

Helen Suzman Foundation

**Submission to the Joint Constitutional Review Committee of Parliament
on the review of Section 25 of the Constitution (Property Clause)**

14 June 2018

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“Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform.”

– *Justice Albie Sachs*

1. Introduction

The Helen Suzman Foundation (“**HSF**”) welcomes the opportunity to make submissions to the Joint Constitutional Review Committee (“**the Committee**”) on the potential review of Section 25 of the Constitution (Property Clause). The HSF sees this as a way of making a constructive contribution to what has become an increasingly emotional public discussion on a subject of major importance for the country. The reason for the emotional nature of the public discussion has as its background not only South Africa’s history of land ownership and dispossession, but also a continuing and very substantial inequality in wealth between different racial groups in our society.

In this submission, the HSF firstly addresses the question as to whether land reform requires a Constitutional amendment, and more specifically, expropriation without compensation. Secondly, this submission sets out an approach to reform which delivers land in a way that will improve the lives of the poorest communities in our society in a manner which addresses not only the practical requirements of the situation, but also the necessary legal and administrative prescriptions. In our view, a narrow focus on the expropriation of land, without including a detailed framework on how this is to be implemented and supported in order to make it a success from an economic point of view, will not improve the situation of poor households, who are the intended beneficiaries of this policy.

The HSF, as a non-governmental organisation, has been an active participant in a variety of public interest areas in South Africa over many years. Its essential aim is to promote constitutional democracy in South Africa, with a focus on good governance, transparency and accountability. The HSF views the current debate about land reform as extremely important for South Africa, not only from a constitutional perspective, but also within a wider social, economic and political context.

2. Background

Following the acceptance of the principle of expropriation without compensation at the 54th National Conference of the African National Congress (“**ANC**”) in December 2017, President Cyril Ramaphosa affirmed this position on 16 February 2018 in the State of the Nation Address:

“We will accelerate our land redistribution programme We will pursue a comprehensive approach that makes effective use of all mechanisms at our disposal. Guided by the resolutions of the 54th

National Conference of the governing party, this approach will include the expropriation of land without compensation. We are determined that expropriation without compensation should be implemented in a way that increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid.”

On 27 February 2018, the National Assembly adopted a motion on a review and amendment of Section 25 of the Constitution relating to expropriation without compensation (“**the Motion**”). The Motion had been introduced by the Economic Freedom Fighters (“**EFF**”), but the final text included certain amendments which had been suggested by the ANC.

3. What does the Motion require of the Joint Constitutional Review Committee?

The Motion addresses the need to accelerate land reform in South Africa. In accepting the Motion, the National Assembly established an *ad hoc* committee to review Section 25 of the Constitution and to propose other constitutional amendments that may be necessary.

The Motion states that current policy instruments and provisions of Section 25 “may” be hindering effective land reform (our underlining of “may”). It mentions that the President has made a commitment to continue the land reform programme that entails expropriation of land without compensation, but subject to conditions relating to agricultural production and food security.

The Motion further states that an *ad hoc* committee is to be established, in order to review Section 25 of the Constitution and other clauses “where necessary” (our underlining) and to propose constitutional amendments “where applicable” (again, our underlining).

The emphasis which is placed on the wording of the three specific parts of the Motion, as set out above, clearly indicates that the *ad hoc* committee has a very wide discretion and that the Motion does not attempt to dictate that constitutional changes have to be made. It is therefore completely within the discretion of the Committee to recommend whether any changes to Section 25 of the Constitution are required.

4. Section 25 of the Constitution already allows for expropriation without compensation

Section 25(2) of the Constitution provides that:

- “Property may be expropriated only in terms of law of general application –
- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.”

In respect of the compensation, Section 25(3) of the Constitution reads:

- “The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
- (a) the current use of the property;

- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.”

Section 25(3)(c) mentions the market value of the property, but it should be noted that the much quoted “willing buyer, willing seller” principle (also mentioned in paragraph 6 of the Motion) does not appear in the Constitution. It appears in Section 12 of the Expropriation Act, 63 of 1975, which is still in force. The fact that this Act has not yet been amended is one of the many signs that land reform has up to now been very low on the Government’s policy agenda. (A Bill was introduced to Parliament in 2015 to amend the Act, but it has been referred back to Parliament as a result of a lack of adequate public consultation.)

Regarding the meaning of “public interest” in Section 25(2)(a) of the Constitution, Section 25(4) states that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources”.

On a literal interpretation, there is nothing in Section 25 that precludes the compensation from being small (or nothing at all), if that is the result of taking all relevant circumstances into account. Such an outcome would be where land has been unutilized for a considerable time, from which the owner is deriving no income, which provides no employment, where there are no plans to use the land in a productive manner but where there is real potential (either for agricultural or urban purposes) in making it available within the Government’s land reform programme. The history of the property and the way in which it was acquired may also be relevant.

The Valuer-General has proposed a formula for valuations of property identified for purposes of land reform, taking all the constitutionally prescribed factors into account. It was gazetted for comment in 2017¹. We believe that the regulations should be finalized as a matter of great urgency, since Section 12(1)(a) of the Property Valuation Act (number 17 of 2014) provides that whenever a property has been identified for purposes of land reform, that property must be valued by the Office of the Valuer-General.

