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**SUBMISSION TO THE UNIVERSAL PERIODIC REVIEW | SOUTH AFRICA IN THE
4th UPR CYCLE
LEGAL RESOURCES CENTRE
2022**

Introduction

The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic established in 1979 to work for the development of a fully democratic South African society based on the principle of substantive equality. The LRC provides free legal services for the poor and landless people and communities of South Africa.

This submission is presented for consideration during the Universal Periodic Review (UPR) 4th cycle of stakeholder reports relevant to South Africa and focuses on the themes of good governance; constitutional and legislative framework; human rights and poverty; human rights and drinking water and sanitation; the right to adequate housing; business and human rights; the advancement of women’s rights; and indigenous peoples.

Theme A47: Good Governance

The LRC is concerned by poor governance of land reform institutions and how corruption has undermined the implementation of land reform. The Commission on the Restitution of Land Rights (“Commission”) tasked with the management of land claims is under-resourced, corrupt, and poorly administered and has lost most of its independent status with its functions increasingly conflated with the Department. This escalates implications for political interference in the Commission’s work. The 11 000 claims in terms of the Land Reform (Labour Tenants) Act 3 of 1996 remain unsettled by the Department of Agriculture, Rural Development and Land Reform (“Department”). In 2019 the LRC secured a Constitutional Court order for the appointment of a “special

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master” to manage the governance and administration of these claims.ⁱ

South Africa, post Constitution, has not yet transformed the colonial and apartheid exclusionary tenure system because it is unable to recognise and record the multitude of tenure regimes that emerged in South Africa over the last century. Today, the majority of South Africans, with ‘informal’ or ‘off-register’ rights, have little protection from interference by the state, developers, traditional leaders, or land invaders. A considered approach to tenure reform to enable the recordal of all tenure rights in an appropriate manner is supported.

The South African Constitution enjoins the State to facilitate equitable access to land and resources. The legislature has not developed legislation clarifying equitable redistribution and how this may be achieved. The legislative gap has enabled corruption, bad decision-making and little accountability demonstrated by the failed Vrede Dairy Farm project in the Free State where the Department appointed Estina (Pty) Ltd to establish and manage the Vrede Dairy Project intended to empower black farmers but was marred by corruption and maladministration and delivered nothing to the farmers. The LRC successfully reviewed and set aside the Public Protector’s Report that had allowed high ranking state functionaries to escape liability.ⁱⁱ Corruption in land reform retards implementation of projects for landless and marginalised groups.

South Africa has not found effective mechanisms to oversee and support land holding structures that hold restituted and communal land. There are over 10 000 such structures in South Africa. Traditional councils who are legally not empowered to hold and administer land, routinely assert that power to the detriment of members. Communities successfully restituted enjoy little benefit as their rights and access to communal resources remain precarious. While relatively good legislation exists to further the good governance of these institutions, the implementation falls short.

The LRC recommends:

- a) That all anti-corruption units and institutions in South Africa be strengthened.
- b) That the state implements its National Anti-Corruption Strategy 2020-2030.
- c) That the Commission and the Department review human resources policies to align with obligations for the settlement, governance, and management of land reform.
- d) That the independence of the Commission be reasserted.

- e) That a Redistribution Framework Act be passed for accountable, reasonable, pro-poor redistribution.
- f) That the state embarks on a tenure reform process as required by the Constitution.
- g) That dysfunctional land holding structures be unbundled and reconstituted.

Theme A41: Constitutional and Legislative Framework

Black women's rights to occupy, use, own and control land is not realised in a democracy committed to substantive gender equality. Section 25 of South Africa's Constitution for equitable redistribution of land is not supported by the current land redistribution statistics when disaggregated by gender. In the absence of legal barriers to women's property rights, the state's failure to address the cultural and customary law practices entrenched against women's property rights is real.ⁱⁱⁱ

The LRC recommends that the state's equality commitment must demonstrate commensurate protection since enforcement of women's land rights is not achievable by the drafting of laws and formal equality.

The state's tracking, and monitoring system be designed for information on the number of female beneficiaries and the impact of land reform on women.

The state guard against formal equality legislation, where gender roles are determined by ideological and ethno-religious factors that determine the distribution of resources between men and women.

