LIBERTY FIRST

Constitutional Land Reform:
Alternatives to Confiscation and Land Retribution

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Constitutional Land Reform

Alternatives to Confiscation and Land Retribution

Liberty First: Legal System and Property Rights

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Executive Summary

South Africa's post-1994 democratisation enshrined property rights in the Constitution. However, since 2008, the African National Congress (ANC) has pursued policies undermining property and limited government, culminating in the 2024 Expropriation Act. This legislation – assented to by Cyril Ramaphosa in January 2025, deviates from constitutional protections by allowing compensationless confiscation and below-market-value expropriation – is framed as land reform, but serves as a tool for political retribution and state power expansion.

This paper, part of the Free Market Foundation's *Liberty First: Legal System and Property Rights* agenda, proposes constitutional alternatives rooted in section 25 of the South African Constitution, emphasising secure property rights, expanded ownership, and justice delivery without coercive dispossession.

Section 25(1)-(4) ensures security of property, limiting state expropriation to legitimate government purposes alongside just compensation. The Expropriation Act contravenes this by enabling confiscation and prioritising state interests over property owners, quite incongruent with global standards where expropriation laws protect owners. The paper recommends repealing the Act and enacting an Expropriation Control Act that treats owners as innocent victims, prohibits confiscation except in narrow, court-sanctioned cases (e.g., criminal forfeiture), and mandates market-value compensation as a minimum, with additional solatium payments to compensate for the involuntary nature of expropriation. The Land Court Act should also be amended to align with due process standards.

Section 25(5) mandates fostering equitable access to land, misinterpreted by the Expropriation Act's supporters as endorsing coercive redistribution. The paper argues that this violates basic constitutional principles. Instead, the state should deregulate property transactions, eliminate capital gains

taxes, cap municipal rates, and remove agricultural land subdivision restrictions to make property ownership more affordable to more South Africans. A housing voucher programme would further enable low-income South Africans to purchase or build homes.

Sections 25(6)-(9) address historical dispossession, entitling communities to secure tenure or restitution for racially discriminatory land losses post-1913. The paper advocates strengthening the 1994 Restitution of Land Rights Act, ensuring perpetual claim eligibility and increased funding, while rejecting redistribution as unconstitutional retribution. The state, holding vast land assets, should transfer ownership to deserving citizens, not retain it. Legislation like the 2017 Communal Land Tenure Bill should be refined to grant communities true private ownership, free from state control. The state must also divest ownership of natural resources (e.g., water, minerals, petroleum), returning them to prior owners or distributing them transparently.

By prioritising security of title, equitable access, and basic justice, South Africa can achieve land reform without undermining property rights. The Expropriation Act's confiscatory approach threatens economic stability, investor confidence, and freedom under law. A constitutional, market-oriented framework, as outlined, ensures fairness, prosperity, and adherence to the rule of law.

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Introduction

For the first few years after 1994 when South Africa democratised and entrenched the right to property in the Constitution, the country experienced notable economic growth and a gradual reduction in poverty. This began to turn when the governing African National Congress (ANC) became increasingly radicalised after 2008.

Beginning in earnest in December 2017 under the leadership of Cyril Ramaphosa, the ANC sought not only to introduce its long-mooted Expropriation Bill, but also "amend" the Constitution to water down the right to property to virtual insignificance.[1] Added to this was intense political rhetoric in favour of confiscating fixed property (primarily agricultural property) from its owners on a racial basis without any payment of compensation.

The year 2018, then, became a monumental one in South Africa's property rights dispensation.

In the early stages of that year, under the guise of land reform and on the back of the ANC's new direction, the government indicated that it wanted to adopt two new legal measures. The first was an amendment to section 25 of the South African Constitution – the property provision – that effectively does away with the absolute requirement to pay compensation when property is expropriated.[2] And the second was an updated version of the then decade old Expropriation Bill, which would introduce the legal detail – enabled by the slated constitutional amendment – of how property could henceforth be confiscated.

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[1] See Van Staden "Property Rights and the Basic Structure of the Constitution: The Case of the Draft Constitution Eighteenth Amendment Bill." (2020). *Pretoria Student Law Review*.

[2] In other words, confiscated. "Expropriation" as a legal concept is conceptually tied to compensation. An "expropriation without compensation" is a contradiction in terms, for which the law already has a term: confiscation. All else equal, confiscation is prohibited under South African law.

At the end of 2021, however, the proposed amendment to the Constitution failed to garner sufficient support in Parliament, meaning that now, as before, the Constitution unambiguously requires that government may only expropriate property subject to the payment of an amount of compensation. Not deterred, however, the government proceeded with the Expropriation Bill, which it argued was constitutionally compliant anyway because the innovation it sought to introduce into the Constitution – confiscation – was (it alleges) already "implicit" in the unamended constitutional text.

Cyril Ramaphosa assented to the Expropriation Act in January 2025 after it was adopted by Parliament in 2024.

