

Submission to the Constitutional Review Committee

From the
Institute for Poverty, Land and Agrarian Studies (PLAAS)
University of the Western Cape

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1. Introduction

- 1.1. The Institute for Poverty, Land and Agrarian Studies (PLAAS) is a constituent unit of the School of Government at the University of the Western Cape which was established in 1995. PLAAS engages in research, training, policy development and advocacy in relation to land and agrarian reform, rural governance and natural resource management. PLAAS aims for rigour in its scholarship, excellence in its training, and effectiveness in its policy support and advocacy. It strives to play a critical yet constructive role in processes of social, economic and political transformation.
- 1.2. We welcome the opportunity to make this submission to the Constitutional Review Committee and express our **request to make a verbal submission** to the committee during the public hearings.

2. Section 25: The property clause

- 2.1. Section 25, the ‘property clause’, is **a mandate for transformation**. The definition of property focuses on all holders of property rights, including those who hold private property rights but also those who have been dispossessed of property rights and those who hold insecure and informal rights to property.
- 2.2. It is our contention that the Constitutional Review Committee must consider section 25 as a whole, and read its subsections and their provisions in relation to one another. Hence our submission will focus on issues of expropriation and compensation in the context of the various components of land reform, understood holistically.
- 2.3. Section 25(1) does not provide blanket protection of property rights. Instead, framed as a negative clause, it requires that when people are deprived of property – whether private property or communal property or informal property rights – this must be in terms of a law of general application. The deprivation of property cannot be in terms of a discriminatory law. Deprivation must not be arbitrary which means it must be substantively and procedurally fair.
- 2.4. Sub-sections 25(3)(a) to (e) identify a list of five criteria to be considered when determining what compensation is just and equitable. It is not an exhaustive list, as the clause requires all relevant considerations ‘including’ this list of five. This means that other factors may be considered.
- 2.5. Section 25(3) has not been tested in the courts except in the Msiza case of 2016 in the Land Claims Court, now overturned by the Supreme Court of Appeal. An appeal to the Constitutional Court in the Msiza matter would be the most rapid manner in

which to get constitutional jurisprudence on the requirement of ‘just and equitable’ compensation (see Proposal 2).

- 2.6. Our understanding of Section 25(1), (2) and (3) together provide the state with precisely the power it seeks, as reflected in the ANC Resolution of December 2017 and the National Assembly Resolution of February 2018. The state can expropriate property for the purposes of land reform, subject to zero compensation – if it is just and equitable to do so. However, if it is not just and equitable to pay zero compensation, then compensation must be paid.
- 2.7. While laws have been enacted to give effect to Section 25(6) and (7) to frame the programmes of land tenure reform and restitution, respectively, post-apartheid Parliaments have failed to enact a law to frame Section 25(5). This has been a grave oversight, as citizens do not have the means to invoke this right nor hold the state to account for how it responds to this right and how it allocates scarce resources across competing needs in society.
- 2.8. The notion of a right of access to land ‘on an equitable basis’ was the least debated of all the clauses. It originated from a small group of ANC-aligned lawyers who argued in favour of a regime of ‘property rights for the property-less’ to ‘place the landless and homeless in the position where they could make a claim of right rather than a petition for largesse’ (Budlender 1992 pp. 299, 203).
- 2.9. In this way, the idea was born of using a constitutional rights framework to impose a **positive obligation on the state** to provide suitable land and housing for the landless and homeless; it would empower them to press their claims, and shape the behaviour of state officials to facilitate a responsive land reform. The purpose of the property clause was therefore to strengthen the **rights of the property-less** by creating a right of access to land on an equitable basis (Section 25(5)), the **rights of those with insecure property rights** (Section 25(6)) and the **rights of the dispossessed** (Section 25(7), all of which would circumscribe and thereby deliberately and as a matter of constitutional principle **weaken the property rights of those holding private title**.
- 2.10. The ‘property clause’ thus mandates transformed property relations between the landed and the landless and between owners and tenants. Agreement between the political parties was reached at midnight on 18 April 1996. Opposition parties launched an application to the Constitutional Court alleging that it violated the non-negotiable principles in the Interim Constitution, with which the final Constitution was required to comply. This was because they wanted blanket protection of private property, which the property clause does not provide. Their application was unsuccessful and the final Constitution was signed into law by the President in December (Klug 2000: 135-136).

- 2.11. Those who now object to expropriation without compensation in all cases therefore misinterpret Section 25 and consider that it provides an absolute protection of property rights. It does not. It has always been a mandate for meaningful and far-reaching transformation of property relations and therefore class relations in South Africa.
- 2.12. We now review the policies, laws, institutions, and implementation programmes that are meant to give effect to Section 25. We argue, with this evidence, that to a significant degree the state has failed to enact the transformatory vision of Section 25.

