the Ingonyama.

Despite requirements in the Act that the Trust administer the land subject to rights that exist in terms of Zulu customary law and other existing land rights or interests,[33] the Trust has been conducting itself as if the rights of community members do not exist, and not for their well being or benefit. The Trust routinely concludes agreements over land under its jurisdiction without consulting the people that actually hold rights to the land. These agreements include the establishment of shopping centres or the conclusion of surface leases for the purpose of mining operations. As a matter of course, the Trust does not inform, let alone obtain the consent of, holders of rights about agreements it intends to conclude that could affect their rights. This is in contravention of IPILRA and required procedures for informing, consulting with, and obtaining the consent of rights holders where decisions could deprive them of their rights to land.

The Trust has also been changing the nature of rights held by individuals and families. It has been requiring people that live on land it administers to conclude residential leases it. People living on Ingonyama Trust land occupy the land either in terms of Permission to Occupy certificates or customary tenure systems that are unrecorded. PTO certificates were an apartheid era mechanism for recording rights on unsurveyed land. In terms of the Upgrading of Land Tenure Rights Act[34] of 1991 PTOs can be converted into title deeds - this illustrates the strength of rights in terms of PTOs. The status of informal rights, and customary land rights, was also confirmed by the

[31] Ingonyama Trust Amendment Act, 9 of 1997.
[32] 28 of 2002.
[33] Section 2(4).
[34] 112 of 1991.

Constitutional Court in *Alexkor* ruling that customary rights to land are ownership.[35] Rights created by a lease are weaker than pre existing PTO and customary law rights. The Constitution recognises and protects rights derived from customary law[36] and section 25(6) requires that insecure tenure rights be strengthened and protected by law. Thus, it is a clear violation of the Constitution to make these rights weaker by converting them into lease rights, the content of which is determined and can be terminated by the Trust.

The process for concluding a lease and its terms illustrate how vulnerable community members are to having their land taken away from them. Numerous accounts from people who were told to conclude leases show patterns of intimidation and misinformation. Communities have been told that the law now requires that they conclude a lease. Their traditional leaders have told them that they will be now be recognised as being members of the community if they do not conclude a lease. They have been threatened with being thrown off their land should they not conclude a lease. The true nature of a lease, and how it differs from a PTO or customary tenure rights, is not explained before a lease is concluded. Terms include the lease enduring 40 years and there is a rental amount with a 10% annual increase. The lessee is required to fence the leased property at their expense. Should the lessee default on rental payment the Trust can cancel the lease, and the land and any building or improvements will belong to the Trust. These terms, and their implications, are not explained to people before they conclude a lease.

Some of the people who have been forced to conclude residential leases with the Trust are incredibly poor and have little means to survive, let alone pay the not insignificant rental amount that increases every year. They survive from subsistence farming, social grants for children or the elderly, and ad hoc informal work opportunities. Many of the people interviewed had questions about what happens to the rent they are expected to pay. They spoke of not being sure of exactly what the Trust accomplishes for their communities. Despite the large income the Trust generated from leases there is very little evidence that the revenue is used for the benefit of the communities over whose land leases, both residential and commercial, are concluded.

Mineral and Petroleum Resources Development Act

The MPRDA has allowed for the dispossession of land and the loss of livelihoods in rural communities that live under traditional leaders, or the Ingonyama Trust, in the former homelands. This is a result of the improper and inconsistent implementation of IPILRA, and an assumption that it is trumped by the MPRDA. In an effort to transform the mining industry and expand opportunities for black South Africans in mining, MPRDA vests all mineral wealth in the state to hold for the benefit of all

[35] Above note 23.
[36] Section 39(3) of the Constitution.

South Africans. The state now holds the power to grant rights to prospect and mine.[37] The MPRDA takes away the power of the owner of land to say no to mining, this was intended to break monopolies in the mining industry and prevent, mostly white, landowners from sterilising mineral and petroleum rights.[38]

In circumstances where, mostly white, landowners have their rights to land registered in the Deeds Registry their rights are protected by practice. The applicant or holder of a mining right engages in negotiations to compensate the owner of land and secure access to the land in respect of which a mining right is sought. However, the situation is vastly different for traditional communities living on communal land under the jurisdiction of traditional leaders. This land is held by the Minister of Rural Development and Land Reform in trust, and such communities rely on IPILRA to protect their rights. The MPRDA makes no mention of, and the Departments of Rural Development and the Department of Mineral Resources, routinely ignore the rights and protections in IPILRA results in mining companies engaging only with traditional authorities without obtaining the consent of the people directly affected.

