To: Mr V Ramaano

Sent by email: section25@parliament.gov.za

13 August 2021

Dear Mr Ramaano,

WRITTEN INPUTS ON THE DRAFT CONSTITUTION EIGHTEENTH AMENDMENT BILL

Thank you for the opportunity to submit comments on the above Bill, published on 19 July 2021.

We are experts in the field of Property Law in general and Constitutional Property Law specifically. We make the submission as a group, based on our scholarly research and knowledge.

The submissions are based on our own expert opinions and should not be attributed to any of the institutions we work for.

Kind regards,

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1 Introductory comments

To understand what this Committee is tasked to do, it is necessary to recap the history of the Bill. It is also important to allude to "Constitutional language" to comment sensibly on the amendments.

1.1 The history of the Bill

This Bill has a particular history that is worth repeating here to place the Bill that we are commenting on in context.

On 27 February 2018, the EFF introduced a motion in parliament that called for the amendment of section 25 of the Constitution to make possible "expropriation without compensation", and to propose the kind of land tenure regime that is needed "taking into account the necessity of the State being a custodian of all South African land". This motion was amended by the ANC, which, amongst other things, removed the requirement of custodianship of all land. The motion was then adopted by parliament. It is helpful to cite the amended paragraphs here, indicating what was deleted by the ANC (strikethrough), and what was added (in italics).

> (6) ~~recognises that at the centre of the present crisis regarding the resolution of the land question is section 25 of the Constitution, the "property clause", which protects private property rights, and requires the State to pay compensation when expropriating land in the public interest and for a public purpose;~~ *recognises that the current policy instruments, including the willing buyer willing seller policy, and other provisions of Section 25 of the Constitution may be hindering effective land reform.*
>
> ~~(7) further recognises that this property clause makes it practically impossible for those dispossessed of their land to get justice for injustices perpetrated against them;~~
>
> (8) notes that in his State of the Nation Address, President Cyril Ramaphosa ~~made a commitment that Government would embark on a radical land reform programme that entails expropriation of land without compensation;~~ *in recognising the original sin of land dispossession, made a commitment that Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the state, implemented in a manner that increases agricultural production, improve food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution.*

(9) further notes that any amendment to the Constitution to allow for land expropriation without compensation must go through a parliamentary process as Parliament is the only institution that can amend the Constitution; and

(10) establishes an ad hoc committee, in terms of Rule 253, the committee to – *with the concurrence of the NCOP instructs the Constitutional Review Committee to*

(a) ~~review and amend section 25 of the Constitution to make it possible for the state to expropriate land in the public interest without compensation, and in the process conduct public hearings to get the views of ordinary South Africans, policy-makers, civil society organisations and academics, about the necessity of, and mechanisms for expropriating land without compensation;~~ *review section 25 of the Constitution and other clauses where necessary*

(b) propose the necessary constitutional amendments *where applicable* with regards to the kind of future land tenure regime needed, ~~taking into account the necessity of the State being a custodian of all South African land;~~

~~(c) consist of 11 members, as follows: ANC 6, DA 2, EFF 1, and other parties 2;~~

~~(d) exercise those powers in Rule 167 that may assist it in carrying out its task; and~~

(e) report to the Assembly by no later than ~~11 May 2018~~. 30 August 2018.

This gave rise to the Constitutional Review Committee (CRC) that embarked on an extensive public participation process to ascertain whether South Africans want the Constitution amended "yes or no". The CRC recommended 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.

This recommendation became the mandate of the first Ad Hoc Committee, tasked with effecting the necessary amendment to section 25 of the Constitution. This Ad Hoc Committee to Amend Section 25 of the Constitution then requested various expert opinions on the amendment, many of whom warned that an amendment is unnecessary. Since custodianship did not survive the motion, and since it was not included in the mandate of the Committee, it was not discussed. On 5 December 2019, the Committee published a (first) Draft Bill for comment. This committee ended with the 5th Parliament

and was reconstituted but renamed the Ad Hoc Committee to Initiate and Introduce Legislation amending Section 25 of the Constitution (hereafter the committee) in terms of Rule 253. The mandate remained that they should assist parliament to amend[1]

> 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.

