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No Place to Park the Clinic: Accountability, Expropriation, and the Social Function of Property in Pursuit of Health Equity in South Africa

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Abstract

As South Africa moves toward implementing the National Health Insurance scheme, the promise of universal health coverage remains constrained by material and legal obstacles to land access. Mobile clinics, vital for underserved communities, are undermined by tenure insecurity, fragmented land governance, and exclusionary property regimes. These obstacles expose an accountability gap: the state's failure to use available constitutional tools to dismantle entrenched spatial inequalities. This paper conceptualizes accountability through three interlinked features—monitoring, review against human rights standards, and remedial action—and uses this framework to examine the case of South Africa. We argue that equitable health care delivery requires transforming the property relations that structure spatial access. At the heart of this claim is the recognition that property is a social institution whose legitimacy depends on serving broad societal goals. Reframed in this way and coupled with expropriation as a constitutionally sanctioned remedial tool, land acquisition for health care infrastructure becomes a decisive test of accountability. Doing so repositions expropriation not as an exception but as a necessary instrument of social repair and redistributive justice, particularly where historical dispossession and spatial apartheid have left deep scars in access to health care.

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Introduction

The South African Constitution guarantees everyone the right to access health care services.[1] Yet millions residing in rural areas, peri-urban townships, and informal settlements face a starkly different reality.[2] This absence of health care stems not merely from underfunding or weak political will but from apartheid's enduring spatial legacies and a fragmented land governance system.[3]

The National Health Insurance Act, aimed at achieving universal health coverage, seeks to redress these inequalities but faces a sore point in mainstream policy discourse: Where will the clinics be built? Much of the well-located land is privately held, underutilized, or locked in speculation, thus obstructing state delivery and frustrating constitutional promises. This paper approaches the problem through the lens of accountability, a cardinal principle of human rights. Accountability refers to the "processes, norms, and structures … that demand power holders account for their decisions and actions and remedy failures in delivering their duties."[4] From this definition, three interlocking features emerge: monitoring, review against human rights standards, and remedial action. Applied to South Africa's health care infrastructure, this underscores two priorities: reviewing the property regime against other human rights, given that it entrenches exclusion and disregards the social function of land, and taking remedial action through expropriation to unlock well-located land for clinics. Within this framework, the Expropriation Act 13 of 2024 provides a crucial feature of accountability (remedial action), thereby enabling the state to fulfill its constitutional obligations under section 27 to provide health care services to everyone.

Since 1994, South Africa's broader land reform debates touched on a wide range of ideas—from full state custodianship of land to defending secure private property rights to accelerating redistribution through existing mechanisms—united by a shared goal of dismantling entrenched exclusion.[5] This paper addresses the specific issue of expropriation for health care infrastructure as a constitutionally grounded feature of accountability. We focus on the narrower category of "public purpose" land acquisition aimed at serving immediate government needs rather than the wider redistributive debates on "public interest" expropriations aimed at historical justice.[6]

This paper comprises three parts: (1) a presentation of our conceptual framework, which draws on South Africa's constitutional commitment to ensure access to health care, the spatial legacies that obstruct its realization, and the principle of accountability in human rights law as applied to health care infrastructure delivery; (2) an analysis of how property regimes and entrenched private interests impede equitable health care planning in South Africa; and (3) an evaluation of the Expropriation Act 13 of 2024 as a tool to fulfill the government's constitutional obligations under section 27. We conclude by positing that expropriation for health care infrastructure constitutes a necessary remedial measure to advance both health equity and constitutional transformation.

From constitutional right to concrete access

The right of access to health care services arguably lies at the center of human rights, and such access cannot be realized in the abstract. As Benjamin Meier observes, "health is essential for human rights flourishing and the exercise of all other rights."[7] General Comment 14 gives concrete content to this principle by defining meaningful access in terms of availability, accessibility, acceptability, and affordability.[8] Read in this light, the constitutional commitment under section 27 places a duty on the state to take reasonable measures, within its available resources, to progressively realize this right. Rights must be given effect in ways that transform lived realities, not remain abstract promises.[9] Etienne Mureinik has described South Africa's transition as a move from a "culture of authority" to a "culture of justification," where every exercise of public power must be defended with reasons rooted in constitutional principle.[10] This culture of justification demands that health rights be delivered not only in form but in substance.