Communities, and people who actually hold the rights to the land in question are not viewed as stakeholders. They are not meaningfully consulted and their consent is not obtained as required by IPILRA. Many communities have been dispossessed or are threatened with dispossession of their land as a result of negotiations and agreements between the mining companies, the DMR and traditional leaders that they formed no meaningful part of.

Even the protections that the MPRDA purports to provide for are grossly inadequate and seldom implemented. Section 54 of the MPRDA which provides for the payment of compensation only provides for it in circumstances where a dispute has arisen between the holder of a mineral right and the owner of land. This provision can be, and has been,[39] interpreted to mean that mining can commence and continue even before negotiations for compensation are on-going.[40] This means that the question of compensation arises only after the mining has commenced and the DMR has actively intervened to start arbitration proceedings. Despite numerous examples of disputes arising the DMR has never initiated section 54 proceedings.[41]

The Xolobeni community, in the Wild Coast of the Eastern Cape, has been fighting for over a decade against the establishment of mining on their ancestral land. The

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[37] Section 3 of the MPRDA.
[38] Section 5 of the MPRDA.
[39] *Itereleng Bakgatla Mineral Resources (PTY) LTD and another v Maledu and others* unreported judgment case no. 496/2015, High Court of the Republic of South Africa, North West High Court, Mafikeng (16 February 2017);
[40] *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 1 SA 198 (SCA).
[41] High Level Panel Report at 502-5.

members of the Xolobeni community who have challenged the mining application all live on, or utilise the land proposed for mining for the grazing of livestock, or for harvesting. The problems they have alleged in litigation before the North Gauteng High Court about their interactions with government institutions and the mining companies are not unique.[42] These allegations illustrate contempt for the lives and dignity of poor rural people; and a complete disregard for their customary land rights and rights that they have in terms of the Constitution. The Xolobeni community alleges that it was not timeously informed of the application for a mining right. Attempts by the community to even obtain a copy of the application were blocked by the mining company - the community had to bring an application to court for access to a mining right application over their own land. The community alleges that the mining company failed to engage with, and inform the community about the possible impact of the mining on their livelihood or how it planned to compensate them for loss and harm associated with the mining. It did not engage with the community on compensation, the provision of alternative land or the restoration of livelihoods. Instead, the company engaged only with the traditional leader - making him a director in the company responsible for the mining activities on the relevant land.

The relevant departments being the Departments of Mineral Resources, and the Department of Rural Development and Land Reform have not provided the community with support. Instead they are disputing the rights of communities to take part in, and ensure the protection of their rights before mining commences on their land.

What has been shown above is that failures of land reform, are not as a result of the Constitution and the provisions of section 25. Instead, these provisions and the positive rights have not been adopted in legislation to ensure their implementation. Even where legislation purporting to give effect to these constitutional rights is adopted, it is either incapable of giving effect to section 25 or institutions tasked with giving effect to it just do not enforce it. Government institutions and Departments do not have the capacity to ensure that, and sometimes simply to not see, land reform and protecting the land rights of black communities as a priority. Money is not made available and institutions have not been capacitated. Other laws and policies are routinely implemented to the detriment of land reform and the protection of black property rights. These failures are not the failures of the Constitution but have shown what happens when constitutional rights are not respected, protected, promoted, and fulfilled.

[42] Above note 31.

3. In whom will the land be vested?

It is our submission that land reform and expropriation of land without compensation cannot be separated from the issue of in whom, and how, land rights will be vested after expropriation and land reform has taken. For the state, or traditional leaders, to hold land on behalf of the people does not bring about equitable access to land. It merely entrenches South Africa's colonial and apartheid history.

