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South African Land Expropriation without Compensation at the Legitimacy Crossroad: Are the Enabling Provisions a Constitutional Amendment or Dismemberment? (Part 1)

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Abstract

The call to amend section 25 of the Constitution of the Republic of South Africa, 1996 in pursuit of land expropriation without paying compensation has become a subject of intense, emotive debate in present day South Africa. The proponents argue that a constitutional amendment which permits land expropriation without compensation is a transformation imperative to speed up land reform to reverse the skewed inequalities in land ownership inherited from the colonial and apartheid eras. However, the opponents contend that such an amendment will necessitate substantial changes to the property clause of the Constitution and thereby violate the basic tenets of constitutionalism by creating a new constitutional order rooted in a populist agenda that is avowedly nationalistic, nativist in outlook, intolerant, and antagonistic to South Africa's extant constitutional architecture. This article explores the merits of the opposing arguments. Utilising the widely acclaimed doctrine of basic structure, the article delineates circumstances under which the said constitutional amendment could result in constitutional dismemberment. It then offers recommendations on how such a constitutional amendment could engrain certain essential protections to prevent abuse of power related with state's power to expropriate land without compensation



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which often results in constitutional dismemberment.

Keywords: Land expropriation, compensation, expropriatees, constitutionalisation, dismemberment

1 INTRODUCTION

The quest to unequivocally empower the State to expropriate land in the public interest, without an explicit enforceable obligation to pay compensation to the owners¹ through an amendment to the Constitution of South Africa, 1996, has spawned an intense and emotive debate.² In particular, many academic commentators, political formations, farmers, property law jurists, human rights defenders, agriculturalists, civil society organisations, foreign investors, international financial institutions and others with vested interests, have joined in the debate.³ Such ideology-driven contestation is not novel given that contemporary history has demonstrated that expropriation of land in the public interest without compensation is a complex issue that has sparked revolutions and created seemingly irreparable diplomatic rifts between nations.⁴ In South Africa, some constitutional law experts argue that the amendment of section 25 of the Constitution,⁵ in order to allow land expropriation without compensation will infringe upon a number of the owners' constitutional rights, especially their right to private

1 Herein referred to as the "expropriatees".

2 For a further discussion on problems emanating from State acquisition of land without compensation see Van der Walt *Constitutional Property Law* (2011) 194; Viljoen "Substantive Adjudication of the Decision to Expropriate Property" 2017 *Stellenbosch Law Review* 454; Slade et al "Submission to Parliament on the Review of Section 25 of the Constitution of the Republic of South Africa, 1996" <https://scholar.sun.ac.za/handle/10019.1/106255> (accessed on 17/07/2019); South African Parliament "High-level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017" <https://www.parliament.gov.za/press-releases/download-report-high-level-panel-assessment-key-legislation-and-acceleration-fundamental-change> (accessed on 17/07/2019); South African Parliament "Committee Discuss Specifics Under Which to Expropriate Land Without Compensation" <https://www.parliament.gov.za/news/committee-discuss-specifics-under-which-expropriate-land-without-compensation> (accessed on 17/07/2019); Boggenpoel "Compliance with Section 25 (2) of the Constitution: When should Compensation for Expropriation be Determined?" 2012 *South African Law Journal* 611; Asmal et al "Placing Property on a Legitimate Footing" in Philip *Reconciliation through Truth* (1996) 132; Pienaar "Reflections on the South African Land Reform Programme: Characteristics, Dichotomies and Tensions Part 2" 2014 *Tydskrif vir die Suid Afrikaanse Reg* 689; Marais "Providing Better Protection for Expropriatees? Preliminary Thoughts on the Interpretation of Arbitrarily in Clause 2(1) of the Expropriation Bill-2015" 2017 *South African Journal on Human Rights* 97; Klug "Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-apartheid South Africa" 2018 *South African Journal on Human Rights* 459; Free Market Foundation *Security of Property Rights in South Africa A Critical Response to Expropriation Without Compensation* (2018) 4. Expropriation occurs when the State takes private property for a public purpose or in the public interest and against payment of compensation. The requirement for compensation is a universally recognised legal norm which ensures the State's power of eminent domain is not abused. Mostert and Lei "The Dynamics of Constitutional Property Clauses in the Developing World: China and South Africa" 2010 *Maastricht Journal of European and Economic Law* 27.

3 Much of these diverging views find their way into the court of public opinion through various channels including public opinion polls, legislative debates, and writings of jurists as well as political and social commentators delving into legal issues. For instance, the former president of the United States of America (US), Donald Trump has expressed his reservations about the proposed land expropriations without compensation by tweeting "I have asked Secretary of State Michael Pompeo to closely study the South Africa land and farm seizures and expropriations and the large scale killing of farmers. South African Government is now seizing land from white farmers." Even though this tweet attracted sharp criticism from the South African government which took it as an undue interference in the domestic affairs of a sovereign country, indeed the trial of land expropriation without compensation in South Africa is on in the court of public opinion and the verdict is yet to be passed. Schneidman "Land Redistribution in South Africa, Trump's Tweet, and US-Africa Policy" <https://www.brookings.edu/blog/africa-in-focus/2018/08/27/land-redistribution-in-south-africa-trumps-tweet-and-us-africa-policy/> (accessed on 19/07/2019); Sibanda "Amending Section 25 of the South African Constitution to Allow for Expropriation of Land without Compensation: Some Theoretical Considerations of the Social Obligation Norm of Ownership" 2019 *South African Journal on Human Rights* 130.

4 For instance the diplomatic rift between Zimbabwe on the one side and Britain, Australia, the European Union, and the United States of America on the other side has its root in the expropriation of land (without payment of compensation) by the Zimbabwean government. Lund et al "Land Rights and Land Conflicts in Africa: A Review of Issues and Experiences" https://pure.diis.dk/ws/files/68278/Land_rights_and_land_conflicts_in_Africa_a_review_of_issues_and_experiences.pdf (accessed on 19/07/2019). The contestation mainly emanates from the collision of societal hegemonic forces epitomised by the ruling elite drawn from the colonial, neo-colonial and post-colonial polity wielding socio-economic and political power. Due to their vested interests, these elite groups are bound to resist any form of economic and political re-configuration which threatens to diminish their privileges and economic fortunes.

