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Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?

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ABSTRACT: The 'land question' has undoubtedly become *the* issue at the centre of South African politics. This is largely because, notwithstanding various government efforts since 1994 to redress access to land and align contested property regimes in the public interest, the white minority continues to own a disproportionally large amount of land. The untransformed pattern of ownership of (and access) to land has become a potent symbol of the broader failures of South Africa's transition from apartheid. At the heart of the current political deliberation has been contestation over s 25 of the Constitution, the 'property clause', which is widely perceived to be an impediment to transformation and has been reviewed for amendment. Reflecting an increasingly uneasy bundle of imperatives from redistribution and restorative restitution, through customary land use, to private property ownership, it is unclear what any amendment will look like. At the same time as there are calls to repeal private property ownership, many poor people and communities are appealing to the government to speed up private title processes, and property owners (black and white), as well as traditional authorities, are demanding greater, rather than less, protection of their property rights. Against this backdrop, instead of interrogating what has (and has not) been achieved since 1994 or whether s 25 is optimal, this article examines the extent to which the current legal frameworks and judicial interpretation thereof are likely to constitute a hindrance to any government wishing to pursue transformative land reform. In doing so the article seeks to contribute towards a more nuanced understanding of the fault lines between the legal realm and the socio-political realm, as relating to the question of transformative land reform.

KEYWORDS: substantive transformation, section 25, land, property

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I INTRODUCTION

Besides the election of the new party president (and the other 'Top Six' officials),[1] the issue that dominated the 54th elective conference of African National Congress ('ANC') in Johannesburg in December 2017 was the evolving crisis around the evident failure of post-apartheid land reform.[2] Following what by all accounts was a heated deliberation, the ANC resolved to adopt a radical programme to fast-track land redistribution without compensation.[3] Accordingly, the ANC's 'January 8 Statement' of 2018 pledged 'the expropriation of land without compensation', albeit in a manner that 'not only meets the constitutional requirement of redress, but also promotes economic development, agricultural production and food security'.[4] And, following the ANC's support of an Economic Freedom Fighters ('EFF') motion[5] on 27 February 2018, the National Assembly voted to establish an ad hoc Constitutional Review Committee ('CRC') to investigate a possible amendment to the Constitution[6] to allow for radical land reform.[7] More recently, on 31 July 2018, in the midst of the CRC public hearings, President Cyril Ramaphosa announced that the ANC would amend the Constitution to enable the expropriation of land without compensation.[8]

[1] In a tight race against Nkosazana Dlamini-Zuma, Cyril Ramaphosa was elected as the 14th president of the ANC on 18 December 2017. Following the resignation of President Jacob Zuma two months later, Ramaphosa was elected President by the National Assembly.

[2] The term 'land reform' is used in this article generically to encompass all land- and property-related reform measures.

[3] L Omarjee 'ANC Reaches Resolution on Land Reform' (20 December 2017) available at, https://www.fin24.com/Economy/anc-reaches-resolution-on-land-reform-20171220; and M Merten '#ANCdecides2017: Land Expropriation without Compensation makes Grand Entrance' (21 December 2017) *Daily Maverick*, available at https://www.dailymaverick.co.za/article/2017-12-21-ancdecides2017-land-expropriation-without-compensation-makes-grand-entrance/#.WubX7C-B2i4.

[4] Statement of the National Executive Committee on the Occasion of the 106th Anniversary of the African National Congress *Politicsweb* (8 January 2018), available at http://www.politicsweb.co.za/documents/the-ancs-january-8th-statement-2018--cyril-ramapho.

[5] Interestingly, on 2 March 2017, the ANC voted against an EFF motion in the National Assembly to amend the Constitution to allow for the expropriation of land without compensation. At the time, then Deputy Secretary–General of the ANC, Jessie Duarte, defended the move, explaining that the Constitution allows the ANC to do what needs to be done on the land question: 'ANC Explains its Position on Land Expropriation' *ENCA* (2 March 2017) *ENCA*, available at https://www.enca.com/south-africa/anc-explains-its-position-on-land-expropriation.

[6] Constitution of the Republic of South Africa, 1996 ('Constitution').

[7] 'National Assembly gives the Constitution Review Committee Mandate to Review Section 25 of the Constitution' *Parliamentary Press Relief* (27 February 2017), available at https://www.parliament.gov.za/press-releases/national-assembly-gives-constitution-review-committee-mandate-review-section-25-constitution.

[8] 'Cyril Ramaphosa: We Are Going to Amend the Constitution on Land' *Businesslive* (1 August 2018), available at https://www.businesslive.co.za/rdm/politics/2018-08-01-cyril-ramaphosa-we-are-going-to-amend-the-constitution-on-land/.

Such moves, however politically motivated and as yet undefined, have occurred against the devastating reality of widening, and persistently racialised, socio-economic inequality,[9] including unequal access to property, especially rural land. A legacy of South Africa's colonial and apartheid past, which witnessed the displacement of black people on a scale that 'far exceeded that in any other colonial state in Africa',[10] the 'land question' has undoubtedly become *the* issue at the centre of national politics. This is largely because, notwithstanding various government efforts since 1994 to redress access to land and align contested property regimes in the public interest, the white minority continues to own a disproportionately large amount of land.[11] Indeed, some commentators have argued that, rather than dismantling colonial apartheid patterns, post-apartheid land reform strategies have perpetuated elite control and ownership of land 'while the majority rural black population holds insecure land rights and is often beholden to the state [including traditional authorities] and whites for their use of the land as "partners"'.[12] The untransformed pattern of ownership of (and access to) land, constituting a 'colonial present, even in the midst of land reform',[13] has become a potent symbol of the broader failures of South Africa's transition from apartheid. As highlighted by Elmien du Plessis, the purpose of land reform was 'not merely to return land to claimants', but also more comprehensively to right the wrongs of the past, to redress, to heal, to 'reverse

[9] With a Gini coefficient of between 0.660 and 0.696, South Africa is one of the most unequal countries in the world: C Barr 'Inequality Index: Where Are the World's Most Unequal Countries?' *The Guardian* (26 April 2017), available at https://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries; H Bhorat 'Is South Africa the most Unequal Society in the World?' *Mail & Guardian* (30 September 2015), available at https://mg.co.za/article/2015-09-30-is-south-africa-the-most-unequal-society-in-the-world. The persistently racialised nature of this inequality is outlined in the South African Human Rights Commission' Equality Report. SAHRC '2017/2018 Equality Report: Achieving Substantive Economic Equality through Rights-Based Radical Socio-Economic Transformation in South Africa' (2019) 19, available at https://www.sahrc.org.za/home/21/files/SAHRC%20Equality%20Report%202017_18.pdf. The Report notes that 'approximately 64 per cent of the Black African population and 40 per cent of the Coloured population group are poor, contrasted to a mere six per cent of the Indian/Asian population group and just a per cent of the White population group'.

[10] B Cousins & R Hall 'The Restitution of Land Rights Amendment Act of 2014' (2015), technical analysis commissioned by the Legal Resources Centre, 1-2 (in author's possession) available at, http://www.plaas.org.za/staff-member/hall. See also T Ngcukaitobi *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) 11–38.

[11] There are no comprehensively accurate statistics on the racial profile of land ownership in South Africa. A November 2017 land audit concluded that approximately 72 per cent of land that is privately-owned in South Africa is owned by white individuals. Department of Rural Development and Land Reform 'Land Audit Report: Phase II Private Land Ownership by Race, Gender and Nationality' ('Land Audit Report 2017'), available at http://www.ruraldevelopment.gov.za/publications/land-audit-report/file/6126). That number is somewhat deceptive. The land that is owned by private individuals constitutes only approximately 32 per cent of South Africa's landmass. The remaining 68 per cent of land is owned by the state (including traditional authorities), companies, community property associations and trusts. There is no clarity about the racial classification of the owners of these large and dominant categories of private and publically-owned land.

[12] T Kepe & R Hall 'Land Redistribution in South Africa: Towards Decolonisation or Recolonisation?' (2018) 45 *Politikon* 128, 131.

[13] Ibid.

racially skewed patterns of landownership' and to 'deracialise the privilege in property rights', as well as to acknowledge the 'hurt of dispossession and the histories of injustice'.[14]

At the heart of the current political deliberation has been contestation over s 25 of the Constitution, the 'property clause', which is widely perceived to be an impediment to transformation. For example, Black First Land First's submission to the Portfolio Committee on Public Works' public hearings on the Expropriation Bill B4-2015 ('Expropriation Bill') on 4 August 2015 sets out that 'Section 25 legalises land theft and legitimises colonialism … Section 25 in its entirety is a yoke around the necks and shackles in the feet and hands of our people. It makes us slaves in our own land'.[15] Officially, the National Assembly's explicit mandate to the CRC was to consider amending s 25 to allow more radical land reform. More polemically, the Azanian People's Organisation ('AZAPO') has called for the scrapping of s 25 and the nationalisation of land to (re)establish 'black power'.[16] And, academically, Magobe Bernard Ramose has argued that s 25 is a fatal obstacle to the objective of achieving justice for indigenous black South Africans.[17]

This consternation over the property clause is not surprising. Section 25 manages a political tension that was at the heart of South Africa's historic constitutional negotiations: how to deal with a reality in 1994 in which whites owned the vast majority of the land, despite comprising a small minority of the population. During the negotiations the National Party and various liberal interests, along with large commercial enterprises (controlled predominantly by the white minority), on the one hand, wanted to ensure that existing ownership of property by the white minority would be protected. On the other hand, more radical wings of the ANC and aligned liberation movements saw the need for major restitution and redistribution of land to correct the historical injustices of colonialism and apartheid.[18] Section 25 – as well as the precursor s 28 in the Interim Constitution of the Republic of South Africa, 1993 (Interim Constitution) – represents a political compromise between these positions, seeking to balance the rights and interests of the (overwhelmingly white) 'haves' against the rights and interests of the (overwhelmingly black) 'have-nots'. Thus, s 25 undoubtedly affords a degree of protection to existing property owners by prohibiting arbitrary deprivation of property.[19] However, at the same time, it includes an imperative to advance access to land on an equitable basis, and a framework to pursue land restitution, inter alia through authorising expropriation (albeit with some form of compensation) when in the public interest. The 'public interest' is explicitly

[14] E du Plessis 'Property in Transitional Times: The Glaring Absence of Property at the TRC' in M Swart & K Van Marle (eds) *The Limits of Transition: The South African Truth and Reconciliation Commission 20 Years on* (2017) 94, 107. See also R Hall 'Reconciling the Past, Present and Future' in C Walker, A Bohlin, R Hall & T Kepe (eds) *Land, Memory, Reconstruction and Justice: Perspectives on Land Claims in South Africa* (2010) 17, 17.

