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

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Abstract

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

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which often results in constitutional dismemberment.

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1 INTRODUCTION

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

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1 Herein referred to as the “expropriatees”.


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

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

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

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

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

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\bibitem{8} Negishi “The Theory and Phenomenology of Constitutional Dismemberment” 2020 Revista de Investigações Constitucionais, Curitiba 813.
\bibitem{9} Chigundu “Politics and Constitutionalism: Entrenching the Rule of Law in Africa” 2019 India Quarterly: A Journal of International Affairs 286.
\bibitem{10} Constitutional dismemberment is recognised both as a theory and phenomenon whereby substantive alteration or modification to the constitution are effected in a manner which leads to the replacement of the constitution without following the formal requirements for writing a new constitution. Albert Constitutional Amendments: Making, Breaking, and Changing Constitutions (2019) 2.
\bibitem{11} Ibid.
\bibitem{12} Molope “The Decision to Amend Section 25 of the Constitution Shakes Cohesion: Perceptions of Public Hearing Participants in the North West Province” 2018 Journal of Public Administration 328
\bibitem{15} Indeed, many factors have propelled land expropriation without compensation on the global agendas including congestion in urban areas, demand for human rights, and political emancipation. At the core of it is the chief question “Who owns the land?” Perspectives derived from the liberation philosophy which became an overarching ideological basis for many freedom movements in Africa seek to answer this question. See Fanon The Wretched of the Earth (1961) 55 http://abahlali.org/wp-content/uploads/2011/04/Frantz-Fanon-The-Wretched-of-the-Earth-1965.pdfargues (accessed on 19/11/2019). Further, the legacy of dispossession is

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

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


\textsuperscript{17} Levinson “Responding to Imperfection: the Theory and Practice of Constitutional Amendment” in Murphy \textit{Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity} (1999) 163.

\textsuperscript{18} Slade “Towards a Clearer Understanding of the Difference between the Obligation to Pay Compensation and the Validity Requirements for an Expropriation” 2019 \textit{Speculum Juris} 23.


\textsuperscript{20} Section 74 of the South African Constitution prescribes procedures that must be complied with for a valid constitutional amendment to be passed. If these are not complied with, the amendment can be struck down by the Constitutional Court. We assume that the legislature will comply with the requisite procedures. Accordingly, there is no need to belabour the procedural requirements for amendment.

\textsuperscript{21} We are alive to the criticism beauleaguing the process of sourcing public opinion through participation, written submissions, public hearings and dialogues as well as Parliamentary debates. Some writers maintain that, despite the process of public hearing, expropriation without compensation was already a foregone conclusion, and that no amount of opposing views could have persuaded the Committee or Parliament to abandon or deviate from its resolution. It can be submitted that many of the public hearings were also mired with chaos with parliamentarians insulting presenters with dissenting views. For a further discussion on the process see October “Land Expropriation Shambles Highlights how Public Participation at Parliament is not Working” https://www.dailymaverick.co.za/article/2018-11-29-landexpropriation-shambles-highlights-how-public-participation-atparliament-is-not-working/(accessed on 14/09/2019); Van Staden “The Land Problem: What Does the Future Hold for South Africa’s Land Reform Program? Comparative Analysis With Zimbabwe’s Land Reform Program: A Lesson on What Not to Do” 2001 \textit{India International and Comparative Law Review} 666.
The article is divided into six parts. Immediately following this introduction is a part dealing, albeit very briefly, with our research methodology followed by part three which largely presents the history that informs the debate on the constitutionality of land expropriation without compensation in the periods before and after the advent of South Africa’s constitutional order.22 The fourth part examines circumstances in which an amendment of the Constitution which allows expropriations of land without compensation may constitute an unconstitutional constitutional amendment under the present Constitution of South Africa.23 It assesses the merits of potential arguments against such a constitutional amendment in light of the constitutional limitations.24 Central issues emanating from scrutinising the constitutionality of an amendment intended to sanction land expropriation without compensation, including the problems of liberal democratic erosion, juristocracy, and legal discontinuity are explored.25

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

2 QUALITATIVE METHODOLOGY AND NON-PHENOMENON APPROACH

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

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

3 CONTEXTUAL AND HISTORICAL BACKGROUND

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

Elsewhere, many centuries later, the iconic 1776 United States (US) Declaration of
Independence and the subsequent French Revolution of 1789 were seismic geo-political occurrences which led to the confiscation of land without compensation from the British crown in the case of the US and from the feudal lords in the case of France resulting in the redistribution of such land to the landless majority. For the states that embraced Marxists ideas, the second phase, after expropriation of land without compensation and its distribution to the peasants, involved collectivisation of agriculture to achieve high levels of economic development. Nevertheless, collectivisation efforts failed to produce the desired outcomes in many current and former communist-controlled countries such as China, Russia. Hence, de-collectivisation programs have been implemented in China, and Vietnam replacing collective farming. Other notable land reform programs occurred in Japan, Korea, and Taiwan, with strong bilateral support from the United States (US) and her allies.