5 Euphorically referred to herein as the property clause.

property.⁶ The impetus behind this view is that the implications of such an amendment of the property clause would be so far reaching as to result in constitutional dismemberment.⁷ In terms of what it is, a constitutional dismemberment occurs when parliament or another constitutional polity amends the constitution by introducing a fundamental alteration which is inconsistent with some of the core provisions or commitments embedded in the extant Constitution.⁸ A significant dissimilarity between a constitutional amendment *vis-à-vis* a constitutional dismemberment is that the former maintains the coherence of the Constitution by retaining core-constitutional values, such as respect for the rule of law, human dignity, non-discrimination, and observance of human rights.⁹ Whereas, as Albert postulates, a constitutional dismemberment marks a fundamental break with the core-constitutional values.¹⁰ It destroys or erodes the very fabric of the country's extant democratic architecture.¹¹

Conceivably, an amendment which permits expropriation of land without compensation, the argument goes, would impose substantial changes which violate the basic tenets of constitutionalism.¹² The argument is that such an amendment will create a new constitutional order rooted in principles that are based on a populist agenda that is avowedly nationalistic, nativist in outlook, intolerant, misogynistic, and overtly antagonistic to the architecture, character and spirit of South Africa's present Constitution.¹³ Essentially, the contention is that the proposed amendment would constitute an unconstitutional constitutional amendment whose effect will be too far reaching in that it would de-constitute and re-constitute the property clause in such a way as to repudiate the current constitutional structure and undermine or destroy its very democratic foundations.¹⁴

Opponents of the preceding view argue that an amendment which permits expropriation of land without compensation is a transformational imperative for the establishment of a just post-apartheid State premised on redressing past land administration injustices (restorative justice) and ensuring that there is fairness (egalitarianism) in the allocation of land, and related economic resources, to the sections of the population that were dispossessed during the colonial and apartheid eras.¹⁵ These divergent views on the constitutionality of an amendment

- 6 Pienaar "Land Reform Embedded in the Constitution: Legal Contextualisation" 2015 *Scriptura* 114; Viljoen "The South African Redistribution Imperative: Incongruities in Theory and Practice" 2021 *Journal of African Law* 2.
- 7 Strydom and Viljoen "Unlawful Occupation of Inner-city Buildings: A Constitutional Analysis of the Rights and Obligations Involved" 2014 *Potchefstroom Electronic Law Journal* 1207; Dugard and Seme "Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation" 2018 *South African Journal of Human Rights* 43; Boshoff et al "Redistribution of Agricultural Land: Expropriation Without Compensation Debate" <https://agbiz.co.za/news/672/105/Redistribution-of-land-Expropriation-without-compensation-debate> (accessed on 19/07/2019).
- 8 Negishi "The Theory and Phenomenology of Constitutional Dismemberment" 2020 *Revista de Investigações Constitucionais, Curitiba* 813.
- 9 Chigundu "Politics and Constitutionalism: Entrenching the Rule of Law in Africa" 2019 *India Quarterly: A Journal of International Affairs* 286.
- 10 Constitutional dismemberment is recognised both as a theory and phenomenon whereby substantive alteration or modification to the constitution are effected in a manner which leads to the replacement of the constitution without following the formal requirements for writing a new constitution. Albert *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (2019) 2.
- 11 *Ibid.*
- 12 Molope "The Decision to Amend Section 25 of the Constitution Shakes Cohesion: Perceptions of Public Hearing Participants in the North West Province" 2018 *Journal of Public Administration* 328
- 13 Alston "The Populist Challenge to Human Rights" 2017 *Journal of Human Rights Practice* 1; Mazzone "Unamendments" 2005 *IOWA Law Review* 1747; Moosa "South Africans' views on Land Reform: Evidence from the South African Reconciliation Barometer" <https://www.ijr.org.za/portfolio-items/south-africans-views-on-land-reform-evidence-from-the-south-african-reconciliation-barometer/> (accessed on 19/07/2019).
- 14 The supposed *ex post* breakdown of the rule of law, democratic degeneration and pariah-ness of the Zimbabwean State partially incubated by expropriation of land without compensation, is cited as the *locus classicus* for de-legitimatising South African land expropriations. See Lahiff and Cousins "The Land Crisis in Zimbabwe Viewed from South of the Limpopo" 2002 *Journal of Agrarian Change* 653; Pienaar "Land Reform and Restitution in South Africa: An Embodiment of Justice?" in De Ville (ed) *Memory and Meaning* (2015) 145; Du Plessis "Silence is Golden: The Lack of Direction on Compensation for Expropriation in the 2011 Green Paper on Land Reform" 2014 *Potchefstroom Electronic Law Journal* 799.
- 15 Indeed, many factors have propelled land expropriation without compensation on the global agendas including congestion in urban areas, demand for human rights, and political emancipation. At the core of it is the chief question "Who owns the land?" Perspectives derived from the liberation philosophy which became an overarching ideological basis for many freedom movements in Africa seek to answer this question. See Fanon *The Wretched of the Earth* (1961) 55 <http://abahlali.org/wp-content/uploads/2011/04/Frantz-Fanon-The-Wretched-of-the-Earth-1965.pdf> (accessed on 19/11/2019). Further, the legacy of dispossession is

enabling land expropriation without compensation demonstrate that although it may garner substantial legislative support, the possibility of government taking privately owned land without paying compensation remains a highly divisive and acrimonious issue in post-apartheid South Africa.¹⁶ Therefore, pertinent to the issue of land expropriation without compensation is the need to inquire whether such an amendment to the property clause is really an amendment at all or is simply what Murphy calls an invalid unconstitutional constitutional amendment whose effects would negatively de-constitute, re-constitute, or replace the current South African constitutional identity and architecture.¹⁷

This article examines the potential lawfulness and/or unlawfulness of a constitutional amendment which permits expropriation of land without compensation in light of the idea of constitutional dismemberment in South Africa.¹⁸ It will, as much as possible, avoid exploring the mundane procedural elements of a constitutional amendment which normally emerge including questions relating to whether the public participation process was adequate.¹⁹ Enough has been written on the status of such constitutional amendments when effected in a manner that is at variance with the procedure provided in the supreme law, South African Constitution.²⁰ This article's focus is on examining the constitutionality of a procedurally sound amendment authorising expropriation of land without compensation.²¹

clearly illustrated by the Constitutional Court in *Daniels v Scribante* (CCT50/16) (2017) ZACC 13 where Justice Madlanga, borrowing a quote from Rugege, stated that: "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 mealie-meal. We must unite together to help each other and face the Boers."

This statement demonstrates that land remains central to the achievement of substantive freedom, poverty reduction and economic growth in South Africa. Moseneke "Keynote Address – Reflections on South African Constitutional Democracy – Transition and Transformation" <http://www.mistra.org.za/Library/ConferencePaper/Documents/Moseneke%20Keynote%20Address%20at%20the%2020%20Years%20of%20Democracy%20Conference%2012%20%2013%20November%202014.pdf>; (accessed on 15/09/2019); Hendriks and Olivier "Review of the South African Agricultural Legislative Framework: Food Security Implications" <http://www.tandfonline.com/doi/abs/10.1080/0376835X.2015.1044075> (accessed on 19/09/2019).