Theme E23: Right to Adequate Housing

Statistics of South Africa's Household Survey 2017 record 1.3 million households without access to piped water and that 297 847 households use bucket toilets, and 748 597 households have no toilets at all. In 2018 the human settlements minister reported the housing backlog had increased to 2.1 million units, with an expected increase of 178 000 units a year due to population growth.^{iv}

The COVID-19 pandemic heightened the need for adequate housing, access to clean water and proper sanitation. A nationwide survey of 80 000 tenants in South Africa, highlighted lack of tenure security of poor and working-class households due to ^v 78.8% of tenants' income being negatively affected by COVID-19 and the ability to pay rent. 37% could afford to pay their rent in full and 22% couldn't pay their rent at all. Many of the evicted families include social housing tenants^{vi}, that no longer qualify for further housing subsidies (Steenvilla evictions).^{vii}

The LRC's advocacy and litigation in support of alternate forms of tenure includes the sale of council rental homes to indigent and low-income households, without proper consultations informing applicants of costs of ownership. The transfer of sectional title homes, where tenants take ownership, is not informed by the financial implications of sectional title ownership such as the maintenance and repair of their own homes and for the collective responsibility for the repair, upgrading, maintenance and upkeep of all common areas of the sectional title scheme, including the insurance, services, and rates for the common areas.

The state's intention to transfer council rental stock at a minimum cost may have been to accelerate ownership but the reality is that the ownership costs of sectional title schemes are unaffordable with the consequence of homelessness and a real threat to security of tenure^{viii}. The LRC supports affordability tests before ownership is passed. Where households do not 'pass' the affordability test, the LRC recommends that they remain within subsidized rental programmes, for protection against execution and eviction.

In 2020, the Minister of Human Settlements declared 136 areas as Priority Human Settlements and Housing Development Areas (PHDAs) in accordance with section 7(3)^{ix} of the Housing Development Agency Act 23 of 2008. Significant public funding is required for subsidies and upgrade informal settlements to overcome apartheid spatial patterns by fostering integrated urban forms.

On 7 December 2020, civil society organisations (including the LRC) submitted a [joint proposal](#) urging the release of three well-located parcels of under-used military land in Cape Town for the development of low-income housing. The Department of Public Works and Infrastructure, the custodian of the identified sites, received the submissions but has not provided any progress for releasing any of the well-located parcels of under-used military land.

The submission was a call for a shift from the “cheap land, poor location” default response to releasing well-located land for affordable housing and advancing spatial justice.

Theme: E25 Human rights & poverty

The LRC represents subsistence fisherfolk facing racial, cultural, and economic exclusion due to the Regulations to the Marine Living Resources Act 18 of 1998 that force subsistence fishers to use recreational fishing licenses as their only option to legally fish. One of the Covid-19 restrictions prohibited recreational fishing leaving subsistence fisherfolk unable to feed households as they are deemed to fish for enjoyment per the recreational license.

The LRC submits the fishing regulatory framework does not align with the contribution of small-scale fishers to poverty alleviation by using marine living resources for food security. The implementation also fails small scale fishers, whom the regulations were purportedly designed to protect.^x Whilst the Policy anticipated the creation of a framework that accommodates the rights and interests of subsistence fishers, the regulations create a disconnect.^{xi}

We recommend the state implement its commitment to “the need to recognise approaches to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty” by addressing the failure to support the food security of subsistence fishers by amending its regulatory framework.

Theme E26: Human Rights & Drinking Water and Sanitation

The water-related Sustainable Development Goals extend commitment beyond access to basic water services. Climate change will affect resilience of water systems with demands beyond delivery and management of basic water services. In South Africa greater water re-use and better management of treatment plants for river health and safe drinking water are frustrated by water treatment plants discharging insufficiently treated effluent into rivers and suburbs, whilst contamination of groundwater and surface water from acid mine drainage is extensive. Improved water management, with greater surveillance of water quality by competent technicians and the delivery of water

services is urgent. High levels of contaminants in rivers, streams and communities pose a direct health risk to our population with wide-ranging effects on child development and adult health.

We recommend the state make reporting of water quality management and conservation strategies more readily, timeously, and publicly accessible for ordinary citizen review, including through public meetings, particularly at local level.

LRC supports the recommendation for South Africa to accept the request for a visit by the Special Rapporteur on the human right to safe drinking water and sanitation.

