**The Eighteenth Constitution Amendment Bill**

**Submission to the Ad Hoc Committee**

**to Initiate and Introduce Legislation Amending Section 25 of the Constitution**

**11 August 2021**

## 1. Introduction

The Helen Suzman Foundation ("**HSF**"), as a non-governmental organisation, has been an active participant in a variety of public interest areas in South Africa over many years. Its essential aim is to promote constitutional democracy in South Africa, with a focus on good governance, the rule of law, transparency and accountability.

The Ad Hoc Committee on the Amendment of Section 25 of the Constitution adopted the text of a revised Eighteenth Amendment Bill to the Constitution ("**the Bill**") in July 2021. Given the importance of land reform in South Africa and the national debate on whether Section 25 of the Constitution needs to be amended to provide for expropriation without compensation, the HSF wishes to submit its comments to Parliament on the text of the Bill.

## 2. Why the Bill is unnecessary

There is nothing in Section 25 that precludes compensation for expropriation from being small (or nothing at all), if that is the result of taking all relevant circumstances into account, and that at all times, the rule of law is not violated.

Section 25(8) specifically provides for the overriding importance of measures relating to land reform. This subsection reads as follows:

> "No provision of this Section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this Section is in accordance with the provisions of Section 36(1)."[1]

[1] Section 36(1), which is referred to at the end of Section 25(8), provides that: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and

The formal criteria to be applied for determining the amount of compensation, are set out in Section 25(3) of the Constitution, which reads as follows:

> "The amount of the compensation, and the time and manner of payment, must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
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> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation."

Little or no compensation could therefore be considered where land has been unutilized for a considerable time, from which the owner is deriving no income, which provides no employment, where there are no plans to use the land in a productive manner. Where there is real immediate potential, either for agricultural or urban purposes, that land could be included in the Government's land reform programme. The history of the property and the way in which it was acquired may also be relevant, together with the market value of the property.

Section 25(3) makes it very clear that all relevant circumstances must be taken into account, quite apart from the specific aspects that it mentions individually. Any legislation permitting expropriation that is not in line with Section 25(3), will be unconstitutional, and if challenged, it will be set aside by the Courts. The proposed constitutional amendment recognises as much.

Our view remains that Section 25 of the Constitution already makes provision for expropriation without compensation. This is confirmed by the wording of the preamble to the Bill, which states that what is implicit in Section 25 must now be made explicit. As a result, we do not see why it is necessary to make the envisaged change to the Bill of Rights, which has a fundamental status in the Constitution, even if the proposed changes are to be limited to land reform.

It is desirable that the Constitution, which establishes the basis upon which all other laws rest, should remain stable. This is particularly so in the case of the Bill of Rights. It should only be amended where there is a pressing need that cannot be resolved through ordinary legislation. This is reflected in the requirement that a supermajority be obtained in Parliament in order for a constitutional amendment to be passed.

For these reasons, we are of the opinion that the proposed amendment should be withdrawn.

The drive to have this provision amended is not the result of legal considerations - it is the obvious result of political pressure and the perceived need by Government to be able to show that something tangible is actually being done on the subject of land reform. Government's

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justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the relation between the limitation and its purpose; and
(d) less restrictive means to achieve the purpose."

failure to achieve anything of substance in this sphere up to now, is dealt with in more detail further below.

### 3. Changing the Constitution is no substitute for a lack of action on land reform

It is common knowledge that the land reform process has been beset with corruption, inefficiency and incompetence. This is best described in the words of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, as published in November 2017:

> "Experts advise 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 land reform budget to elites, lack of political will, and lack of training and capacity have proved the more serious stumbling blocks to land reform."[2]

Making the Constitution the villain of the piece serves as a convenient excuse for the lack of progress in land reform by Government. It demonstrates an inadequate understanding or conscious denial of the actual problems which have plagued the land reform process since 1994. The obstacle is not the Constitution, but rather a lack of political will to implement an effective land reform policy. Clear evidence of this lack of political will is presented by the following examples:

- The pace of restitution has been extremely slow. According to the Report of the High Level Panel, there has been a downward trend in the pace of redistribution since 2008.[3] There were at the time of the Report's publication, 7 000 unsettled claims and more than 19 000 unfinalised claims that had been lodged before 1998. It will take 35 years to settle these claims at the present rate of 560 claims a year.
- The budget allocated to land reform and restitution is risible. Substantially less than 1% of Government's consolidated expenditure is allocated to land reform and restitution combined. This fact on its own illustrates the almost complete absence of political will on the part of Government to achieve anything of substance in this area.
- The Government has made no attempt so far at using Section 25 of the Constitution to effect expropriation of land in a meaningful manner.
- The failure to amend the Expropriation Act of 1975, which contains the "willing seller - willing buyer" concept in setting a price ceiling for land to be expropriated. Much has been made of this obstacle to land reform, but the concept does not appear in the Constitution. The public debate on the subject has shown how few are aware of this fact. The question to be asked in this regard is therefore: why has it taken Government so long to repeal and replace the 1975 Expropriation Act, if it is serious about land reform? It is noted that a new Expropriation Bill is currently making its way through Parliament, but this has not yet been passed.

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[2] The Report of the High Level Panel On the Assessment of Key Legislation and the Acceleration of Fundamental Change, 2017, Chapter 3, Dr Aninka Claassens, p. 300. The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was created by the Speaker's Forum (a voluntary association comprising speakers and other office bearers of the National Assembly, the National Council of Provinces and Provincial Legislatures). This Panel was mandated to review legislation, assess implementation, identify gaps and propose steps with a view to identifying laws that require strengthening, amending or change. The Panel was chaired by former President Kgalema Motlanthe. The Working Group on land reform was led by Dr Aninka Claassens, a land reform specialist from the University of Cape Town.

[3] The Report of the High Level Panel, page 210.

- A judgment of the Constitutional Court in 2019, where it authorised the outsourcing of specific work which was supposed to have been done by the Department of Rural Development and Land Reform, to an outside entity, purely reinforces the general perception of the inefficiency of Government action on land reform.[4] In its judgment, the Court commented that -

> "…. over nearly two decades, and indisputably since 2006, the Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties. It has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights. And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done."

**4. What must be done by Government to manage the land reform process?**

The comments in this paragraph do not address specific provisions of the Bill, but they are included in this document as they emphasise the need for an overall legislative, administrative and financial framework to manage the land reform process in a rational and efficient manner. The legislative procedure to expropriate represents only one part of the land reform process, but it has received all the attention in the recent public debate. Practically no attention has been paid to how such a process should be implemented.

Prior to an overall legislative, administrative and financial framework for land reform being established, clarity first has to be obtained on a number of different issues which would have a direct effect on any expropriation process. The wide range of issues which need to be addressed are illustrated by the following questions on land reform (which are by no means exhaustive)[5]:

- How will decisions be taken on land that is to be expropriated? What criteria are relevant in any decisions? Who will take the decisions?
- Who is to be given the expropriated land? Who will decide on who is to be a beneficiary? On what criteria? Will the policy be targeted to benefit the poor?
- How much land is to be targeted for land expropriation?
- How will sufficient transparency be given to the process to avoid public discontent?
- Presumably, both urban and rural land reform are envisaged. What should the balance be between urban and rural land reform? What are the needs for each category? Will any land redistribution be subject to feasibility studies which set out what can realistically be achieved in any specific case? Have the environmental implications been taken into account in an adequate manner? If urban development is foreseen, will it fit into larger urban development programmes (including transport and basic infrastructure)?
- Is post-settlement support by Government to be provided, or will beneficiaries (presumably mainly the poor) be left to their own devices?
- On what legal basis is the land to be held by beneficiaries? With full legal title or through a lease from a local authority? If it is the latter, what security of tenure will beneficiaries have? Is any form of tenure reform envisaged by Government for this purpose?

[4] Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another (CCT 232/18) [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC) (20 August 2019).
[5] The Report of the High Level Panel raises many of these questions. See p 220.

