
# Observations and recommendations

## on the possible review of Section 25 of the Constitution

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# Introduction

The Democratic Alliance (DA) and its members on the Constitutional Review Committee state categorically that these observations and recommendations are made under protest. The draft report in which these recommendations and observations are to appear should not be considered yet as the constituent parts of the report are yet to be finalised. The Democratic Alliance reserves all of its rights with regard to this draft report, and the making of recommendations under these circumstances should not be construed under any circumstances as acquiescence, approval or consent of the errors in procedure that have been wilfully committed by the Committee and some of its members.

In particular:

- The Committee has not received a final report on the written submissions from Parliament, as previously agreed upon on the 20th of September 2018, after an attempted presentation by the service provider. The circumstances surrounding the appointment of the service provider IsiLumko must still be thoroughly investigated and traversed, and it must be noted that the committee in its entirety rejected the putative presentation by the two persons who came to the committee and attempted to make a presentation.

- Section three of the draft report that discusses the public submissions on the possible review of Section 25 of the Constitution that includes a section on Written Submissions (Section 3.2). Thus, the final Committee report should not be considered until the Committee receives the report on the written submissions. To date, no such report has been received, and no presentation in this regard has been made to the committee. In fact, the committee has not engaged, meaningfully or at all, with the contents of the written submissions.

# Observations on the Constitutional Review Process

## General Observations

- The DA, through our Members of Parliament represented on the Constitutional Review Committee (CRC), set out to listen to the inputs of people from across the Country. The underlying sentiment, no matter your stance on whether the Constitution should be changed or not, is that land reform needs to happen and at an accelerated pace.
- The majority of those who participated in the public hearings across the country expressed the sentiment that s25 needed to be amended to allow for expropriation without compensation. There was, however, no consensus on how this should take place, nor what the nature of the amendment should be. There was also no consensus on what should happen to land once expropriated, whether with or without compensation. There was a strong feeling that individual land ownership rights were important, and there was also a strong narrative that South Africans did not necessarily want agricultural land, but that some wanted urban land.
- Note should also be had of the high levels if intimidation that occurred during these public hearings. Racial attacks on and threats against speakers at these hearings were totally uncalled for and may cast doubt over the integrity of the process.
- The majority of oral submissions were strongly opposed to changing the Constitution, pointing out that the Government has failed to implement the current provisions of the Constitution. Many also warned against the unintended consequences of the proposed amendment.

- It is deeply disturbing to the DA that the ANC and EFF used the land hearings that took place to spread misleading information about the real constraints facing the land reform process and is treating a very serious matter and process as a tool for electioneering.
- The written submissions received by the Committee, notwithstanding the current issues of the report and presentation thereof, are also strongly opposed to changing the Constitution.

## Processes not finished and potentially comprised

### Public Participation

- Section 59 of the Constitution directs the National Assembly to facilitate public involvement in legislative and other processes of the Assembly and its committees. Sections 72 and 118 of the Constitution, respectively, contains similar provisions for the National Council of Provinces and the provincial legislatures.
- In the matter of ***Doctors for Life International v Speaker of the National Assembly and Others*** **2006 (12) BCLR 1399 (CC),** the Constitutional Court had the opportunity of examining what public participation means to the legislative process.
- On behalf of the majority, Ngcobo J states: "*Public participation in the law-making process is one of the means of ensuring that legislation is both informed and responsive. (…) The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation*."
- Thus, it must be concluded that where the legislature makes a decision, and such decision does not correctly reflect what was deduced during the public participation process, the legitimacy of legislation which flows from such a decision will be tainted.
- Per Sachs J in the minority judgment: *"Although in other countries nods in the direction of participatory democracy may serve as hallmarks of good government in a political sense, in our country active and ongoing public involvement is a requirement of constitutional government in a legal sense. It is not just a matter of legislative etiquette or good governmental manners. It is one of constitutional obligation."*
- Two years later, in ***Merafong Demarcation Forum and Others v President of the Republic of South Africa*** **2008 (10) BCLR 968 (CC)**, Van Der Westhuizen J stated: *"Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections".*
- If public participation becomes an ineffective exercise, however, the only time the public will be able to have a meaningful say in government is once every five years. This goes against the constitutional principle that our democracy encompasses both representative and participatory democracy.
- If this committee proceeds to recommend that constitutional amendments are necessary, it runs the risk of the resulting legislation running the same route as did the *Restitution of Land Rights Amendment Act*. In that case, ***Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*** **2016 (5) SA 635 (CC),** the Constitutional Court found that the NCOP pushed the Bill through on a tight four-week schedule and its consultation process was unreasonable. Even though substantial issues had been raised at the majority of the public hearings in that instance, they were hardly

deliberated on in the NCOP and eight of the nine provinces voted in favour of the Bill. This rendered the public participation process quite meaningless.

