



*South African Institute for Advanced Constitutional,
Public, Human Rights & International Law*



Submission on the Constitution Eighteenth Amendment Bill

Submitted to: Mr V Ramaano

Ad Hoc Committee to Initiate and Introduce Legislation Amending Section 25 of the Constitution

Per email: section25@parliament.gov.za

Submitted by:

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Executive Summary

- The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a centre of the University of Johannesburg, welcomes the opportunity to make submissions to the Ad hoc Committee on the Amendment of section 25 of the Constitution of the Republic of South Africa, 1996.
- **We would appreciate the opportunity to make oral submissions.**
- SAIFAC recognises and acknowledges the deep historical injustices surrounding land in South Africa where the rights of black South Africans to their own land were taken away by force of law. They were removed, often forcibly, from land their ancestors had inhabited for decades and centuries. Such dispossession also generated serious economic hardship which continues in the high levels of poverty South Africa experiences currently. These injustices cry out for remediation.
- As a result, to address the pressing need for land reform, some have argued that the solution lies in reducing the burden on the state to pay for land that was forcibly taken from black South Africans and that expropriation of land without any compensation should be allowed. The Constitution Eighteenth Amendment Bill expressly recognises that the payment of nil compensation is a possibility and mandates the passing of national legislation to outline the specific circumstances under which it is warranted.
- We submit that, given recent developments in constitutionalism in similarly-situated democracies to South Africa, the power of parliament to pass constitutional amendments is limited. The basic structure doctrine holds that an amendment of the Constitution may be declared unconstitutional if it alters the basic structure – which includes the core values and principles – of the Constitution. A super-majority of parliament is thus not free to make any amendment it wishes but must still respect the basic features of the South African constitutional order.

SAIFAC makes three submissions concerning the Eighteenth Amendment Act.

- Firstly, in order for a provision to be a valid constitutional amendment, it must subject any determination of when expropriation without compensation takes place to **judicial review by the Courts**. In other words, it cannot provide in any national legislation that is envisaged by the amendment for a determination to be made solely by the executive of expropriation without compensation. In our reading, the current amendment meets this criterion – however, there have been disturbing reports that some political leaders and members of parliament are pushing for the amendment to leave such a determination solely in the hands of the executive. Such a change to the amendment would leave individuals at the mercy of unlimited executive discretion and thus be fundamentally inconsistent with South Africa’s commitment to constitutionalism, the rule of law and judicial review. In our view, it is therefore likely to be struck down by the Constitutional Court;
- Secondly, it is our submission that a constitutional amendment cannot simply defer a determination of all details relating to when expropriation without compensation is permissible to national legislation. The minimum that is required of such an amendment is that it subject a determination of when nil compensation is payable to a **constitutional standard** against which the legislation can be tested in the courts. In our view, the current amendment is unclear as to whether it meets this criterion. It would be better, in our view, to clarify that any national legislation is to conform with the constitutional standards outlined in subsections 25(2) and (3) of the Constitution;
- Thirdly, in our view, expropriation without compensation should only be permissible where it is designed for **purposes of land reform** to correct historical injustices.
- To address the above points, we propose subsection 3A be reworded as follows: **‘National Legislation must set out specific circumstances where a court may determine that the amount of compensation is nil. Such legislation must comply with the requirements of subsections 25(2) and**

(3) and only allow such expropriation for the purposes of land reform to correct historical injustices.'

THE MAIN SUBMISSION

1. Introduction

- 1.1. The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC) is a research centre of the Faculty of Law at the University of Johannesburg. SAIFAC produces advanced research in its focus areas of constitutional, human rights, public and international law and aims to foster collaboration and engagement between academics and members of the legal community across South Africa and internationally, and to advance constitutionalism, human rights and the rule of law in Southern Africa.
- 1.2. SAIFAC welcomes the opportunity to make a written submission to the Ad hoc Committee on the Amendment of section 25 of the Constitution of the Republic of South Africa, 1996. We would also appreciate the opportunity to make an oral submission. The opinions expressed in this submission can be attributed to SAIFAC and its authors but do not express the position of any other members of the Faculty of Law or any other Faculty of the University of Johannesburg.
- 1.3. SAIFAC recognises and acknowledges the deep historical injustices surrounding land in South Africa where the rights of black South Africans to their own land were taken away by force of law. They were removed, often forcibly, from land their ancestors had inhabited for decades and centuries. Such dispossession also generated serious economic hardship which continues in the high levels of poverty South Africa experiences currently. These injustices cry out for remediation.
- 1.4. SAIFAC also recognises that section 25 of the Constitution provides a carefully constructed scheme by the Constitutional drafters on the one hand, to protect property rights, but, on the other, to enable land reform and remediation of the