In addition, Section 25(8) of the Constitution provides that:

“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).”

¹ Notice 365, Government Gazette 40793, 21 April 2017

Section 36(1), which is referred to at the end of Section 25(8), provides that:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the relation between the limitation and its purpose; and
- (d) less restrictive means to achieve the purpose.”

There can be no doubt as to the ambit of Section 25(8), but almost no attention has been paid to it in the public debate on land reform. The question can therefore be asked: given the clear and unambiguous meaning of Section 25(8), what need is there even to discuss changing the Constitution to provide for expropriation without compensation?

5. Changing the Constitution is no substitute for a lack of action on land reform

The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change², published in November 2017, (“**the High Level Panel**”) provides a comprehensive overview of the land reform process. The High Level Panel carried out extensive research on this subject.

It highlights the many obstacles to land reform as follows:

“Evidence presented to the Panel *via* commissioned research reports, roundtables and public hearings over the past year has demonstrated profound problems in the conception and implementation of the land reform programme. These extend beyond issues of how land is acquired (whether *via* the market, expropriation or confiscation) and relate more generally to the ways in which beneficiaries are chosen (especially in relation to land redistribution); land is identified; land reform is planned at the level of local government; tenure rights are recognised or conferred; the quality and effectiveness of post-settlement or post-transfer support that is provided; and the equality or inequality of power relationships between land reform beneficiaries and strategic partners or mentors. In addition, there is a high level of demand for land in urban areas, for purposes of human settlement, that land reform does not address at present. These

²The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was created by the Speaker’s Forum (a voluntary association comprising speakers and other office bearers of the National Assembly, the National Council of Provinces and Provincial Legislatures). The High Level Panel was mandated to review legislation, assess implementation, identify gaps and propose steps with a view to identifying laws that require strengthening, amending or change. The Panel was chaired by former President Kgalema Motlanthe and its work was divided into three thematic areas: (i) poverty, unemployment and the equitable distribution of wealth (ii) land reform: restitution, redistribution and the security of tenure and (iii) social cohesion and nation-building. The Working Group on land reform was led by Dr Aninka Claassens, a land reform specialist from the University of Cape Town. The Working Group was given the task of producing a report focusing on the most important policies and laws passed since 1994. It was also required to propose an implementation plan with short, medium and long-term recommendations.

problems are generating immense frustration and in some cases, anger, within the ranks of land reform beneficiaries and other citizens.”³

The Report of the High Level Panel makes it clear that the reason for the slow pace of land reform is not the Constitution. It states that:

“Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date - other constraints, including increasing evidence of corruption by officials, the diversion of land reform budget to elites, lack of political will, and lack of training and capacity have proved the more serious stumbling blocks to land reform. Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3), particularly in relation to land that is unutilised or under-utilised.”⁴

Making the Constitution the villain of the piece serves as a convenient excuse for the lack of progress in land reform by Government. It demonstrates an inadequate understanding or conscious denial of the actual problems which have plagued the land reform process since 1994. The obstacle is not the Constitution, but rather a lack of political will to implement an effective land reform policy.

Clear evidence of this lack of political will is presented by the following:

- The pace of restitution has been extremely slow. According to the Report of the High Level Panel, there has been a downward trend in the pace of redistribution since 2008⁵. There are still 7000 unsettled claims and more than 19 000 unfinalised claims that had been lodged before 1998. It will take 35 years to settle these claims at the present rate of 560 claims a year;
- The budget allocated to land reform and restitution is negligible. In the 2018 National Budget, only 0,3% of the consolidated expenditure is allocated to land reform and restitution combined.⁶ This fact on its own illustrates the almost complete absence of political will on the part of Government to achieve anything of substance in this area;
- The Government has made no real attempt at using Section 25 of the Constitution to effect expropriation of land in a meaningful manner; and
- The failure to amend legislation such as the Expropriation Act of 1975, which contains the “willing seller - willing buyer” concept (as already mentioned above).

³ The Report of the High Level Panel On the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017, Chapter 3, Dr Aninka Claassens, p. 221.

⁴ Ibid., p. 300.

⁵ Ibid., p. 210.

⁶ Tables 5.5 & 5.12, <http://www.treasury.gov.za/documents/national%20budget/2018/review/FullBR.pdf>

6. Is expropriation without compensation necessary?

Whilst emphasis is given in Government statements to rectifying the historical dispossession of land, the underlying message is that it is seen as a way of broadening economic participation, given the degree of continued inequality in wealth between racial groups in South Africa. It is generally accepted that a small portion of South African society owns a very large part of the country's wealth and further, that there is a very strong racial disparity in this division of wealth. As an example, one study found that 10% of the South African population owns 95% of wealth and receive almost all investment income (99%).⁷ Another study found that the top 10% hold 85% of wealth, with the average black household holding about 4% of the wealth of the average white household.⁸

Whatever bias or inaccuracies may exist in such studies⁹, the results show that wealth is massively skewed against the black portion of the population and in favour of other racial groups, especially the white portion. Attempts to rectify this considerable imbalance incrementally through the normal workings of the economy will, even if economic growth increases substantially over current levels, take generations. It is therefore not unexpected that more radical policies are advocated, such as a more aggressive approach to land reform.

