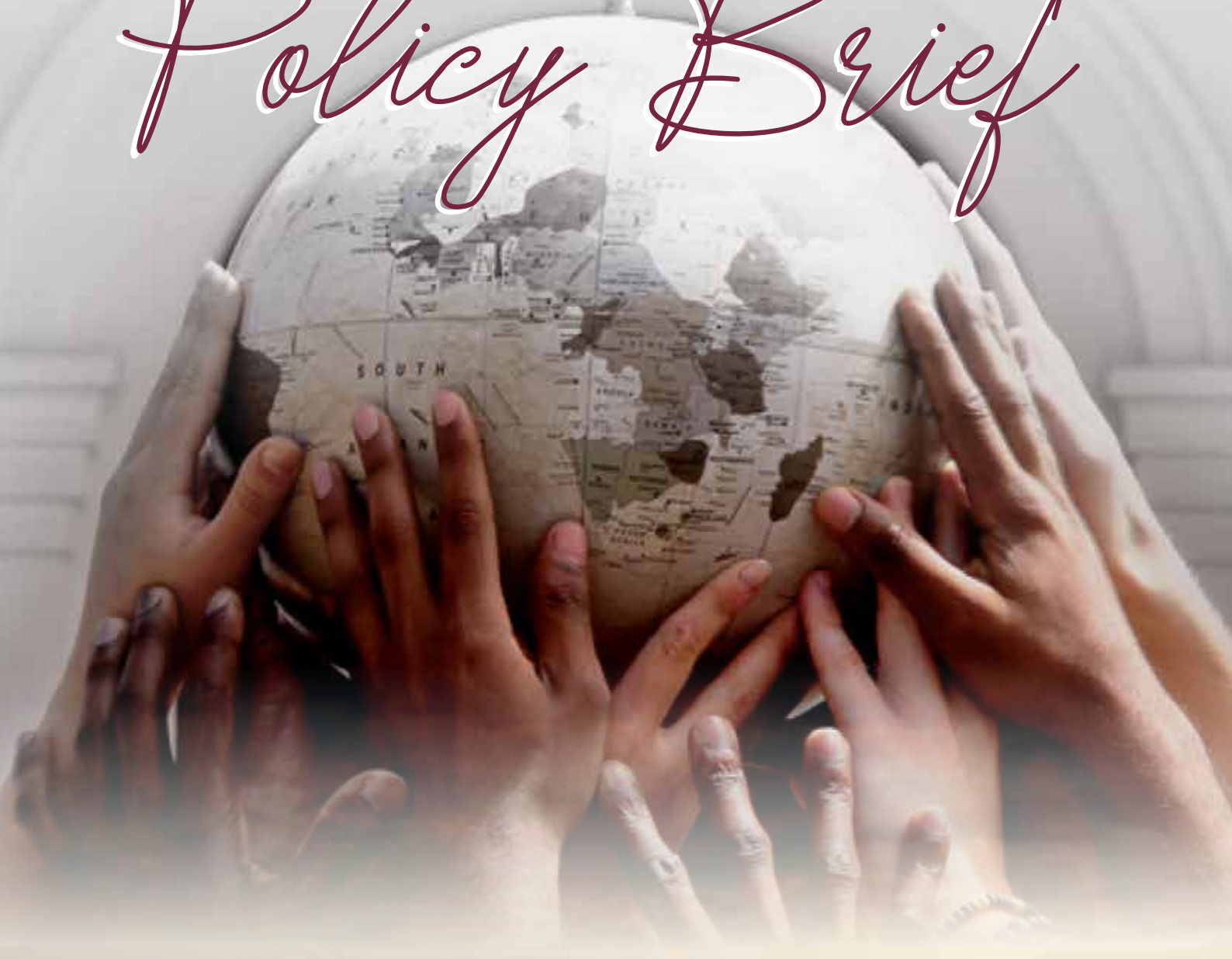




LAND

Policy Brief





About the project

This policy brief came about as a result of a written submission on land reform and redistribution that was made to Parliament after the hosting of a Women's Land Summit. The President has given priority to this difficult social justice matter through the establishment of an inclusive Expert Panel. This is an issue that affects the country as a whole and, if handled badly, may pose a threat to democracy, the rule of law and peace.