Meeting this constitutional duty requires mechanisms of accountability capable of addressing and remedying the persistent barriers to access. Accountability in this context is not reducible to administrative efficiency; it requires the state to fulfill both its constitutional and international obligations in ways that dismantle structural and systemic obstacles to equity. Solomon Benatar and others show that health inequities in South Africa are structurally determined and demand systemic interventions to dismantle their deep roots.[11] Historical patterns of exclusion shaped by race, gender, disability, and geography continue to determine who has access to health care facilities and where they are located.[12] The success of South Africa's National Health Insurance (NHI), a health-financing reform aimed at ensuring equitable access to health care services, will depend not only on its vision of universal health coverage but on the state's ability to deliver infrastructure where it is most needed. Although the NHI's policy framework positions health care as a public good and a social entitlement, persistent spatial inequality exposes the limits of policy commitments.[13] Policy documents underpinning the NHI recognize that unless systemic barriers are resolved, universal health care coverage will remain illusory.[14] Accordingly, Paul Hunt emphasizes that accountability is a cardinal principle of the right to health care, requiring not just monitoring but effective remedies when obligations are not met.[15] His insight resonates directly where government commitments to equity lack the institutional follow-through.

The normative dimension of accountability can be sharpened by key theoretical insights. Derrick Brinkerhoff distinguishes between answerability—the obligation of state actors to justify how they fulfill health-related duties—and enforceability—the mechanisms through which failures to meet those duties can be corrected or sanctioned.[16] Sandra Liebenberg similarly argues that enforcing socioeconomic rights requires the promotion of substantive equality and the indivisibility of rights by dismantling patterns of disadvantage that cut across health, equality, and property rights.[17] Karl Klare's conception of transformative constitutionalism strengthens this line of argument, insisting that South African law, including property law, must be continually reoriented toward egalitarian outcomes.[18] Together, these scholars underscore that accountability should drive structural change, and not merely oversee government efficiency.

Institutional and operational features further refine this picture. Claudia Baez-Camargo distinguishes between a "long route" of accountability centered on mandates, resource allocation, oversight, and sanctions at the institutional level and a "short route" that centers on citizen engagement and frontline responsiveness.[19] In the South African context, expropriation represents the long-route mechanism, equipping institutions with the authority to secure land to park clinics, while the short-route option remains essential for communities to monitor delivery and demand remedial action when implementation falters. Lara Stemple, however, cautions that accountability often collapses into fragility when legal obligations carry no meaningful consequences for noncompliance.[20] This fragility is evident in South Africa, where the government repeatedly restates commitments to equity but fails to activate the institutional tools available at its disposal. Weaknesses in the long route such as the non-use of constitutional mechanisms like expropriation undermine the state's capacity to act decisively. What emerges is a layered picture of accountability in health operating simultaneously through legal enforcement, political oversight, administrative monitoring, and remedial action. Danwood Chirwa offers a way forward by suggesting that the right of access to health care services can be enforced both in its own terms and through other related constitutional rights such as the right to property.[21] This dual pathway underscores that by neglecting expropriation, the state effectively abdicates its accountability duty, allowing inequities in access to health care to persist.

In this light, expropriation emerges as a decisive test of accountability. It reveals whether the state is willing to deploy its full constitutional authority to dismantle structural barriers to health care. In this regard, property law serves as a structural determinant of health care, influencing

who receives care and where facilities are located. To treat property as an individualistic entitlement ignores its social function and capacity in advancing the public good. Expropriation, in this sense, is not a departure from constitutionalism but an affirmation of it, realigning property relations with the substantive obligations that flow from the right to health care. Within this context, expropriation without compensation is a constitutionally sanctioned remedial tool to promote fairer land distribution and health infrastructure, making the right to health care meaningful.