However, there are risks. A rushed and poorly thought out programme will incur unnecessary delays and costs and lead to disappointing outcomes. The stated aim is that land reform should have a beneficial economic influence and it is important to emphasise in this context that the poorest in our society must be the beneficiaries. Land reform would not be justified if, as a consequence, the wealthier sectors of society accumulate further assets. Our submission suggests an approach which will succeed from an economic and developmental perspective and at the same time, reduce already existing public discontent.

The crucial issues that need to be considered and determined, as well as the dangers inherent in a process where they are not adequately dealt with, are set out in the next section.

7. Expropriation without compensation can only be carried out within a clearly defined decision-making process and administrative structure

The HSF believes that it is possible in terms of Section 25 of the Constitution (as it stands now) to expropriate land in the public interest, often with little or no compensation. However, the major principles of the law regulating the ownership of property should be respected. This general principle embodies the fact that the state is not permitted to deprive any person of his property,

⁷ Anna Orthofer, *Wealth Inequality in South Africa: Evidence from survey and tax data*, Research Project on Employment, Income Distribution and Inclusive Growth, Working Paper, 15 June 2016.

⁸ Samson Mbewe and Ingrid Woolard, *Cross-Sectional Features of Wealth Inequality in South Africa: Evidence from the National Income Dynamics Study*, SALDRU Working Paper no. 185, NIDS Discussion Paper, 2016, University of Cape Town.

⁹ Anna Orthofer, op. cit. note 7, pp. 3 and 6.

unless it is done in accordance with the rule of law. The rule of law requires that no power may be exercised unless it is sanctioned by law. As emphasised in the jurisprudence of the Constitutional Court, our constitutional order hinges on this principle, which has been adopted in order to make a decisive break from the unchecked abuse of State power during the apartheid era.

Section 25(1) of the Constitution puts the principle as follows:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

In order to avoid arbitrary conduct in the implementation of a land reform policy, a clear legislative and administrative framework, together with a properly resourced Government institution to manage the process, has to be put in place. If this is not done, any expropriation policy is going to confront insurmountable problems. This would, however, not be the result of inadequate provisions in the Constitution, but a failure on the part of Government to establish an overall legislative, administrative and financial framework to manage the process in a rational and efficient manner.

In establishing such a legislative, administrative and financial framework, clarity first has to be obtained on a number of different issues which would have a direct effect on any expropriation process. The wide range of issues which need to be addressed are illustrated by the following questions (which are by no means exhaustive)¹⁰:

- How will decisions be taken on land that is to be expropriated? What criteria are relevant in any decisions? Who will take the decisions? What procedure is foreseen for objections?
- Who is to be given the expropriated land? Who will decide on who is to be a beneficiary? On what criteria? Will the policy be targeted to benefit the poor?
- How much land is to be targeted for land expropriation?
- Are the financial circumstances of the persons whose land are to be expropriated relevant (to avoid former owners being left destitute)?
- What dispute resolution mechanism is to be established?
- How will sufficient transparency be given to the process to avoid public discontent?
- Presumably, both urban and rural land reform is envisaged. What should the balance be between urban and rural land reform?
- What is to be the basis for deciding that specific land is suitable for redistribution for agricultural or urban purposes? What are the needs for each category? Will any land redistribution be subject to feasibility studies which set out what can realistically be achieved in any specific case? Have the environmental implications been taken into account in an adequate manner? If urban development is foreseen, will it fit into larger urban development programmes (including transport and basic infrastructure)?
- Is post-settlement support by Government to be provided, or will beneficiaries (mainly the poor) be left to their own devices?

¹⁰ The Report of the High Level Panel raises many of these questions. See p 220.

- On what legal basis is the land to be held by beneficiaries? With full legal title or through a lease from a local authority? If it is the latter, what security of tenure will beneficiaries have? Is any form of tenure reform envisaged by Government for this purpose?
- How can beneficiaries be protected from arbitrary or corrupt decisions by local authorities in the case of leasing rights? What rights would local authorities have to levy lease payments?
- Will the process be managed by an adequately resourced and staffed land reform agency? Will appropriately qualified staff be available for this?
- Will Government be able to fund this whole undertaking, in stark contrast to the purely nominal funding dedicated to land reform up to now?

The wide scope which is covered by these questions shows that any land reform policy which includes expropriation without compensation, not only requires policy clarity in many different areas, but also extensive planning and careful implementation. However, it is striking that none of these issues have been raised in the public debate so far. The focus has been exclusively on the principle of expropriation without compensation and the supposed need for the Constitution to be amended to cater for it.

