

# An Analysis of Post-apartheid Land Reform Interventions Fostering Restoration of Dignity and Equality in South Africa

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## **Abstract**

*This article discusses constitutional, legislative and policy frameworks strategically introduced post-apartheid era to foster land expropriation reforms that would restore dignity, equity, equality and justice to the forcefully dispossessed Black South Africans from their land during the pre-colonial and apartheid regimes. More importantly, even though the colonial and apartheid settlers metamorphosised into rulers expropriated land without compensation, the Constitution of the Republic of South Africa 1996 has brought about various interventions that seek to ensure that the land that was forcefully taken should be returned to the right owners. This proposition has continued to generate fierce debates in the country. While some pundits have asserted that the Black majority now in charge of governance, should use post-apartheid laws to expropriate land without compensation, there have been stiff resistance from the white minority who are both the owners of vast land and at the same time exercising right of possession and occupation respectively. It is against these competing interests that this paper postulates that in order to restore the dignity of the dispossessed and forcefully removed Black South Africans from their rightful land, there is need to look at the constitutional imperatives as well as equity and justice based on the post-apartheid frameworks that are available to ensure that the past apartheid land dispossession and injustices are redressed, and the wrongs committed are remedied.*

**Keywords:** land justice, inclusivity, equality, post-apartheid, constitutional imperatives.

**JEL Classification:** K30, K33, K38

## **1. Introduction**

The land question in South Africa, as well as its socioeconomic transformation related matters, remain crucial in public debates aimed at generating different development trajectories in the confined context of land reform. The land issue has typically cantered on land tenure and livelihoods, rather than agrarian development and land justice.<sup>3</sup> The topic of land reform and restoration remains unsettled in South Africa's legal framework. One of the aspects of land reforms which bothers on land expropriation without compensation has become a mantra in the offices of government leaders to the extent that it has lost its gloss and glamour in the eyes of vast majority of civilians. The promises of transformation and land reform to achieve redistributive justice through meaningful and advantageous means have been mostly unfulfilled, this contrasts with a backdrop of broad and far-reaching understanding.<sup>4</sup>

The need to amend Section 25 of the Constitution of the Republic of South Africa 1996 (Constitution)<sup>5</sup> to concede land expropriation without compensation has dominated South African public discussions for many years. Thus, in 2019, parliament approved the resolution to modify the Constitution to unambiguously permit expropriation, an “*Ad Hoc* Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution”<sup>6</sup> subsequently started engaging in the legislative process to engender these changes that are put forward.<sup>7</sup> The current intellectual discourse

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<sup>3</sup> Mudau, J. “Land Expropriation Without Compensation in a Former Settler Colony: A Polemic Discourse” (2021) 18/3 *African Renaissance* at 163-183.

<sup>4</sup> James, D. *Gaining ground?: Rights and property in South African land reform* (2007, Routledge-Cavendish).

<sup>5</sup> The Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Parliament of South Africa “Ad Hoc Committee to initiate and Introduce Legislation amending Section 25 of the Constitution” (last accessed 22 March 2022).

<sup>7</sup> Stellenbosch Institute for Advanced Study “Compensation through Expropriation without Compensation? Constitutional Amendment, Land Reform and the Future of Redistributive Justice in South Africa,” available at <https://stias.ac.za> (last accessed 29 April 2022).

on land expropriation with or without compensation provides an ample opportunity to raise important questions insofar as the colonial and apartheid legacy of land dispossession is concerned. This is an opportunity not only to look at the crucial issue of land expropriation with or without compensation but to ask a question of paramount importance, in essence; what does “Land” mean to people of South Africa? This is a question which must be answered in consideration of a preponderance of circumstances, together with what has transpired in the past. For some people land means security of tenure and farming, whereas to some, land means wealth and opportunity for business. However, from a perspective of constitutionalism and or transformation, land means dignity, equality, freedom, and property rights for everyone.<sup>8</sup>

The South African post-democratic era, the Constitutional dispensation has moreover resuscitated debates about the content of ownership of land. Even though the 'property clause' incorporates the perpetuity of the neoliberal land ownership paradigm, its provisions illustrate categorically that arguments against land reform; achieved through expropriation without compensation are no longer viable, if they were ever viable. In the new constitutional framework, the property clause limits the circumstances and method of property deprivation and expropriation, while preserving the permanent value of neoliberal land ownership. In essence, section 25(8) of the Constitution generally provides that the state may depart from any provision in the section in question, for so long as that departure is compliant with section 36(1) of the Constitution.<sup>9</sup> Consequently, section 25 expressly mandates reform, insofar as access to land, sanitation, water, and other natural resources are concerned, indicating a strong desire for a more socially accountable form of ownership in the future. It uses property (and its preservation) to achieve a society based on the values outlined in section 1(a) of the Constitution. For purposes of this contribution, we consider transformative constitutional dimensions of using post-apartheid laws to redress the historical land injustices which underpins the present inequalitarian society of South Africa.<sup>10</sup>

## 2. Background

The issue of land ownership disparities in South Africa is deeply rooted in the history of land dispossession as well as racial segregation.<sup>11</sup> South Africa has a sad history of dispossession. The story of land deprivation is a narrative in which many indigenous people were hunted down and killed by both colonial and apartheid rulers.<sup>12</sup> Territorial battles were the order of the day and land; crops and cattle were claimed as golden medals of war by the colonial and apartheid rulers. From historic point of view, land dispossession started shortly after Johan Van Riebeeck arrived at the Cape of Good Hope in 1652.<sup>13</sup> The land dispossession was worsened when the first group of colonialists (so-called ‘free burgers’) were allowed to farm for their own profit. The arrival of British settlers at the Cape intensified the process of land dispossession and humiliation of African people. The land dispossession process was characterised by hostilities and wars between the settlers and African people (the rightful owners of the land). The Great Trek which occurred after Cape occupation also accelerated the process of land dispossession in the territories which were later called the Boar Republics of Transvaal and Free State. Most importantly, the colonial government at the Cape and Natal Colony, and the leaders of the Boar Republics legalised and legitimised the ownership of land by the settlers over the conquered or stolen land of black majority. This deprivation of land was achieved through a system of title deed which guaranteed land ownership by a mere piece of paper.

<sup>8</sup> Khunou, F., “An abstract of paper presented at the Land Expropriation Symposium” Organised by Polokwane Bar and other stakeholders, held at Meropa, Polokwane, South Africa 13 July 2018.

<sup>9</sup> Van Der Walt, A.J. “Section 25 vortices (part 1)” (2016) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* at 412-427.

<sup>10</sup> Liebenberg, S. *Socio-economic rights: adjudication under a transformative constitution* (2010, Juta and Company Ltd).

<sup>11</sup> Matseke S. “Land reform in South Africa” (2021) 88/3 *The Thinker* at 40-47.

<sup>12</sup> Laband, J. *The land wars: The dispossession of the Khoisan and AmaXhosa in the Cape Colony* (2020, Penguin Random House South Africa).

<sup>13</sup> Troup, F. *South Africa: an historical introduction* (2022, Taylor & Francis).

The colonial and the Apartheid regime used several methods of dispossession to legitimise land theft and dislodge Africans from their land. Legislation was the most prominent such as the Glen Grey Act 1884, Squatters Act 1887, Native Land Act 1913, Group Areas Act 1950, including resolutions such as Transvaal and Free State Volksraad Resolutions. The Glen Grey Act, passed by Cecil John Rhodes who became proud of the fact that he had made a "Bill for Africa" by giving a certain area to Africans for their own development, but in reality, it was used to keep native Africans apart, take away their voting rights, and limit their economic choices. Squatters Act, this law gave the go-ahead to remove squatter populations by force. Government officials and municipal authorities were given carte blanche to demolish the homes of squatters and expel them. The Native Land Act prohibited blacks from owning or occupying land unless they worked for a white master. 87 percent of the land was given to white people, while black people were forced to compete for what was left. The Group Areas Act, this law divided South Africa's cities and towns into separate residential and commercial zones. Many Coloured, Black and Indian people were expelled from territories designated for white occupancy.

The above exposition of statutes is of paramount importance in understanding land dispossession in the context of law and force. For instance, the Occupation Act of 1886 was passed by the Boer Republic of Transvaal and legalise acquisition of land by the Transvaal government without any compensation in districts of Zoutpansberg as well as Waterberg. This was the first law passed in Transvaal to govern land distribution. Legislation, resolutions, proclamations, and ordinances were instrumental in legalizing systematic land confiscation. The Khoikhoi, the San, and the Africans were expelled from their ancestral lands by the Dutch, British, Boer, and the apartheid governments, respectively. Africans, and Indians were divided and prohibited from holding land in urban areas. All these events resulted in the expropriation of land, which must be viewed in the context of historical injustices. It is this history which we must take into consideration when analysing the notion of expropriation of land without compensation as a land reform idea for transformative constitutionalism.