- In the case of the *Restitution of Land Rights Amendment Act*, as in the present instance, a truncated timeline was adopted for public participation in order for the legislation to be pushed through Parliament before elections, and the formation of a new Parliament, will cause it to lapse. However, in that case the Court found that "*Nothing was placed before the Court indicating that – beside the desire by Parliament to finalise it before the end of term – the Bill was objectively urgent*", and the resulting truncated timeline was the "root cause" of all the procedural deficiencies that followed.
- In this instance, as in the case of the *Restitution of Land Rights Amendment Act,* the urgency attached to the process is entirely arbitrary and there is no objective reason why the Sixth Parliament cannot consider the proposed constitutional amendments. It is the DA's submission that the process is being abused as an electioneering tool, as was probably the case with the *Restitution of Land Rights Amendment Act* that was pushed through before the 2014 national and provincial elections.

## Arbitrary disregard of certain submissions

- 630 609 written submissions were received by the Committee according to the service provider appointed by Parliament. In the process certain submissions were classified as "duplicate submissions" and were subsequently disregarded. 176 780 duplicate submissions which were identified by analysing the name and surname of the respondent as well as the content in the comment of the submissions.
- However, in the case of the submission of the Institute of Race Relations (IRR) more than 60 000 members of the public chose to use their template to send in their submission. Each submission included the name of the person and contact details submitting their inputs.
- It is apparent that neither the service provider nor the Committee attempted to contact these individuals that sent in their submission utilising the IRR or other organisation's templates.
- According the Hon. Member of the FF+ the IRR has repeatedly contacted the committee following the dismissal of the aforementioned submissions.
- All submissions should be treated equally, and the Committee failed in its duty to include all valid submissions.
- The submissions (around 60 000) submitted by the Democratic Alliance could not be traced amongst the written submissions at 90 Plein Street.

## Integrity of report on written submission questionable

- The report on the written submissions (by a company called isiLumko, that turned out to be a labour broking firm, with no credentials to do the job at hand) that was presented to the committee on the 20th of September 2018 received unanimous rebuke following an attempt to make a presentation by the service provider.
- Members in the Committee found the service provider is a labour broker or recruiting office and that the company is not in the business of producing reports, which destroys the credibility of the report.
- Electronic records such as the emails sent to the Committee Secretary were not readily available to the committee members.

- The procurement procedures in appointing the service provider, isiLumko, were questioned, whereafter the Committee resolved to request Parliament to submit a report on the appointment of the service provider (which has not been presented yet to the Committee).
- According to PMG records of the meeting the Chairperson and Committee agreed on the following:
    - "That the service provider was initially appointed to assist in handling the submissions received on the review of section 25 of the Constitution.
    - Parliament must take ownership of the process and a report must be presented regarding the manner in which the service provider was appointed. A report should be given to the Committee at a later date.
    - The Chairperson excused the service provider. The service provider therefore did not complete its presentation."[1]
- In a committee meeting the ANC's MP Vincent Smith stated that "We took a decision to do a sample and we did a sample [of about 400] and I am happy that from the sample we have an idea of what South African's are saying." Questions remain around the sample that was selected by the committee and whether that sample is representative, or an accurate reflection of the written submissions received.
- Currently the committee has not received a finalised report or presentation on the written submissions following the concerns expressed above nor a report on the appointment of the service provider.

## Report on written submissions allegedly leaked to the ANC party structures

- According to media reports the report on written submissions was allegedly leaked from the Committee to the ANC National Executive Committee in July 2018. According to reports the report was shared at the party's *lekgotla* on 30 and 31 July in Irene.
- It is also alleged that based on the information in the report that showed overwhelming opposition to the amendment of the Constitution, the ANC wanted to open the written submissions process again using their majority in the Committee to do so.
- If the report was distributed to political structures before it was discussed in the Committee, it seriously undermines the integrity of the committee.
- The incident again emphasises the true intention of the ruling party to simply use this Parliamentary process for electioneering purposes. To date, this report has not been made available to the Committee.

## Process has pre-decided outcome

- Soon after the announcement of the of the possible review of the Constitution, the government announced that 139 farms have already been ear marked for expropriation while the Parliamentary process was underway.
- President Ramaphosa's statement on the 31st of July 2018, while the public hearings were not completed, pre-empted the outcome of the process still underway and as a result undermined the work of the committee. Additionally, it had the effect of silencing those not heard by the Committee.
- The committee also seems to have prejudged the issues from the very start. According to reports at its first meeting, before any submissions had been sent in, the chairperson Vincent

[1] https://pmg.org.za/committee-meeting/27106/

Smith made it clear that expropriation without compensation is going to happen, whether people like it or not.