- 16 Afriforum "Expropriation without Compensation: A Disaster in Waiting" <https://www.afriforum.co.za/wp-content/uploads/2019/08/Expropriation-without-compensation.pdf> (accessed on 19/09/2019). Boyle "The Land Problem: What Does the Future Hold for South Africa's Land Reform Program? Comparative Analysis With Zimbabwe's Land Reform Program: A Lesson on What Not to Do" 2001 *India International and Comparative Law Review* 666.
- 17 Levinson "Responding to Imperfection: the Theory and Practice of Constitutional Amendment" in Murphy *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity* (1995) 163.
- 18 Slade "Towards a Clearer Understanding of the Difference between the Obligation to Pay Compensation and the Validity Requirements for an Expropriation" 2019 *Speculum Juris* 23.
- 19 The procedural aspects of a constitutional amendment were alluded to in *United Democratic Party v President of the Republic of South Africa* 2002 CCT 23/02; International Institute For Democracy and Electoral Assistance "Constitutional Amendment Procedures" http://constitutionnet.org/sites/default/files/constitutional_amendment_procedures.pdf (accessed on 09/10/2019); South African Institute for Advanced Constitutional and Public, Human Rights and International Law "Submission on the Constitution Eighteenth Amendment Bill" <https://www.uj.ac.za/faculties/law/saifac/Documents/Submission%20Constitution%20Eighteenth%20Amendment%20Bill.pdf> (accessed on 10/09/2019).
- 20 Section 74 of the South African Constitution prescribes procedures that must be complied with for a valid constitutional amendment to be passed. If these are not complied with, the amendment can be struck down by the Constitutional Court. We assume that the legislature will comply with the requisite procedures. Accordingly, there is no need to belabour the procedural requirements for amendment.
- 21 We are alive to the criticism beleaguering the process of sourcing public opinion through participation, written submissions, public hearings and dialogues as well as Parliamentary debates. Some writers maintain that, despite the process of public hearing, expropriation without compensation was already a foregone conclusion, and that no amount of opposing views could have persuaded the Committee or Parliament to abandon or deviate from its resolution. It can be submitted that many of the public hearings were also mired with chaos with parliamentarians insulting presenters with dissenting views. For a further discussion on the process see October "Land Expropriation Shambles Highlights how Public Participation at Parliament is not Working" <https://www.dailymaverick.co.za/article/2018-11-29-landexpropriation-shambles-highlights-how-public-participation-atparliament-is-not-working/> (accessed on 14/09/2019); Van Staden "Amending the Constitution on Shaky Grounds will Cause Illegitimacy" <https://www.bbrief.co.za/2018/11/19/amending-theconstitution-on-shaky-grounds-will-cause-illegitimacy/> (accessed on 11/11/2019); Corrigan "Constitutional Committee Fails Public Participation Test on EWC" <https://www.biznews.com/thoughtleaders/2018/12/13/ewc-ong-difficult-path-lies-ahead> (accessed on 11/11/2019).

The article is divided into six parts. Immediately following this introduction is a part dealing, albeit very briefly, with our research methodology followed by part three which largely presents the history that informs the debate on the constitutionality of land expropriation without compensation in the periods before and after the advent of South Africa's constitutional order.²² The fourth part examines circumstances in which an amendment of the Constitution which allows expropriations of land without compensation may constitute an unconstitutional constitutional amendment under the present Constitution of South Africa.²³ It assesses the merits of potential arguments against such a constitutional amendment in light of the constitutional limitations.²⁴ Central issues emanating from scrutinising the constitutionality of an amendment intended to sanction land expropriation without compensation, including the problems of liberal democratic erosion, juristocracy, and legal discontinuity are explored.²⁵

The fifth part offers recommendations on how a constitutional amendment can incorporate certain essential protections to prevent abuse of the power associated with the state's right to expropriate land without compensation.²⁶ The objective of these recommendations is to ensure that such a constitutional amendment does not lead to constitutional dismemberment which may violate the values, structure, and identity of the property clause in a way that threatens the rule of law in South Africa.²⁷ Lastly, the sixth part concludes the discussion on the constitutionality of an amendment authorising expropriation of land without compensation in light of constitutional dismemberment.²⁸ Accordingly, one of the questions confronted in this article appertains to how constitutional reformers can avoid delivering an amendment that authorises unfettered expropriation of land without compensation potentially inconsistent with maintenance of the rule of law and the foundational values of the constitutional order.²⁹

2 QUALITATIVE METHODOLOGY AND NON-PHENOMENON APPROACH

The purpose of this article is to examine the potential lawfulness and/or unlawfulness of a constitutional amendment which permits expropriation of land without compensation in South Africa in light of the idea of constitutional dismemberment.³⁰ The methodology used in exploring the constitutionality of such a constitutional amendment should be reliable.³¹ There are mainly two types of research approaches that may be employed in law.³² These include the quantitative approach and the qualitative research approach.³³ This article relies exclusively on the qualitative methodology.³⁴ The qualitative approach may be used by means of several research methods which have varying effectiveness and applicability depending on the nature of the subject matter.³⁵ For the preparatory work on this article, the qualitative approach was implemented by means of a limited number of research methods. These specifically include

22 Martiniello "Dispossession and Access to Land in South Africa: an African Perspective" 2010 *Review of African Political Economy* 37.

23 Dellinger "The Legitimacy of Constitutional Change: Rethinking the Amendment Process" 1983 *Harvard Law Review* 388; Albert "An Unconstitutional Amendment in Trinidad and Tobago" 2014 *International Journal of Constitutional Law* 5; Albert "Amending Constitutional Amendment Rules" 2015 *International Law Journal* 681.

24 Contiades and Fotiadou "Models of Constitutional Change" in Xenophon (ed) *Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA* 417 (2012) 417.

25 Albert "The Expressive Function of Constitutional Amendment Rules" 2015 *Journal of Constitutional Research* 2359.

26 Lars "The Incoherence of Strong Popular Sovereignty" 2013 *International Journal of Constitutional Law* 101; Van Horn and Alison "Redefining Property: The Constitutional Battle Over Land Redistribution in Zimbabwe" 1994 *Journal of African Law* 144.

27 Albert "The Structure of Constitutional Amendment Rules" 2014 *Wake Forest Law Review* 915.

28 Negishi "The Theory and Phenomenology of Constitutional Dismemberment" 2020 *Revista de Investigações Constitucionais, Curitiba* 816.

29 Bester "South Africa: The Current State of the Rule of Law and Key Challenges in Strengthening The Rule of Law" https://www.researchgate.net/profile/Petrus_Bester/publication/329011927_South_Africa_The_current_state_of_the_rule_of_law_and_key_challenges_in_strengthening_the_rule_of_law/links/5bef9ec3a6fdcc3a8ddbef88/South-Africa-The-current-state-of-the-rule-of-law-and-key-challenges-in-strengthening-the-rule-of-law.pdf (accessed on 19/10/2019).

30 Roznai *Unconstitutional Constitutional Amendments: the Limits of Amendment Powers* (2017) 179.

31 *Ibid.*

32 Johnson and Christensen *Educational Research: Quantitative, Qualitative, and Mixed Approaches* (2012) 366.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

historical studies, critical content analysis and comparative sectional analysis.³⁶ These research methods are regarded as the most suitable for the subject of this article because of the following reasons.³⁷ First, the historical studies method employed in Parts two and three of the article³⁸ enables a credible discussion of the historical and factual background of the debate and contestations around land expropriation without compensation in South Africa.³⁹ Second, the critical and comparative approach is used in the fourth, fifth and sixth parts of the article to analyse the proposed constitutional amendments in light of the notion of constitutional dismemberment.⁴⁰ Third, primary and secondary legal source analysis is relied on throughout the article. Those legal sources used include the Constitution, legislation, judicial decisions, foreign law, journals, internet sources and textbooks on constitutional theory.⁴¹