Public hearings did not take place in March 2020 because of the Covid-19 pandemic. The committee lapsed at the end of May 2020, only to be reintroduced again. The committee resumed its work in October 2020 with a renewed sense of urgency. Public hearings then took place mostly virtually in March 2021, with the committee also calling for inputs from the relevant Ministries. Very little of these conversations and inputs focused on the issue of custodianship, as it was not understood to be within the committee's mandate. It was not stated in the motion, and it was not included, at least not explicitly, in the mandate.

It, therefore, makes sense that when "custodianship" was added to the revised draft, that there was another call for public comments, as this is a substantive change not only from the previous draft Bill but possibly from the committee's mandate as well.

This, however, raises serious questions. One big question that resonates from the most recent suggestions for amendment to section 25 is: Are the latest suggested amendments still in line with the mandate of the Committee? In other words, do the suggestions comply with the mandate to make explicit what is implicit in the current section 25? At least in some instances, it would appear that the suggested proposals would go beyond the mandate. We will indicate where.

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[1] Unrevised Hansard of the National Assembly, 25 July 2019, available at https://pmg.org.za/hansard/28757/

1.2 Constitutional language

Our Bill of Rights is written in "plain language", consciously steering away from legalese and overly detailed formulations. This is to ensure that the Constitution is flexible and adaptable to endure. So, although Constitutions are generally not cast in stone, they are meant to endure for at least some time.

Constitutions are also "final" documents, in the sense that amending them (and especially the Bill of Rights) are long and complex processes. The current amendment to section 25 is no different and is evidence of this. When commenting on the wording of the proposed amendment, this needs to be kept in mind.

2 Long title

to provide that national legislation must provide circumstances where the amount of compensation is nil

This phrasing is awkward. Perhaps it may be reformulated to read: "to provide that national legislation must stipulate the circumstances where the amount of compensation is nil".

3 Proposed amendments – clause by clause

3.1 Preamble

In the past couple of decades, preambles have become important in the process of interpreting provisions. Preambles often give a background to or provide why the legislation is promulgated, and as such, can help with its interpretation.

The preamble has not changed from the previous draft. The comments made in previous submisssions by this group thus still stands. We will also show that what the preamble envisions, namely "ownership" is in fact contradicted later in the proposed amendment to section 25(5) that envisions "custodianship of certain land".

3.2 Paragraph 1

WHEREAS there is a need for urgent and accelerated land reform in order to address the injustices of the past that were inflicted on the majority of South Africans and especially as the hunger for land amongst the dispossessed is palpable and the dispossessed are of the view that very little is being done to redress the skewed land ownership pattern;

It has previously been pointed out[2] that the first paragraph is problematic. For one, it suggests that the slow pace of land reform is only viewed as problematic by the dispossessed when this is instead a widely held opinion. This has also been pointed out in many judgments – *Rakgase*,[3] *Mwelase*,[4] and *District Six Committee*[5] come to mind. Rather, the Preamble should speak to *all people* in South Africa, as a successful and orderly land reform programme that brings real change to people is in the interest of all South Africans. Furthermore, the Constitution is also the Constitution of *all* South Africans. An amendment that suggests that it is only aimed at a specific part of the population seems problematic. To solve this problem, the preamble should instead state as a fact that little has been done to realise the constitutional mandate regarding land reform. The relevant phrase, we suggest, should read thus: "... and very little is being done to redress the skewed land ownership pattern."

Moreover, the focus on "dispossessed" seems to negate the important place of tenure reforms of land rights. Land reform is not only focused on the dispossessed. It also incorporates laws that aim at securing tenure or programmes that aim to broaden access to land that is not necessarily linked to whether the person was dispossessed or not. This paragraph is therefore limiting. It is further limiting as "skewed land ownership pattern"

[2] The submission is uploaded on the PMG website at https://pmg.org.za/committee-meeting/32664/.
[3] {, 2019 #1173}.
[4] {, (CCT 232/18) [2019] ZACC 30 #500}.
[5] {, (LCC54/2018) [2019] ZALCC 13 (2 August 2019) #503}.

suggests that land reform should exclusively focus on ownership instead of also promoting land tenure.