3. Redistribution

- 3.1. Despite the right of access to land on an equitable basis, in Section 25(5), the state has embarked on a land redistribution programme that has changed shape over time. It still uses empowering legislation from the apartheid era – the Provision of Land and Assistance Act 126 of 1993.
- 3.2. Whether or not our current land redistribution programme meets the constitutional requirement of providing access to land on an equitable basis is doubtful, not least because it patently provides public resources to the not-poor, including urban businesspeople, the politically connected and agribusinesses, as evidenced in the High-Level Panel report and in our own research, including Hall and Kepe (2017). Such patterns of spending public funds do not constitute an ‘equitable basis,’ which presumably should give priority to those in greatest need. Rather, what is evident is elite capture of the limited opportunities for people to gain access to land.
- 3.3. The White Paper on South African Land Policy of 1997 set out a comprehensive set of policies but has been overtaken by a series of subsequent policies, and no longer describes the land reform programmes.
- 3.4. From 2011 onwards, the **Proactive Land Acquisition Strategy (PLAS)** has been the redistribution policy, based on state purchase of land for allocation on a leasehold basis. In 2013, a **State Land Lease and Disposal Policy** set out a principle of 30 year leases, renewably for a further 20 years. Farmers have to pay 5% of net turnover as rent to the state. The policy also introduced the idea that medium to large-scale farmers would, after 50 years of paying rent to the state, be allowed to apply for a right to purchase their land.
- 3.5. Our **field research on PLAS** in the Eastern Cape found that none of the beneficiaries had leases. While the state was purchasing farms under PLAS, it was failing to redistribute secure tenure rights (Hall & Kepe 2017). In this sense, land reform was stalled, and ‘beneficiaries’ who lack documented tenure rights fail to get credit from banks or even farming support. Farm workers face increased tenure insecurity and

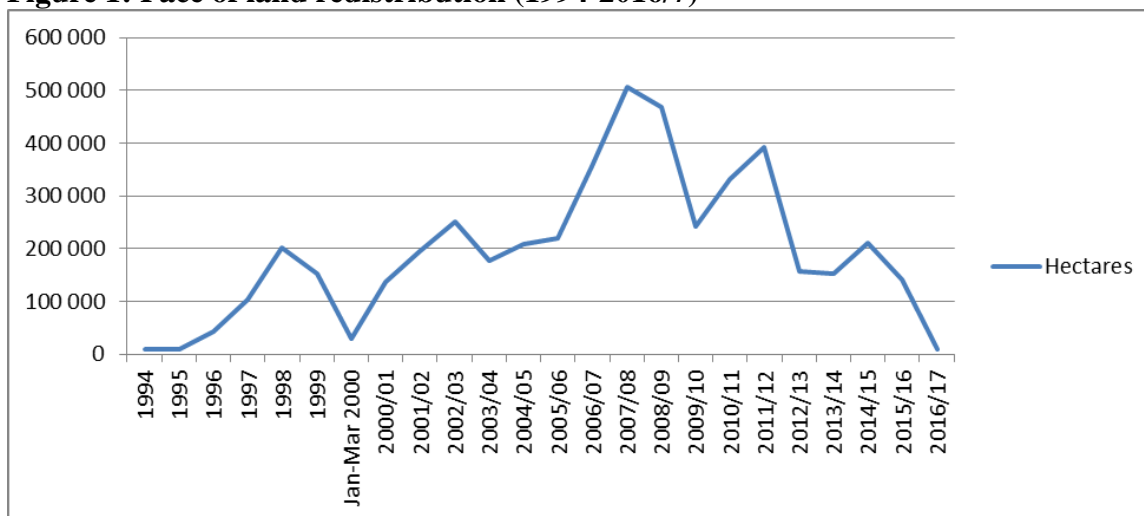
livelihood uncertainty – in some cases, all farm workers lost their jobs when farms were acquired. Others are paid below the minimum wage as ‘beneficiaries’.

- 3.6. **Municipal Commonage** was a fairly successful programme of making available existing commonage to small-scale farmers, but many municipalities refused to end long-term leases on commonage land with commercial farmers. National government also helped to buy municipalities new commonage land to make available to disadvantaged small-scale farmers. This worked fairly well. However, the entire programme ground to a halt more than ten years ago and, as far as we are aware, there is no more commonage programme. This should be revived as an effective way of making public land available to the poor in rural areas and small towns.

- 3.7. **Farm Worker Equity Schemes** are where government provides subsidies to farm workers to buy equity in the enterprises where they are employed. Under the old redistribution programmes, SLAG and LRAD, this typically provided worker trusts with about 5% shareholdings. On his appointment in 2009, former Minister Nkwinti imposed a moratorium on such schemes, due to concerns that they were being used to recapitalize failing farms, without any transformation. A study had found that ‘of the 88 FES projects implemented between 1996 and 2008, only nine have declared dividends’. So in 90% of cases, farm workers did not benefit at all, and where they did, dividends were between R200 and R2,000. Yet, from 2015, equity schemes were re-introduced with higher levels of funding through the ‘50/50 Policy’, formally known as Strengthening the Relative Rights of People Who Work the Land. It is unclear how these are being structured in any way to address the reasons for failure of equity scheme projects to date.

- 3.8. **Recapitalisation and Development Programme:** While initiated as a means to fix ailing projects by providing capital investment, ‘Recap’ has emerged as the only form of farming support in the post-settlement phase. It is poorly designed for this purpose, and most projects do not receive Recap funds. The DPME review of 2014 found that more than R463,000 was spent on each beneficiary, and that it cost R588,000 per job created. It concluded that Recap is inappropriately designed and poorly implemented, does not constitute effective use of available resources. It proposed that Recap be scrapped and a new integrated form of farmer support be created.

- 3.9. Land redistribution has been slowing down dramatically. While delivery of hectares has been volatile, there was a clear peak in 2007/08, since which it has returned to the level of the mid-1990s and largely ground to a halt, as shown in Figure 1 below.

Figure 1: Pace of land redistribution (1994-2016/7)

Source: DRDLR 2016 [note: figure for 2016/17 is updated to September 2016 and so reflects approximately half the year. Figures for 2017/08 are not available from the DRDLR.]

