

# **FOUNDATION FOR HUMAN RIGHTS**

## **SUBMISSION TO THE CONSTITUTIONAL REVIEW COMMITTEE**

### **CALL FOR COMMENT: REVIEW OF SECTION 25 OF THE CONSTITUTION**

The views contained in this submission represent the views of Management of the Foundation for Human Rights, and should not be ascribed to any member of the Supervisory Board.

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## **1. PREAMBLE**

The position taken by the Foundation for Human Rights on whether Section 25 of the Constitution should be amended to allow for expropriation of land without compensation reflects the views of Management and Programme staff and is based on their experiences and engagement with communities, community-based organisations, farmworkers, farm dwellers, labour tenants and women on farms. The position taken on Section 25 is not reflective of the views of any individual member of the Supervisory Board.

## **2. INTRODUCTION**

The Foundation for Human Rights (FHR) is delighted to make a submission to the Constitutional Review Committee which was set up to review Section 25 of the South African Constitution following the adoption in the National Assembly of a motion calling for the expropriation of land without compensation while ensuring that food security and production are not affected.

FHR is an independent civil society organization, was established in 1996 through a Financing Agreement (FA) between the European Union and the South African government, initially to overcome the legacy of apartheid. It is presently funded through sector budget support with the Department of Justice and Constitutional Development (DOJ&CD) being the line department. The DOJ&CD has an implementation agreement with the FHR to meet the indicators set out in the FA. FHR has supported civil society organisations to promote the rights contained in the Constitution.

## **3. WHY THE REVIEW OF SECTION 25?**

There is little doubt that the National Assembly motion on expropriation without compensation has ignited a lot of enthusiasm, debate and discussion. At the same time, however, it has given rise to a great deal of confusion and anxiety.

Some of the crucial questions that have dominated debate and discussion include the context that informed the adoption of the much debated section 25 of the South African constitution, the Property Clause. This then leads to debates as to whether or not this section needs to be amended to ensure radical land redistribution. The motion of the National Assembly seems to suggest that the clause be amended, given that the constitution as it stands provides

for expropriation with compensation, based on guidelines listed in the constitution. However, there are those who are vehemently opposed to tempering with the Property Clause, which is part of the Bill of Rights.

How to interpret the motion seems to be a key issue that is causing anxiety and confusion. We hope that our submission will throw light on this and related issues.

#### 4. CONTEXTUAL ANALYSIS

The land question in South Africa is a legacy of a painful past of land dispossession and deprivation enforced through racial discriminatory laws under colonialism and apartheid. Previous colonial and apartheid regimes have used the law to arbitrarily deprive black people of the right to own land and property.

Land and property ownership in large parts of the country was reserved solely for whites. This was done through a series of laws which were passed as early as 1894 which rendered Black people land deficient, thus curtailing their economic wellbeing and independence. The following laws *inter alia* facilitated this:

- The Glen Grey act of 1894 (Under Cecil John Rhodes).
- The Native Land Act of 1913 (Act 27).
- The Transvaal Asiatic Land Tenure of 1930.
- The Riotous Assemblies Act of 1930 (Act 19).
- The Asiatic Immigration Amendment Act of 1931.
- The Native Service Contracts Act of 1932.
- The Slums Act of 1934.
- The Rural Dealers Licensing Act of 1935.
- The Native Trust and Land Act of 1936 (Act 18).
- The Development Trust and Land Act of 1936 (Act 18).
- The Representation of Blacks of 1936 (Act 12).
- The Black (Native) Laws Amendment Act of 1937 (Act 46).
- The Pegging Act of 1943.
- The Group Areas Act of 1950 (Act. 41).
- The Bantu Authorities Act of 1951.
- The Bantu Education Act of 1953.
- The Promotion of Self Government Act of 1959.

Using laws promulgated by an undemocratic and oppressive colonial and apartheid regimes to dispossess indigenous peoples was the norm.

