

Oral Submission on the review of section 25 of the Constitution.

To the Constitutional Review Committee, Parliament of South Africa, 5th September 2018.

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1. Introduction

Thank you for this opportunity to present to your committee on this topic of national importance.

The decision to review this section of the Constitution provides an exciting opportunity to give effect to the ideals in the preamble to our Constitution, notably to recognise “the injustices of our past” and ensure that indeed “South Africa belongs to all who live in it”.

I present on this topic mindful that the Constitution of South Africa is the supreme law, thus impacting all laws and their interpretation and further that the content of the Constitution sends a message about our values as a nation to all citizens, all civil servants, all politicians.

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

1. The creation of a constitutionally defined and protected social and ecological function¹ for all land in South Africa.
2. Creating the legal space for the state and for landless people to acquire land without paying compensation under certain circumstances.
3. Creating affirmative responsibilities to advance the land rights of vulnerable groups and women.
4. Ensuring strong rights to land that people, especially those in poverty, can defend from arbitrary state action.
5. The need for a wider transformation of the food and agricultural sector in order to create an enabling environment for people, especially small-scale farmers, to succeed on the land.

I will elaborate each of these points.

¹ This is based on the well-established principle of the social function of property as first outlined by Leon Duguit in 1911 and incorporated into a number of constitutions around the world, including in Brazil, Mexico, Chile, Columbia, Indonesia.

2. Elaboration of Proposals

2.1. Social function of land

Land and the related natural resources linked to it are an asset for our nation and should serve the needs and aims of our nation and all its citizens and future generations. We should articulate this and what it means with the concept of a social and ecological function of land, drawing on examples from the constitutions of countries like Brazil. Such an opening to the property clause would set a very different tone and legal framing to the current one.

Article 186 of Chapter 3 the Brazilian Constitution decrees the 'social function' for rural land that to be met requires land to be adequately used in a way that preserves the environment, respects labour laws, and benefits the owner and laborers.

It would be very valuable to discuss what the social function of land (all land; private, communal, state, urban and rural) in South Africa should be. Certainly, issues of production and protection of the environment would be there. The respecting of labour and tenure security laws would be critical given our history and continued reality of abuses of workers and residents on farms. Addressing historical injustices and the cultural and spiritual importance of land need to be mentioned. This needs a thorough and public debate to establish a South African definition of the social, and I suggest ecological, function of land.

2.2. Expropriation of land

The failure to use land for its social function would be a reason to expropriate land. Ensuring that land does fulfil its social function would also guide who that land then goes to and for what purpose.

Articles in the Brazilian Constitution give the government powers to expropriate land not performing its 'social function' and gives ownership of land to landless people (people not owning any other rural or urban property) who, for 5 years, occupy and make productive use of up to 50 hectares of rural land. This creates a legal space for people's direct action to occupy and use land and through that to trigger expropriation. This is vital given that we cannot rely on the state to use the powers they have to act in the interests of landless people. This has been important to the land occupation strategies of movements such as the MST (Landless Rural Workers Movement) that have settled hundreds of thousands of families on close to five million hectares of previously unused or underused rural land in Brazil. Such provisions in the South African Constitution would

affirm that the land is a national resource that is there for those who can work it. Provisions, such as those that the people involved must be landless and limiting the land size, will reduce the risk of abuse and elite capture. The requirement to use the land for its social function, in order to be able to obtain or keep it, clearly encourages land utilization.

There are circumstances where it makes no sense to pay for land that is expropriated, but likewise there are situations where it would be unreasonable to refuse any compensation (I can elaborate on such circumstance if the committee would like). Therefore, we need a formula to calculate when compensation should not be paid and when it should be paid and, in such cases, how much is fair compensation. The current section 25(3) of the Constitution provides a good set of criteria. To these we can add whether the land is fulfilling its social function or not. The wording should also be amended to explicitly allow for expropriating without compensation. For example, it could read; “whether any compensation is to be paid or not, and if so how much, will be determined taking into account...”.

It is important to note that these provisions in the Brazilian Constitution have not led to anarchy or stopped Brazil being a global agricultural power house.

2.3. Explicitly favour the marginalised.

A grave concern in many countries, including in South Africa, is the abuse of land reforms to benefit elites. This undermines the potential of land reforms to bring about greater equity and to create opportunities for the majority and the most needy. In addition to those mentioned above, the Brazilian Constitution has other clauses that favour small-scale land owners over larger ones. For example, clause XXVI prevents the attachment of “small rural property” for recovery of debts incurred for productive purposes. My point is, we can and should use the Constitution to explicitly favour a scale of production and vulnerable groups to ensure more equitable outcomes and forms of agriculture.

Women in South Africa and around the world face discrimination in relation to land rights and access, yet the current property clause is gender blind. Of course, read with other sections of the Constitution there is a clear requirement to not discriminate against women. But, this does not set any clear obligation to overcome existing deeply rooted gender inequalities. At a minimum we should create an explicit obligation to put in place legislation and programmes to advance women’s land rights in order to achieve more gender equitable outcomes. This could be similar in tone to

existing clauses such as 25(6) on tenure security. Amongst other things, we need to see more specific targeting of women as beneficiaries and the gathering and making available of sex disaggregated data so that we know the existing level of gender equality and can monitor progress.

2.4. Ensure people have strong defensible land rights

It would defeat the purpose of transforming land rights and access in South Africa if black South African's gained land, but with no security on that land. It would also leave a situation where any gains made could be easily unravelled. We have to keep a long-term view in mind when amending the Constitution. We don't want to amend it frequently and we have little idea who will be ruling the country in ten or 20 years-time. We need to ensure that the state cannot use any new powers to further attack the land rights of people in poverty and black South Africans. Around the world it is poor, indigenous and black people who are having land taken away, often without compensation. This is happening in the context of massive and sustained corporate demand for land and natural resources. South Africa is not exempt from these global trends as we see in examples like the protracted struggles of the Xolobeni and other communities to protect their land and environment from foreign mining companies and their government allies.

The creation of a constitutionally recognised social and ecological function of land could assist again through being clear for what purpose land can and cannot be taken. Land seizure and compensation decisions also have to remain subject to review by courts. But, we need to make sure the landless and those in poverty can get a fair hearing and representation in any such court processes. We need to discuss further how we can provide long-term security, while also requiring and not hindering a far-reaching transformation of land and property rights.

2.5. Transform the food and agricultural sector as a whole

The South African food and agricultural sector, far beyond land, remains highly concentrated in a few, mostly white, hands. The ownership of much food processing and retailing capacity is concentrated among a few large corporations. This makes it extremely hard for new and smaller-scale farmers to break into the market and succeed, regardless of their skills and commitment levels. Unless we address this, we are setting many people and our land reform programme up to fail.

This is a constitutional issue relevant for this committee. President Ramaphosa has repeatedly put preserving, or even enhancing, food security and agricultural production at the centre of the debate. I suggest the addition of a section to the property clause that would create an obligation on the state

to provide an enabling environment for land reform beneficiaries to succeed in the interests of food security and production. This could be formulated in a similar way to the current section 25(5) on enabling citizens to gain access to land.

The need to preserve or enhance production and food security must not be used as an excuse to block far reaching transformation of land rights and access. Instead this commitment requires us to implement a wider and more holistic transformation of the grossly inequitable and corporate dominated food and agriculture sector, along with addressing the inequalities in land holding.

We have the opportunity to send a clear message and create a constitutional obligation to get all this done.

Thank you for your time and consideration of my submission.