- 3.10. Budgets have declined, and the rate of delivering access to land has declined faster, as available funds are diverted to purposes other than acquiring land and securing rights. State purchase of land means that budgets can be spent and land acquired without any redistribution of land rights taking place; the state merely becomes the owner. Selection of beneficiaries is wholly untransparent as is the allocation of Recap funds which are mostly accessible to commercial strategic partners – not to ordinary farmers. The extent of elite capture is unknown at a national level, largely due to the absence of a national monitoring and evaluation system.
- 3.11. The evidence we present here, and that contained in the High-Level Panel report, is that the problems with land redistribution have not been due to the Constitution. Rather, they have been due to the failure to democratically engage with those who want and need land; buying the wrong land; dispossessing beneficiaries; failing to subdivide; failing to support communal property associations; and failing to provide appropriate production support.
- 3.12. The absence of framework legislation to operationalise Section 25(5) is a critical gap. We therefore recommend a ‘Redistribution Bill’ (see Proposal 3 below).

4. Restitution

- 4.1. The Restitution of Land Rights Act 22 of 1994 set out the process by which people can realise their right to restitution. It offers claimants either restoration of the land from which they or their ancestors were dispossessed, or “comparable redress” which includes cash compensation, alternative land or developmental restitution.
- 4.2. The Act established two institutions: the Commission on Restitution of Land Rights to investigate claims and the Land Claims Court to adjudicate claims. An amendment in 1999 empowered the Commission to enter into negotiated settlements with claimants, thus reducing reliance on the Court, except where disputes arise.
- 4.3. By the deadline for claims lodgement on 31 December 1998, a total of 63,455 claims were lodged. Despite there being approximately 30,000 claims that were either not settled or were settled but not finalized, during 2013, an amendment Act was passed which reopened the period for claims lodgement from 1 July 2014 for 5 years. From available information, we understand that over 160,000 new claims, with new claims being submitted up to the new deadline of the end of June 2019.
- 4.4. According to the High-Level Panel report, at the current pace of settling claims, it will take another 35 years to complete the ‘old claims’ submitted by 1998, and a further 143 years thereafter to complete the ‘new claims’ lodged so far.
- 4.5. The challenges with restitution clearly relate to the weak institutional capacity of the Commission; the design of restitution with its demand for evidence to prove the validity of claims; the need to reconstitute ‘communities’ who are often now dispersed far and wide; the need to establish landholding entities and agree on rules; conflicts and disputes over land uses and beneficiation; and strategic partnership agreements which in many cases fail to deliver tangible benefits to the successful claimants.
- 4.6. Together, according to official figures, a total of 9.7% of commercial farmland has been acquired and/or been transferred under restitution and redistribution combined (see Table 1).

Table 1: Land redistribution and restitution (1994-2018)

Land area of South Africa	Commercial agricultural land	Land redistribution	Land restitution	Land reform as % of commercial agricultural land
122 mill ha	86 mill ha	4.8 mill ha	3.5 mill ha	9.7%

Sources: Authors’ own, derived from DRDLR 2016 and Minister of Rural Development and Land Reform Budget and Policy Speech 2018

5. Farm tenure

- 5.1. Section 25(6) of the Constitution provides that ‘a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provide by an Act of Parliament, either to tenure which is legally secure or to comparable redress.’ Tenure reform legislation has been adopted in relation to farmworkers and farm dwellers, labour tenants, and those threatened with eviction from illegally occupied land.
- 5.2. Government policy is aimed at securing tenure rights for people living on farms, but tries to balance the interests of landowners and people living on farms. Two laws that establish tenure rights for farm dwellers are the Extension of Security of Tenure Act (ESTA) 62 of 1997 and the Land Reform (Labour Tenants) Act (LTA) 3 of 1996. Neither aim to stop evictions, but regulate when and how evictions can happen. Any eviction without an order from the magistrate’s court is illegal.
- 5.3. Both ESTA and the LTA provide options for long-term tenure including upgrading tenure to full ownership of farms or portions thereof. These provisions have remained largely unused, while the protective provisions have been ineffectively enforced.
- 5.4. There has been a dramatic reduction in the number of permanently employed people on farms, driven largely by structural changes in the agricultural sector spurred by deregulation, removal of subsidies and trade liberalisation. As jobs were shed and casualization progressed, so the evictions from farms gathered pace.
- 5.5. Instead of securing tenure, as required by the Constitution, evictions have continued apace, even become more commonplace in the first decade of democracy, when nearly one million people were forcibly removed from farms (see Table 2). Only 1% were evicted through a legal process. There has been no national monitoring of evictions, except for this one national survey. The government has never conducted any monitoring or survey of farm evictions, and there is no data to show what has happened since 2004.

Table 2: National estimates of displacement and evictions from farm

	Displaced from farms	Evicted from farms
1984 to end 1993	1 832 000	737 000
1994 to end 2003	2 351 000	942 000
Total	4 183 000	1 679 000

Source: Wegerif et al. 2005

- 5.6. What alternatives could stem the tide of evictions and provide farm workers and dwellers with secure rights to land of their own, alongside wage work – which is often precarious and seasonal – in order to create more robust and diversified livelihoods? We propose several mechanisms to strengthen the enforcement of ESTA; revising the legal support system under the Land Rights Management Facility; training police and magistrates; processing LTA claims; providing an application-based process to invoke the long-term tenure provisions; and engaging with farm dwellers about their land needs.
- 5.7. We propose that a Land Records Bill (see Proposal 3 below) would enable farm dwellers, among others, to register their existing homes and land that they use, and so create the basis for claims to property.