The Act does not bear the hallmarks of typical expropriation legislation found elsewhere in the open and democratic societies[3] of the world. In post-colonial states like Singapore and the United States, and states where land is limited and one expects more generous powers for government, like Switzerland, expropriation legislation is substantially deferential to property owners, and regards the standard of market value compensation as basically sacrosanct. It is widely recognised that expropriation law is a tool that is meant to constrain government's inherent power to dispossess property, and protect owners against political abuse.

The Expropriation Act departs not merely from market-based compensation by unconstitutionally allowing outright compensationless confiscation, but it also in theory allows the payment of (significantly) below market value upon expropriation. More than that, the Act is also an Act of retribution, morphing expropriation law from a tool of social improvement and protection against overzealous government, into a

[3] Section 36(1) of the Constitution, alongside Constitutional Court jurisprudence, sets the "open and democratic society" as the standard for determining whether it might be reasonable and justifiable for government to limit the constitutional rights protected in the Bill of Rights.

tool of punishment (on the back of intensely racialised political rhetoric directed at South Africa's minorities) and political rent-seeking.

While the Act is portrayed as necessary to bring about justice and land reform, it is not a land reform statute. It deals exclusively with bestowing upon the state new (again, unconstitutional) powers, making it politically desirable. It imposes few substantive obligations upon the state, and not one of these few includes the pursuance of land reform. Despite this incongruence, opponents of the Act are routinely portrayed as opponents of land reform *per se*, with an accusatory question posed without fail: "What is the alternative?!"

This question, thankfully, is easily answered, but its answer is not yet dominant in the discourse. This paper hopes to make a small contribution in bringing it to light.

It is, first, important to note that secure private property rights are a necessary ingredient to an economically prosperous, and politically free, society. The Fraser Institute's *Economic Freedom of the World* annual report puts it beyond any doubt that there is a causal link between a policy dispensation that is pro-market (free enterprise and private property), and desirable social outcomes.[4] As Sary Levy-Carciente notes in the *International Property Rights Index*:

> "Results keep suggesting that countries with high IPRI scores and its components also show high income and high development levels indicating the positive relationship between a robust property rights system and people's quality of life."[5]

She further writes, "property rights are a linchpin institution for a free society, based on citizenship that controls its own life and builds its own destiny."[6]

[4] www.EFoTW.org
[5] Levy-Carciente, S. 2023. *International Property Rights Index 2023*. Property Rights Alliance. 75. https://atr-ipri.s3.amazonaws.com/ipri23_fullreport.pdf.
[6] Levy-Carciente 2023 4.

Within the confines of this reality, section 25 of the Constitution of South Africa is a comprehensive property provision that covers the whole range of permissible and sensible land reform.

Firstly, sections 25(1)-(4) provide for *security of title*; secondly, section 25(5) provides for the *expansion of ownership*, to enable previously deprived South Africans to easy gain access to property; and sections 25(6)-(9) provides for the *delivery of justice* after a century of segregation and Apartheid. Each of these three characteristic elements of section 25 are considered in turn.

Opponents of private property – when they were not trying to water down section 25 or reject it as some "colonial" construct – have however sought to portray this provision as having essentially nothing to do with secure title, expanded ownership, or delivered justice. To them, according to their counter-constitutional reading, section 25 is a means by which to expand the power of the state and limit, if not eliminate, the property rights of the people.

Successive, demographically representative surveys by the South African Institute of Race Relations shows that, among ordinary South Africans across racial and class differences, there exists no true "hunger for land," nor is land reform a particularly important political priority. The latest survey reveals that only 1% of respondents picked land reform as one of their two most important issues.[7] With the pittance that government allocates for land reform in the annual budget,[8] it is clear that even among the political elite land reform is no true priority – except, of course, to the degree that its pretext could be utilised to expand state power.

This paper is part of the Free Market Foundation (FMF)'s *Liberty First: Legal System and Property Rights* policy agenda. In the overview

[7] Pretorius, H. 2024. Hope, opportunity, unity, and new common ground: Findings of IRR polling 2024. South African Institute of Race Relations. 14. https://irr.org.za/reports/occasional-reports/files/irr-polling-2024.pdf.
[8] Budget Review 2024. 2024. National Treasury of the Republic of South Africa. 49. https://www.treasury.gov.za/documents/national%20budget/2024/review/FullBR.pdf.

paper on this topic,[9] the FMF submitted that the section 25 right to private property in the Constitution should be prioritised as an imperative, rather than an optional inconvenience.

In this paper, the constitutional basis for strong and secure private property rights and land reform is set out, alongside an alternative to the destructive, statist, and confiscatory approach hitherto adopted by the government and its allies.

[9] See "Liberty First: Legal System and Property Rights." https://libertyfirst.co.za/publications/.

Securing Title

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

(2) Property may be expropriated only in terms of law of general application –

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

(3) 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 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.