We are also apprehensive about the impression created in this paragraph that this amendment is done to accelerate land reform. The effect of this proposed amendment will, in our view, *not* be to accelerate land reform, and we are concerned about the expectations that are created in the process. If the government does not implement the laws we already have and amend and promulgate laws needed to ensure land redistribution, an amendment to section 25 will be of no real effect. The expectation created by this paragraph is dangerous.

3.3 Paragraph 2

AND WHEREAS section 25 of the Constitution of the Republic of South Africa, 1996, must be amended to make explicit that which is implicit therein, so that an amount of nil compensation is explicitly stated as a legitimate option for land reform;

The second paragraph mimics the committee's mandate: amending section 25 "to make explicit what is implicit […] so that nil compensation is explicitly stated as a legitimate option for land reform".

As we pointed out in a previous written submission, there seems to be little consensus on what is currently "implicit" in section 25 concerning compensation for expropriation. On our interpretation, what is implicit, is that in any expropriation, an amount of compensation that is just and equitable under the circumstances is payable. However, in some cases, the circumstances may indicate that the just and equitable amount of compensation is R0 (or nil), just as, in other cases, it may be market value, below market value, or even above market value.

This position – in other words, that compensation is always payable for expropriation but may under appropriate circumstances be nil – is the point of departure for the current interpretation of section 25 as well as any amendment to it.

As a point of departure, this position is notably different from "expropriation without compensation", which in principle means that there is no obligation at all to compensate when property is expropriated. With "expropriation without compensation", the expropriatee can, in other words, not question the compensation because there is no *per se* duty to compensate. In our view, this is not implicit in the current section 25.

Any amendment, to make explicit what is implicit, must then be clear that in any expropriation (also expropriation for land reform purposes), there is always a duty to compensate, but that the amount of compensation must be determined on a case-by-case basis, on the standard of justice and equity, and may sometimes be an amount of nil.

3.4 Paragraph 3

AND WHEREAS such an amendment will contribute to address the historic wrongs caused by the arbitrary dispossession of land;

Linking to the comments above, we are concerned that the impression is created that this amendment *will* contribute to addressing historic wrongs. Expropriation is only part of the solution. Preambles should also not state what the legislation will do. It should instead identify the purpose of the legislation. Therefore, a sentence saying "there is a need to address the historic wrongs" is arguably more appropriate in this context.

3.5 Paragraph 4

AND WHEREAS such an amendment will further ensure equitable access to land and will further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs;

Law on its own cannot ensure what is listed here. It should be coupled with government action. As in the comment above, we propose that the sentence should instead read thus: "there is a need to 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".

We are also concerned that there is only reference to agricultural land in the preamble and this paragraph specifically. Does that mean that nil compensation is only applicable to agricultural land?

We are further concerned that the requirement that people are "productive participants in ownership" suggests that land reform is only concerned with (productive) agriculture, while land reform encompasses much more than that. In some instances, it ensures that people have security of tenure and that they will not be arbitrarily evicted from their homes. Some people and communities want restitution of their land not necessarily to use it "productively" but to restore their connection with the land or use it for housing purposes. In other words: this formulation limits the transformative scope of section 25.

Lastly, the preamble creates the impression that this will be done by giving people *ownership* of land. Yet, the suggested amendment of section 25(5) (see comments below) seeks to do land reform through custodianship, which is *not* ownership. There is, therefore, a conflict between the preamble and the provisions of the suggested Bill.

3.6 1(a) amending section 25(2)(b)

"(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court: Provided that where land and any improvements thereon are expropriated for purposes of land reform as contemplated in subsection (8), the amount of compensation may be nil.";

The only change in this paragraph from the previous version is removing the courts as the only forum that can determine nil compensation. In our last submission, we have supported such a stance.

What is meant with "improvements" remains unclear. In terms of the basic principles of property law, all permanent attachments form part of the land. It is submitted that where land has any improvements (in the sense of permanent attachments), such improvements automatically form part of the land in terms of the principle of attachment (or *inaedifiatio*, to be more specific). Therefore, unless this is an indication that improvements that do not normally attach to the land (for instance crops and implementations) can also be expropriated at nil compensation, this should be removed.