3 CONTEXTUAL AND HISTORICAL BACKGROUND

There is widespread consensus amongst government officials, political actors, non-governmental organisations, and academic commentators that no discourse on the constitutionality of land expropriation without compensation would be complete without the pertinent contextual background.⁴² This is because much of the arguments raised [for] and [against] land expropriation without compensation, whilst constitutionally grounded, are also largely rooted in the colonial legacy of property dispossession, wealth deprivation, social exclusion, political marginalisation and economic disempowerment as well as the South African government's failure to implement land reform in the past 27 years.⁴³ This historiography provides the contextual framework in which the constitutionality of an amendment to expropriate land without compensation in South Africa should be interrogated.⁴⁴ Undeniably, such contextual historiography has a pre-colonial and post-colonial dimension.⁴⁵ Illustratively, land dispossessions or expropriations dominated the socio-economic, political and legal discourse of the earliest pre-colonial States such as Mapungubwe, Great Zimbabwe, Monomotapa, Rozvi, Zulu, Xhosa and the Chinese Empires, among others.⁴⁶ Central to the politics of these earliest communities was the skewed land ownership patterns imposed by the ruling elites on the general population through coercive military force applied to secure prime agricultural land for themselves and their progenies.⁴⁷ These ineluctable economic inequalities engendered ethnic social struggles, wars and later on peasant-driven revolutions.⁴⁸

Elsewhere, many centuries later, the iconic 1776 United States (US) Declaration of

36 *Ibid.*

37 McConville and Chui (eds) *Research Methods for Law* (2017) 9.

38 Clinch *Legal Research: A Practitioner's Handbook* (2013) 17.

39 Sparks "Land in South Africa: Dispossession, Constitutionalism, Political Expediency" https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1184&context=senproj_s2019 (accessed on 19/10/2019).

40 *Ibid.*

41 Holburn *Butterworths Legal Research Guide* (2001) 6.

42 Klaasen "Constitutional Interpretation in the so called 'Hard Cases: Revisiting *S v Makwanyane*" 2017 *De Jure* 11; Gumede "Land Reform in Post-apartheid South Africa: Should South Africa follow Zimbabwe's Footsteps?" 2014 *International Journal of African Renaissance Studies - Multi-Inter and Transdisciplinarity* 55; Kloppers and Pienaar "The Historical Context of Land Reform in South Africa and Early Policies" 2014 *Potchefstroom Electronic Law Journal* 679.

43 Nqokaitobi *The Land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2018) 4; Boudreaux "Land Reform as Social Justice: The Case of South Africa" 2010 *Economic Affairs* 13; Klug "Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-apartheid South Africa" 2018 *South African Journal on Human Rights* 460.

44 Webb "The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law" 1996 *Journal of Constitutional Law* 216.

45 Hlomendlini and Makgolane "Land Expropriation without Compensation: Possible Impact on the South African Agricultural Economy" <https://www.blsa.org.za/assets/Uploads/2017-July-Possible-impactof-land-expropriation-on-the-agric-sector-27-July2.pdf> (accessed on 19/10/2019).

46 Huffman "Mapela, Mapungubwe and the Origins of States in Southern Africa" 2015 *South African Archaeological Bulletin* 25; Miao et al "China's Land-Use Changes during the Past 300 Years: A Historical Perspective" 2016 *International Environmental Research and Public Health* 6; Eberhard *A History of China* (2004) 26.; Sicilia "A Chiefly Succession Dispute in the Mid-Zambezi Valley: Contemporary Challenges and Dynamics" 2014 *Social Evolution and History* 123; Wright "Beyond the Zulu Aftermath: Rescrambling Southern Africa's Mfecane Migrations" <http://www.kznhas-history.net/files/seminars/Wright2006.pdf> (accessed on 16/05/2020).

47 Monroe "Power and Agency in Precolonial African States" 2013 *Annual Review of Anthropology* 27.

48 Mkandawire "The Terrible Toll of Post-colonial Rebel Movements in Africa: towards an Explanation of the Violence against the Peasantry" 2002 *Journal of Modern Change* 189; Peters "Inequality and Social Conflict Over Land in Africa" 2004 *Journal of Agrarian Change* 279.

Independence and the subsequent French Revolution of 1789 were seismic geo-political occurrences which led to the confiscation of land without compensation from the British crown in the case of the US and from the feudal lords in the case of France resulting in the redistribution of such land to the landless majority.⁴⁹ Further, several European countries such as Germany, Spain, and Denmark, among others, embarked on a moderate land expropriations agenda.⁵⁰ Consequently, Europe only completed its land redistribution agenda after World War II with the expropriation of land in the southern cities of Italy.⁵¹ At the same time, inspired by the communist ideological persuasions of Karl Marx and Friedrich Engels, the Mexican, Russian, Chinese and Cuban revolutions led to the first comprehensive rural land-based expropriations without compensation and subsequent nationalisations which took place outside Europe.⁵²

The aforementioned communist-socialist school of thought became the primary underlying *motif* driving several states across the world to consider land expropriation without compensation as the pre-condition for the establishment of an egalitarian society.⁵³ For the states that embraced Marxists ideas, the second phase, after expropriation of land without compensation and its distribution to the peasants, involved collectivisation of agriculture to achieve high levels of economic development.⁵⁴ Nevertheless, collectivisation efforts failed to produce the desired outcomes in many current and former communist-controlled countries such as China, Russia.⁵⁵ Hence, de-collectivisation programs have been implemented in China, and Vietnam replacing collective farming.⁵⁶ Other notable land reform programs occurred in Japan, Korea, and Taiwan, with strong bilateral support from the United States (US) and her allies.⁵⁷

The demise of the western-driven colonial project culminated in newly established

49 Historically, the US was settled by Europeans fleeing religious and political oppression. The settlers were searching for liberty and fraternity which is currently guaranteed in the First Amendment to the U.S. Constitution and for access to land. Historians maintain that in America's early years European societies were still labouring under the vestiges of feudalism. An elite owned most of the economic resources dashing the hopes of the ordinary person to obtain freehold. While the US offered an alternative because in theory white male immigrants could have ownership of land, the "land of the free and the home of the brave" staggered under the colonial tentacles of Britain. The British crown exercised its sovereign power over colonial America. Jones "The 'Agrarian Law': Schemes for Land Redistribution during the French Revolution" 1991 *Oxford University Journal, Past and Present* 104; Commenge "America's Spirit of 1776: the First Anti-colonialist Revolution" <https://unesdoc.unesco.org/ark:/48223/pf0000074826> (accessed on 18/05/2020).

50 For example, in Germany, immediately after the dethronement of the Nazi regime at the end of World War II, the Soviet Military Administration (SMA) adopted the SMA Command Nos. 124 allowing the Soviets to rapidly sequester real property within their occupation zones. The Soviets were to seize all property of: (a) the German government; (b) the Nazi party and its leading members; (c) the German military command; (d) corporations and partnerships dissolved or forbidden by the SMA; (e) citizens of countries allied with Germany in the war; and (f) other persons identified by the Soviet Command on special lists or otherwise. After 1945, the SMA carried out a program of expropriations aimed at agricultural holdings of more than 100 hectares. These expropriations were carried out without adhering to aforementioned classification of property ownership. In urban areas, ownership of real estate, buildings, inventories and related businesses was forcibly transferred to manual labourers, displaced persons, and craftsmen without compensation to the former title holders. The new owners rarely had the knowledge or expertise to farm these estates at a profit, and the government soon used their poor economic performance to pressure them to collectivize into agricultural production communes. The property interests united in communes were technically retained by these new farmers, but could only be inherited, not sold or otherwise alienated, by them. Although Article 23 of the 1949 Constitution of the German Democratic Republic declared that equitable and just compensation must be paid in every case of government expropriation, the campaign of outright confiscations begun by the SMA continued until at least 1952. These measures were particularly directed at those citizens with business relationships to individuals officially classified as Nazis or war criminals. The assets of Germans who had left the Soviet Occupied Zone without permission of the appropriate authorities were disposed of in various ways over the years. The controlling principle in all such cases, however, was the legal definition of flight from the republic as a criminal act. See Doyle "A Bitter Inheritance: East German Real Property and the Supreme Constitutional Court's Land Reform Decision of April 23, 1991" 1992 *Michigan Journal of International Law* 833.