Integral to the aims of both the colonial and apartheid regimes was exercise of control over the black population through indirect rule, by incorporating traditional leadership institutions into colonial governance structures. This is also linked to dispossessing black people of their existing rights to land and controlling the nature of rights they were able to access. Throughout this history, black people have not been allowed to hold real rights over land, or there have been significant legal and practical limitations on their ability to hold rights to land. This meant black people were not recognised as stakeholders when decisions were made over land they had lived on and had depended on for generations. It also resulted in black people being powerless to prevent further dispossession and degradation of their rights to land by the state or private individuals.

Colonial conceptions of traditional authority and the nature of black property rights went hand in hand. Amplifying and distorting the powers of these institutions; centralising and vesting in them the property rights of black people; and incorporating them into the colonial governance system - facilitated the control over, and dispossession of black people. **Any land reform programme, including expropriation without compensation, that does not vest land rights in the people that actually use and occupy it fails to give effect to the Constitution.**

Authority and land rights under colonialism and apartheid

The colonial state's understanding of the jurisdiction and powers of traditional leadership centralised powers in what it saw as an autocratic sovereign. This resulted in undermining of pre-existing indigenous accountability mechanisms that served to mediate the power of traditional leaders.[43] This was in contrast to how power actually

[43] Mnwana and Capps, '"No Chief ever bought a piece of land": Struggles over property, community and mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province', Society, Work and Development Institute University of the Witwatersrand (March 2015); Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*, Princeton University Press, Kampala, Uganda, 1996, 40-41; Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa', in *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*, eds. Claassens and Cousins UCT Press, Cape Town, (2008); Bennet T.W., *Customary Law in South Africa*, Juta and Company Ltd, Cape Town (2004); Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*, Cambridge University Press, New York (2001); Claassens, 'Power, accountability and apartheid borders: the impact of recent laws on struggles over land

operated within customary communities. Ordinary people participated in clan and lineage-based councils that held institutions of power to account. The vested rights and roles of control in relation to natural resources, including land held and used at lineage and family level, were recognised and protected.[44]

Other mechanisms of accountability included, the ability to breakaway to different chiefdoms or to create separate groupings elsewhere. This created important checks on the exercise of power and allowed for cultural heterogeneity. Historically, it has been shown that chiefs had jurisdiction over people and not fixed areas of land. Later and current notions that all tribes were homogeneous populations that had defined social and geographic boundaries are incorrect.[45]

Colonial, and later apartheid, regimes made assumptions about the nature of traditional leadership institutions based on European conceptions of sovereignty. That a sovereign (a chief) was in charge of particular geographical area and that strict boundaries existed between ethnically different groups.[46] Not being able to find these strict categories, the colonial government set about defining clear boundaries between 'tribes' as well as hierarchies of authority between senior and lesser chiefs.[47] These

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rights' in *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act,* eds. Claassens and Cousins UCT Press, Cape Town (2008); Delius *The Land Belongs to Us: Pedi Polity, the Boers and the British in the Nineteenth-Century Transvaal*, Raven Press (1983).

[44] Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*, Princeton University Press, Kampala, Uganda, 1996 at 41-43; Delius P. 'Contested terrain: land rights and chiefly power in historical perspective' in *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*, eds. Claassens A. and Cousins B., UCT Press (2008), at 211 -218.

[45] Delius 'Contested terrain: land rights and chiefly power in historical perspective' in *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*, eds. Claassens and Cousins, UCT Press (2008); Schapera, *Government and Politics in Tribal Societies*, Watts (1956) at 207; Gluckman, *The Ideas of Barotse Jurisprudence*, Manchester University Press and Yale University Press (1965) at 49–52; Bennett, *Human Rights and African Customary Law under the South African Constitution* Juta (1995) at 67; Hall, *The Changing Past: Farmers, Kings, and Traders in Southern Africa 200-1860*, David Philip (1987); Hammond-Tooke *Command or Consensus: The Development of Transkeian Local Government* David Philip (1975); Schapera, *Native Land Tenure in the Bechuanaland Protectorate* Lovedale Press (1943); Schapera, *A Handbook of Tswana Law and Custom,* 2ed, Frank Cass & Co. (1970); Hunter, *Reaction to Conquest: Effects of the Contact with Europeans on the Pondo of South Africa*, Oxford University Press (1936); Crais, 'Custom and the politics of sovereignty in South Africa' (Spring 2006) 39 (3) *Journal of Social History* 721 at 722.

