

1 **Submission on the review of section 25 of the Constitution.**

2 **To the Constitutional Review Committee, Parliament of South Africa.**

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5

6 **1. Introduction**

7 I welcome the decision to review this section of the constitution for the opportunity it affords us to
8 create a constitutional dispensation that is supportive of the far reaching transformation of
9 property rights still needed in South Africa. This is needed to ensure the ideals captured in the
10 preamble to our Constitution are real in people's lives. Notably we need to recognise with action
11 "the injustices of our past" and ensure that indeed "South Africa belongs to all who live in it". We
12 all know the Constitution of South Africa is the supreme law, thus impacting all laws and their
13 interpretation. The Constitution is also important for the message that it sends to all citizens about
14 what kind of society we are building and what values we hold as a nation.

15 I, therefore, humbly make this submission to the Constitutional Review Committee and hope that it
16 will be given due consideration.

17 There are many aspects to this debate, I focus on five important suggestions/issues:

- 18 1. The creation of a constitutionally defined and protected social function for all land in South
19 Africa. Ensuring land is used for its social function should become the leading principle and
20 purpose of our constitutional position on land access and rights.
- 21 2. Creating the legal space for the state and for landless people to take direct action to seize land,
22 without compensation under certain circumstances, and use that land for the fulfilment of its
23 social function.
- 24 3. Creating affirmative responsibilities in relation to defending and advancing the land rights of
25 particular vulnerable groups and women.
- 26 4. Ensuring strong rights to land that people, especially those in poverty, can defend from
27 arbitrary state action. Without such protection people will live without the level of tenure
28 security they need to improve their lives and we risk seeing the very transformation in land
29 rights that we wish to achieve undermined in the future.

30 5. The need for a wider transformation of the food and agricultural sector in order to create an
31 enabling environment for effective land use, in particular for new and smaller scale farmers to
32 succeed.

33 These points are elaborated below and I would be happy to add information or engage in
34 discussions on these propositions if there is interest in them. I provide this submission with line
35 numbers on the left to facilitate discussion on the various points made.

36 **2. Proposals**

37 **2.1. Social function of land**

38 The current opening clause of the section of the Constitution on Property is section 25(1) and it reads
39 “No one may be deprived of property except in terms of law of general application, and no law may
40 permit arbitrary deprivation of property.”¹ This sets the tone and meaning of the property clause and
41 that tone is the protection of existing property rights. We need to shift this.

42 Land and the related natural resources linked to it are an asset for our nation and should serve the
43 needs and aims of our nation and all its citizens of this and future generations. We should articulate
44 this and what it means with the concept of a social function of land, which I take from the Brazilian
45 Constitution (Annex 1 contains key land related clauses from the Brazilian Constitution). Such an
46 opening to the property clause would set a very different tone to the current one. Sub-sections would
47 spell out what this social function is.

48 Article 186 of Chapter 3 the Brazilian Constitution creates a concept of a ‘social function’ for rural
49 land that to be met requires land to be adequately used in a way that preserves the environment,
50 respects labour laws, and benefits the owner and laborers. Note that this only covers rural land. I
51 suggest that in South Africa we build on the example of the Brazilian constitution to cover all land
52 and other issues in relation to land that are of particular importance for us in the construction of our
53 own concept of the social function of land.

54 It would be a very valuable to discuss what the social function of land (all land; private, communal,
55 state, etc..) in South Africa should be. Certainly, issues of production and protection of the
56 environment would be there. The respecting of labour and perhaps tenure security laws would be

¹ Incidentally, this clause could have been written read something like: “Everyone can be deprived of property as long as it is done in terms of a law of general application, and such law should not permit arbitrary deprivation of property”. The legal meaning is the same, but the message people would pick up from the clause would be very different.

57 critical in South Africa given our history and continued reality of abuses of workers and residents on
58 farms. The history of land dispossession and related injustice need to be addressed. The cultural and
59 spiritual importance of land could be taken into consideration. A thorough and public debate on this
60 would be more valuable than me trying to cover all aspects that should be in our South African
61 definition of the social function of land.

62 With the social function of land defined, we then have clarity (not arbitrary or discriminatory) on how
63 land should and should not be used and we have a basis for taking land if needed. This would inform
64 enabling land related legislation to be put in place or amended.

65 **2.2. Expropriation of land**

66 The failure to use land for its social function would be one, not the only, reason to expropriate land.
67 Ensuring that land does fulfil its social function would at the same time be the main purpose for which
68 that land should be expropriated and utilised.