serious injustices outlined above.¹ A constitutional standard – ‘just and equitable compensation’ – and a well-considered set of factors are prescribed in section 25(3) for calculating the amount of compensation to be paid. The courts have, in fact, interpreted the standard and formula flexibly and in such a way that arguably could, in the relevant circumstances, allow for expropriation of land without compensation.²

- 1.5. The Constitution Eighteenth Amendment Bill, recognises in its preamble the historical injustices mentioned above and states that its goal is to render explicit what is implicit – namely, that expropriation can take place for purposes of land reform with nil compensation (referred to in the rest of this submission as ‘expropriation without compensation’). The core change brought about by the Act is the insertion of a section 25(3A) which states that ‘National Legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil’.
- 1.6. In this submission, SAIFAC outlines what is often termed the ‘basic structure doctrine’ which essentially provides that an amendment of the Constitution may be declared unconstitutional if it alters the basic structure – which includes the core values and principles – of the Constitution. A super-majority of parliament is thus not free to make any amendment it wishes but must still respect the basic features of the South African constitutional order.
- 1.7. SAIFAC makes three submissions concerning the Eighteenth Amendment Act. First, to be a constitutional amendment, it must subject any determination of when expropriation without compensation takes place to **judicial review by the Courts**. In other words, it cannot provide in any national legislation that is envisaged by the section for a determination to be made solely by the executive. In our reading, the current amendment meets this criterion –

¹ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 60-62 (judgment by Mogoeng CJ); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) (judgment by Langa CJ) para 81.

² See, for instance, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Msiza v Director-General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC); *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC).

however, there have been disturbing reports that some political leaders and members of parliament are pushing for the amendment to leave such a determination solely in the hands of the executive. Such a change to the amendment would leave individuals at the mercy of unlimited executive discretion and thus be fundamentally inconsistent with South Africa's commitment to constitutionalism, the rule of law and judicial review. In our view, it is therefore likely to be struck down by the Constitutional Court.

- 1.8. Secondly, it is our submission that a constitutional amendment cannot simply defer a determination of all details relating to when expropriation without compensation is permissible to national legislation. The minimum that is required of such an amendment is that it subject a determination of when nil compensation is payable to a **constitutional standard** against which the legislation can be tested in the courts. In our view, there is some ambiguity as to whether the current amendment meets this criterion. It does state that the envisaged national legislation will be subject to the provisions of subsections 25(2) and 25(3) of the Constitution. That would require the existence of a law of general application, a valid public purpose or public interest, the amount of compensation to be determined by agreement between the parties or judicial supervision, and the amount of compensation to meet the standard of being just and equitable (if the amount offered by the state is challenged in a court of law). If this is indeed the position that the amendment enshrines, in our view, it would also be constitutional. If, however, the intention of parliament is to enable national legislation to circumvent the constitutional requirements on expropriation more generally, it would be unconstitutional.
- 1.9. Thirdly, in our view, expropriation without compensation should only be permissible where it is designed for purposes of land reform to correct historical injustices.
- 1.10. In the conclusion and executive summary, we propose alternative wording which clarifies that the new subsection 3A meets these tests.

1.11. To justify the views outlined above, our argument is presented in more detail in the next segments of this submission.

2. The Constitutional Limits of Constitutional Amendments

2.1. Section 74 of the South African Constitution prescribes a number of procedures that must be complied with in order for a valid constitutional amendment to be passed. If these are not complied with, the amendment can be struck down by the Constitutional Court. We assume parliament will comply with the requisite procedures and, consequently, our submissions do not concern the procedural requirements for amendment.