6. Communal tenure

- 6.1. To give effect to Section 25(6) which provides for legally secure tenure, interim legislation, renewed every year since 1997 (the Interim Protection of Informal Land Rights Act or IPILRA), affords basic protections to holders of informal land rights.
- 6.2. Legislation in relation to residents of communal land in the former reserves was adopted in 2004 but subsequently struck down by the Constitutional Court. At present only IPILRA affords a degree of protection to residents in communal areas. These number around 18 million people, roughly one third of the South African population.
- 6.3. Research suggests that many communal area residents, although legally insecure, enjoy *de facto* security of tenure in practice, but also to the underlying vulnerability of communal land rights. This is evident when traditional leaders sell community land to outsiders, and where investment in lucrative mining operations occurs, as in North West Province and in areas with coal, titanium and other minerals in other provinces. In cases like the Bakgatla Ba Kgafela and Bapo Ba Mogale, traditional leaders have been the subject of litigation when they have entered into business arrangements with investors to the detriment of community members (Claassens and Matlala 2014). In the Xolobeni case in the Eastern Cape, community members are of the view that mining will not be to their benefit, assert the importance of land-based livelihoods, and argue that mining will undermine these livelihoods.
- 6.4. Commentators suggest that community members who lose their land rights as a result of external investment, and without their consent, are being subjected to ‘expropriation without compensation’. Recent moves by the Ingonyama Trust in KwaZulu-Natal to alter the nature of ordinary residents’ rights to land, from a customary form of ownership to a rent-paying leasehold, also constitute a form of expropriation without compensation. In the Xolobeni case, now before the courts, the core issue is the principle of ‘Free, Prior and Informed Consent’ (FPIC) to the loss of land, now well established in international law. Do the provisions of the Mineral and

Petroleum Resources Development Act (MPRDA), which provide for state custodianship of mineral resources and the authority to award rights to prospecting and exploration, override FPIC? Where they do, then adequate compensation must surely be paid to people who lose their property rights, possibly at a premium above market value.

- 6.5. In our view, tenure reform in communal areas is of vital importance and an urgent priority, and urgent consideration should be given to the Land Records Act proposed by the High Level Panel.
- 6.6. It makes no sense to consider the issue of expropriation for purposes of land reform, and the extent of compensation to be paid, in isolation from the constitutional commitments in Section 25(6). In particular, the Expropriation Bill before parliament must clarify that its provisions apply to black South Africans whose rights to land remain largely informal character (i.e. unrecognised in law).

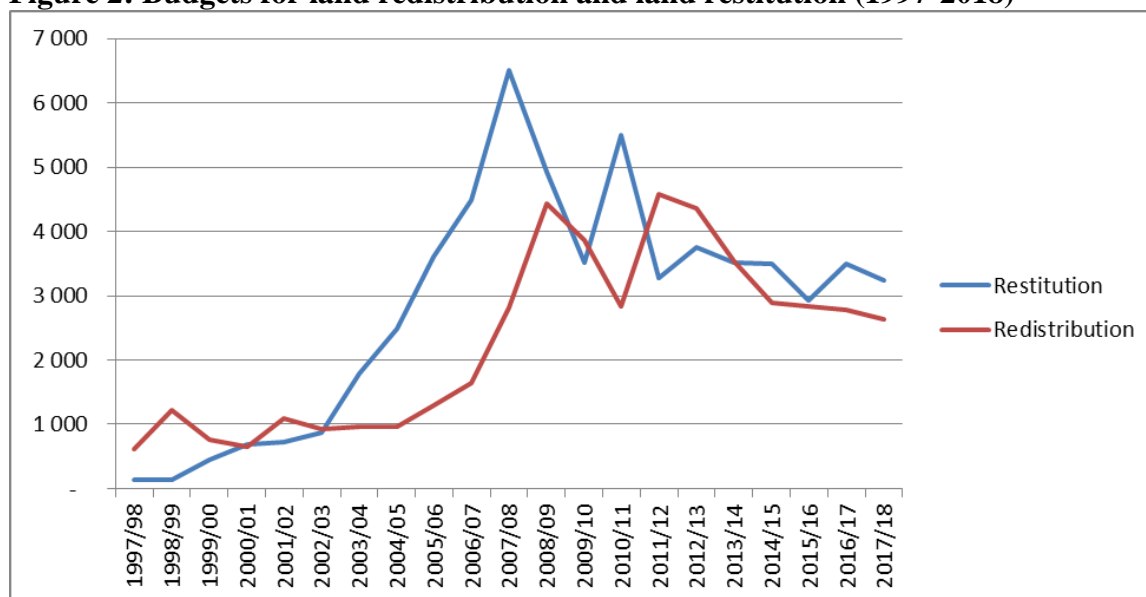
7. Urban tenure

- 7.1. Very large numbers of South Africans occupy and hold land and housing outside of the formal property system, perhaps some 60% of the total population in both urban and rural areas (Hornby et al 2017). The formal system is based on an accurately surveyed cadastre, overseen by the Registrar of Deeds and the Surveyor-General. The cadastre forms the basis of both development planning and local rates and taxes. It is regulated by law and serviced by several professions. The system works well for those can afford its costs, but is out of reach for most of the poor and unemployed.
- 7.2. Despite the existence of tenure reform legislation that provides a degree of protection of the land rights of the poor, it is evident that very large numbers of people living in urban areas continue to be vulnerable. This is the case in informal settlements, backyard shacks, inner city buildings, and RDP houses where no title has been issued. Urban land reform must address this vulnerability as an urgent priority, through the proposed Land Records Act (see below).
- 7.3. In addition, as pointed out by the High Level Panel of Parliament, much of the low-cost housing development supported by government is located on the periphery of towns and cities, far from (already scarce) employment opportunities. The transport costs borne by the urban poor in support of their livelihood strategies consume a large proportion of their very small incomes. If expropriation without compensation is to be undertaken

