



**SOUTH AFRICAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE JOINT  
CONSTITUTIONAL REVIEW COMMITTEE REGARDING SECTION 25 OF THE  
CONSTITUTION**

**June 2018**

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## Table of Contents

1. INTRODUCTION .....	3
2. SCOPE OF CONSTITUTIONAL REVIEW.....	4
2.2. Oral representations.....	5
3. MANDATE OF THE SAHRC.....	5
4. CURRENT ISSUES IN LAND REFORM.....	6
5. THE SAHRC'S POSITION ON THE PROPOSED CONSTITUTIONAL AMENDMENT.....	7
5.1 Expropriation of land without compensation.....	8
5.2 The challenges inherent in constitutional amendment .....	11
5.2.1 <i>Constitutional subsidiarity: Using section 25(8) of the Constitution</i> .....	11
5.3 Proposed legislative reform .....	12
6. FOSTERING CONDITIONS FOR EQUITABLE ACCESS TO LAND.....	14
6.1 The meaning of 'equitable' access: Determining the land for and beneficiaries of land reform.....	15
6.1.1 <i>Targeting vulnerable groups</i> .....	17
6.1.2 <i>Targeting land that will advance identified beneficiaries</i> .....	19
6.1.3 <i>Promoting equality through post-distribution support</i> .....	19
6.2 Reasonable legislative and other measures within available resources.....	20
7. CONCLUSION .....	24

## 1. INTRODUCTION

Land is dignity.<sup>1</sup> Yet the majority of South Africans remains landless due to our history of colonialism and apartheid. Colonialism constituted an overwhelmingly violent dispossession and exploitation of land, slavery and compulsory labour, torture and, ultimately, protracted wars of independence. Whereas most African countries gained complete independence in the 1960s and 1970s, South Africa gained formal independence in 1910, however, but a majority of its people were still subjected to the oppressive white minority rule under Apartheid regime until formal liberation in 1994. Although South Africa obtained democracy in 1994, the socio-economic conditions of the black majority have largely remained the same. This can be gleaned from the existing economic structure which is largely in the hands of a white minority. Even though the state has implemented policies and legislation to address results of past racial discrimination, property ownership patterns largely remain the same. Today, 55.5% of South Africans live in poverty, and our country is amongst the most unequal in the world. Income inequality measured according to the Gini coefficient (where a value of 0 represents complete equality and a value of 1 represents complete inequality) stood at 0.68 in 2015.<sup>2</sup> Moreover, the Gini coefficient for wealth inequality in South Africa is incredibly high at approximately 0.95.<sup>3</sup>

The dispossession of the majority of the population's land by colonial and apartheid-era governments constitutes one of the key drivers of persistent wealth inequality in South Africa.<sup>4</sup> The legacy of dispossession was recently acknowledged by the Constitutional Court in *Daniels v Scribante*,<sup>5</sup> in which judgment Justice Madlanga opens with a quote from Rugege:

"The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in

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<sup>1</sup> F Fanon *The Wretched of the Earth* (1961 transl 2004) 8-9, 55.

<sup>2</sup> Stats SA *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* (2017) 17.

<sup>3</sup> A Orthofer *Wealth Inequality in South Africa: Insights from Survey and Tax Data* REDI3x3 Working Paper 15 (2016) 23.

<sup>4</sup> Oxfam *The Commitment to Reducing Inequality Index* (2017) 7; United Nations Development Programme *The Impact of Socio-economic Inequality on Economic Development in South Africa* (2014) 27.

<sup>5</sup> [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC).

everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world.”<sup>6</sup>

Substantive freedom – of which land reform is a central component – has thus not been achieved for the majority of South Africans. Redistribution has a broader transformative objective of reducing poverty and promoting economic growth, particularly in rural areas.<sup>7</sup> The Constitution of the Republic of South Africa, 1996’s (the Constitution) transformative vision of a society based on dignity, equality and freedom requires us to balance private property rights with the rights of the dispossessed within a transparent process subject to judicial review and the Constitution’s general limitations clause.<sup>8</sup>

The South African Human Rights Commission (SAHRC or Commission) regards land reform as a key process through which South Africa’s legacy of racial and spatial apartheid can be addressed. It moreover considers land reform as an essential mechanism to achieve social justice and substantive equality more broadly, and thereby restore dignity to South Africa’s people through a process of land restitution and redistribution. In respect of both rural and urban land, the Commission submits that it is imperative that the state’s approach be decisively informed by inclusive, democratic, and egalitarian systems of landholding in South Africa which benefit the most marginalised and vulnerable members of our society. Any such process must be transparent, include a plan for implementation which includes specific departmental obligations and clear timelines, and incorporate mechanisms that enable the public and parliament to measure delivery and hold the executive directly accountable.

## **2. SCOPE OF CONSTITUTIONAL REVIEW**

The following central issues can thus be distilled from the Joint Constitutional Review Committee’s call for public submissions:

- (i) Calls for expropriation without compensation are limited to land in the context of government’s programme of land reform.

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<sup>6</sup> S Rugege ‘Land Reform in South Africa: An Overview’ (2004) 32 *International Journal Legal Information* 283, 286.

<sup>7</sup> South African Human Rights Commission ‘*The 7<sup>th</sup> Economic and Social Rights Report: Millennium Development Goals and the Progressive Realisation of Economic and Social Rights in South Africa*’ (2010) 226.

<sup>8</sup> S 36 of the Constitution.

(ii) Land acquired by government – including through the mechanism of expropriation without compensation - should be returned to those who were dispossessed under apartheid and colonialism. Land reform should thus be targeted based on socio-economic need.

(iii) In using all mechanisms at the disposal of the State to expedite land reform, agricultural production and food security should be improved.

The following submission is therefore limited to the question of expropriation without compensation for the purpose of land reform, taking into account the need to prevent agricultural production, agricultural investment and food security being jeopardised.

## **2.2. Oral representations**

The Joint Constitutional Review Committee's call for public submissions requests that submissions indicate whether parties wish to make oral representations to the Committee in due course. As the guardians of human rights and constitutional democracy in South Africa, the Commission avails itself to make oral representations.