Theme: B6 Business & Human Rights

Despite confirmation by South African courts that communities with informal and customary tenure have the right to consent to development on their land, this principle is routinely flouted. The LRC has represented clients in cases where collusion between business, traditional leaders and government officials circumvent consent requirements at the expense of local communities and the environment.

The Mineral and Petroleum Resources and Development Act provides that mineral and petroleum resources are the common heritage of all the people of South Africa.^{xii} In 2018, the LRC co-representing the Xolobeni community succeeded with a High Court order to confirm their right to free, prior and informed consent to any development on their land in terms of their customary law and the legislation protecting informal rights to land, and that the mining legislation not override their consent rights. However, affected communities remain ignored when development is proposed on their land.

Upon mining rights being granted, the MPRDA requires a social and labour plan developed in consultation with communities to ensure mining rights holders contribute toward the socio-economic development of the mining affected areas.^{xiii} LRC client communities in northern KwaZulu-Natal have reported no consultation on the formulation of the social and labour plan and no implementation of the plan. The funds earmarked for community development are diverted to traditional leaders or select community members that rally against community complaints against mining activities. Despite harrowing environmental impacts there is no transparency or accountability by the mining companies or evidence of enforcement by the Department of Mineral Resources.

The Mining Charter requires mining companies to have at least 26% black ownership. The Baloyi Commission of Enquiry in the North-West following allegations of misconduct against the chief of the Bakgatla BaKgafela tribe revealed that through a strategic Black Economic Empowerment partnership between the tribe and Anglo American, the income of the tribe ought to have been R5 billion between 2006 and 2015. But by December 2016, all the money had disappeared. The chief evaded legal accountability by placing himself and his family members in key positions with sole control over decisions relating to community finances with mining companies complicit in these egregious community losses.

We recommend that South Africa take steps to review the legal framework that enable human rights abuses by businesses.

We support urgent implementation of the requirement of free, prior, and informed consent for communities with informal and customary rights as confirmed in both the *Baleni* and *Maledu* judgments.

Meaningful consultation with communities in developing social and labour plans under the MPRDA and financial consequences for mining companies which fail to fulfil their obligations in social and labour plans.

A review of the legislation regulating finances accruing to communities in business transactions, to ensure that the funds are implemented for the benefit of the community.

That the Minister of Mineral Resources and Energy conduct meaningful consultation with affected communities in terms of the MPRDA and NEMA before approving environmental authorisations for prospecting and exploration for mineral resources.

Theme F12: Discrimination against women and Theme F11: Advancement of women

Women in South Africa are forced to litigate the realization of the right to equitable property rights in marriage. This is demonstrated by a trilogy^{xiv} of decisions relevant to elderly African women in South Africa married according to customary and civil

marriage.^{xv}

We recommend the state take urgent measures to audit and repeal laws that discriminate against women in matters such as marriage and family relations, and amend laws for substantive equality for women in all relationships, including marriage. We support the call for the state to implement the Constitutional Court order in *Agnes Sithole & Others v Gideon Sithole and Others*. We call on the state to support the South African Law Reform Commission Issue Paper 41 on Project 100E to review aspects of matrimonial property law to promote women's empowerment and gender equality.

Theme G3: Indigenous Peoples

The Traditional and Khoi-San Leadership Act 3 of 2019 came into effect in 2021. Whilst the Act provides for the long-overdue legal recognition of the Khoi San people, it also poses a threat to rural democracy and indigenous people by permitting traditional leaders to enter into agreements with third parties without the consent of those directly affected. This threatens the land rights of communities who could be dispossessed of their customary and informal rights to land by mining companies and other developers. The consultation requirements are inadequate and undermine the legal protections provided by the Interim Protection of Informal Land Rights Act.