In addition, not only were the indigenous peoples robbed of their land, they were incorporated into an extractive and highly exploitative system of racial capitalism that allowed whites to amass huge profits through the naked exploitation of black labour.

The exploitation of black, specifically African labour was made possible by the establishment of “native” reserves going back to the 19<sup>th</sup> century. In 1913, the white-led government of the Union of South Africa passed legislation restricting the indigenous people to a mere seven percent of South Africa’s territory which by then was already overcrowded and overgrazed. This paltry percentage of the land was increased in law to 13 per cent in 1936, a situation that prevailed until the advent of democracy in South Africa in 1994.

And even after being relegated to faraway reserves, black South Africans often did not actually own their land. The state owned most of the land in the rural areas of the former reserves, granting only rights of occupation to its residents, rather than the freehold title deeds that were common for white landowners.

While white colonialists were initially committed to promoting a class of African farmers in the reserves, they changed their minds in the late nineteenth century when minerals and gold were discovered throughout the country. The rural areas, including the reserves, were seen as reservoirs of cheap labour to stimulate capitalist development in South Africa.

Lacking adequate land, black Africans were forced to sell their labour, cheaply, in the booming gold and diamond mines across the country as well as on farms and as workers in the emerging white-controlled towns and cities.

The administration of land in the reserves during the colonial period up to the introduction of Apartheid in 1948 was in the hands of compliant state appointed headmen. Having fought wars with chiefs, colonialists appointed headmen as administrators of land whenever they defeated chiefs. With the advent of apartheid in 1948, chieftainship was revived with only chiefs who were prepared to execute the apartheid policies appointed.

Under apartheid, reserves were renamed bantustans, in line with the apartheid thinking that Africans were Bantus, used in a derogatory form. As with their “subjects”, headmen and chiefs were not the owners of the land. However, although they did not own the land, colonialists and the apartheid state officials made chiefs and headmen their gatekeepers by giving them land allocation powers. No rural resident could be allocated land without the approval of chiefs and headmen. This is how they derived their authority.

More than 80 percent of South Africa’s agriculturally, mostly productive land was in the hands of white commercial farmers, who, unlike their African counterparts, held freehold title to it. They received enormous support from the state in the form of extension officers who provided technical services, marketing strategies, and state subsidies – all of which were denied to their African counterparts. They also had access to cheap labour, supplied by the defeated and often landless Africans.

The above provides a context within which to understand section 25 of the South African constitution. It attempts to provide a balance between the interests of property owners, mainly comprising a minority of whites, on the one hand, and the interests of the vast majority of blacks who were historically dispossessed and denied ownership of land.

To address the above imbalance, the ANC adopted a land reform programme whose key feature was that land would be purchased from white commercial farmers. The ANC government even went so far as to commit itself to a willing seller, willing buyer policy. This is a policy that was widely marketed by the International Monetary Fund (IMF). Worth noting is that there is no provision in the South African constitution for the adoption of this policy.

This land reform program has been a dismal failure, with less than 10 per cent of land transferred from white to black hands in the more than 24 years since the advent of democracy in South Africa. It is this failure that has brought us to where we are, including this submission.

As already noted, debates about land reform in South Africa and its failure tend to revolve around section 25 of the South African Constitution which, as indicated attempts to strike a balance between recognizing existing property rights historically held by whites, while at the same time acclaiming the need to return land

to the indigenous people who were dispossessed of their land and property.

Scholars such as Professor Lungisile Ntsebeza of the University of Cape Town argue that this clause is conflictual in that it protects existing property rights which favour whites, while at the same time promising the dispossessed that their land will be returned to them. He thus argues for a constitutional amendment to make expropriation of land unambiguous.

Others such as Professor Ruth Hall, argue that section 25(2) of the constitution already provides for expropriation of land with limited compensation which, in terms of section 25(3) “must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected”. What is lacking, they argue, is the political will on the part of the ANC-led government leaders to do something.