## **2.1. Post-apartheid democratic South Africa: trails to restore land disparities (beginning of democracy)**

Through the implementation of the following three pillars, land restitution, redistribution, and tenure security, the concept of land reform tried to tackle apartheid's socioeconomic difficulties.<sup>14</sup> Post apartheid dispensation considers land as an essential element of planning, and land-related statutes have an impact on development law; consequently, the main objective of land reform was to implement change on issues related to land by employing those three pillars. Land reform is a process systematically defined by a sequence of innovations to transform structures of ownership of land, its use, and tenure systems in a manner that promotes sustainable development to empowers individuals who lost land due to the enactment of the Natives Land Act. As a realistic compromise between colonialism (1652) and apartheid (1948), 1913 was chosen a suitable break-even point for land expropriation in South Africa. Therefore, it is vital for individuals or groups who were deprived of their land after 1913. This was done to reduce the likelihood of violence resulting from opposing claims that dated far back in time and were difficult to substantiate, especially among various Black South African communities.<sup>15</sup> Notably, the deal has been contested, particularly by individuals representing the Khoi San, who believed that it is indefensible; there has been no change, but the government has made references to the possibility of modifying the dispossession periods. White ownership of land pattern has been changed and more than 17 000 million hectares of land have been

<sup>14</sup> Gibson, J.F. *Overcoming historical injustices: Land reconciliation in South Africa* (2009, Cambridge University Press).

<sup>15</sup> Keep, T. and Hall, R. "Land redistribution in South Africa" (2016), available at: [https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High\\_Level\\_Panel/Commissioned\\_Report\\_land/Commissioned\\_Report\\_on\\_Land\\_Redistribution\\_Kepe\\_and\\_Hall.pdf](https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_Report_land/Commissioned_Report_on_Land_Redistribution_Kepe_and_Hall.pdf) (last accessed: 25 May 2022).

transferred since 1994.<sup>16</sup>

This accounts for 21 percent of the 82 759 million hectares of farmland held under freehold. This is crucial considering the government's commitment to redistribute 30 percent of land, although the given time frame exceeds the initial aim. Kepe and Hall describe the status of the land reform pillars and suggest that the restitution program began in 1994 but has made only moderate progress since then. Less than five of the 12 000 submitted cases had been resolved by 1997, prompting the outrage of a number of individuals, especially in light of the fact that 3.5 million people were forcibly evacuated under the Land Act of 1913.<sup>17</sup> In 1998, the program was evaluated and modifications were made to expedite the administrative procedure, which was bogged down by legal considerations. By the end of 1998, 68 878 claims for restitution had been registered, but just 49 had been settled, what an embarrassment!<sup>18</sup>

According to the reports from the Land Affairs Department, at the end of the first quarter of 2005, the Commission on Restitution of Land Rights had settled 59 395 requests, benefiting 900 thousand persons 88 093 hectares of land.<sup>19</sup> South Africa's estimated 1.76 million rural households required a total of 23.6 million hectares of agrarian land for the land redistribution program. However, only 161 317 hectares (0.7% of the land) had been transferred by 1998.<sup>20</sup> Compared to the 30 percent of land that was supposed to be transferred by 1999, the 0.7 percent of land that was redistributed was drastically low. Sihlobo and Kapuya highlighted the most recent land redistribution statistics. The 21 percent of land that has been reallocated is less than the original goal and has exceeded the first deadline.<sup>21</sup> Nonetheless, Kepe & Hall assert that one of the reasons behind this was that the initial and updated goals were unachievable due to the state's inadequate resources.<sup>22</sup> The third element of land reform is land tenure reform, which strives to solve apartheid-era issues such as tenure instability and concurrent and contested land claims. Restitution and redistribution strengthens' this component, which has the primary goal of preventing evictions and providing long-term stability on property owned by or occupied by labour tenants, in order to encourage people to participate in the development of their land. This is done with the goal of boosting the economy.

During the transition to democratic governance 28 years ago, section 28 of the Interim Constitution reflected a compromise between the ANC and the now-defunct National Party, as is widely acknowledged. Its interpretation gave rise to the notion known as willing-buyer-willing seller. In the past, the ANC government attempted to put an end to property disputes by setting a deadline for land claims in 1998, however that year has passed. Since then, dismal failure has followed dismal failure, while the few landowners have been better equipped legally to thwart any procedure. Now the administration is speaking left, recognizing the consequences of allowing the land issue to continue to fester. A statute allowing the extension of land claims until June 2019 has been enacted. Political party like the Economic Freedom Fighters (EFF) has continued to advocate for expropriation without compensation land reform and this seems to be resonating very well with the grassroots.<sup>23</sup> The ANC government is now singing the expropriation song in the public interest, going so far as to appoint a Valuer General to evaluate the fair market value of land. Prior to this, the willing seller-willing buyer system had resulted in huge inflation of government-designated land prices as well as unscrupulous behaviours.

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<sup>16</sup> Sihlobo, W. and Kapuya, T. "Special report: The truth about land ownership in South Africa" (2018), available at: <https://scholar.google.com/citations?user=rj0Yg04AAAAJ&hl=en> (last accessed: 27 May 2022).

<sup>17</sup> Keep, T. and Hall, R. "Land redistribution in South Africa" (2016), above at note 15.

<sup>18</sup> A Mthembu "Reflections on expropriation-based land reform in Southern Africa" (2019) 75 *Town and Regional Planning* at 75, 54-65.

<sup>19</sup> Department of Land Affairs "Land Affairs Annual Report 1 April 2004-31 March 2005," available at: <http://www.ruraldevelopment.gov.za/publications/annual-report/file/49-department-of-land-affairs-annualreport-1-april-2004-31-march-2005> [last accessed: 7 May 2022].

<sup>20</sup> Ibid.

<sup>21</sup> Sihlobo, W. and Kapuya, T. "Special report: The truth about land ownership in South Africa" (2018), above at note 14.

<sup>22</sup> Keep, T. and Hall, R. "Land redistribution in South Africa" (2016), above at note 15.

<sup>23</sup> Cousins, B. *Land Reform in South Africa: The Politics of Expropriation Without Compensation*. In *Land Tenure Challenges in Africa: Confronting the Land Governance Deficit* (2022, Cham: Springer International Publishing) at 99-119.

### 3. Land as dignity and equity

Despite the difficulty in defining it, the concept of dignity has been given considerable weight by the courts. It has its origins in South Africa's racial humiliation past when racial subordination was based on and manifested via the use of shame and dishonour. Black South Africans were denied citizenship under apartheid legislation, received a lesser quality of education than whites, were restricted to separate areas of cities and farms, and were often consigned to lower status economic roles. They treated Black South Africans the way they did because they thought of them as lesser people. They formalised the stigmatisation of "non-whiteness" and actively promoted it.<sup>24</sup>

The two post-apartheid Constitutions, the interim Constitution of 1993 that went into effect on April 27, 1994, and its successor, the 'Final' Constitution of 1996, ushered in a constitutional revolution in South Africa. Prior to 1994, it was practically unthinkable for the courts to effectively protect human rights. When the British colonists occupied and enforced their public law on the Cape in 1806, it was under the idea of Parliamentary supremacy, which held that Parliament was capable of "doing anything that was not naturally impracticable." By the time Cape and Natal were granted self-government, and undoubtedly by the time the Union of South Africa was established,<sup>25</sup> Parliamentary supremacy was the defining characteristic of Westminster constitutionalism.<sup>26</sup> Then, what precludes Parliament from becoming a dictator?<sup>27</sup> In order to ensure its own continued existence as a political institution, the British Parliament could not pass laws that went against the "prevailing sentiment among the overwhelming majority of citizens in any given country." South Africa's Parliament, however, solely represented the white minority and had no power over black inhabitants under the racially divided state established by the Union Constitution of 1909.

#### 3.1. Conceptualisation of the right to land and dignity

Attempts to change the constitution are concerning because they threaten property rights, which are essential to a free market economy. They are the most notable manifestation of black anger at the continuation of pre-1994 inequality in South Africa since the country became a democracy in 1994. They have, of course, precipitated a crisis, with the focus shifting from former president Jacob Zuma to economic divisions in the public sphere. While the argument is heated and divisive, it appears that black middle-class citizens are overwhelmingly in favour of the proposed reform. It may be surprising to foreigners that land is at the focus of economic problems in South Africa, given that agriculture has not been the country's primary economic activity for decades. Why "land" is so divisive is because it represents so much more than just a piece of property in South Africa. For most individuals, it has nothing to do with farming. Black liberation organisations' calls for farmland to be returned to their original owners were part of a larger pushback against minority control of the economy and society. This is why many people who have no desire to farm and who believe that 28 years of democracy have not eradicated white privilege have taken up the cause of expropriation without compensation. It's a microcosm of a much larger call for transformation. This is why there is such support for a constitutional amendment, even if expropriation without compensation is already possible, and why no one has paid much attention to arguments about the technical virtues of land expropriation. To protect private property rights, monetary recompense is required by section 25 of

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<sup>24</sup> Thus the National Party's 1947 Manifesto, on which the white electorate voted it into power in 1948, proclaimed that "Bantu education" should be "adapted" to the "development level" of "the vast majority of Bantu people", and that "the Bantu in urban areas should be regarded as migratory citizens [of their rural "homelands"] not entitled to political or social rights equal to those of the Whites," available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=298016&sn=Detail> (last accessed 6 December 2022).