## **3. MANDATE OF THE SAHRC**

The SAHRC is an independent State institution, which is established in terms of section 181 of the Constitution to support constitutional democracy. In terms of section 184 of the Constitution, the Commission is mandated to promote, respect for human rights and a culture of human rights; promote the protection, development and attainment of human rights; and monitor and assess the observance of human rights in the Republic. Section 13 of the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) expands on the powers and functions of the SAHRC, providing in section 13(1)(a)(i) that:

“The Commission is competent and is obliged to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of human rights...”

Section 13(1)(b)(v) further provides that the Commission must review government policies relating to human rights and may make recommendations, whereas section 13(2) empowers the Commission to propose new human rights-congruent legislation while compelling it to report any legislation that might be contrary to Chapter 2 of the Constitution to the relevant legislature.

#### 4. CURRENT ISSUES IN LAND REFORM

Leading experts<sup>9</sup> have long since pointed out the misalignment of land reform legislation, policies and practices.<sup>10</sup> The Commission already highlighted significant problems in current tenure regimes in 2008, in which it stated:

“The current approach to tenure security with its narrow focus on securing land rights does not pay sufficient attention to the needs of women and children living on farms whose rights, freedoms and future work opportunities are frequently constrained by their living situations.”<sup>11</sup>

Subsequently, the Commission found that there was institutional misalignment and failure to effectively implement land reform measures in 2013. In its report, the Commission noted that economic revitalisation should be pursued in conjunction with – but separate from – land restitution programmes. Moreover, the Commission took cognisance of the fact that communities living on land with rich mineral resources rarely benefited from such lucrative land. Finally, the Commission emphasised that government must provide appropriate financial and other resources to beneficiaries of land restitution, so as to promote equality and economic empowerment in addition to mere land restitution.<sup>12</sup>

According to Poverty, Land and Agrarian Studies (PLAAS) land redistribution began slowly and continued at a sluggish pace until 2001, when it accelerated. By 2006, approximately 2.5 million hectares of land had been redistributed to about 170 000 beneficiaries and by 2015, an approximate total of 5 million hectares of land had been redistributed.<sup>13</sup> However, the success of

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<sup>9</sup> See further JM Pienaar *Land Reform* (2014); JM Pienaar ‘Reflections on the South African land reform programme: characteristics, dichotomies and tensions (Part 1)’ (2014) *TSAR* 425-446; JM Pienaar ‘Reflections on the South African land reform programme: characteristics, dichotomies and tensions (Part 2)’ (2014) *TSAR* 689-705.

<sup>10</sup> SAHRC *Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa* (2014) 45-49.

<sup>11</sup> SAHRC *Progress made in terms of Land Tenure Security, Safety and Labour Relations in Farming Communities since 2003* (2008) 45.

<sup>12</sup> SAHRC *Monitoring and Investigating the Systemic Challenges Affecting the Land Restitution Process in South Africa* (2014) 45-49.

<sup>13</sup> M Ramutsindela, N Davis & I Sinthumule ‘*Diagnostic Report of Land Reform in South Africa*’ (2016) 9-11.

the redistribution programme remains in question by academics, civil society and the state itself for various reasons.<sup>14</sup>

Similarly, in the diagnostic report on land tenure, PLAAS explains that in relation to planning, budgeting and reporting, redistribution and land tenure reform statistics are not separated. It is therefore difficult to assess the efficacy of each of these programmes.<sup>15</sup> Further, state reporting is inconsistent. It is therefore difficult to track progress in the redistribution programme over time. Case studies on redistribution programmes found that often people did not settle on allocated land and those that did, moved off the land soon after. And while there were success stories associated with redistribution of agricultural land that was linked to communal property associations and strong partners, particularly those with capital, many such projects failed due to a lack of access to funding, infrastructure and support. It is important to note that successful projects had a positive impact on the quality of life indicators of the associated beneficiaries,<sup>16</sup> and that the potential of small-scale family-farming with resource and monetary backing from the state or partner is a potentially successful model, where greater research is required.

In March 2018, during its *Public Inquiry into the Impact of Rural Land Use and Ownership Patterns on Human Rights*, the Commission learnt that the problems identified through its previous Hearings have intensified. The restitution system thus continues to suffer from massive backlogs, traditional forms of ownership continue to exclude those who depend on land but who do not possess Western forms of tenure, communities still lose out on lucrative transactions with corporations, and institutions as well as legislation aimed at land reform remain highly fragmented.

## **5. THE SAHRC'S POSITION ON THE PROPOSED CONSTITUTIONAL AMENDMENT**

The Commission is cognisant of the importance of land reform for the future of South Africa. Without land justice and social justice, an egalitarian society cannot be achieved. The Commission encourages the adoption of reasonable legislative and policy measures that can be

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<sup>14</sup> See for example: 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' (2017): [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/HLP\\_Report/HLP\\_report.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf) and S Turner, B Cousins, E Lahiff & P Wisborg 'Land and Agrarian Reform in South Africa: A Status Report' (2002) 29.

<sup>15</sup> M Ramutsindela, N Davis & I Sinthumule 'Diagnostic Report of Land Reform in South Africa' (2016) 9.

<sup>16</sup> Ibid 29. Cousins, E Lahiff & P Wisborg 'Land and Agrarian Reform in South Africa: A Status Report' (2002) 29

<sup>16</sup> M Ramutsindela, N Davis & I Sinthumule 'Diagnostic Report of Land Reform in South Africa' (2016) 32.

<sup>16</sup> Ibid 29.

used by government to facilitate and expedite land reform as required by section 25 (8) of the Constitution. Nevertheless, as custodians of human rights and a State institution supporting constitutional democracy, the Commission cautions against amending the Bill of Rights where it has been established that a human right enshrined therein does not constitute the root cause of insufficient transformation. The Commission points out that as the supreme, overarching law in the country, the Constitution does not lend itself to amendments in the detail needed to limit expropriation without compensation in the context of addressing the results of past racial discrimination. The Commission proposes that in addition to addressing the significant issues in land reform as expounded above, government pursues a legislative route in order to expropriate land without compensation in appropriate circumstances.

