



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

**Submission to the Constitutional Review Committee on the
Proposed Amendment to Section 25 of the Constitution**

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SAHRC





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Mandate of the SAHRC

- The South African Human Rights Commission (SAHRC) is a Chapter 9 institution established in terms of section 181 of the Constitution.
- Along with other institutions created under the same provision, they are described as “state institutions supporting constitutional democracy.” In terms of section 184 (1) of the Constitution, the Commission is specifically mandated to:
 - Promote respect for human rights and a culture of human rights;
 - Promote the protection, development, and attainment of human rights; and
 - Monitor and assess the observance of human rights in the Republic.
- Furthermore, section 184 (2) (a) of the Constitution empowers the Commission to investigate and report on the observance of human rights in the country.



Mandate of the SAHRC (2)

- Section 13 of the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act) expands on the powers and functions of the SAHRC, providing in section 13(1)(a)(i) that:
 - “The Commission is competent and is obliged to make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of human rights...”
- Section 13(1)(b)(v) further provides that the Commission must review government policies relating to human rights and may make recommendations.



SAHRC's Position on Land Reform

- Land is dignity and the restitution of land rights equals restoration of dignity.
- The dispossession of the majority of the population's land by colonial and apartheid-era governments constitutes one of the key drivers of persistent wealth inequality in South Africa.
- The SAHRC regards land reform as a key process through which South Africa's legacy of racial and spatial apartheid can be addressed.
- The issue of the 1998 restitution claim deadline has been identified as a concern, but also other challenges that have made the resolution of existing claims difficult and/or severely delayed.



SAHRC's Position on Land Reform

- The SAHRC regards land reform as a key process through which South Africa's legacy of racial and spatial apartheid can be addressed.
- It moreover considers land reform as an essential mechanism to achieve social justice and substantive equality more broadly, and thereby restore dignity to South Africa's people through a process of land restitution and redistribution.



SAHRC's Position on Land Reform

- In respect of both rural and urban land, the SAHRC submits that it is imperative that the state's approach be decisively informed by inclusive, democratic, and egalitarian systems of landholding in South Africa which benefit the most marginalised and vulnerable members of our society.
- Any such process must be transparent, include a plan for implementation which includes specific departmental obligations and clear timelines, and incorporate mechanisms that enable the public and parliament to measure delivery and hold the executive directly accountable.
- Delays in finalising claims have the effect of compromising the claim in that old people who have the information necessary for the passage of a land claim have either died or are too old to impart the information.



SAHRC's Investigative Inquiry

- Noting the challenges in the restitution process in South Africa, the SAHRC saw the need for a systemic intervention to these challenges.
- As such, in November and December 2013, the SAHRC convened an investigative hearing on systemic challenges affecting the land restitution process in South Africa.
- The SAHRC convened a Public Inquiry into the Impact of Rural Land Use and Ownership Patterns on Human Rights in March 2018.

Findings

- The hearings revealed a number of challenges related to addressing the challenges affecting land restitution in SA including:
 - Under-staffing;
 - Lack of technical skills; and
 - Inadequate research capacity
 - The relationship between the CRLR and the DRDLR: Need for independence
 - Communities occupying land with mineral resources below the surface
 - Backlog of claims and introduction of new date: May prejudice existing claims
 - Challenges in calculating the value of land in light of subsequent uses
 - Capacity of Chief Surveyor-General
 - Failure to subdivide land and register title deeds: May be exacerbated by reopening of claims
 - Impermanence and lack of continuity for LCC judged: Addressed by Amendment Bill

Position on Expropriation & the Proposed Amendment

- A fundamental solution to address the issue of land reform is the adoption of reasonable legislative and policy measures that can be used by government to facilitate and expedite land reform as required by section 25 (8) of the Constitution.
- In our view, as the supreme and overarching law in the country, the Constitution does not lend itself to amendments in the detail needed to limit expropriation without compensation in the context of addressing the results of past racial discrimination.

Position on Expropriation & the Proposed Amendment

- The Commission proposes that in addition to addressing the significant issues in land reform as expounded above, government pursues a legislative route in order to expropriate land without compensation in appropriate circumstances.
- Restitution failed in its attempt to transform land use patterns in South Africa for various reasons, including the one associated with the cut-off date for restitution, above. When decisions had to be made on restoration for dispossessed land, claimants often opted for monetary compensation. Standard settlement offers were developed, with little regard for the value, potential, location and other characteristics of the dispossessed land.

Position on Expropriation & the Proposed Amendment

- The overlap of restitution claims (i.e. more than one claimant for a piece of land) has congested the CRLR, and in these cases, communities have resorted to legal measures to stake claim to the land. This means that poorer communities, which may be the rightful claimant of the land but were unable to afford legal representation, were disadvantaged. There were myriad additional administrative issues for the CRLR, which have caused unnecessary delays of the stalling of restitution claims.
- As such, the Commission regards the ineffective implementation of land reform programmes as the root cause of inadequate land reform in South Africa to date.

Position on Expropriation & the Proposed Amendment

- Given the decreasing budget for land reform, as well as the failure of the ‘willing buyer, willing seller’ model used by the government to date, the Commission regards expropriation of land without compensation as being just and equitable in appropriate circumstances. May I remind you, honourable members that the ‘willing buyer, willing seller’ model is not provided by the Constitution.

Position on Expropriation & the Proposed Amendment

- However, it should be noted that it remains unknown to what extent the government has used its constitutional powers to expropriate land. Although the state expropriates land on a regular basis, it has rarely expropriated property for the purposes of land reform. Where it has done so, it has tended to pay market value for that property, even though it is not constitutionally obliged to do so.
- As observed by the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change Report land should include well-situated urban and rural land.