51 Franklin "Social Structure and Land Reform in Southern Italy" 1961 *The Sociological Review* 323.

52 Binswanger-Mkhize et al *Agricultural Land Redistribution toward Greater Consensus* (2009) 6.

53 Yeh "Land Reform and the Revolutionary War: A Review of Mao's Concepts and Doctrines" <https://apps.dtic.mil/dtic/tr/fulltext/u2/742332.pdf> (accessed on 16/05/2020).

54 Kokaisl "Soviet Collectivisation and Its Specific Focus on Central Asia" 2013 *Agricultural Economics and Informatics* 122.

55 Tauger *Stalin Soviet Agriculture and Collectivisation* (2006) 109.

56 Qug-Toan and Iyer "Land Rights and Economic Development: Evidence from Viet Nam" https://www.researchgate.net/publication/23722802_Land_Rights_and_Economic_Development_Evidence_From_Vietnam (accessed on 19/05/2020).

57 Perkins "China's Land System: Past, Present, and Future" in Ingram and Hong *Property Rights and Land*

independent governments embarking on relatively significant land expropriations without compensation across North Africa and the Middle East, mainly in Egypt, Algeria, Iran, Iraq, and Syria.⁵⁸ These land redistribution programs were implemented in order to reclaim agricultural land from quasi feudal lords and sometimes to reverse the legacy of colonial land dispossessions.⁵⁹ Similarly, moderate agrarian reforms were adopted in India after securing independence from Britain.⁶⁰ Further, in many Latin American countries western-backed land expropriations without compensation occurred after the eruption of the Cuban Revolution to deter the expansion of communist-inspired revolutions.⁶¹ However, expropriation of land without compensation in these countries achieved modest results largely leaving skewed land ownership rights virtually unchanged.⁶² Thereafter, in the 1980s the prospects of embarking on expansive land expropriations without compensation were dashed with the coming to power of new regimes in many Latin American countries which were championing a different posture of politics and policy thrust.⁶³

Notwithstanding the above, the first noteworthy moderate land expropriations without compensation in sub-Saharan Africa occurred in Kenya during the 1960s and 1970s.⁶⁴ In contrast, South Africa was, at that time, still reeling under a prolonged period of colonial subjugation, racial oppression and land dispossession which rendered the majority of its citizen's landless leading to the white minority group owning the greater part of the agricultural land to the exclusion of others.⁶⁵ Although the landless black majority mounted liberation resistance struggles against colonial subjugation they were heavily defeated by the well-resourced colonial militaries.⁶⁶ At the heart of these anti-colonial struggles were the need to protect the dignity of the landless black majority through land repossession from the colonialists.⁶⁷ As Lewin maintains, "whatever minor causes there may have been for the many Bantu-European wars, the desire for land was the fundamental cause."⁶⁸

South African land dispossession, mainly of the black people, occurred through colonial conquest and malfeasance.⁶⁹ However, these historic dispossessions largely took place through

Policies (2009) 70; Kim "Land Reform in South Korea under the U.S. Military Occupation, 1945–1948" https://www.mitpressjournals.org/doi/pdf/10.1162/JCWS_a_00639 (accessed on 12/05/2020).

58 Rae "An Overview of Land Tenure in the Near East Region" <http://www.fao.org/3/a-aq202e.pdf> (accessed on 22/05/2020).

59 Stephens Nasser: *A Political Biography* (1971) 4; African Development Bank et al "Land Policy in Africa: North Africa Regional Assessment" https://www.uneca.org/sites/default/files/PublicationFiles/regionalassessment_northafrica.pdf (accessed on 24/05/2020). Smith "The Political and Economic Ambitions of Algerian Land Reform, 1962-1974" 1975 *Middle East Journal* 269; Bennewitz1 "Land Tenure in Latin America: From Land Reforms to Counter-Movement to Neoliberalism" 2017 *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* 1794.

60 *Ibid.*

61 De Janvry and Sadoulet "Land Reforms in Latin America: Ten Lessons toward a Contemporary Agenda" https://are.berkeley.edu/~esadoulet/papers/Land_Reform_in_LA_10_lesson.pdf (accessed on 26/05/2020); Ortiz "The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba" 2000 *Loyola University of Los Angeles International and Comparative Law Review* 332.

62 Munk et al "Land Governance, Gender Equality and Development: Past Achievements and Remaining Challenges" 2016 *Special Issue: Aid for Gender Equality and Development* 412. Karst "Latin-American Land Reform: The Uses of Confiscation" 1964 *Michigan Law Review* 327.

63 Oxfam "Unearthed: Land, Power and Inequality in Latin America" https://www-cdn.oxfam.org/S3fs-Public/File_Attachments/Bp-Land-Power-Inequality-Latin-America-301116-En.Pdf (accessed on 20/05/2020).

64 Moyo "The Land Question in Africa: Research Perspectives and Questions" <https://www.google.com/search?hl=en&gbv=2&q=Sam+Moyo+%E2%80%9CThe+Land+Question+in+Africa%3A+Research+Perspectives+and+Questions%E2%80%9D&oq=&aqs=heirloom-srp> (accessed on 24/05/2020); Moyo "Debating the African Land Question with Archie Mafeje" 2018 *Agrarian South: Journal of Political Economy: A triannual Journal of Agrarian South* 10.

65 Akinola *Land Reform in South Africa: an Appraisal* (2018) 4.

66 Martiniello "Dispossession and Access to Land in South Africa: an African Perspective" 2010 *Review of African Political Economy* 545.

67 *Ibid.*

68 Lewin "The Native in South Africa" in De Klerk (ed) *A Harvest of Discontent: The Land Question in South Africa* (1944) 99.

