**4. Report of the ad hoc Committee to amend section 25 of the Constitution of the Republic of South Africa, 1996, dated 13 March 2019**

1. **Introduction**

Following the adoption of the Report of the Joint Constitutional Review Committee on the possible review of section 25 of the Constitution, the National Assembly resolved to set up an *ad hoc* Committee to undertake the work in amending section 25 of the Constitution in order to make explicit that which is implicit in the Constitution, with regards to expropriation of land without compensation.

In approaching its work, the ad hoc Committee appreciated that in amending the Constitution, there are specific legal prescripts that must be followed and therefore sought legal advice from the Parliamentary Legal Services. The ad hoc Committee was mindful that the task of amending the supreme law of the land must be undertaken with all the sensitivities required and ensure that such an amendment will meet the various objectives among which, being nation building. Therefore, in developing a work program the ad hoc Committee ensured that all processes were undertaken so as to achieve consensus on the outcome.

This report therefore gives an outline of the work done since the constitution of the ad hoc committee which will give the National Assembly the scope of work that the committee should follow in amending the Constitution.

1. **Mandate of the Committee**
   1. On 6 December 2018, the National Assembly noted that the Report of the Constitutional Review Committee (CRC) on the Review of section 25 of the Constitution, 1996was adopted by the Assembly and the Council on 4 and 5 December 2018 respectively, recommending that Parliament, amongst others –
2. amend section 25 of the Constitution 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, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs;
3. urgently establishes a mechanism to effect the necessary amendment to the relevant part of section 25 of the Constitution; and
4. tables, processes and passes a Constitutional Amendment Bill before the end of the Fifth Democratic Parliament in order to allow for expropriation without compensation;
   1. The National Assembly resolved to establish an *ad hoc* committee in terms of Rule 253 of the Rules of the National Assembly, and mandated the committee to initiate and introduce legislation amending section 25 of the Constitution. The ad hoc committee was instructed to have regard to the recommendations as contained in the Constitutional Review Committee report.
5. **Constitution of the Committee**
   1. The ad hoc committee was established by resolution of the National Assembly as provided in Rule 253(1)(b) of the Rules of the National Assembly. The Resolution provided that the Committee should consist of 11 voting members and 14 non-voting members. On 5 February 2019, the Speaker of the National Assembly published the names of members of the committee in the Announcements, Tablings and Committee Reports (ATC), No 6-2019, as follows: voting members of the Assembly: African National Congress 6, Democratic Alliance 2, Economic Freedom Fighters 1 and other parties 2; and non-voting members of the Assembly, as follows: African National Congress 2, Democratic Alliance 1, Economic Freedom Fighters 1 and other parties 10.
   2. At its first meeting, held on 12 February 2019, the Committee noted that the Inkatha Freedom Party had two voting members. The Committee agreed that this was incorrect and resolved to approach the Chief Whips Forum and the Speaker so that membership of the committee could be corrected. On 21 February 2019, the Speaker corrected the representation of the IFP in the Committee and published further names of members to represent other parties in the ATC. **(Annexure A).**
6. **Process followed/programme outline**

The Committee had its first meeting on 12 February 2019, where Mrs AT Didiza was elected Chairperson of the Committee. On 21 February 2019, the Committee agreed to adopt its programme **(Annexure B)** and undertook to do proceed as follows:

* Briefing by Legal Services on the legislative process and the High Court application by Afriforum;
* Briefing on the summary of the Report of the Joint Constitutional Review Committee on the Review of section 25 of the Constitution;
* Presentations by identified experts;
* Committee discussions on Policy framework that will inform the drafting of a Committee Bill;
* Presentation of Committee Bill by Parliamentary Legal Services and Committee deliberations on the Bill;
* Public participation process on the Bill, including referral to the National House of traditional Leaders and Provincial Legislatures;
* Tabling of reports on the Bill;

1. **Presentation by Legal Services on processes to initiate a Committee Bill and to amend the Constitution**
   * 1. The Constitution outlines the process that Parliament should follow when considering a Bill amending the Constitution. The Committee agreed to a briefing on the process so as to ensure that its processes were constitutional.
     2. Adv. C van der Merwe briefed the Committee and indicated that:

* The Committee should prepare a draft Bill and memorandum on the objects of the Bill.
* The Bill should only include provisions related to the constitutional amendments and matters connected with the amendments.
* The Bill should be published for comments in the government gazette.
* The Bill should be referred to the National House of Traditional Leaders and Provincial Legislatures.
  + 1. The Committee noted the presentation **(Annexure C)** and requested Legal Services to draft a clear roadmap (with timeframes) on the process to be followed. The roadmap will assist the committee in determining what can be done before the general elections scheduled for 8 May 2019.