### **5.1 Expropriation of land without compensation**

The 2017 Land Audit by the DRDLR reflects land ownership by race and gender. It notes that the majority of land in South Africa (94%) is privately-owned non-agricultural land. The remainder of the land is made up of agricultural holdings or farms, the majority of which (in hectares) is owned by whites (72%) followed by Coloureds (15%), Indians (5%) and Blacks (4%). Over half of the individual landowners of agricultural holdings or farms are white, while under one-quarter are black. These statistics differ greatly in the Free State, Northern Cape and the Western Cape, where 66%, 73% and 66% of agricultural holdings or farms respectively are White-owned and 11%, 2 % and 3% respectively are Black-owned.

Although the process of lodging restitution claims was slow, at first, by 31 December 1998, the 63 455 claims had been lodged and there was a realisation that this number would continue to grow.<sup>17</sup> By 2007, the number of lodged claims was at 79 696, with between 83% and 88% of these urban land claims and the remained, rural land claims.<sup>18</sup> In 2013, there were just under 60 000 claims finalised and over 20 000 claims settled or partially settled.<sup>19</sup> The CRLR further reported that approximately 3 million hectares of land had been allocated or earmarked for restitution projects but had yet to be finalised. However, according to the HLP report:

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<sup>17</sup> M Ramutsindela, N Davis & I Sinthumule '*Diagnostic Report of Land Reform in South Africa*' (2016) 32.

<sup>18</sup> E Lahiff *Land Reform in South Africa: A Status Report* (2008) 42 13.

<sup>19</sup> M Ramutsindela, N Davis & I Sinthumule '*Diagnostic Report of Land Reform in South Africa*' (2016) 33.

There are still more than 7 000 unsettled, and more than 19 000 un-finalised, 'old order' claims (claims lodged before the initial cut-off date of 1998). At the present rate of finalising 560 claims a year, it will take at least 35 years to finalise all old order claims; new order claims (lodged in terms of the now repealed Restitution of Land Rights Amendment Act of 2014) that have already been lodged will take 143 years to settle; and if land claims are reopened and the expected 397 000 claims are lodged, it will take 709 years to complete Land Restitution.<sup>20</sup>

Restitution failed in its attempt to transform land use patterns in South Africa for various reasons, including the one associated with the cut-off date for restitution, above. When decisions had to be made on restoration for dispossess land, the state often chose to compensate applicants in monetary form. Standard settlement offers were developed, with little regard for the value, potential, location and other characteristics of the dispossessed land. Residential properties were valued at R40 000 (with some in major metropolitan areas fetching R50 000). As such, many claimants lost revenue and the livelihood benefits associated with many.

The majority of restitution claims there were settled were in urban areas, which countered the goal of rural development and associated poverty and inequality alleviation. Further, farm labourers and tenants were unable to benefit from the restitution process, despite living on a particular piece of land for the majority, or all of their life.

The overlap of restitution claims (i.e. more than one claimant for a piece of land) has stymied the CRLR, and in these cases, communities have resorted to legal measures to stake claim to the land. This means that poorer communities, which may be the rightful claimant of the land but were unable to afford legal representation, were disadvantaged. There were myriad additional administrative issues for the CRLR, which have caused unnecessary delays of the stalling of restitution claims.

The developmental and poverty alleviation goals of the restitution process have not been realised. A study conducted in 2006 by the Community Agency for Social Enquiry (CASE) (cited in a PLAAS report) found that in an assessment, the majority of the land restitution projects were not meeting their developmental objectives, namely agriculture, settlement and ecotourism. In all of these

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<sup>20</sup> Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change 233.

categories, over three-quarters of all projects had failed or under-performed.<sup>21</sup> Hall elaborates that:

“The most striking finding from the case studies is that the majority of beneficiaries across all the restitution projects have received no material benefit whatsoever from restitution, whether in the form of cash income or access to land. Many have not moved onto the land, either because they are restricted from doing so (as in the case of leasing out of land, or as a result of strategic partnerships), or because post-transfer support has not been forthcoming and land-use plans are delayed.”<sup>22</sup>

As such, the Commission regards the ineffective implementation of land reform programmes as the root cause of inadequate land reform in South Africa to date. Given the decreasing budget for land reform, as well as the failure of the ‘willing buyer, willing seller’ model used by government to date, the Commission regards expropriation of land without compensation as being just and equitable in appropriate circumstances. However, it should be noted that it remains unknown to what extent government has used its constitutional powers to expropriate land. Although the state expropriates land on a regular basis, it has rarely expropriated property for the purposes of land reform. Where it has done so, it has tended to pay market value for that property, even though it is not constitutionally obliged to do so.

The Commission thus echoes the sentiments expressed in the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High Level Panel) Report that land should include well-situated urban and rural land.<sup>23</sup> Land-related rights, including rights pertaining to water, should furthermore be accommodated. At the hearings conducted by the High Level Panel, communities indicated that they felt more vulnerable now, in terms of land dispossession than they did pre-1994. The view was that land rights are often denied by Traditional Authorities especially in cases of mining where communities are regularly relocated to barren areas further from economic opportunities than before.<sup>24</sup>

Ultimately, the Commission is of the view that legislation should cater for circumstances where no compensation for land is payable by the State to address the racial disparities cause the

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<sup>21</sup> R Hall *The Impact of Land Restitution and Land Reform on Livelihoods* (2007) 22 5.

<sup>22</sup> Ibid 16.

<sup>23</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 300, 461-463.

<sup>24</sup> Ibid 202.

discriminatory system of apartheid, and that it is neither desirable nor necessary to amend the Constitution to reflect this level of detail.

## **5.2 The challenges inherent in constitutional amendment**

### **5.2.1 Constitutional subsidiarity: Using section 25(8) of the Constitution**

In terms of the doctrine of constitutional subsidiarity, a claimant wishing to exercise a constitutional right must rely on legislation purporting to give effect to such right before relying directly on the relevant constitutional provision. According to the Constitutional Court, the doctrine seeks to strike a balance between the need for deference to branches of government that make laws and policies, and the supremacy of the Constitution. Reliance on legislation that gives effect to constitutional rights thus reflects respect for the Legislature.<sup>25</sup> Section 25(5), (6), (7), (8) and (9) obliges government to adopt legislation and other reasonable measures to achieve land reform. In accordance with the doctrine of subsidiarity, government's programme of land reform should thus proceed through means of legislation before constitutional amendment is considered.