69 Modise "The Natives Land Act of 1913 Engineered the Poverty of Black South Africans: a Historical-ecclesiastical Perspective" <http://www.scielo.org.za/pdf/she/v39n2/20.pdf>. The Constitutional Court in the *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* referred to this degradation of rights in land as a "systematic practice of exploiting black people as a cheap source of labour for the financial benefit of white farmers" which enabled "landowners to unilaterally alter the status of the claimants and their families without concerning themselves with the consequences of their actions." It is this injustice that the Constitution

a well-orchestrated deployment of a plethora of laws enacted from the earliest days of the colonial administration.⁷⁰ The most infamous systematic dispossession of land by the colonial administration happened through the enactment of the Native Land Act of 1913 which divided land based on racial criteria with large parts of the infertile land reserved for Africans, and the rest of the arable land apportioned to the white minority.⁷¹ Only five per cent of all the land in the country was availed for use by the majority.⁷² In 1936, this was increased to 13 per cent of the total area of South Africa. Lamentably, the bulk of the 13 per cent of the land availed to the black majority remained in the custody of the State through the South African Development Trust purportedly held in trust for the black people.⁷³ In total 80 per cent of the black population was confined to 13 per cent of the land while whites who constituted less than 20 per cent of the total population owned over 80 per cent of the land.⁷⁴ This was exacerbated by the fact that black people were prohibited from buying land in areas other than the reserves.⁷⁵ Although race-based apportionment of land officially ended with the demise of apartheid, its legacy of the skewed property ownership picture has subsisted until this day.⁷⁶

The Native Land Act of 1913 was especially enacted to avail more land to the white minorities.⁷⁷ This repressive legislation impoverished many black people through relentless land dispossession and the outlawing of any joint agricultural activities across racial lines.⁷⁸ This meant that many black people became economically dependent on employment opportunities created by white people thereby producing a huge reservoir of cheap labour for the minority owned farms, manufacturing industries and mines.⁷⁹ The draconian Group Areas Act of 1950 legislated in 1948 by the National Party (NP), was weaponised by the apartheid State to remove black people from land declared to be white areas and to further deepen racial segregation by driving out coloured and Indian people from the so-called white areas.⁸⁰ The passing of the Prevention of Illegal Squatting Act of 1951 further consolidated the colonial land dispossessions by permitting the forceful eviction of people who were regarded as unlawful occupiers of the land.⁸¹ Under the pretext of this legislation, the apartheid State and private landowners arbitrarily evicted people and demolished their homes without court orders.⁸² Academic commentators have estimated that more than 3.5 million people were dispossessed of their land and forcibly removed under the said apartheid discriminatory laws.⁸³

The impetus which drove the South African democratic struggle to unshackle the people from the colonial tentacles in pursuit of liberation was partially influenced by the need to regain the land.⁸⁴ The Freedom Charter adopted at a multi-racial congress held in Kliptown, Soweto on 26 June 1955 by the African National Congress (ANC), among other political parties, encompasses a declaration of the fundamental principles establishing a just and equitable democratic society as well as a non-racial unitary State focusing on addressing skewed colonial property rights through land reform. The preamble to the Charter states as follows:

South Africa belongs to all who live in it, black and white, and that no government can justly claim authority unless it is based on the will of all the people ... That our people have been robbed of their birth right to land, liberty and peace by a form of government founded on injustice and inequality; That our country will never be prosperous or free until all our people live in brotherhood enjoying equal rights and opportunities; ..That only a democratic state,

and the land reform program aim to redress.

70 *Ibid.*

71 Beinart and Delius "The Historical Context and Legacy of the Natives Land Act of 1913 The Historical Context and Legacy of the Natives Land Act of 1913" 2014 *Journal of Southern African Studies* 667.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*

76 Tsheola and Makhudu "Governance of Land in South Africa and the Fallacious Bantustan Urbanisation" 2019 *Bangladesh e-Journal of Sociology* 16.

77 Hamilton "The Role of Apartheid Legislation in the Property Law of South Africa" 1987 *National Black Law Journal* 159.

78 *Ibid.*

79 Davenport and Saunders *South Africa: A Modern History* (2000) 271; Chaskalson and Lewis "Property" in Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 34.

80 *Ibid.*

81 Muller "The Legal-Historical Context of Urban Forced Evictions in South Africa" 2013 *Fundamina* 369.

82 *Ibid.*

83 *Ibid.*

84 Mazibuko "The Freedom Charter: the Contested South African Land Issue" 2017 *Third World Quarterly* 438.

based on the will of all the people, can secure to all their birth right without distinction of colour, race, sex or belief ... Restrictions on land ownership shall be ended, and all the land re-divided among those who work it, to banish famine and hunger ... All shall have the right to occupy land wherever they choose.⁸⁵

Clearly, the foregoing epigraphy envisaged that people who were historically dispossessed should have access to land as a means of restoring their human dignity and advancing economic empowerment.⁸⁶ As will be demonstrated below, this goal of expanding access to land remains elusive for the majority of South African citizens, arousing an intense discussion on the desirability and constitutionality of land expropriation without compensation.⁸⁷

3.1 The Decolonisation Process, Constitutional Order, Land, Compensation and Property Rights in South Africa

The inception of the South African democratic order which began in 1990, following decades of colonial rule, was largely a product of a negotiated process under the auspices of the Convention for a Democratic South Africa (CODESA). That famous process required rival parties to reach a compromise on many issues towards the settlement of the multifaceted conflict including the constitutional protection of property rights in a manner compatible with land reform.⁸⁸ During the negotiations, wide ideological cracks between the parties were evident.⁸⁹ The African National Congress (ANC) wanted to tilt the scale of negotiations by ensuring that the constitutionalisation of property rights would not be an obstacle to the inevitable socio-economic transformation project, especially land reform.⁹⁰ Diametrically opposing was the National Party (NP) which was extremely concerned that the existing property rights of white people would be weakened and eventually eroded, if they were not sufficiently protected in the country's first democratic Constitution.⁹¹

Further, the NP argued that the Constitution should strongly protect the property rights of existing land owners by unequivocally stating that no expropriation may occur unless in terms of a law of general application, in the public interest, subject to compensation payable to the expropriatees at present market value and with the authorisation of a court order.⁹² However, the NP eventually conceded that compensation for expropriation of property should not necessarily be predicated on market value alone, rather it could be based on a "restorative justice" mechanism that is just and equitable taking into account various factors including market value.⁹³ It can be opined that this concession was a significant achievement for the ANC, because if compensation was only payable at market value this would have hindered land reform by making the process of acquiring land most cumbersome and expensive.⁹⁴

Notwithstanding the above, Chaskalson objected that the inclusion of the aforementioned factors, which need to be satisfied before expropriation of land can lawfully take place, would lead to intractable application and interpretation problems.⁹⁵ He wanted the courts to have the exclusive discretion to determine what was "just and equitable" in every case without

85 African National Congress "The Freedom Charter" <https://www.marxists.org/subject/africa/anc/1955/freedom-charter.htm> (accessed on 25/05/2020)

86 Pienaar 2015 *Scriptura* 5.

87 Spark "Land in South Africa: Dispossession, Constitutionalism, Political Expediency" https://digitalcommons.bard.edu/senproj_s2019/223/ (accessed on 26/05/2020). Murphy "Property Rights in the New Constitution: An Analytical Framework for Constitutional Review" 1993 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 623; Badenhorst et al *The Law of Property* (2006) 257.

88 Kariuki "Can Negotiated Land Reforms Deliver? A Case of Kenya's, South Africa's and Zimbabwe's Land Reform Policy Debates" <https://www.ascleiden.nl/Pdf/workingpaper59.pdf> (accessed on 25/05/2020); Van der Walt, *Constitutional Property Law* 3 ed (2011) 461.

89 De Klerk *The Last Trek – A New Beginning: The Autobiography* (1998) 222.

90 Murphy 1993 *THRHR* 629.

91 Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 183.

92 *Ibid.*

93 This jurisprudential view is mainly subscribed to by scholars such as Du Plessis who opine that what is at stake is more than merely an equalising act of compensating the owner of the property whilst proceeding with the acquisition. Instead, underlying the transaction is the need to promote restorative justice through viewing property as an instrument of promoting social cohesion and relations. Du Plessis "The Public Purpose Requirement in the Calculation of Just and Equitable Compensation" 2014 *SSRN Electronic Journal* 385.