Consequently, the Women's Land Summit was convened to engage in conversations on land as a form of restitution, to foster social cohesion and to give life to the constitutional promise of social justice in the context of land and social justice reform. Moreover, the summit was aimed at reaching a common understanding of how ideas on reducing poverty and inequality can be infused into the land reform process. The discourse also sought to examine how some of the current patterns in land reform undermine the rule of law with a view to generating solutions that enhance the rule of law while ensuring swifter progress in the period between now and 2030. This is the period within which, in terms of the Global Sustainable Development Goals (SDGs) South Africa has to end poverty and drastically reduce

structural inequality while ensuring inclusive economic growth and environmental sustainability.

The policy brief captures the key discussions that took place during the summit and the tentative solutions that seek to move the land redistribution discourse forward in a manner that is in line with the constitutional objectives of a united South Africa anchored in shared humanity and prosperity. This input further encourages a change in the public narrative towards a unifying tone instead of the divisiveness of the past and advocates for a common understanding of the psychological and emotional trauma underlying the denial or delay of land restitution.

Executive summary

The policy-brief seeks to summarise the key issues raised at the Women's Land Summit, which was aimed at uplifting women's voices on the land question and its social justice implications. The summit, which was hosted by the Law Trust Chair in Social Justice and the Division for Social Impact Component at Stellenbosch University, was conceived of at the time the land debate threatened to tear the nation apart through polarising pronouncements from various political actors. Absent from the discourse however, were women's voices despite the fact that women, for many years were left to till the land, as men flocked into migrant labour. It was also important to harness women's history of engaging meaningfully across political, colour, class and other divides with a view to exploring interests and eschewing a zero-sum-game approach to land redistribution solutions.

Central to the summit was fostering an approach that resonates with our constitutional values and societal vision of inducing wide-ranging social change through non-violent political processes grounded in the rule of law and social justice and the pursuit of national unity. The land question was discussed under three key headings: The Constitutional context and socio-economic dimensions; Housing and resources; and Sociological and anthropological dimensions of land reform.

Project Leaders:

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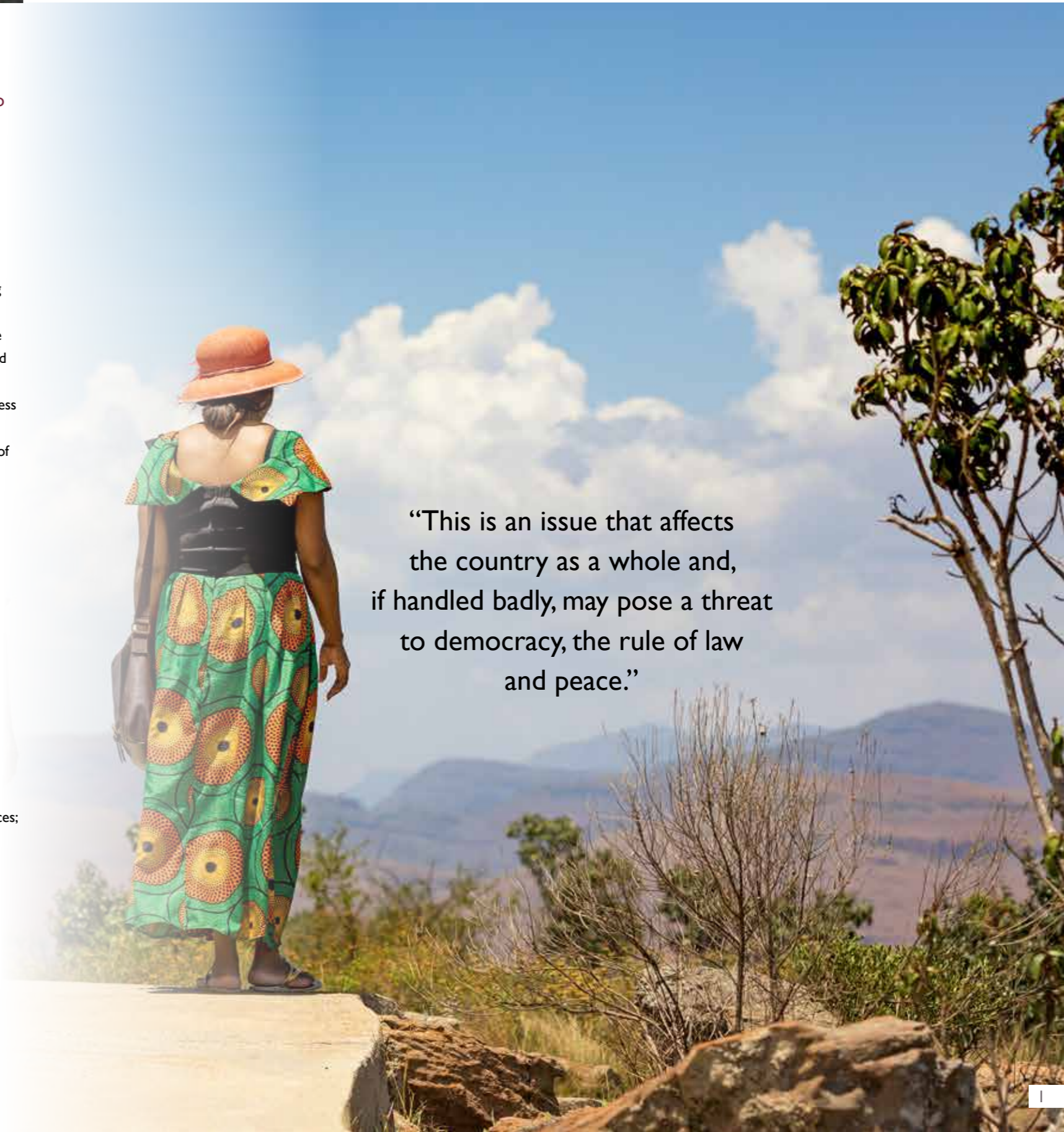
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Contributors: Women's Land Summit participants