Ntsebeza’s retort to the above argument is that political will is one consideration, but attention should also be given the possibility of current property owners using the constitution to litigate on any attempt to expropriate land, especially if it goes without compensation. The cost of such an exercise will no doubt be prohibitive and discourage the historically and currently disadvantage from challenging Big Capital.

## **5. OUR SUBMISSION**

Land reform is important for correcting the wrongs of the past and for the purpose of reconciliation. In a country whose economy cannot absorb its labour, land is important in tackling the current developmental challenges that the country is facing such as inequality, poverty, food insecurity and unemployment.

South Africa is, after some 24 years of democratic rule, shamefully the most unequal country in the world. The Oxfam report of 2014 found that 25% in South Africa go to bed hungry. It also reported that half of our population are at risk of going hungry.

Taking the above into account, we submit that the section 25 (1) of the Constitution should be amended to make it less ambiguous in its attempt to balance the interests of existing property owners and the vast majority of those who were dispossessed of their property. The section should unambiguously be in favour of restoring land to

those who were dispossessed of their land and subsequently denied citizenship rights which included the right to buy and sell land.

Clarity is also needed on section 25(3b) ... “the history of the acquisition”. It should be made clear that “the history of acquisition” means the history of dispossession, what the South African President, Ramaphosa refers to as the “original sin”. It is this history that should form the basis for deciding how the historical wrong of dispossessing indigenous people and subjecting them to rampant racism and tribalism can be righted. Restricting the history of the acquisition of the property to the legal owner of the land at the point of expropriation is ahistorical.

The constitution lists a number of factors that must be included when compensation is considered. This is not an exhaustive list.

However, given the point we make above about the brutal\ exploitation of black labour, it is our submission that the exploitation of labour be included as one of the circumstances to be taken into account for purposes of compensation.

The inclusion of labour in the list will also demonstrate commitment to the question of striking a balance between property owners, Capital and the dispossessed, mainly exploited workers and the unemployed. It will also show that it is not only property owners who must be compensated, but workers (labour) too, as a result of “over accumulation”.

The above amendment, we humbly submit will go a long way to ensuring that the apparent squaring of the circle between land expropriation without compensation, in the context of a constitution that favours expropriation with qualified compensation is resolvable. The price of compensation, properly calculated could work out to nothing and could even put the property owner in the negative, where they could consider donating land, particularly land that they are not using and/or are under-utilising.

It is our contention that the abovementioned proposed amendment to section 25 should clearly provide for land expropriation without compensation of privately owned land which is not used, under-utilised, abandoned.

Also, land that is currently being utilised by labour tenants should be expropriated without compensation from current owners and be given to those labour tenants. Compensating farmers for this land

will amount to over accumulation, as labour tenants have already paid for this portion of land through free-labour provided over many decades for which commercial farmers have made profits.

## **6. WHO SHOULD BENEFIT FROM EXPROPRIATED LAND?**

Our work on land rights has always focused on ensuring that vulnerable and marginalised groups such as women, farmworkers, farm dwellers, labour tenants and the poor in rural and peri-urban areas are empowered to understand and access their rights. We have funded a number of land rights organisations in the country who assist such communities to secure their rights. We have convened, funded and facilitated major land conferences where landless persons and civil society organisations working on land related issues participated.

In addition to supporting projects by land rights organisations, some of the activities we have organised to promote land rights of vulnerable people:

- We have trained community advice offices assisting farmworkers at the request of the DOJ&CD as part of the activity of the Deputy Presidents Task Team after the protests in the Boland. This was a Popular Paralegal and Community Leadership training course. The FHR has developed the training material which can be used for future training.
- A National Strategic Engagement on farm workers and farm dwellers rights was held in Cape Town in November 2015. The aim of this activity was to identify and discuss challenges that impedes the protection and realisation of the rights of farm workers and farm dwellers, and make recommendations on how civil society, farm workers and farm dwellers, government and other stakeholders should work together in promoting and protecting the rights of farm workers and farm dwellers. This was followed by provincial workshops in the Northern Cape.
- A land and human rights symposium in partnership with the Nelson Mandela University which was held at the University of Limpopo on the 19<sup>th</sup> June 2017.
- A national training of Community-Based Advice Offices on land claims to assist land claimants with lodgement of their claims at the request of the Portfolio Committee on Justice was held in Polokwane on 12 and 13 July 2017.