94 Sisk *Democratisation in South Africa: The Elusive Social Contract* (1995) 2005.

95 Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" 1995 *South African Journal of Human Rights* 233.

having to stick to pre-determined factors.⁹⁶ It is noteworthy that some parties were sceptical that the presence of such a clause in the Constitution could lead to an interpretation which sanctions compensation at a rate higher than the current market value.⁹⁷ Chaskalson posited that the inclusion of such factors could disadvantage expropriatees by forcing them to accept compensation at less than market value.⁹⁸ Eventually, the negotiators settled for the inclusion of market value as a factor, among others, to be considered when determining the quantum of compensation.⁹⁹

At the close of the first session of the CODESA negotiations, the majority of the participants adopted a Declaration of Intent consisting of thirty-four principles. The declaration provided, *inter alia*, a commitment to the supremacy of the Constitution, separation of powers between the three branches of government, universal suffrage, regular elections, an entrenched and justiciable bill of rights together with a legal order which guaranteed equality of all before the law. These cardinal principles became the *Lex fundamentalist* with which the foundation of the new post-apartheid Constitution for a democratic system had to comply.¹⁰⁰

The capstone of the multi-party negotiations was the adoption of the Constitution of South Africa, 1996.¹⁰¹ In this vein, it can be argued that South Africa's constitutional dispensation was reached through a representative process where the peoples' delegates established a new order through a democratic deliberation which posited the Constitution as the supreme law of the country.¹⁰² This new Constitution recognises centuries of systemic socio-economic, cultural and political exploitation through colonisation as well as the violence perpetrated against indigenous groups and decades of de-humanisation under apartheid.¹⁰³ While it is alive to the historical wrongs, the Constitution's enlivening thematic focus is not retribution but reconciliation.¹⁰⁴ Its preamble remarkably declares that "South Africa belongs to all who live in it, united in our diversity."¹⁰⁵ Described as the crown jewel of constitutionalism, the Constitution is a transformative "document" and "bridge" that seeks to "improve the quality of life of all citizens and free the potential of each person" thereby enabling a fractured polity to open a new chapter in the journey towards establishing a new social and political order.¹⁰⁶ But the remarkableness of the South African Constitution transcends its breaking from the past injustices; indeed equally admirable is its abandonment of parliamentary sovereignty in favour of constitutional supremacy and the establishment of a constitutional order premised on, *inter alia*, social justice, rule of law, advancement of human rights and social cohesion.¹⁰⁷

Bearing in mind that the South African constitutional order invariably emanates from periods

96 *Ibid.*

97 Badenhorst "Compensation for Purposes of the Property Clause in the New South African Constitution" 1998 31 *De Jure* 257.

98 Chaskalson "Should there be a Property Clause" in Venter and Anderson (eds) *Land Property Rights and the Constitution* (1993) 87.

99 Van der Walt "Compensation for Excessive or Unfair Regulation: a Comparative Overview of Constitutional Practice Relating to Regulatory Takings" 1999 *South African Public Law* 277.

100 This Declaration was endorsed by all parties who participated except the Homeland governments of Bophuthatswana and Ciskei as well as the Inkatha Freedom Party (IFP). The IFP argued that the insertion of the phrase "undivided South Africa" in the Declaration would undermine the establishment of a federal State. Eventually, an amendment was adopted to remove the term "undivided" from the Declaration to a unitary State. Both the IFP and the Ciskei governments then signed the Declaration. Mbambi "Codesa: Seeds of Compromise in Post-apartheid South Africa" http://wiredspace.wits.ac.za/bitstream/handle/10539/4692/NsundiMbambiP_Chapter%203.pdf;jsessionid=3D6FC45A804BA537F5DCD4EDF234E010?sequence=5 CODESA 1 – Declaration of Intent (accessed on 25/05/2020); Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* (1998) 529; Davis "Constitutional Browning: The History of Legal Culture and Local History in the Reconstitution of Comparative Influence: A South African Experience" 2003 *International Journal of Constitutional Law* 185.

101 Mthembu "Reflections on Expropriation-based Land Reform in Southern Africa" 2019 75 *Town and Regional Planning* 54.

102 Endoh "Democratic Constitutionalism in Post-apartheid South Africa: the Interim Constitution Revisited" 2015 *Africa Review* 70.

103 Roux "Transformative Constitutionalism and The Best Interpretation of the South African Constitution: Distinction without Difference?" 2009 *Stellenbosch Law Review* 259; Du Plessis and Corder *Transitional Bill of Rights* (1994) 184.

104 De Villiers *The Birth of a Constitution* (1994) 5.

105 Preamble to the Constitution, 1996.

106 Rapatsa "Transformative Constitutionalism in South Africa: 20 Years of Democracy" 2014 *Mediterranean Journal of Social Sciences* 887.

107 Roux "Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism" 2004 19 *South African Public Law* 629.

of socio-economic struggle punctuated with political de-humanisation, it represents a shared social contract or manifesto designed to ensure that the material deprivations which led to the conflict from which the society emerged are not allowed to re-emerge in the future.¹⁰⁸ As such, the South African Constitution creates a new society by enshrining justiciable socio-economic rights, as opposed to simply providing for the civil and political rights.¹⁰⁹ Accordingly, section 25 of the Constitution protects the right to property not only against arbitrary deprivation but also provides for the power of the State to expropriate land for public purposes or in the public interest, subject to payment of just and equitable compensation.¹¹⁰ The term “public interest” encapsulates the country’s land redistribution programs and land reform aimed at ensuring equitable access to all of South Africa’s natural resources.¹¹¹ Furthermore, section 26(1) of the Constitution stipulates that “everyone has the right to have access to adequate housing” and section 27(1) guarantees the right of everyone to have “...access to (a) health care services, including reproductive health care; (b) sufficient food and water.”¹¹² In sum, the State is obliged to ensure effective realisation of the aforementioned socio-economic rights to achieve social transformation as envisioned by the Constitution.¹¹³

In light of the above, it can be submitted that, *prima facie*, the South African Constitution animates the hopes of the majority of the landless black people by allowing land reform as part of economic reform and the pursuit of social justice.¹¹⁴ It places an obligation on the State to take reasonable legislative and other measures, within its available resources, to create conditions that enable citizens to have access to land on an equitable basis.¹¹⁵ Consequently, from 1994 to the present, the State has embarked on land reform for settlement or agricultural production primarily based on a three-tier system consisting of redistribution, restitution and tenure reform with a view to addressing the constitutional imperatives.¹¹⁶ It can be opined that this three-tier system has, to some extent, resulted in viable land transfers, with barely economic disturbance and the beneficiaries received ownership of the land.¹¹⁷

Aside from the aforementioned, the pace and scale of the land reform pursued by the

108 Muravyeva “The Quest for Constitutionalism in South Africa” 2016 *BRICS Law Journal* 138; Chaskalson “Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution” 1995 *South African Journal of Human Rights* 233; Van der Walt “Dancing with Codes-Protecting, Developing, Limiting and Deconstructing Property Rights in a Constitutional State” 2001 *South African Law Journal* 259.