The demise of the western-driven colonial project culminated in newly established states that embraced Marxists ideas, the second phase, after expropriation of land without compensation as the pre-condition for the establishment of an egalitarian society. For the states that embraced Marxists ideas, the second phase, after expropriation of land without compensation and its distribution to the peasants, involved collectivisation of agriculture to achieve high levels of economic development. Nevertheless, collectivisation efforts failed to produce the desired outcomes in many current and former communist-controlled countries such as China, Russia. Hence, de-collectivisation programs have been implemented in China, and Vietnam replacing collective farming. Other notable land reform programs occurred in Japan, Korea, and Taiwan, with strong bilateral support from the United States (US) and her allies.

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

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

Franklin “Social Structure and Land Reform in Southern Italy” 1961 The Sociological Review 323.


Kokaisl “Soviet Collectivisation and Its Specific Focus on Central Asia” 2013 Agricultural Economics and Informatics 122.


Perkins “China’s Land System: Past, Present, and Future” in Ingram and Hong Property Rights and Land
Independent governments embarking on relatively significant land expropriations without compensation across North Africa and the Middle East, mainly in Egypt, Algeria, Iran, Iraq, and Syria. Similarly, moderate agrarian reforms were adopted in India after securing independence from Britain. Further, in many Latin American countries western-backed land expropriations without compensation occurred after the eruption of the Cuban Revolution to deter the expansion of communist-inspired revolutions. However, expropriation of land without compensation in these countries achieved modest results largely leaving skewed land ownership rights virtually unchanged. Thereafter, in the 1980s the prospects of embarking on expansive land expropriations without compensation were dashed with the coming to power of new regimes in many Latin American countries which were championing a different posture of politics and policy thrust.

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

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

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

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

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

\textsuperscript{70} Ibid.
\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid.
\textsuperscript{76} Tsheola and Makhudu “Governance of Land in South Africa and the Fallacious Bantustan Urbanisation” 2019 Bangladesh e-Journal of Sociology 16.
\textsuperscript{78} Ibid.
\textsuperscript{80} Ibid.
\textsuperscript{81} Muller “The Legal-Historical Context of Urban Forced Evictions in South Africa” 2013 Fundamina 369.
\textsuperscript{82} Ibid.
\textsuperscript{83} Ibid.
based on the will of all the people, can secure to all their birth right without distinction of colour, race, sex or belief … Restrictions on land ownership shall be ended, and all the land re-divided among those who work it, to banish famine and hunger … All shall have the right to occupy land wherever they choose.85

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

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

The inception of the South African democratic order which began in 1990, following decades of colonial rule, was largely a product of a negotiated process under the auspices of the Convention for a Democratic South Africa (CODESA). That famous process required rival parties to reach a compromise on many issues towards the settlement of the multifaceted conflict including the constitutional protection of property rights in a manner compatible with land reform.88 During the negotiations, wide ideological cracks between the parties were evident.89

The African National Congress (ANC) wanted to tilt the scale of negotiations by ensuring that the constitutionalisation of property rights would not be an obstacle to the inevitable socio-economic transformation project, especially land reform.90 Diametrically opposing was the National Party (NP) which was extremely concerned that the existing property rights of white people would be weakened and eventually eroded, if they were not sufficiently protected in the country's first democratic Constitution.91

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

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

86 Pienaar 2015 Scriptura 5.
90 Murphy 1993 THRHR 629.
91 Du Plessis and Corder Understanding South Africa’s Transitional Bill of Rights (1994) 183.
92 Ibid.
93 This jurisprudential view is mainly subscribed to by scholars such as Du Plessis who opine that what is at stake is more than merely an equalising act of compensating the owner of the property whilst proceeding with the acquisition. Instead, underlying the transaction is the need to promote restorative justice through viewing property as an instrument of promoting social cohesion and relations. Du Plessis “The Public Purpose Requirement in the Calculation of Just and Equitable Compensation” 2014 SSRN Electronic Journal 385.
having to stick to pre-determined factors. It is noteworthy that some parties were sceptical that the presence of such a clause in the Constitution could lead to an interpretation which sanctions compensation at a rate higher than the current market value. Chaskalson posited that the inclusion of such factors could disadvantage expropriatees by forcing them to accept compensation at less than market value. Eventually, the negotiators settled for the inclusion of market value as a factor, among others, to be considered when determining the quantum of compensation.