Property law as a barrier and as a solution

Theoretical foundations: Property as a social function

In applying a property theory lens, we must understand property as a social function as opposed to an absolute entitlement.[22] Property rights are legal constructs that must operate within a constitutional order committed to equality, human dignity, and social justice.[23] In South Africa, where historical land patterns continue to shape present inequalities, we argue that property must serve not only the private interests of its holder but also the legitimate needs of the broader public.[24] In this context, the expropriation of abandoned, neglected, or underutilized properties, or those held solely for long-term speculative gain, becomes legally justifiable and normatively imperative.[25] Universal health care cannot be spatially realized if valuable land remains locked in private hands while urgent public needs go unmet. Property law must recognize the social obligations attached to ownership and permit the state to intervene where private holding undermines urgent public objectives.[26]

The principle that ownership carries obligations to the broader community is long-standing, although its articulation and practical implications have varied across jurisdictions and historical moments.[27] We draw on the contributions of Timothy Mulvaney, Joseph Singer, and Amanda Byer, which sharpen the social function theory of property in ways directly relevant to South Africa.[28] Each underscores the public responsibilities of ownership amid inequality, transformation, and urgent social need.[29] Jane Baron reinforces this by showing that property rights are embedded in social and political commitments, underscoring their democratic and redistributive role.[30] Together, these perspectives provide a dynamic framework for understanding property's social function in South Africa's constitutional order.

Mulvaney views property as a relational and socially rooted institution, rejecting the classical liberal view of property as an unalienable domain of personal autonomy.[31] Accordingly, property rights depend on changing moral, environmental, and democratic imperatives rather than being fixed or absolute.[32] He argues that legitimate expectations in property must adapt to reflect the broader public interest, thus supporting state interventions where private property impedes access to essential services.[33] Singer frames property as a mechanism of governance, arguing that ownership must be evaluated through democratic principles such as equality, inclusion, and human dignity since it dictates access to essential resources such as housing and health care.[34] In doing so, Singer highlights the need for property law to set affirmative obligations in order to promote social justice rather than limit itself to safeguarding negative liberties.[35] In his co-authored work with Mulvaney, they argue that redistributive state interventions, including expropriation, are sometimes necessary to prevent property law from functioning as a barrier to social justice.[36]

Byer offers a cautionary perspective.[37] Drawing on legal geography, she reminds us that land was once viewed as relational space tied to kinship and ecology before being reduced to an abstract good.[38] The transition to abstract, market-oriented ownership has obscured these relational features and dislocated property from community and purpose.[39] Byer warns that vague doctrinal formulations risk becoming instruments of political discretion if not grounded in clear legal standards and procedural safeguards.[40]

Together, these theorists affirm that property carries social obligations, that state intervention may be necessary to realize rights, and that safe-

guards are critical to ensure legitimacy. In doing so, they establish a principled foundation for expropriation as a constitutional remedy to secure land for health infrastructure.

Convergences and tensions: Critical analysis

While each of these theorists approaches the social function of property differently, their insights converge around a common theme: ownership cannot be treated as absolute when it entrenches inequality or obstructs urgent public needs.[41] Mulvaney offers the most normatively expansive contribution by reimagining property as a responsive and evolving institution, grounded in shifting societal values rather than fixed entitlements.[42] He rejects the classical liberal framing of property as a zone of personal autonomy insulated from public claims and insists that property expectations must adapt to broader moral, democratic, and environmental imperatives.[43] This approach is compelling in contexts such as South Africa, where deeply entrenched ownership patterns obstruct equitable development.[44] Yet Mulvaney's reliance on judicial reasoning as the primary mechanism for effecting reform assumes a judiciary both willing and able to engage with evolving social norms, an expectation that may be unrealistic in legal cultures where the judiciary remains cautious, formalist, or institutionally constrained.[45] In South Africa, the legacy of apartheid-era formalism still exerts a powerful influence on legal reasoning and risks rendering Mulvaney's model normatively rich but practically inert.[46] Moreover, by offering little guidance on the role of legislatures or administrative bodies in reforming a property regime, his framework lacks a clear division of labor between institutions, an omission that weakens its applicability in transitional contexts requiring coordinated, multilevel interventions.[47]

