

A Suggested Review of Sub-Section (7) of Section 25 of the Constitution of the Republic of South Africa

A Submission

Prepared By
Thandi Ngcobo
Executive Director
Dr. John Langalibalele Dube Institute
University of KwaZulu Natal
Gate 9, Howard College
Glenwood, Durban
Direct Tel: +27 31 260 2790
Mobile: 079 040 6282
Mobile: 0736051718
Email 1: thandi.ngcobo@drjldubeinstitute.org
Email 2: Ngcobot4@ukzn.ac.za

Table of Content

- 1. Introduction and Executive Summary**
- 2. Background**
- 3. Purpose of a Suggested Review**
- 4. Context and Framework**
- 5. Operational Strategy and Methodology**

A. Introduction and Executive Summary

The Constitution, which South Africa adopted nineteen years ago, has served the Country well. It has been a reliable guarantor of parliamentary democracy, and fundamental rights which all of us cherish. It has also inspired the spread of democratic consciousness in our society, empowering all, the socio-economically underprivileged classes and women and making our system of governance more participatory and progressive. While keeping the basic structure and salient features of the Constitution inviolate, it has, however become necessary to examine the experience of the past nineteen years to better achieve the ideals enshrined in the Constitution.

The issue of land rights, specifically the right to restitution or equitable redress is an important human rights concern and it is one that must be addressed. This right is contained within The Constitution of the Republic of South Africa, 1996, Chapter 2: Bill of Rights, Section 25, Sub-section (7). However, after several decades of attempting land reform with little progress to show and complex issues that have arisen, there is enough evidence that propels a conviction that a review of legislation is necessary, and specifically a review of Section 25 (7) of the Constitution.

Section 25 (7) of the Constitution of South Africa addresses specifically the need and procedure for land reform, in brief and it places the onus on another Act of Parliament to guide the process. However, it prescribes that it is people or communities that were dispossessed after 19 June 1913 that are entitled to redress or restitution of land:

A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

It is important to note that section 25 as a whole is about property which enshrines both **public interest** and **individual interest**. In particular, section 25 (8) of the Constitution foresaw the need for a credible review or application of discretion to be worked into matters of property, given the complexity of this issue. It states:

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)

Whilst legislation exists to guide and order social behaviour, law reform must be possible where it is clear that current provisions are out of synch with reality and do not empower a country to advance its national development and social cohesion agenda. Civil society organisations, and government have wrestled with complexity when it comes to land reform; and while early hints of law reform on this matter may have been regarded as premature, it is clear that the problems are deep and may result into a general feeling that the system is failing on the promise of redress. In particular, many have argued that failure to amend the 19 June 1913 date will present an obstacle to the vision of creating inclusive and shared prosperity as contained in the National Development Plan and this in turn will undermine the promotion and protection of all human rights for all South Africans. Essentially this is human rights issue that if not addressed could hold serious implications for South Africa. It is in this regard, that the John Langalibalele Dube Institute, presents the following proposal on this matter – based on its own recent experiences of dealing with Land Reform applications and the backlog.

B. Background

The land question remains one of the most critical and contested matter within South Africa after the 1994 breakthrough into a new dispensation. After the Dr. John Langalibalele Dube Institute was charged with a responsibility of conducting a comprehensive research regarding a number of stagnant land claims, it emerged that there is considerable discontentment amongst black South Africans, in particular, regarding the negotiated cut-off date for claiming loss of their rights in land ownership, i.e. 19th June 1913. It is also well documented that land dispossession began in the early 17th century when Jan van Rebeeck landed on South African shores, specifically in 1652. Whilst the later fact is sometimes deliberately abused for political reasons (to suggested that any form of migration, even by Africans within the Continent, was necessarily plunder), it is important for purposes of social cohesion to deal with dispossession that is still painful to the current generations

It is a common course that the greatest accelerated land dispossession occurred during the 19th Century, starting from 1803. The nineteenth century was a period of several events whose socio-political and economic impact profoundly changed South Africa and the African continent. Colonial conquest and rapid land dispossession was accelerated during this period. Conversely, fierce resistance was launched by African people in response to their loss of land, livestock and political power. As *voortrekkers* moved away from the Cape Colony to escape British rule, they fought, seized and occupied land while dispossessing Khoi, San and African communities in the process.

This opened up the interior of South Africa to further colonial conquest. In some instances, land dispossession was achieved by stealth through “treaties” which colonists claimed were signed by leaders of communities. The mineral revolution which exploded during the nineteenth century further contributed to land dispossession as the white colonial government sought to force Africans off their land to become cheap labourers in

the newly established mines in Kimberley and the Transvaal. All of the above concluded what may be termed the first, the second and the third wars of dispossession.

Land reform, while it is not a total solution, it nonetheless has great bearing on:-

- Poverty
- Unemployment
- Inequality

These issues represent a fundamental threat to the quality and substance of the country's democratic order. The Freedom Charter, the Constitution and the National Development Plan (NDP) embody a vision of a South Africa in which development is progressive and inclusive, and prospects and prosperity is shared.