<sup>25</sup> The Union of South Africa was established in 1910.

<sup>26</sup> According to this doctrine, Parliament could pass any law it desired, and no individual or institution (including the courts) could challenge it.

<sup>27</sup> In its country of origin, the monopoly of power of the British Parliament could be justified by the fact that it is the state's representative branch. It derives its authority from and is answerable to the electorate, the group of citizens who voted it into office.

the Constitution.<sup>28</sup> As a result, if the government can prove that expropriation eliminates racial prejudice, it can do it without paying compensation. However, this has been disregarded because the issue is more about respect and equality.

### 3.2. Dignity as a foundational value and a fundamental right

Section 10 of the Constitution guarantees the right to human dignity.<sup>29</sup> Because human dignity is inalienable, even if one is shunned by society, that does not make him or her any less deserving of respect. For example, even if they may have done harm to society, criminals nevertheless have a certain amount of respect for themselves. Section 1 of the Constitution identifies human dignity as a value.<sup>30</sup> Therefore, dignity is one of the values that must guide our entire legal system.<sup>31</sup> The Constitution's use of the term "inherent" to describe human dignity shows that it is not something citizens receive from the government but rather something they have by right as human beings.<sup>32</sup> By doing so, the Constitution expresses a commitment to the international human rights discourse and a vision for a future in which each person's dignity is respected and cherished rather than their oppression.<sup>33</sup>

Because of the reliance on more narrowly drawn rights, constitutional theory often treats dignity as a virtue. Therefore, a claim of violation of a more direct right is often linked to the concept of dignity. For example, if someone's dignity is violated, a claim could be filed, as could a claim for a violation of the right to equality (which has been widely argued in the courts, and for which standards have been created to assess such an infringement).<sup>34</sup> The right to equality in this situation would be interpreted in light of the value of human dignity. When parties have conflicting interests, the court must find a compromise that allows them to maintain their intrinsic worth.

Only in the transitional Constitution that oversaw South Africa's return to democracy did human dignity become a guaranteed right.<sup>35</sup> The new democracy's guiding principle is respect for individual dignity, and the Constitutional Court reflected that principle by voting to outlaw the death penalty. As a direct response to the *Makwanyane* judgement,<sup>36</sup> this was accepted by the Constitutional Assembly during the process of drafting the final South African Constitution. Human dignity was recognised as a cornerstone of the Constitution from the very beginning. The only two rights that were specifically established to be inviolable were the rights to life and dignity.<sup>37</sup> Therefore, the Court's jurisprudence recognises dignity as a fully justiciable right in its own right and as a foundational principle that guides the interpretation of all other rights. It's uncommon to hear dignity defended as a fundamental human right. It's a principle that underpins many other protections, including the right to equal treatment. Socially, dignity is very significant. The political, legal, and social protections we have are a reflection of this. These enable us to go out into the world and take on the responsibilities and pursue the activities that speak to who we are and who we aim to be, regardless of our background or the accidents of our lives.<sup>38</sup> As a result, the court has concluded that the Constitution's anti-discrimination provisions offer protection from threats to human dignity, and that the goal to avoid discrimination is supported by a respect for human dignity. The Supreme Court's

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<sup>28</sup> It also says that this can't be used to "prevent the state from taking legislative and other measures to achieve land, water, and related reform in order to remedy past racial discrimination."

<sup>29</sup> Stating that "everyone has inherent dignity and the right to have their dignity respected and protected."

<sup>30</sup> Stating: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality, or the advancement of human rights and freedoms..."

<sup>31</sup> Chaskalson, A. "Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *South African Journal on Human Rights* at 196.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at 199.

<sup>34</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300.

<sup>35</sup> Constitution of the Republic of South Africa, Act 200 of 1993, section 10.

<sup>36</sup> *S. v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

<sup>37</sup> Constitution section 37. In states of emergency, other rights are partially derogable.

<sup>38</sup> Koopman, N. "Inclusive Dignity and Land Reform in South Africa" (2014) 113/1 *Scriptura: Journal for Contextual Hermeneutics in Southern Africa* at 1-8.

anti-discrimination doctrine is based on this premise of equal worth.<sup>39</sup> It's clear that this is *at par* with the constitutional or legal protections for human dignity in other countries. A product of World War II, the German Constitution stipulated that all governmental institutions "respect and protect" the "inviolability" of human dignity.<sup>40</sup> The Canadian Charter of Rights and Freedoms does not include a reference to dignity, but the Supreme Court of Canada has utilised "respect for the inherent dignity of every human being" to accord these freedoms and rights significance. The South African Constitutional Court's doctrine on dignity and equality borrows heavily from the Supreme Court of Canada in terms of both its formal and conceptual framework.<sup>41</sup> Dignity, however, has a longer and more significant history as a constitutional virtue in South Africa. It's also a mistake to assume it was merely stolen. To grasp its significance, one must look at the shame that apartheid brought upon the vast majority of South Africans.

Everyone is born with a certain degree of dignity (and may inhere in all beings). It is made up of our unique and deeply held beliefs about who we are and how valuable we are to the world around us. In this regard, nobody can be stripped of their humanity by the letter of the law or the customs of society. Even if the laws of apartheid were a direct attack on the Black South Africans' dignity, they could not take away their worth as human beings. It's possible that black people's intrinsic human dignity was not affected by the systemic humiliation and debasement put on them by the legal frameworks of apartheid. However, it was based on a racist philosophy that favoured people with lighter skin and European culture while demeaning those with darker colour and African heritage. A sense of shame and stigma was left behind as a result of this. The idea that the racism of apartheid was "disgraceful" stems from the reality that it intentionally aimed to humiliate individuals for no good reason.

When characterising the South African Constitution in one of its early rulings, the Constitutional Court of South Africa distinguished itself from other courts by calling it "a fundamental departure with and an overwhelming denial of that disgustingly racist, dictatorial, isolated, and oppressive part of the past."<sup>42</sup> As a result, South African legal system has worked to remove historical barriers by guaranteeing that citizens' sense of value is upheld by the state's official institutions and law. Those who have fallen from favour in the past will eventually find redemption. We have not fully moved on from our repressive history, nor have we forgotten it. However, due to our Constitution, people who were once shamed by an oppressive system are now fully recognised. Legal protections have been established so that citizens can claim their entitlements, vent their wrath, and demand acknowledgment. Because of this, people are able to put their pasts behind them and stand tall in the present with a renewed feeling of personal and communal pride. The humiliating impacts of racial and gender subjugation forced the architects of the new constitutional system to include safeguards against a range of circumstances that were rendered inoperable by apartheid.

To further individual personhood and eliminate any remaining shame, the Court's jurisprudence has been able to bring disparities in sexual behaviour out of the private sphere thanks to the principle of dignity. As a result, the Supreme Court's rulings have discredited the idea that people's actions and relationships need to be standard in order to shield them from shameful ridicule. The Supreme Court's decisions have worked to guarantee that citizens' dignity is recognised and protected by the state and its institutions, as well as to remove historical barriers. It has worked to create a normative framework in which all South Africans, regardless of their history of oppression, can confidently claim to be individuals. In a nutshell, the purpose of dignity in South African constitutionalism has been to grant full moral citizenship to people who had been denied it before.<sup>43</sup>

<sup>39</sup> *Harksen v Lane* [1997] ZACC 12; 1998 (1) SA 300 (CC) para 49.

<sup>40</sup> Deutscher Bundestag-Basic Law for the Federal Republic of Germany, Art. I.

<sup>41</sup> *The President of the Republic of South Africa v Hugo*, para 41, citing the judicial analysis of section 15 of the Canadian Charter, which the Canadian Supreme Court determined was given full effect in section 15, the equality provision of the Charter, because of the Court's recognition of every individual's inherent human dignity as crucial to their realisation in an open and democratic society. *Egan v Canada*, (1995) 29 CRR (2d) 79 at 104-5.

<sup>42</sup> *S. v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para 262.

<sup>43</sup> Cameron, E. *Dignity and Disgrace Moral Citizenship and Constitutional Protection* (2016, Routledge).