More significantly, section 25(8) explicitly authorises a departure from the provisions in section 25 to effect land reform that redresses the effects of racial discrimination, as long as a departure is in accordance with section 36 of the Constitution. Section 36 directs that a right in the Bill of Rights may only be limited in terms of a law of general application and must be reasonable and justifiable in an open and democratic society, taking into account various factors that constitute a proportionality enquiry. Section 25(8) thus makes it possible for government to depart from the requirements for compensation as set out in section 25(2) and (3). However, the following conditions must be met:

- (i) A departure from the provisions of section 25 – including those pertaining to the payment of compensation for expropriation – must be done in terms of a law of general application.
- (ii) A departure from the provisions in section 25(2) must be done for the purposes of land, water and related reform.
- (iii) A departure must have as its purpose the redress of past racial discrimination.
- (iv) The law used to effect such land reform must be reasonable and justifiable in terms of section 36 of the Constitution.

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<sup>25</sup> *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) paras 51-52; *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) paras 39-40.

The conditions set by section 25(8) read with section 36 (1) thus reflect the scope of government's proposed strategy of expropriation without compensation, in that it permits a departure from the compensation provisions in section 25 to the land reform context. The Commission underscores that legislation permitting land expropriation without compensation enacted in terms of section 25 (8) should be reasonable and justifiable in an open and democratic society.

Currently, no law of general application exists that can be used to expropriate land without compensation for purposes of land reform. The Commission is accordingly of the view that until a law of general application has been created in terms of section 25(8), an amendment to the Bill of Rights would be premature and would additionally conflict with the doctrine of constitutional subsidiarity.

### **5.3 Proposed legislative reform**

In the light of the Commission's finding that poor implementation constitutes the root cause of unsatisfactory land reform, the doctrine of constitutional subsidiarity, the existence of section 25(8) of the Constitution, and the practical difficulties inherent in endeavouring to amend the Constitution in detail, the Commission strongly recommends that government pursues expropriation of land without compensation in terms of legislation.

Recently, the High Level Panel Review found that government's current programme of land reform is institutionally misaligned and fragmented in terms of both legislation and policy. The Panel accordingly recommended the need for an overarching, umbrella law to regulate all aspects of land reform, namely restitution (section 25(7)), redistribution (section 25(5)) and tenure reform (section 26(6)).<sup>26</sup>

The current legislation governing expropriation is the Expropriation Act, 63 of 1975. In its current form, the Expropriation Act provides for the procedure to be followed in the event of an expropriation and the process by which compensation should be determined. The Act provides that 'the Minister may, *subject to an obligation to pay compensation*, expropriate any property for

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<sup>26</sup> Illustrative Land Reform Framework Bill, 2017 in High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017).

public purposes or take the right to use temporarily any property for public purposes'.<sup>27</sup> The current Act also requires market-related compensation. There is a clear disjuncture between the Act and the Constitution. It would therefore seem necessary to amend same, a process which has been ongoing for some time but still remains stalled. The signing of the Expropriation Bill into law is on hold following concern over the process followed by Parliament in passing the Bill. On 17 February 2017, the Bill was returned to the National Assembly due to reservations about inadequate public participation.<sup>28</sup> The Commission expressed a number of concerns with the content of the Bill.<sup>29</sup> A key concern included the fact that the Bill lacked protections afforded to communities on communal land.<sup>30</sup>

A provision allowing for expropriation of land without compensation in line with section 25(8) may thus be included in a new, overarching land reform framework Act, or may be added as a clause in the dormant Expropriation Bill. It should be pointed out that legislative reform or drafting – while time consuming – may be less resource-intensive than a constitutional amendment.<sup>31</sup> Any such clause must include:

- (i) the factors set out in section 25(3) of the Constitution; and
- (ii) the factors listed in section 36(1) of the Constitution.

By including these factors in new legislation, pending draft legislation or the amendment of existing legislation, an equitable balance can be struck between the interests of current property owners and the interests of landless South Africans.<sup>32</sup>

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<sup>27</sup> S 2(1) of the Expropriation Act.

<sup>28</sup> See the Bill history here: <https://pmg.org.za/bill/550/>.

<sup>29</sup> See 'A Guide to the Expropriation Bill' <<https://www.sahrc.org.za/home/21/files/EXPROPRIATION%20BILL.pdf>>.

<sup>30</sup> Ibid.

<sup>31</sup> S 74(5) of the Constitution states that at least 30 days before a Bill amending the Constitution is introduced in Parliament, the person or committee introducing the Bill must publish the proposed amendment for public comment in the Government Gazette. All written comments received from the public and the provincial legislatures must be submitted to the National Assembly and the National Council of Provinces. It is likely that any amendment of the nature proposed is likely to be controversial and numerous submissions would be received in terms of this process. It is also likely that an extensive public consultation process would be required. Further, section 74(7) prescribes that a Bill amending the Constitution may not be put to the vote in the National Assembly within 30 days of its introduction or tabling. It is only if these procedural hurdles are overcome that any proposed amendment would be effected.

<sup>32</sup> Legislation must take into account the SADC Tribunal judgment in *Mike Campbell (Pvt) Ltd. V The Republic of Zimbabwe* Case No. 2/2007, which held that the absence of objective and reasonable criteria for land reform, the absence of compensation, and the failure to distribute land to poor and marginalized people, rendered Zimbabwe's targeting of exclusively White-owned farms discriminatory. If the enumerated requirements had been met, such differential treatment would not amount to racial discrimination.