Ethiopian law, for instance, regards land and the structures built on land as two different kinds of immovable property. While land cannot be held in private ownership, the state can still expropriate the immovable property in the form of a house, for instance. In Ethiopian law, such a construct will therefore make sense. But not in the South African law context.

3.7 Clause 1(b) amending section 25(3)

"The amount of the compensation <u>as contemplated in subsection (2)(b),</u> and the time and manner of <u>any</u> 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—";

Not much has changed here. What is important from a legal perspective is to note what is left in this section, namely, that the compensation standard remains "just and equitable". What is "*just and equitable*" will differ from case to case. Our problem, and in our opinion where the bulk of the conversation *should* lie, is *how* do we calculate "*just and equitable*" compensation because justice and equity are difficult to quantify.

3.8 Clause 1(c) inserting section 3A

"<u>(3A) For the furtherance of land reform, national legislation must, subject to subsections (2) and (3), set out circumstances where the amount of compensation is nil.</u>";

This subsection changed from the previous one in that references to the courts are removed, and "land reform" was added. What this section envisions has been done in the Expropriation Bill that is awaiting finalisation in parliament.

A fair amount of time has been spent in the Ad Hoc Committee regarding whether the Constitution should list the circumstances where property can be expropriated at nil compensation or whether this should be left to the legislature to legislate on. Concerns were raised that the amendment to the Constitution requires a 2/3 majority, while the promulgation of legislation only requires 51%.

At this point, it should be reiterated that the Constitution is a framework, and any legislation promulgated by the legislature must comply with the principles and values laid down in the Constitution. The constitutional standard of "just and equitable" will always be applicable in the calculation of compensation. While a list might signal what property may be subjected to nil compensation, the principle remains flexible and contextual.

There are also formulation problems with the revised draft: "the amount of compensation is nil". "Just and equitable" is a contextual question, and "is" in the suggested formulation removes the discretion to determine in a particular case whether nil compensation is indeed "just and equitable". Instead, the sentence should read, "the amount of compensation *may be* nil".

3.9 Clause 1(d) inserting 4A

"(4A) The land is the common heritage of all citizens that the state must safeguard for future generations."; and

It is unclear why this clause was added. We are of the opinion that such a statement should be in the preamble and not in the text. Such a clause indicates big policy choices rather than a constitutional provision.

Furthermore, we are concerned that the reference is limited to land and does not include other natural resources. Section 25 speaks to a range of other reforms, and the proposed amendment seems to limit our idea of what reform of natural resources entails.

"Common heritage", in international law, is a principle that is often used in the context of natural resources that should be shielded from (commercial) exploitation because of the value that it holds (also for future generations).

In the South African context, the Freedom Charter stated that "[t]he national wealth of our country, the heritage of all South Africans, shall be restored to the people", but it referred to wealth. A similar statement was not included under land. The Mineral and Petroleum Resources Development Act that states that "[m]ineral and petroleum resources are the common heritage of all the people of South Africa", and then, importantly, continues to state that "the State is the custodian thereof for the benefit of all South Africans". In other words – because minerals are common heritage, it should be under state custodianship – similar to the thinking in international law. However, the proposed amendment to section 25(5) only refers to "certain land" and does not seek to place *all* land in the common heritage.

That being said, we do acknowledge that a statement like this in the Constitution may have some purpose. It potentially allows for more radical land reform, especially in the cases where individual interests must be balanced with the purpose of specific legislation. However, more thought must be given to its intended meaning and its reach.

3.10 Clause 1(e) amending section 25(5)

"(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable <u>state custodianship of certain land in order for</u> citizens to gain access to land on an equitable basis."

This is a new proposed amendment. Section 25(5) orders the state to redistribute land. Despite this explicit instruction, we currently lack a comprehensive "Redistribution Act".

The policies that guide redistribution are muddled and often inaccessible to the public. Policies, in any event, do not create solid rights and lack robust accountability mechanisms.

The reference to "certain land" signals that it does not envision placing *all* land under custodianship. The fact that there is no clarity as to *what* land it would be is highly problematic.