If the questions which are set out above are not dealt with in an adequate manner (together with the implementation of a suitable legislative/administrative framework), the consequences will be the following:

- Legal challenges based on the irrational/arbitrary exercise of executive power will bring the process to a grinding halt very quickly - this is not a far-off possibility, but can be expected as an unavoidable consequence if a suitable legislative and administrative framework is not put in place and implemented, to enable a process which is based on rational decisions and an absence of corruption/elite capture.
- The problems which already exist in the land reform process, specifically those of corruption, elite capture and an inefficient administrative system, will continue, leading not only to a stalled process, but also to perceptions of a failed policy, further fueling public dissatisfaction.
- Business and investment confidence will experience a serious shock. It is easy to underestimate the degree to which such confidence relies on legal certainty and on the predictability of Government policy. Any policy on land reform that increases uncertainty and unpredictability will have materially negative consequences not only for the agricultural sector, but for the economy as a whole.
- A lack of a clear policy framework also increases the perceived risk to private property rights and will have direct financial consequences in the form of urban and rural ventures being unable to source funding from banks (since the banks would not wish to lend if the activities they are financing are on land where ownership is not considered to be secure).

Taken together, these consequences will ensure the failure of any land reform programme, however well-meant it may be in principle, unless Government takes the necessary measures which are outlined above.

8. The important practical issues need to be dealt with outside of the Constitution

No amendment to the Constitution will provide answers to the practical questions which are set out under the previous heading. Extensive legislation and clear administrative regulations and guidelines will be required, together with a properly funded and staffed supervisory/management agency, to enable a process which is characterized by rational decision-making and efficient implementation.

The public debate on the subject of land reform has so far largely been limited to the principle of expropriation without compensation, within the context of a possible constitutional amendment. It is worrying that the debate has shown no signs of even trying to engage with the crucial practical issues that any land reform policy will have to contend with. It is essential that these aspects be dealt with in detail, to avoid a process which is doomed to fail.

9. The need for a new framework law on land reform and for clarification of the content of land tenure rights

The Report of the High Level Panel contains a proposed new framework law on land reform.¹¹ These proposals again underline the diverse issues which need to be dealt with in any comprehensive land reform programme and provide an example of a legislative starting-point. In order to recognise and administer a diverse range of land tenure rights that are currently off-register¹², the High Level Panel proposes the introduction of a Land Records Act¹³. In the opinion of the High Level Panel, the current cadastral and deeds registry systems are onerous, unaffordable and fail to recognise the rights of millions of South Africans. The object of this legislative recommendation is twofold: firstly, to make different categories¹⁴ of rights 'visible' and secondly, to elevate such rights.¹⁵ Systems of legal

¹¹ The proposed framework legislation seeks to fill the gap created by deficient law and policy in relation to land reform and provides for a coherent set of principles to guide this process. It covers the concerns raised earlier in this submission, namely how beneficiaries will be identified and the need for accountable and transparent administration of land reform programmes as well as identifying a potential dispute resolution mechanism in the form of a Land Rights Protector. The rough draft Bill which is annexed to the Report of the High Level Panel (as L1) serves as a good starting point: https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf

¹² Ben Cousins estimates that in 2011 nearly 60% of all South Africans, lived on land or in dwellings held outside of the land titling system. Further discussed in an article by Ben Cousins: *Why title deeds aren't the solution to South Africa's land tenure problems* 2017: https://theconversation.com/why-title-deeds-arent-the-solution-to-south-africas-land-tenure-problem-82098?utm_source=twitter&utm_medium=twitterbutton

¹³ Report of the High Level Panel, op. cit. note 3, p. 477.

¹⁴ William Beinart, Peter Delius and Michelle Hay, *Rights to Land: A guide to tenure upgrading and restitution in South Africa*, Good Governance Africa (Jacana), 2017: identify nine categories of off-register rights all with different legal status at p. 25.

¹⁵ Report of the High Level Panel, op. cit. note 3, p. 481.

flexibility that recognise a range of tenure and landholding possibilities within a continuum of land rights would seem to be consistent with international trends.¹⁶

Of particular interest is the category of off-register tenure held in land owned by traditional authorities. It is often the case that tenants lease the land from a traditional leader but the basis on which lease payments are calculated may be unclear and the revenue received from the lessees, unaccounted for. The insecurity of this tenure may be exacerbated by exposure to administrative pressure and manipulation by local officials who are able to act within a regulatory structure which does not adequately protect the rights of tenants. It is not uncommon for traditional leaders and their councils to assume the power of land administration and unilaterally determine the use and negotiate sales of the land they control.¹⁷

The High Level Panel also recommends that the Ingonyama Trust Act be repealed, in order to bring KwaZulu-Natal in line with national land policy.¹⁸ If such repeal is not immediately possible, it recommends that substantial amendments must be made to secure the land rights of the people affected and to ensure that the land vests in a person or body with proper democratic accountability.¹⁹

As far as the legal tenure of residents in traditional areas is concerned, the HSF shares the High Level Panel's concern, where the latter comments as follows:

"It is of great concern to the Panel that recent policy shifts appear to default to some of the key repertoires that were used to justify the denial of political and property rights for black people during colonialism and apartheid. These repertoires include the assumption that customary and *de facto* land tenure systems do not constitute property rights for the poor. The State Land Lease and Disposal policy, and the CPA Amendment Bill default to the model of state trusteeship put in place by the Development Trust and Land Act of 1936 as the most appropriate form of land rights for beneficiaries of land reform. This model previously applied only in the former homelands, but now appears to have been extended to all land made available through restitution and redistribution."²⁰

In paragraph 10(b) of the Motion, the Committee is asked to propose "the necessary constitutional amendments, where applicable, with regards to the kind of future land tenure regime needed". The HSF is of the opinion that this matter does not need to be determined in the Constitution. Rather, draft legislation should be prepared for public comment (in line with other legislation needed within the framework of land reform) to enable real ownership rights to be given not only to persons who benefit from land reform, but also those who live in areas where they are subject to the authority of traditional authorities.