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

The capstone of the multi-party negotiations was the adoption of the Constitution of South Africa, 1996. In this vein, it can be argued that South Africa’s constitutional dispensation was reached through a representative process where the peoples’ delegates established a new order through a democratic deliberation which posited the Constitution as the supreme law of the country. This new Constitution recognises centuries of systemic socio-economic, cultural and political exploitation through colonisation as well as the violence perpetrated against indigenous groups and decades of de-humanisation under apartheid. While it is alive to the historical wrongs, the Constitution’s enlivening thematic focus is not retribution but reconciliation. Its preamble remarkably declares that “South Africa belongs to all who live in it, united in our diversity.” Described as the crown jewel of constitutionalism, the Constitution is a transformative “document” and “bridge” that seeks to “improve the quality of life of all citizens and free the potential of each person” thereby enabling a fractured polity to open a new chapter in the journey towards establishing a new social and political order. But the remarkableness of the South African Constitution transcends its breaking from the past injustices; indeed equally admirable is its abandonment of parliamentary sovereignty in favour of constitutional supremacy and the establishment of a constitutional order premised on, inter alia, social justice, rule of law, advancement of human rights and social cohesion.

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

96 Ibid.
99 Van der Walt “Compensation for Excessive or Unfair Regulation: a Comparative Overview of Constitutional Practice Relating to Regulatory Takings” 1999 South African Public Law 277.
100 This Declaration was endorsed by all parties who participated except the Homeland governments of Bophuthatswana and Ciskei as well as the Inkatha Freedom Party (IFP). The IFP argued that the insertion of the phrase “undivided South Africa” in the Declaration would undermine the establishment of a federal State. Eventually, an amendment was adopted to remove the term “undivided” from the Declaration to a unitary State. Both the IFP and the Ciskei governments then signed the Declaration. Mbambi “Codesa: Seeds of Compromise in Post-apartheid South Africa” http://wiredspace.wits.ac.za/bitstream/handle/10539/4692/ NsundiMbambiP_Chapter%203.pdf;jsessionid=3D6FC45A804BA537F5DCD4EDF234E010?sequence=5 CODESA 1 – Declaration of Intent (accessed on 25/05/2020); Ebrahim The Soul of a Nation: Constitution-Making in South Africa (1998) 529; Davis “Constitutional Browning: The History of Legal Culture and Local History in the Reconstitution of Comparative Influence: A South African Experience” 2003 International Journal of Constitutional Law 185.
101 Mthethu “Reflections on Expropriation-based Land Reform in Southern Africa” 2019 75 Town and Regional Planning 54.
105 Preamble to the Constitution, 1996.
of socio-economic struggle punctuated with political de-humanisation, it represents a shared social contract or manifesto designed to ensure that the material deprivations which led to the conflict from which the society emerged are not allowed to re-emerge in the future.\textsuperscript{108} As such, the South African Constitution creates a new society by enshrining justiciable socio-economic rights, as opposed to simply providing for the civil and political rights.\textsuperscript{109} Accordingly, section 25 of the Constitution protects the right to property not only against arbitrary deprivation but also provides for the power of the State to expropriate land for public purposes or in the public interest, subject to payment of just and equitable compensation.\textsuperscript{110} The term “public interest” encapsulates the country’s land redistribution programs and land reform aimed at ensuring equitable access to all of South Africa’s natural resources.\textsuperscript{111} Furthermore, section 26(1) of the Constitution stipulates that “everyone has the right to have access to adequate housing” and section 27(1) guarantees the right of everyone to have “…access to (a) health care services, including reproductive health care; (b) sufficient food and water.”\textsuperscript{112} In sum, the State is obliged to ensure effective realisation of the aforementioned socio-economic rights to achieve social transformation as envisioned by the Constitution.\textsuperscript{113}

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

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


\textsuperscript{112} The Constitution of South Africa, 1996.

\textsuperscript{113} Ibíd.

\textsuperscript{114} Pienaar and Brickhill “Land” 39; Claassens SAJHR 429.

\textsuperscript{115} Ibíd.


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

The said Parliamentary Constitutional Review Committee was established to investigate the possibility of amending section 25.\(^{127}\) Since then, there has been intense debate on the economic, social and legal desirability of such an amendment to the Constitution.\(^{128}\) Although the substantive and procedural requirements for such an amendment have been analysed and commented upon by academic commentators, there is hardly any scholarly engagement on the key question whether such an amendment may introduce substantial changes into the constitution and thereby constitute an unconstitutional amendment. The critical question is whether the effect of the proposed changes could be so far reaching that it may ultimately de-constitute and re-constitute the property clause in a way that repudiates the existing constitutional structure and undermines the rule of law in South Africa.\(^{129}\) The discussion in part two therefore examines the constitutionality of an amendment which allows expropriation of land without compensation in light of the idea of constitutional dismemberment.

118 Lahiff “Stalled Land Reform in South Africa” 2016 Current History 184.
120 Financial Times “Land Reform in South Africa is Crucial for Inclusive Growth New President Outlines Potential Conditions for Expropriation without Compensation” https://www.ft.com/content/c81543d8-a61b-11e8-926a-7342fe5e173f (accessed on 04/06/2020).
124 Ibid.
125 Ibid.
127 Ibid.