

#12 EQUITABLE ACCESS TO LAND

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Land redistribution is a hot topic in South Africa. Some are saying that the constitution needs to change so as to speed up land reform and land redistribution¹ while others claim that it is not the constitution that is the problem, but rather weak land reform implementation and elite capture of the land reform process². What does the constitution actually say about land redistribution? What legislation is there in support of land redistribution? What is the state doing to implement land redistribution?

Section 25.5 of the Constitution says that *"the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."*³ In other words the constitution does not give

¹ Mail and Guardian reporters, 4 July 2017, *Hunger for land must be satisfied*, <https://mg.co.za/article/2017-07-04-00-hunger-for-land-must-be-satisfied>

² Ben Cousins, 2016, *Land reform in South Africa is sinking. Can it be saved?* available at: https://www.nelsonmandela.org/uploads/files/Land_law_and_leadership_-_paper_2.pdf

³ Section 25.5 of the constitution can be termed the 'land redistribution' clause of the constitution. This contrasts with sections 25. 6 and 25.7 which can be termed the 'tenure reform' and the 'land restitution' clauses of the constitution respectively. Section 25.6 states that *"a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided*

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people the right to land as many people think. The constitution only gives people the right to a legislative and other (e.g. economic and institutional) environment which helps these people gain access to land on an equitable basis.

Section 26 of the Constitution dealing with housing, on the other hand, does give people the right to adequate housing on a progressive basis and within available resources⁴. As housing needs to be built on land, section 26 in effect does give people the right to land for residential purposes. Does this mean then that for the purposes of the right to land for housing, that section 25.5 dealing with land redistribution is irrelevant? Is section 25.5 only of interest to those that want to use land for agricultural and other non housing related purposes?

One way to unpack these questions is to explore what would need to be done by an applicant (or group of applicants) if they wanted to get a ruling from the courts that the state is violating section 25.5 of the constitution. In effect the applicant would need to show two things. Firstly the applicant would need to show that the state is not doing enough to foster conditions for land redistribution; and secondly the applicant would need to show that the conditions that the state has fostered are not enabling citizens to gain access to land on an equitable basis⁵. This learning brief suggests that a case can be made showing that the second of these two issues in particular is not being met, even when it comes to land for housing.

In relation to ‘fostering conditions for land redistribution’, the piece of legislation that currently provides a legal basis for land redistribution is the *Provision of Land and Assistance Act, no 126 of 1993*. This Act however does not go into any detail on the goals of land redistribution and how it will be supported⁶. Further, in relation to land for residential purposes, governments’ initial housing and subsequent human settlement policy⁷ is directly geared at providing adequate housing, which implies that land is also made available for this purpose. However, in relation to achieving an outcome that enables citizens to gain access to land (for residential purposes) on an equitable basis, it can be argued that the state is falling short. For more discussion on ‘equitable access’ see Box 1 on “what does equitable access to land mean?”

As much as housing (and residential land) is provided by the state through housing subsidies, millions of people continue to live in informal settlements and other poor

by an Act of Parliament, either to tenure which is legally secure or to comparable redress”; while section 25.7 states that “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 restitution of that property or to equitable redress”.

⁴ 25.1 “Everyone has the right to have access to adequate housing” and 25.2 “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” and 25.3 “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

⁵ The focus of this paper is on land redistribution for residential and housing purposes but many of the arguments also apply to land redistribution for agricultural and other purposes.

⁶ Personal communication with Prof Ben Cousins (7 June 2017)

⁷ Governments human settlement policy is articulated in Breaking New Ground: A comprehensive Plan for the Development of Sustainable human Settlements (2004),

http://www.dhs.gov.za/sites/default/files/documents/26082014_BNG2004.pdf

conditions⁸. At current rates of housing delivery this situation is worsening and not improving. Between 1994 and 2014 the South African government provided more than 2.5 million houses and some 1.2 million serviced sites, but the housing backlog nevertheless increased over this same period from 1.5 million to 2.1 million units, while the number of informal settlements went up from 300 to 2 225⁹. Citizens are not gaining access to land on an equitable basis as a result of the conditions that the state has fostered through the legislative and other measures that they have put in place. Many people do get land through the housing subsidy programme but many others have to wait years to be allocated a house (and a residential site)¹⁰.

