

## **Submission**

to the

### **Joint Constitutional Review Committee**

on the

### **Review of section 25 of the Constitution**

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## **INTRODUCTION**

### ***About the Centre for Applied Legal Studies***

1. The Centre for Applied Legal Studies ('CALs') welcomes the opportunity to submit comments on the Review of section 25 of the Constitution in response to the Joint Constitutional Review Committee call by the to make these submissions. In the event that the Joint Constitutional Review Committee hosts public hearings on the Bill, CALs hereby requests that it be placed on the roll to make oral submissions.
2. CALs is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALs is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALs' vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils this mandate by:
  - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations,
  - providing professional legal representation to survivors of human rights abuses; and
  - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable.
4. CALs operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law.

## **BACKGROUND**

5. It is undisputed that colonial and apartheid laws sought to benefit and were in the interests of a white minority of European origin and discriminated and excluded Africans from participation and in particular benefiting from their land. This exploitation and exclusion of Africans began at the inception of colonialism and more formalised by law in 1894 through the Glen Grey Act of 1894 and many others after it.<sup>1</sup>

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<sup>1</sup> Such as the Native Land Act 27 of 1913; the Transvaal Asiatic Land Tenure Act 35 of 1932; the Native Service Contract Act of 1932; The Native Trust and Land Act 18 of 1936; the Slums Act of 1934; The Rural Dealers Licensing Ordinance Natal of 1935; the Representation of Natives Act 12 of 1936; the Pegging Act in 1946

6. The Constitutional Court, has said the following in *Agri South Africa v Minister of Minerals & Energy*:

*“[T]he architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty.”<sup>2</sup>*

7. To address this gross economic inequality, CALS submits that existing legislative measures must facilitate equitable access to land and opportunities in key industries like the agricultural and mining sector. Taking into account the racially discriminatory nature of these industries in particular under Apartheid and its lasting legacy, CALS submits that it is imperative that redress measures be substantive and extensive in nature. The land regulatory system should address not only the economically exploitative nature of these industries, but the migrant labour system, the abhorrent housing and living conditions of black people, the exclusion of black people from the management, ownership and job reservation, and the disproportionate burden of impact on sexual minorities, gender non-conforming peoples and communities at large.

## **GENDER APPROACH AND POVERTY REDUCTION**

8. CALS submits that the most affected people by landlessness are women and this is due to the social construct of gender. Further that women affected by landlessness are often denied the opportunity to speak or make recommendations on the issue of land and this is due to a patriarchal history of South Africa. CALS hopes therefore that this process initiated by the Constitutional Review Committee will give due consideration to indigenous people, minority groups, and those disadvantaged by age, disability, gender or sexual orientation.
9. In this regard, also notes the commitment to gender equality in terms the Convention on the Elimination of all forms of Discrimination against Women (‘CEDAW’) by the South African government. Further, that sixty-six percent of African states have ratified or acceded to the Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa, which provides that states will take measures to prevent discrimination against women.
10. Exclusion of black people from owning land through various legal instruments has resulted in poverty. Poor people, and in particular black women depend on the

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<sup>2</sup> 2013 (4) SA (CC) para 1.

environment for food, shelter, and water. Landlessness leads to hunger, malnutrition and ill-health and thus exacerbates poverty.

11. CALS submits that in its intended land reform programme, the South African government must seek to address the racial and gendered impact of landlessness of previously disadvantaged persons and therefore ending poverty.

## **LAND EXPROPRIATION MANDATED BY THE CONSTITUTION IN VARIOUS SECTIONS**

12. Section 25 of the Constitution must be interpreted with due regard to the constitutional commitment to substantive equality and the recognition of the need for transformative or restitutionary measures by the state, in sections 1(a), 7(2), 9(2) and section 25 in its entirety.

13. The Preamble to the Constitution states that the Constitution was adopted "*recognis[ing] the injustices of our past*", and that one of its purposes is to "*improve the quality of life of all citizens and free the potential of each person*". The very first founding provision of the Constitution, section 1(a), provides that the founding values of the Republic of South Africa include "*human dignity, the achievement of equality and the advancement of human rights and freedoms*".

### Section 7(2) and 9(2) of the Constitution

14. The rights in the Bill of Rights are interdependent and mutually supporting. The Bill of Rights therefore imposes the following two obligations on anyone tasked with the implementation of any right, and in particular to this submission land reform:
15. The first obligation arises from section 7(2): This section requires that the state "*must respect, protect, promote and fulfil the rights in the Bill of Rights.*" This constitutional obligation includes the duty to pass legislation to ensure that the right is promoted. The State, through a Minister cannot for instance promote and fulfil the right to equality if he cannot compel compliance with the legislative and other measures taken in this sphere to achieve the fulfilment of the right. The Minister's failure to compel compliance with these measures would constitute a breach of the state's obligations under section 7(2).
16. The second obligation flows from section 9(2): Where the state has put in place a measure to promote and achieve substantive equality, the Minister is obliged to ensure and compel compliance with that measure. Should the Minister fail to compel compliance, he fails to fulfil his obligations under section 9(2).