1. **Afriforum NPC v Chairperson of the Joint CRC of Parliament and Others**
   * 1. The Committee also noted the High Court application brought by Afriforum NPC against the Chairperson of the Joint CRC of Parliament and Others and agreed to invite Parliamentary Legal Services to brief it on the implication(s) of the application to the Committee’s processes. The Committee wanted to establish the facts of the case; seek guidance so that it could avoid any possible mistakes committed by the CRC; and to understand the nature of the order granted by the court.
     2. Mr N Mjenxane briefed the committee and indicated that (**Annexure D)**:

* Afriforum had sought an urgent interdict to suspend the decision of the Constitutional Review Committee (CRC) taken on 15 November 2018 (Part A of the application) and a declaratory order declaring the report of the CRC and its decision to adopt the Report to be constitutionally invalid (Part B of the application).
* The Court dismissed Part A of Afriforum’s Application and directed the Parties to agree to a timetable in order to bring Part B before the Court.
* Mr Mjenxane highlighted that there was a view that the Afriforum matter was moot, as the challenge had been overtaken by current events. The Afriforum decision was not an impediment to the work of the ad hoc committee. The *sub judice* rule also had no bearing on the work of the ad hoc committee.
  + 1. The Committee noted that the Afriforum order had no bearing on its work and agreed to continue with its processes.

1. **Summary of the Report of the Joint Constitutional Review Committee**
   * 1. The Resolution of the National Assembly required the committee to have regard to the recommendation of the CRC when initiating and introducing legislation amending section of the Constitution. Mr S Denyssen, Content Advisor, briefed the committee on the process followed and recommendations made by the CRC. The purpose of the presentation was to highlight key aspects of the CRC Report **(Annexure E).**
     2. The Report listed the following key observations:

* Inequality and skewed land ownership continues to exist.
* The dispossessed expressed the view that very little was being done to redress the skewed land ownership patterns.
* The security of tenure for farm workers, farm tenants and those residing on communal land held in a Trust must be assured.
* Corruption, an insufficient budget for the land reform process, and a lack of capacity within the state were some stumbling blocks that stymied land reform.
* The State should formulate a clear strategy for land redistribution to address the injustices of the past that was inflicted on the majority of South Africans.
* While the Constitution implicitly provided for expropriation of land without compensation as a legitimate option for land reform, it needed to be explicitly stated.
  + 1. The CRC recommended that:

1. *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, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.*
2. *That Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant part of Section 25 of the Constitution.*
3. *Parliament must table, process and pass a Constitutional Amendment Bill before the end of the 5th Democratic Parliament in order to allow for expropriation without compensation.”*
4. **Briefing by Experts**

* When the programme of the Committee was considered, members proposed names of experts to advise the Committee on the policy that would inform the amendment to section 25 of the Constitution. All suggested experts were approached, but a few could not assist. Former Deputy Chief Justice Moseneke was not available due to prior commitment with the Presidential Envoy to Lesotho and Adv. Ntsebeza expressed concern over possible conflict of interest. The Management Committee decided not to invite Deputy Judge President M Madondo given that he is a sitting judge. The Management Committee also took the decision that AgriSA, PLAAS; Nkuzi Development Association and other practitioners should participate during public hearings on the Bill.
* The experts were requested to offer advice and respond to the following question: *“Considering the Report of the Constitutional Review Committee and the proposed amendment of section 25 of the Constitution, what would your views and suggestions be on the sections to be amended and why?”* The following people/experts made presentations before the committee:

a) Mr MV Moosa

b) Retired Judge A Sachs

c) Prof. R Hall

d) Mr P Meakin

e) Adv. W Trengove

f) Adv. T Ngcukaitobi

g) Acting Valuer General

* The presentations received by the Committee are discussed in short below:
  1. **Input by Mr MV Moosa**
     1. Mr Moosa’s presentation focused on the Constitution making process. He pointed out that this is the first time that the Bill of Rights is being amended. Mr. Moosa cautioned that the Committee must carefully consider what it wants the country to look like in 20 years and from that vision draft an amendment. He requested that the Committee communicate more with the people. He said that the people do not realise that land reform is a global question and that this process is part of a very necessary debate.
     2. He reminded the Committee that when considering why the Constitution is the most trusted brand in South Africa, it will become clear that it is not only because it is worded in such a way that it is one of the best Constitutions in the world, but also because of the process that was followed to adopt it. Society owns the Constitution and it must own any amendment that is made. He pointed out that it is absolutely legal to amend the Bill of Rights and section 74 of the Constitution sets out the minimum requirements for the procedure to do so. The Rules of the National Assembly also expands on this. He however proposed that although the Constitution and the Rules set out the requirements to amend the Bill of Rights, the Committee should go further and ensure that the amendment contributes to nation building and becomes a legitimate document that is accepted by the people. This process, being the first of its kind will set a precedent and he encouraged the Committee to invent a process to amend the Bill of Rights. He cautioned that the amendment of the Bill of Rights is not the same as amending an Act of Parliament: It cannot happen every few years. He commended Parliament for the process followed to date, especially in respect of the public hearings held by the Constitutional Review Committee.
     3. He cautioned that in amending section 25, the Committee must take care not to dispossess those who have been dispossessed in the past. Black people are now owning property. The Committee cannot cause uncertainty for these people and take a step backwards that puts them back in an era where they did not have security of tenure and could not own property.
     4. He suggested that regular and clear communication of what the Committee is doing and what rights the Committee aims to affect with the amendment to section 25 (land only), will assist the economy as potential investors are currently fearful of what the proposed law might contain. The type of property affected must be clearly defined. Property is not limited to land – see subsection (4)*(b)* of section 25. The Committee must be clear on what its mandate is and focus on that in the amendment. A question was raised on whether water should be included in the amendment related to expropriation without compensation. Mr. Moosa reminded Members that water is owned by the state. However, it would not be sensible to provide a person with agricultural land without water. When drafting a Bill, this must be kept in mind.
     5. Mr. Moosa made it clear that section 25 was never intended to protect land that was stolen. It was not a “sell out” clause. It was very carefully considered before including it into the Constitution. It created a fair balance to acknowledge existing ownership, but addressing injustice. One of the most humiliating things of Apartheid was that Africans could not own land and could be removed without notice or compensation. This was foremost in the minds of those who crafted the current section 25. That is why the concept of “willing buyer – willing seller” was not included in section 25. He opined that it was the right thing to include this right in the Bill of Rights. His view is that it is not the wording of section 25 that is the main obstacle, there are other factors that are more of a concern. At most, section 25 is a peripheral obstacle. He commented that land restitution has a dismal record when it comes to implementation, but he pointed out that this performance concern is not within the mandate of the Committee, but rather an issue that should be addressed through oversight.
     6. A question was raised on the inclusion of 1913 into the section and Mr Moosa indicated that the 1913 Act was central to the struggle and it provided a neat cut-off point. The Constitution does not limit any person who suffered an injustice before 1913 from seeking redress.
  2. **Input by Retired Judge A Sachs**
     1. Judge Sachs expressed concern at the apparent haste with which the amendment is approached and he cautioned that the drafters of the Constitution were very careful when it was drafted and set out procedures that must be followed when amending it. He proposed that the amendment Bill could either be a short amendment, or it could contain a preamble. A preamble could result in more debate, but it would guide future generations and courts when considering the amendment contained in that Bill. He also proposed that the conclusion in the Constitutional Review Committee’s report could assist the Committee in drafting such a preamble. He also indicated to the Committee that he has wording to propose once the Committee is ready to provide the instruction to draft a Bill.