¹⁶ Ibid., p. 482-3.

¹⁷ Ibid., pp. 276 & 488.

¹⁸ The land that belonged to the KwaZulu Government under apartheid was transferred to the Ingonyama Trust, which was established in terms of the Ingonyama Trust Act of 1994. King Goodwill Zwelithini is the sole trustee of this land which makes up a significant portion of KwaZulu-Natal province.

¹⁹ Ibid., p. 277.

²⁰ Ibid., p. 303.

We are aware of comments that have been made within the broader land discussion in South Africa, which deny the need for real property rights, on the grounds that they do not form part of what is seen as the historical context of traditional land or the perceived needs of beneficiaries. Such comments also tend to downplay any need of beneficiaries for bank finance, implying that real ownership (evidenced by title deeds) is not considered necessary. An example of this approach appeared in a recent opinion piece in *Business Day*, where it was stated that “the fixation on title deeds” serves as a “convenient diversion”. It continues as follows:

“It is born of a misunderstanding of how the land debate counterposes the values that govern land use (and claim to it) between European and African societies and the contradictions emerging from this contest. Making a similar observation, African sociologist Archie Mafeje drew our attention to the limitations of the notion of private ownership in African society: “ African jurisprudence recognized rights of possession, determined by prior settlement and membership given in social groups, use-rights contingent on social labour and the rights of social exchange underscored by implicit reversionary rights” Put simply, the notion of ownership in a static sense, for the purposes of collateral and securitization until some later transaction, and the change of that ownership, is a notion foreign to many places in our continent, least of all black rural SA.”²¹

We do not dispute the significance of such views from a historical African perspective. However, such observations avoid the pertinent issue as to whether those living on traditional land are content to continue living there, with the legal uncertainty and risks of elite capture which are often associated with the current dispensation of property rights in rural areas. Furthermore, such comments only deal with the situation in very general terms and do not attempt to describe the detail of what rights actually accrue to people living there.

Regarding the applicability of customary law, the Constitutional Court has put it in the following terms:

“It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”²²

A recent publication, *Untitled*²³, contains case studies of a wide range of land tenure systems found in different parts of South Africa – both urban and rural. The book disputes the view that simply extending the system of title deeds to all South Africans will remedy the apartheid legacy of continued tenure insecurity. It makes the point that off-register property systems are diverse and

²¹ Ayabaonga Cawe: Misplaced fixation on title deeds is a convenient diversion, *Business Day*, 21 May 2018.

²² *Alexkor Ltd and Another v Richtersveld Community and Others* 2003(12) BCLR 1301 (CC) at para 51.

²³ *Untitled: Securing Land Tenure in Urban and Rural South*, Donna Hornby, Rosalie Kingwill, Ben Cousins and Lauren Royston (Editors), University of KwaZulu-Natal Press, 2017.

can be well organized, but it is emphasized that a lack of recognition and support makes them vulnerable to both poor support services and elite capture.

It is therefore contended that security of tenure does not necessarily have to be evidenced by possession of a title deed. This does not minimise the importance of secure tenure but rather opens the door for the adoption of a tenure reform policy which provides a degree of official and legal recognition of rights within the off-register tenure system.²⁴ This presents a reasonable solution by acknowledging the issue relating to the “the fixation on title deeds” (referred to above), whilst balancing it with the introduction of parallel formal and informal systems.

The HSF is of the opinion that the historical state/traditional authority trusteeship model needs to benefit from administrative standards and practices that allow for secure tenure, in order to avoid the following dangers:

- A lack of legal clarity leaves the poor at the mercy of local authorities (of whatever nature) and limits their rights to deal with the property which they hold, since it is often not clear what the precise content of any such rights may be.
- Rental payments may be levied (on whatever basis), leading to expensive tenure.
- A lack of incentive to establish a lasting business or a substantial residential structure of any kind, since the absence of clarity on ownership rights means that any potential sale of the land and improvements may be impossible on a commercial basis.
- Land and improvements may not be passed on to heirs on the death of the owner, as would be the case with full property ownership.

The nature of the rights that accrue to beneficiaries of land reform therefore need to be clarified and set out as part of the legislation required to implement land reform. The land tenure system in general also needs to be clarified, as explained above, and should also be dealt with in such legislation.