(4) For the purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land.

Section 25 of the South African Constitution.

Sections 25(1)-(4) are the foundation of the property provision – as with any constitutional property provision in the world – in that it requires that property rights must be secure against deprivation, by the state or otherwise.

It further circumscribes the state's power of expropriation, subjecting it to strict controls that ensure political abuse and victimisation does not occur. In subsection (4) the provision even clarifies that land reform is not a free-floating *sui generis* justification for dispossession – it is part of the well-trodden concept of the "public interest" – and that all forms of property, not merely "land,"[10] are protected.

Expropriation Control

Expropriation law is meant to limit government dispossession of property, not amplify it.

Like "human rights law" is not a framework that enables the deprivation of human rights, "expropriation law" is not a framework that enables dispossession.

Expropriation, clearly, is a *legal* concept, which means it is to be distinguished from other forms of dispossession, like theft or conquest. It is a lawful method of coercively acquiring the property of another through the medium of a lawful political authority: the state.

The state's power to deprive human rights and to dispossess is the default, pre-constitutional position. In the absence of constitutionalism – humanity's collective decision to subject even the state to the control of law – the state may utilise its overwhelming might to harm, pillage, and plunder at will.

It is with the introduction of constitutionalism and then human rights and expropriation law that this power became subject to the circumspection of law. That is to say that human rights law protects civil liberties, and expropriation law protects property against abusive dispossession.

[10] "Land" is a term with the potential to mislead in South African property law. According to the principle of *accessio*, any immovable property built on "land" becomes, in law, part of the land. It is therefore advisable, for the avoidance of doubt, to construe any legal reference to "land" as a reference to any "fixed property," whether rural or urban.

Expropriation, in other words, is an institution that operates to the benefit of property owners, not the government. Expropriation law is the institutional arrangement that circumscribes when and how the state may take property non-consensually, in an effort to safeguard – as a matter of public interest – the interests of property owners against potential abuse.

South Africa's Expropriation Act of 2024 flips the script on its head.

It is not, strictly, an expropriation law at all, in that departs significantly from accepted standards of expropriation law. The key standard here is that the *expropriated owner is a victim*, not a perpetrator. This means that government treats the owner with an overwhelming degree of respect and deference. It is, after all, the government that has decided for itself – *not the owner through their own conduct* – that an expropriation has to take place. If the owner had done something to give rise to the expropriation, the government must instead firstly deal with them via the routes of criminal law or the law of delict (or tort). Expropriation only occurs when government needs property for some public purpose, not because the owner is the perpetrator of a wrong.

The Expropriation Act treats expropriated owners, at best, as inconvenient hurdles to overcome in the state's quest to amass a large asset registry, and at worst, as essentially criminals who should be thankful that they are not being imprisoned for the grave act of owning property that the state wants.

Parliament should repeal the profoundly unconstitutional Expropriation Act of 2024 without delay, and begin the process of replacing it with an Expropriation Control Act that

indicates the legislature's commitment to the integrity and purpose of section 25 of the Constitution.

An Expropriation Control Act would flip the present government's conceptualisation of expropriation law around and re-centralise the property owners (as opposed to politicians and bureaucrats) as the beneficiaries of legal protection. Among other things, a law of this nature should ensure the following principles are given legislative expression:

- The owner must in both substance and form be regarded as an (1) *innocent* (2) *victim* of perhaps necessary state conduct. In the first place, this must mean that expropriation cannot be utilised in practice as a proxy or alternative for criminal prosecution or delictual litigation. In the second place, it must entail a high degree of deference to the interests and preferences of the owner during the process of expropriation.
- Property confiscation – that is, "expropriation" without the payment of compensation – must be expressly prohibited for any sphere or organ of state. The only exceptions to this would be those examples of confiscation that are entrenched in the legal tradition. This includes, for example, confiscation of property used for criminal enterprises (like a firearm or a bomb); or confiscation of property for the settlement of debts (like sequestration and attachment of assets). These may strictly only occur after a competent and ordinary court of law has rendered judgment following accepted due process requirements.
- Owners must be assisted with the administrative and financial compliance of the process of expropriation. They must bear no cost (including litigation) themselves, nor should they be expected to expend money or effort maintaining the property's value.

- Upon expropriation, all mortgages and bonds or other contractual obligations attaching to the property must shift (*by operation of law*, that is, automatically) with the property from the owner to the state unless the owner willingly opts into retaining the obligation. Separate contracts that the owner might have with a bank or another party may not invalidate this requirement.
- Property that has been subject to so-called "public interest" expropriations (that is, related to land reform), must henceforth and forevermore be immunised to further public interest expropriations.
- Before any decision to expropriate is taken, it must be demonstrated to both the owner and, ultimately, to the courts, that the state exhausted all reasonable alternatives. This includes acquiring different property from a willing seller, or tabling a higher purchase offer to incentivise voluntary sale.
- Possession of the property may not pass from the owner to the state until the final payment of the full compensation amount has been rendered. The state may not negotiate to pay off the compensation over a period whilst acquiring possession.

