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# **Submission to the Joint Constitutional Review Committee on the review of Section 25 of the Constitution**

**Introduction**

The following is a submission to the Joint Constitutional Committee on the review of Section 25 of the Constitution and other sections where necessary for ensuring access, protection and ownership of land by black people of South Africa

1. **Who is ARD**

The Alliance for Rural Democracy (ARD) is a cross-section of civil society organisations sharing a common concern about the on-going struggle to defend rural land rights and democracy against the onslaught of new laws and policies that favour the interests of traditional leaders and politically connected business investors at the expense of the land and political rights of poor South Africans living in the former Bantustans.

The ARD welcomes an opportunity to be invited to submit to the Constitutional Review on this matter. We believe that the CRC provincial and national hearings are of crucial importance to the directly affected black communities of South Africa who have:

* 1. Continue to suffer in the hands of white farmers, traditional leaders and big mining and Agricultural companies
  2. Whose tenure on communal land and in urban informal settlements remain insecure;
  3. Waited for over 24 years for new promised land and not been afforded real redistribution of land;
  4. Whose existing land claims have not been dealt with or have not been finalised; and
  5. Who are seeing that their land is still being mined and new mining rights are granted to companies who continues their business without any accountability to the communities and benefit for their members.

**Background**

The Constitutional Review Committee [section 25] was instructed by the National Assembly (NA) and the National Council of Provinces (NCOP) to review section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land in the public interest without compensation and propose the necessary constitutional amendments. The committee has announced their planned engagement in a public participation process to get the views of all stakeholders about the necessity and mechanisms for expropriating land without compensation.

On 21st March 2018 the CRC, through the PMG website, advertised its invitation to the public of South Africa for written inputs

**What prompted the Resolution on Expropriation without Compensation**

Due to policy gaps and blind spots in our current land reform statute law, the property rights of our people especially those living in former homelands and on communal land, and people living in urban informal settlements have been rendered invisible and remain insecure. our experience is that many of our constituencies and members suffer expropriation and deprivation of their property rights on communal land and in informal settlements without any statutory procedure and without any compensation. Traditional leaders and mining companies ride roughshod over our land rights and procedural and substantive rights under the constitution are either ignored or regarded as extinguished by for example the Minerals and Petroleum Resources Act of 2002 [MPRDA]. Minimal compensation, if any, is supposed to be represented in the discretionary Social and Labour Plans [SLPs] and so called broad based socio - economic empowerment [BEE] benefits under the mining charter.

The Constitutional Review Committee’s mandate is to review section 25 of the Constitution and other clauses, and report on the applicability of “expropriation without compensation.” This mandate surely includes the current practice of the taking of peoples’ communal and informal settlement land for mining, infrastructure and housing projects without direct compensation sounding in money or kind i.e. commensurate agricultural land, services and guaranteed housing.

**Concerns about the schedule and Timetable of the Hearings**

1. We make the following submissions relating to the procedure of written submissions and timetable of the CRC for provincial public hearings:
   1. It is a fact that rural people living in the country side do not have access to mainstream media and technology, therefore might be unbale to submit by deadline. We appreciate the extension of the deadline to the 15th June 2018, and has also written a letter to the committee to allow written submission at the public hearings to ensure that the voices of the marginalised are not left out
   2. It is important for the credibility of the CRC and legitimacy of civil society participation that directly affected communities on communal and informal settlement land participate in the hearings of the CRC;
   3. Their participation must be informed to be meaningful, it required prior consultations and workshops for them to understand the fundamentals, the current framework and the implications of amending the constitution. Adequate notice is crucial to ensure that constituencies can inform themselves and ask for information, clarification and knowledges from parliament and civil society supporters;
   4. There should be continuity and the committee members should attend as many meetings as possible to ensure such;
   5. To achieve b) and c) above, public hearings should be scheduled in a staggered manner to ensure that meetings are not held on the same day in various provinces. There should not be multiple meetings in one province on one day and scheduled meetings should not be changed overnight.

**History of Dispossession**

The bitter colonial history of dispossession in South Africa tells us that land was taken from as far as the 1800. in 1913 Africans were colonially allocated 7 percent of their country. 93 percent of it was handed to 349,837 colonial settlers. When this land was found inadequate for Africans the Tom lion Commission was appointed in 1916 and it was because of its findings that 20 years later, the colonial parliament passed the Native Trust Land Act 1936 which added 6 percent to the 7 percent allocated to Africans in 1913.This left the colonial settlers with 87 percent.

In 1950 the colonial parliament passed a law called Group Areas Act 1950 to remove those Africans who were too close to “European” land. This was to intensify colonial racism, which in 1948, colonial Prime Minister Daniel Malan named “apartheid” (race separation). When the situation did not change and the revolutionary movements in South Africa resorted to the armed struggle; the apartheid colonialist regime resorted to creating “tribal republics” for Africans where they would “rule themselves.” They were nine “republics” called “Homelands.”  They were called Ciskei, Kwa-Ngwane, Lebowakgomo, Kwa-Ndebele, Venda, Kwa-Zulu, QwaQwa, Transkei and Bophuthatswana.

South Africa’s land surface is 472,281 square miles. But in 1969 through what the apartheid colonialist regime called Promotion of Bantu Self-Government Act No. 46, nine “Bantu Republics,” established and allocated 68,264 square miles of South African territory. The remaining 404,017 square miles with all its mineral and agricultural wealth and other national resources remained under the control of the minority white population, many of whom still have the arrogance to claim that they did not take land from any one. They found it “empty!” Oh! well, maybe they thought its empty because Africans did not have boundaries, border gates, it as a free access to those who use it. We lost freedom of movement and was deprived of scarce natural resources.