17. In *Minister of Finance and others v Van Heerden*<sup>3</sup>, Moseneke J (as he then was) for the majority of the Constitutional Court observed that South African equality jurisprudence recognises a conception of equality that goes beyond mere formal equality. He noted that:

*"This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist... It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."*<sup>4</sup>

18. The Court in *Van Heerden* recognised that remedial measures are not derogations from, but substantive and composite parts of, the right to equality envisaged in the Constitution.

19. The constitutional recognition of the critical need for state policies aimed at transformation was identified in the judgments of O'Regan J and Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, in the context of review of administrative action with restitutionary objectives in relation to the fishing industry.

20. As was pointed out by the Constitutional Court in *Bel Porto School Governing Body and Others v Premier, Western Cape*:

*"The difficulties confronting us as a nation -in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others."*

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<sup>3</sup> 2004 (6) SA 121 (CC)

<sup>4</sup> Para 27.

## SECTION 25 (5) – “LEGISLATIVE AND OTHER MEASURES”

21. CALS notes with concern that the Expropriation Bill (“the Bill”)<sup>5</sup> intended to be a transformative measure “provide for the expropriation of property for a public purpose or in the public interest” has not been signed into law since its introduction in the National Assembly in February 2015.
22. The spirit and purport of the Constitution as reflected in sections 7 (2), 9 (2) and 25 of the Constitution is reiterated in the Preamble of the Bill and further providing that “*uniformity across the nation is required in order to deal effectively with these matters*”. The Constitution, in a number of provisions, calls upon the state to take positive measures to redress the unfair effects of past.<sup>6</sup> The state is therefore mandated to take measure to advance and protect historically disadvantaged peoples. This is not a need or a privilege, but a constitutional imperative, and an obligation.
23. A preamble, while not enforceable, is a significant aspect of any legislation. It sheds light on the historical context and the broad aims and purposes that motivate the law.<sup>7</sup> It is therefore imperative that the preamble speak not only to the purpose of the law itself but also, where its purpose is aligned with the Constitution, speak in a manner consistent to the latter. Section 7(2) of the Constitution imposes a duty (not a need) on the State to protect the rights in the Bill of Rights which must be read together with section 237 requiring that all constitutional obligations be performed diligently and without delay.
24. As stated above, the very first founding provision of the Constitution, section 1(a), provides that the founding values of the Republic of South Africa include “*human dignity, the achievement of equality and the advancement of human rights and freedoms*”.
25. The Bill is a legislative measure which, if enacted, must give effect to section 25 (5) of the Constitution and therefore bringing “*uniformity*” where the State, “within its available resources, fosters conditions which enable citizens to gain access to land on an equitable basis” and thus facilitating redress for historical injustices through land reform.

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<sup>5</sup> B4D-2015

<sup>6</sup> Sections 9(2), 23(6), 24(b), 25(5), 26(2), 27(2), 29(1)(b), 32(2), and 33(3) of the Constitution.

<sup>7</sup> S v Shaik and Others 2008 (5) SA 354 (CC), at para 50-51.

## Mandatory compliance

26. Compliance by the Minister with the measures provided in the current Bill is not optional but constitutionally mandated to ensure compliance with the spirit and purport of the Bill which directly flows from section 25 of the Constitution. Any failure on the part of the state would directly lead to the objects of the Act and the provisions of the Constitution not being realised. In addition, it is incumbent upon any Minister to promote and fulfil the state's responsibility in terms of section 7(2) of the Constitution.
27. Section 25 of the Constitution itself envisages the need for such measures by providing in section 25(4) that for the purposes of the property clause "*the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources*"; and in section 25 (8), that no provision of the property clause "*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)*".
28. Lastly, section 39(2) of the Constitution enjoins courts interpreting legislation to "*promote the spirit, purport and objects of the Bill of Rights*", CALS submits that any expropriation must be interpreted with due regard to these provisions of the Constitution. If interpreted with these provisions in mind, expropriation without compensation meets constitutional muster and where it is contended that certain compensable expropriation is appropriate; the amount of compensation must be calculated with reference to the provisions of section 25(3) of the Constitution.
29. International law special measures<sup>8</sup> which South Africa has either signed or is a party to and which are targeted at particular disadvantaged groups<sup>9</sup> in order to pursue restitutionary measures are also of great significance for the interpretation of section 25 of the Constitution. These measures are designed to promote the achievement of equality and to protect and advance categories of persons disadvantaged by past unfair discrimination.

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<sup>8</sup> International Convention on the Elimination of all Forms of Racial Discrimination 1965 (CERD); the African Charter on Human and Peoples' Rights 1986; the International Covenant on Civil and Political Rights 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); and Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).

<sup>9</sup> Sometimes seeking the advancement of particular racial or ethnic groups, women and other groups in appropriate circumstances.

## CONCLUSION

30. In summation, we call on the Constitutional Review Committee to commit to:

- 30.1. Effective consultation on and addressing the racial and gendered impact of landlessness of previously disadvantaged persons through land reform;
- 30.2. Transformative constitutional mandate as provided by the sections and case law outlined above;
- 30.3. Facilitating the appropriate amendment of the Expropriation Bill to be enacted reflecting and giving effect to section 25 (5) of the Constitution and therefore bringing “*uniformity*” where the State, within its available resources, fosters conditions which enable citizens to gain access to land on an equitable basis.