## 6. FOSTERING CONDITIONS FOR EQUITABLE ACCESS TO LAND

In addition to the severe challenges faced in respect of land *restitution*, government has failed to utilise constitutional provisions that are intended to facilitate land *redistribution*. In particular, section 25(5) of the Constitution provides:

“The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

Expropriation of land without compensation for purposes of land reform could be accommodated through the legislative measures envisioned by section 25(5). Moreover, this could be achieved through means of an overarching land reform statute, or through a combination of discrete laws and policies. Importantly, section 25(5) allows for the creation of legislation to address current gaps in government’s land reform programme, including those pertaining to the plight of people dispossessed of land before the 1913 cut-off date, women, people with disabilities and other vulnerable groups, and those in respect of the shortcomings of existing tenure systems.

Section 25(5) thus allows for the application of affirmative action or ‘special measures’ in the context of land.<sup>33</sup> Similarly, international law allows for ‘special measures’ to advance persons subject to discrimination, in various contexts including land distribution. The United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) explicitly endorses the adoption of special measures ‘to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms’. The Committee on the Elimination of Racial Discrimination (CERD) has summarised the meaning of special measures:

“Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and *proportionality*, and be *temporary*.

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<sup>33</sup> Section 9(2) of the Constitution stipulates that equality includes the full and equal enjoyment of all rights and freedoms, and permits the adoption of affirmative action measures for this purpose. Affirmative action therefore aims to radically transform society in order to achieve substantive equality in all spheres of life, including in terms of the equitable distribution of income, wealth, land, and skills obtained through education. Affirmative action measures should not be viewed as an exception to equality, but instead as an essential component thereof. Affirmative action in the context of the labour market is regulated through the Employment Equity Act, 55 of 1998. The Broad-Based Black Economic Empowerment Act, 53 of 2003 and the Broad-Based Black Economic Empowerment Amendment Act, 55 of 2013 (B-BBEE Act) complement the EEA and aim to transform ownership patterns, control of and participation in the economy.

The measures should be designed and implemented on the *basis of need*, grounded in a *realistic appraisal of the current situation of the individuals and communities concerned*.<sup>34</sup>

Government's recent land audit demonstrates the need for special measures in the context of land reform. The land audit finds that 90 percent of land registered with the Deeds Office is privately owned. 39 percent of this land is owned by private individuals, whereas companies, trusts, and community-based organisations (CBO) own the remaining registered privately owned land, which includes both rural land and urban erven. According to the Department of Rural Development and Land Reform, '[t]he same individuals own most of these companies, trusts and CBOs'.<sup>35</sup> Of the farm and agricultural land holdings owned by private individuals, Black South Africans directly own a mere 4 percent of rural land,<sup>36</sup> while the White population group owns 72 percent of such land. Gender inequality is similarly rife, with women owning 13 percent of individually owned private farm and agricultural land, while men own 72 percent of this land, and couples own 11 percent of such land. Current ownership patterns thus reflect the structural exclusion of Black people, women, and people with disabilities.

Government's strategy of expropriation without compensation must thus be carefully designed in order to ensure that it constitutes a special measure targeted at groups in need, considers socio-economic factors prior to acquisition and subsequent distribution of land, and does not give rise to new imbalances.

## **6.1 The meaning of 'equitable' access: Determining the land for and beneficiaries of land reform**

It is crucial to determine what is meant by access and whether such access has been realised within the current constitutional dispensation. Notably, in *Grootboom*, the Constitutional Court recognized access to land as a socio-economic right.<sup>37</sup>

Access does not only demand that a piece of land is identified, it enjoins the state to make it reasonable for citizens to obtain land. In this instance, it would mean that there must be measures

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<sup>34</sup> Ibid para 16 (emphasis added).

<sup>35</sup> Department of Rural Development and Land Reform *Land Audit Report* (2017) 2.

<sup>36</sup> In contrast, land ownership of urban erven is more congruent with national demographics, with Black Africans owning the majority of urban erven in most provinces. However, the Land Audit Report does not indicate the value or settlement quality of this land. Department of Rural Development and Land Reform *Land Audit Report* (2017) 13.

<sup>37</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) para 35.

developed to realise both physical and legal access.<sup>38</sup> Similarly, section 25 (6) of the Constitution guarantees those whose tenure is not secure as a result of past discriminatory practices to a legally secure tenure or comparable redress.<sup>39</sup> In *Daniels*, Jafta J explores the positive obligations imposed by section 25 (6) in that:

“Section 25(6) first and foremost is part of section 25 which begins by safeguarding property rights. Together with section 25(7) they form the transformative component of section 25 which seeks to redress the injustices caused by the past racially discriminatory laws or practices in terms of which forced removals were carried out. The positive obligation to address the injustices in relation to loss of tenure or dispossession of land is imposed on the state alone by section 25(5). This provision provides:

“The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

This duty of the state is buttressed by section 25(8). It proclaims—

“No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).”

Section 25(6) must be read together with section 25(5) to determine the content and scope of the obligation it imposes. The Constitution contemplates that the right of equitable access to land will depend on reasonable legislative and other measures taken by the state, within its available resources. In this way the Constitution recognises that at the time it was adopted, millions of South Africans had no access to land and those that had access had a legally insecure tenure. The purpose of entrenching the rights of access to land and secure tenure was to ensure that the state, through reasonable measures within its budget, progressively makes the realisation of those rights achievable to the millions who did not enjoy them.”<sup>40</sup>

Similarly, in his concurrence in *Daniels*, Justice Froneman engaged in a detailed discussion of property rights in South Africa. Notably, Froneman addresses the hierarchical structure of property rights that benefitted white South Africans at the expense of black South Africans. This hierarchy of rights “confirmed and perpetuated the existing inequalities in personal, social, economic and political freedom.” Much of the discriminatory policies—such as the Native Lands Act of 1913—aside from being discriminatory, were based on economic efficiency principles,

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<sup>38</sup> Section 25 (9) of the Constitution.

<sup>39</sup> Section 25 (6) of the Constitution.

<sup>40</sup> *Daniels* paras 167-169.

notably the Coase Theorem. This theory presumes “perfect market conditions,” stating that so long as property rights are secure and transaction costs are absent, an economically efficient outcome will result no matter the initial allocation of property rights because an asset will flow to the highest user.