In KwaZulu-Natal, 23% of the land is governed by the Ingonyama Trust Board (ITB) that was established by the Ingonyama Trust Act. Around 5.2 million people live on this land. In November 2017, the ITB announced that it would convert the permission to occupy certificates of the residents, as well as their informal rights in the land, to long-term leases. This effectively watered down their existing land rights and made their tenure less secure. In 2021, the LRC successfully brought an application to set aside the actions of the ITB and ordered them to repay residents the rental amounts they had collected under the leasing scheme.^{xvi}

The LRC is working with the Nibela Community indigenous traditional fishers and small-scale agriculture and livestock owners in northern KwaZulu-Natal whose traditional fishing grounds form part of the iSimangaliso Wetland Park, which is a UNESCO World Heritage Site, managed by government conservation authorities. The Nibela community have repeatedly been prevented from fishing in the Lake, despite

recognition of their customary rights to fish under South African law, and permission to fish under small-scale fishing permits. The conservation authorities have harassed the community and, in some cases, used violence to deter them from fishing in the Lake. One fisherman was shot and killed by rangers. Strictly managed and militarized conservation practices generate human rights abuses and are detrimental to indigenous livelihoods and food security.

We recommend that:

- a) The Ingonyama Trust Act be repealed in support of the tenure of communities and residents and the land be managed for the benefit of the people, rather than the ITB.
- b) The Traditional and Khoi-San Leadership Act be repealed, and new legislation be developed for the accountability and transparency of traditional leadership structures that protects the rights of community members.
- c) Officials be cognisant of the impact of conservation initiatives on the rights of indigenous people and their right to food security.

Conclusion

South Africa's key human rights priorities over the next four years should include a concerted effort to ensure the achievement of human rights and that these obligations align with economic and fiscal policies. We further recommend implementation of the recommendations from prior reviews.

ⁱ *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) (20 August 2019).

ⁱⁱ *Democratic Alliance v Public Protector; Council for the Advancement of the South African Constitution v Public Protector* 2019 (7) BCLR 882 (GP) (20 May 2019).

ⁱⁱⁱ <https://iafrica.com/the-tension-between-womens-individual-rights-to-tenure-in-communal-land-structures/>

^{iv} <https://africacheck.org/fact-checks/factsheets/local-election-factsheet-housing-south-africa> , accessed 13.02.2022.

^v "How COVID-19 has affected South African tenants", Flow Findings Research Report (May 2020), available: <https://flow.rent/tenants>

^{vi} Section 1 of the Social Housing Act 16 of 2008 defines social housing as: "a rental or co-operative housing option for low to medium income households at a level of scale and built form which requires institutionalized arrangement, and which is provided by social housing institutions or delivery agents in approved projects in designated restructuring zones with the benefit of public funding contemplated in this Act.

vii <https://www.iol.co.za/capeargus/news/more-than-100-steen-villa-families-facing-evictions-again-b28451e8-1b00-4f2e-b7d8-eb6ea1b95a2c>, accessed on 10 March 2022.

viii Flamingo Court; <https://lrc.org.za/hpcs-int-2-2/>

ix section 7(3) In performing its functions the Agency may,

“(a) declare priority housing development areas for residential and community purposes in accordance with integrated development plans and provincial spatial development frameworks;

(b) develop and submit a development plan for such priority housing development areas as contemplated in subsection 1(a); and

(c) implement such measures as may be prescribed to fast-track housing development in the declared priority housing development areas.”

x The Small-Scale Fishing Policy was developed following a challenge to the Marine Living Resources Act brought by the LRC on behalf of small scale fishing communities to the Equality Court in 2007.

xi <https://iafrica.com/the-systematic-exclusion-of-kzn-subsistence-fishers-an-ill-suited-regulatory-framework-that-poses-a-threat-to-their-food-security/>

xii Section 3(1) Mineral and Petroleum Resources Development Act 28 of 2002.

xiii Regulation under Mineral and Petroleum Resources and Development Act, No. R527 23 April 2004, section 41.

xiv <https://iafrica.com/legal-trilogy-how-three-women-changed-the-face-of-matrimonial-property-rights-for-black-women-in-south-africa/>

xv [https://mg.co.za/opinion/2021-09-19-constitutional-triumph-on-matrimonial-property-rights/#:~:text=The%20legal%20trilogy%20was%20completed,22\(6\)%20of%20the%20BAA](https://mg.co.za/opinion/2021-09-19-constitutional-triumph-on-matrimonial-property-rights/#:~:text=The%20legal%20trilogy%20was%20completed,22(6)%20of%20the%20BAA)

xvi *Council for the Advancement of the South African Constitution and Others v The Ingonyama Trust and Others* 2022 (1) SA 251 (KZP) (11 June 2021).