2.2. Our focus concerns the possible substantive challenges that may be raised against the constitutionality of an amendment. In our view, in order to validly amend the Constitution in terms of section 74, any amendment must still operate within the logic and framework of the Constitution and not attempt to replace it.³ If parliament were to adopt an amendment which is in fact a 'replacement' of the Constitution, the courts would be justified in setting that 'amendment' aside. The notion that there are substantive limits to constitutional amendments has often been referred to as the basic structure doctrine or the unconstitutional constitutional amendment doctrine.⁴

Anatomy of the Basic Structure Doctrine

2.3. The basic structure doctrine postulates that there are certain principles or features of a constitutional order that even a supermajority of parliament cannot validly overturn. This doctrine has been developed in numerous courts and, most notably, by the Supreme Court of India.⁵ In the case of *Kesavananda*

³ Abebe "The Substantive Validity of Constitutional Amendments in South Africa" 2014 *South African Law Journal* 667.

⁴ See, for instance, the detailed study by Roznai *Unconstitutional constitutional amendment* (2017, Oxford University Press).

⁵ We can only very briefly outline its contours here and it has been the subject of much writing in constitutional law in recent years.

Bharati v The State of Kerala,⁶ the court explained that a constitution has certain basic features which underlie not just the written text but also the spirit of that constitution. These features constitute the “inviolable core” of the constitution, and any amendment, which intends to alter the constitution in a manner that takes away that basic structure, is void and unenforceable.⁷ The court held that, as the Supreme Court of the land, it had the power to review and strike down amendments which went to the very heart and core of the constitution, by seeking to alter its basic structure. The rationale of the decision was that an amendment which makes a change in the basic structure of the constitution is not really an amendment but is, in effect, tantamount to rewriting the constitution, which parliament has no power to do. This is because the constitution merely gives a power of amendment to Parliament and not a power of replacement.⁸ The basic structures doctrine was upheld and relied on in subsequent decisions in India, and in many other constitutional democracies.⁹

- 2.4. What, then, are some of the features of the basic structure? In India, it has been held to include the supremacy of the Constitution, rule of law, separation of powers, judicial review and independence, human dignity, free and fair elections, federalism and secularism. If an amendment contravenes some of these basic principles, it may be set aside by a Court.

The Basic Structure Doctrine in South Africa

- 2.5. Although the doctrine has not yet been applied in South Africa in a particular case, the Constitutional Court has hinted at its possible application by our courts. In *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others*, the Constitutional Court referred to the doctrine when it held that:

‘There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly

⁶ *Kesavananda Bharati v The State of Kerala* (1973) AIR 1461 (SC).

⁷ *Kesavananda Bharati v The State of Kerala* (n 5) par 1590.

⁸ See *Minerva Mills Ltd v Union of India* (1980) AIR 1789 (SC) at 1789.

⁹ Constitutional democracies that have applied the basic structure doctrine include, Taiwan, Colombia and Argentina.

done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the constitution, might not qualify as an “amendment” at all’.¹⁰

2.6. In considering the possibility that an extreme amendment could not be deemed an “amendment” at all, the Court left open the question of the application of the basic structure doctrine in South African law. A similar question was raised in *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*¹¹ where Justice Sachs noted that:

‘[t]here are certain fundamental features of parliamentary democracy, which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life – the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle of the basic legislative responsibilities entrusted to it by the Constitution’.¹²

2.7. Therefore, it appears to be clear that the Constitutional Court has expressly contemplated the application of the doctrine in South Africa. Justice Sachs identifies that, at least, basic principles of democracy could not be abrogated and hints that the separation of powers, too, would form part of the basic constitutional framework.

¹⁰ *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC), para 47.

¹¹ *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC).

¹² *Ibid*, para 204.