## Amendment will not pass constitutional master

### The limitations clause

The stated mandate of the Committee was 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 where necessary."***

Section 36 of the Constitution requires that a right contained in the Bill of Rights may only be limited in a manner that is reasonable and justifiable in an open and democratic society, by "a law of general application." With any limitation, the following factors need to be taken into account:

- The nature of the right;
- The importance and purpose of the limitation;
- The nature and extent of the limitation;
- The relation between the limitation and its purpose; and
- Less restrictive measures to achieve the purpose.

#### *The nature of the right*

To make it possible for the state to expropriate land in the public interest without compensation, section 25(2)(b) of the Constitution specifically would have to be amended. This section requires that expropriation be subject to compensation.

Such an amendment will infringe on other rights in the Bill of Rights. These include (but are not necessarily limited to):

- Section 25(1), which determines that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"

- Section 26(3), which determines that "no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

- Section 33(1), which determines that "everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

#### *Less restrictive measures to achieve the purpose*

It is in this regard especially that the proposal to change the constitution fails to measure up to the requirements of the limitations' clause. Less restrictive means to achieve the purpose of land reform are available in abundance.

### Test case

The ANC's own submissions to this committee states: *"There were differing views on whether the current S25 of the Constitution is an impediment to Land Reform, especially in as far as Expropriation of Land without Compensation is concerned and that clarity should either be sought through an application to the Constitutional Court directly or through a test case."*

Their submission further recommends: "*That Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation, as a legitimate option for Land Reform (…)"*

If expropriation without compensation is implicit in the Constitution (academic opinions to this effect does indeed exist), then a test case, or an application to the Constitutional Court directly, will be able to confirm this and amending the Constitution will not be necessary.

The proposed constitutional amendment has far-reaching potential implications, which can be avoided altogether by taking a test case to court in order to determine and/or confirm whether our law already allows for expropriation without compensation.

### Other legislative measures not exhausted

Parliament has an appalling track record in the introduction and processing of legislative measures aimed at effecting land reform and addressing historical balances in this regard. On date hereof, a range of legislative measures remain in draft format only or have been languishing unattended for years.

The *Restitution of Land Rights Amendment Bill* (hereafter "RLRAB") was first introduced in the Fourth Parliament, published for the first time as a draft bill in May 2013. It was signed into law by the President on 29 June 2014 as the *Restitution of Land Rights Amendment Act* 15 of 2014 and took effect on 1 July 2014. Just over two years later, on 28 July 2016 the Constitutional Court declared the Act invalid. Parliament was given two years to re-enact it – despite this, the RLRAB was only re-introduced in August 2017, as a private member's bill, and was still being deliberated on in the portfolio committee in September this year, two months after the deadline for its re-enactment had passed.

The *Interim Protection of Informal Land Rights Act*, Act 31 of 1996 (hereafter referred to as "IPILRA"), first adopted in 1996 as an interim stop-gap or holding measure, has been renewed for a further 12-month period every year for the last 22 years, the last time by Minister Gugile Nkwinti in December 2017 (expiring again on 31 December 2018).

The *Extension of Security of Tenure Amendment Bill* (hereafter "ESTAB") was first introduced more than three years ago in early October 2015. It was only adopted by the relevant portfolio committee in March 2017 and then only passed by both houses in June 2018 – it is at date hereof still languishing on the president's desk, awaiting signature.

These examples are demonstrative of the lack of urgency with which an ANC-led government and ANC-dominated Parliament has approached legislative measures to effect land reform and ensure tenure security. It also hints at the range of legislative options that are still available in this regard, were it not for the fact that they are not being processed efficiently or implemented properly. It confirms that not all remedies available to Parliament has been exhausted.

### High Level Panel recommendations

The Mandate of the Panel was to examine the extent to which current laws and legislation uphold and fulfils rights to equitable access (redistribution), tenure security and restitution as stipulated in Section 25 of the Constitution and identify proactive inventions to address shortcomings identified.

The High-level panel found via commissioned research reports, roundtables and public hearings that profound problems in the conception and implementation of the land reform programme exist.

The High-Level Panel report contains several key recommendations which has been largely ignored by the ANC government and Parliament. These include a test case to determine whether or not the Constitution allows expropriation without compensation, enacting relevant legislative measures, and finally the implementation of existing legislation.

The Democratic Alliance holds the view that this process SHOULD NOT be finalised, nor should any report or draft report be discussed by the Committee until the Committee has engaged meaningfully with the High-Level Panel Report, and at least some of its authors.

The Democratic Alliance also holds the view that meaningful engagement by the Committee with the Surveyor General is vital to this process.

In order to give the process on which Parliament has embarked upon, at great expense, credibility, it is important that the process is concluded properly and meaningfully. It will render the public participation process nugatory if the report by the Constitutional Review Committee is rushed, pre-determined and finalised, without properly considering all the inputs of various roleplayers and reports at hand.