Another problem is the way it is phrased. As currently formulated, the phrase allows land redistribution to occur *only* through the mechanism of state custodianship and in no other way. Paradoxically, the proposed formulation drastically limits the scope for land redistribution from what is possible in terms of the current section 25(5), which gives the state a blanket mandate to take any measures (including, presumably, state custodianship) to enable citizens to gain equitable access to land.

There is also a conceptual problem (linked with the preamble) in this instance. Suppose the problem is, as stated in the preamble, that skewed patterns of land ownership must be addressed. In that case, the question must be asked whether this introduced "custodianship" still leaves options open for "ownership"? The proposed formulation does not – it says that land redistribution may occur only through state custodianship of land (and by implication not by finding ways in which to pass ownership onto the excluded). In other words: what the preamble states it wants to do with the amendment Bill and what it does, are two different things. Custodianship will not address skewed patterns of land ownership.

3.10.1 Our understanding of custodianship[6]

The notion of "public trusteeship" was formally introduced into South African law in the *National Water Act*[7] *,* establishing public trusteeship of the nation's water resources. This was followed by the *National Environmental Management Act.*[8] The *National Environmental Management: Biodiversity Act*[9] and the *National Environmental Management: Integrated Coastal Management Act* oblige the state to act as trustee of the environment or the specified natural resource.

The *Mineral and Petroleum Resources Development Act*[10] uses the term "custodianship", stating that "[m]ineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans". Custodianship of "certain land", namely agricultural land, has been tried before in the form of the Draft Preservation and Development of Agricultural Land Framework Bill of 2015. Clause 3(1) of the said Draft Bill states that "agricultural land is the common heritage of all the people of South Africa and the Department is the custodian thereof for the benefit of all South Africans". State custodianship was removed in the final version that is now back in parliament.

Scholars argue that it is possible to use the notion of public trusteeship widely to include references to state custodianship due to the inherent similarities of the two concepts.[11]

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[6] A great deal of the explanation under this paragraph comes from a chapter that our colleague Ms Phephelaphi Dube worked on at the time of her untimely passing.

[7] Act 36 of 1998 at s 3 (1). See also Pienaar and Van der Schyff 2007 *LEAD* 179-194 who state that this section "can therefore be regarded as the axle of the new water law dispensation.

[8] Act 107 of 1998 at s 2 (o).

[9] Act 10 of 2004 at s 3.

[10] Act 28 of 2002 at s 3(1). In addition, from its preamble and other relevant provisions, it becomes evident that the South African people are bestowed with property and the government has a fiduciary responsibility which changes the existing concept of ownership.

[11] Van der Schyff states that the terms have been used interchangeably within the various statutes where the concept of trusteeship is used. She concludes that trusteeship and custodianship lie within the umbrella term "stewardship". Van der Schyff 2013 *SALJ* 388.

These concepts have also been used interchangeably in court cases.[12] These two concepts have in common the fiduciary responsibility in respect of natural resources imposed on the state, with the primary intention of protecting inter and intra-generational interests.[13] It also seeks to ensure transformation. It does so by converting certain private property rights into public rights, heavily regulated, usually with permits and licences.

The statutes lay out the responsibilities of the public trustee with regard to the fiduciary responsibility of protecting and preserving the particular natural resource.[14] In addition, the trustee is tasked with managing the resource use sustainably and equitably for the benefit of present and future users. South Africans and, indeed, non-South Africans as a whole are the beneficiaries under the different statutes. The trustee or custodian seeks to protect the public interest in national resources.

This idea has not always been a part of South African law. However, some scholars have noted that the concept of custodianship over water was part of indigenous customary law[15] and Roman Law.[16] Other scholars make the argument that this is not an entirely

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[12] *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2006] ZAGPHC 132 para 19 states that the Constitution "confers upon the authorities a stewardship whereby the present generation is constituted as the custodian or trustee of the environment for future genera- tions. From this follows that owners of land no longer enjoy the absolute real rights known to earlier generations. An owner may not use his or her land in a way which may prejudice the community in which he or she lives because to a degree he or she holds the land in trust for future generations." See also Van der Schyff (2013) *SALJ*.