[15] Black First Land First 'Return the Stolen Land – That's the Only Real Solution! Sankara Policy and Political School Submission to the Portfolio Committee of Public Works on Public Hearing on the Expropriation Bill [2015]' *Wordpress* (4 August 2015), available at https://black1stland1st.wordpress.com/2015/08/04/return-the-stolen-land-thats-the-only-real-solution-sankara-policy-and-political-school-submission-to-the-portfolio-committee-of-public-works-on-public-hearing-on-the-expropriation-bill/.

[16] Input by AZAPO representative, Lepeto Nkubela, at UNISA debate on expropriation without compensation, Pretoria *ENCA* (30 April 2018), available at https://www.enca.com/south-africa/catch-it-live-unisas-land-expropriation-debate.

[17] M Ramose 'To Whom Does the Land Belong' (2016) 50 *Psychology in Society* 86.

[18] H Klug *Constituting Democracy: Law, Globalisation and South Africa's Political Reconstruction* (2000) 124–136.

[19] Constitution, s 25(1) prohibits arbitrary deprivation of property.

defined as including 'the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.[20]

Reflecting an increasingly uneasy bundle of imperatives from redistribution and restorative restitution, through customary land use, to private property ownership, s 25's Janus character has given rise to a schizophrenic public discourse. At the same time as there are calls to amend and even repeal s 25, many poor people and communities are appealing to the government to speed up private property titling processes, and property owners (black and white), as well as traditional authorities, are demanding greater, rather than less, protection of their property rights. Against this backdrop, instead of interrogating what has (and has not) been achieved since 1994, or whether s 25 is optimal – the socio-political question, this article examines the extent to which the current legal frameworks and judicial interpretation thereof are likely to constitute a hindrance to any government wishing to pursue transformative land reform. In doing so, the article seeks to contribute towards a more nuanced understanding of the fault lines between the legal realm and the socio-political realm, as relating to the transformative land reform question. Before unpacking s 25's legal limits (in part III), the article first grapples in part II with the question of what transformation means in the legal realm and how this might (should?) be applied to land.

II DEFINING TRANSFORMATIVE LAND REFORM

In his influential 1998 article entitled 'Legal Culture and Transformative Constitutionalism', Karl Klare identifies transformative constitutionalism as the:

> Long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and *egalitarian direction.* Transformative constitutionalism connotes an enterprise of inducing large-scale change through non-violent political processes grounded in law.[21]

Expanding on the 'egalitarian direction', Klare describes transformative constitutionalism as being potentially post-liberal in its pursuit of 'substantive equality'.[22] As explained by Cathi Albertyn, in South Africa the term substantive equality emerged 'from the constitutional negotiations of the early 1990s'.[23] In constitutional terms, substantive equality goes beyond an 'inclusive' trajectory ('inclusive equality') that 'would align with a liberal idea of inclusion into the status quo'.[24] Inclusive equality is referred to by Nancy Fraser as an 'affirmative' approach to change, in which the objective is to correct 'inequitable outcomes of social arrangements without disturbing the underlying framework that generates them'.[25]

[20] Constitution, s 25(2) provides that property may be expropriated only in terms of a law of general application 'for a public purpose or in the public interest' and subject to compensation; s 25(4) specifies that 'the public interest' includes 'the nation's commitment to land reform'; and s 25(2)–(9) sets out the parameters of expropriation and land restitution. Land restitution is expounded in greater detail in the Restitution of Land Rights Act 22 of 1994.

[21] K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150 (own emphasis).

[22] Ibid at 151.

[23] C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253, 254.

[24] Ibid at 256.

[25] N Fraser 'From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age' (1995) 212 *New Left Review* 68, 82.

Contradistinctively, and in Klare's post-liberal iteration, substantive equality entails a commitment to the eradication of systemic inequalities and to shifting 'the power relations that maintain the status quo'.[26] That substantive equality in the socio-economic (including land/property) realm would have to entail significant redistribution (especially in profoundly unequal societies such as South Africa) is emphasised by Fraser.[27] Importantly, a constitutional commitment to transformation defined in substantive equality terms – 'substantive transformation' – is both an aspirational ideal and a presumption that this 'is (at least partly) possible through law'.[28] However, 25 years after South Africa's transition to democratic rule, at the political level it remains unclear which model of equality we are pursuing as our vehicle for, and vision of, transformation. To an extent, as explored below, this lack of political direction has been reflected in constitutional adjudication, which still has to develop a substantive theory of socio-economic transformation.[29]

Until now, the political trajectory – as pursued, however incompletely, through policies such as Black Economic Empowerment – has arguably been more closely aligned with inclusive than substantive equality (mainly representing an attempt to deracialise the existing unequal socio-economic order). Yet, during 2017, politicians from an increasingly embattled ANC government began to call publicly for radical economic transformation.[30] Recently, these calls have focused on land and, by extension, the property clause.[31] Reflecting the broader opaqueness about what kind of transformation to pursue, criticisms of s 25 reveal several strands that delineate critical societal fractures.[32]

One strand of critique holds that s 25 imposes a western notion of property rights, and needs to be 'decolonised'.[33] While it is true that s 25 recognises individual private property ownership (but does not establish a positive right to this), it also implicitly (and explicitly through related legislation) encompasses plural land rights, including African customary land rights.[34] Yet, this inclusion of customary land rights presents a political and constitutional conundrum. In geographic terms, the areas in which customary land rights apply are the previous 'bantustans' or 'homeland' (black African) areas, which are still governed by traditional authorities who exercise constitutionally-enshrined[35] chiefly authority over customary land rights. With traditional

[26] Albertyn (note 23 above) at 256.

[27] Fraser (note 25 above) at 68–93.

[28] Albertyn (note 23 above) at 254.

[29] S Wilson & J Dugard 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' (2011) 22 *Stellenbosch Law Review* 664–682.

[30] C Malikane's Discussion of Radical Economic Transformation as Reported by 702 radio (10 April 2017), available at http://www.702.co.za/articles/251821/so-what-exactly-is-radical-economic-transformation.

[31] That dissatisfaction over the failure of land reform has focused on the legal sphere, as opposed to the political sphere, makes sense from the ANC's perspective, as the political party that has governed since 1994. It is less clear why the EFF, which was established in opposition to the ANC, has pursued such a legal focus.

[32] This article does not attempt an interrogation of any of the strands of academic or popular critique.

[33] T Madlingozi 'The Proposed Amendment to the South African Constitution: Finishing the Unfinished Business of Decolonialisation?' *Critical Legal Thinking* (6 April 2018), available at http://criticallegalthinking.com/2018/04/06/the-proposed-amendment-to-the-south-african-constitution/. See also Ramose (note 17 above).

[34] Constitution, s 25(6) requires the government to enact legislation to secure land tenure (as opposed to ownership) rights. As examined in part III below, a range of legislation has been enacted to protect land tenure rights, including legislation to protect customary land rights. In addition, Constitution, s 211(3) underscores that customary law is a recognised source of law in South Africa.

[35] Traditional leadership is recognised as one of the institutions of government, and its powers are consolidated in ss 211 and 212 of the Constitution as well as the Traditional Leadership and Governance Framework Act 41 of 2003.

leadership typically assuming crucial decision-making powers over land, individuals and communities in customary land rights areas often operate as 'subjects' rather than 'citizens',[36] when compared with the greater degree of social and political (if not necessarily economic) autonomy and accountability afforded in non-customary land rights areas.

This bifurcated system of land governance has resulted in tangible discontent and tension within customary communities, as poignantly detailed in the November 2017 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change ('HLPR').[37] Indeed, customary communities have actively resisted the attempts by the Jacob Zuma Presidency to entrench chiefly power over land rights. For example, the Communal Land Rights Act 11 of 2004 ('CLARA'), which sought to entrench the powers of traditional authorities to control the occupation, use and administration of customary communal land,[38] was (successfully) challenged by rural communities in the case of *Tongoane*,[39] resulting in the striking down of CLARA. Similarly, various iterations of the Traditional Courts Bill ('TCB') have had to be abandoned in the face of resistance among affected communities towards the extensive powers envisaged for traditional courts.[40] And the attempt to re-open the land restitution process via the Restitution of Land Rights Amendment Act 15 of 2014 ('RLRAA')

[36] Mahmoud Mamdani's seminal 1996 book, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, outlines how colonial rule in Africa took on the form of a bifurcated state, with racial domination mediated through direct rule in urban areas and through tribally organised traditional authorities elsewhere, and how this bifurcation has persisted in the post-colonial period creating 'citizens' in urban areas and maintaining 'subjects' under authoritarian traditional rule in rural areas. For an analysis of the continuity in South Africa of traditional leadership through colonialism and apartheid until today, see M Buthelezi and D Skosana 'The Salience of Chiefs in Postapartheid South Africa: Reflections on the Nhlapo Commission' (2018) in J Comaroff & J Comaroff (eds) *The Politics of Custom: Chiefship, Capital, and the State in Contemporary Africa* 110. In addition to diminished citizenship, scholars have pointed to the institutional perpetuation of patriarchy under traditional authorities, including regarding allocation of land (A Claassens 'Recent Changes in Women's Land Rights and Contested Customary Law in South Africa' (2013) 13 *Journal of Agrarian Change* 71). Other scholars have highlighted the mounting fracture between customary communities and traditional leadership over mineral rights (S Mnwana '"Custom" and Fractured "Community": Mining, Property Disputes and Law on the Platinum Belt, South Africa' (2016) 1 *Third World Thematics: A TWQ Journal* 218).