### 3.3. The possibilities of dignity

The Court's deference allowed it to take a bold step away from precedent. Dignity is a value and a right that has helped validate and destigmatize those who were previously marginalised. Furthermore, it has laid the groundwork and provided the tools necessary to outlaw discrimination in the future, including that which targets non-citizens and that which recognises the whole range of sexual orientations and identities. Constitutionalism has sought to construct a reparative legal framework in which injury to dignity may be mended and humanness can be declared in a society where most of the people have internalised stigma and dishonour.

The Constitution is a straightforward declaration that upholds the worth of every person in South Africa. Furthermore, its laws provide formerly excluded individuals with symbolic affirmation, reinstatement, and atonement, recognising and affirming their variety. And it gives a practical framework for developing internal dignity and establishing external dignity by rejecting stigma and shame and affirming moral citizenship and worth. No amount of legal protection can make up for a lack of self-respect or erase years of humiliation. The law, by itself, cannot do away with prejudice or prevent hostility. But it can fight back against making people feel ashamed by identifying them as inferior. Therefore, the Supreme Court's jurisprudence on racial equality has addressed both social and legal equality and has sought to correct the subordination of the past by allowing gays and lesbians to assert themselves as morally equal citizens who can freely exercise their human capacities. Therefore, dignity allows for the development not of conformity but of those aspects of our life that have the potential to be extraordinary: the ability to freely explore the world without fear, the development of our intellect and the freedom to express ourselves, and the possibility of finding love and procreation.<sup>44</sup>

### 3.4. Dignity and equality are inseparable

While the Bill of Rights guarantees all citizens the right to equality, South Africa's deeply unequal society is acknowledged by the Constitution's endorsement of a substantive understanding of equality. This inequality must be mitigated by promoting some groups at the expense of others by uneven means in order to achieve legal equality. Human dignity justifies and informs substantive equality through the recognition that in order to genuinely respect the dignity of those living in desperate situations as a result of our oppressive past, they must be placed on an equal footing with the rest of society. In the *National Coalition* case,<sup>45</sup> The Constitutional Court upheld the link between dignity and equality by ruling that gay men's criminalization for engaging in conduct that is part of their human experience violated their dignity."<sup>46</sup> The court found that the prosecution of sodomy discriminated against homosexual males unfairly according to their sexual orientation, and thus violated their right to equality. The court did note, however, that the right to dignity was a "fundamental principle of our Constitution" that was taken into account in the fairness evaluation. By labelling them as perverts for behaviours that were integral to their identity but were performed behind closed doors, the outlawing of sodomy robbed homosexual men of their respect and dignity. The offence so breached not only equality, but also dignity and privacy, as judged by the court. At the very core of equality jurisprudence is the emancipation of human beings from a caste-like condition and the end of them being treated as subhuman because they fall within a specific group, as Sachs J. states eloquently in a separate but concurring decision. It is a gross violation of equality and an insult to human decency to punish people for who and what they are.<sup>47</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice and Others* 1999 (1) SA 6.

<sup>46</sup> Ibid at para 28.

<sup>47</sup> Ibid at para 129.

### 3.5. Land is equality and dignity

The Constitutional Court's major judgement in the matter of Daniels, written by Madlanga J, begins with a remark from Mr Petros Nkosi.<sup>48</sup> Access to land and housing is linked with dignity protection in both the main judgement and a moving concurring judgement by Froneman J. The right to tenure security, the court found, was at the heart of the case. The right to be treated with respect and dignity is a cornerstone of that right. No one should be expected to feel safe in their home if they are not treated with respect. The centrality of land expropriation to colonialism and apartheid was emphasised by the court. It started with a gun and some "trickery" in the barrel. This started happening to the Khoi and San as soon as the white people moved into South Africa. Then, starting in the earliest days of colonisation, there was "an array of laws" passed that made it illegal for Black South Africans to own land. First and foremost, the goal was to give white farmers access to more farmland. The second was to deprive black people of means of subsistence by forbidding and then seizing land used for subsistence farming. As a result, people had to find work just to get by, which provided a ready supply of inexpensive labour for white-owned farms and mines. There had been ongoing complaints from white farmers about the inability to find Africans to fill the roles of servants and labour. The third factor was the apartheid-era intensification of the policy of racial segregation. There is no disagreement about these facts. They also shouldn't spark debate. In his concurring opinion, Froneman J. notes that this "historical injustice is nowadays not easily denied," but that it is nonetheless commonly avoided. Possible causes include bias based on socioeconomic status or ethnicity. The short answer is that the Constitution forbids it to the extent that discrimination is expressly recognised as the reason. When we accept this demeaning existence for others but refuse to accept it for ourselves, we are often shocked and taken aback to be termed racist or prejudiced.

Until then, we won't be able to make the kind of permanent, meaningful progress necessary to realise the Constitution's goals. All of us, however, must acknowledge this historical wrong and its ongoing ramifications in a sincere and profound way. With this in mind, the Constitutional Court examined the underlying legal questions. To the extent permitted by an Act of Parliament, a person or community whose land tenure is legally insecure as a result of previous racial discriminatory legislation or practises is entitled to either secure tenure or comparable restitution. This is guaranteed under Section 25(6) of the Constitution. This privilege is enshrined in the Extension of Security of Tenure Act. Regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply cannot do all the transformational work that is required in a context where traditional notions of property are or should be in question. In this view, it is not enough to show that private property is subject to ... public-purpose limits; rather, the goal is to pinpoint and provide explanations for specific cases in which transformation justifies modifications that call into question the entire basis upon which the current distribution of property rests.

As a result, we must re-evaluate the concept that property owners' rights would always take precedence over the rights of others in society and adopt a more nuanced understanding of property rights, as mandated by the Constitution. This could have far-reaching implications for the millions of South Africans who occupy buildings or homes on land legally considered to be "owned" by another person. In all such circumstances, the rights of the users of the land may be held to supersede the rights of the legal owner, depending on the particular conditions. While this ruling won't drastically alter South Africa's land allocation any time soon, it does establish precedent that social justice proponents can utilise in future cases to alter the country's perspective on property rights. The ruling requires us to view real estate through the lens of our connections to it, rather than through the narrow lens of property rights.

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<sup>48</sup> The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals. Our people have many problems; we are beaten and killed by the farmers; the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world.

#### 4. Post-apartheid land reform interventions

The government has introduced policies and passed a number of laws in an effort to rectify land distribution inequalities caused by the discriminatory laws of the colonial and apartheid governments. One of the goals of the 1994 Reconstruction and Development Programme (RDP)<sup>49</sup> was the redistribution of thirty percent of agricultural land over a period of five years. The White Paper on South African Land Policy was enacted by the government in 1997 to guide land reform in the country.<sup>50</sup> To achieve these goals, the White Paper outlined three guiding principles: Land Redistribution, Land Restitution, and Land Tenure Reform. The goal of land redistribution is to ensure that everyone has access to land for housing and farming; the goal of land restitution is to compensate and restore land to those who were dispossessed under colonial and apartheid laws; and the goal of the secure land tenure programme is to ensure that everyone has the legal right to own land. The government's ability to alleviate poverty is directly tied to its ability to resolve the land issue. As a result, the idea that some people need land while others do not feel safe on the ground, they currently inhabit is foundational to the concept of the right to access land. It requires attending to the requirement that the landless be provided with land and resources for survival.

#### 5. Constitutional framework

The Constitution of the Republic of South Africa guarantees all citizens equal access to land. Section 25(5) of the Constitution mandates that the government "must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain equitable access to land." Land rights are regarded within the context of Constitutionally protected property rights. A person or community that lost property after 1913 due to discriminatory laws is entitled to restitution or compensation, per Section 25(7).<sup>51</sup> Property rights, particularly land rights, are intrinsically linked to the housing crisis. An estimated one billion individuals worldwide lack adequate housing, while another million do not have a home.

The Constitution is consistent with international standards established by the United Nations to guarantee equal property rights. The United Nations Declaration on Social Progress and Development, for instance, "recognizes the social functions of property, including land, and calls for land ownership that guarantees equal property rights for all."<sup>52</sup> The Convention on the Elimination of All Forms of Discrimination against Women promotes the concept of gender equality in acquiring land for agrarian reform and land resettlement programmes. (CEDAW).<sup>53</sup> Regarding tenure reform, the CEDAW position stems from the fact that women have been treated unjustly. From this vantage point, we also investigate the problem of women's land ownership.

The Constitutional Court acknowledged land ownership as a socioeconomic right in the *Grootboom* case. The Constitution's guarantees for economic and social rights were upheld by the Court, who said they "protect the privilege of having access to land, to adequate dwellings and medical care, to food, water, and social security." They protect kids' rights to freedom and schooling.<sup>54</sup>

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<sup>49</sup> The Reconstruction and Development Programme: A Policy Framework (1994).