[46] Crais, 'Custom and the politics of sovereignty in South Africa' (Spring 2006) 39 (3) *Journal of Social History* 721 at 722.

[47] Crais, 'Custom and the politics of sovereignty in South Africa' (Spring 2006) 39 (3) *Journal of Social History* 721 at 729; Bennett, *Customary Law in South Africa*, Juta and Company Ltd (2004) 101 *ff*;Delius P. 'Contested terrain: land rights and chiefly power in historical perspective' in *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act*, eds. Claassens and Cousins, UCT Press (2008); Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*, Princeton University Press, Kampala, Uganda, 1996.

and other interventions by white governments undermined existing nexuses of accountability. The people were no longer the source of chiefly power. The state removed popular chiefs and others were put in their place.

Wide-ranging and autocratic powers were vested in the colonial state on the basis that they were vested in chiefs in terms of custom. In terms of section 13 of Law 4 of 1885 the state president has "all the power and authority which in accordance with native laws, habits and customs are given to any paramount chief." Later, after the creation of the Union of South Africa, the Native Administration Act[48] was adopted and it made the Governor-General the 'supreme chief' of all natives,[49] with extensive powers that included being able to impose or depose chiefs or headmen; to define the powers, duties, and privileges of any chief or headman;[50] define and alter boundaries of tribes; and to define and amalgamate existing tribes.[51] Chiefs were paid salaries by the state, they were no longer dependent on their people for contributions and tributes, as now the flow of power and resources was from the state.

This approach continued under apartheid with the Bantu Authorities Act,[52] creating powers for chiefs then vesting them in the apartheid state. Through its terms, the government was able to determine and Gazette the area of jurisdiction of Bantu authorities - the chief was given jurisdiction over people within those boundaries irrespective of whether these people supported them or not. This undermined important accountability mechanisms and checks on the exercise of chiefly power.[53]

The above history was tied to the assumption that the land belonged to 'some community', lineage or 'tribal polity' the rights to which were completely controlled by the chief. This prevented the recognition and development of family and individual rights for black people.[54] The strength of the rights held by members of the communities was denied and undermined, so were decentralised and participatory local processes of land allocation and dispute resolution. The rights of those who occupied and used the land were regarded as being derived from the chief, and thus the state.[55] This approach distorted the real nature of customary tenure systems, which

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[48] 38 of 1927.
[49] Section 1 of the Native Administration Act.
[50] Section 2(7) of the Native Administration Act.
[51] Section 5 of the Native Administration Act.
[52] 68 of 1951.
[53] Section 2(3).
[54] Colson, 'The impact of the colonial period on the definition of land rights' in *The Impact of Colonialism* ed. Turner Cambridge University Press (1971) 193-215 at 197.
[55] Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*, Cambridge University Press, New York (2001) at 381 and 387; Heinz Klug, *Defining the Property Rights of Others*, 35 J. Legal Pluralism & Unofficial L. 126 1995, pg 126; Rogers, *Native Administration in the Union of South Africa*, 2ed Linington, Authority (1949) 96.

were made up of complementary interests that were held simultaneously.[56] An enquiry into customary rights to land cannot proceed from the point of western constructs of exclusive ownership, more nuanced enquiries about the content and nature of customary rights is necessary.[57]

Colonial and apartheid laws entrenched this idea that black people did not have an identity, and were not capable of holding rights, except as part of a tribe.[58] This made it easier to justify colonial land grabs; and enforce the transfer of land by a chief without consulting with his people, or the unilateral encumberment of traditional lands by chiefs that could lead to tribes losing their land.[59]

What eventually developed was a trustee system that required land to be held by a government institution on behalf of tribes. This system of holding land on behalf of black people started in Natal with the Natal Native Trust that was created to hold the land that had been set aside to become black locations on behalf of the relevant tribe.[60] The trustees were empowered to grant, sell, lease, or otherwise administer the land for the benefit of the black people.[61] This approach was formalised in the Transvaal between 1877 and 1881.[62] In the Transvaal black people had not been allowed to own land, they were forced to ask missionaries or sympathetic white people to buy the land and hold it on their behalf.[63] After 1881, black people in the Transvaal were allowed

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[56] Okoth-Ogendo, 'Some issues of theory in the study of tenure relations in African agriculture', (1989) 59 (1) *Africa* 6-17 and Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa' in *Land Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* eds. Claassens and Cousins, UCT Press, (2008) 95-108; Bennett, *Customary Law in South Africa*, Juta and Company Ltd (2004) 374 *ff*.