Position on Expropriation & the Proposed Amendment

- Land-related rights, including rights pertaining to water, should also be accommodated. At the hearings conducted by the High-Level Panel, communities indicated that they felt more vulnerable now, in terms of land dispossession than they did pre-1994. This sentiment, including de facto expropriation of land without compensation for black South Africans with access to communal land under traditional authority management, was confirmed during the SAHRC's 2018 Public Inquiry.
- High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) 300, 461-463.

Position on Expropriation & the Proposed Amendment

- The view was that land rights are often denied by Traditional Authorities especially in cases of mining where communities are regularly relocated to barren areas further from economic opportunities than before.
- Legislation should cater for circumstances where no compensation for land is payable by the State to address the racial disparities caused by the discriminatory system of apartheid, and that it is neither desirable nor necessary to amend the Constitution to reflect this level of detail.
- Section 25(8) explicitly authorises a departure from the provisions in section 25 to effect land reform that redresses the effects of racial discrimination, as long as a departure is in accordance with section 36 of the Constitution.

Position on Expropriation & the Proposed Amendment

- Section 36 directs that a right in the Bill of Rights may only be limited in terms of a law of general application and must be reasonable and justifiable in an open and democratic society, taking into account various factors that constitute a proportionality enquiry. Section 25(8) thus makes it possible for the government to depart from the requirements for compensation as set out in section 25(2) and (3).
- The conditions set by section 25(8) read with section 36 (1) thus reflect the scope of government's proposed strategy of expropriation without compensation, in that it permits a departure from the compensation provisions in section 25 to the land reform context.

Position on Expropriation & the Proposed Amendment

- The Commission underscores that legislation permitting land expropriation without compensation enacted in terms of section 25 (8) should be reasonable and justifiable in an open and democratic society.
- Currently, no law of general application exists that can be used to expropriate land without compensation for purposes of land reform. The Commission is accordingly of the view that until a law of general application has been created in terms of section 25(8), an amendment to the Bill of Rights would be premature and would additionally conflict with the doctrine of constitutional subsidiarity.

Position on Expropriation & the Proposed Amendment

- First, legislative measures should acknowledge groups that were dispossessed of land prior to 1913, and whose position is thus not addressed by the restitutionary provisions enshrined in section 25(7) of the Constitution. This group of beneficiaries would include both the Khoi-San as a distinct group and ethnic (tribal) minorities dispossessed of land before the introduction of the Native Land Act, 27 of 1913 or the Native Affairs Act, 23 of 1920. This is no way should be taken as an exhaustive list.

Position on Expropriation & the Proposed Amendment

- Next, women should benefit from land redistribution. Given current land ownership patterns that are skewed in terms of gender, specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects.
- Third, special measures in the land reform context should target people with disabilities and older persons as beneficiaries of land redistribution. The youth should also benefit from land reform.
- In order for land redistribution to advance equality, land should be transferred to beneficiaries and not leased out by the State.

Position on Expropriation & the Proposed Amendment

- Moreover, post-settlement support should be revised to cater for long delays in current mentorship schemes, while ensuring that power does not remain in the hands of white ‘co-managers’.
- Finally, the State should provide necessary infrastructure that is appropriate for the nature of the land, albeit urban or rural land.
- Ultimately, comprehensive legislation that is reasonably formulated and implemented, and that is accompanied by adequate resources, should be adopted by the government to further the objectives of section 25(5) of the Constitution.

Position on Expropriation & the Proposed Amendment

- It is important to also note that the factors in section 25(3) are aimed at making land reform affordable for government and consequently, we need to interpret section 25 and our expropriation laws with a focus on the justice and equitability element, rather than consider the current framing of the Constitution and applicable legislation as limiting the government's agenda.
- With that in mind, only can we then achieve a rights-based approach.



Concluding Remarks

- There are concerns over the election to accept monetary compensation as opposed to land.
- There has been insufficient training and capacitation of the land claimants once they receive their portions of land for better productivity and sustainability.
- There is also a need for an updated analysis as to whether there is sufficient budget being allocated towards land reform processes.
- More attention to the adjudication and processing of rural land claims.
- Land reform should focus on both rural and urban land.
- Challenges related to the manner in which calculations and determinations of the value of land from which individuals and communities were historically dispossessed but which have to be seen in the context of subsequent developments and uses.



Concluding Remarks

- Beneficiaries of land reform, and especially land redistribution, must enjoy adequate security of tenure.
- It is essential that with restitution and redistribution projects, beneficiaries are provided with monetary, resource and skills support.
- By ensuring creative partnerships with resources trusts and individuals, this goal can be achieved. It is clear from research findings by the Commission and other entities that transferring land without the requisite support, does not assist the new land beneficiaries and does not espouse the goals of development, economic growth and poverty alleviation.



Concluding Remarks

- The Commission recommends that expropriation without compensation be pursued through legislative means, and in accordance with section 25(8) of the Constitution.
- Legislative reform should address the current lacuna in implementing land redistribution in addition to restitution, and should thus be framed as a special measure in the context of land reform.
- Beneficiaries should be prioritised based on need, and should include those dispossessed of land prior to 1913, women, youth, and people with disabilities.
- Without successful implementation of government's programme of land reform, a life characterised by dignity, equality and freedom will not materialise for those who remain landless.



Concluding Remarks

- Thank you.



The South African Human Rights Commission

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