<sup>50</sup> White Paper on South African Land Policy, (April 1997). According to the White Paper, the land policy was pronounced with four objectives, namely: to correct past injustices; to engender reconciliation and stability; to promote economic growth; and to improve lives through the alleviation of poverty.

<sup>51</sup> Section 25(7) of the Constitution. Thus, a person or community that lost property because of the Land Act of 1913 is entitled, to the extent provided by an Act of Parliament, either to restitution or equitable redress.

<sup>52</sup> South African Human Rights Commission (SAHRC) "Economic & Social Rights Report 1999/2000. South African Human Rights Commission," (2001), at 279. Several articles of the Convention Concerning Tribal and Indigenous Peoples in Independent Countries, 7 (1), 13, 14, 15, 16, 17, 18 and 19 (1991), give detailed account on the provisions for the said groups of people. The SAHRC's 3rd Economic and Social Rights Report also refers to the Peasant Charter of the United Nations Food and Agricultural Organisation and the Convention Concerning Indigenous and Tribal People in Independent Countries, which require tenure reform and redistribution for the landless and emerging farmers, and indigenous people, respectively.

<sup>53</sup> Article 14(2)h of the Convention on the Elimination of all Forms of Discrimination Against Women (1979).

<sup>54</sup> *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169, para 19. Emphasis was on section 25(5) of the Constitution, which places responsibility on the State to create conditions enabling '... citizens to gain access to land on an equitable basis.'

This implies that the state may use its resources to acquire, redistribute, or purchase land, actions that, by implication, are reasonable.<sup>55</sup> Grootboom considers implementation to be the most important aspect of the State's constitutional obligation. Measuring reasonableness involves achieving the objectives for which the policies and programmes were designed.<sup>56</sup>

Therefore, reasonableness in this context will entail granting access to the right to refuge and land to those without a home. No person "shall be deprived of property except in accordance with a law of general application, and no law shall permit the arbitrary deprivation of property," as stated in Section 25(1) of the Constitution. *Grootboom's* case established a connection between the right to access land and the right to access adequate accommodation.<sup>57</sup> In accordance with section 25(5) of the Constitution, as such, the progress made by the Department of Land Affairs, provincial and local authorities on land reform between 2000 and 2002 to restore dignity are here below articulated.

## **6. Interventions through policy, programmes and projects**

During the period after attainment of democracy, a number of policy developments concerning land restitution, redistribution, and tenure reform programmes occurred. The National Department of Land Affairs (DLA) announced the implementation of the following policies:

### **6.1. Restitution of land policy**

#### **6.1.1. Standard settlement offer policy**

The Standard Settlement Offer Policy, which was formulated in 2002 period, endeavours to identify alternative restitution packages for urban claimants. This policy's primary objective was to determine which options should be considered for urban restitution claims. According to a report from the Department of Land Affairs, this policy, which benefits urban restitution claimants, was implemented to expedite the negotiation of many claims. Several objectives were attained. Through this policy, for instance, settlements were negotiated, the settlement process was expedited, and more claims were resolved.

#### **6.1.2. Policy for enhancing claims**

The DLA also established a Policy on Betterment of Claims to help people recover property rights that were taken away by the apartheid regime. The approach, which facilitated better claim settlement negotiations, was especially helpful to rural areas. In accordance with section 42D of the Restitution of Land Rights Act 1994, the Labour Tenancy Policy was put into effect, and claims were presented to the Minister for Approval. Land was returned to labour tenants in numerous locations as part of this programme, which aims to help them and their families by promoting resettlement and the restoration of displaced land, alternative housing, or compensation. Some labour renters even received compensation for land they lost.<sup>58</sup>

#### **6.1.3. Distributional strategy**

The Municipal Commonage Policy and Procedures was revised by the Department of Land

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<sup>55</sup> In defining reasonableness, the *Grootboom* judgment goes beyond mere passage of legislation and conception of policies and programmes, which are viewed as the initial steps in fulfilling the obligation of the State.

<sup>56</sup> These policies and programmes must be reasonable both in their conception and their implementation. The formulation of programmes is only the first stage in meeting the state's obligations... An otherwise reasonable programme that is not reasonably implemented will not constitute compliance with the state's obligation. *Grootboom*, para 42.

<sup>57</sup> Thus, effectively recognising a linkage to section 26 of the Constitution, that provides that the State has an obligation to take reasonable measures to ensure the "progressive realisation of the right to adequate housing." That right can only be realised when the right of access to land is itself realised.

<sup>58</sup> The Department of Land Affairs Report, 2002.

Affairs in 2000 to provide a wider range of farming operations. The goal of this programme was to make municipally owned and controlled property grazable for residents of densely populated areas.

#### **6.1.4. Transfer of Land for Agricultural Development (LRAD)**

The Department of Land Affairs launched the Land Redistribution for Agricultural Development (LRAD) sub-programme of the Land Redistribution Programme Act 2001<sup>59</sup> (LRP).<sup>60</sup> According to the DLA, this policy has two components. The first involves the transfer of agricultural land to individuals and groups, while the second involves commonage projects to enhance access to municipal and tribal land, primarily for grazing. Other beneficiaries of this sub-programme include historically disadvantaged rural residents, specifically rural women and youth. In December 2001, the programme made 60 hectares of land available to 2,681 applicants.

#### **6.1.5. Tenure reform strategy**

Regarding the Disposal of State Land Act, the Minister of Agriculture and Land Affairs authorised a document outlining the rights of individuals protected by the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), and the Extension of Security of Tenure Act 52 of 1997 (ESTA). In addition, the provision of grants for the acquisition of land for the purpose of enhancing tenure security for previously disadvantaged groups. The intent of the IPILRA is to transfer land rights to long-term communal tribal or traditional areas and to dispose of State land to people who actually own the land but have limited rights to it.<sup>61</sup> In addition, the department established the Tenure Security Grant, which benefits labour renters.<sup>62</sup>

#### **6.1.6. Benefits policy**

The Benefits Policy provided for the leasing of land in primarily communal areas to private users on behalf of various communities, the conversion of limited State land rights to full ownership, and the extension of land benefits to all members of the community. Nonetheless, no conclusion has yet been reached.<sup>63</sup>

#### **6.1.7. Legislative measures**

Most of the legislation have not changed as of date. During the 2000/2002 period, however, few changes were implemented: Section 2 of the Provision of Land and Assistance Act 126 of 1993 was amended by the Land Affairs General Amendment Act 11 of 2000. The amendment was intended to accelerate land reform. Section 13(1A) of the Land Reform (Labour Tenants) Act amended section 33 (1) so that few labour tenants would obtain land tenure security.

### **7. Obligations to respect, promote, and fulfil the right of access to land**

The DLA's policies were developed with the intention of giving effect to constitutional guarantees of property ownership. The realisation of the right to access land must be taken into account during both the policymaking process and its implementation if it is to meet constitutional criteria. The implementation of land reform protects people from unfair discrimination and ensures

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<sup>59</sup> Land Redistribution Programme of August 2001.

<sup>60</sup> This policy was implemented by the DLA to stimulate development and encourage African producers to engage in commercial agriculture.

<sup>61</sup> IPILRA is a temporary measure enacted to safeguard the standing of individuals with untitled land rights.

<sup>62</sup> This programme has four goals: to acquire land or land rights for people protected by ESTA and the Labour Tenants Act; to provide tenure redress in accordance with the Draft Communal Land Rights Act (2002); to acquire land for commonage in traditional areas; and to oversee the land rights inquiry process in order to determine the nature of certain rights and their rightful holders.

<sup>63</sup> The policy was abandoned because to this date, no tangible agreement was ever reached.

that they can gain access to land. The policies and their implementation are geared primarily towards marginalised groups. Therefore, the Department satisfies its duty to safeguard the right to access land by keeping an eye on the law.

### **7.1.1 Provision of Land and Assistance Act 126 of 1993**

The DLA reported that amendments to this Act would enable the Minister to delegate the authority to designate land and to approve the release of funds for manager development. The amendments are included in the measures to accelerate land reform.<sup>64</sup>

### **7.1.2. Labour Tenants Act**

The Land Reform (Labour Tenants) Act protects labour tenants from maltreatment as well as arbitrary and illegal evictions by granting them secure tenure on land. The DLA's guidelines facilitate the efficient acquisition of this security. The amendments to the act were minor and had no major impact on the policy direction or the legislation.

### **7.1.3. Expansion of the Secure Tenancy Act 62 of 1997**

As was the case with the Labour Tenants Act, the DLA reported that the amendments to the Act were minor and did not significantly affect the policy direction.<sup>65</sup>

#### **7.1.3.1. Analysing the measures taken by the DLA**

This section seeks to determine whether the departments responsible for land distribution have fulfilled their constitutional obligations.