- Will the process be managed by an adequately resourced and staffed land reform agency? Will appropriately qualified staff be available for this?
- Will Government be able to fund this whole undertaking, in stark contrast to the purely nominal funding dedicated to land reform up to now?

The wide scope which is covered by these questions shows that any land reform policy which includes the possibility of expropriation without compensation, not only requires policy clarity in many different areas, but also extensive planning and careful implementation by a properly staffed agency. However, it is striking that none of these issues has been raised in the public debate so far. The focus has been exclusively on the principle of expropriation without compensation and the supposed need for the Constitution to be amended to cater for it.

If the questions which are set out above are not dealt with in an adequate manner (together with the establishment of a suitable legislative/administrative framework), the consequences will be the following:

- The irrational, arbitrary or unlawful exercise of executive power will lead to immediate legal action, which will bring the land reform process to a grinding halt very quickly. This can be expected as an unavoidable consequence if a suitable legislative and administrative framework is not put in place and implemented by a capable agency, to enable a process which is based on rational decisions and an absence of corruption/elite capture.
- These problems will lead not only to a stalled process, but also to perceptions of a failed policy, fuelling further public dissatisfaction.
- A lack of a clear policy framework and a commitment by Government to stick to it, increases the perceived risk to private property rights. This will have direct financial consequences in the form of urban and rural ventures being unable to source funding from banks (since the banks would not wish to lend if the activities which they are financing are on land where ownership is not considered to be secure, or where such land is offered as security for bank debt).
- Business and investment confidence, already at low levels, will experience a further serious shock. It is easy to underestimate the degree to which such confidence relies on legal certainty and on the predictability of Government policy. Any policy on land reform that increases uncertainty and unpredictability will have materially negative consequences not only for the agricultural sector, but for the economy as a whole.

Taken together, these potential consequences would be sufficient to ensure the failure of any land reform programme, however well-meant it may be in principle.

## 5. The detrimental economic effect of insecure property rights

In the economic growth literature of the past thirty years, much attention has been paid to the relationship between property rights and economic activity. Besley and Ghatak, in a chapter of the influential *Handbook of Development Economics,* summarize the issues as follows:

> "We emphasize four main aspects of how property rights affect economic activity. The first is expropriation risk – insecure property rights imply that individuals may fail to realize the fruits of their

> investments and efforts. Second, insecure property rights lead to costs that individuals have to incur to defend their property which, from the economic point of view, is unproductive. The third is failure to facilitate gains from trade – a productive economy requires that assets are used by those who can do so most productively, and improvements in property rights facilitate this. In other words, they enable an asset's mobility as a factor of production (e.g. via a rental market). The fourth is the use of property in supporting other transactions. Modern market economies rely on collateral to support a variety of financial market transactions and improving property rights may increase productivity by enhancing such possibilities."[6]

Besley and Ghatak also produced evidence that a property rights protection score correlates positively with income *per capita* across countries. In other words, countries with a higher risk of expropriation have lower levels of income *per capita*. Moreover, there is a positive correlation between the protection of property rights and taxation as a percentage of gross domestic product (ie. wealthier countries have a greater protection of property rights). The authors conclude:

> "Countries with more developed fiscal systems tend to be richer and more market oriented. It brings into sharp relief that expropriation of property (and not taxation) is symptomatic of a low level of development."[7]

It was not surprising that envoys dispatched by the President to drum up foreign investment in 2018 found themselves constantly asked about the Government's intentions about land reform. This concern has not disappeared. It would be tragic if, in a context where real *per capita* gross domestic product has been falling for the last five years and medium-term growth prospects are weak, a desire for explicit confirmation of what is already implicit in the Constitution, inhibits investment in the South African economy.

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[6] Besley, T. and Ghatak, M., 2009. Property rights and economic development. In: D. Rodrik and M. Rosenzweig, eds., Handbook of Development Economics. Elsevier, pp.4525– 4595, on p. 4528.
[7] Besley and Ghatak, p. 4580.