[57] *Id*.

[58] Feinberg, *Our Land, Our Life, Our Future: Black South African Challanges to Territorial Segregation, 1913-1948*, UNISA Press (2015); Bergh and Feinberg, 'Trusteeship and Black Land Ownership in the Transvaal During the Nineteenth and Twentieth Centuries', *African Historical Review*, (2004) 36:1, 170-193; Claassens, 'Denying Ownership and Equal Citizenship: Continuities in the State's Use of Law and 'Custom', 1913–2013', (2014) *Journal of Southern African Studies* 40:4, 761-779 ; Claasens and Maltala, 'Platinum, poverty, and princes in post-apartheid South Africa: new laws, old repertoires (4) *New South African Law Review* 117-139; Mnwana and Capps, 'Claims from below: platinum and the politics of land in the Bakgatla-ba-Kgafela traditional authority area', (2015) *Review of African Political Economy*, 42:146, 606-624.

[59] Chanock M., *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*, Cambridge University Press, New York (2001)

[60] Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Colonialism*, Princeton University Press, Kampala, Uganda, 1996 at 41-43; Rogers, *Native Administration in the Union of South Africa*, 2ed Linington, (1949) Authority.

[61] *Id*.

[62] Mnwana S. and Capps G., '"No Chief ever bought a piece of land": Struggles over property, community and mining in the Bakgatla-ba-Kgafela Traditional Authority Area, North West Province', Society, Work and Development Institute University of the Witwatersrand (March 2015) at 13 *ff.*

[63] Feinberg, *Our Land, Our Life, Our Future: Black South African Challanges to Territorial Segregation, 1913-1948*, UNISA Press (2015); Bergh and Feinberg, 'Trusteeship and Black Land Ownership in the Transvaal During the Nineteenth and Twentieth Centuries', *African*

to buy land - but permission would have to be granted by the state and the land would have to be registered in the name of a state institution. Further, only a land-buying group that was affiliated with a recognised tribe could buy the land via the recognised traditional leader.[64]

Thus came about the 'six native rule', the Department of Native Affairs developed a practice that where six or more black people wanted to buy land, they needed to do so through a tribe, and have the land registered on behalf of the tribe in the name of the state - and not in the name of those that had actually purchased the land.[65] This rule was later codified in the Native Trust and Land Act 18 of 1936, later renamed the Development Trust and Land Act of 1936. This Act also provided a schedule of the areas within which black people were allowed to obtain any rights to land, this area was to not exceed 13% of South Africa.[66] The Development Trust and Land Act also created the South African Native Trust and provided in terms of section 6 that this 13% of land would vest in the Trust. The Governor-General was the trustee and was to hold this land for the use and benefit of black people, and could grant them rights in the land subject to any conditions he deemed fit.[67]

Vesting of right in land through land reform post-constitutionally

The history set out above needs to inform future laws and policies that will deal with how, and in whom land rights will be vested. Reverting to laws and policies that fail to respect the dignity and agency of black people and communities, but instead maintain processes that would have their rights to land either legally, or *de facto*, held by the state or traditional leaders on their behalf would not fulfill the mandate of the Constitution to achieve land reform.

A pattern demonstrating a reversion to holding land and rights to it on behalf of black people is already happening in the implementation of land reform policies. In redistribution, early policies such as the RDP programme and SLAG aimed to transfer land to poor people who needed it, whereas PLAS which is currently the only land redistribution policy makes agricultural land available only through long-term leases. The state retains ownership and imposes strict conditions to continue holding rights that were granted.[68]

The same issues can be seen in the context of tenure reform. As set out above, the one law that is aimed at recognising and protecting individual rights, IPILRA, is not

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Historical Review, (2004) 36:1, 170-193; Rogers, *Native Administration in the Union of South Africa*, 2ed Linington, (1949) Authority.