November 2019

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“This is an issue that affects the country as a whole and, if handled badly, may pose a threat to democracy, the rule of law and peace.”

Introduction

Background

Women's voices have been muted in the land reform discourse. Until recently the tone has been rather racially divisive as opposed to healing the divisions of the past as envisaged by our transformative Constitution. Solutions on the table tend to be either about keeping the status quo or about radical disruption, thereby exacerbating historical divisions. So much anger on both sides does not bode well for gender-based violence and violence in general, as women tend to bear the brunt of violence. In the past, women have worked across race, class and religion to find women's solutions to seemingly intractable challenges. The 1956 Women's March is an example in this regard, as is the Women's Charter. The various transformation initiatives initiated by women during the constitution-making process in the early years of democracy is another example which demonstrates that to drive women towards social justice is a win-win approach. The Social Justice M-Plan initiative also brings women together in the sharing of ideas for advancing social justice as a national and global imperative that transcends gender, racial, class and



Key observations were the following:

Constitutional context and socio-economic dimensions

1. What is the problem?

There is a gap between the law (Constitution) and reality. The problem is not necessarily with the Constitution, but rather with the implementation thereof. A solution requires a bridge between the legislature and the executive branch of government. The lack of implementation may be the reason for the suggested amendment which would provide for expropriation without compensation. However, land redistribution as envisaged in the Constitution transcends expropriation without compensation. There is also a gap in knowledge. There is a lack of education regarding land reform in general, and with each specific programme (redistribution, restitution and tenure security).

2. Does the Constitution say anything to support or hamper the vision?

The Constitution is merely a guide or "skeleton". The skeleton must still be fleshed out with legislation and policy. On the assumption that the problem is with the implementation of the law, the Constitution supports the vision of land redistribution to address historical disparities by creating a mandate for it in section 25 of the Constitution, particularly articulated in subsections 2 and 8 particularly. The Constitution entrenches a land reform programme. But that reform is not restricted to expropriation with or without compensation. There is room for incentivising various pathways to land redistribution - an option that, to date, has not been adequately harnessed.

3. Existing legislation or policies that hamper or support the vision?

There seems to be no clear vision for what problem solving looks like for land redistribution. The law and policy reform process is also a piecemeal process. The way forward would achieve better results if an integrated white paper was developed that spelt out the vision for a just and equitable distribution of land, for a recognition of multiple uses of land beyond agriculture in rural areas and housing in the urban environment and for incorporating tenure security in farm lands and trust land and also dealing with rights of occupants, mainly women, who are not direct lessees and are affected by daily evictions by farm owners and traditional leaders due to loopholes in the Extension of Security of Tenure Act (ESTA) and related laws.

It was also noted that rights protection should also include user rights relating to cultural needs such as ancestral burial sites and sacred places for traditional rituals for certain groups.