109 De Beer “The Enforcement of Socio-Economic Rights” 2008 3 *Potchefstroom Electronic Law Journal* 2; *Government of the Republic of South Africa v Grootboom* (CCT11/00) (2000) ZACC 19; *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) (2002) ZACC 15; *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzo* 2001 (10) BCLR 1039 (SCA); *Dladla v City of Johannesburg* (2017) ZACC 42; Business Unity South Africa “Submission on the Review of Section 25 of the Constitution, to Enable Expropriation Without Compensation in The Public Interest and Propose Constitutional Amendments Where Necessary” <https://www.busa.org.za/wp-content/uploads/2018/08/Annexure-1-BUSA-Submission-Constitutional-Review-Committee-15-06-2018.pdf> (accessed on 27/05/2020); South African Human Rights Commission “Submission to the Joint Constitutional Review Committee Regarding Section 25 of The Constitution” <https://www.sahrc.org.za/home/21/files/Commissions%20Position%20on%20Expropriation%20Without%20Compensation.pdf> (accessed on 29/05/2020).

110 Ntsebeza “Land Redistribution in South Africa: The Property Clause Revisited” in Ntsebeza and Hall (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (2010) 107.

111 Pienaar and Brickhill “Land” in Chaskalson and Bishop (eds) *Constitutional Law of South Africa* (2007) 34; Claassens “Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation” 1993 9 *South African Journal of Human Rights* 427.

112 The Constitution of South Africa, 1996.

113 *Ibid.*

114 Pienaar and Brickhill “Land” 39; Claassens *SAJHR* 429.

115 *Ibid.*

116 South African Department of Land Affairs “The White Paper Land Policy 1997” <http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf> (accessed on 28/05/2020); De Klerk Foundation “Statement On Submission To Constitutional Review Committee On Possible Amendment to Section 25 of Constitution to Allow Expropriation Without Compensation” https://static.pmg.org.za/180629fwdk_statement.pdf (accessed on 28/05/2020); South African Institute of Race Relations “Submission to the Joint Constitutional Review Committee regarding its review of Section 25 of the Constitution and other Sections where Necessary, to make it Possible for the State to Expropriate Land in the Public Interest without Compensation Johannesburg, 14th June 2018” <https://irr.org.za/reports/submissions-on-proposed-legislation/irr-full-submission-to-joint-constitutional-review-committee-14-june-2018.pdf> (accessed on 04/06/2020).

117 Boshoff et al “Redistribution of Agricultural Land: Expropriation Without Compensation Debate” https://Agbiz.Co.Za/Uploads/Agbiznews18/Expropriation_Without_Compensation_Debate.Pdf (accessed on 07/06/2020);

post-apartheid State has left much to be desired.¹¹⁸ Therefore, in recent times, the Parliament of South Africa has proposed a Constitution Eighteenth Amendment Bill that would accelerate land reform by allowing the State to expropriate land without compensation.¹¹⁹ The President has further declared that land expropriation without compensation is intended to facilitate land reform and that it should not, at the same time, have a negative bearing on South Africa's agricultural production, food security, and economic development.¹²⁰ Whether such an equilibrium is practically achievable without undermining one or the other depends on the text of such a constitutional amendment, bureaucratic implementation and other competing polycentric concerns explored below.¹²¹ For now it suffices to state that the South African legislature has backed the President by adopting a resolution on land expropriation without compensation.¹²² The resolution on land expropriation without compensation, among other things, required the Parliamentary Constitutional Review Committee to solicit inputs on reviewing various constitutional provisions including the property clause in order to find ways of making expropriation without compensation constitutional.¹²³ According to the resolution on land expropriation without compensation, the land reform programme "has been fraught with difficulties" and "only 8% of land" has been "transferred back to black people since 1994".¹²⁴ The resolution identified current policy instruments like the "willing buyer willing seller policy", as well as the property clause as "hindering effective land reform".¹²⁵ It then instructs Parliament to amend the property clause to allow the State to expropriate land in the public interest without paying compensation.¹²⁶

The said Parliamentary Constitutional Review Committee was established to investigate the possibility of amending section 25.¹²⁷ Since then, there has been intense debate on the economic, social and legal desirability of such an amendment to the Constitution.¹²⁸ Although the substantive and procedural requirements for such an amendment have been analysed and commented upon by academic commentators, there is hardly any scholarly engagement on the key question whether such an amendment may introduce substantial changes into the constitution and thereby constitute an unconstitutional amendment. The critical question is whether the effect of the proposed changes could be so far reaching that it may ultimately de-constitute and re-constitute the property clause in a way that repudiates the existing constitutional structure and undermines the rule of law in South Africa.¹²⁹ The discussion in part two therefore examines the constitutionality of an amendment which allows expropriation of land without compensation in light of the idea of constitutional dismemberment.

118 Lahiff "Stalled Land Reform in South Africa" 2016 *Current History* 184.

119 South African Government "Expropriation Bill: Draft" https://www.gov.za/documents/expropriation-bill-draft-comments-invited-21-dec-2018-0000?gclid=cj0kcqjwuh6brdqarisai3iue5rtmrko2vy8vklaloekgslswbasowmckwfkquczsdg76cxriffcaamzgealw_wcB (accessed on 09/06/2020).

120 *Financial Times* "Land Reform in South Africa is Crucial for Inclusive Growth New President Outlines Potential Conditions for Expropriation without Compensation" <https://www.ft.com/content/c81543d8-a61b-11e8-926a-7342fe5e173f> (accessed on 04/06/2020).

121 Hlomendlini and Makgolane "Land Expropriation without Compensation: Possible Impact on the South African Agricultural Economy" <https://www.bizcommunity.com/Article/196/358/165375.html> (accessed on 04/06/2020).

122 South African Parliament "Ad Hoc Committee on Amending Section 25 of the Constitution" <https://www.parliament.gov.za/project-event-details/285> (accessed on 04/06/2020).

123 South African Government "Parliament Approves Recommendation to Amend Section 25 of Constitution" <https://www.gov.za/speeches/ncop-approves-recommendation-amend-section-25-constitution-5-dec-2018-0000> (accessed on 04/06/2020).

124 *Ibid.*

125 *Ibid.*

126 South African Parliament "The Mandate of The Constitutional Review Committee" <https://static.pmg.org.za/200902MANDATE.Pdf> (accessed on 04/06/2020).

127 *Ibid.*

128 The Banking Association of South Africa "Public Submission to the Ad Hoc Committee on the Amendment of Section 25 of The Constitution of The Republic of South Africa, 1996 Constitution Eighteenth Amendment Bill" <https://www.banking.org.za/wp-content/uploads/2020/02/EWC-BASA-Submission.pdf> (accessed on 04/06/2020); Equal Education Law Centre and Equal Education "Submission Relating to the Review of Section 25 of The Constitution in the Context of Expropriation of Land Without Compensation" https://static.pmg.org.za/ee-eelc-submission-to-the-constitutional-review-committee_-_review-of-section-25.pdf (accessed on 04/06/2020).

129 Douglas "What in the Constitution Cannot be Amended?" 1981 *Arizona Law Review* 718; Wang *Limits on the Power to Revise A Constitution: Study on the Worldwide Constitutional Laws* (2007) 38; Albert "The Structure of Constitutional Amendment Rules" 2014 *Wake Forest Law Review* 914; Suber *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, And Change* (1990) 12.