The Expropriation Act, however, cannot be seen in isolation. The government has undertaken a process of constructing a whole dispensation of property deprivation that must similarly be dismantled. The key place to start is to amend the Land Court Act.

This Act seeks to allow the Land Court to deviate from accepted rules of evidence and procedure in land reforms matters, which could in time come to envelop expropriation matters as well.

Parliament should amend the Land Court Act to ensure that the Land Court is construed as a specialised division of the

High Court and subject to all the same rules that regulate proceedings and judgments of that court.

Legal standards are there for the protection of the people against abuse by the state. Relaxing these standards ensures the state has a freer hand to ride roughshod over recognised legal interests.

An Expropriation Control Act should unequivocally provide that all dimensions of expropriation litigation will be heard before ordinary courts of law and according to ordinary rules of evidence and procedure.

Compensation and *Solatium*

The state may not punish those with clean hands who just happen to possess property that the state requires.

Among the aforementioned accepted standards of expropriation law is also the inherent conceptual tie between expropriation and compensation. There can be no "expropriation without compensation."

The moment compensation is absent; one is dealing with *confiscation*. Similarly, compensation means (obviously) "to compensate," which means to restore the harmed party to the position they would have occupied had the harm not occurred. In other words, even if some money is paid, but this does not rise – at least – to the level of market value, *still* no compensation has been rendered, and still, fundamentally, one is dealing with confiscation.

The use of confiscation where the confiscated party has clean hands (in that they have not been pronounced guilty of a criminal act or delictual wrong by a court of law) is always necessarily unfair. It is precisely because of this that governments – including South Africa's – are generally prohibited from confiscating property and required to

follow the legally regulated path of expropriation that entails substantive compensation.

The extreme action, of the state non-consensually seizing the property of its subjects, must come at a substantive cost to the state. Only in so doing does expropriation law guard against abuse, but also protects investor confidence.

No harm is done to the restitution (discussed below) and land reform agenda by paying market value compensation or above to innocent owners who find themselves in the wrong place at the wrong time. Everyone – from the public at large, to the land reform beneficiaries, to the expropriated owners, to foreign hawk-eyed investors – benefits from a market value-based compensation dispensation.

The Expropriation Act's most well-known and concerning feature is its unconstitutional allowance for confiscation. It provides that property may be "expropriated" at the so-called "amount" of "nil compensation." As we have discovered, this cannot be regarded as referring to expropriation, or to compensation, or to an "amount."

The Constitution's standard is clear: there must be a *payment* ("nil" cannot be paid) of an *amount* ("nil" is the absence of an amount) of *compensation* ("nil" does not restore the owner to their pre-expropriation position). On this score alone, the Expropriation Act is unconstitutional.

Nonetheless, it has become common for proponents of the Act to argue that "market value is not the constitutional standard." And while they are correct in a sense, the true state of affairs would be even more offensive to those who seek to empower the state at the expense of ordinary South Africans' property rights. For, indeed, *mere* market value is not the constitutional standard: *above market value* is.

As we have seen, section 25(3) of the Constitution provides that the determination of the *amount* of *compensation* and the time and

manner of the *payment* of that compensation must account for "all relevant circumstances," but at least the following factors:

- The current use of the property;
- The history of the acquisition and use of the property;
- The market value of the property;
- The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- The purpose of the expropriation.

Many assume that these listed factors imply, or even require, a downwards adjustment of compensation from market value.

Such a reading is a profoundly counter-constitutional one. Because rarely is any other provision of the Bill of Rights read similarly: It is never said, for example, that the "relevant circumstances" that courts must consider when adjudicating evictions under the section 26 right to housing must militate in favour of a weaker protection of the very right in question.

This is to say that a constitutional provision may obviously not be read at odds with its own purpose.

The right to compensation, in particular, is a right *in favour of* property owners. There is no such thing as a right in a constitutional bill of rights that is a right in favour of the state at the expense of legal subjects. The *purpose* of these provisions is to protect owners against political abuse.

To be clear, constitutions do recognise and bestow state power, but it is an old principle of interpretation that such provisions must be *explicit* (not implied) and must be construed *narrowly* (not generously), especially where those powers tend to clash with the interests of legal subjects. This applies doubly in the case of a bill of rights.

Therefore, unless section 25 provided, clearly, that "compensation may be below market value," market value necessarily becomes the floor – not the ceiling – of compensation in cases of expropriation.

Many participants in the discourse desire setting up the "just and equitable" standard and "market value" in tension with one another, when they in fact are conceptually tied. Compensation must obviously be just ("justice," as in, that which is *due* or *deserved*) and equitable ("equity," as in, that which is *fair* and *not discriminatory*).