8. Budgets

- 8.1. The total budget for land reform and restitution has never exceeded 1% of the national budget and the budget for land redistribution (ie. Land Reform budget line) is currently at 0.4% of the national budget. This is a massively under-funded mandate of government.
- 8.2. In real terms, the budget has dropped, from its peak in 2007/08 to about half of that (see Figure 2). This has been devastating for the pace of land reform. Even as the budgets fell, much of the available funds were diverted away from getting land and towards using it for other purposes, like AgriParks or NARYSEC.

Figure 2: Budgets for land redistribution and land restitution (1997-2018)



Sources: National Treasury, Estimates of National Expenditure (various); adjusted for inflation.

- 8.3. Regardless of the level of compensation for land, budgets are needed to run institutions, pay civil servants to implement land reform, and provide capital budgets to support land use and tenure.
- 8.4. We propose a **costing exercise** for a reinvigorated land reform process, based on certain assumptions that include payment of compensation in some cases and not in others, while strengthening institutions and improving the quality and scale of farmer support and support to landholding institutions like communal property associations.

9. Strategic questions for land reform

- 9.1. Land reform needs a fundamental rethink.
- 9.2. The debate about expropriation without compensation focuses on the redistribution of land – yet as we have shown in this review, the focus and content of land redistribution is far from clear. Among the key issues are its class agenda (who is it for), its purpose and land uses (what is it for), what land should be targeted (where should it happen), how open and democratic processes can shape it (how it is decided), how people should be able to hold and manage their land (with what tenure), the means of land acquisition for redistribution (how to get the land) and finally, in light of all the above, whether or when to pay compensation.
- 9.3. Any outcome of the Constitutional Review Committee will need to provide some direction on these broader questions. Any meaningful change requires addressing these prior questions, and not only the means of acquiring the land or the question to compensate or not.
- 9.4. We propose a set of strategic questions and a range of possible policy options, in order to situate the expropriation without compensation debate in its larger context (see Table 3 below).

Table 3: Strategic questions about land reform

Strategic questions	A range of possible policy options
Who is it for?	Priority for landless and land-poor farmers; farm workers; peri-urban landless (ie. not commercial farmers except via commercial lending, and not agribusiness) – ie. <i>'equitable access' and not elite capture</i>
What is it for?	Smallholdings for individuals / small groups plus worker cooperatives on larger farms, for food production, and smallholdings for non-agric purposes – ie. <i>not replicating the big-farm model</i>
Where?	Strategically located land in highest demand, including commonage and private land, urban and peri-urban, subdivided where needed – ie. <i>get the land needed, <u>not</u> the land offered on the market</i>
How is it decided?	Identification of people – and the land they need – via participatory processes at local level – ie. <i>democratise land reform and beneficiary selection.</i>
With what tenure?	Priority on long-term secure rights, like private title or 30 year leases, to CPAs, cooperatives or family trusts – ie. <i>not 'caretakerships or mere absence of leases</i>
How to get the land?	Should this be through expropriation in each case, and is there a role for strategic purchase on the open market, promoting land donations, and negotiated acquisition alongside expropriation? – ie. <i>a range of methods of land acquisition?</i>
With what compensation?	Where expropriating, when should there be compensation, at what scale, and when should there be no compensation, and how will this be determined? – ie. <i>what is the compensation regime?</i>

10. The need for expropriation

10.1. We support the use of expropriation as one mechanism to advance meaningful land reform and to ensure that well-located land in urban and rural areas is made available for redistribution, restitution, and for the upgrading of informal tenure rights.

10.2. Expropriation is needed to **break a deadlock**. This is crucial (a) where there is a claim on a specific piece of land or (b) where specific land is needed, for instance where it is strategically located.

- 10.3. The question of expropriation, however, is distinct from whether or not the state compensates.
- 10.4. When expropriating, when should the state pay compensation and when not? Our starting point is that determination of whether and what compensation is to be paid must be made **on a case-by-case basis**.
- 10.5. We propose below **a compensation spectrum** ranging from zero compensation to partial compensation to market-related compensation to above-market compensation.
- 10.6. Any compensation regime will need to be flexible, so as to take into account the **variety of circumstances** – from wealthy farmers to working class homeowners to residents of communal areas to middle class suburbs to corporate agribusinesses.
- 10.7. In our affidavit, for the amicus curiae, on the **Mala-Mala case**, we proposed an indicative set of scenarios that should, using S25(3), attract different determinations of compensation. We proposed that, using these five criteria, **just and equitable compensation would be far below market price**. The Minister's withdrawal of the case, and payment of the asking price – far above the price the state valuers proposed – was a travesty of justice, and the loss of an opportunity for the Constitutional Court to rule for the first time on what is 'just and equitable' not only for those parties involved but for society as a whole.
- 10.8. The state's *de facto* policy on compensation to date has been to pay market price, contrary to the provisions of the Constitution.
- 10.9. We therefore conclude that the debate concerning the level of compensation is a **policy issue, rather than a constitutional issue**. Section 25, already provides the mandate for transformation of property rights, for expropriation and for a flexible approach to compensation.