69 Further articles of the Brazilian Constitution give the government powers to expropriate land not
70 performing its 'social function' and indeed the state already has such powers in South Africa that
71 need to be applied more rigorously for land transformation. The other interesting aspect of the
72 Brazilian Constitution is that it gives ownership of land to landless people (people not owning any
73 other rural or urban property) who occupy and make productive use of rural land (as long as it is
74 not state land), up to a maximum size of 50 hectares, for a period of five years. These articles create
75 a legal space for direct action to occupy and use land and through that to trigger expropriation.
76 Such a legal opportunity for direct action is vital given that we cannot rely on the state to use the
77 powers they have to act in the interests of people, especially landless people and those in poverty.

78 This has been important to the land occupation strategies of movements such as the MST (Landless
79 Rural Workers Movement) that have settled hundreds of thousands of families on close to five
80 million hectares of previously unused or underused rural land in Brazil. Such provisions in the South
81 African Constitution could give a right to poor and landless people and those who were
82 dispossessed in the past to occupy and use land, thereby affirming that the land is a national
83 resource that is there for those who can work it. Provisions, such as those that the people involved
84 must be landless and the land involved should not be more than 50 hectares per person, will
85 reduce the risk of these provisions being abused by elites to grab large tracts of land. The

86 requirement to use the land for its social function in order to be able to obtain or keep it clearly
87 encourages production and other uses of land.

88 There are circumstances where it does not make sense to pay for land that is expropriated, but
89 likewise there are situations where it would be unreasonable to refuse any compensation. Law
90 makers need to keep in mind that there are a wide diversity of reasons to expropriate land that go
91 beyond the implementation of land reforms. Therefore, we need a formula to calculate when
92 compensation should not be paid and when it should be paid and, in such cases, how much is fair
93 compensation. The current section 25(3) of the Constitution provides a good set of criteria. To these
94 I would add whether the land is fulfilling its social function or not. I also suggest that the wording
95 explicitly allows for expropriating without compensation. For example, it could read something along
96 the lines of, “whether any compensation is to be paid or not, and if so how much, will be determined
97 taking into account...” With these changes, it is a fairly simply exercise to identify circumstances
98 where compensation should not be paid. I am trying to keep this submission reasonably short, so will
99 not provide hypothetical scenarios here, but I can if the Committee is interested.

100 It is important to note that these provisions in the Brazilian Constitution, that I suggest we take
101 lessons from, have not led to anarchy or stopped Brazil being a global agricultural power house.

102 **2.3. Explicitly favour the marginalised.**

103 A grave concern in many countries, including some allege in South Africa, has been the abuse of land
104 reforms to benefit elites. This undermines the potential of land reforms to bringing about greater
105 equity and to create the maximum level of opportunities, especially for many who need land the
106 most. The section above gave an example of the explicit favouring of landless people and the
107 limitation of the amount of land that can be acquired through occupation.

108 The Brazilian Constitution has further clauses that favour small-scale land owners over larger ones.
109 Clause XXVI prevents the attachment of “small rural property” for recovery of debts incurred for
110 productive purposes. This may be a useful clause in South Africa and it is an example of how we can
111 use the constitution to explicitly favour a scale of production and we can likewise favour particular
112 vulnerable groups to ensure more equitable outcomes and forms of agriculture.

113 Women generally face discrimination and have less secure rights to land than men, yet the current
114 property clause is gender blind. Of course, read with other sections of the Constitution there is a
115 clear requirement that laws and programmes of the state do not discriminate against women. But,

116 this does not set any clear obligation to overcome existing deeply rooted gender inequalities. It also
117 does not send a clear message in this regard to public servants or the citizens. There would be value
118 in having explicit commitments built into the property clause that do not leave room for ambiguity.
119 This would make it clear that legislation and programmes must address gender discrimination and
120 advance women's rights.

121 At a minimum we should create an explicit obligation on the state to put in place legislation and
122 programmes to advance women's land rights in order to achieve more gender equitable outcomes.
123 Further, it is possible to affirm the land rights of women who have insecure rights due to past and
124 current gender discrimination in our society. This is similar in tone to existing clauses such as 25(6).
125 This would steer legislators and the executive arm of government to put in place legislation and
126 programmes to fulfil this obligation. Amongst other things, we need to see more specific targeting
127 of women as beneficiaries and the gathering and making available of sex disaggregated data so that
128 we know the existing level of gender equality or inequality and can monitor progress.