Under such a standard it cannot easily be argued that market value must not be the floor of compensation. But more importantly, often compensation must usually *exceed* market value, and only very rarely may it be *slightly* below market value.

Recent state subsidies to the same owner could, in theory, justify a downwards deviation from market value. But every other explicitly listed item in section 25(3) of the Constitution would tend to drive the compensation quantum upwards from market value.

In the aforementioned Expropriation Control Act, Parliament should make it clear that market value compensation is the floor of compensation for expropriation, and that the factors listed in the Constitution must militate in favour of greater, not lesser, compensation. The payment of *solatium* (compensation for inconvenience) must also be built in at a fixed percentage of market value (e.g., 5%), starting at a minimum amount of at least R50,000.

This follows logically, justly, and equitably. This is so for various reasons:

- If the property is presently used in a productive manner, the amount of compensation must not simply represent the current market value of the property but also potential future earnings from the property. If the property is not used productively, market value, again is the floor of compensation (at least for this factor).
- If the property was historically dispossessed and the state wishes to return it to its rightful owner, then the state's interest in acquiring the property is one of basic justice. And the value of justice is infinitely large. There is no reasonable amount that the state should be unwilling to pay to set right the inequity it has come to correct.
- If there is a very important purpose underlying the expropriation – like the aforementioned imperative of justice, or even a key piece of infrastructure that must be built on the property – it follows that the amount of compensation must be higher than market value. The greater the demand for something, and the greater the urgency of acquiring that something, the higher its price logically trends. If, however, the purpose of the expropriation is not urgent or not particularly important, then, at least, a prolonged negotiation around market value is called for. But perhaps more significantly: why is the state trying to involuntarily seize property from a legal subject if it is not important?

However, the most important reason for above market value compensation is the involuntariness of the expropriation. To repeat: the owner of the property has not done wrong, and therefore the intervention of the expropriation in their lives is necessarily undue and unfair.

Nonetheless, the state does have a legitimate interest in acquiring the property. In recognition of the unfairness of it all, however, additional money should be paid, to ensure the equitable balance between the

state and the civilian – between the civil servant and the citizen – is maintained.

Confiscation

The Constitution sets out a strict methodology to determine when confiscation might be allowed.

As is by now clear, nothing in section 25 gives rise to an allowance for confiscation. It is not "implicit" in the text of this provision, and certainly not in the notion of "just and equitable" compensation. Nonetheless, a different provision – section 36(1) – of the Constitution does recognise that constitutional rights could be limited, and strictly regulates how the state may do so.

Contrary to popular belief, section 36(1) does not *open the door* to the limitation of constitutional rights. Constitutional rights are legally limited in every jurisdiction with a supreme constitution, even those without limitations provisions. The First Amendment to the United States Constitution contains no allowance for government to prohibit criminal threats, yet this is widely recognised across the political spectrum as a justifiable limitation on the right to free speech that does not, in fact, detract from the right itself. Rights are by their nature limited. Section 36(1) of the South African Constitution simply recognises this reality, but, in pursuit of a *greater protection* of constitutional rights, *explicitly constrains how the state may go about limiting them*.[11]

Within this context, there are a fixed number of cases wherein confiscation could conceivably be allowed – outside of criminal asset forfeiture and judicial attachment of property, as already discussed – though it must be noted that in all but one case are not *strictly*

[11] See Van Staden M. 2023. Civil liberty in South Africa: Freedom under law three decades after Apartheid. South African Institute of Race Relations. https://irr.org.za/reports/occasional-reports/civil-liberty-in-south-africa-freedom-under-law-three-decades-after-apartheid.

"confiscation." Nonetheless, given the political desire for an institution of confiscation, it would be constitutionally permissible to compromise on these cases:

- State-owned property in any sphere of government that another sphere of government requires for strictly necessary purposes, after an intergovernmental dispute resolution process has been exhausted. Abuse of this allowance should be met with criminal penalties.
- Abandoned property (*res derelictae*) recognised as such by court. This must exclude property that was abandoned involuntarily, for example after a land invasion or an unlawful eviction.
- Other exceptional and fringe cases that can be justified according to the criteria set out in section 36(1) of the Constitution. These cases must always be brought before a court and not regarded as a matter of executive law enforcement. It is next to impossible to conceive of such cases passing muster, though if that is possible, a fair amount of *solatium* must nonetheless still be paid to the innocent owners.

Parliament may, in an Expropriation Control Act, therefore allow for the confiscation of state property, abandoned property, or cases strictly justified under section 36(1) of the Constitution.

Expanding Ownership

> (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

Section 25 of the South African Constitution.

Section 25(5) has been construed by supporters of the Expropriation Act as one that allows for a government agenda of *redistribution*. Property, they argue, is maldistributed in South Africa, usually according to racial considerations. As a consequence, without specific property being tainted by historical dispossession, it must nonetheless be expropriated by the state and distributed to other South Africans in order for ownership patterns to reflect the national demographic profile.