11. Proposals

We propose a seven-step process to clarify and implement a reinvigorated programme of land reform. This will include expropriation without compensation, but not be limited to it. It requires new legislation, a comprehensive new policy process and strengthened political leadership and fixing institutions.

It does not require amendment of Section 25.

Proposal 1: Develop a new compensation regime

What kind of compensation regime can be created, in law and in policy?

We propose a **flexible approach to compensation** that is founded on the constitutional principles of ‘just and equitable’ while acknowledging explicitly that this might mean zero or limited compensation in certain types of cases. We therefore set out a proposed **compensation policy framework** here, as a basis for developing policy and embedding key elements of this in law, to be subjected to test cases.

1. No compensation

The rationale for providing zero compensation in some cases is that the holder of the title deed has no effective occupation and use of the land and fails to perform the function of the property owner and fails to uphold the social function and utility of land, as part of our common national heritage. Instead, long-term tenants should be recognized as the *de facto* owners of the property they already occupy, in the interests of property transformation, where tenants are poor and lack secure rights, compared to the holders of the underlying title. We identify four cases as a starting point for expropriation with no compensation, all of which can and doubtless will need to be tested.

1.1. Inner-city buildings with absentee landlords: There is a need to address the situation of people living in inner-city buildings where there are absentee landowners who have abandoned the buildings, fail to maintain them, provide services, and maintain rates. In such cases, the occupiers should be recognised as the *de facto* owners, and there should be expropriation without compensation. This will contribute to changing property and class relations in our inner cities.

1.2. Informal settlements: Some 14% of South Africans live in informal settlements around our towns and cities, with no alternative place to go. They occupy land openly and for their own survival, and as such have property rights which we must recognise and secure. Once there is a well-established informal settlement on land, there is no justification for paying compensation (one norm used elsewhere in law, including internationally as in Brazil, is a five-year period after informal occupation). The state should expropriate both private and public landowners in order to secure the rights of

people living in informal settlements and enable them to build secure livelihoods in our cities.

1.3. Labour tenants: Labour tenants are farm dwellers who have occupied and used land on commercial farms for generations, who have their homesteads on farms, who have cropping land and keep livestock on grazing land. These are the last among the black farming class that was almost wiped out by the 1913 Natives Land Act. They evaded eviction. They are farming already. They have a historical right to the land that has been confirmed through their continued occupation and use of the land. The state should expropriate without compensation entire farms occupied by labour tenants, as already defined by the Land Reform (Labour Tenants) Act of 1996. Where appropriate, where there are commercial operations alongside labour tenants, the state should subdivide and expropriate those portions of farms already used by labour tenants, and aim to expand their access where appropriate.

1.4. Publicly-owned land: Public sector entities, notably departments like the Department of Public Works, Department of Defence, and SOEs like Transnet, Eskom and PRASA, are significant land custodians, often of well-located but under-utilised land in towns and cities. The ANC needs to instruct state departments to much more actively dispose of land for inclusive urban development and transformation, so as to bring poor people away from the periphery and into the centre of the cities. SOE-owned land can be expropriated where appropriate, while amendments to the Government Immovable Asset Management Act (GIAMA) are considered to incorporate SOE's within the ambit of this legislation. This will enable SOEs to prioritise the public interest including land reform over the return to the shareholder.

1.5. Land donations: The state should strengthen its capacity to accept and process land donations via expropriation without compensation. Over the past 20 years, there have been numerous offers to donate land, which have not been processed due to a lack of expertise and commitment on the part of the Department of Rural Development and Land Reform (previously Land Affairs). As a result, there are cases where farm owners have been trying for more than 10-15 years to donate land to farm dwellers, and the state has failed to effect transfer. The state should promote a land donations process which will make available the option for landowners to offer portions of land, and ensure that state institutions expedite the expropriation without compensation, subdivision, redistribution and transfer of land to people.

2. Partial compensation

The state should compensate partially where properties (a) were acquired prior to 1994, (b) benefitted from apartheid-era subsidies or even were acquired after 1994 but are (c) under-utilised or (c) held for speculative purposes. A compensation policy should be drawn up to clarify how different scenarios are to be treated. This approach would be contested in the courts, which will be able to confirm the policy approach or offer

guidance on an amended approach to partial compensation. This approach will be adopted regardless of whether the property is needed to settle a land claim or more generally for redistribution. The aim should be to create the kind of certainty over time so that, in the future, when the state offers partial compensation, property owners may accept it, knowing that it will be fruitless to contest in court, and so enabling the state to expedite the land reform process without having to defend each expropriation and the provision of partial compensation in each case.

3. Market-related compensation

The state should, as a general principle, compensate properties at market price where these properties were acquired after 1994, and did not benefit from below-market purchase price or apartheid-era subsidies. This should apply to properties owned by white and black owners, by rich and poor owners, by South Africans and foreign owners. It will therefore be consistent with the requirement that deprivation of property be undertaken in terms of a law of general application. As long as the title holders occupy and use the land, market-related compensation should be considered, while still allowing for variation, bearing in mind the five criteria listed in Section 25(3) of the Constitution.