[37] *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* ('HLPR') (November 2017) 200–305, available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf.

[38] T Thipe 'Bound by Tradition: Chieftaincy in a 'New' South Africa' in C Ballantine, M Chapman, K Erwin & G Maré (eds) *Living Together, Living Apart? Social Cohesion in a Future South Africa* 68.

[39] *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 [ZACC] 10, 2010 (6) SA 214 (CC)('*Tongoane*').

[40] T Thipe, M De Souza & N Luwaya '"The Advert was Put Up Yesterday": Public Participation in the Traditional Courts Bill Legislative Process' (2016) 60 *New York Law School Law Review* 519. See also A Claassens 'Reviled Land Act is being re-enacted' (7 February 2014) *Mail & Guardian,* available at https://mg.co.za/article/2014-02-06-reviled-land-act-is-being-re-enacted. In 2017, a new draft TCB was introduced (B1-2017)(the previous, ill-fated iterations of the Bill were B15-2008 and B1-2012). See the Congress of South African Trade Union (COSATU)'s statement on the new Bill entitled 'COSATU strongly condemns ANC MP's removal of Gender and Human Rights Protection Clauses from the Traditional Courts Bill' (23 August 2018), available at http://www.cosatu.org.za/show.php?ID=14202. See also M Merten 'Parliament: Opt-Out, Traditional Courts Bill supporters' most hated clause' (19 March 2018) *Daily Maverick*, available at http://www.cosatu.org.za/show.php?ID=14202; S Mnisi-Weeks 'South Africa's Traditional Courts Bill 2.0: Improved but still Flawed' (4 April 2017) *The Conversation* (4 April 2017), available at https://theconversation.com/south-africas-traditional-courts-bill-2-0-improved-but-still-flawed-74997.

was derailed after it was successfully challenged in the *Land Access Movement*[41] case by affected communities, who feared that the re-opening of the restitution process would mean that their as yet unresolved claims might never be settled. Commentators have pointed out that the RLRAA was viewed by former President Zuma as a move to appease traditional leaders following the failures of CLARA and the TCB.[42] At the time, then President Zuma had been mobilising traditional authorities 'to hire good lawyers and make vast claims on behalf of their people', which many rural communities understood to be a push to 'consolidate chiefly power at the expense of the rights and citizenship' of customary communities.[43]

Returning to the legal realm, while the HLPR has exposed the dissatisfaction among customary communities with their current land rights governance regime as overseen by traditional authorities, it remains unclear precisely what land rights regime should be pursued in customary areas (whether communal land use, communal property ownership, private land ownership etc),[44] as well as how to ensure democratic citizenship over such land rights under traditional authority administration of land. The recent calls for land expropriation without compensation, including those that stress the link between restoration of land and recognition of African culture, have mostly been silent about how to approach the issue of traditional authority power over customary land rights. Interestingly, support expressed by the ANC at its elective conference in December 2017 for the HLPR's recommendation to amend or repeal the KwaZulu Ingonyama Trust Act 3KZ of 1993 (Ingonyama Trust Act[45])[46] dissolved in March 2018 following strident opposition by King Goodwill Zwelithini, who warned the government to leave the Ingonyama Trust Act alone or 'face something else'.[47]

Another (not unrelated) strand of critique focuses on the abolishment of private ownership of land as it currently operates. This strand is exemplified by the EFF's official policy position that 'all land should be transferred to the ownership and custodianship of the state' and that 'once the state is in control and custodianship of all land, those who are currently using the land or intend using the land … will apply for land-use licenses, which should be granted only

[41] *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others* 2016 [ZACC] 22, 2016 (5) SA 635 (CC)('*Land Access Movement*').

[42] Centre for Law and Society: Rural Women's Action Research Programme 'Restitution of Land Rights Amendment Bill' (January 2014), available at https://open.uct.ac.za/handle/11427/2497.

[43] N Gasa 'Laws for Traditional Leaders Emulate the Logic of Apartheid' (14 October 2014) *Business Day* (Referring to then President Zuma's opening address to the House of Traditional Leaders on 27 February 2014). See also A Claassens 'Haste over Land Rights Bill not just in Aid of Buying Votes' (10 April 2014) *Business Day* (who notes that, less than a week after President Zuma's opening address, King Goodwill Zwelithini announced that he had agreed to submit one consolidated claim for all the land taken from the Zulu nation, and that such land would be distributed 'fairly' among communities once restituted).

[44] In the absence of appropriate and acceptable legislation since the overturning of CLARA, the Interim Protection of Informal Land Rights Act 31 of 1996 ('IPILRA')(which was meant to be an interim piece of legislation lasting only until 31 December 1997), has had to be renewed each year since 1995). Among the recommendations of the HLPR is that urgent attention should be given to consolidating the legislation governing customary land rights (HLPR (note 37 above) at 269).

[45] The Ingonyama Trust Act was a last-minute political compromise that was enacted just days before South Africa's historic election on 27 April 1994. Controversially, it vests sole control over affected land with the Ingonyama Trust Board.

[46] HLPR (note 37 above) at 273–274.

[47] Z Ngcobo 'Zulu King Calls Urgent Meeting over Possible Repeal of Ingonyama Trust Act' (2018) ENCA, available at https://ewn.co.za/2018/03/07/zulu-king-calls-urgent-meeting-over-possible-repeal-of-ingonyama-trust-act.

when there is a purpose for the land being applied for'.[48] This would certainly be one way to transform land rights in South Africa. In relation to this article's inquiry, it is likely that there would be significant constitutional and statutory obstacles to this kind of transformation of property rights. Indeed, this magnitude of change (that might be called 'revolutionary equality' or 'revolutionary transformation' as it would completely undo, as opposed to redistribute, ownership of land) would require an entirely different socio-political and legal order that goes beyond the scope of this article's analysis. However, it is unclear whether, for better or worse, any political party (including the EFF) would actually (as opposed to rhetorically) abolish private title outright.[49] The extent to which any such political stance would garner popular support is furthermore unclear. Case studies suggest that low- and no-income households wish for more, rather than less, property ownership.[50] And, presumably, the majority of black property owners (including beneficiaries of the state's subsidy housing scheme[51]), like their white counterparts, are unlikely to support any such agenda. It should also be noted that, alongside property ownership (which in South Africa includes public property ownership, private property ownership and communal property ownership), s 25 covers other property rights – namely, use (including customary use) and occupation (including unlawful occupation). Nonetheless, as explored in part III below, it is inescapable that, without concerted political efforts, where title (whether private, public or communal) exists alongside other property rights, ownership rights will almost always dominate, not only in the interests of the empowered but also in the aspirations of the disempowered.[52]

Regrettably, the Parliamentary CRC hearings that took place between June and August 2018 did not focus on the significant unanswered questions about what forms of land and

[48] The EFF describes its policy position on land as being similar to the licensing scheme in the Minerals and Petroleum Resources Development Act 28 of 2002 ('MPRDA') in terms of which old order mineral rights were converted – with equity- and social justice-related conditions – into new order 'transformed' mineral rights. In *Agri South Africa v Minister for Minerals and Energy* 2013 [ZACC] 9, 2013 (4) SA 1 (CC)('*AgriSA*'), the Court found that the MPRDA's licensing scheme was constitutional and did not amount to uncompensated expropriation (see discussion of *AgriSA* in part III below). However, the constitutionality of the MPRDA scheme relies in part on the fact that there was already a regulatory scheme in place for the licensing of mining rights, and the MPRDA constituted merely the latest in a long line of regulatory changes to the scheme governing mineral rights. Since there is no such existing regulatory framework for the licensing of property rights (the requirement for the registration of relevant property rights is not comparable), the kind of change that would be entailed in converting to the EFF's proposed scheme for land is likely to pose a full-frontal challenge to s 25.

[49] The EFF has been inconsistent in its statements about property. See for example the news report by E Gerber 'EFF on Land Expropriation: "No One Will Lose Their House"' (27 February 2018) *News24*, available at https://www.news24.com/SouthAfrica/News/eff-on-land-expropriation-no-one-will-lose-their-house-20180227. See also Kepe & Hall (note 12 above) at 129) (who point to a possibly relevant distinction between the EFF's election song '*Izwe Lami*' (the Land is Mine) and the Pan Africanist Congress (PAC)'s slogan from the 1960s – '*Izwe Lethu*' (the Land is Ours)).

[50] J Dugard & M Ngwenya 'Property in a Time of Transition: An Examination of Perceptions, Navigations and Constructions of Property Relations among Unlawful Occupiers in Johannesburg's Inner City' (2018) 56 *Urban Studies* 1165.

[51] In research I undertook in April 2018 among 21 beneficiaries of the government's private housing programme (so-called 'RDP' or 'Breaking New Ground' housing), I asked home-owners whether, if they were given the hypothetical choice between their private title RDP house (which they have to maintain) or free housing that the municipality would maintain, 20 of the 21 respondents answered that they would choose the RDP house option (Dugard 'Staircase or Safety Net: Examining the Socio-Economic Meaning of RDP Home Ownership to Beneficiaries – a Case Study of Klapmuts, Stellenbosch (forthcoming)).

[52] Dugard & Ngwenya (note 50 above).

property rights South Africans (particularly black South Africans) want, and how individuals and communities envisage land reform. In the absence of clear answers to these questions – and assuming that, for a significant proportion of black South Africans, the burning issue is not the outright abolishment of property ownership (revolutionary equality) but rather how to gain more and/or stronger property rights, in whatever form – the remainder of this article explores the extent to which the current legal parameters (in terms of both legislative text and judicial interpretation thereof) enable transformation of the land regime in the substantive equality sense.