4. Examples of ideal models and opportunities for better solutions?

In light of the problem of education, it was suggested that NPOs or NGOs should play a greater role in educating communities about their rights. In terms of providing short and/or quick solutions to vulnerable people or communities and to monitor the land reform process from a grassroots level the following is suggested:

- Establish a hotline for vulnerable people where they can call in and, for example, report that they have been evicted
- Compile and distribute a compendium of cases
- Formulate and distribute a pamphlet regarding rights
- Access a vast number of people, preferably in their home language, by way of radio. More people have access to radio and by answering questions on radio there is a sense of accountability.

Currently, there is no integrated, holistic or multidisciplinary approach to land reform. We have the three pillars: restitution, tenure security and redistribution. What is required is to take a step back and ask: What do we want from land reform? Where should the focus fall? What is our end goal?

In terms of the *commissioned Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*, an initiative of the Parliament of South Africa, the following questions are pivotal to establish what we want from land reform and what our end goal or target should be. Therefore, the following questions should be addressed in legislation or policy (national land policy):

1. Who should get the land or who should the beneficiaries be? Should this be the 'rural poor', the experienced, the dispossessed or the creditworthy? Should emerging black commercial farmers be the focus? What about farm workers? Or should it be urban business people and entrepreneurs with capital to invest? Related to this is how public funds should be distributed: Should the wealthy get substantially more support than the poor? Should women be prioritised or not? What would giving priority to women and to the poor require in terms of policy prescription and how would this be assessed?
2. How should the land be used? What type and scale of farming? Should land be redistributed to enable settlement and multiple livelihoods? Or should it be exclusively for farming? If so, should this be farming on a small scale, made possible through proactive subdivision? Should it be on varying scales? Or should it be for farming only on existing farming units?
3. How should land be identified and acquired? Should redistribution be restricted to those properties that are offered for sale – for example, there would be no targeting? Or should there be area-based priorities? If so, how can these priorities be set, what state planning is needed to inform this and how can the process be participatory and enable local people to identify their land needs and vision for redistribution? In other words, who will determine where land is redistributed? The market? State officials? Or rural communities themselves?
4. How is land to be valued? What should the state, or beneficiaries, pay for land? Should this be a 'market' price, a negotiated price, or a price determined on the basis of Section 25(3) of the Constitution? If the latter, how should 'just and equitable' compensation be defined? How should the history of acquisition, market value, past subsidies, current use and purpose of expropriation be defined, and how can a formula be developed to clarify this? Should a case be taken to the Constitutional Court precisely to get judicial guidance on how to address valuation?
5. What rights should beneficiaries have? Should they be owners of the land? Or long-term lessees? What is the rationale for leasing, and should those who do not pay lose their land? Does the state have the capacity to enforce leases and extract rent – now and in the future when more properties are obtained? Should land be held by traditional councils on behalf of communities, or by beneficiaries through communal property institutions? Is payment of rent to the state a feasible and workable system, and what does the track record of the past decade tell us about this? Should people obtain secure long-term rights, or contingent rights based on 'production discipline' and a 'use it or lose it' approach? What capacity does the state have to determine effective use of land within the constraints of people's available resources?
And is there a strong political and legal rationale for land reform beneficiaries' tenures to be contingent on production discipline, while private owners' tenures are not? While these questions relate specifically to redistribution, some of the questions are also applicable to the tenure security programme.

5. Why is failure not an option?

As mentioned above, the Constitution creates a constitutional mandate to realise the land reform programme (through redistribution, tenure security and restitution). Failure would undermine the constitutional vision and undermine the legitimacy of the Constitution itself.

Housing and resources

1. What is the problem?

There is a lack of political will to effect land reform at various levels in government. This results in problems with the implementation of legislation and/or policies at municipal and/or provincial level. The common perception that market value is still the primary factor to determine compensation, leads government to be slow to expropriate.

The problem with the top-down approach to land reform is that, sometimes the legislation or policies are removed from the realities on the ground. Then the Constitution is still only an ideal standard. The Wupperthal community experienced this first hand.

Some voices, like those of the Khoi and San, are left out of the conversation.

People still feel disempowered in the land reform process. The TRC was not enough. No apology for what was done in the past and no restoration means that people are still aggrieved.

2. Does the Constitution say anything to support or hamper the vision?

The cut-of date in the Constitution for restitution is problematic. From the perspective of ethnic minorities and land, for example, Khoisan communities' land rights and the ways in which those particular issues are not accommodated in the current conversation, are presenting challenges as a result of the Constitution's cut-off date. For the community, it may even mean an outright exclusion. In terms of land and identity: How does the Constitution accommodate not only the idea of land identity, but also the ways in which land and identity merge with questions of need?