4. A premium above market compensation

While government has not pursued expropriation as a land reform strategy, many people have in fact been deprived of their property rights, without compensation, since 1994. Land dispossession was not only 'colonial and apartheid-era dispossession', but has extended into the democratic era. The vast majority of those losing their property rights are poor and black: those in informal settlements; the farm dwellers evicted from commercial farms; residents of communal areas forcibly removed to make way for commercial operations in agriculture and mining. The reality is that our compensation regime must account for the different positions of those whose property rights are taken away. Our view is that where poor people lose their property rights for any reason, there should be an affirmative action principle that ensures that they are left better off than they were before. Merely allocating a market price to the land, housing and other resources they lose is not sufficient. For this reason, as a rule of thumb, the state – and others involved in expropriating such property rights – should provide 150% of market price to those in these three categories – those evicted from informal settlements, commercial farms and communal areas. All this is in line with the imperative in Section 25 that the manner of implementing land reform must redress the legacy of racial discrimination under apartheid.

Proposal 2: Amend and pass the Expropriation Bill

The Expropriation Bill of 2016, currently returned to Parliament, is consistent with the property clause. Unlike the existing Expropriation Act of 1975, which is inconsistent with the Constitution in two respects:

- (a) It limits expropriation to ‘public purposes’ rather than in the ‘public interest’, such as land reform
- (b) It requires compensation at market price, rather than ‘just and equitable’ compensation, as provided in S25(3)

We supported the Expropriation Bill in a written submission and in the hearings in the National Assembly.

Since the President has returned the Expropriation Bill to Parliament and the NCOP for further consultation, there is now an opportunity to express the new compensation regime outlined above, as a way of operationalizing the criteria for ‘just and equitable’ compensation.

The Bill should be returned by Parliament to the Department of Public Works, where it should be redrafted. Minimal amendments to the Expropriation Bill should be introduced, setting out a spectrum of criteria and circumstances for the payment of:

- Zero compensation
- Partial compensation
- Market-related compensation
- Premium above market price

Proposal 3: Take test cases to the Constitutional Court

Even while the Expropriation Bill is underway, the existing expropriation powers vested in the state can be tested through test cases which will allow the Constitutional Court to rule on what constitutes ‘just and equitable’ compensation in different circumstances.

Test cases to confirm these criteria and circumstances are essential. An indicative list of priority test cases would need to include, as a start:

1. **Msiza case:** to determine whether or what payment of compensation is justified for a property bought after 1994, but with an existing labour tenant claim on it, and the new owner never taking effective occupation and use of that portion of the land.
2. **Xolobeni case:** to determine whether there is a right to say ‘no’ to dispossession and also whether an expropriation can proceed prior to compensation being determined.
3. **Inner-city case:** an appropriate case where an abandoned building that is not maintained or serviced, with an absentee owner who is in arrears for municipal rates, can be expropriated without compensation.

4. **Informal settlements:** where, over many years, informal settlements have grown on privately-owned land, some owners want occupiers to be evicted while other owners want the state to buy them out. Instead, the state could, in the public interest, expropriate with just and equitable compensation (which might be zero) the land on which the occupiers already live, and which the property owner has not, for many years, had beneficial occupation. Two such cases can be considered: the de Clerq¹ (Klerksdorp) case and the Fischer (Marikana)² case in Cape Town.

Passing an amended Expropriation Bill while pursuing a well-selected set of test cases under the existing expropriation would provide a means of building jurisprudence and providing policy and legal certainty, subject to judicial review.

After the new Expropriation Bill is passed into law and becomes an Act, further test cases should be prepared to utilise its specific provisions on compensation. However, we should not wait for the new Bill and rather test the existing expropriation system.

Proposal 4: Draft and pass a Redistribution Bill

The proposal for a ‘Redistribution Bill’ is contained in the High-Level Panel report. It emerges from the fact that – unlike restitution and tenure reform – **the state’s obligation in S25(5) to provide citizens with access to land on an ‘equitable basis’ has not been interpreted in an operational law, nor has it been tested in the courts.** Do the state’s existing measures to provide access to land meet constitutional muster? Where we have evidence of elite capture, by the politically-connected, or business-people, and allocation of land to them ahead of those whose needs are more desperate, we suspect that the state is systematically violating S25(5).

For this reason, it is essential to have law that provides power to citizens to hold the state to account for our rights of access to land on an equitable basis. This will shape the behavior of state officials, require inter-governmental cooperation in provision of access to land, and provide assurances of transparency and accountability.

The Redistribution Bill is the counterpart to the Expropriation Bill. While the Expropriation Bill confirms and strengthens the powers of the state, the Redistribution Bill strengthens the hands of citizens to ensure that the state uses its power in the interests of all, and with a bias towards those citizens who are in greatest need.

The Redistribution Bill would need to do the following:

1. Operationalise and define the right of ‘equitable access’ to land
2. Set legal criteria for beneficiary selection
3. Determine how land acquisition should happen

¹ De Clerq and Others v Occupiers of Plot 38 Meringspark, Klerksdorp and Others (‘Ratanang’)

² Fischer v Unlawful Occupiers, Erf 150, Philippi

4. Promote transparency and accountability
5. Establish criteria and mechanisms for subdivision
6. Oblige municipalities to make commonage available
7. Ensure people get long-term use and benefit rights
8. Establish transversal principles for land reform
9. Promote alternative dispute resolutions
10. Establish a Land Rights Protector as an ombudsperson

Proposal 5: Draft and pass a Protection of Informal Land Rights Bill

Basic protections to holders of informal land rights are currently afforded by the Interim Protection of Informal Land Rights Act of 1997 (IPILRA). As recommended by the High Level Panel of Parliament (see pp 269-271), this should be amended, strengthened where appropriate, and made a permanent piece of legislation (e.g. a Protection of Informal Land Rights Act). In order to provide basic protections of the land rights of the poor, it is necessary that other relevant laws such as the MPRDA, the TGLFA and the Ingonyama Trust Act be made subject to the provisions of the new legislation.