## **8. Constitutional responsibilities**

### **8.1. Responsibility to respect the privilege of land access**

The Land Redistribution for Agricultural Development (LRAD) programme is designed to provide grants to African people who wish to access land for agricultural development. The LRAD complies with section 25(5) of the Constitution,<sup>66</sup> LRAD is implemented in accordance with the provisions of the Provision of Land and Assistance Act,<sup>67</sup> which mandates the provision and preservation of land rights.

### **8.2. Duty to safeguard the right to obtain access to land**

A policy on the entitlements of people protected by the Interim Protection of Informal Land Rights Act (IPILRA)<sup>68</sup> and the Extension of Security of Tenure Act<sup>69</sup> protects and acknowledges the rights of people who have occupied state land for extended periods. The LRAD takes into account, among other factors, the interests of landless persons with limited access to land, particularly women and youth who now have a right to land to which they previously had no access. The Policy of Labour Tenancy and the submission of claims to the Minister for approval in accordance with section 42D of the Restitution Act satisfies the right to access land of labour tenants who submitted applications

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<sup>64</sup> The DLA report.

<sup>65</sup> Ibid.

<sup>66</sup> Which states that "the State must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain equitable access to land."

<sup>67</sup> Act 126 of 1993.

<sup>68</sup> Act 31 of 1996.

<sup>69</sup> Act 62 of 1997.

under the Restitution Act.<sup>70</sup>

### **8.3. Vulnerable and persecuted groups**

The Department of Land Affairs asserts that the policies it has implemented do not unfairly discriminate against any group of people, and that it has therefore taken into account the desires of farm workers and their families to gain access to land and enhance their tenure conditions. In addition, consideration must be given to the interests of the landless, particularly women who have limited access to land for productive purposes.<sup>71</sup>

## **9. Provision for vulnerable populations per measure of policy**

### **9.1. Redistribution of land**

As part of LRAD, the DLA has set aside certain land for use by women, youth, people with disabilities, farm labourers, and tenants in the agricultural sector. Although the LRAD is gender-blind at the national level, women are given preferential treatment when it comes to gaining access to land for agricultural development. While the only persons who can benefit from this scheme are those whose access to land was hindered by discriminatory regulations in the past, the DLA insists that its policies do not discriminate against anyone. The department did not say whether or not just those of African descent were included in this group. Farm workers, labour tenants, the homeless, and those living in informal settlements can apply for funding through the Tenure Security Grant to improve their housing and other living circumstances on farms. Farm workers, labour tenants, and residents of informal settlements on state-owned land are eligible for State land allocations through IPILRA and ESTA per the Disposal of State Land Act.

### **9.2. Tenure reform**

According to the DLA, the Tenure Security Grant is meant for people who do not have stable housing arrangements, including as farm workers, labour tenants, and people who live in communal Right to Land areas. The DLA argued that the homeless and people living in informal settlements should also be entitled for aid under this initiative, even though neither group is specifically mentioned. Grants can be given to this demographic to improve or buy land, making their tenure more secure. The DLA argued that farm workers, labour tenants, and residents of informal settlements are specifically protected by the Policy of Entitlements of people protected by the Interim Protection of Informal Land Rights Act and the Extension of Security of Tenure Act with respect to the Disposal of State Land. The DLA, however, does not provide any information regarding whether or not these steps have been taken.<sup>72</sup>

#### **9.2.1. Reasonableness of measures**

In interpreting reasonableness, the Constitutional Court explained in *Grootboom*, the State must take steps that are able to make the right a reality. We evaluate the reasonableness of the land reform programmes and policies below.

##### **9.2.1.1. Restitution**

The measures implemented during the reporting period were reasonable. After a backlog was reported, the number of claims processed by the DLA has increased in a brief period. For example,

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<sup>70</sup> The DLA reports.

<sup>71</sup> Ibid.

<sup>72</sup> The DLA report.

whereas there were approximately 8,000 settled claims in 2000, the number increased to 12,094 by March 2001.<sup>73</sup> In February 2002, the Institute for Democracy in South Africa reported that there were 32,389 settled claims, of which approximately 80% involved metropolitan cases and 20% involved rural ones.<sup>74</sup>

According to the DLA, this is primarily due to the shift from judicial to administrative approaches to restitution in resolving cases or disputes. For instance, 95 percent of restitution cases were resolved through administrative measures, according to the report.<sup>75</sup> All 35 restitution cases brought before the court were resolved. The number of claims resolved demonstrates that the adoption of the measures and the resulting improvement in the relationship between the DLA and the Restitution Commission resulted in accelerated delivery.<sup>76</sup>

### **9.2.1.2. Redistribution**

Following the elections of 1999, implementation of the land redistribution programme halted. In 2001, only 2% of the land had been redistributed by the DLA. According to the SAHRC's Third Economic and Social Report, where it was reported that 1 006 135 ha (0.81 percent or less than 1 percent) of the total land area had been transferred between 1994 and 2001. As a result, the majority of (agricultural) land remains in the hands of white proprietors. Land Redistribution for Agricultural Development is one of the most important redistribution measures implemented during the reporting period. (LRAD). Since its implementation, the DLA's LRAD programme has redistributed 60 000 ha of land to 2681 applicants in only three months.<sup>77</sup> It appears that this programme has accomplished much in a brief period. However, this programme was halted because few individuals could afford the R5,000 in-kind contribution required to access the R20,000 to R100,000 DLA grant.

This should not have occurred because, according to Grootboom, the state must ensure equal access to land for all citizens. The court's ruling also requires the government to create conditions that ensure all residents have equal access to land. The Court further stressed that low-income persons who cannot afford the in-kind contribution had a right to require the State to create conditions that would grant them access to land. Most people are still landless because of the large number of people who cannot obtain land. Land grants are available only to people who have saved enough money. According to Lahiff and Rugege, LRAD's ineffectiveness can be traced back to the fact that it did not employ sophisticated land redistribution tactics (despite being the only programme since the 1997 White Paper on Land).<sup>78</sup> In this regard, the LRAD fails to comply with the constitutional mandate to establish conditions for land access. According to the redistribution programme's design and implementation, access to land is restricted to willing sellers and willing buyers. This programme fails those without funds, regardless of whether they receive money from other sources, such as the Land Bank. Furthermore, the concept is meaningless because, in most cases, even when there are 'willing buyers', there are no 'willing sellers.'

### **9.2.1.3. Tenure reform**

According to the DLA, there are ongoing land rights training programmes designed to empower farm employees. In addition, the DLA reported that a special fund was being established to assist farm occupants in litigation. The Department of Land Affairs and the Department of Justice collaborated on the establishment of this fund (now Department of Justice and Correctional Services). Despite the abundance of legislative and other measures, little progress has been made in the direction

<sup>73</sup> The Department of Land Affairs. Annual Report 2000-2001.

<sup>74</sup> Mingo, C. "The 2002 Land Affairs Budget: Is Land Reform on Track?" (2002) available at [https://www.sahrc.org.za/home/21/files/Reports/4th\\_esr\\_chap\\_3.pdf](https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_3.pdf) (last accessed 14 March 2023).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Mayende, G.P. Media Briefing, DLA, 2001 available at <http://land.pwv.gov.za> (last accessed 5 November 2022).

<sup>78</sup> Lahiff, E. and Rugege, S. "A Critical Assessment of State Land Redistribution Policy in the Light of the Grootboom Judgement" (2002) 6/2 *Law, Democracy & Development*, at 279-319.

of tenure reform.

### 9.2.2. Availability of resources

The state must do everything in its power to guarantee the full and equal enjoyment of all economic, social, and cultural rights, as outlined in Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Under the CESCRs, a state must provide evidence that it is unable to meet its commitments because of insufficient funding. So, we can tell if the DLA had enough people and money by looking at how well its plans and measurements have worked so far.

#### 9.2.2.1. Restitution

The land reform budget indicates that the money allocated for restitution was insufficient. After actual expenditure, however, the programme demonstrated an overspending of R193 000 000 after funds were shifted from other programmes. This was primarily due to the increased number of claims processed during that period. For the 2001/2002 fiscal year, R309 244,000 was allocated. However, expenditures dropped below R128 million. This overspending is the consequence of expedited delivery in the settlement of claims for restitution. The DLA reported that it has spent close to one billion Rand (R938 268 710) on restitution to date, primarily to urban claimants; however, the amount awarded to rural claimants is unknown. It is reprehensible that the DLA could not spend slightly more than R128 million when there are still many unpaid claims.<sup>79</sup>

#### 9.2.2.2. Redistribution

The DLA reported a shortage of qualified personnel for land distribution. However, it is unclear what these individuals were intended to accomplish. This personnel shortage was mentioned even during the previous reporting period. It is unclear why the DLA would continue to operate while failing to deploy qualified personnel for land redistribution. The budget for the redistribution programme indicates it was sufficient for the three fiscal years commencing with 1999/2000. Throughout all these years, funds remained unused. For instance, more than R50 million of the R319 405 000 000 allocated for the 1999/2000 fiscal year remained unspent. More than R80 million was underspent during the 2000/2001 fiscal year, while R40,129,00 was underspent during the 2001/2002 fiscal year. This is why the land reform programme has been so sluggish.