III UNPACKING SECTION 25

Section 25 contains eight sub-sections, making the property clause the longest in the Bill of Rights.[53] Sub-sections 25(1), (2) and (3) constitute the more defensive sub-sections, with s 25(4)–(8) constituting the more reformist sub-sections.[54] In 1996, at the time the Final Constitution came into effect, it was clear that the defensive sub-sections would overwhelmingly act to the benefit of white, historically advantaged persons (who constituted the vast majority of property owners); whereas the reformist sub-sections were focused on benefiting historically disadvantaged black persons. It is perhaps worth noting that, over time and, as more black people have become property owners, the defensive sub-sections serve all property owners, while the reformist sub-sections continue to benefit historically disadvantaged black persons. To be sure, one of the arguments for including property rights' protections after 1994 was to extend these to the previously excluded black majority, whose property-related rights had been regularly disrespected and violated under apartheid. As voiced by Constitutional Court Judge, Albie Sachs, in *Port Elizabeth Municipality*:

> The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.[55]

Naturally, particularly from a Marxist perspective,[56] the increasingly (but still far from representative) multi-racial profile of, specifically, private ownership rights[57] is not evidence of any inherently transformative (or non-transformative) character of s 25. Rather, the legal

[53] Mogobe Bernard Ramose notes that the 'longest clause in constitutions is normally the clause that has to do with the abrogation of rights' (note 17 above) at 97. However, in the case of s 25 of the South African Constitution, the reformist clauses that advance rights to historically disadvantaged individuals and groups are longer than the protective clauses.

[54] J Pienaar *Land Reform* (2014) 167)(Section 25 embodies a 'clearly more reform-centred and expansive land reform approach' than its precursor, s 28 of the Interim Constitution).

[55] *Port Elizabeth Municipality v Various Occupiers* 2004 [ZACC] 7, 2005 (1) SA 217 (CC)('*Port Elizabeth Municipality*') para 15.

[56] There has been surprisingly scant Marxist/class-based critique of the current land debates. Most commentary has been in the form of a race- and class-blind defence of property ownership rights from interest groups such as the Free Market Foundation; or a (class-de-emphasised) race-based critique of the property paradigm from scholars in the decoloniality or Black Consciousness traditions.

[57] Statistics for private house ownership (as opposed to ownership of farm land) indicate that a higher proportion of African households (approximately 55 per cent) own their houses outright than do the proportion of white households (approximately 40 per cent) (South African Institute of Race Relations *South Africa Survey 2017* (2017) 706–707). This is due to the government's subsidy housing programme, which results in beneficiaries becoming owners without having to make any mortgage bond payments.

potential and legal limits of s 25's clauses, along with the associated legislation, are revealed through an examination of the textual parameters and judicial adjudication thereof.

A Section 25(1): arbitrary deprivation

Section 25 does not provide a positive guarantee of continued ownership, or a right to property per se.[58] Rather, s 25(1) establishes a negative right not to be arbitrarily deprived of property, stating that no-one 'may be deprived of property except in terms of a law of general application', and 'no law may permit arbitrary deprivation of property'. This provision protects property owners, whether historically advantaged or historically disadvantaged, from being arbitrarily deprived of their property.[59] Although on the surface this is a conservative right (preserving property ownership), the courts have interpreted this sub-section transformatively in two key respects.

First, in terms of the relationship between deprivation and expropriation (with expropriation constituting the harshest and most comprehensive form of deprivation),[60] the courts have on the whole interpreted deprivation quite widely and, concomitantly, interpreted expropriation quite narrowly.[61] This is a progressive approach because, in light of the requirement for compensation in the context of expropriation, a more restrictive interpretation of what constitutes expropriation (and a wider interpretation of deprivation) means having to draw less on public funds to compensate property owners.

Similarly, the courts have clarified that, while wholesale regulatory regime-change projects embarked on by the post-apartheid state may amount to (non-arbitrary) deprivation, these do not amount to expropriation, relieving the state of the obligation to pay compensation to

[58] Section 25's precursor, s 28 of the Interim Constitution, did not contain a conventional property clause either but it had a more robustly articulated protection of property rights in that s 28(1) recognised the right of everyone to 'acquire and hold rights in property'. This formulation was dropped in favour of the weaker iteration of property rights pursued in s 25 of the Final Constitution. In addition, in relation to arbitrary deprivation, s 28(2) of the Interim Constitution provided a stronger protection against deprivation than that of s 25(1) of the Final Constitution, stating: 'No deprivation of any rights in property shall be permitted otherwise than in accordance with a law' (Pienaar (note 54 above) at 167–191).

[59] Andre van der Walt explains that a deprivation (such as the inability to transfer one's immovable property without obtaining a municipal rates clearance certificate, or having to accommodate unlawful occupiers while the state provides alternative accommodation) restricts or limits the use of private property in the public interest without necessarily taking away the property – it affects everyone in that situation more or less equally, whereas expropriation entails taking away the property from specific owner(s) for a public use (A Van der Walt & G Pienaar *Introduction to the Law of Property* (6th Ed, 2013) 313).

[60] *Harksen v Lane NO & Others* [1997] ZACC 12, 1998 (1) SA 300 (CC) and *Reflect-All 1025 CC &Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & Another* [2009] ZACC 24, 2009 (6) SA 391 (CC).

[61] A disappointing exception is the Constitutional Court's decision in *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37, 2015 (2) SA 584 (CC)('*Arun*'), in which, instead of finding that the City of Cape Town's unauthorized, excessive vesting of property was simply unlawful administrative action to be set aside, the Court found this action to have amounted to expropriation and that the property developer was therefore entitled to compensation. Arun's legal reasoning has been questioned and, arguably, does not reflect a clear legal line in relation to the jurisprudence on deprivation and/or expropriation. See J Dugard & N Seme 'Property Rights in Court: An Examination of Judicial Attempts to Settle Section 25's Balancing Act re Restitution and Expropriation' (2018) 34 *South African Journal on Human Rights* 33, 51–55. See also E Marais 'A Common-Law Presumption, Statutory Interpretation and Section 25(2) of the Constitution – A Tale of Three Fallacies: A Critical Analysis of the Constitutional Court's *Arun* Judgment' (2016) 133 *South African Law Journal* 629.

the multitude of affected property owners. In *AgriSA*,[62] the Constitutional Court (the Court) endorsed the transformative objective of the Minerals and Petroleum Resources Development Act 28 of 2002 ('MPRDA'), which seeks to 'promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa and to 'substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources'.[63] Crucially, *AgriSA* validated the MPRDA's conversion scheme, which had the effect of terminating the rights of any old-order mineral rights holder that failed to convert its rights to new-order mineral rights in terms of the process set out in the MPRDA. The Court found that, although constituting (non-arbitrary) deprivation, the scheme did not amount to expropriation and, as such, was not subject to compensation. The judgment thus confirmed the MPRDA's transformative objectives, as well as the project to redistribute mineral rights from old-order (overwhelmingly historically advantaged) to new-order (historically disadvantaged) holders.

Second, the courts have clarified that property owners might have to tolerate some degree of deprivation of their property rights in the context of balancing property rights with other constitutional rights such as unlawful occupiers' housing rights (set out in section 26 of the Constitution[64]), and that having to accommodate unlawful occupation for months at a time will not in itself constitute arbitrary deprivation. In *Blue Moonlight*,[65] which concerned an application by a private property developer to evict 86 desperately poor unlawful occupiers from an inner city building, the Court ruled that, although the property owner could not be expected to be burdened with providing accommodation to the occupiers indefinitely, 'a degree of patience should be reasonably expected of it' while the municipality lined up alternative accommodation.[66] In the *Blue Moonlight* case, the Court operationalised this principle by ordering the municipality to provide the occupiers with alternative accommodation within four months of the judgment being delivered, and authorising an eviction only after the occupiers had been relocated in the alternative accommodation.[67]

As underscored by the Court, the property owner, who 'wishes to exercise its right to develop its property', [68] cannot be expected indefinitely to provide free housing to the occupiers, but its rights as property owner must be interpreted within the context of the requirement that eviction must be just and equitable:[69]

> The South African constitutional order recognises the social and historical context of property and related rights. The protection against arbitrary deprivation of property in section 25 of the

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[62] *AgriSA* (note 48 above).

[63] MPRDA, s 2.

[64] Constitution, s 26 ('[E]veryone has the right to have access to adequate housing'; the 'state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'; and no-one 'may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances' and no 'legislation may permit arbitrary evictions'.

[65] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC)('*Blue Moonlight*').

[66] Ibid at para 101.

[67] Ibid para 104.

[68] Ibid para 3.

[69] Ibid para 97.

> Constitution is balanced by the right of access to adequate housing in section 26(1) and the right not to be evicted arbitrarily from one's home in section 26(3).[70]
>
> Historical context is relevant to one's understanding of the constitutional protection against arbitrary deprivation of property and to access to adequate housing. Apartheid legislation undermined both the right of access to adequate housing and the right to property. Section 25 prohibits arbitrary deprivation of property but also addresses the need to redress the grossly unequal social conditions … Unlawful occupation results in a deprivation of property under section 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by a law of general application and if not arbitrary. Therefore [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998] allows for eviction of unlawful occupiers only when it is just and equitable … A court must consider an open list of factors in the determination of what is just and equitable. The relevant factors to be taken into account in this case are the following. The Occupiers have been in occupation for more than six months. Some of them have occupied the property for a long time. The occupation was once lawful. Blue Moonlight was aware of the Occupiers when it bought the property. Eviction of the Occupiers will render them homeless. There is no competing risk of homelessness on the part of Blue Moonlight, as there might be in circumstances where eviction is sought to enable a family to move into a home. It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by [the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998].[71]

Like the hierarchical contestation between traditional authorities and customary communities outlined in part II above, the clash between private ownership and unlawful occupation rights is an important structural fault line in the property paradigm. While not specifying how this clash of rights should be governed, s 25 provides a framework in which maximum latitude is afforded to the executive, legislature and judiciary to pursue a substantive equality approach. The extent to which, in the absence of concerted executive action, the judiciary has adjudicated such clashes transformatively is explored in the analysis of s 25(6) in part C below.