3. Existing legislation or policies that hamper or support the vision?

Implementation and the implementation gap is a significant challenge, even when we have good legislation. Difficulties arise especially in instances where there are no laws or where there is an absolute gap and people are left vulnerable, as opposed to a situation where there are laws and people are able to seek some kind of protection.

Laws often do not speak in one voice – laws that seek to protect the same group of people, or the same type of land, or land right may articulate certain points differently, thereby creating confusion. This non-unified way of speaking about a particular aspect can be a hindrance to people being able to seek protection and frequently result in us being unable to get a clear reading from the numerous laws that apply. This may result in having recourse to the Constitution itself which puts a burden on the Constitution to do more than it was designed for, since it is then required to deal with finer points that actually should have been dealt with in legislation and this can be a hindrance.

4. Examples of ideal models and opportunities for better solutions?

There are problems with lack of creativity regarding legislation and policies, but also regarding models that can work to ensure land reform. Sometimes successful models in one setting do not always work in other settings; that is the problem with the one-size-fits-all approach.

5. Why is failure not an option?

Land is being made to carry almost all of our hopes and dreams. There are so many other failures – lack of service delivery, education and health, for instance - that land comes to hold the 'magic key' to so many other social issues, most importantly the alleviation of poverty. The stakes are high; people's lives are affected on a daily basis. Without having the ability to express yourself through land, you are left an incomplete person, an empty shell, an ID number.

Sociological and anthropological dimensions of land reform

1. What is the problem?

We cannot only speak about land reform for farming or for urban or peri-urban, or for other land users. It is therefore, important to disaggregate land for different purposes.

The institutional framework is very complicated. We should improve this by removing patronage by streamlining and by integrating the process of land reform. This also speaks to the importance of land acquisition and planning at the local level.

Land reform policies are gender blind and not sensitive to the vulnerabilities of women.

2. How does the Constitution support or hamper the resolution of the problem?

The Constitution is not only the property clause, it also encompasses a myriad of other issues such as equality, dignity, housing equality and the right to self-determination, and the right to food, shelter and water.

The Constitution does allow for expropriation without compensation, but the provision needs to be sharpened and clarified.

There needs to be a clear statement that this is indeed a possibility and will take the heat of the political debate, allowing us to move forward.

3. How do pre-existing legislation or policies hamper or support the resolution of the problem identified?

The reopening of the restitution process is hamstringing our future – more than a 140 000 claims are still unresolved. This is further hampered by other complicated interplays like the ESTA amendment and the Traditional Khoisan Leaders Bill.

4. Examples of models and opportunities for better solutions in the future?

Land reform for agriculture entails such complex value chains. Cooperative models and partnerships may be valuable in instances such as the old agricultural cooperatives where producers are linked in terms of their marketing inputs and extension.

Commonage land also holds promise.

5. Why is failure not an option?

Africa is a youthful nation and we are all part of the same habita. We should ensure a sustainable future.

Concluding remarks: keeping social justice at the forefront

Land is a social justice issue. People's lives are intertwined with land, which makes it an emotional and life-and-death issue. The land issue in South Africa has always been a source of struggle. Over the years, women have played an important role in transcending boundaries and in finding peaceful solutions. Women view justice as beyond just us.

In dealing with the issue of land, Parliament is constitutionally obliged to use as its yardstick the question of whether its approach enhances or undermines social justice, particularly gender-, class- and poverty-related social justice. If this is its point of departure, Parliament will be in the best position possible to satisfy itself that any proposed intervention is in line with the vision of our democratic

The Women's Land Summit resolutions can be summarised as follows:

- Land reform must be expedited. Achievements of the last 25 years have changed some things, but others are still lacking. The pace has not been good and the selection of beneficiaries has been questionable. For the sake of the youth and peace we need to do better fast.
- South Africans need a holistic policy with a clear vision for a desired end state to be achieved through land reform.
- The policy should include a clear indication of beneficiaries and better protection of informal rights, such as those of farmworkers, women and those people residing in traditional communities.
- The policy should accommodate multiple distribution pathways.
- The policy should contain some incentives for those who voluntarily participate in land reform.
- We should broaden the land use perspective beyond agrarian reform. When we think of rural land, we should not only consider farming. Land may be useless for farming, but may be appropriate for factories.
- Those who farm should be assisted to translate products into finished goods.
- Land should be separated from agrarian reform, as land has multiple usages.
- Land administration should be included as a fourth leg of land reform.
- Implementation capacity within the state and society should be addressed. Existing reports that have identified the gaps within the state and judicial system around the implementation of existing laws can be used as a starting point.
- Legal awareness needs to be addressed. Including making use of vernacular radio programs and helplines, and summarising landmark cases.
- A process that will ensure constitutional clarity, thereby addressing the question of whether the Constitution supports land reform in multiple ways or not, should be facilitated.
- The conversation around land reform should be broadened to encourage voluntary participation.
- Social justice should be part of a land reform policy – as long as there is injustice somewhere, there cannot be sustainable peace.