It should further be noted that the Constitutional Court has developed a three-pronged test to determine whether affirmative action measures fall within the bounds of section 9(2) of the Constitution. The test asks whether such measures (i) target persons or categories of persons who have been disadvantaged by unfair discrimination; (ii) are designed to protect or advance such persons or categories of persons; and (iii) promote the achievement of equality.<sup>41</sup> Furthermore, affirmative action or restitutionary measures must be ‘reasonably capable’ of achieving the desired ends.<sup>42</sup>

### **6.1.1 Targeting vulnerable groups**

Firstly, legislative measures should acknowledge groups that were dispossessed of land prior to 1913, and whose position is thus not addressed by the restitutionary provisions enshrined in section 25(7) of the Constitution.<sup>43</sup> This group of beneficiaries would include both indigenous peoples<sup>44</sup> (the Khoi-San) and ethnic (tribal) minorities dispossessed<sup>45</sup> of land before the introduction of the Native Land Act, 27 of 1913 or the Native Affairs Act, 23 of 1920. However, this should not be regarded as an exhaustive list.

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<sup>41</sup> *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 37.

<sup>42</sup> *Ibid* para 41.

<sup>43</sup> S 25(7) of the Constitution states:

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

<sup>44</sup> Through the establishment of colonies by European settlers, the Khoi-San were displaced and dispossessed of large portions of land, resulting in a loss of livelihood. The historical (and in many instances, ongoing) dispossession and forced removal of indigenous peoples from land has given rise to other social challenges, including being disproportionately impacted by structural forms of discrimination through poverty, marginalisation, negative stigmatisation, resulting in numerous ongoing rights violations. One of the most pressing concerns of Khoi-San peoples, therefore, is securing access to land to carry out new land-based ventures such as farming. Although some land has been returned to indigenous peoples in South Africa, this has been restricted to small groups and has been insufficient to meet the needs of the majority of Khoi-San peoples. See SAHRC *Report on the National Hearing Relating to the Human Rights Situation of the Khoi-San in South Africa* (2018).

<sup>45</sup> For example, whereas the Ingonyama Trust received vast tracts of land, other tribal communities remain landless. See, for example The Conversation ‘A look at how complex the land issue is in South Africa’ (29-03-2018) The Conversation < <https://www.thesouthafrican.com/complex-the-land-issue-south-africa/>>.

In addressing the plight of landless South Africans who were dispossessed of land prior to 1913, it should be borne in mind that the 1913 cut-off date was introduced to, *inter alia*, mitigate difficulties in establishing proof of dispossession prior to this date. In addition, it was feared that pre-1913 historical claims on ancestral land would be impossible to unravel, and would serve to awaken and/or prolong destructive ethnic and racial politics; that the members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered; and that large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British. In addition, the High Level Panel estimates that restitution claims that have already been lodged, together with anticipated claims should the process be re-opened,<sup>46</sup> will take over 700 years to finalise.<sup>47</sup> The addition of pre-1913 claims in this process will thus exacerbate an already severely dysfunctional restitution system.<sup>48</sup> On the other hand, massive land dispossession pre-dates 1913, while there have been waves of dispossession that cover both the pre-1913 and post-1913 periods. Justice through land reform can thus be achieved by identifying those dispossessed prior to 1913 as beneficiaries of land redistribution that should be prioritised.

Secondly, women should benefit from land redistribution. Given current land ownership patterns that are skewed in terms of gender, specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects. In traditional communities, women were treated as minors, and even married women did not have rights to family land, nor were they consulted on land use or land transactions.<sup>49</sup> Since land is understood as the property of the husband and his natal family, divorced and widowed

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<sup>46</sup> In *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) the validity of the Restitution of Land Rights Amendment Act was challenged by civil society organisations on the basis that Parliament failed to conduct public participation in the manner required by the Constitution. The Constitutional Court upheld the challenge, and declared the Amendment Act invalid effective from 28 July 2016. The Constitutional Court reiterated that the right to restitution in land plays a pivotal role in South Africa's constitutional democracy, and is a means to achieving the guarantee of dignity for those who continue to suffer from the racist practices and laws of the past. The legislative processes which resulted in the Amendment Act, enacted to give effect to the right, by implication needed to include comprehensive public participation.

<sup>47</sup> In terms of all the land claims that have been settled up to 31 March 2016, the vast majority of claimants have opted for restitution in the form of financial compensation rather than land. This trend is likely to continue as 94 percent of claimants of the 143 720 new claims that have been lodged since the re-opening of the new claims process, have indicated a preference for their claims being settled through payment of financial compensation. See SAHRC *Research Brief on Race and Equality in South Africa 2013-2017* (2017) 15.

<sup>48</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 237-239.

<sup>49</sup> S Meer 'Land Reform and Women's Land Rights in South Africa' in H Böll Stiftung *Women and Land Rights: Questions of Access, Ownership and Control* (2013).

women are often evicted by their former husbands' families or brothers.<sup>50</sup> Although legislative reform has sought to ensure that rural African women are no longer legally considered minors in land related transactions, this legal status is not always reflected in current customary law and practices.

Thirdly, special measures in the land reform context should target people with disabilities and older persons as beneficiaries of land redistribution. The Commission has consistently noted that people with disabilities continue to be marginalised in society. Whereas such exclusion is apparent from the prevalence of poverty amongst Black people with disabilities and in the gross under-representation of people with disabilities in the labour market,<sup>51</sup> it is also reflected in the omission of people with disabilities from current land reform initiatives. Finally, legislation should be drafted so as to ensure that no vulnerable groups are omitted.

### **6.1.2 Targeting land that will advance identified beneficiaries**

In order to meet the second prong of the Constitutional Court's test for legitimate affirmative action or special measures, such measures should be designed to advance targeted beneficiaries. In the land reform context, this means that the type of land targeted should advance beneficiaries in different spheres of society. Thus, land should be targeted following participatory processes during which targeted beneficiaries can articulate their land needs. It is likely that such consultation will reveal the need for both well-situated rural and urban land to be redistributed to the landless. Furthermore, instead of simply redistributing large commercial farms, such land should be subdivided in order to accommodate demand for land that exceeds supply thereof.<sup>52</sup>

### **6.1.3 Promoting equality through post-distribution support**

Finally, special measures for land reform should promote equality in order to meet the Constitutional Court's test for legitimate affirmative action. In order for land redistribution to advance equality, land should be transferred to beneficiaries and not leased out by the State. However, 'ownership' should not be limited to traditional forms of title, whereas significant

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<sup>50</sup> A Claassens & S Ngubane 'Women, land and power: The impact of the Communal Land Rights Act' in A Claassens & B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008).