B Section 25(2), (3) and (4): expropriation for a public purpose or in the public interest[72]

The power of the state to expropriate private property – sometimes referred to as eminent domain – is a common feature of most legal frameworks and is regularly used by governments around the world to pursue the public purpose of building roads or dams etc. In South Africa, expropriation generally is set out in s 25(2), which establishes that property can be expropriated only in terms of a law of general application–

a. for a public purpose or in the public interest; and
b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

[70] Ibid para 34 (footnotes omitted).

[71] Ibid paras 35–40 (footnotes omitted).

[72] This section draws on J Dugard 'The Right to Land Remains a Thorny Issue' in J Meiring (ed) (2017) *South Africa's Constitution at Twenty One* 160.

Apart from the usual public purposes, s 25(4) explicitly authorises the state to expropriate 'in the public interest'[73] for the purposes of land reform, land restitution and 'to bring about equitable access to natural resources', and clarifies that 'property is not limited to land.[74] Nonetheless, s 25's expropriation framework has been popularly cast as inimical to transformation because of its supposed requirement of a 'willing buyer, willing seller', market value-driven compensation approach. This approach, which for largely undefended reasons has to date been pursued by the government, is in fact not mandated by the Constitution.

It is probable that the persistence of a 'willing buyer, willing seller', market value-driven compensation approach in the post-apartheid era is at least partially explained by a mistaken continued reliance on s 12(a)(i) of the Expropriation Act 63 of 1975 (Expropriation Act), which refers to compensation for expropriation reflecting 'the amount which the property would have realised if sold on the date of notice in the open market'. Under the apartheid regime, this clause certainly did mandate a 'willing buyer, willing seller' market value-driven approach. Crucially, however, the Expropriation Act must comply with the Constitution to be lawful. This means that s 25(3) of the Constitution's formulation for compensation must take precedence.[75] Section 25(3) provides:

> The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including–
> a. the current use of the property;
> b. the history of the acquisition of the property and use of the property;
> c. the market value of the property;
> d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> e. the purpose of the expropriation.

It is clear from s 25(3)(a)–(e) that market value is simply one of a range of (non-exhaustive) factors to be considered when deciding how much compensation to award in cases of

[73] Pienaar notes that s 28 of the Interim Constitution had a 'rather limited scope' for expropriation, allowing expropriation only for a 'public purpose', which was reformulated for the (Final) Constitution specifically to acknowledge the need for land reform and restitution (Pienaar (note 54 above) 170).

[74] The provisions in s 25(4) that the 'public interest' includes the 'nation's commitment … to reforms to bring about equitable access to all South Africa's natural resources' and that 'property is not limited to land', create significant room for the state to undertake systemic transformation of property regimes such as water, minerals, land etc. There is not the space here to deal with the resources aspect, suffice to mention that there has been a wholesale restructuring in relation to water ownership and rights, overseen by the Water Services Act 108 of 1997 and the National Water Act 36 of 1998 and, as outlined above, a similar substantial restructuring of the regime governing mineral rights under the MPRDA.

[75] While the subsidiarity principle establishes that where there is legislation to give effect to a constitutional right, any person alleging a violation of the right should rely on the legislation rather than directly on the Constitution, direct reliance on the Constitution is possible when the legislation does not properly give effect to the constitutional right (Pienaar (note 54 above) 188). Nonetheless, a cleaner approach would be for the Expropriation Act to be amended to bring it in line with the Constitution. Parliament has been attempting to enact a new Expropriation Act for many years. The latest version of the Expropriation Bill was approved by Parliament on 26 May 2016. However, in mid-2016 the Bill was sent back to Parliament by then President Zuma over concerns related to the public participation process pursued by the National Council of Provinces. Intriguingly, on 28 August 2018, the Public Works Committee withdrew the Expropriation Bill (L Ensor 'Expropriation Bill Withdrawn for Further Consideration' (28 August 2019) *Business Live*, available at https://www.businesslive.co.za/bd/national/2018-08-28-expropriation-bill-withdrawn-for-further-consideration/).

expropriation. This list implies a system of calculation in which even if market value is used as the starting point of any calculation of compensation, after proper consideration of all the other factors, the final amount could be substantially lower.[76] A recent Land Claims Court ('LCC') case, *Msiza* LCC [77] – concerning s 16 of the Labour Tenants (Land Reform) Act 3 of 1996 ('LTA'), which enables labour tenants to acquire ownership of the land on which they have worked and lived – confirmed this legal interpretation. *Msiza* LCC emphasised that the guiding principle in s 25(3) is for just and equitable compensation rather than market value compensation, meaning that, even if market value is a useful starting point in deciding the amount of compensation (the 'two-stage' approach to calculation of compensation), a court can award below-market value compensation in the public interest:

> In this trial, the third and fourth respondents [the affected property owners] were insistent upon the payment of market value for compensation. I must dispense with this argument at this early stage. Market value is not the basis for the determination of compensation under s 25 of the Constitution where property or land has been acquired by the state in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a court assesses just and equitable compensation. It is not correct to submit, as was done on behalf of the landowners, that the jurisprudence of this court has installed market value as a pre-eminent consideration. Properly understood, the jurisprudence of this court shows that market value is regularly used as an entry point to the analysis because it is the most tangible factor in all of the factors listed in s 25(3). This is not to make market value the most important factor in the analysis of just and equitable compensation; the object is always to determine compensation which is just and equitable, not to determine the market value of the property.[78]

Although the Supreme Court of Appeal ('SCA') subsequently overturned the quantum of compensation awarded in *Msiza* LCC[79] on a (questionable) technicality, the legal principle regarding the relative weight of the market value criterion is well-established. For example, in the prior expropriation case of *Khumalo*, the LCC used market value as merely the starting point for its determination of the value of compensation.[80] And in *Du Toit*, the Court

[76] So, for example, according to the formulation of s 25(3), where the property had been egregiously dispossessed, was not being used for food crops, had benefitted from substantial state subsidies under apartheid, and where the expropriation was going to result in the restitution of the land to a community of farmers, compensation might be extremely low. That s 25(3)'s matrix for calculating compensation to current owners has not typically been applied as described here is because – arising from the prevailing administrative practice of pursuing a market value sale approach – there have been hardly any instances in which expropriation has been used in land reform cases. However, should the government decide to pursue expropriation and to calculate compensation along these lines, s 25 provides an enabling framework to do so.

[77] *Msiza v Director-General, Department of Rural Development and Land Reform & Others* [2016] ZALCC 12, 2016 (5) SA 513 (LCC)('*Msiza* LCC').

[78] Ibid paras 29–30.

[79] In September 2017, the *Msiza* LCC judgment was successfully appealed to the SCA, which, while not disputing the framework for the calculation of compensation of the LCC judgment, disagreed with the calculation and awarded a higher amount to the landowners (*Uys NO & Another v Msiza & Others* [2017] ZASCA 130, 2018 (3) SA 440 (SCA)). Regrettably, the Department of Rural Development and Land Reform failed to seek leave to appeal the judgment to the Constitutional Court (where, arguably, the Court would have endorsed the LCC rather than the SCA interpretation and calculation).

[80] *Khumalo & Others v Potgieter & Others* [1999] ZALCC 68 ('*Khumalo*') paras 93–101.

emphasised the Constitution's requirement that compensation be 'just and equitable', having regard to 'all relevant circumstances' including (but not limited to) those listed in s 25(3).[81]

Beyond market value, the other factors included in the mandatory but non-exhaustive list in s 25(3) have a transformative, public interest basis. The current use of the property is a consideration that establishes justification for the expropriation of scarce resources, such as land and minerals', where these are 'not being used productively and they are needed for reformative purposes, such as access to housing or access to the mining industry for historically disadvantaged parties, or to support emerging farmers'.[82] The history of the acquisition of the property implicitly authorises a discounting of the amount of compensation in respect of any property acquired as a result of forced removals and/or made available to white farmers at discounted prices and/or accompanied by state subsidies.[83] This is linked to the consideration of 'the extent of direct state investment and subsidy', referencing the inequity of current owners who have received substantial state subsidies over the years receiving market value compensation (amounting to a double subsidy for historically advantaged persons) in instances of expropriation. Finally, 'the purpose of the expropriation' offers justification 'for expropriations that are aimed at alleviating pressing social needs', and also justifying 'downward adjustment of the amount of compensation'.[84]

It is true that the reference in s 25(2)(b) to any such expropriation being 'subject to compensation' suggests that *some form* of compensation must be awarded. However, it is possible that on a proper assessment of all the factors set out above, the compensation could be very low and even nothing at all (this argument is taken further in the analysis of s 25(8) below). Moreover, regarding the requirement in relation to compensation that 'the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court', it has been conclusively established by the Court in *Haffejee* that, while it is ideal for the amount, time and manner of compensation to be established prior to the expropriation, this is not necessary.[85] In other words, an owner may not hold up an impending expropriation by arguing over the price.

From the above it is clear that s 25 mandates neither a willing buyer/willing seller nor market value compensation regime for expropriation. As stressed by the LCC in both *Khumalo* and *Msiza*, and the Court in *Du Toit*, the constitutional framework of 'just and equitable compensation' (rather than the Expropriations Act) should govern expropriations. The courts could arguably have done more to establish a substantively transformative approach for applying s 25(3)'s compensation matrix. But their ability to do so has been circumscribed by the perplexing adherence of the post-apartheid government to a market-value, willing buyer, willing seller paradigm, which has meant that the courts have had limited opportunities to adjudicate this issue in the context of land reform. To the extent that the law per se frustrates any substantive transformation in relation to the calculation of compensation for current (historically advantaged) owners, it is the Expropriation Act's contradiction of s 25's paradigm. Therefore, if the CRC is looking for legislation to amend, the Expropriation Act would be a

[81] *Du Toit v Minister of Transport* [2005] ZACC 9, 2006 (1) SA 297 (CC)('*Du Toit*') paras 30–33.