     2. Judge Sachs pointed out that providing for expropriation without compensation in the Constitution, would be insufficient to address the failures of land reform. More is needed: Amongst others, a programme of implementation must be developed. He also referred to the High Level Panel Report and its inputs on and reform and the failures to date in this regard. He indicated that he has not applied his mind to whether new national legislation is required, or if existing national legislation could simply be amended to address any shortcomings.
     3. Judge Sachs commented that South Africa needs a new property dispensation. Countries have different systems of regulating property. In South Africa we adopted the Roman Dutch Law. He used the examples of Sectional Title, a concept that was strange to Roman Dutch law. It involved buying a house but not owning the land on which it is built. Now this concept is accepted. He also referred to the Ingonyama Trust and the questions around ownership that is currently being discussed. People want the security of a legal title, but in African culture the concept of the land belonging to one person is foreign, rather stewardship of the land is more accepted. When mining rights are exercised people must be compensated. He also mentioned other concepts that could be considered such as 50:50 ownership, overlapping rights, share-holding, shared interest that could incrementally become more in favour of the workers on the land, mixed ownership, land tenure and environmental conservation as a few examples. He stressed that the first step in nation-building is to acknowledge the tension that exists and then find solutions and work together. Judge Sachs did mention the Law Reform Commission, but was also concerned that going that route may take too long.
     4. Judge Sachs acknowledged that a lot of his comments refer to the “how” of land reform, which is not in the mandate of the Committee. It is perhaps something that the Committee could refer to as a need in its report to the House.
     5. Judge Sachs cautioned against excluding courts from the process. Although court processes are abused to draw disputes out, courts are also the bulwark against risks such as corruption and nepotism. There should be a good balance between courts being an external control, and not delaying the process. The Rule of Law aspect of Land Reform is essential to the process and must be overseen by the judiciary. It must play a crucial role in the amendment and its role must be strengthened to enable it to operate effectively.
  3. **Input by Prof R Hall** (**Annexure F)**:
     1. Prof Hall reflected on the development of the Constitution and stressed that the Constitution does not protect a right to private property. The idea was to create a Constitutional rights framework which would place a duty on the state to enable the landless to obtain land.
     2. She referred the Committee to the timing and manner of payment of compensation referred to in subsection (3), but indicated that there is not case-law on this aspect yet that she could access to advise the Committee on.
     3. Prof Hall highlighted subsections (5), (6) and (7) as the three pillars of land reform, with subsection (8) being the overarching provision. If section 25 is read as one, subsection (8) clearly states that the requirement of compensation cannot be a mechanism to stop land reform. When considering compensation as contained in the Constitution, Prof Hall reminded Members that the Constitution only requires that compensation is just and equitable. It is not linked to market value. She described the purpose of expropriation as a tool to break a deadlock, a tool to speed matters up and to do it cheaply. But the problem with expropriation according to her does not lie in the wording of section 25.
     4. Prof Hall presented four options to the Committee regarding expropriation without compensation. The first was a form where the state takes custodianship of all land. She pointed out that in this model, that custodianship would not constitute expropriation. She referred to the case of Agri South Africa versus the Minister for Minerals and Energy, Case CCT 51/12 [2013] ZACC 9 (“AgriSA case”) where the Constitutional Court found that it does not constitute expropriation if the state does not benefit from the deprivation of property (in that case, minerals). She did caution that it cannot simply be accepted that the state would give property away for free though. The second option presented by Prof Hall was to always expropriate without compensation and in this regard she cautioned that such a policy would violate even the limitations clause in the Constitution (section 36) as well as section 1, as it would treat all people the same without regard for individual circumstances, including whether the person was previously disadvantaged or not. The third and fourth options related to compensation only being withheld in certain circumstances, either without (option 3) or with (option 4) an amendment to section 25. In respect of an amendment, she identified subsections (2)*(b)* and (8) as possible areas for amendment.
     5. Prof Hall also provided an example of Brazil where the requirement is that land should perform a social function. This example shows what could be done if citizens are given more power.
     6. Prof Hall made the following proposals:

a) Parliament should expedite the Expropriation Bill.

b) A compensation policy should be developed. The manner of calculating compensation needs to be clarified.

c) There should be a Land Records Bill as well as legislation related to the Administration of Land.

d) A Land Redistribution Bill should be drafted and expedited.

* + 1. Prof Hall stressed that Parliament should not only look toward restitution as a solution, but must consider redistribution of land as well. She criticised the processes around restitution of land as it is slow and promises were made that were not kept. Redistribution of land can be done faster and will enable the state to make good on these promises.
  1. **Input by Mr. P Meakin** (**Annexure G)**:
     1. Mr. Meakin made a presentation to the Committee on the concept of “working villages”, where a community is developed with the focus on the community becoming self-sufficient. This would contribute to food security. The concept could also be used in respect of social housing schemes in urban areas. He also commented on providing security of tenure in perpetuity where a person occupies more than 250m2 of land. The major part of his presentation focused on possible mechanisms to address land reform. As this falls outside of the mandate of the Committee, his presentation is not included here, but it is attached to this report for consideration. He acknowledged that it is possible to amend section 25 and specifically to provide more clarity. In this regard his proposals focused on using vacant or unused land in all land reform processes, considering the inclusion of indirect subsidies, as well as replacing the income tax regime and value added tax regime with a land tax regime.
  2. **Input by Adv. W Trengove**
     1. Adv. Trengove started his presentation by reminding the committee that the objective is the need to redistribute land to address past injustices and not only just about restitution. Restitution is very important for land reform and is a very important part of restorative justice, however the object is also about redistribution in order to ensure equality. He advised the Committee to continue to ask itself “what is it that this Committee wants to achieve?”. How far will Parliament go in amending the Constitution? These questions should remain the focus of Parliament, as amending the Constitution may affect other constitutional rights.
     2. Adv. Trengove spoke of “three spaces in section 25” that already allows for expropriation without compensation: The first space relates to the case of Agri South Africa v Minister for Minerals and Energy CCT51/12 [2-13] (Agri SA case). Adv. Trengove pointed out that it must be understood that the taking of property does not constitute expropriation if the State takes land only to distribute such land, and does not take it for itself. This would constitute deprivation under section 25 (1). He directed members specifically to paragraphs 58, 59, 67 and 69 of the judgment. He is of the view that should section 25 be amended to provide for expropriation without compensation, it cannot be applied to the space created by the Agri SA case because the deprivation of property according to the principles set out in the Agri SA case does not constitute expropriation. The Agri SA case provides an ideal opportunity to the State to effect redistribution.
     3. The second space is contained within section 25, which provides for legislation that deals with redistribution. Although section 25 has its own inbuilt limitations he reminded members that the rights that are built into section 25 can also be limited by section 36 of the Constitution. He stressed that currently as it stands section 25 does not require the concept of “willing buyer – willing seller”, but rather section 25 strikes a balance between the owners’ rights vs the rights of the nation who are entitled to redistribution. He pointed out that the willing buyer-willing seller concept is only contained in national legislation and is not a constitutional requirement.
     4. In his discussion relating to the third space, Adv. Trengove reminded the Committee that the rights entrenched in the Constitution are not absolute. This is why the spirit of the Bill of Rights is wide and undefined. Very few of the rights clauses are explicit in spelling out a right. It allows for change in society. Adv. Trengove cautioned that when amending section 25 the impact of the right should be looked at together with the limitations clause, section 36. The rights contained in the Bill of Rights evolve over time, through the interpretation of the Courts. Parliament should therefore provide the “meat” to section 25 rather through the enactment of national legislation. Furthermore, section 25(8) reminds us that the right to property is not conclusive. Nothing within the section prevents Parliament from limiting the rights set out in section 25 to ensure land reform.
     5. According to Advocate Trengove it is the current Expropriation Act that does not do justice to the freedom of expropriation, and expressed the view that the Expropriation Bill does not go far enough to address the mischief that envisaged with land reform and could be much more dynamic in enabling the state to achieve its land reform goals. He gave an example of how this could be achieved: The Bill could include a “presumption of privilege” when land is owned by a white owner. If ever the origin of land is disputed and the owner is white, that owner then has the burden of proving that the land was not acquired through the dispossession of people or through laws that catered for white privilege during Apartheid.
     6. Adv. Trengove concluded that although he was not of the opinion that the Constitution required an amendment as a matter of law, but going back to what the committee seeks to achieve, perhaps it is a political imperative in order restore the land balance. However, the Constitution may not be the correct place to create this imperative.
  3. **Input by Adv. T Ngcukaitobi**
     1. Adv. Ngcukaitobi began his presentation with a reminder of the three aspects of land reform: Tenure security, redistribution and restitution. In his opinion these have not been translated into a practical reality. He stressed that Parliament should not only look toward restitution as a solution, but must consider redistribution of land as well. Parliament must think creatively when addressing land reform, and think beyond compensation. Restitution cannot correct the historical problem alone as restitution has inbuilt limitations and these will not be resolved by debates on compensation. He proposed that it may even be necessary to delink compensation and land reform as the current disputes about compensation is delaying expropriation. This could entail an amendment related to subsection (3) in respect of “time and manner” of payment.