## Expropriation without compensation fails to address real constraints in the land reform process

South Africa suffers from a history of systematic exclusion of black people from land ownership, facilitated by discriminatory laws. The effect of this dispossession was to destroy the intergenerational wealth creation potential of black families, and to leave many South Africans without legally protected ownership of land. That is why the DA fully supports the constitutional injunction to restitute land and reform the still-skewed patterns of land ownership.

The debate on expropriation however allows government the perfect cover to avoid having to explain their rank failure over two decades to take land reform seriously.

That is why the ANC has adopted it with such enthusiasm which they voted against last year.

In the words of Albie Sachs: “Far from being a barrier to radical land redistribution, the Constitution in fact requires and facilitates extensive and progressive programmes of land reform. It provides for constitutional and judicial control to ensure equitable access and prevent abuse”.

The High-level panel report chaired by Kgalema Motlanthe, states that “the need to pay compensation has not been the most serious constraint on land reform in South Africa to date” – other constraints including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity have proved more serious stumbling blocks to land reform.”

- **Evidence of Corruption:** Nepotism and corruption have plagued the current land reform process where the ANC elite have directly benefited. This is epitomised by the Vrede Dairy Farming project corruption saga where the poor were side-lined for the alleged benefit of the Gupta family, reportedly facilitated by Mosebenzi Zwane and Ace Magashule.
- **Lack of Political Will:** The ANC’s lack of commitment to real reform is revealed in the meagre budget allocations to these programmes over the years. Last year, only 0.14% of the national budget was allocated to land reform, the lowest figure ever. This budget has been in decline

every year for the last ten years. Far from showing tangible commitment to speed up land reform, the ANC has been deliberately slowing it down.

- **Lack of training and capacity:** At the land claims commission huge capacity issues persist. At present rate of finalisation 560 claims a year, it will take 35 years for all "old order" claims to be settled (currently there is 7 000 unsettled and more than 19 000 "old older" claims that remain unsettled.)
- **Lack of post settlement support:** The ANC-led national and provincial governments have attributed to the massive failure rates of the land reform programme by not providing adequate training and post-settlement support.
- **Reluctance of government to cede ownership:** In the interest of restoring dignity and enacting real land reform in South Africa, ownership should be restored to those dispossessed due to past discriminatory laws. Under the current land reform policy, the Proactive Land Acquisition Strategy (PLAS), the state custodianship is implemented, and beneficiaries remain tenants for life. Worryingly the ANC government also has the "use it or lose it" strategy where farmers who did not received adequate support are forced off land. In both cases they deserve full ownership and adequate post-settlement support.

## Expropriation without compensation has serious unintended consequences

- The prospect of being deprived of assets without compensation would be a major disincentive for investment, which will inevitably impact on the involvement in agriculture by investors and farmers alike as land can no longer serve as collateral which erodes property rights.
- Most productive agricultural land is bonded to financial institutions under a total debt of approximately R160 billion. What will happen to that debt should the encumbered farms be expropriated without compensation is unsure.
- Expropriation without compensation is implemented may cause ripple effects on the Banking sector especially Land Bank that may have to pay back up to R41 billion to investors.
- Uncertainty surrounding land expropriation without compensation has already impacted investment and growth in the agriculture sector with the sector contracting by nearly 30% (Q1 of 18/19).
- There is no such thing as expropriation without compensation, because what the government refuses to pay in compensation will effectively be paid for through the negative effects that the beneficiaries experience including devaluing their property, as well as the ripple effects in the wider economy.

## Recommendations on the potential amendment to the Constitution

Following the Constitutional Review process the Democratic Alliance makes the following recommendations:

1. The current Constitutional provisions adequately allows for progressive land reform, restitution and the protection of tenure security and land rights. Successful land reform doesn't require amending the Constitution.

2. Other mechanisms and legislative measures are not exhausted. Parliament through leadership of the ANC has not enacted appropriate legislation to lend effect to constitutional provisions that currently exist.

3. Expropriation without compensation does not address the real constraints in land reform. Other constraints including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity have proved to be the real stumbling blocks to land reform.

4. There are serious consequences inherent to amending the Bill of Rights, which includes legal uncertainty and the infringement on a variety of other rights set out in the Bill of Rights.

5. Expropriation without compensation holds a real and tangible threat not only to existing land rights of all South Africans but also threatens investment, the banking industry and food security due to the fact that “property” is not limited to land.

6. Procedural issues with the public participation process potentially compromise the process followed by the committee due to a failure to fully and meaningfully engage with and consider all submissions to the Committee.

7. Any proposed amendment will likely fail to meet Constitutional muster.

The Democratic Alliance is thus against amending the Constitution to explicitly accommodate expropriation without compensation as same is already permissible and recommends that the Committee, based on merits of the argument and for the sake of all South Africans, reject any amendment to the Constitution.