[82] H Mostert & A Pope *The Principles of The Law of Property in South Africa* (6th Ed) (2013) 128 citing G Budlender 'Constitutional Protection of Property Rights' in G Budlender, V Latsky & T Roux (eds) (1998) *Juta's New Land Law* 1–56.

[83] Ibid at 129.

[84] Ibid.

[85] *Haffejee NO v eThekwini Municipality* [2011] ZACC 28, 2011 (6) SA 134 (CC)('*Haffejee*').

good place to start. It is possible that the withdrawal of the Expropriation Bill on 28 August 2018 signals that such a process is underway.

C Section 25(5): foster conditions to gain access to land, and section 25(6): advance tenure security

Sections 25(5) and 25(6) are widely permissive authorisations for the state to pursue programmes to advance access to land and tenure security. Advancing access to land could be in the form of facilitating land ownership or it could entail making land available for secure occupation and use. Regarding land ownership, s 25(5) clearly empowers – and indeed obliges – the state to pursue land redistribution (including via expropriation). However, as signalled by the HLPR, the scope of s 25(5) of the Constitution has not yet been interpreted judicially, so there is no jurisprudence on what constitutes adequate measures to 'enable citizens to gain access to land on an equitable basis'.[86] Nonetheless, to give legal effect to this mandate, two of the main laws that have been enacted are the LTA and the Provision of Land and Assistance Act 126 of 1993 ('PLAA').

The LTA exists to benefit a particular category of land user: a person[87] who resides on, or has the right to reside on, the farm or another farm of the owner; who has or has had the right to use cropping or grazing land on the farm in exchange for labour; and whose parent or grandparent resided or resides on such farm or had the use of cropping or grazing land in exchange for labour.[88] The redistributive objective of the LTA is contained in ch III, which sets out parameters for the acquisition of ownership by labour tenants. Section 16(1) of the LTA establishes that a labour tenant can apply for an award of land 'which he or she is entitled to occupy or use in terms of section 3', which provides that 'a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members to occupy and use' that part of the farm which 'he or she or his or her associate was using and occupying on that date'; or 'the land which he or she or his or her family occupied or used during a period of five years immediately prior to the commencement of this Act, and of which he or she or his or her family was deprived contrary to the terms of an agreement between the parties'; or 'rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm' – any such claim must be made within four years of the commencement of the LTA. In line with s 25(3) of the Constitution, according to s 23 of the LTA the owner of affected land is entitled to 'just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land'.

The LTA, as underpinned by s 25, thus provides a substantively transformative framework for the redistribution of land. Unfortunately, there have been numerous problems with the administration of this component of the LTA, with few s 16 claims having been resolved (*Msiza* is a notable, but long-awaited exception). The government's failure to settle some

[86] HLPR (note 37 above) at 205.

[87] This, according to s 1(xi)(c) of the LTA, includes a successor of a labour tenant but excludes a farm worker (farm workers are covered by the Extension of Security of Tenure Act 62 of 1997, discussed below). Juanita Pienaar and Jason Brickhill note that, although the purpose of the LTA is to phase out labour tenancy whereas the purpose of the Extension of Security of Tenure Act 62 of 1997 is to provide ongoing protection against the exploitation of farm workers, the continued distinction between labour tenants and farm workers is not ideal (J Pienaar & J Brickhill 'Chapter 48: Land' in S Woolman & M Bishop (eds) *Constitutional Law in South Africa* (2nd Ed, 2014)(*CLOSA*) 48-16.

[88] LTA, s 1(xi).

10 914 labour tenant claims gave rise to protracted litigation brought by the Legal Resources Centre on behalf of the Association for Rural Advancement and various labour tenants to have a Special Master of Labour Tenants appointed to ensure that the Minister of Rural Development and Land Reform implements multiple court orders for redistribution of land under the LTA. On 8 December 2016, the LCC (which has primary jurisdiction over the LTA),[89] ruled that, by refusing to implement labour tenants' land ownership claims since the early-2000s, the Minister and Director General of the Department of Rural Development and Land Reform had acted inconsistently with the Constitution. It granted an order appointing a Special Master of Labour Tenants, who was tasked to produce a plan to implement all the amassed labour tenants' claims to facilitate ownership in collaboration with the Department of Rural Development and Land Reform.[90]

In its amended form,[91] the PLAA is the main legislative mechanism to realise the land ownership redistribution programme. From a legal perspective, the PLAA provides an extraordinarily transformative framework in terms of which land[92] is designated by the Minister of Rural Development and Land Reform for the purposes of redistribution to persons who have no land or restricted access to land, persons wishing to upgrade their land tenure or persons who have been dispossessed of their right in land but do not have a right to restitution under the Restitution of Land Rights Act 22 of 1994.[93] As with the LTA, the PLAA has been under-utilised. More generally, the HLPR paints a bleak picture of government efforts to comply with s 25(5) of the Constitution.[94]

Regarding land occupation and use, in recognition of the large numbers of black people who live (and often work) on land that someone else owns, s 25(6) establishes the need for the state to recognise and protect land occupation and use rights even where these rights clash with land ownership rights. It also requires Parliament to enact legislation to give effect to s 25(6), and several laws have been promulgated to this end. Chief among these legal reforms are the LTA, which (apart from enabling land acquisition) provides enhanced protection against the exploitation and eviction of labour tenants (ch II, LTA);[95] the Interim Protection

[89] The LCC also has primary jurisdiction over the Extension of Security of Tenure Act 62 of 1997 and the Restitution of Land Rights Act 22 of 1994, discussed below.

[90] *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform &Others* [2016] ZALCC 23, 2017 (4) SA 422 (LCC)('*Mwelase*'). Disappointingly, on 17 August 2018, the SCA overturned the appointment of the Special Master in *Mwelase* (on the grounds of judicial over-reach). However, the Legal Resources Centre has indicated it will seek leave to appeal the judgment to the Constitutional Court, available at http://lrc.org.za/news/press-release-disappointing-sca-outcome-labour-tenants-special-master-rejected/.

[91] The PLAA, which was originally called the Provision of Certain Land for Settlement Act, has undergone various amendments and name changes over the years including: the Land Affairs General Amendment Act 11 of 2000, the Provision of Land and Assistance Amendment Act 58 of 2008 and the rural Development and Land Reform General Amendment Act 4 of 2011. Pienaar notes that since 2011, the PLAA has been known as the Land Reform: Provision of Land and Assistance Act 126 of 1993 (Pienaar (note 54 above) 287).

[92] Both state and privately-owned land can be designated but privately-owned land can only be designated for this purpose if it has been made available by the owner (who would then receive compensation).

[93] Pienaar & Brickhill (note 87 above) at 48–21.

[94] HLPR (note 37 above) 205–231.

[95] LTA, s 3(1) (stipulates that a person who was a labour tenant on 2 June 1995 shall have the right 'with his or her family members to occupy and use that part of the farm' that he or she was using and occupying on that date)' LTA, s 9(1) (establishes that a labour tenant who is over 65 years of age, or as a result of disability is unable personally to provide labour to the owner or lessee; and has not nominated a person to provide labour in his or her stead, 'shall not be evicted' for reasons of failure to work for the owner or lessee).

of Informal Land Rights Act 31 of 1996 ('IPILRA'), which governs the tenure security of people who occupy and use land under customary land law;[96] the Extension of Security of Tenure Act 62 of 1997 ('ESTA'),[97] which provides enhanced protection against the eviction of people who occupy non-formally proclaimed township areas with the consent of the owner;[98] and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'), which protects unlawful occupiers anywhere in South Africa from being evicted un-procedurally or unjustly.

As outlined in part II above, there are considerable problems with the regime governing customary land rights, including IPILRA. However, whatever the complexities of IPILRA and the broader frameworks for governing customary land law (including the controversial Traditional Leadership and Governance Framework Act 41 of 2003 and the highly contested TCB), it is not s 25 that blocks transformative change (however this may be defined) in the customary land rights arena. Regarding IPILRA itself, the HLPR laments the fact that 'despite the constitutional imperative to secure and protect land tenure', Parliament has failed to enact 'substantive legislation to defend communal land tenure', leaving the 17 million South Africans who live in the former homelands with only the interim 'holding measure' or 'safety net' of IPILRA.[99] The HLPR recommends inter alia that IPILRA be made permanent, and that it is clarified that 'holders of informal rights' rather than the state (including traditional authorities) are deemed to be the owners of the land' for the purposes of decision-making and revenue.[100] The courts have arguably done what they can in the absence of comprehensive legislation to defend customary communities against the erosion of their land rights by political attempts to bolster the position of traditional leadership.[101]

The courts have also played a critical role in interpreting the scope of PIE and ESTA. Regarding ESTA, beyond affirming the additional protections against unjust evictions,[102] the courts have established that ESTA protects a range of rights including the right of a wife to remain on the land notwithstanding the valid dismissal and eviction of her husband.[103] The Court has also recently, in *Daniels*,[104] ruled that where landowners refuse to improve their

[96] IPILRA protects several categories of rights: use or occupation of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe; or (ii) the custom, usage or administrative practice in a particular area or community where the land at any time vested in the South African Development Trust, the government of any self-governing territory or the former governments of the four national states.

[97] In addition to security of tenure provisions, ESTA, like the LTA, provides for redistribution (ch II, ESTA). However, this form of land redistribution has hardly been invoked and where it has, it has not been very successful (Pienaar & Brickhill (note 87 above) at 48-16).

[98] This includes a right to family life, not present in the Constitution (s 6(1)(d)), burial rights (s 6(4)) and safeguards against unfair eviction (ss 8–13). An ESTA Amendment Bill B224-2016 has been before Parliament for several years. The HLPR notes various problems with this Bill that, if approved, would result in an erosion of farm dweller's rights (HLPR (note37 above) at 295–297).

[99] HLPR (ibid) at 258.

[100] Ibid at 270.