Given the above, we submit that the following social groups should receive priority when expropriated land is redistributed.

Women:

We note the ongoing challenge of lack of access to land by women. Despite the Equality clause set out in Section 9 of the Constitution, women are still denied the right to own land in their own name in territories falling under traditional leaders. Their lack of the right to hold land in their own name exposes them to rights violations and food insecurity.

We therefore submit that the land redistribution process should prioritise the registration of Title Deeds in women's names especially in rural areas. We note that the Commissioner Wallace Mgoqi of the Commission on Gender Equality' has indefatigably promoted a 'One Women, One Hectare' campaign, which we support. This, however, should be seen as a minimum demand.

Farmworkers/ dwellers and Small-scale farmers:

The state must give current farmworkers, farm dwellers and labour tenants first preference as beneficiaries of expropriated land. They must be encouraged to become small scale farmers and existing small scale farmers who have shown an aptitude for farming should be encouraged through being allocated more land.

The above will also address the vexed issue of security of tenure for farmworkers, farm dwellers and labour tenants on farms where they currently reside.

Rural areas and land redistribution beneficiaries:

We also note with concern the leasing of land to poor people in rural areas and the *modus operandi* of the Proactive Land Acquisition Strategy (PLAS) of emphasising land leases to beneficiaries as opposed to land transfers.

We support the recommendations made by the Motlanthe High Level Panel. That the ownership and control of land in rural areas should be given to the people living and working on the land, and not to traditional leaders.

Land in urban areas:

The role of municipalities in land redistribution must be clarified. Municipalities control access to Commonage land which is vital for

food production and grazing of livestock in urban areas. We submit that the allocation of Commonages must prioritise the poor urban dwellers who want to produce food and keep livestock.

The land question is not only about agriculture and farming. It also entails housing, a struggle that *abaHlali baseMjondolo* have been waging for years and are still in the trenches.

#### Beneficiaries of share equity schemes

Equity schemes should be abolished and land held under this scheme should be given to the farmworkers involved. Research shows that white farmers use this scheme to continue with their exploitation of labour, albeit under the cloak of democracy. Farmers are paid out, but still retain the land. On the other hand, farmworkers' rights of tenure remain precarious and power relations barely changed.

### **7. POST-SETTLEMENT SUPPORT**

We also submit that a full transfer of land must be accompanied by a comprehensive post-settlement support to ensure continuous productivity of the transferred land. The Department of Agriculture, Forests and Fisheries (DAFF) must take a leading role in the provision of post-settlement support to beneficiaries of land reform, working with various stakeholders including civil society organisations, universities and agricultural colleges.

### **8. RECOMMENDATIONS**

- Section 25 of the Constitution should be amended in line with the submissions and arguments made above.
- Land reform, especially land redistribution should be focussed on vulnerable and marginalised communities such as women, farmworkers, farm dwellers, labour tenants, unemployed youth and homeless persons in urban areas.
- Women must be allowed title in their own names in rural areas.
- The recommendations of the Motlanthe Commission should be supported with regard to ensuring that title to rural land should not be transferred to traditional leaders but should be transferred to persons who live on the land and who work the land.

- A simpler cost effective method of transferring and registering title deeds should be developed and implemented.
- Allotments should be allocated to unemployed persons on the periphery of urban areas for the purposes of growing their own food.
- Land for housing should be allocated to persons in urban areas, especially those in informal settlements close to job opportunities.
- A Land Ombudsman must be appointed with the specific task of assisting vulnerable and marginalised communities to acquire and work land.
- A land CODESA/SUMMIT must be held, where a new agreement on how to take the land reform process forward will be discussed. The disposed and the landless should actively participate in this process.

**Dated at Johannesburg this 14<sup>th</sup> day of June 2018.**



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