Singer complements Mulvaney's approach by offering a more pragmatic and institutionally grounded vision of property reform.[48] Singer also rejects the idea of property as a purely private right and instead frames it as a form of governance with distributive consequences.[49] His work insists that legal entitlements be measured not merely by their formal validity but by their substantive effects on access to opportunity and the social conditions for flourishing.[50] Importantly, Singer shifts the emphasis from judicial interpretation to legislative responsibility.[51] He advocates for democratic processes that embed redistributive principles into the design of property systems.[52] In doing so, he charts a more politically legitimate path to reform, one that places obligations squarely on the shoulders of lawmakers rather than leaving reform to the incrementalism of courts.[53] While Singer advances a powerful normative vision of property rooted in justice and democracy, his work often stops short of proposing concrete institutional frameworks. This is particularly important in contexts such as South Africa, where fiscal constraints, administrative fragility, and political volatility complicate redistributive reform.[54]

Byer offers a critical intervention by shifting the conversation from abstract theory to grounded institutional realities.[55] She exposes how modern legal systems have displaced community-based, relational forms of land tenure with abstract, commodified ownership regimes.[56] This transformation, she argues, has eroded the social and ecological embeddedness of property, leaving it exposed to bureaucratic overreach and deepening public mistrust.[57] Byer warns that vague invocations of the social function of property without precise legal standards and procedural safeguards risk becoming instruments of political opportunism or legal incoherence.[58] In South Africa, where land reform efforts have often faltered due to administrative fragmentation, legal ambiguity, and elite capture, her caution is highly relevant.[59] Yet Byer's emphasis on institutional clarity and procedural safeguards, while crucial, risks underestimating the urgency of reform in societies where property continues to reproduce deep structural inequality.[60]

Together, the authors highlight the promise and the limits of the social function approach. Mulvaney underscores the need for property law to evolve with shifting moral and democratic imperatives, Singer grounds this duty in democratic governance and affirmative state obligations, while Byer cautions against vague formulations that risk

abuse without procedural safeguards. In South Africa, their insights affirm that property law cannot afford to be merely a system of private entitlements. It must operate as a vehicle for redistribution, spatial justice, and social inclusion.[61]

Why expropriation without compensation is on the table

South Africa's democratic government committed to redressing the injustices of apartheid through a constitutionally grounded land reform program built on three pillars: restitution, redistribution, and tenure security.[62] The 2017 Land Audit highlights this imbalance, revealing that approximately 76% of land is privately owned, with over 30% concentrated in the hands of corporate entities and trusts, much of it underutilized or held for speculative purposes.[63] While debates on racial patterns in land ownership, financial mismanagement, and administrative dysfunction persist, our focus here is on the structural divide between state and private landholding and how it obstructs access to well-located sites for public infrastructure development.[64] The spatial reality is that much of South Africa's privately owned land lies in strategically important areas where infrastructure demand is highest and health care most limited.[65] To meet its constitutional obligations, the state must engage with or intervene in these holdings.[66] By contrast, most state-owned land lies in protected areas or former homelands, far from service demand. This misalignment creates a paradox: the land most accessible to the state is spatially irrelevant, while the land that is most needed remains locked in private hands.[67] This paradox is reinforced by inflated, market-driven compensation demands that entrench inequality by privileging profit over public welfare.[68]

As one of the most unequal societies in the world, South Africa's developmental trajectory is still shaped by the enduring legacies of apartheid and colonial exclusion.[69] Entire communities were forcibly removed from well-located urban areas to peripheral areas, depriving them of infrastructure and opportunity.[70] The black majority was systematically disempowered, denied quality education and health care, and subjected to a coercive migrant labor system that fractured families and entrenched economic vulnerability.[71] Housing and health policies actively reinforced this marginalization. The Public Health Act 36 of 1919 enabled the removal of black residents from urban centers under the guise of disease control, embedding segregation into the fabric of public health.[72] This logic was further entrenched through the Housing Act 35 of 1920, which facilitated racially segregated housing on urban peripheries.[73] Together, these measures produced a dual urban system whose legacy continues to shape exclusion today, underscoring that any strategy for health infrastructure must confront both material shortages and the institutional patterns inherited from this history.[74]

The principle that the state may expropriate land for public purpose within a clearly defined constitutional framework is neither novel nor exceptional. As early as the 17th century, jurists such as Hugo Grotius and Samuel von Pufendorf affirmed that private property rights are not absolute and can be constrained when necessary to advance public good.[75] Modern democracies have operationalized this idea; in the United States, for example, the doctrine of eminent domain is treated as essential to sovereignty and enables land acquisition for public use.[76]