[101] During 2018, the courts further reinforced the informal land rights of customary communities under IPILRA (over the rights of traditional authorities, the state and mining companies), in the cases of *Maledu & Others v Itereleng Bakgatla Mineral Resources (Pty) Limited & Another* 2018 [ZACC] 41, 2019 (2) SA 1 (CC) and *Baleni & Others v Minister of Mineral Resources &Others* [2018] ZAGPPHC 829, 2019 (2) SA 453 (GP). The latter case was under appeal at the time of writing.

[102] Pienaar & Brickhill (note 87 above) at 48–37 and 48–42.

[103] *Klaase & Another v Van der Merwe NO & Others* 2016 [ZACC] 17, 2016 (6) SA 131 (CC).

[104] *Daniels v Scribante & Another* 2017 [ZACC] 13, 2017 (4) SA 341 (CC)('*Daniels*').

accommodation, in terms of ESTA, ESTA occupiers have the right to make such improvements that are necessary to live in acceptable conditions. Following an amendment to ESTA in 2001 that provided for burial rights in certain circumstances,[105] the LCC found in *Nhlabathi*[106] that – contrary to the arguments of the landowner that the 'appropriation of a grave deprives the land-owner of property' – the right to burial was introduced by legislation as part of the constitutional mandate to ensure legally secure tenure,[107] and that the appropriation of a grave in terms of ESTA amounts to a 'minor intrusion' only and not requiring compensation.[108]

The right of family members to receive ESTA protection, the right of farm dwellers to live in adequate standards of accommodation, and the right to bury on the land regardless of the owner's wishes, constitute significant and transformative inroads of use and occupation rights vis-à-vis ownership rights. In addition, in recognition of the typical vulnerability and low-income status of occupiers covered by ESTA, in *Nkuzi*,[109] the LCC interpreted ESTA as providing a right to legal representation at state expense for occupiers whose tenure is threatened or infringed.[110]

Regarding PIE, in a series of cases, the courts have established a set of transformative principles that clarify not only the state's obligations, but also (as flagged above in the analysis of deprivation of private ownership rights in the context of unlawful occupation) the constitutional and public interest-related duties of property owners and the limits of property ownership rights, in relation to unlawful occupiers:

- The state has an obligation to devise and implement a reasonable housing policy that, at the minimum, provides emergency shelter for those who would otherwise be rendered homeless by an eviction;[111]
- Where an eviction would render occupiers homeless, it would ordinarily not be just and equitable to evict them without the state providing alternative accommodation;[112]
- The state has an obligation to meaningfully engage occupiers regarding evictions;[113]
- The state has the same obligation to provide emergency shelter to evictees who would otherwise be rendered homeless regardless of whether the eviction is initiated by the state or a private land owner;[114]
- Where the provision of emergency shelter (whether directly or via a service provider) entails draconian rules such as gender-segregation and lockout during the day, this is an unjustified limitation of occupiers' rights, and therefore unconstitutional;[115]

[105] Section 6(2)(dA) of ESTA now provides that an occupier 'has the right to bury a family member who resided on the land at the time of his or her death, in accordance with their religion or cultural belief, if an established practice in respect of the land exists'. And, according to section 6(5), 'family members of a long-term occupier have the right to bury the occupier on the land on which he or she was resident at the time of death.'

[106] *Nhlabathi v Fick* [2003] ZALCC 9 ('*Nhlabathi*').

[107] Ibid para 26(d).

[108] Pienaar & Brickhill (note 87 above) at 48–34 and 48–35 citing *Nhlabathi* (note 106 above) paras 27–30.

[109] *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC)('*Nkuzi*').

[110] Pienaar & Brickhill (note 87 above) at 48–36.

[111] *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

[112] *Port Elizabeth Municipality* (note 55 above)

[113] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg & Others* [2008] ZACC 1, 2008 (3) 208 (CC).

[114] *Blue Moonlight* (note 65 above).

[115] *Dladla & Another v City of Johannesburg & Others* [2017] ZACC 42, 2018 (2) SA 327 (CC).

- Where, due to the scale of the unlawful occupation, it is unfeasible to order an eviction because it would not be just and equitable to do so, the state might be compelled to purchase (or expropriate) the property from the property owner to fulfil its constitutional obligations;[116]
- The state cannot use disaster management legislation as a way to evict occupiers without complying with PIE;[117]
- Private owners seeking to evict unlawful occupiers bear the onus of showing that it is just and equitable to evict them (rather than the unlawful occupiers having to prove that it would not be just and equitable to evict them);[118] and
- A private land owner might have to tolerate unlawful occupation for a considerable time until the state can provide emergency shelter.[119]

Notwithstanding these progressive interpretations by the judiciary, while there is nothing in the law that explicitly determines it, there has been an inherently conservative tendency by the judiciary when it comes to balancing ownership with occupation rights ultimately to grant eviction orders once the state has provided alternative emergency shelter, even if this is blatantly unsuitable and unacceptable. However, although in most cases the courts have granted eviction orders following an order ensuring that emergency shelter (however dire) is provided, in a recent case the court found that it was not just and equitable to evict a group of people – including two pensioners, who had lived on the property for 44 years working for the previous owner – from a property purchased by the current property owner, who wanted to redevelop the property for higher-income persons.[120] In addition, the High Court judgment in *Fischer* indicates a new frontier of transformative adjudication in cases in which eviction of unlawful occupiers from private property is not equitable.[121] In this case, the High Court ordered the government – in circumstances where it would be patently unjust and inequitable to evict a large number of unlawful occupiers from private land – to enter into good faith negotiations with Mrs Fischer (the landowner) to purchase her property.[122]

[116] *Fischer v Persons listed on Annexure X to the Notice of Motion and those persons whose identity are unknown to the Applicant and who are unlawfully occupying or attempting to occupy Erf 150 (remaining extent) Phillipi, Cape Division, Province of the Western Cape & Others; Stock & Others v Persons unlawfully occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape Rd & Others; Copper Moon Trading 203 (Pty) Ltd v Persons whose identities are to the Applicant unknown and who are unlawfully occupy remainder Erf 149, Phillipi, Cape Town & Others* [2017] ZAWCHC 99, 2018 (2) SA 228 (WCC)('*Fischer*'). For an analysis of the *Fischer* judgment, J Dugard '*Modderklip* Revisited: Can Courts Compel the State to Expropriate Property where the Eviction of Unlawful Occupiers is not Just and Equitable?' (2018) 21(1) *Potchefstroom Electronic Law Journal* 1–28.

[117] *Pheko v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34, 2012 (2) SA 598 (CC); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* [2012] ZACC 26, 2013 (1) SA 323 (CC).

[118] *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others* [2012] ZASCA 116, 2012 (6) SA 294 (SCA).

[119] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC); *Blue Moonlight* (note 65 above).

[120] *All Builders and Cleaning Services CC v Matlaila & Others* [2015] ZAGPJHC 2.

[121] The *Fischer* judgment has been appealed to a full bench of the Western Cape High Court, with no set down date at the time of writing this article. It should be noted that, at least from the perspective of race, the *Fischer* case presents a challenge. Mrs Fischer is an elderly black woman who is not well off. She and her family have lived on their property since 1969. This land is now occupied as part of a mass-occupation by black communities who could find nowhere else to settle. If the government expropriates Mrs Fischer's land to fulfil its constitutional housing obligations towards the unlawful occupiers, this case will highlight the importance of having a nuanced framework for calculating compensation provided for in s 25(3) of the Constitution.

[122] *Fischer* (note 116 above) para 197.

D Section 25(7): restitution

Land restitution is probably the most complex and emotive of the land reform processes delineated in s 25. It has also been one of the least successful processes in terms of both the relatively low number of instances in which land has been restored to claimants and the questionable success of restitution where this has occurred.[123] The HLPR emphasises that the evident failures of the restitution mandate relate overwhelmingly to multiple problems with the Land Claims Commission,[124] which has not yet finalised the claims that were lodged by the cut-off date of 31 December 1998,[125] and/or government implementation processes,[126] rather than with the text of s 25(7) per se. These problems have resulted in the majority of successful claimants opting for relatively paltry cash settlements rather than pursuing restitution per se,[127] a fact that has undermined the potential for the restitution process to contribute towards greater land redistribution.

In terms of the legal frameworks governing restitution, the scope and detail of s 25(7) have been fleshed out in the Restitution of Land Rights Act 22 of 1994 ('RLRA'). The RLRA echoes the main features and requirements of s 25(7) but set the deadline for making any land claims at 31 December 1998.[128] Although there have been some conservative judgments particularly from the LCC in the early years,[129] the general arc of judicial interpretation of the RLRA has been transformative, and the courts have interpreted key concepts progressively. For example, in an early case, *Kranspoort*, the LCC rejected a narrow interpretation (which would have required a high degree of association and cohesion between often far-flung members of the erstwhile community) of the requirement (in both s 25(7) and the RLRA) concerning a 'community' dispossessed of property after 1913, arguing that it 'would be a grave injustice if the RLRA is to be interpreted so that the tragic consequences of a removal become the main reason why a community restitution claim aimed at remedying the removal should fail'.[130] Another transformative clarification was provided by the Court in *Popela,* when it generously interpreted the words (again reflected in both s 25(7) and the RLRA) 'as a result of past racially discriminatory laws or practices' to mean 'as a consequence of' and not necessarily 'solely as a

[123] See HLPR (note 37 above) at 232–256. See also Cousins & Hall (note 10 above) at 1–2.

[124] Systemic problems, as detailed in the HLPR, include, at the level of the Land Claims Commission: high staff turnover and insufficient training, ineffective bureaucratic processes (with files in many places in disarray) and corruption; and, regarding the claims themselves, conflicting and overlapping claims, often resulting in the 'bunching' of unrelated claimants together (HLPR (note 337 above) at 232–256).

[125] According to the HLPR, there are still 19 000 non-finalised and 7 000 unsettled claims arising from the claims process that closed at the end of December 1998; at an average rate of 560 claims being settled per year, it will take approximately 35 years to process these claims (HLPR (note 37 above) at 233).