[64] *Id*.

[65] *Id*.

[66] Section 2(1) and Schedules.

[67] Section 6 of the Development Trust and Land Act.

[68] High Level Panel Report at 208.

enforced. Early law and policy that supported vesting rights in those who actually use and occupy the land, have been replaced by policies that seek to vest ownership in centralised 'tribes', now called traditional communities, that will again result in the *de facto* control of the land by traditional authorities. The 1997 White Paper on Land Policy and the draft Land Rights Bill that followed both provided that people whose occupation of land was rendered legally insecure because of apartheid are the underlying owners of the land. The documents proposed a structure that ownership must vest in the people who occupy and use the land, rather than in leaders who would hold it in trust on their behalf.

The Communal Land Rights Act (CLRA) was adopted in 2004, it gave traditional leaders extensive powers over rural land and went in the opposite direction from vesting rights in the people who actually use and occupy the land. It provided for the transfer of land within the jurisdiction of traditional authorities, that were based on the structures introduced by the Bantu Authorities Act. The CLRA was declared unconstitutional by the Constitutional Court, but was the first in a series of policies and Bills that aimed to vest control of land in traditional authorities that remained largely unaccountable to their people.

The draft Communal Land Tenure Bill (CLTB) was introduced in 2017 for public comment. It proposes to transfer the outer boundaries of tribal land to traditional communities (previously named tribes).[69] The Bill provides that a community can choose the institution to manage and control its land; a traditional council, a Communal Property Association (CPA), or a trust.[70] However, there is no real choice for communities on land under the jurisdiction of traditional leaders. Currently the Communal Land Tenure Policy states that the state will not be establishing new CPAs on land within the jurisdiction of traditional councils.[71] The *de facto* choice for many communities will be traditional authorities who will then be empowered to control the land. The Bill does not make it clear how holders of use rights are to hold traditional authorities to account, or how they will protect their rights when the title deed is given to traditional communities, and by extension traditional leaders, before the rights of community members are defined.

These laws and policies set out above need to be considered in the context of current and proposed legislation dealing with traditional leadership that has, and threatens to further, entrench distortions and power dynamics created by the colonial and

[69] Section 5 of the CLTB.
[70] Section 28 of the CLTB.
[71] Department of Rural Development and Land Reform, *Communal Land Tenure Policy*, (August 2014), Government of the Republic of South Africa: Pretoria at 29.

apartheid projects. One such law is the Traditional Leadership and Government Framework Act (Framework Act), which was passed in 2003.[72]

In terms of the Framework Act, a traditional community's recognition is contingent on it being subject to traditional leadership; and its observance of customary law.[73] 'Tribes' that had been recognised in terms of the Native Administration Act of 1927 and the Bantu Authorities Act of 1951 are deemed to be traditional communities for the purposes of the Act. Tribal authorities that had been created in terms of the Bantu Authorities Act were deemed to be traditional councils in terms of the Act.[74] The Act requires that these traditional councils comply with certain composition requirements intended to democratise them. These requirements include, that at least one third of the council must be women; the senior traditional leader in the council, as the chairperson of the council, appoints 60% of its members from other traditional leaders and community members; 40% of the council is to be elected by community members; and the council is to serve a five year terms.[75] However, attempts at transforming traditional councils have been mired by controversies since the adoption of the Framework Act.

The problem is that making these 'tribes' and 'tribal authorities' the point of departure further embeds the context created in apartheid and binds rural Black people to the identities, communities, and territorial boundaries that were put in place by previous regimes in a supposedly unified and democratic South Africa. Attempts at transforming these institutions has failed, yet these institutions face no consequences for their failures. As can be seen from the laws and policies set out above, the continue to be placed at the centre of land administration. They continue to operate, concluding agreements over land on behalf of communities they do not validly represent, and are given chance after chance through legislative amendments[76] and, now, that attempt to remove any consequences for the failure to comply with the law.

This law, like colonial and apartheid laws, links the rights and identity of rural persons to unaccountable and untransformed traditional leaders and it is operating alongside state policies that fail to vest land rights in people and instead enable abuse by unaccountable institutions.