In South Africa, however, the legitimacy of expropriation cannot be grounded solely in comparative traditions. Its normative foundation is also rooted in Indigenous jurisprudence, where precolonial land systems conceived of property not as individual entitlement but as communal stewardship.[77] Land was treated as a shared resource, governed by collective obligations to the community—a perspective reflected in Ubuntu, which emphasizes interdependence, human dignity, and equality.[78] From this perspective, repurposing land for the public good is not something novel; it is intrinsic to African legal and moral values.[79] Read alongside the global doctrine of eminent domain, these traditions provide a coherent basis for expropriation for public purpose in South Africa. For accountability to be meaningful in post-apartheid South Africa, it must fundamentally reconsider

prevailing property norms.[80] This demands shifting from private individualistic ownership paradigms to a conception of property grounded in social function and public responsibility.[81] Properly exercised within constitutional safeguards, property's social function affirms rather than undermines democratic principle, recognizing that property rights, while protected, are not absolute and may yield to equity and the collective good.[82]

Expropriation Act 2024 versus 1975: Between symbolism and substance

The Expropriation Act 63 of 1975 (hereinafter referred to as the 1975 Act) reflected an apartheid-era order in which administrative discretion was both formally broad and substantively unchecked. The 1975 Act granted the state unrestrained authority to expropriate land for "public purpose," a term undefined and interpreted loosely, with judicial review limited to minimal rationality tests.[83] Compensation was tethered almost exclusively to market value, with limited scope to consider whether the amount was just or fair in light of broader equity considerations. Although property rights were formally preserved, in practice they were hollowed out by race-based statutory exclusions.[84]

By contrast, the Expropriation Act 13 of 2024 (hereinafter referred to as the 2024 Act) repeals the 1975 Act and repositions expropriation within the post-1996 constitutional framework.[85] It authorizes expropriation only for a public purpose or in the public interest and requires compensation to be just and equitable, balancing private interests with the broader public good.[86] These principles are operationalized through detailed procedures and a compensatory scheme that deliberately moves beyond the narrow market-value standard of its predecessor, enabling a more context-sensitive and constitutionally defensible approach.[87] Despite its normative fidelity to the constitutional text and values, the 2024 Act has generated considerable public anxiety and political resistance.[88] Much of this concern stems less from the 2024 Act's actual provisions (or any other redistribution effort in the past) than from the symbolic weight of land reform in South Africa's historical and political imagination.[89] Among historically advantaged groups, the 2024 Act is often perceived as a retributive economic instrument targeting otherwise blameless property holders in the name of historical redress.[90] While such perceptions are not without political significance, a closer reading shows that the 2024 Act strengthens, rather than weakens, property rights by introducing robust procedural safeguards and clear limits on expropriation, including a narrowly framed nil compensation clause.

The 2024 Act limits nil compensation to defined circumstances, such as abandoned land, property held purely for speculation, and land improved through state investment, targeting specific situations where paying market value would entrench inequality and frustrate public obligations.[91] Before assessing the 2024 Act's constitutional defensibility, it is necessary to analyze the act's substantive and procedural framework and compare it with its 1975 predecessor. Such an analysis clarifies what the current legal framework permits, dispels misconceptions, and identifies the legal safeguards governing its application to ensure compliance with the constitutional principles of property, administrative justice, and the rule of law.

Section 23 of the 2024 Act affirms that where the expropriating authority and the property holder do not agree on the amount of compensation to be paid, either may approach a court for a determination of what is just and equitable.[92] Courts are not limited to assessing the numerical value of the compensation; they must also weigh proportionality, fairness, and public interest as required by section 25(3) of the Constitution.[93] However, the 2024 Act stops short of requiring judicial review of the legality of the expropriation itself unless such a challenge is independently launched. Moreover, section 23(4) of the 2024 Act clarifies that the lodging of such an application does not suspend the expropriation or its effective date, meaning that the state acquisition of property may proceed before compensation disputes are resolved.[94] While this sequencing ensures administrative continuity, it raises constitutional concerns about whether dispossession without compensation can be reconciled with the imperative that expropriation be just and equitable at the

time it occurs, as required by section 25(2)(b) of the Constitution.