This sentiment is profoundly incompatible with constitutionalism and the constitutional criterion of an open and democratic society. South Africans are not pawns in a grand political chess match, with their recognised legal interests secondary to the ideological visions of politicians and academics.

Unless the state requires property for a legitimate public purpose, it should steer well clear of dispossessing that property from its rightful owners.

Nonetheless, the prevailing conception of section 25(5) in the discourse is simply not borne out from the text of the Constitution.

There is a categorial difference between clinically arguing that people must be made to own the exact amount of property proportional to their racial population size, and arguing, as the Constitution does, that

all South Africans must be enabled to access fixed property on a fair basis.

Reasonable measures that foster conditions *enabling* citizens to gain access to land on an equitable basis cannot be interpreted as providing for or implying coercive redistribution. Redistribution does not "enable citizens" to gain access to land; instead, it deprives some citizens of land and makes other citizens tenants on the land which is now owned by the state. Coercive redistribution is also not "reasonable," if reasonableness is understood as the convictions of the reasonable person. Indeed, as IRR research discussed above shows, only about 1% of South Africans want land reform to be sped up.

Political and demographic formulas that problematise "patterns of ownership" are academic endeavours unrelated to the lived reality of ordinary people – the "reasonable persons."

Only academics, journalists, and politicians fret about the "problem" of the racial makeup of property owners – no ordinary South African lies awake at night worrying about the fact that people who belong to another race own a certain percentage of "the land." At best, they worry about the fact that ill-begotten land has not been returned to its true owners, which is *restitution* – a clear matter of justice, not *redistribution* – an academic political concern.

Constitutional reasonableness requires the existence of a legitimate government purpose, which in this context evidently does not exist. Using state force in pursuance of essentially academic ends is neither reasonable, nor is it a legitimate aim of government according to the Constitution.

What section 25(5) does do, however, is enjoin government to create a conducive environment, or "foster conditions," that means – through policy or law – that it must enable ordinary South Africans to participate in land ownership *themselves*. Indeed, the fostering of conditions necessarily implies a supportive role for government, not a direct, interventionist role.

Some practical manifestations of this, more constitutionally coherent approach to section 25(5), are now considered.

Deregulation

The state has made it difficult to purchase and transfer property, excluding millions from participating in ownership.

Purchasing or transferring fixed property in South Africa is a bureaucratic nightmare even for the well-to-do. A person or family regarded as "poor" has little plausible chance of participating in the benefits of property ownership under these circumstances.

To add insult to injury, that this process is expensive and cumbersome has come to be regarded as a perfectly normal phenomenon, as if it is self-justifying.

The reality is that multiple stacked layers of regulation, in the municipal, provincial, and central spheres of government, drive these costs up. It is because of these regulatory requirements that architects, planning consultants, and lawyers are able to charge a premium for their services, knowing that clients have no choice but to comply.

While it is difficult, within the scope of this paper, to list all the conceivable reforms that should be made to reduce the burden, it is clear that widespread deregulation has to occur.

Parliament, provincial legislatures, and municipal councils should reduce the red tape and compliance costs for the purchase, transfer, and selling of property.

Reform of this nature could include:

- Outsourcing the functions of the deeds registrars to the private sector, given the seemingly endemic problems of mismanagement and backlogs that now characterise these offices.
- Scrapping any administrative fees payable to the state when property is purchased or transferred.
- Waiving the requirement that homes must have formal building plans before they can be sold.

The state, furthermore, should not be in the business of profiting off of ordinary South Africans' quest to becoming property owners. In this respect, the various forms of rent-seeking, extractive taxes that in practice penalise ownership should be done away with.

Parliament should eliminate the capital gains tax, and introduce an upper limit on all municipal property rates in the Municipal Property Rates Act of 2004.

Both capital gains taxes and municipal property rates make ownership unattractive for poorer South Africans. This is especially problematic when considering that a poor family could acquire ownership of a large tract of farmland through a restitution process and as a result be required to pay exceptionally large amounts of money monthly to their local or district municipality.

In this vein, of the poor gaining access to farmland, there also exists the enduring barrier of subdivision regulations. According to the now-repealed Subdivision of Agricultural Land Act of 1970, a farmer would need to seek permission from agriculture authorities before they could subdivide their land, for example to sell off smaller plots for more affordable prices.

While the Act has been repealed, it is not yet clear that the regulatory paradigm that came with it has been entirely done away with.

Any remaining restrictions on the subdivision of agricultural property should be repealed. This especially includes any discretionary power that a minister or regulator might have to impose such restrictions.

By making it more affordable to acquire both urban and rural property, government would be directly engaged in fostering the conditions that enable greater numbers of South Africans to – of their own accord, which recognises their dignity as persons – gain equitable access to fixed property.

Housing Vouchers

The South African Institute of Race Relations has published a Right to Own Bill that re-entrenches and re-emphasises the right to property as recognised by section 25 of the Constitution.[12] This proposed legislation should be considered as a desirable intervention beyond what is mentioned about it here.