On 28 May 2018, Deputy President David Mabuza announced that the Communal Land Tenure Bill (“CLTB”)²⁵ will be processed in Parliament shortly and that enacting this legislation will bring certainty regarding the status of land under traditional leadership and provide for community members to get title deeds for their communal land.²⁶

The CLTB is to apply to all communal land vested in the State and includes land held by the former homeland governments (and from the wording it seems to include the land held by the Ingonyama Trust in KwaZulu-Natal). The CLTB’s objects include the conversion of legally insecure land tenure rights on land owned by the State, into ownership by communities or community members. This follows from the obligation on the State in terms of 25(6) of the Constitution, which provides that:

²⁴ Examples of how this integration could be effected are: the recording of rights using locally accepted forms of evidence, the use of special land use zones by planners working with communities and the recognition of occupational rights in informal settlements.

²⁵ https://juta.co.za/media/filestore/2017/07/Draft_Communal_Land_Tenure_Bill_2017_.pdf

²⁶ <https://www.businesslive.co.za/bd/national/2018-05-29-new-bill-aims-to-move-land-from-traditional-leaders-to-the-people/#>

“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.”

Whilst we support concrete steps to provide certainty on rights to land in communal areas, our concerns at what is envisaged in the CLTB revolve around the following issues:

- does it fit into the larger land reform picture, both conceptually and in its detail?
- the CLTB is hugely demanding on the Department of Rural Development and Land Reform in that it creates a massive additional administrative workload - there is no way that the Department can cope with this, given its current composition and funding; and
- is it not further complicating an already complicated situation? See for instance Section 18(2) of the CLTB, which provides that a person in whose name a subdivided portion of communal land is registered, is regarded as the owner of that subdivided land, but the community may nevertheless impose conditions on such ownership or reserve any right in its favour. This does not look like ownership in the ordinary sense of the word.

Against this background, the question may be raised as to whether it is desirable to proceed with the CLTB in isolation, or whether the whole land reform process does not need to be consolidated into one larger project, given its complexity and dimensions. The HSF therefore supports the Institute for Poverty, Land and Agrarian Studies’ (“**PLAAS**”) appeal, which calls for priority to be accorded to, *inter alia*, the High Level Panel’s proposals for the development of a framework law on land reform and a land records act (these High Level Panel proposals are referred to in more detail above). In this context, PLAAS’ appeal also includes:

“Calling a halt to Parliament’s processing of all pending legislation related to land, in view of the recommendations of the HLP – including the Communal Land Tenure Bill, Communal Property Associations Amendment Bill, Extension of Security of Tenure Amendment Bill, Traditional and KhoiSan Leadership Bill, Regulation of Landholdings Bill, Preservation and Development of Agricultural Land Framework Bill;”²⁷

In summary, it is evident that the preparation of a legislative framework of all aspects of land reform is a very substantial undertaking. Once Government policy has been defined in some detail, Government should consider appointing a specialist committee to oversee the work that is required to implement that policy. Such a committee would ensure that the relevant principles are appropriately addressed in a coherent policy and that a detailed framework of laws and regulations is put in place, together with an institution that is capable of implementing this undertaking in a fair and efficient manner.

10. Land ownership statistics

In the public debate on land reform, statistics are often selected in accordance with the individual speaker’s agenda. The problem is that there is no generally accepted set of statistics available for an accurate analysis. Much is clouded by the fact that private ownership statistics

²⁷ <http://www.plaas.org.za/blog/why-government-failing-achieve-land-reform>

include land owned by companies, trusts and other entities which make it impossible to obtain an accurate impression of racial composition. Further, large areas inhabited by black residents are held by traditional authorities and the legal basis of individual tenure is often less than clear. It is also evident that this latter segment cannot be compared to areas held by white residents, where there is no comparable category. The various studies and audits that have been carried out, have therefore not succeeded in describing the racial imbalance in land ownership in precise terms. According to Ben Cousins, “There is almost zero information on how many people have actually benefited from land reform, patterns of land use after transfer, and levels of production and income.”²⁸

It is extremely difficult to measure the progress of land reform without accurate statistics. The two most recent land audits (one by the Department of Rural Development and the other by AgriSA) are both based on information derived from title deeds in the national registry, thus disregarding all off-register rights held in land. However, neither audit identifies areas of opportunity and the need for land reform, which is fundamental information for well-planned redistribution²⁹. The Government Land Audit³⁰ states that 4% of agricultural land is held by Africans, but this only relates to land held by individuals - and individuals own only 39% of the country’s land which is in private ownership (aggregate private ownership amounts to 94 million hectares, out of South Africa’s total land area of 122.5 million hectares. Companies, trusts and community-based organisations own nearly all of the balance of 61% of land in private ownership.) In contrast, the AgriSA Land Audit³¹ estimates that almost 30% of agricultural land has been transferred *via* land reform.

It should also be mentioned in this context that the source of the percentages owned by black people as set out in the Motion (2% of rural land and 7% of urban land), is not mentioned in the Motion and it is not clear where these estimates come from.