The 2024 Act creates a dual-level system of constitutional review. First, the decision to expropriate must satisfy the administrative law standard of rationality, requiring only that it serve a lawful and non-arbitrary purpose.[95] Once that threshold is satisfied, the inquiry shifts to compensation, where section 25(3) of the Constitution demands that the compensation be just and equitable. This triggers a proportionality inquiry in which the court must assess whether the public interest invoked justifies the amount awarded and whether a fair balance has been struck between public purpose and private loss.[96] This proportionality-based test ensures that even when pursuing legitimate public goals, the state does not impose disproportionate burdens on individual rights.[97]

The effect is that while expropriation itself may satisfy the low threshold of rationality, the compensation awarded, particularly in cases of nil or below-market valuation, invites deeper judicial scrutiny of its substantive justifications. Proportionality enters the legal analysis indirectly, through the assessment of compensation rather than the legality of expropriation itself. At the same time, the 2024 Act collapses two distinct constitutional objectives—immediate infrastructure provision (public purpose) and longer-term land reform (public interest)—without drawing clear distinctions between them.[98] These two concepts, although both included in section 25 of the Constitution, differ significantly in their legal structure, policy rationale, and temporal implementation.[99] This conflation, while it satisfies constitutional requirements of procedural fairness and just and equitable compensation under section 25(2)–(3) of the Constitution, means that expropriation's capacity to deliver transformative outcomes is uncertain. Without clearer institutional architecture and policy guidance, expropriation risks being justified in overly broad terms, making it harder for courts and communities to hold the state accountable or to test whether actions genuinely advance urgent needs such as health care or the goals of redistribution.[100]

The 2024 Act also sees a fundamental departure from the institutional logic of its 1975 predecessor by centralizing all expropriation authority in the minister of public works and infrastructure.[101] By contrast, the 1975 Act permitted various public bodies, including universities and energy boards, to request that the minister of public works expropriate property on their behalf, provided that the request aligned with their statutory mandates.[102] This mechanism preserved the principle that expropriation decisions should be grounded in subject-matter expertise, allowing policy-competent departments to initiate action even if execution rested with a central authority. The 2024 Act contains no equivalent provision. It eliminates this conduit entirely, vesting expropriation power solely in the minister of public works. Land reform, for example, governed by section 25(5)–(8) of the Constitution, falls within the mandate of the minister of land reform and rural development.[103] Yet the 2024 Act empowers the minister of public works to expropriate land on grounds of "public interest," a formulation that includes land reform.[104] This creates a structural misalignment: authority is centralized in a minister lacking policy responsibility, while the department responsible for redistribution has no control over the expropriation itself.[105] The result is a breakdown in accountability, with no single actor responsible; this enables institutional evasion, weakens oversight, and frustrates both legal scrutiny and democratic accountability. Affected communities are left without a clear recourse.

Conclusion

Although land reform is a foundational element of South Africa's post-apartheid constitutional order, the country still lacks a comprehensive statute to give full effect to the right of equitable access to land. In this vacuum, the 2024 Act has inadvertently become the most visible instrument for both spatial development and redress. Yet the act blurs the distinction between expropriations for infrastructure (public purpose) and those aimed at redistribution (public interest), creating conceptual and institutional uncertainty.

In the context of the NHI, the need for spatially accessible health care infrastructure cannot be overstated. Urban and peri-urban lands held for speculation or private development are obstructing the state's ability to deliver equitable health care. South Africa's enduring accountability gap lies not in the absence of legal tools but in their underuse. When ownership obstructs health care equity and entrenches exclusion, the state must act not in defiance of rights, but in fulfillment of them.

Against this backdrop, this paper has argued that expropriation for NHI infrastructure is not merely an act of land redistribution—it is a crucial feature of accountability within the constitutional framework. Viewed through the accountability framework, the Expropriation Act embodies the remedial action feature by enabling the state to correct spatial inequities in access to health care. That is, it responds to the monitoring of spatial health care disparities, reviews property standards that privilege speculative land holding over need, and provides remedial action by securing land to park the clinics. Properly exercised, expropriation without compensation is not a circumvention of rights but a mechanism through which constitutional commitments to equality, human dignity, and health care are made tangible.

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