[13] Anstee-Wedderburn 2014 *Australian Journal of Environmental Law* 38-39.

[14] Pienaar and Van der Schyff 2007 *LEAD* 179-194.

[15] Feris who notes that indigenous and customary law treated water as part of the "commons" in the sense that it was not privately owned in "The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa" 2007 *LEAD* 8/1 11. Bennett notes with regard to water which in terms of indigenous law was managed as a common resource by the local rulers of a region and access to water was allowed for all members of the community. This access was regulated, where appropriate in accordance with the interests of the entire community in Bennett 2004 *African Customary Law* 206.

[16] Yiannopoulos 1962 *Louisiana LR* 756 – 766 who states that Justinian distinguished between *res divini iuris* which referred to things pertaining to the gods and *res humani* which was made up of res communes, *res publicae* and *res universitatis*. Common property as such was known as *res communae* and included examples such as the air, ocean, and light and rain water and the water of the rivers. Public property was however divided into *res publicae* and *res universitatis.* Property which could be of use and or belonging to people was termed *res publicae*. *Res publicae* was under state ownership in a form of public ownership subject to special rules which differed greatly from those applied in private law. *Res universitatis* was said to be "the property of public bodies other than the people or the state" and included things owned by a smaller community of people or bodies such as corporations and municipalities.

novel concept and is comparable to customary law (where water, for instance, has been part of the commons and, in that sense not privately owned) and Roman law (the idea of *res nostro patrimonio*, as Justinian would have it), land under the Ingonyama Trust, or even land under the South African Development Trust during Apartheid.

Nonetheless, as it appears in South African legislation, trusteeship and custodianship are now created by statutes.[17] The state is strictly bound to regulate the resources in terms of the legislation that bestows this trusteeship or custodianship.

Placing resources under the custodianship of the state has certain implications. It removes certain specific forms of property, as clarified in legislation, from the realm of private property and places it in the arena of public property. But it stops short of nationalisation (although some scholars question this). The state is not the owner, as it would be in the case of nationalisation. The state cannot alienate the resources. The state does not benefit from the resources. The holder of a mineral right, for instance, uses the right for their benefit, even if they are not the owner. Custodianship is not based on an ownership model at all. This makes the goal of addressing skewed patterns of landownership impossible to achieve.

When the state places a resource under its custodianship, compensation is not due to the former owner. It is not an expropriation (as per *AgriSA*) but rather deprivation of property. These powers are restricted, and the question of when it will be unconstitutional is still undetermined.

Such an institutional change – changing the resource from private property to public property – will only be permissible under the current Constitution if such a scheme is based on constitutional authority and is rationally legitimate and procedurally just.

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[17] Reid and Visser 2013 *Bringing Rights Home in Scotland and South Africa in Private Law and Human Rights* 507.

Also, suppose the effect of such a change disproportionately lands on one individual or a small group of people without providing for some form of compensation (damages or some other form of compensation). In that case, it will (at least in the current wording of s 25) be unconstitutional.

What is important to note here is that placing "certain land" under custodianship is a policy decision and one that is already possible within the current wording of the Constitution subject to the provisos listed above. In the group it was argued that the insertion of 4A would probably facilitate such a move.

It is important to note that the language of the Constitution does not specify entrenching a specific economic system – this is negotiated politically. Therefore, since placing resources under the custodianship of the land is already possible in terms of the Constitution and indeed has been done before, this is a *policy* decision, not a matter for a constitutional amendment.

There are different views about what state custodianship entails. What it means in this context makes it rather worrying that this has not been part of a more extensive conversation and public participation and engagement. It is also crucial to underscore that the concept explained by certain members in the Ad Hoc Committee[18] is not what we understand "custodianship" to mean. Inserting such a concept in a constitutional amendment with three-week comments and no public participation or engagement seems dangerous.

4 Conclusion

We thank you for the opportunity to submit comments on the revised draft amendment. If there is an opportunity for oral submissions, we would like to make an oral submission.

[18] See the interpretation of hon Xaba here: https://pmg.org.za/committee-meeting/33100/ .