In an attempt to obtain an indicative overall picture, we can refer to the summary provided by the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape.³² It sets out the following rough distribution:

- 67% “white” commercial agricultural land (where most farmers are white but small numbers of black farmers with access to capital are acquiring land through the market independently of land reform);
- 15% “black” communal areas (mostly state-owned, and settled by black households under various form of customary tenure, including the land held by the Ingonyama Trust, which on its own holds 2% of South Africa’s land);

²⁸ Ben Cousins, *Land debate in South Africa is clouded by misrepresentation and lack of data*, The Conversation, 2018 available at: <https://theconversation.com/land-debate-in-south-africa-is-clouded-by-misrepresentation-and-lack-of-data-93078>.

²⁹ Ben Cousins, *ibid*.

³⁰ Department of Rural Development and Land Reform, *Land Audit*, 2017.

³¹ AgriSA Land Centre of Excellence, *Land Audit: A Transactions Approach*, 2017.

³² Institute for Poverty, Land and Agrarian Studies, FACT CHECK NO.1 LAND REFORM: <http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf>

- 10% other state land; and
- 8% remainder, which includes urban areas.

The indicative picture presented above contrasts with the Land Audit of September 2013³³, which found that state-owned land comprised 14% of the total area of South Africa, with 50% of KwaZulu-Natal, 25% of Mpumalanga, 23% of the North West Province and 20% of Limpopo. We would assume that these percentages include traditional areas, but this is not stated as such in the document.

In addition, even if certain statistics on land ownership are accurate, they only tell a part of the story, as nothing is normally said about the quality of the land or whether it is suitable for any particular purpose. The following example shows how deceptive statistics can be in this context, without some contextual explanation: according to the Abstract of Agricultural Statistics published by the Department of Agriculture, Forestry & Fisheries, only 1,3% of the total area of the Northern Cape Province constitutes arable land.³⁴ You could therefore theoretically own 98.7% of the Northern Cape Province, but 0% of its arable land.

In spite of a lack of accurate statistics, it is clear that a very substantial racial imbalance in land ownership exists. However, the racial distribution of ownership is only one factor to be considered. We do not believe that redistribution of land on its own, will solve the problem, without a developmental economic approach which accompanies it (and with the supporting framework that such an approach requires). The objective of land reform should be that every household needing access to land to improve their lives, should have such access. Government policy should ensure that households are able to achieve satisfaction and not limit its focus purely on a predetermined racial ownership target.

11. Land reform policies need to accept the increasing importance of urbanisation³⁵

Land reform is often thought about in relation to rural areas, but it is most needed in urban areas. This is the result of an urban transition which is much more complete than is generally recognized.

Statistics South Africa divides South Africa into three geographical types: urban, traditional areas, and non-traditional areas. The difficulty with this classification is that it obscures the level of urbanisation within traditional areas, which is higher than generally assumed. This urbanisation takes two forms: areas formally divided into erven, as in urban areas outside traditional areas, and settlements where households live at high density, but where individual parcels of land have not been formally defined.

³³ Department of Rural Development and Land Reform, Land Audit Booklet September 2013.

³⁴ Abstract of Agricultural Statistics 2013, Table 5, Department of Agriculture, Forestry and Fisheries.

³⁵ The material in this section is based on Charles Simkins, *Human settlements and urban land reform*, HSF, forthcoming publication.

The size of the population living in these settlements can be estimated by proxy measures of urbanisation, and the results of this analysis are striking, as the following table indicates:

	2011	2016
Urbanisation outside traditional areas	93.3%	94.4%
Urbanisation inside traditional areas	65.7%	64.3%
Urbanisation – whole country	84.3%	83.8%

Both the 2011 Census and the 2016 Community Survey yield estimates of urbanisation in traditional areas at above 60%. The table should not be read as indicating that urbanisation in traditional areas decreased between 2011 and 2016 - rather, the two estimates of urbanisation in traditional areas contain a degree of uncertainty and suggest a roughly constant rate. 90% of household income was earned in urban areas in 2016.

Between 2011 and 2016, there was increasing concentration of the urban population in the metros, and this is projected to continue. Population growth in other urban areas was much slower, and in just over a third of municipalities urban populations actually declined. It follows that the metros are under the greatest human settlements pressure, and the number of households in them will increase by 70% between 2011 and 2030. Household sizes are dropping, so the household growth rate exceeds the population growth.

These developments are occurring at a time of weak economic growth. The potential growth rate (the 'speed limit' on the economy in the medium term) is currently below 2%, and the International Monetary Fund projects the situation to continue to 2023. The result is that the new households requiring dwellings will predominantly be in the poorest categories. Worse, they cannot all be provided with BNG³⁶ housing within anything like the current Medium Term Expenditure Framework. And it is not desirable that it should be, as there are many other possibilities, such as: the sub-division of properties, rental housing on new developments and social development housing. Densification and the creation of more rental stock in existing urban settlements are universally regarded as desirable, though nothing in current national human settlements policy encourages their production, outside a limited range of 'catalytic' areas.