     2. He then proceeded to unpack the three reasons behind the failure of restitution, which included the cute off date of restitution claims which is set by 1913 (as referred to in section 25(7)). He pointed out that only 7% of all land was controlled by Africans by 1913, therefore even if all that land was returned, there would still be serious inequality in respect of land ownership. He also pointed out the effects of urban migration, even across borders of provinces: People are occupying inner cities and not agricultural land. Adv. Ngcukaitobi reminded the Committee that redistribution of land is future looking whereas restitution is backward looking. Secondly the focus has changed significantly from the first document on the topic “Ready to Govern”, issued in 1992 where is discussed in detail. The focus was on redistribution as there was a need for land. That concept was transformed into the words used in section 25, “access to land on an equitable basis”. In 1994 the next document, “RDP” tried to give effect to “Ready to Govern” but with time the focus shifted to restitution. “RDP” envisaged the Land Claims Commission and Court to only exist for five years and that redistribution of commercial farms would occur at about 6% per year – that was more or less the percentage of commercial farms available on the market each year. The state tried to give due consideration to tribalism, but at the time found it difficult to settle who owns what land. Restitution has slowed down to a rate that is less than annual commercial sales. Adv. Ngcukaitobi stressed that there is in fact not enough land in South Africa that will address the past injustices through restitution – the population has increased many times, but South Africa still only consists of so many hectares. He pointed out that redistribution can however only be affected by national legislation and not through an amendment to the Constitution. Adv. Ngcukaitobi expressed the view that in fact there was no need to amend section 25, it was rather a case that Parliament itself has failed to implement the redistribution provisions within section 25 through the enactment of national legislation (he did however acknowledge the political need to amend the section).
     3. Adv. Ngcukaitobi considered the reasoning behind compensation, and delved into the history behind the requirement for compensation of land. He pointed out that the individual who is the holder of the property should not be burdened by a national problem, and for this reason the state compensates that individual for the national good. It for this reason that he stressed that only courts or an independent and impartial tribunal should be able to determine whether no compensation is payable. The Rule of Law aspect of land reform is essential to the process and must be overseen by the judiciary. The judicial arm of land reform must be strengthened so that it can operate effectively in this process. This would also ensure that there was a balancing of the rights of the owner and the right of the person seeking redistribution. He cautioned leaving this decision to the executive. Adv. Ngcukaitobi informed the Committee that either the amendment to section 25 or national legislation must take cognisance of all the role players in the ownership of land. Land is often purchased subject to finance. If land is expropriated without compensation, the state cannot take on any mortgages that are still on that property, as that would still result in an expense to the state. It is also open for abuse. It seems that owners are currently re-mortgaging property as a guarantee against expropriation without compensation. He recommended that the Committee should unpack the risks around mortgages and agree on a policy direction.
     4. Adv. Ngcukaitobi warned that any amendment of section 25 that includes expropriation without compensation may lead to further dispossession of land from indigent people, and the example of mining rights conferred in terms of the Mineral and Petroleum Resources Development Act was provided. In these instances, the only recourse some communities have against mining companies lies within the current formulation of section 25(3) and the right to just and equitable compensation. However, with due consideration to aforesaid, Adv Ngcukaitobi made considerable proposals (**Annexure H)** to the amendment of section 25 and these are captured in paragraph 9 of this Interim Report.
  4. **Input by the Acting Valuer-General** (**Annexure I)**
     1. The Valuer-General uses both market value and production value (or the value of the use of the property). Members were questioning how the fact of being forcefully removed from your property is included in this calculation. The Office of the Valuer-General pointed out that it does not determine compensation but rather value and thus this consideration is not yet included. In their opinion the need for a policy may not be part of the constitutional amendment, but the need for a policy to define how calculations should be done is needed.
     2. The Office of the Valuer-General unpacked its “formula” that it used when determining value and explained that this is set out in section 25(3)*(a)* – *(e)* of the Constitution. In their experience although these factors are useful, they have difficulty in accessing information. The Office of the Valuer-General is of the opinion that using the current “formulae”, could result in a “just and equitable value”, and that such value could be closer to zero by applying these factors set out in section 25(3)*(a)* – *(e)*. This is often achievable where land is unproductive or abandoned therefore the current value of a property equals zero and further where the state subsidies and benefits on property are equal to or greater than the present market value of the property, i.e. municipal land. It is for this reason that the Valuer-General felt that it would be practical to amend section 25(3)*(a)* to “current use value of the property” as opposed to “current use of the property”. Lastly, more than often the Office of the Valuer-General cannot calculate the extent of direct state investment as per section 25(3)*(d)* as there is a reliance on the owner to provide such information. Therefore, a practical amendment to this factor must be made.
     3. However, the Office of the Valuer-General felt that the Expropriation Act should be aligned to the Constitution and any possible amendments. The Office of the Valuer-General warned Parliament that the amendment should be practical, as the Office rely on the factors contained in section 25(3)*(a)* – *(e)*. The Office of the Valuer-General welcomed any regulations to the Expropriation Act that would assist it by providing explicit criteria so to ascertain how the land to be expropriated without compensation will be identified so as to minimise uncertainty in the market. Furthermore, the Office of the Valuer-General questioned how zero compensation would affect bonded properties, and who would reimburse the banks. The Office of the Valuer-General questioned that if the state would be reimbursing the banks, what would be the overall implications on the fiscus of the government?