Among the Bill's proposals is a housing voucher programme for low-income households, which slots neatly and coherently into section 25(5)'s requirement that government foster conditions for South Africans to gain access to land. These vouchers would enable beneficiaries to purchase, rent, or construct residential property.

An added benefit of this proposal is that private residential developers could qualify for tax exemptions or other incentives if they construct

[12] https://irr.org.za/whatsacanbe/files/right-to-own-bill.pdf

affordable housing or regenerate dilapidated urban areas (of which South Africa has many).

Parliament should implement a housing voucher programme that allows qualifying low-income South Africans to purchase, rent, or construct residential property in the open market.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).

Section 25 of the South African Constitution.

Racialised property dispossession is a significant part of South Africa's history and contributed in large part to the endemic destitution that still characterises parts of the country today. It is no surprise that in light of this problematic anti-property rights posture adopted by previous dispensations, the Constitution would recognise that reparative policy is necessary. Subsections (6) through (9) are devoted explicitly to that.

Section 25(9) in particular makes reference back specifically to subsection (6) – not any other subsection – which links security of tenure (that is, protected property rights) inseparably from South Africa's contemporary land reform agenda. Further weakening of property rights is evidently constitutionally prohibited, and it is condemnable that the South African government has not taken heed of this.

Rural *and* Urban Titling

Millions are waiting for a simple ownership transfer that they are entitled to by right.

The state, as an institution, is not an appropriate landlord. The social contract establishes the state as the coercive guarantor of public order and basic justice. As an entity governed exclusively by political – not commercial or communitarian – considerations, bestowing upon the state the power of lease and eviction is dangerous, and South Africa's history has borne this fact out.

Peri-urban townships, regarded as temporary labour reserves, trapped primarily millions of black South Africans in perpetual tenancy. Rural communities, confined largely to their "homelands," faced similar deprivation. The result was dead capital: land and homes that cannot be leveraged for wealth creation or development.

As per section 25(6) of the Constitution, these people are all lawfully entitled to ownership. And while land reform is often presented as a generally rural phenomenon, where millions have an ostensible "hunger for land" to farm, the far greater need for constructive land reform is found in urban areas.

South Africa's cities are economic hubs. Yet, millions of urban dwellers live in Reconstruction and Development Programme (RDP) houses or informal settlements without ownership. State RDP housing, while well-intentioned, often fails because beneficiaries cannot sell their homes without official permission, or upgrade them without title. This hinders RDP settlements from ever becoming suburbs. Instead, they will remain state housing complexes without character.

Title deeds are not mere paper. They unlock economic potential. Ownership allows individuals to borrow against their property, invest in improvements, or sell for profit. Without title, residents are locked out of the market economy. Their homes, often their only asset, remain illiquid. This entrenches poverty.

But more than that: title bestows peace of mind and certainty – certainty that "what is mine" today is still mine tomorrow morning. This is far from a guarantee for many poor South Africans.

Government should begin a comprehensive audit of all property directly or indirectly under state (municipal, provincial, and central) ownership, custodianship, or trusteeship, and commit in principle to divesting itself of said ownership in favour of the person(s) lawfully living and/or working on that property.

The Free Market Foundation's Khaya Lam (My Home) Land Reform Project was launched in 2010 to facilitate the transfer of municipal property[13] (i.e., homes owned by municipal councils) to the people who have been living in and on those properties for generations as tenants. By 2013, to mark 100 years since the inequitable Natives Land Act was adopted, Khaya Lam celebrated 100 title deeds transferred. At the time of writing, the project had transferred some 20,000 deeds to the families entitled to ownership by right.

Many hundreds of thousands, or potentially millions, of properties remain to be taken off of primarily municipal asset registers and turned into live capital for real people.

Restitution

Those who can prove ownership of dispossessed property are entitled, by right, to receive it back.

As has been noted, in South Africa's land reform discourse there is a preoccupation with the phenomenon of *redistribution*, which some

[13] www.KhayaLam.org.za

believe the Expropriation Act will bring about, as a means to effect land reform.

Redistribution is however a purely political, moreover ideological, phenomenon that is relatively novel in law, and which no provision of the Constitution hints at.

Restitution, on the other hand, is an entrenched feature of South African law that is constitutionally required as a matter of justice. Restitution – the idea that those dispossessed of property must see it returned as a matter of law – is intimately tied to security of property.

Whereas restitution is about returning identifiable property to that identifiable legal subject from whom it had been taken involuntarily by another identifiable person or entity, redistribution is about taking any property (virtually at random) from owners who have not been proven to be guilty of anything, and handing it to any person or people, chosen based on political considerations. Redistribution is, therefore, at best an unconstitutional attempt at legislative retribution, where past injustice is "addressed" with the creation of present injustice.