2.8. In our assessment, it is likely that the doctrine will be found to be applicable in South Africa, given its widespread adoption in modern Global South democracies, such as India and Colombia, and the above contemplation of its application by the Constitutional Court.¹³ On the basis of this assumption, the question then arises whether the Eighteenth Amendment Bill would contravene this doctrine or be compatible with it. In determining that question, we need to identify which facets of the basic structure of South African constitutionalism are implicated by the amendment and, then upon an analysis of it, reach a conclusion concerning its constitutionality. The analysis also, we hope, can provide guidance to parliament concerning which features of such an amendment must be present without which it will likely be declared invalid.

3. The Basic Structure and the Constitution Eighteenth Amendment Bill

3.1. The Constitution Eighteenth Amendment Bill is designed to allow explicitly for expropriation of property for purposes of land reform without having to compensate the previous owner. The Amendment arises against the backdrop whereby black people were systematically dispossessed of land by operation of law – most notably, the 1913 Native Land Act.¹⁴ The Constitutional Court has previously held that section 25 must be understood purposively because it is connected to the very remedial and transformational purposes of the Constitution.¹⁵ It explicitly envisages addressing the lack of tenure security caused by the dispossession, restitution of land that was taken away and redistribution of land for purposes of land reform. Section 25(3)(b) also envisages that when determining compensation, courts must take account of the history of the acquisition of the property. The Constitutional Court has expressly held that the amount of compensation need not be market value and

¹³ Devenish “A Jurisprudential Assessment of the Process of Constitutional Amendment and the Basic Structure Doctrine in South African Constitutional Law” 2005 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 252; Henderson “Cry the Beloved Constitution? Constitutional Amendment, the Vanished Imperative of Constitutional Principles and the Controlling Values of Section 1” 1997 *South African Law Journal* 554.

¹⁴ *Daniels v Scribante* 2017 (4) SA 341 (CC) para 1.

¹⁵ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 60-62 (judgment by Mogoeng CJ); *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service* 2002 (4) SA 768 (CC) paras 49-50.

is determined by the standard of being ‘just and equitable’¹⁶ – in the appropriate circumstances, arguably, such a formula allows for nil compensation.¹⁷

- 3.2. The need to undertake land reform, however, is regarded in the Constitution as being consistent with providing protection for property rights. Indeed, one facet of the colonial and apartheid systems was the deliberate disregard of black people’s property rights – consequently, in redressing this aspect of the past it was necessary to ensure that there would be no arbitrary deprivations of property and expropriation take place only under particular circumstances.¹⁸
- 3.3. Following the flexible formula of the Constitutional Court, we accept that there may be limited circumstances – for purposes of land reform and under specified conditions – in which expropriation without compensation can be just and equitable and that a constitutional amendment that allows it is not invalid per se. The necessity for such an amendment may, however, be disputed given the prior holdings of the Constitutional Court that allow for such circumstances. Nevertheless, the core rationale for such an amendment appears to be to make explicit the possibility of nil compensation and regulate expressly the circumstances when that is to be applied.
- 3.4. It is important to recognise that the exercise of a power to expropriate property without compensation involves a grave interference with an individual’s life. The Constitutional Court has in the past linked property and dignity¹⁹ – individuals often see their own worth and life projects as tied in some sense to their possessions. Property too is tied to a sense of security which, if taken away without any compensation, can leave an individual destitute but also feeling extremely vulnerable (especially if the expropriation without compensation

¹⁶ *Du Toit v Minister of Transport* (n 1 above) par 37.

¹⁷ See, for instance, *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Msiza v Director-General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC); *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC).

¹⁸ Van der Walt and Viljoen “The Constitutional Mandate for Social Welfare-Systemic Differences and Links between Property, Land Rights and Housing Rights” 2015 *PER/PELJ* 1061.

¹⁹ *Daniels v Scribante* (n 14 above) paras 1-2; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) paras 49-56.

results in the expropriated person losing his or her only home).²⁰ Property is also linked to autonomy – it provides the resources which enable individuals to make decisions concerning their lives and also, in itself, involves the exercise of freedom concerning individual life projects.²¹ If property can simply be taken away without any compensation, many foundational interests of individuals are affected that are protected by other rights in the Constitution, such as the right to human dignity (section 10) and the right to have access to adequate housing (section 26(1)).