<sup>51</sup> SAHRC *Research Brief on Disability and Equality in South Africa 2013-2017* (2017); SAHRC *Equality Report 2017/18* (2018).

<sup>52</sup> Institute for Poverty, Land and Agrarian Studies *Diagnostic Report on Land Reform in South Africa* (2016).

problems relating to communal property schemes and land administration by traditional authorities should be addressed. Moreover, post-settlement support should be revised to cater for long delays in current mentorship schemes, while ensuring that power does not remain in the hands of White 'co-managers'. Finally, the State should provide necessary infrastructure that is appropriate for the nature of the land, albeit urban or rural land.<sup>53</sup>

## **6.2 Reasonable legislative and other measures within available resources**

Section 25(5) of the Constitution mirrors the primary socio-economic rights provisions of the Constitution to the extent that it compels the State to adopt 'reasonable legislative and other measures, within its available resources' to foster conditions that enable citizens to access land on an equitable basis. However, the provision is more limited than the rights of access to adequate housing, health care services, and sufficient food and water, in that it does not create a right of access to land, but merely imposes obligations on the State to foster conditions conducive to equitable access to land. Furthermore, whereas the other socio-economic rights in the Constitution inhere to 'everyone', section 25(5) is limited to citizens.

Nevertheless, the textual similarity of the obligation placed upon government in the context of land and in terms of other rights such as that of access to adequate housing, allows existing jurisprudence to inform the interpretation of the provision. Accordingly, for legislative and other measures such as policy to be reasonable, it should be reasonably capable of facilitating the realisation of the relevant right; comprehensive, coordinated; reasonably formulated and implemented; balanced and flexible to cater for short, medium and long-term needs; appropriate human and financial resources should be allocated to its implementation; it should be transparent; it should cater for those in desperate need, and its formulation and implementation should include civil society participation.<sup>54</sup> In addition, affirmative action or special measures should thus be designed and implemented in the context of land, to advance persons or categories of persons disadvantaged by unfair discrimination.

Currently, the primary legislation in respect of land redistribution as contemplated by section 25(5) of the Constitution is the Land Reform: Provision of Land and Assistance Act, 45 of 1993, as

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<sup>53</sup> Ibid 20.

<sup>54</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

amended.<sup>55</sup> Although the Act purports to give effect to constitutional land reform provision, contribute to poverty alleviation, spur economic growth and empower historically disadvantaged persons, it does not provide guidance on how such beneficiaries should be identified. In the light of the huge demand for land and bearing in mind that land is a finite resources, the Act begs the question as to what criteria will be used to prioritise beneficiaries. As pointed out by the High Level Panel report,<sup>56</sup> land redistribution legislation should establish who wants land, for what purposes land is desired, and who amongst those who do want land should be prioritised as beneficiaries of land reform. As mentioned above, factors such as land already possessed, alternative sources of livelihood, and intersecting grounds of disadvantage should be considered when both identifying and prioritising beneficiaries. Since the Act is not targeted at vulnerable groups or individuals in need, it fails the constitutional test for affirmative action or special measures to be legitimate.

Moreover, the High Level Panel notes that the current processes of identifying beneficiaries is not transparent,<sup>57</sup> thereby falling short of the standard for reasonableness set by the Constitutional Court. In addition, the Act does not cater for those in desperate need (as required by *Grootboom*), and does not cater for different short-, medium-, and long-term usages of land. The Act can therefore not be considered to constitute a 'reasonable' measure to foster conditions for equitable access to land. Other discrete interventions, such as the Amended AgriBEE Sector Code,<sup>58</sup> likewise only applies to the commercial agriculture sector and therefore similarly fails the constitutional test for reasonableness.

Government recently introduced the Regulation of Agricultural Land Holdings Draft Bill, 2017, which is based on both section 25(5) and (8) of the Constitution. After reiterating the provisions of section 25(5), the Preamble of the Bill recognizes the 'need to redistribute agricultural land more equally by race and class, raise agricultural output and food security and to advance social justice and political stability by obtaining agricultural land to support and promote productive employment and income to poor and efficient small scale farmers'. The Bill establishes a Land Commission and mandates the Commission to maintain a register of all private and public

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<sup>55</sup> Development Facilitation Act, 67 of 1995; Provision of Certain Land for Settlement Amendment Act, 26 of 1998 Land Affairs General Amendment Act, 11 of 2000; Provision of Land and Assistance Act, 58 of 2008.

<sup>56</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 220-221, 227.

<sup>57</sup> Ibid 227-228.

<sup>58</sup> Amended AgriBEE Sector Code GN 1354 in GG No. 41306 of 8 December 2017.

agricultural land, while further compelling the disclosure of present ownership and the acquisition of ownership. Furthermore, the Bill prohibits the acquisition or lease of agricultural land by a foreign person.

Most significantly, the Bill empowers the Minister to set different categories of ceiling for agricultural land holdings in each district. Where land holdings exceed prescribed ceilings, such land becomes 'redistribution agricultural land'. Importantly, 'Black people' as defined in the Employment Equity Act, 55 of 1998 are entitled to a right of first refusal in respect of redistribution agricultural land. Where no Black person acquired the redistribution agricultural land, such land shall be acquired by the Minister, who may expropriate the land where no agreement can be reached.<sup>59</sup> To the extent that Black persons are the targeted beneficiaries of the Bill, the Bill constitutes a special measure in the context of land. However, it falls short of the CERD's for special measures to be based on socio-economic need, since the provisions do not preclude the redistribution of agricultural land to wealthy Black commercial farmers or other elite interests. Furthermore, the Bill on its own cannot be regarded as a 'reasonable' legislative measure, given the fact that its scope is limited to agricultural land. In addition, since beneficiaries are not determined based on current socio-economic need, the Bill cannot be said to cater for the plight of those 'in most desperate need'.<sup>60</sup> Finally, the introduction of land holding ceilings merits further research, given that comparative analyses indicate that the use of ceilings in jurisdictions such as India, Mexico and the Philippines has not met expectations.<sup>61</sup> It therefore remains to be seen whether the introduction of ceilings renders the legislative measure 'capable of facilitating the realization of the right',<sup>62</sup> or whether its inability to do so renders it unreasonable.