129 Importantly, such explicit provisions in the constitution will send a message to women, to the
130 landless, to the previously marginalised, that they have rights to land and they can and should
131 demand and exercise those rights.

132 **2.4. Leave people with strong rights to land**

133 It would defeat the purpose of transforming land rights and access in South Africa if black South
134 African's gained land, but with no security on that land. It would also leave a situation where any
135 gains made could be easily unravelled. We have to keep a long-term view in mind when amending
136 the Constitution. It may not be easy to amend it again and the impact could go on for generations.
137 We may or may not like the current government. We may believe they will be in power after next
138 year, but we have little idea who will be ruling the country in ten or 20 years-time. We therefore
139 need to think beyond short-term goals, be prudent and put in place strong safe guards. This is
140 especially the case in relation to something as important as land rights that can impact on how secure
141 people are in their homes, the extent to which they will care for the fertility of the soil in their fields,
142 the level of their own and other's investment of time and resources, etc...

143 We need, therefore, to ensure that the state cannot use any new powers to further attack the land
144 rights of people in poverty and black South Africans. Around the world it is poor, indigenous and
145 black people who are having land taken away, often without compensation. This is happening in the

146 context of massive and sustained corporate demand for land and natural resources. The Land Matrix
147 Project tracks large land deals (often land grabs) and lists over 71 million hectares of land (for
148 comparison Zimbabwe is 39 million hectares) as being subject to such deals over the last ten years.
149 In all these cases the state is involved in facilitating the grabbing of land by corporate interests. South
150 Africa is not exempt from these global trends as we see in examples like the protracted struggle of
151 the Xolobeni community to protect their land and environment from an Australian Mining company.
152 At the same time residents on Ingonyama Trust Land are having their very strong customary rights
153 to land, that are passed down from generation to generation, converted to mere leases, without any
154 compensation of course.

155 The creation of a constitutionally recognised social (maybe social and ecological) function of land
156 could assist again through being clear for what purpose land can and cannot be taken. Land seizure
157 and compensations decisions also have to remain subject to review by courts. This will in any case be
158 needed to make the clause consistent with other parts of the constitution, but we should embrace
159 this as an important safeguard, not just something we have to do. We need to discuss further how
160 we can provide secure land rights, while also requiring a far-reaching transformation of land and
161 property rights and access.

162 **2.5. Transform the food and agricultural sector**

163 The South African food and agricultural sector remains highly concentrated in a few hands. This is
164 not just a concentration of land ownership, in fact the ownership of food processing and retailing is
165 even more concentrated among a few large corporations, and this concentration is increasing. This
166 makes it extremely hard for new and smaller-scale farmers to break into the market and succeed.
167 The challenges of new farmers, including beneficiaries of land reforms, is not just skills and access to
168 capital, it is the whole structure of the sector. Unless we address this, we are setting many people,
169 and our land reform programme, up to fail.

170 I am sure there are people who will try to argue that this is not a constitutional issue or is beyond the
171 scope of this committee. That would be incorrect. First of all, the President has repeatedly put
172 preserving, or even enhancing, food security and agricultural production at the centre of the debate.
173 Secondly, there is nothing preventing the addition of a section to the property clause that would
174 create an obligation on the state to provide an enabling environment for land reform beneficiaries
175 to succeed, perhaps in the interests of food security and production. This could be formulated in a
176 similar way to the current section 25(5), such as by requiring the state to foster conditions to enable

177 a wider spectrum of South African citizens, especially land reform beneficiaries, to succeed on their
178 land, access markets, acquire inputs and gain appropriate ecologically sustainable farming skills.

179 It is good and possible to ensure that land will not be expropriated in a way that will harm agricultural
180 production or threaten food security. But, this should not be used as an excuse to block far reaching
181 transformation of land rights and access. Instead this commitment requires us to address the current
182 grossly inequitable and corporate dominated food and agriculture system as part of addressing the
183 inequalities in land holding. We have the opportunity to send a clear message that this is needed and
184 create a constitutional mandate and obligation to get this done.