But maybe the reconciliation argument from the moderates could be, lets talk the here and now. I agree that the Review process cannot be able to deal with land challenges that started centuries ago, we need to bite what we can chew and talk the land rights now! The South African government land reform programme has failed to redress colonial land injustices. Only about 9% of the land was redistributed in 23 years since 1994 – against a 30% target in 10 years following the end of apartheid rule. Many South Africans are frustrated by this slow pace hence the call for radical transformation on land and economic assets.

**A need for Expropriation**

We fully support that Expropriation of land without compensation only when done in the public interest. The big questions could be why are we expropriating, which land, for who? The starting point of this submission is that majority of well deserving citizens of this country do not have access to land, are denied access and control of their environment. When I emphasise the “well deserving” citizens I mean poor rural and urban, women and youth and orphans, and black people.

Over 36 million of South African black majority live without Security of tenure. The former homelands are under threat of eviction by big mega projects, millions of Farm dwellers have been displaced ever since the dawn of Democracy, the social housing statistics tell us that there is a housing backlog of 2.1 million in South Africa. This crisis cannot be resolved without making well located land available for housing, small scale farming and livelihoods.

Land reform should be understood as a question of dignity, identity and power, and not only be reduced to Agriculture and Farming only. Expropriation without compensation has been happening all along, against the rural poor, through evictions on farms and displacement of rural villages to make way for big mining, game and big dams. is already happening. It is only seen as un-progressive by those in power when urban democratic popular organisations such as Abahlali occupy unused land, but they see nothing wrong when they take our grazing land, exhume our graves to make way for their mining companies.

**ARD’s position on expropriation without compensation and amendment of Section 25**

We are saying, hands off our Constitution!!!

We interpreted the current intention to consider amending the Constitution to enable land expropriation without compensation as a way to hide out from the real failures of land reform and the failure of Parliament to deliver on provisions made under Section 25 of Act 108 of 1996

Secondly, the legal opinion confirms that the Constitution of South Africa, Section 25 (2-3) allows for expropriation, and also outlines the formula for compensation. This can be with zero compensation, minimum compensation or compensation that is below, or at market value depending on the merit of the case, so compensation or no compensation cannot be a one size fits all.

This must be implemented by way of a law of general application and in a manner, which meets the requirements of just administrative action as required by the Promotion of Administrative Justice Act (No. 3 of 200). Although the Constitution is clear, in practice the content of "just and equitable" compensation, remains insufficiently debated and understood.

Neither government nor the courts have weighed in on the content or developed a transparent procedure for arriving at what is ‘just and equitable’ compensation. The Property Valuation Act (No. 17 of 2014) makes a single reference to expropriation and just and equitable compensation in its preamble but the body of the Act is silent on the procedures involved. Draft regulations try to provide guidance but without this being addressed in the Act this can only be limited in scope.

Lastly, alternative compensation does not mean cash only, which has been the case with most Restitution awards for black claimants. The country needs a balanced ownership pattern and the approach has not addressed that. In all of this it is critically important to recognise that, when you compensate a title owner, there are other right holders alongside the registered owner.

**Recommendations**; We strongly recommend that the CRC should take time to consider the recent report released by the High-Level Panel led by the former President Kgalema Motlanthe. We understand that the report has not been adopted, but we know that it was handed over to the speakers, and we listened to the Speaker of Parliament mentioning the report during SONA, and we know that the process was supported by this house. It is therefore important to us to know that this committee and this house will consider and induct themselves on the recommendations of the Motlanthe led High-level Panel report on Land Reform and other chapters such as Poverty and Inequality and nation building. We believe that discussing hectares and budgets without linking them to Poverty and Inequality can be self-defeating.

1. **Exploit the available avenues within the existing framework, and develop a test case**

* **Map out different land needs, and cluster them accordingly** to ensure that when expropriation happens, who needs the land where and why? This will mitigate against elite capture that we see in land reform**.**
* **Identify land for absentee landlords and create homes in urban areas.** The cities have many abandoned properties belonging to absent landlords.
* Metropolitan cities must therefore use Spatial Planning and Land Use Management Act (SPLUMA) which empowers them to survey land available, rezone and allocate land to most needy people who need a place to stay.
* Declare a moratorium on evictions of farm dwellers and secure tenure rights, Section 4 of Extension of security of tenure act (ESTA) allows government to expropriate section of land where farm dwellers are using and give them tenure security. Most people who will benefit from Section 4 of ESTA will be women and families whose tenure rights was tied to their counterparts working contracts.
* **Finalise, Amend and Pass the Expropriation Bill of 2016:**The Expropriation Bill of 2016 is consistent with the property clause, but it should be returned to the Department of Public Works by Parliament, where it should be redrafted, and minimal amendments made to it which must include setting out a spectrum of criteria and circumstances for:

·         Zero compensation

·         Partial compensation

·         Market-related compensation

·         Premium above market price

* **Land Records Bill**; Motlanthe HLP report recommends radical and far-reaching step that can be taken to transforming property relations in South Africa and strengthening the rights of the majority who have no documented or official forms of property. Whether in informal settlements, on commercial farms, or in the communal areas, **most South Africans have no documented rights**. This Bill will provide the basis for a bottom-up process of creating recognized rights for non-private owners of property.

**Conclusion**

Government needs to expropriate land and distribute it to the deserving citizens, and refrain from being biased to big businesses and banks. Since 1994 all we are seeing are mega projects like shopping malls and hotels but nothing for social needs such as housing that prioritized the aged, the orphans and widows and Black women particularly. This must change.

Alliance is calling Government to put make resources available for public consultation and participation. Adequate resources are needed to educate ordinary rural people and ensure enforcement of their rights under an improved bill.

Submitted by

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