Poverty, unemployment and inequality that affects the dispossessed and poorest of the poor the most, poses a serious threat to the goal of achieving substantive democracy in South Africa. Substantive democracy extends beyond procedural democracy, the act of voting and holding free and fair elections. Substance based democracy is the brand that serves to make the case, in Africa, for the interdependence between democracy and human rights. The land reform and correction process is thus an issue of justice, one that holds consequences for the future and quality of democracy and one that has far reaching implications for the promotion and protection of human rights.

C. Purpose of a Suggested Review

As part of its work in assisting the Commission on Land Restitution, the Dr John Langalibalele Dube Institute, has realised the conundrum and complexity on resolving claims lies in rigidity of the 19 June 1913 date. It is for this reason that a need for a review of Section 25(7) of the Constitution is at the core of a proposed review of land reform procedures that is the subject matter of this document. After the Dr John Langalibalele Dube Institute was charged with a responsibility of conducting research regarding a number of stagnant land claims, it emerged that there is considerable discontentment amongst black South Africans, in particular, regarding the negotiated cut-off date for claiming loss of their rights in land ownership, i.e. 19th June 1913.

The Dr John Langalibalele Dube Institute therefore proposes that a broad-based Constitution Review, with special focus on sub section (7) of Section 25 of the Constitution. Rationale behind the review is to: -

- 1) Firstly, to investigate why the 19th of June 1913 has created such discontent as a cut-off date for claims on restitution and redistribution of Land Rights in South Africa after the attainment of freedom in 1994. Historical evidence confirms that, in large measure, dispossession took place prior to 1913. The onslaught against land owners began in the 1600's and intensified during the 1800s. The cut-off date of June 1913 is thus grossly unfair and arguably serves to entrench past human rights violations and this in turn undermines the South African democratisation process.

- 2) Secondly, based on sound and reasonable evidence and historical record to advance clear views on lack of appropriateness, or otherwise, of Section 25 (7) in particular of the South African Constitution and Section 25 generally within which this section is read. Land dispossession was not only a race issue, but there was an important class dimension. People were dispossessed in order to ensure that they were available to serve as migrants within the apartheid industrialisation project. This is an important economic motive, and when combined with the fact that individuals, families and communities were removed from productive land, it then shows the cumulative impact of the process of dispossession on the rights and freedoms, opportunities and privileges available to indigenous and black South Africans. Inequality in South Africa has its roots in this process. Through the act of denying black people land rights, dispossessing them of land and creating reserves of labour for other sectors – structural poverty and inequality was created, perpetuated and entrenched. This matter must be addressed in that light the issue of public interest (which may be seen to include social cohesion) must be re-examined with the view to elevate it in relation to land reform. For this reason, section 25 deserves to be re-read in this suggested review exercise.
- Thirdly, to remind and to educate South Africans of the realities of our painful and sad history of land dispossession which is the cornerstone of the triple challenges, i.e. poverty, unemployment and inequalities. history reveals that a country that falls short of adequately resolving racial and unequal distribution of land creates grounds for serious problems in the future. Certain countries in Africa can attest to this. The reminder and the education message must be for all, not just the down-trodden. Systems of tenure that are embrassive of sharing, communality and respect must form part of the message so that people are not excluded because of their chosen method of grouping in order to receive the land. As such legality must be fair to all legitimate formats of tenure that are chosen in an open democratic manner.

- 3) Fourthly, the review to look at the methodologies that are used to undertake land reform and post-settlement support with the view that they do not lose sight of creating efficient and beneficial partnerships designed to make ‘the reform’ felt by the beneficiaries. The context of poverty, inequality and unemployment must be remedied in the context of the current economic situation where economic productivity is imperative.

Land reform in South Africa has benefited from ‘trial and error’. During the course of its work, the review process should come up or design a methodology that will:

- review archives;
- interview and engage stakeholders (government civil society; citizens; women; amakhosi and traditional councils; private sector);
- review cases of deadlock and distil lessons from these;
- engage current beneficiaries of historically unjust land acquisitions;
- open discourse on ‘legality’ or legitimacy of old treaties and subsequent transfers of land (even to boroughs and towns);
- open discourse on multiple claims and innovative ways of settling conflict between claimants.

The methodology to be used must include a review of archives and previous attempts at land reform (including the work of civil society). The final outcome should make it possible to decide on the following:

- Why the 19th June 1913 is problematic in land reform work in South Africa
- Why this date may have been suggested in the first instance
- What are the possible important considerations to use to determine appropriate timeframes for land reform in South Africa

- If necessary, who should be given sufficient administrative discretion to resolve any extra-ordinary timeframe issues should another rigid but acceptable date be suggested.
- Other than section 25 (7) of the Constitution, what other pieces of legislation would have to be amended, should an amendment be justified.
- Legal persona that can claim
- Possible partnerships that may form part of administrative and operational vehicles to work and administer benefit from the land
- What kinds of legitimate proclamations must be made to assist municipalities, town, and government and commercial centres affected by land claims in order to ensure that people are part of negotiated settlement or legitimate release of these for purposes they now serve.

For more information

Thandi Ngcobo
Executive Director
Dr John Langalibalele Dube Institute for Humanitarian & Development Praxis
University of KwaZulu Natal
Gate 9, Howard College, Innovation Centre, Glenwood Durban
Tel: +27 31 260 2790
Mobile: 0790406282
Email: Ngcobot4@ukzn.ac.za
Email: thandi.ngcobo@drjldubeinstitute.org