185 **Annex 1**

186 **Key Land Related Provisions of the Federative Republic of Brazil, Constitution, 1988.**

187 XXII - the right of property is guaranteed;

188 XXIII - property shall observe its social function;

189 XXIV - the law shall establish the procedure for expropriation for public

190 necessity or use, or for social interest, with fair and previous pecuniary

191 compensation, except for the cases provided in this Constitution;

192 XXVI - the small rural property, as defined by law, provided that it is

193 exploited by the family, shall not be subject to attachment for the payment of

194 debts incurred by reason of its productive activities, and the law shall establish

195 the means to finance its development;

196 XXX - the right to inheritance is guaranteed;

197 **AGRICULTURAL AND LAND POLICY AND AGRARIAN REFORM**

198 **Article 184.** It is within the power of the Union to expropriate on account of

199 social interest, for purposes of agrarian reform, the rural property which is not

200 performing its social function, against prior and fair compensation in agrarian

201 debt bonds with a clause providing for maintenance of the real value, redeemable

202 within a period of up to twenty years computed as from the second year of

203 issue, and the use of which shall be defined in the law.

204 Paragraph 1 - Useful and necessary improvements shall be compensated in

205 cash.

206 Paragraph 2 - The decree declaring the property as being of social interest

207 for agrarian reform purposes empowers the Union to start expropriation action.

208 Paragraph 3 - It is incumbent upon a supplementary law to establish special

209 summary adversary proceeding for expropriation action.

210 Paragraph 4 - The budget shall determine each year the total volume of

211 agrarian debt bonds, as well as the total amount of funds to meet the agrarian

212 reform programme in the fiscal year.

213 Paragraph 5 - The transactions of transfer of property expropriated for

214 agrarian reform purposes are exempt from federal, state and municipal taxes.

215 **Article 185.** Expropriation of the following for agrarian reform purposes is

216 not permitted:

217 I - small and medium-size rural property, as defined by law, provided
218 its owner does not own other property;
219 II - productive property.

220 Sole paragraph - The law shall guarantee special treatment for the productive
221 property and shall establish rules for the fulfilment of the requirements
222 regarding its social function.

223 **Article 186.** The social function is met when the rural property complies
224 simultaneously with, according to the criteria and standards prescribed by law,
225 the following requirements:

226 I - rational and adequate use;
227 II - adequate use of available natural resources and preservation of the
228 environment;
229 III - compliance with the provisions that regulate labour relations;
230 IV - exploitation that favours the well-being of the owners and labourers.

231 **Article 187.** The agricultural policy shall be planned and carried out as
232 established by law, with the effective participation of the production sector,
233 comprising producers and rural workers, as well as the marketing, storage and
234 transportation sectors, with especial consideration for:

235 I - the credit and fiscal mechanisms;
236 II - prices compatible with production costs and the guarantee of
237 marketing;
238 III - research and technology incentives;
239 IV - technical assistance and rural extension;
240 V - agricultural insurance;
241 VI - cooperative activity;
242 VII - rural electricity and irrigation systems;
243 VIII - housing for the rural workers.

244 Paragraph 1 - Agricultural planning includes agro industrial, stock raising,
245 fishing and forestry activities.

246 Paragraph 2 - Agricultural policy and agrarian reform actions shall be
247 made compatible.

248 **Article 188.** The destination given to public and unoccupied lands shall be

249 made compatible with the agricultural policy and the national agrarian reform
250 plan.

251 Paragraph 1 - The alienation or concession in any way of public lands with
252 an area of more than two thousand and five hundred hectares to an individual
253 or legal entity, even if through an intermediary, shall depend on the prior
254 approval of the National Congress.

255 Paragraph 2 - Alienations or concessions of public lands for agrarian reform
256 purposes are excluded from the provisions of the preceding paragraph.

257 **Article 189.** The beneficiaries of distribution of rural land through agrarian
258 reform shall receive title-deeds or concession of use which may not be transacted
259 for a period of ten years.

260 Sole paragraph - The title-deed and the concession of use shall be granted
261 to the man or the woman, or to both, irrespective of their marital status,
262 according to the terms and conditions set forth by law.

263 **Article 190.** The law shall regulate and limit the acquisition or lease of rural
264 property by a foreign individual or legal entity, and shall establish the cases
265 that shall depend on authorization by the National Congress.

266 **Article 191.** The individual who, not being the owner of rural or urban property,
267 holds as his own, for five uninterrupted years, without opposition, an area of
268 land in the rural zone, not exceeding fifty hectares, making it productive with
269 his labour or that of his family, and having his dwelling thereon, shall acquire
270 ownership of the land.

271 Sole paragraph - The public real estate shall not be acquired by prescription.