The reasons cited for the DLA's underspending are a lack of skilled or qualified personnel, transfer payments, and professional and special services; a delay in developing a policy framework that would enable or facilitate the handling of tenure cases; the absence of funding agreements between the DLA and local or district structures; and implementation challenges resulting from the delivery of massive amounts of services. As part of the DLA's transformation and decentralisation process, vacant positions were not filled. In the third economic and social rights report of the South African Human Rights Commission, the DLA reported a lack of capacity. Why these positions have not been filled defies logic.<sup>80</sup>

### 9.2.3. Progressive realisation

As stated in the Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, economic, social, and cultural rights can only be realised incrementally and over time, i.e., step by step.<sup>81</sup> Regarding the restitution program, more claims were settled in a brief period during the

<sup>79</sup> Mingo, C. "The 2002 Land Affairs Budget: Is Land Reform on Track," above at note 74.

<sup>80</sup> This accounts for both the redistribution and tenure reform as the budget was a combined one for the two programmes.

<sup>81</sup> Leckie, S. and Theo, C.V.B. *Violations of Economic, Social and Cultural Rights* (1998, The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights) at 35- 36.

reporting period than in previous fiscal years. Restitution is regarded as the slowest component of the land reform programme. Since the 1998 implementation of the Restitution Review, the rate of restitution has only accelerated since June 2001, when 12,314 claims were filed.<sup>82</sup> However, by 2001/2002, only 12,150 claims had been resolved, the majority of which, according to the Minister, were from rural areas.<sup>83</sup>

During the current reporting period, 191,940 rural claims were submitted, which is a significant increase from the 20 rural claims reported in the previous SAHRC economic and social report. The aforementioned statistics indicate that more claims were resolved during the 2001/2002 fiscal year than in previous years. In 2001, there was a consistent increase in the number of settled claims compared to the previous year. By the end of September 2000, there were 6,525 settled claims, an increase from the 3,916 claims settled in March 2000.<sup>84</sup> However, there are still a great deal of pending cases. There are many more instances of restitution in rural communities than in metropolitan ones. Urban centres, however, are home to a larger population. Given that a single occurrence in rural locations may affect numerous families, this is an abnormality that must be fixed. The DLA study states that just 35 reparation cases (30 rural and 5 urban) are now active in the judicial system. The DLA was requested to fill up a survey regarding ethnic groups affected by land loss, but whites, Indians, and Africans were left from the list. This gives the idea that Africans are the only people in this country who have sought compensation for land loss. White farmers and Native alike have been shown to have staked claims.<sup>85</sup> Some of the claims are submitted by white farmers, while others are submitted by Indians who lost their businesses predominantly in urban areas. The perception that only black individuals make land claims is therefore not always accurate. The initiative evaluated 1,160 land claims from Whites and Natives.<sup>86</sup>

### **9.2.3.1. Redistribution**

In 2003, there was a marked decrease in land transfers compared to previous years since the programme's inception. In 2004, only 0.81 percent of land was reported to have been transferred.<sup>87</sup> The government's 1994 goal to redistribute 30% of land within five years was therefore not met. This sluggish rate of delivery prompted policy adjustments. Realizing that it had failed to meet its original objective, the DLA set a new deadline for delivery: 15 million hectares must be redistributed by 2005, and an additional 30 percent of rural land within the next fifteen years.<sup>88</sup> The DLA has thus far only declared its intention to expand its land disposal. It is commendable, however, that the DLA was able to deliver 60 000 ha of land to 2681 applicants within a few months of the 2002 introduction of LRAD. This was accomplished through grants ranging from R20,000 to R100,000, which the DLA made available to all beneficiaries in exchange for a minimum contribution of R5,000. It is problematic to believe that the DLA depends on the willingness of proprietors to sell their land without regulation. This unnecessarily delays the process, particularly considering that expropriation is a tool that can reduce the time required for land redistribution, thereby avoiding what the New

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<sup>82</sup> E. Lahiff "Land reform in South Africa: Is it meeting the challenges? Programme for Land and Agrarian Studies" (2001) (PLAAS), UWC, Policy Brief No. 1, (September 2001), available at <http://www.uwc.ac.za/plaas/> (last accessed 20 March 2023).

<sup>83</sup> Department of Land Affairs, GCIS: South Africa Yearbook 2001/2002, 403. See also DLA, "Restitution Statistics", Department of Land Affairs, January 2002, available at <http://land.pwv.gov.za/restitution/new%5Fstats%5Frest%5Fgraph.htm> (last accessed 18 March 2023).

<sup>84</sup> GCIS: South Africa Yearbook 2001/2002 at. 403.

<sup>85</sup> The Department of Land Affairs (DLA) "Restitution Statistics" (2002), available at <http://land.pwv.gov.za/restitution/new%5Fstats%5Frest%5Fgraph.htm> (last accessed 18 March 2023).

<sup>86</sup> Kotÿe, F., "White farmers claim land," Marketing and Public Relations Department (2002, Potchefstroom University) available at <http://www.puk.ac.za/nuus/eng/news26.html> (last accessed 21 March 2023).

<sup>87</sup> Mayende, G.P. "Less than 1% of farmland redistributed", Media Briefing, Department of Land Affairs, (2001), available at <http://land.pwv.gov.za> (last accessed 14 February 2002).

<sup>88</sup> Ministry of Land Affairs and Agriculture, "The Minister and the Land Affairs Programme: Briefing," Minutes of the Agriculture and Land Affairs Portfolio Committee, June 20, 2000. See also Human Rights Watch. *Unequal Protection: The State Response to Crime on South African Farms*. Washington, D.C. 2001, at. 38.

African termed a "ticking time bomb."<sup>89</sup>

Minister Thoko Didiza released her first statement on land policies on 11 February 2000, following the suspension of the Land Rights Bill of 1999. Additionally, the Minister suggested a freeze on new initiatives. However, this moratorium was overturned in August of 2000 when a new redistribution programme was introduced. This affected the implementation of additional land redistribution initiatives. Consequently, only 72 projects were implemented in the 2000/2001 fiscal year, a drastic decrease from the 140 projects approved in the 1997/1998 fiscal year. The Settlement/Land Acquisition Grant (SLAG) and the Grant for the Acquisition of Municipal Commonage are operational programmes.<sup>90</sup> The R16 000 contribution from SLAG was intended for beneficiaries who wished to acquire land and other agricultural equipment.<sup>91</sup> On the other hand, the DLA intended to use the Grant for the Acquisition of Municipal Commonage to assist beneficiaries of commonage in refining their agricultural endeavours through the use of their grants for extensive agriculture.

The Minister's 11 February 2000 statement regarding commonages<sup>92</sup> was ambiguous. It stated that municipal commonages remained "a useful instrument in achieving broader land reform objectives," but warned that "it must be clearly reaffirmed that it cannot take budgetary precedence over the objectives of land redistribution to the poor." During the same month, the DLA hosted a workshop on commonage in which it was recommended that the commonage policy be revised to "allow for both 'subsistence' and emerging farmers." By March 2000, approximately 23 percent of all approved commonage projects were complete.<sup>93</sup> At this juncture, the DLA's revised redistribution strategy had two objectives. First, it sought to transfer settlement programmes to the Department of Housing so that the DLA could focus on agricultural production; second, it sought to transition from a demand-driven approach to a supply-driven approach that emphasised district level planning.<sup>94</sup>

### 9.2.3.2. Tenure reform

Despite the lack of readily available statistics, it has been determined that more people in the former homelands and the former South African Development Trust (SADT) regions lack secure tenure. For this reason, the DLA aimed to meet the requirements of between 10 and 15 percent of these individuals (between 600 000 and 900 000 households) within a decade.<sup>95</sup> Thus, tenure reform has become a priority for the DLA. Prior to the 2001/2002 fiscal year, the government had hoped to convince both national and provincial offices to relinquish a substantial quantity of land. According to the Minister of Agriculture and territory Affairs, between 2001 and 2002, 669 000 hectares of state territory would be sold throughout the country. There has been very little progress in this regard. The fact that there are vast tracts of available land but people without land is cause for concern. There are 1,098,008 hectares of available territory.<sup>96</sup>

The DLA has allocated 836 417 ha of this land to displaced individuals, and a further 406 120 ha to those who have been evicted. According to the SAHRC's third report, 268 306 hectares were set aside for redistribution projects, making a total of 696 346 hectares available to those who had been excluded from land ownership in the past. There is no proof that those who had previously been

<sup>89</sup> Commey, P. "Land: A ticking time bomb" (2002) available at [https://www.sahrc.org.za/home/21/files/Reports/4th\\_esr\\_chap\\_3.pdf](https://www.sahrc.org.za/home/21/files/Reports/4th_esr_chap_3.pdf) (last accessed 24 March 2023).