Resolution adopted by the Women's Land Summit on 11 April 2019

1/1. Land Reform and Restitution – Women Leading the Healing of the Divisions of the Past

The Participants,

Mindful of women's voices being muted in the land reform discourse and the divisiveness of the dialogue that has not led to a healing of the divisions of the past as envisaged by our transformative Constitution,

Recognising the important role of women in the land debate as well as the importance of harnessing women's history of engaging meaningfully across political, colour, class and other divides with a view to exploring interests and eschewing a zero-sum-game approach to land redistribution solutions,

Welcoming the initiative of the Law Trust Chair in Social Justice, Faculty of Law and the Division for Social Impact at Stellenbosch University that brings women together in the sharing of ideas to address the difficult and emotional land question in a manner that advances social justice,

1. **Decide** to give life to the constitutional promise of social justice and to lift up women's voices on the land question and its social justice implications,
2. **Encourage** a change in the public dialogue and/or narrative towards a unifying tone instead of the divisiveness of the past,
3. **Invite** a select committee to examine how current patterns in land reform undermine the rule of law with a view to generating solutions to be implemented under the leadership of women that enhances the rule of law, in particular to reach a common understanding of how ideas on reducing poverty and inequality move the land reform discourse forward in a manner that is in line with the constitutional objectives of a united South Africa anchored in shared humanity and prosperity; and within a common understanding of the psychological and emotional trauma underlying the denial or delay of land restitution,
4. **Agree** that a follow-up summit should take place in August 2019,
5. **Identified** the following current patterns in land reform that undermine the rule of law:
 - There is a gap between the law (Constitution) and reality characterised by a dissonance between the constitutional vision guaranteed and anchored in shared prosperity and social justice, and land redistribution practices in the last 25 years.
 - There is a gap in knowledge – a lack of education regarding land reform in general, and with each specific programme (redistribution, restitution and tenure security).

- The common perception that market value is still the primary factor to determine compensation – leads government to be slow to expropriate.
- Some voices are left out of the conversation – like those of the Khoi and San.
- People still feel disempowered in the land reform process. The TRC was not enough. No apology for what was done in the past and no restoration means that people are still aggrieved.
- We cannot only speak about land reform for farming or for urban or peri-urban, or for other land users. It is, therefore important to disaggregate land for different purposes.
- The institutional framework is very complicated. We should improve this by removing patronage, by streamlining and by integrating the process of land reform. This also speaks to the importance of land acquisition and planning at the local level.
- Land reform policies are gender blind and not sensitive to the vulnerabilities of women.

6. **Request** the Law Trust Chair in Social Justice, Stellenbosch University, to bring the following resolutions to the attention of Parliament and all heads of political parties:

- Land reform must be expedited. Achievements of the last 25 years have changed some things, but others are still lacking. The pace has not been good and the selection of beneficiaries has been questionable. For the sake of the youth and peace we need to do better fast.
- The policy should include a clear indication of beneficiaries and better protection of informal rights, such as those of farmworkers, women and those people residing in traditional communities.
- The policy should accommodate multiple distribution pathways.
- The policy should contain some incentives for those who voluntarily participate in land reform.
- We should broaden the land use perspective beyond agrarian reform. When we think of rural land, we should not only consider farming. Land may be useless for farming, but may be appropriate for factories.
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- Legal awareness needs to be addressed, including making use of vernacular radio programs and helplines, and summarising landmark cases.
- A process that will ensure constitutional clarity, thereby addressing the question of whether the Constitution supports land reform in multiple ways or not, should be facilitated.
- The conversation around land reform should be broadened to encourage voluntary participation.
- Social justice should be part of a land reform policy – as long as there is injustice somewhere, there cannot be sustainable peace.
- Failure is not an option.

**1st Plenary Meeting
11 April 2019**

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