The Proactive Land Acquisition Policy (PLAS) is government's primary mechanism with which to regulate land redistribution. PLAS was launched in 2006 in an ostensible attempt to replace the 'willing buyer, willing seller' model with a more proactive approach. In terms of the policy, government acquires land and leases land to beneficiaries. Following non-payment of rentals, the Minister declared in 2011 that such land would not be transferred to beneficiaries. Furthermore, a ministerial injunction held that where land was not productively used, beneficiaries would lose access to such land.<sup>63</sup> Unlike government's original land reform policy, the Settlement/Land

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<sup>59</sup> Clause 26(2)(a)-(c).

<sup>60</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 52.

<sup>61</sup> B Cousins (Nelson Mandela Foundation) *Land reform in South Africa is sinking. Can it be saved?* (2016) 7.

<sup>62</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 41.

<sup>63</sup> Institute for Poverty, Land and Agrarian Studies *Diagnostic Report on Land Reform in South Africa* (2016) 18-19.

Acquisition Grant, PLAS is not means tested.<sup>64</sup> As a result, it does not pass muster as a special measure targeted at those in socio-economic need, and furthermore fails to cater for those in desperate need as required for a policy to be reasonable in terms of *Grootboom*.

Government's framework of legislation and policies aimed at facilitating equitable land redistribution ultimately cannot be regarded as reasonable. Where those in desperate need are seemingly targeted, legislative instruments are restricted to agricultural land and are thus not comprehensive or coordinated. Available land is a prerequisite for the realization of the right of access to adequate housing,<sup>65</sup> and an exclusive focus on agricultural land will therefore not ultimately transform South African society. Moreover, the State's obligation in terms of section 25(5) is subject to 'available resources'. In *Grootboom*, the Constitutional Court held that 'appropriate' financial resources must be allocated for a policy to be reasonable.<sup>66</sup> However, government has thus far not prioritized land reform, as is apparent from the fact that 'the Land Reform budget has generally been between 0.15% and 0.4%, reaching a peak of 0.44% of the national expenditure in 2008/09 and then declining to 0.2% in the current financial year'.<sup>67</sup> Even if the legislative and policy framework could be regarded as reasonable, the insufficient budget allocated to land reform would accordingly render the measures adopted by government to foster equitable access to land unreasonable.

Ultimately, comprehensive legislation that is reasonably formulated and implemented, and that is accompanied by adequate resources, should be adopted by government to further the objectives of section 25(5) of the Constitution. The framework law proposed by the High Level Panel constitutes an appropriate basis from which to formulate such legislation, to the extent that the proposed law acknowledges the crucial need for public consultation and meaningful engagement in order to identify beneficiaries of land reform, establish land needs, and identify suitable land.<sup>68</sup> Finally, to be reasonable and to constitute a special measure, legislation adopted under section 25(5) must target beneficiaries of land reform based on socio-economic need and disadvantage, with a focus on race (and ethnic origin), gender, disability and age.

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<sup>64</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 209.

<sup>65</sup> *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 35.

<sup>66</sup> *Ibid* para 39.

<sup>67</sup> High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 215.

<sup>68</sup> Clause 8 of the Illustrative Land Reform Framework Bill, 2017 in High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017).

## 7. CONCLUSION

The Commission recommends that the State takes cognisance of the need to accelerate land reform in order to achieve social justice and therefore, promote social cohesion. To this end, we encourage the State to enact reasonable legislative and other measures within the ambit of the Constitution that are aimed at achieving redress for past injustices and particularly improving the land reform system in South Africa. The Commission is ultimately of the view that a lack of effective implementation constitutes the main obstacle to successful land reform. In addition, it finds that both the doctrine of constitutional subsidiarity and practical difficulties inherent in amending the Constitution, renders a constitutional amendment unnecessary and undesirable. Instead, the Commission recommends that expropriation without compensation be pursued through legislative means, and in accordance with section 25(8) of the Constitution. Legislative reform should address the current lacuna in implementing land redistribution in addition to restitution, and should thus be framed as a special measure in the context of land reform. Beneficiaries should be prioritised based on need, and should include those dispossessed of land prior to 1913, women, and people with disabilities. Without successful implementation of government's programme of land reform, a life characterised by dignity, equality and freedom will not materialise for those who remain landless.

It is essential that with restitution and redistribution projects, beneficiaries are provided with monetary, resource and skills support. By ensuring creative partnerships with resources trusts and individuals, this goal can be achieved. It is clear from research findings by the Commission and other entities that transferring land without the requisite support, does not assist the new landowners and does not espouse the goals of development, economic growth and poverty alleviation. It should not however be inferred that that the Commission supports the removal of agency of the new landowner or their right to use the land as they wish, but rather that partnerships are definitely needed.

There is very little mention of expropriation for urban land use or resources available to people that have been evicted from land in urban or peri-urban areas without recourse or suitable alternate housing provided. It is clear that communal property rights have not always benefitted all – in many cases it has benefitted just traditional leaders. Adequate discourse around such issues are required before recommendations or appropriate action is suggested.

There is a dire need for further research and engagement with relevant partners before significant decisions on the land debate are made. There is a wealth of knowledge, particularly in the civil society sphere, which could assist to ensure that the goals of land reform are achieved. While the land audit findings are noted, the report is very basic and confusing at times. There is a clear need for a more comprehensive land audit with specific objectives, which should also map areas where people with insecure land tenure live and what their specific circumstances are.

The Commission appreciates the extension afforded to stakeholders to comment on the proposed review of section 25 and wishes the Committee well in the consideration of the inputs.

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