<sup>90</sup> Turner, S. and Ibsen, H. "Land agrarian reform in South Africa: A status report" (2000) <https://www.cabdirect.org/cabdirect/abstract/20013123991> (last accessed 19 February 2023).

<sup>91</sup> Mingo, C. "The 2002 Land Affairs Budget: Is Land Reform on Track?" above at note 74.

<sup>92</sup> A commonage is a municipality-owned land which is made available to town dwellers for grazing purposes.

<sup>93</sup> The commonage programme was 'extensive' in the formerly coloured areas of the Northern Cape. In the Free State there was progress in helping commonage projects develop into agricultural infrastructure. In other areas, it was concluded that the beneficiaries could not use their land rights in a productive, profitable and sustainable manner.

<sup>94</sup> Turner, S. and Ibsen, H. *Land agrarian reform in South Africa: A status report* (2000, University of the Western Cape) at 37.

<sup>95</sup> Ministry for Land Affairs. "Demand and Access to Land Amongst Black South Africans" available at <http://land.pwv.gov.za/rep2%5F98.html> (last accessed 20 February 2022).

<sup>96</sup> Minister of Agriculture and Land Affairs, "Budget Vote Speech by the Minister of Agriculture and Land Affairs (2021), available at <http://www.polity.org.za/govdocs/speeches/2001/sp0405a.html> (last accessed 12 February 2002).

denied access really utilised the additional land that was made available to them (140 071 hectares). Accessibility is not always implied by availability, and vice versa; availability may simply mean that something can be reached. Then it's hard to say whether the DLA has failed in its duty to ensure that marginalised people like single mothers, migrant workers, and the homeless have access to land.

In total, 507 792 households have benefited from land reform so far, including 40 633 households in rural areas and 15 238 households that previously had no access to land. Again, it is not clear if these numbers represent all people without access to land or just those lacking tenure security. It's not clear if these numbers only pertain to the period under examination or if they contain data from the beginning of the reform initiative. Only in May 2001 was agricultural state land in Port St Johns, Eastern Cape, delivered in accordance with the Power of Attorney held by provincial Members of the Executive Council (MECs). In April 2002, Minister Didiza made history by transferring the missionary settlement of Clarkson to 600 Mfengu households, making up 190 hectares of common land. The intention behind this land giveaway was to help successful African farmers secure property rights. There are 48 675.80 ha of unused state land, and 40,000 ha of it is suitable for rural settlement, as reported by the DLA in the questionnaire. When millions of people do not have access to land for housing or farming, it is puzzling that so much of it goes idle.

Despite some progress, the sluggish implementation is still to blame for the landless' continued lack of access to land. To this day, the discrepancies in land ownership between Europeans (who own more than 80%) and Africans (who own 20%) are virtually identical to those under colonialism and apartheid. Therefore, between 13 and 14 million people, mostly in rural areas, are affected by the lack of access to land.<sup>97</sup> Consequently, despite the progress made in land reform, there is mounting concern that it will be a long time before the majority of landless individuals realise their right to access residential and/or agricultural land. In the former homelands, the observance of land rights and land administration has deteriorated significantly. In November 2001, the DLA acknowledged that they lacked a distinct land ownership policy. According to its Deputy Director, Mampho Malgas, the government is still developing a land ownership policy. People in rural locations are still granted permission to occupy land at the present time. People are unable to obtain loans from commercial institutions because they lack the necessary documentation. Nevertheless, traditional leaders have been granted the authority to extend the land tenure.<sup>98</sup>

According to the Minister, the DLA is consulting with traditional leaders regarding the administration of communal land to identify "land use and development" solutions. The measure is considered the solution to "the role, powers, and functions of traditional leaders and institutions in local government."<sup>99</sup> Consequently, the measure endorses the security of tenure for former Bantustans and South African Development Trusts residents. (SADTs). Currently, relocating landless Africans causes them to be overcrowded on the 13 percent of land allocated to Africans during colonial times. Such an action does not effectively address land issues; hence, the urban population density. This is evidence that the authorities have failed to implement land tenure programmes effectively, coupled with an insufficient allocation of resources to realise the correct programme. Administrative Action and Mismanagement or Corruption There have been additional obstacles to the progression of land redistribution. For instance, the DLA has reported egregious instances of maladministration resulting from official corruption. Members of the DLA have reportedly committed acts of sabotage, as reported by the DLA. A case is pending against the DLA alleging that an employee intentionally obliterated records. A second instance involves a staff member who "has sold positions to the general public." This case and others involving nepotism and favouritism are prevalent and may be connected to sabotage. For instance, a candidate who receives an appointment in the manner described above is likely unqualified for the position.

The DLA's human resources division has conducted every fraud investigation involving an

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<sup>97</sup> Human Rights Watch revealed that 68 per cent of rural dwellers want to have their own farming land. *Unequal Protection: The State Response to Crime on South African Farms*, at 37.

<sup>98</sup> *Ibid.*

<sup>99</sup> Contralesa calls on speeding up for legal transfer of communal land," SABC, November 27, 2001, available at [http://www.sabcnews.com/south\\_africa/land\\_affairs/0,1009,24290,00.html](http://www.sabcnews.com/south_africa/land_affairs/0,1009,24290,00.html) (last accessed 16 March 2022).

employee who attempted to defraud a claimant. The department determined that it was best to fire the fraudster. If the department expands its capacity-building efforts, these cases may be reduced. In fact, the DLA has implemented measures that have reduced the number of instances of maladministration and corruption. The DLA has drafted policies and procedures on corruption and maladministration, which are readily available throughout the department in brochure form. In addition, staff members, including administrators, received training in sensitivity to inappropriate behaviour.

## 10. Conclusion

Land reform in South Africa remains problematic. Problems with programme implementation have persisted for the past seven years. Problems concerning the sluggish rate of delivery and the capacity to oversee the implementation of projects and programmes have not been addressed in a significant manner. Because the DLA does not specify some of the measures it has implemented, it is difficult to assess how these measures are implemented to fulfil the obligation to provide land to the landless. The advancement of land reform is hindered by the fact that policy issues continue to pose obstacles. In light of this, the allocation for land reform has been reduced over the years, particularly for the period under review. This has a significant impact on any policy worth implementing. Consequently, without effective implementation, the DLA's measures to respect, promote, fulfil, and protect the land access rights of individuals will be rendered ineffective. This is evidenced by the fact that many landless individuals remain dissatisfied with the rate of land reform. While the DLA is attempting to provide land to the landless, it is not doing so in a timely and efficient manner. The Grootboom decision demonstrates that "reasonableness" and "progressive realisation" can only be achieved when measures are taken to achieve a particular objective "quickly and efficiently." The DLA's sluggish direction of land reform continues to be cause for concern. A mechanism must be established to integrate the operations of the provinces with those of the DLA, as the provinces consistently refer to the DLA as the primary body dealing with land reform. It is disheartening to read Andries du Toit's warning statement quoted in the Kranspoort judgement about the ability for land restitution particularly, and maybe land reform in general, to overcome South Africa's enormous challenges of historical injustice and socio-economic inequality. The most pressing and distressing part of the problem is that returning to the land will fall short of the hopes and dreams that people have for it. Obviously, there is no way to get back what was lost. Part of the issue is that land wasn't the only thing lost. What was destroyed by the relocations was not just the land itself, but also a way of life, a network of social relationships, a structure of authority, and, lest we forget, a means of survival. Thus, the tragic truth of Restitution has been that returning to the land is often an uninspiring and disappointing experience. It is not always a return to a more genuine, dignified, and optimistic way of life to settle in the same place as one's ancestors or a younger, more vigorous, more hopeful version of oneself. Complex, disheartening, and agonising problems of the new South Africa have re-emerged, often in far more intractable forms than before. The rural and national economies that allowed for ways of life may now be in decline due to urbanisation and the increased demand for associated services. Once considered a luxury in a less globalised economy, modern conveniences like running water and electricity are now necessities that must be paid for. It's possible that in far too many cases, people whose land was taken away will have it returned to them, only to have it taken away again by banks or other wealthy buyers.<sup>100</sup>

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<sup>100</sup> J Dugard "Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?" *Constitutional Court Review* (2019) 9 at 135-160.

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