Lying in wait to further entrench the issues that have been set out above is the Traditional and Khoi-San Leadership Bill (TKLB) of 2015. Many of the issues set out above in relation to the Framework Act are present in the TKLB. It continues to use as

[72] 41 of 2003.
[73] Section 2 of the Framework Act.
[74] Section 28 of the Framework Act.
[75] Section 3B of the Framework Act.
[76] Traditional Leadership and Governance Framework Amendment Act 23 of 2009 and the Traditional Leadership and Governance Framework Amendment Bill, [B8B-2017].

the point of departure, the structures for traditional communities created in the Native Administration Act and the structures for traditional authorities codified in the Black Authorities Act. The Bill also gives traditional leaders certain roles and functions that would effectively establish territorial jurisdiction for traditional leaders, the Bill makes the dangerous assumption that if you live within the geographical boundaries of the former homelands, then you should be subject to a chief. The Bill does not restore the ability of choice of leader or authority, or other accountability mechanisms that would exist in terms of customary law. Perhaps most worrying is that this Bill would empower traditional leaders to enter into partnerships and conclude agreements with a vague requirement to consult with the relevant community - a requirement that was only added after public outcry over the provision. No details are given about who exactly should be consulted or how they ought to be consulted - no mention is made of IPILRA, and the assumption appears to be that the TKLB would trump IPILRA.

4. 'Just and equitable compensation' in terms of section 25 allows for expropriation with zero compensation

It is our submission that a proper reading of section 25 already allows for expropriation without compensation for the purposes of land reform, in certain clearly defined instances. Section 25 does two things: it prohibits the arbitrary deprivation of property and it gives the state authority to take action to promote land and related reforms aimed at reversing the injustices of South Africa's history. South Africa's history and the other provisions in the Bill of Rights, and the Constitution generally, is the context within which section 25 needs to be interpreted and applied. This includes provisions in the Constitution that emphasise the constitutional project of remedying the injustices of South Africa's past and creating a society based on social justice and fundamental human rights.[77] Also included are the Constitution's founding values of human dignity, the achievement of equality, and the advancement of human rights and dignity.[78] This 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, make it clear that it envisages and legitimates significant intervention in the existing distribution of wealth and property.[79]

Section 25 does not give an absolute and positive right to have and hold property. Instead, section 25 (1) provides for a negative procedural right not to be deprived of your property arbitrarily. The rest of section 25 then is an articulation of procedures and positive rights that could allow for the constitutional deprivation of property – section 25 (1) simply requires that deprivation be in terms of a law of general

[77] Preamble of the Constitution.
[78] Section 1 of the Constitution.
[79] Section 26 and section 27 of the Constitution.

application. Section 25 (2) and 25 (3) provide for expropriation and give general requirements for that expropriation to be constitutional. These requirements are that it must be in terms of a law of general application, it must be for either a public purpose or in the public interest, and subject to just and equitable compensation. Section 25 (3) gives a general guide in terms of which it is to be determined that compensation is just and equitable – that just and equitable is a balance of the interests of those affected and the public interest. Section 25 (3) then goes on to give a non-exhaustive list of factors that are to be considered in balancing individual interests and the interests of the society we aim to build. These are: the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

A theme that characterises section 25, and this is echoed throughout the Constitution, is its emphasis on remedying the consequences of pre-constitutional South Africa that was premised on the dispossession and subjugation of a people. This is illustrated when section 25 (4) is read with section 25 (2), and later, section 25 (8). Section 25(4) states that the public interest - which is recognised as a legitimate basis for expropriation in section 25(2) - includes land reform and ensuring equitable access to land and other resources. Section 25 (8) then provides that no provision in section 25 is to be interpreted to impede the ability of the state to take steps, legislative or otherwise, that are aimed at achieving land reform - subject to the general limitation clause in section 36 of the Constitution.

Section 25(5), 25(6), 25(7) and 25 (9) create a series of positive rights aimed at achieving land reform and obligations on the government to take concrete steps for this purpose. Section 25(5) requires the state to take reasonable legislative and other steps to foster conditions that enable citizens to gain access to land on an equitable basis - this has been termed the redistribution of land. This is to reverse the spatial and landholding patterns in South Africa that are set in terms of racial lines in favour of white South Africans. Section 25(6) specifically obliges the government to ensure security of tenure for persons or communities whose tenure to land is legally insecure as a result of past racially discriminatory laws and practices. Section 25(9) requires that the government adopt legislation to give effect to section 25(6).