It is often said that Parliament should adopt a "Redistribution Act," but the far more reasonable and constitutionally compliant approach is to strengthen the Restitution Act.

The 1994 Restitution of Land Rights Act makes provision for restitution and as such be retained. There are, however, certain changes that Parliament should make to South Africa's restitution law.

These include:

- Once restituted, that property falls out of any further consideration for land reform purposes. This should replace the endless "window periods" for submitting restitution claims. Those who legitimately believe that they or their ancestors-in-title have been dispossessed and can prove it should be able to lodge such a claim at any time. However, upon the adjudication of such a claim – successful or unsuccessful – that property must forevermore be regarded as "dealt with" as far as land reform is concerned.
- A significant amount of money should be budgeted for the restitution process until claims completely dry up. The government has underfunded the restitution programme and the Land Claims Court (the predecessor of the Land Court) for decades. This has allowed politicians to continuously milk the land reform issue and drive up the temperature of South African politics.

State and Communal Property

The state's abundant asset register is the best place to start a legitimate redistribution process.

As stated above, the state has no business being a retentive owner of tracts of land. The state is not fundamentally an agricultural or development institution, but a guarantor of law and order. Any property the state owns that is not strictly necessary to the constitutional mandate of a given organ of state, must be redistributed-in-ownership (as opposed to leasehold) to deserving civilians (as opposed to family or friends of the political class).

Since the South African government embarked on a programme of redistribution, it has acquired some 2.5 million hectares of land in addition to what the state already owned at the time. The state then held onto this land in ownership, rather than transferring ownership of it to potentially deserving South Africans. This is a growing amount of land,

and presently amounts to a landmass larger than the Gauteng Province. The political elite, therefore, hoards land under state ownership whilst decrying the lack of an equitable distribution of land among the peoples of South Africa.[14]

In the legislation referred to above in the context of titling, Parliament should include requirements that compel any executive institution that has acquired property as part of a land reform initiative to transfer that property, in ownership, to a civilian who demonstrably has no relation (family or friendship) to any political figure, within a period of six months.

The state should, furthermore, divest itself fully of ownership (by that or any proxy descriptor like "custodianship" or "trusteeship") of water, minerals, petroleum, and other natural resources.

Parliament should either repeal or amend the 1998 National Water Act, 2002 Mineral Resources Development Act, and 2024 Upstream Petroleum Resources Development Act to divest itself of the role of owner, trustee, or custodian of South Africa's natural resources.

Unless they were compensated at or above market value, these resources should be returned to their prior owners if they can be

[14] Kirsten, J., and W. Sihlobo. 2025. Land reform in South Africa doesn't need a new law: the state should release property it owns – economists. *Democracy in Africa*. https://democracyinafrica.org/land-reform-in-south-africa-doesnt-need-a-new-law-the-state-should-release-property-it-owns-economists/.

identified. If they cannot be identified, a transparent process of transferring the property, for free, to deserving South Africans should be undertaken.

Insofar as is possible, the common principle of *ad coelum* – whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell – should apply, meaning that the owners of the land beneath which water, mineral, or petroleum resources are found, are also the owners of those resources. Landowners should then be free to contract and lease or sell their mineral, water, and petroleum rights if they so choose. The Coase theorem provides us with the reassurance that these resources will make their way into the hands that will treat them in the most economically efficient manner.

Not all property need be owned by individuals, however. What is key is that property must primarily be *private*. Communal property dispensations need therefore not necessarily be individualised or "Westernised," though they must be severed from the Western-derived state and vested, in full and unambiguous private ownership, in wholly private communal or tribal associations or functionaries appointed and regulated by the community or tribe.

Parliament should modify the 2017 Communal Land Tenure Bill by removing its problematic provisions and strengthening the granting of true, private ownership of land to community formations, and ensure that communal property ownership is severed totally from state ownership.

In this respect, the 2017 Bill, though far from ideal, would move things in the right direction if adopted. That bill proposes to convert legally insecure communal tenure into secure (ownership) tenure.

Among its problematic provisions, however, is that it could threaten existing tenure, which should be fiercely guarded against. It also bestows a too-high degree of discretionary power upon the executive in various respects, which should be circumscribed. Where the Bill empowers the minister to reserve certain communal land to the state or lease state land to communities, it goes completely off the rails.

Conclusion

There is widespread consensus that much of the poverty caused by Apartheid resulted from its denial of the right to property to millions of South Africans depending on how they looked and where they were. The post-Apartheid government has nonetheless continued to further undermine this crucial right, in an insatiable quest to acquire more power for itself at the expense of citizens.

This paper shows that there are desirable and beneficial ways to undertake equitable land reform without doing harm to the non-negotiable property rights that make a free and flourishing society possible. The Expropriation Act of 2024 was by no means inevitable nor does it represent the best version of a law conducive for land reform or reparation.

By simply placing Liberty First, and giving constitutionalism its due respect, do the alternatives to destitution and tyranny reveal themselves.



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