1. **Amendments proposed by the Experts**
   1. Some of the experts who presented, did not restrict themselves to the question that they were asked to respond to, but they also made some proposals on how section 25 could be amended to make explicit that which is implicit in the Constitution as well as to address current challenges.
   2. The following were proposed in respect of the drafting of a Bill to amend the Constitution. Some presenters also provided inputs that went broader than the mere inclusion of the explicitly stated” expropriation may be done without the payment of compensation”.

* Preamble: If the Bill includes a preamble it would show the purpose of the amendment and the role of the Bill in the country. The concluding paragraph of the Constitutional Review Committee report could be used as a preamble as it acknowledges that an injustice exists, but it also acknowledges existing rights.
* S25(2):
  + A proposal was made that this subsection could be amended to empower the Land Claims Court, or another forum as the rate of restitution has slowed down significantly. There are periods where there are no judges available. The proposal in this regard was to include the words “any other independent and impartial tribunal or forum established by an Act of Parliament” after the words “approved by a court”.
  + S25(2): This subsection could also house the condition that expropriation does not always require compensation. The proposal made was to include a proviso: “Provided that a court or such tribunal or forum may determine that no compensation is payable to the owner of land in the event of expropriation of land in the public interest for the purposes of subsection 4*(a)*.” The proposer cautioned against the executive deciding on no compensation being payable, and suggested that it should be the courts that makes this decision.
* S25(3):
  + A proposal was made for a consequential amendment to the introductory sentence of this subsection: “Where compensation is payable” could be added to start of section 25(3).
  + The general view is that the current formula set out in this subsection results in a “just and equitable value”, and that such value could be as little as zero by applying the factors set out in paragraphs *(a)* – *(e)*.
  + It was proposed that to assist in the calculation of compensation the word “value” could be included after the words “current use” in paragraph *(a)*.
  + In respect of paragraph *(c)*, a proposal was made that market value should not be applicable to unused or vacant land and that rental from such land should be deemed to belong to national government.
  + A proposal was made that paragraph *(d)* should include indirect state investment and subsidies in the acquisition and beneficial capital improvement. A concern was however expressed that it is already difficult to calculate the effect of direct state subsidies and state loans.
  + There was also a suggestion that the Committee could consider the words “time and manner of payment”. Of expropriation was de-linked from compensation, compensation could be paid at a stage after expropriation and not as part of expropriation.
* S25(4): A proposal was made that paragraph *(b)* could include a sentence that read “except as a last resort, property to be expropriated in the public interest, but must be confined to unused or vacant land, excluding man-made improvements.”.
* S25(5):
* A suggestion was made to include the following sentence after the words “equitable basis”: “with due regard to the economic and social circumstances of the intended beneficiaries”. This would assist in ensuring that expropriation does not benefit the elite but rather enable the landless to benefit.
* Another proposal was to provide in subsection (5) for the “gradual replacement of all income taxes and VAT with land rents”.
* S25(8): It was proposed that to make what was implicit, explicit, section 25(8) could be amended so that the underlined portion is inserted: “No provision of this section, including the payment of compensation, may impeded the state from taking legislative and other measures to achieve land, water and related reform, in order to redress…”

1. **Recommendation**

The ad hoc committee recommends that the National Assembly:

1. Takes note of the approved programme of the committee;
2. Acknowledges that the task of amending section 25 of the Constitution cannot be concluded during this parliamentary term; and
3. Resolves that the 6th Parliament concludes the matter.
4. **Acknowledgements**

The ad hoc committee welcomes and appreciates the input presented and acknowledges the contribution by all Support Staff.

***(Please note that copies of the annexures can be obtained from the National Assembly Table).***