[126] HLPR (ibid) at 232–256.

[127] According to the Department of Rural Development and Land Reform in August 2017, of the approximately 80 000 claims settled to date, all but 7 478 claimants opted for cash settlements rather than land transfers: https://www.notesfromthehouse.co.za/opinion/item/54-questions-that-leave-more-questions-than-answers. See also B Atuahene *We Want What's Ours: Learning from South Africa's Land Restitution Program* (2014) 89–106

[128] As outlined in part II above, President Zuma's government had sought to re-open the restitution process via the RLRAA, but this was derailed by the *Land Access Movement* litigation.

[129] T Roux 'Pro-poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court' (2004) 20 *South African Journal on Human Rights* 511.

[130] *In Re Kranspoort Community* 2000 (2) SA 124 (LCC)('*Kranspoort*') para 48. The HLPR recommends that if the RLRA is amended, it should adopt the definition of community from *Kranspoort* (HLPR (note 37 above) at 248).

consequence of'.[131] This interpretation enabled more claims to satisfy the requirement, even where the dispossession/removal was not the sole consequence of past racially discriminatory laws or practices e.g. where other factors might also have played a role.

On the more contentious side, there is the thorny issue of the large number of cases in which restitution is deemed not feasible – mainly in urban areas and/or where there has been substantial subsequent development of the property. In such cases, the Land Claims Commission and courts have typically provided monetary compensation to claimants in lieu of restitution. The question arises as to whether the compensation in such cases can be regarded as 'equitable redress' as required by s 25(7) and the RLRA. A recent Constitutional Court case that illustrates the difficulties of awarding compensation in such situations is *Florence*.[132] In this case – in which restitution of a piece of land in Cape Town was deemed not feasible on the ground that it had, in the more than 25 years since dispossession, been developed into a parking lot and shopping complex – the Court grappled with how to calculate compensation for the claimants. The Court settled on a formula which, summarised, is as follows:

- Take as the starting point the value of the property at the time of dispossession – in this case it had been valued at R32 000 in 1970. Subtract any monies received for the property – in this case R1 350 was paid to Mr Florence, leaving a shortfall of R30 750.
- Then, in order to capture 'the changes in value over time' as per section 33(eC) of the RLRA, add CPI (inflation), in this case establishing an amount of compensation owed of R1 488 890 (plus a court-awarded solatium of R10 000).[133]

At first blush, the amount of close to R1 500 000 seems like an attractive sum. However, it is less attractive when considered in light of the fact that the property had a current market value of almost ten times this amount. In defence of the *Florence* formula (which had been applied in a string of earlier cases in other courts and was applied by the LCC and SCA in the *Florence* litigation), it might be questioned whether, had they not been dispossessed, the claimants would have developed the property to achieve the same current market value. But what if they would have? And, regardless, can this amount of compensation be regarded as 'equitable redress' when compared with the current market value of the property? Or does this constitute what Ms Florence argued was 'an illogical discrepancy between the value of restitution in the form of restoration and restitution in the form of financial compensation'?[134] The *Florence* formula for calculating compensation in instances where restitution is not feasible raises questions about the adjudication of restitution claims, especially in light of the de facto awarding of current market value to current owners in

[131] *Department of Land Affairs, Popela Community &Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12, 2007 (6) SA 199 (CC)('*Popela*') para 69.

[132] *Florence v Government of the Republic of South Africa* [2014] ZACC 22, 2014 (6) SA 456 (CC)('*Florence*').

[133] In a dissenting opinion (Cameron J, Froneman J and Majiet, AJ concurring), Van der Westhuizen J would have awarded R2 211 732.54, which reflects the amount had the under-compensated amount been invested in a 32–day notice deposit facility since the day of the LCC initial judgment in the matter. A separate dissenting opinion, by Froneman J, comes closest to acknowledging the underlying injustice of the discrepancy in compensation: 'I find it difficult, however, to conceive how one can ever adequately determine proper compensation for people who were forced to sell their property at the time of dispossession. The only way to compensate them for their loss is restoration or, if restoration is not possible, something as close as possible in financial terms to restoration. In this kind of case the CPI, as representing the change in the value of money, may be inappropriate, and the present market value of the property could serve as evidence of its inappropriateness' (*Florence* (ibid) para 203).

[134] *Florence* (ibid) para 147.

land reform contexts. Responding to this apparent puzzle, the HLPR recommends that 'the question of equitable redress needs to be revisited'.[135]

In general, the courts and especially the Constitutional Court have pursued substantively transformative interpretations of the legal frameworks governing restitution. A notable exception is the Court's endorsement of the asymmetrical and unfair discrepancy between the de facto current market value regime (as pursued at least until 2018) for compensating current owners and the restricted formula for compensating historically dispossessed persons in instances where restoration is deemed not feasible. However, as an incident of judicial interpretation, this approach could be shifted through new legislation or subsequent Constitutional Court interpretation.

E Section 25(8): any other measures

As highlighted in this article, it would be possible, legally, for the government to pursue a much more substantively transformative land reform programme than it has pursued until now. But, returning to the question left hanging in the analysis of s 25(2), (3) and (4) above, would it be possible for the government to bypass the compensation clause entirely? The requirement for 'just and equitable compensation' according to s 25(3)'s matrix, arguably provides an appropriate and substantively transformative method for balancing the various rights and considerations and achieving what, in some circumstances, might be nil compensation. However, if this is not considered to be sufficiently transformative a premise for government action, tantalisingly s 25(8) of the Constitution, which has not received much attention and has yet to be conclusively litigated, states: 'No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of s 36(1)'. This suggests it is likely that, should action be pursued, and/or a law be adopted that enables the state to expropriate property for the purpose of land restitution without any compensation, this could be deemed constitutional if found 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. Thus, s 25(8) signals that, notwithstanding any of the limits discussed here that relate to the constitutional or legislative frameworks or judicial interpretation thereof, it would be possible for any government to pursue quite radical land reform and for this to fall within the legal parameters of s 25.

IV CONCLUSION

Sidestepping scholarly and popular debates about whether s 25 of the Constitution is optimal or should be amended, this article has focused on what can be achieved within s 25's existing formulation. Specifically, the article has empirically examined the legal limits of any potential project of transformative land reform, as understood within a substantive (rather than revolutionary) model of equality. The article has argued that, while recognising different regimes and kinds of property rights including private ownership rights, s 25 provides a permissive – and even mandatory – template to pursue transformative land reform. Certainly (in the same way as the Domestic Violence Act 116 of 1998 does not eradicate domestic violence), s 25

[135] HLPR (note 37 above) at 250.

does not automatically 'undo the settler-created house'.[136] But it allows expropriation in the public interest and for a public purpose that explicitly includes redistributive reforms. It also establishes a mechanism for individuals and communities to secure the return of historically dispossessed land. And it sets out a matrix for calculating compensation to current owners that, on a proper application, could amount to zero compensation in appropriate cases. As such, s 25 provides a framework within which much more could be done to alter land ownership, occupation and use patterns. Indeed, it is hard to visualise how (even in a revolutionary equality model) in practical terms the 'settler-created house' could more justly be deconstructed given the overlapping and conflicting land rights claims etched in the land over centuries of use, occupation, ownership and dispossession.

For their part, the courts have played an important role in interpreting s 25 in transformative ways. Nonetheless, the courts could certainly do more to push the boundaries of substantive transformation. In particular, the courts could play a more robust role in deliberations over compensation – by unravelling the de facto current market value paradigm pursued by the government until now, and by pursuing a more equitable formulation for compensation for historically dispossessed individuals or groups when restitution is not feasible. In addition, courts could develop a stronger approach to hierarchical clashes of rights especially as between owners and unlawful occupiers. Recent cases, including *Fischer* suggest that the courts are moving in this direction. However, there is ultimately a very real limit to what the courts can achieve in the absence of political direction. As pointed out by Geoff Budlender in 1992,

> The only way to achieve a true balance between the rights of property-holders and property-less is to weaken existing property rights, as a matter of deliberate policy. Whether that should and could be done is a question not of constitutional principle, but of political power and priorities.[137]

Finally, in relation to the potential for land restitution specifically – and possibly land reform more generally – to resolve South Africa's daunting problems of historical injustice and socio-economic inequality, it is sobering to read the cautionary note from Andries du Toit as quoted in the *Kranspoort* judgment:

> This brings us to the most pressing and painful part of the problem – which is that the moment of return to the land cannot live up to the expectations and hopes generated by it. For of course what was lost can never be returned. Part of the problem is that the land is not the only thing that was lost. What was destroyed through … removals was a whole way of being, a set of community relations, a system of authority and let [us] not forget, a broader system of economic relations and livelihoods *of which the land was but a part*, and which gave it its function and its value. The terrible truth of Restitution has thus been that the moment of return to the land is often a moment of disappointment and anti-climax. To settle on the spot from which one's forebears – or even a younger, more vigorous, more hopeful self – were once removed, is not necessarily to return to that more authentic, more dignified, more hopeful mode of existence. As we have seen in numerous cases … to return to face the complex, dispiriting and painful problems of the new South Africa once again in new and often more intractable ways. For communities have grown, services are needed and the rural and national economies that made certain forms of existence possible may no longer be in palace. If existence without piped water

[136] T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 *Stellenbosch Law Review* 123, 141.

[137] G Budlender 'The Right to Equitable Access to Land' (1992) 8 *South African Journal on Human Rights* 295, 304.

and electricity was acceptable in the past, it is no longer so – and these services have to be paid for, and paid for in a very different, increasingly globalised, economy. In all too many cases, we may be looking at a scenario where the land is returned to those who lost it – only to be lost again to the banks, or to those who are willing to pay good cash for it.[138]

[138] A Du Toit 'The End of Restitution: Getting Real about Land Claims' (unpublished paper), Land and Agrarian Reform Conference, Pretoria, 26–28 July 1999 as cited in *Kranspoort* (note 130 above) para 108 and footnotes 147 and 153.