

EXECUTIVE SUMMARY

- [1] The issue of land in South Africa is a painful, disgraceful and highly emotive subject marked by colonial and apartheid era land dispossession. Despite well-meaning attempts by government, through legislative and other measures the impact of land dispossession and forced removal remains a painful reality for most South Africans who, almost three decades post-Apartheid, are yet to enjoy the fruits of restitution or equitable redress.
- [2] This submission by the National Association of Democratic Lawyers (NADEL) is made in response to the call made by the Joint Constitutional Review Committee (CRC). It has been developed in order to inform the key constitutional, legislative and policy considerations by the CRC on the question of expropriation without compensation, especially for purposes of advancing land reform.
- [3] The Interim Constitution (1993) and Final Constitution (1996) changed colonial apartheid legal formalism and introduced a human rights approach to achieving human wellbeing. While it gives everyone an opportunity to achieve their potential to acquire, hold and manage land, the larger goal of achieving substantive democracy has been challenging with the result that many gaps have developed between the constitution, laws and implementation, and policies and implementation.
- [4] These gaps are ever more prevalent in the area of property rights. The gaps and obstacles are compounded by the contested notion of ownership and dominion that pervades the discourse on land and the absence of progressive state policies to reform and improve the status quo. These gaps have had a catastrophic effect of widening poverty, unemployment and inequality, as well as varied interests that have developed between rural and urban dweller.
- [5] The structure of the property right (section 25) in the constitution also contains an imbalance of power in favour of an excessively *laissez faire* owner/dominion-centric approach, that directly imposes positive obligations in

the wording “*subject to compensation*” (see s25 (2)(b) of the constitution), with clearly defined criteria for calculating compensation in terms of the monetary value of property rights. It is therefore imperative to address the disparities within the social context and review the balance of forces in the structure of property rights

- [6] There is a disconnect on an ideological level between the transformative vision and the continued legal formalism that is guiding government’s approach to property rights, with the latter sometimes conflicting starkly with the harsh realities of black people in rural and urban communities, and the interests of the poor in general.
- [7] There are a variety of obstacles to building a new social compact on land reform such as: the absence of a progressive government policy on property rights which allows for expropriation without compensation; the contested notion of ownership, dominion and possession that pervades the discourse on land reform; the inability to effectively provide meaningful redress for black people who were dispossessed of their land rights under apartheid laws, policies and practices; opposition to a human rights approach to human wellbeing, which is often seen as an irritation rather than as a means to achieve land reform; and resistance to addressing the impact of apartheid spatial planning through the instruments of expropriation.
- [8] As stated in the preamble of the Constitution South Africa belongs to all who live in it. Property in accordance to section 25(4)(b) is not limited to land. The state is given wide powers and obligation in S 25(5) to take reasonable legislative and other measures to enable citizens to gain access to land on an equitable basis
- [9] Section 25 is unambiguous in so far as the requirements for compensation or redress is concerned, though it provides for circumstances where the market value of the property is not the only measure of redress.

- [10] NADEL has examined the question whether section 25 of the Constitution disallows expropriation without compensation completely, with particular reference hereto to S25 (8) and international law, and found that there is no absolute bar to a policy that provides for expropriation without compensation. Compensation is not indispensable to property rights.
- [11] NADEL however submits that a blanket policy of expropriation of land without compensation, regardless of whether it is residential, commercial, agricultural, or recreational, which does not address *inter alia*, the question of arbitrary deprivation of property and without regard to the circumstances of the owner and the method of acquisition, would probably not be justifiable.
- [12] The reason for this lies in notion of “adequate reparations”, which is well recognized and entrenched in both international and domestic law.
- [13] The question of expropriation without compensation will require an individualised inquiry in each case into various factors and will require to pass vigorous constitutional test to be valid or pass constitutional muster.
- [14] It must be recognized that the economic and political realities and the need to attract development opportunities as well as the cost of perpetuating an excessively *laissez faire* owner/dominion-centric approach to property rights is too high for South Africa to pay.
- [15] The adoption of an expropriation without compensation policy is necessary when viewed from the perspective of the landless poor, marginalized and indigent people and communities.
- [16] NADEL urges the Constitutional Review Committee to review the structure of property rights in its entirety at this juncture, such that a minimalist, flexible and balanced rights-based approach is adopted in order to enable the state to exercise its powers unrestrained and expropriate property without compensation for a public purpose and in the public interest.

[17] In terms of this balanced rights-based approach, compensation should not remain an essential prerequisite or be treated as a fundamental right, but rather the public purpose and public interest coupled with judicial review, to restrain decision-making and eliminate unfair discrimination.

[18] NADEL urges as amendment to section 25(2)(b) or section 25(8) of the Constitution, which removes the imbalance referred to above, and permits expropriation without compensation, subject to certain conditions subject to conditions fully stated in the full body of these submission.