It is critically important that questions of expropriation and payment of expropriation be addressed in the proposed legislation. The holders of informal land rights must be considered as the rightful ‘owners’ of this land, and thus be appropriately compensated, should it be necessary to expropriate. It is also crucial that the issue of the duration of the beneficial occupation of land required to be considered a beneficiary of the law be addressed, and that the current provisions (which in effect date occupation from 1992) be reduced to a minimum period of three years of beneficial occupation.

Proposal 6: Draft and pass a Land Records Bill

This is a radical and far-reaching step that can be taken to transforming property relations in South Africa, and strengthening the rights of the majority who have no documented or official forms of property. Whether in informal settlements, on commercial farms, or in the communal areas, **most South Africans have no documented rights**. This Bill will provide the basis for a bottom-up process of creating recognized rights for non-private owners of property.

The Land Records Bill, as proposed by the High-Level Panel, will emulate the world-wide trend to record off-register forms of property. It will:

1. Immediately record current occupation and use
2. Incrementally clarify content of rights
3. Recognise inclusive forms of ownership, listing all family members, not just a household head, and therefore mitigate against gender discrimination

4. Use quick and affordable technologies, that can be rolled out at scale, unlike the Deeds Registry System
5. Record shared rights using blockchain technology
6. Require substantial investment in land administration – but technologies are available to link local offices with the national register.

Proposal 7: Fix institutions and develop a new White Paper

Two inter-related challenges remain: to fix our available institutions to drive a new land reform White Paper process to clarify, beyond what is contained in law, the new land reform policy principles and procedures.

The Department of Rural Development and Land Reform faces massive deficiencies in its capacity to carry out its important mandate to effect land reform. This much is common cause, and conceded by the Minister in her recent Budget and Policy Speech in Parliament in May 2018.

To address the institutional challenges, we propose a series of urgent remedial steps:

- Appoint a senior and experienced permanent Director-General (there have been acting DG appointments since 2016)
- Appoint senior and experienced permanent Deputy Directors-General to fill the DDG positions, many of whom are acting DDGs
- Fill vacant posts in DRDLR
- Develop a skills-development and training programme for DRDLR officials

Two further measures urgently needed to fix the institutions responsible for land reform are:

- Appoint at least 5 full-time judges to the **Land Claims Court**; presently there is only one judge, on a part-time basis.
- Strengthen the capacity of the **Office of the Valuer-General** by constituting a highly-skilled team of valuers who, with a new mandate, can travel around the country to implement the new compensation regime.

A new White Paper on South African Land Policy is needed to provide overall coherence and strategic direction to the land reform process. The new compensation regime which will be indicated in broad terms in the Expropriation Bill needs to be elaborated more fully in the new White Paper. A nationally-inclusive and participatory process is needed to craft a robust and legitimate White Paper that will frame a new reinvigorated programme of land reform.

Conclusion

It is our submission that land reform in post-apartheid South Africa to date has suffered from several key weaknesses. These include the lack of a coherent vision on what its main purposes are, who should be the main beneficiaries of policies, and how they should be supported by state programmes. Policy has not ensured that the different sub-programmes are appropriately aligned with each other, and with other relevant policies and programmes of government, such as water allocation reform. Together with weak state capacity, corruption and a tiny budget, these failures have meant that the outcomes of land transfers have been highly problematic. In addition, because tenure reform has been badly neglected, the land rights of many black South Africans are as insecure as they were under apartheid (and in some instances, may be even more insecure).

The Constitutional Review Committee is tasked with considering the issues of expropriation and compensation, and the question of whether or not to amend the Constitution. It cannot, however, assess these issues in isolation from the measures contained in Section 25 as a whole. If it does so, it runs the risk of making recommendations in a fragmented and incoherent manner, divorced from the actions needed to address the failings of the policy framework taken as a whole. We urge the committee to consider land reform holistically, and assess expropriation and compensation from this perspective.

References

Budlender, Geoff. 1992. 'The right to equitable access to land' in *South African Journal on Human Rights*, vol. 8, pp. 295–304.

DRDLR (Department of Rural Development and Land Reform). 2016. Draft input on reporting on women's empowerment and gender equality contribution to national building and social cohesion. Director-General PM Shabane. Pretoria: DRDLR. 15 September 2016.

Hall, Ruth and Thembele Kepe. 2017. Elite capture and state neglect: New evidence on South Africa's land reform. *Review of African Political Economy*. 1-9.

Klug, Heinz. 2000. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction*. Cambridge: Cambridge University Press.

Mohoebi, Eddie Ramakoloi. 2009. Doubts about farm equity schemes. *Business Day*. 2 September 2009 <http://www.businessday.co.za/articles/Content.aspx?id=80365>

Wegerif, M., B. Russell, and I. Grundling. 2005. *Still searching for security: The reality of farm dweller evictions in South Africa*. Johannesburg & Polokwane: Social Surveys Africa and Nkuzi Development Association.