The power to expropriate, as set out above, for public interest, which includes the achievement of land reform, is subject to the requirement of just and equitable compensation. What is now the question is whether the requirement for just and equitable compensation in section 25(2) read with section 25(3) can be interpreted to allow for the expropriation of land without compensation for the purposes of land reform. This question has yet to be considered by the Constitutional Court but it is our submission that this language is broad enough for the requirement for just and

equitable compensation to include, in certain circumstances, zero compensation. The government has simply not used the powers given by the Constitution in that it has not passed a law, as required by both section 25(1) and section 25(2), that appropriately articulates the exercise of the extensive powers given to it to achieve land reform.

Section 25(1), 25(2), and 25(3) must be read to apply subject to other provisions of section 25, the Constitution as a whole, and the current and historical context within which the Constitution exists and operates. These factors should be used to guide the determination of what is possible through legislation. By its very nature, the Constitution is an aspirational and transformative document in that it aims to change our society to one that embodies its founding values. Central to that endeavour is ameliorating the consequences of centuries of land dispossession through strong provisions for rights and obligations to achieve land reform. In addition to that, the importance of land reform is illustrated through the positive rights given with the aim of achieving it and the instances when it is emphasised that its achievement should be prioritised. It was left for Parliament to adopt legislation that would set out exactly how this would be achieved.

To ensure that such legislation would pass constitutional muster, in other words to ensure it is not the legalisation of arbitrary deprivation and does not violate section 36, principles that accord with the Constitution need to be the premise of the law. Advocate Ngcukaitobi has elucidated these principles in various contexts.[80] Expropriation, even for the purposes of land reform, must remain subject to just and equitable compensation as the general point of departure. It must be made clear that expropriation with zero compensation is possible and under what circumstances this is so. Courts should remain the final arbiters of whether in each case expropriation without compensation is legitimate. To prevent elite capture, expropriation without compensation must be used only to achieve land reform - for restitution, redistribution, and tenure security. The law must clearly set out the procedures to be followed in expropriation without compensation and these procedures must make clear that it is subject to judicial review.

The current failures in land reform are not due to the inadequacy of the Constitution. The state has failed to articulate and provide for the exercise of its extensive powers to achieve land reform, and give effect to the positive rights provided for in the section 25. There is no need to amend the Constitution.

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[80] Ngcukaitobi T, *Land reform can be done reasonably*, Mail and Guardian (09 March 2018), https://mg.co.za/article/2018-03-09-00-land-reform-can-be-done-reasonably, last accessed 15 June 2018; Ngcukaitobi T, *The land: ANC's date with destiny*, Mail and Guardian (02 March 2018) https://mg.co.za/article/2018-03-02-00-the-land-ancs-date-with-destiny, last accessed 15 June 2018.

Conclusion

It is therefore LARC's submission that section 25 of the Constitution does not need to be amended to allow the state to expropriate land without the payment of compensation. Section 25 had not been an impediment to the achievement of land reform since 1994. Instead, laws and policies that have been adopted have either failed to give full effect to the provisions of the Constitution or they have undermined the project of land reform.

Other laws that have the effect of undermining the land reform project, and undermining rights provided for in the Constitution must be repealed. Parliament is urged to fully engage with the findings and recommendations of the High Level Panel Report. The possible effects of laws Parliament intends to pass must be kept in mind so as no not perpetuate and entrench the injustices of the past and the failures of the last 24 years.

Government departments and state institutions created to achieve land reform have not fulfilled their mandate. Issues of capacity, corruption, and the lack of clear guidance of how land reform is to be achieved have contributed to the current state of affairs.

What is necessary is for the adoption of a law that fully articulates the aims of land reform and how it is to be achieved. Laws are needed to give effect to, and protect, the positive rights provided for in the section 25. Broad guiding principles, the necessary capacity, and clarity in what is intended to be achieved through land reform is what is needed to assist departments and institutions that are tasked with implementing it.

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