- 3.5. Consequently, in our view, such an interference may only take place provided there are appropriate safeguards in place. It also needs to be clear that the only purpose for which this can occur is to remedy past injustices given historic dispossession and that, even then, there will only be narrow circumstances in which it is just and equitable to provide no compensation at all (as opposed to limited compensation). If the government wishes to expropriate for purposes of building roads and other public purposes, then it must compensate individuals. In our view, three criteria are critical without which any such amendment will be invalid.

The Core Criteria for Validity of the Eighteenth Amendment

- 3.6. The first criterion for any constitutional amendment relating to expropriation without compensation will be the ability of courts to review legislation that governs the circumstances in which it is permissible as well as their ability to review the determinations in individual cases as to when property may be expropriated for nil compensation. Why is this such a central component of any legislative scheme?
- 3.7. As we have mentioned, the expropriation of property without compensation can have a very negative effect on an individual. Consequently, the ability of the

²⁰ Michelman “Liberal Constitutionalism, Property Rights and the Assault on Poverty” 2011 *Stellenbosch Law Review* 706

²¹ *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* (n 19 above) paras 49-56; Michelman (20 above) 716.

executive to remove property from an individual without any compensation involves the exercise of significant power over individuals. If that power is not subject to review, the executive can act in a manner that is arbitrary, favours political elites, and punishes disfavoured individuals or groups. The misuse of such a power would be reminiscent of apartheid-style dispossession and, thus, undermines the very purpose of the Constitutional order itself, which is to correct such past injustices and not repeat them.

3.8. Moreover, if the executive can simply remove property at whim with no compensation and without any review being possible of its decisions, this would undermine the very foundational value of the rule of law in South African society (protected in section 1). Such an exercise of power would ultimately subject individuals to a severe interference with their lives without any possibility of justification or challenge. That is the definition of despotic rather than democratic constitutional rule. The executive cannot, therefore, be given unlimited power to expropriate without compensation without the possibility for the courts to be able to review those decisions. Our submission would allow for the executive to make the initial determinations concerning whether compensation is payable (and the amount thereof) – but any such power should be subject to challenge and review in the courts.

3.9. The second key criterion would be that the amendment must subject any legislation and individual determinations concerning expropriation without compensation to review against a standard that is outlined in the Constitution. That means that parliament or the executive are subject to a substantive standard against which their behaviour must be evaluated. The Constitution currently already has three standards it envisages: there must be a law of general application, any expropriation must be for a valid public purpose or in the public interest; and compensation must be just and equitable (taking into account the factors in section 25(3)). These standards provide the basis upon which the courts can review legislation (and individual determinations) and provide an understanding of the substantive grounds of justification that can be given for expropriation and the amount of compensation payable. The severe interference with property that an amendment allowing expropriation without

compensation entails, as well as its potential to harm the rule of law, means that there must be substantive constitutional standards according to which such an action can be evaluated. Without that, once again, individuals are subject to a grave interference with their lives without there being a proper basis for evaluating the justification thereof.

- 3.10. The last criterion flows from what we have said about expropriation without compensation only being justifiable for purposes of remedying historical injustice. Any amendment should indicate that this is the only purpose for which nil compensation may be paid.
- 3.11. The arbitrary exercise of significant power without justification is the background against which the South African Constitution was adopted. In the famous words of Etienne Mureinik, South Africa has moved from a 'culture of authority' in which authority was respected for its own sake, to a 'culture of justification' in which all exercises of authority need to be justified.²² Allowing expropriation without compensation without judicial review against a constitutional standard would fundamentally violate this foundational feature of the South African Constitution. In our view, consequently, any amendment that fails to meet the above criteria would be invalid.

Does the Constitution Eighteenth Amendment Bill meet these criteria?

- 3.12. The question thus for determination is whether the current Amendment Bill ("the Bill") meets these criteria. In relation to the first criterion of judicial review, in our view, the current Bill does conform to this criterion. The amendment to section 25(2) expressly envisages a court making the determination that the compensation will be nil. Similarly, section 3A expressly states that national legislation will outline the circumstances when a court may determine the compensation is nil. The Amendment thus envisages a determination by a court concerning the amount of compensation payable and whether it is nil.

²² Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 *South African Journal of Human Rights* 31.

- 3.13. Why then do we outline the criterion in question? There have been reports that some political leaders wish to ensure the powers of the courts in this regard are ousted and the process of expropriation without compensation takes place purely through executive action.²³ If there are changes to the Bill that remove courts' powers of determination in this regard – or at least of review of any executive determination – any such amendment will be likely to be struck down as invalid. Similarly, the national legislation in question will not be constitutional if it fails to envisage a role for the courts, as we have mentioned.
- 3.14. The second question, then, is whether or not the current Bill provides for the review of legislation concerning expropriation without compensation (as well as individual determinations) against a constitutional standard. In this respect, the Bill is less clear. The key section is the new 3A – currently, it states that 'National legislation must, *subject to subsections (2) and (3)*, set out specific circumstances where a court may determine that the amount of compensation is nil'. The core words in this section are 'subject to subsections (2) and (3)'. An ordinary reading of these words suggests that the national legislation must be held to accord with the standards currently contained in subsections (2) and (3). As such, the legislation would simply be elaborating upon the circumstances that would constitute a public purpose or public interest and when compensation would be just and equitable. Such legislation would, in fact, be helpful to courts and could also, on this view, be reviewed against the constitutional standards applicable in those sections.
- 3.15. It is, however, possible that the intention behind the Bill was simply to enable national legislation to define all the circumstances in which expropriation without compensation could take place without being subject to any further constitutional standards. If the latter is the intention, as we have indicated, then the new amendment would be invalid: it cannot be that the legislature is

²³ Merten "ANC's Executive Proposal on Expropriation without Compensation Obscures Already Vast Ministerial Powers" 2020 *Daily Maverick* <https://www.dailymaverick.co.za/article/2020-01-28-ancs-executive-proposal-on-expropriation-without-compensation-obscures-already-vast-ministerial-powers/amp/> (27-02-2020)

empowered to pass legislation without being governed by a constitutional standard. It is also important that individual determinations are made taking account of the constitutional standards. We suggest an alternative wording to clarify the intention in the conclusion.

- 3.16. Lastly, we have suggested that the only justifiable purpose for expropriation without compensation would be to remedy historical injustice. Again, currently, the amendment to subsection 25(2) requires the purpose for which such an expropriation takes place to involve 'land reform'. The amendment currently meets this criterion but it should be clear that any changes to the amendment or national legislation must conform to this requirement.

4. Conclusion

- 4.1. In this submission, we have highlighted the fact that across the world in jurisdictions similar to South Africa, the power to amend the Constitution is limited. Courts may review such an exercise of power for whether it conforms to the basic structure and values of the Constitution.
- 4.2. We recognised in our submission the pressing need for land reform in South Africa to address the historical injustices brought about by colonialism and apartheid. Doing so, however, must take place within the framework of the constitutional order South Africa enacted and not fundamentally undermine democracy, fundamental rights and the rule of law, which are some of the central features of South African constitutionalism.
- 4.3. We recognise that an amendment allowing expropriation without compensation can represent a grave interference with the most basic foundational interests and fundamental rights of affected individuals. To be permissible, such an amendment must conform with, in our view, at least three criteria: the expropriation must be for purposes of land reform focused on remedying past historical injustices; legislation allowing such expropriation without compensation and individual determinations must be subject to review by

courts; such review must take place against a standard (or standards) included in the Constitution.

- 4.4. In our view, it is possible to interpret the current amendment as complying with these conditions. However, in order to remove any ambiguity, it would be desirable to clarify that any national legislation passed in terms of section 3A is subject to the substantive constitutional standards in subsections 25(2) and 25(3) of the Constitution. A revised 3A that expressly complies with the criteria we have highlighted could read as follows:

‘National Legislation must set out specific circumstances where a court may determine that the amount of compensation is nil. Such legislation must comply with the requirements of subsections 2 and 3 and only allow such expropriation for purposes of land reform to correct historical injustices.’