Accordingly, it comes as no surprise that the Gauteng provincial administration is taking steps to secure rapid land release for site and service on which households can build their own dwellings. Such construction would be incremental in nature, as indeed happens in urban areas within traditional areas. Urban areas outside traditional areas have traditionally been hostile to incremental building. It contravened apartheid policies, but it occurred anyway and had to be accommodated. Now there is opposition both among beneficiaries and host communities, but incremental housing is now inevitable in the metros. The only question is whether it will take place in an orderly or disorderly fashion. Disorderly development will impose costs in the form of sub-

³⁶ Breaking New Ground (BNG) houses are successors to RDP houses, but built to higher specifications.

optimal location, higher settlement upgrading costs, social conflict and damage to the economy. Orderly development requires first improving the process of land acquisition (including expropriation) for purposes of housing and secondly the financing of contracts to develop serviced sites and to link them to bulk infrastructure.

In rural areas the population is dropping, making land reform easier. Land there is not the main problem. It is the policy, institutional and support surround that really matters and hard work on these fronts is needed to make rural land reform work. Equally, the availability of land in metros is not the key constraint on land reform. Making human settlements policy fitter for purpose, mobilizing the energies of households, private developers and finance institutions and providing leadership to encouraging change in outlook in urban areas are all much more important.

12. Protection of investment

The Protection of Investment Act 22 of 2015, has been criticised for the watering down of foreign investors' rights to seek redress in the case of expropriation of their investments.³⁷ In terms of this Act (which is still to come into force), the dispute settlement mechanism is domestic mediation and the South African Government may (but is not obliged to) consent to international arbitration, once domestic remedies have been exhausted. In the event of international arbitration, the question of customary international law on this topic will certainly be raised. Depending on the circumstances, customary international law may treat expropriation without compensation as unlawful.

Whilst foreign investments made under bilateral investment treaties would be protected as stipulated in the treaties, any new ones would be subject to the Protection of Investment Act. The South African Government has notified a number of countries that the relevant bilateral investment treaties would not be renewed. Legal protection of investment is now provided for by Section 10 of the Act which states that:

“Investors have the right to property in terms of Section 25 of the Constitution.”

Any amendment to Section 25 of the Constitution would therefore have an immediate impact on the legislative protection of foreign investment. Depending on the ambit of any change to Section 25, it may be seen as a further dilution of the security of foreign investment. In addition, if it is accompanied by the absence of a clear legislative and administrative framework to implement a land reform policy, it will have a negative knock-on effect on foreign investor confidence. The impact of such a situation on foreign investor confidence is of greater significance to South Africa's economic development than the danger of the State having to face legal action in an international forum in individual cases of expropriation. It is the perception that is important in this context. If confronted with what is seen as an arbitrary expropriation régime, potential foreign investors are

³⁷ Niel Joubert, New Protection of Investment Act – The Implications for Foreign Investors: <http://www.caveatlegal.com/new-protection-of-investment-act-the-implications-for-foreign-investors/>

likely to come to the conclusion that the risks of investing in South Africa are too great for comfort. Such investors would, as a consequence, prefer to invest elsewhere in the world.

It is also worth considering South Africa's obligations under international trade law in this context, as the scope of protection afforded to property rights under Section 25 of the Constitution is not limited to corporeal property, but also extends to other property rights (including intellectual property rights). Intellectual property rights are protected under the World Trade Organisation's ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), to which South Africa is a signatory. The expropriation of intellectual property rights without compensation would render South Africa in clear violation of its obligations under TRIPS, and other countries would be able to use the WTO's dispute settlement mechanisms to enforce their intellectual property rights.

13. Conclusion

The HSF agrees that land reform is necessary, given South Africa's history, and to assist in addressing the inequalities in the country. However, the focus of the Motion, in considering a change to the Constitution, is misplaced and diverts attention away from the policy and institutional changes needed for effective land reform. The Constitution does not need to be changed to allow for expropriation without compensation. Instead of considering a change to the Constitution, the Committee should look at the establishment of a clearly defined overall legislative and regulatory framework, together with an adequately resourced and financed administrative structure.

Such a framework would enable land reform to be implemented in an efficient and transparent manner, which would exclude arbitrary and corrupt practices. It would be able to focus on the needs of the poorest in South African society, who should be the major beneficiaries under any land reform policy.

As an integral part of this overall framework, consideration will also need to be given to the nature of rights that are to be granted to beneficiaries. Clearly defined rights to land are appropriate, as opposed to a form of undefined lease tenure which runs the danger of being insecure and dependent on the whim of local authorities. The danger of abuse and corruption in the latter situation is clear.

It is evident that the implementation of any new land reform policy is a massive undertaking from a legislative, administrative and financial perspective. Land reform should not be jeopardized by underestimating the extent of the undertaking or by putting inadequate measures in place. A focus purely on the property clause of the Constitution (which in any event permits land reform and expropriation without compensation) diverts the attention away from what needs to be done in practice.

An appropriate legislative basis and administrative structure, together with sufficient financial support within a clearly defined Government policy, is also necessary to give certainty to investors, financial institutions and other parties who may be affected, even if only indirectly. In this context, the importance to the economy of certainty and predictability of important aspects of Government policy cannot be overstated.

This submission has been prepared by Anton van Dalsen, Mira Menell Briel, Charles Simkins and Francis Antonie.