Maybe it is time for social justice advocates and human rights lawyers working with communities living in informal settlements, backyard shacks and in other poor living conditions to work together as a group, to take the state to court to make the case that the state is not living up to section 25.5 of the constitution. It would need to be demonstrated that the legislative and other measures the state has put in place are not up to the task of ensuring that everyone has access to land (for residential purposes) on an equitable basis. The present individual case by case litigation process, where individual communities are winning court cases demonstrating that the state is not living up to its duty to address section 26 of the constitution dealing with the right to housing¹¹, is not addressing the bigger picture, that it is actually governments' housing programme, as whole, that is inadequate in the task of ensuring all citizens gain access to land (for residential purposes) on an equitable basis.

The implications of applicants winning such a case related to section 25.5 of the constitution would be huge. The state will have to rethink all of its policies and programmes relating to human settlement development. Far more attention would need to be given to putting in place legislation that speeds up the identification, acquisition and development of land for human settlements. With limited resources this will imply a shift in priorities around budget spending from housing top structures to land acquisition and development. Instead of providing land and housing for a lucky few each year, the state could, with the same budget reach far more people each year by providing at least a (basic) serviced site and tenure security as part of a new Managed Land Settlement Programme and the upgrading of informal settlements to at least level 2 (basic services) of the Upgrading of Informal Settlements Programme.

The state however does not need to wait for such a constitutional court case under section 25.5 of the constitution to be brought against it. The state can proactively improve the

⁸ "Of the nation's 16.9 million households, the number of people living in informal settlements stood at 13% in 2016." That's nearly 2.2 million households or more than 7.2 million people (at a household size of 3.3 people per household).

<http://www.sundayworld.co.za/news/2016/07/01/number-of-people-in-informal-settlements-remains-stubbornly-high->

⁹ South Africa's Housing Conundrum, SAIRR, @liberty, No 4, 2015/6 October 2015/Issue 20

<http://irr.org.za/reports-and-publications/atLiberty/files/liberty-2013-south-africas-housing-conundrum>

¹⁰ For more motivation for this statement see Ronald Eglin, July 2017, *Land Acquisition and Development for human Settlement Development*

<http://afesis.org.za/wp-content/uploads/2017/06/Learning-Brief-Land-Acquisition-and-development-for-human-settlement-development.pdf>

¹¹ <http://afesis.org.za/ground-breaking-constitutional-court-judgement-managed-land-settlement-connecting-dots/>

legislative and other conditions in a way that fosters “*conditions which enable citizens to gain access to land on an equitable basis.*” The state can do this by shifting its policy and legislative focus away from the predominant provision of ‘top structures’ to more of a focus on the provision of ‘land’ and services as explained above; and it can also do this by modifying existing legislation and/or introducing new legislation¹² that defines what is meant by ‘*equitable access to land*’ and put in place procedures for monitoring and evaluating the extent to which such equitable access to land is continually being improved.

Box 1: What does equitable access to land mean?

Let's once again remind ourselves what the constitution says about equitable access to land: “[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.” (section 25.5)

The Cambridge Dictionary defines ‘equitable’ as “*treating everyone fairly and in the same way*”.¹³ The Collins Dictionary states that “*something that is equitable is fair and reasonable in a way that gives equal treatment to everyone*”.¹⁴ Using this Collins dictionary definition, gaining access to land on an equitable basis would mean that the state is fair and reasonable and gives equal treatment to everyone in the way that they are able to access land.

The achievement of equality is central to the constitution - it is one of the three founding values alongside human dignity and freedom¹⁵. Section 9.2 of the constitution states that “*equality includes the full and equal enjoyment of all rights and freedoms*”. This section goes on to say that “*to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken*”. (emphasis added).

According to the *Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000* (commonly known as the Equality Act), equality is defined as “*the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes de jure and de facto equality and also equality in terms of outcomes*”. *De jure* equality is equality derived through law, while *de facto* equality is equality derived in practice. See further on in this section for a discussion on equality in terms of outcomes. Chapter 5 of the Equality Act (section 24.1) gives the State “*a duty and responsibility to promote and achieve equality*” but unfortunately this chapter of the Act has not yet been enacted. If chapter 5 were enacted it would, as per section 26 of this same Act, require the State to 1) adopt equality plans, regulations and other measures to promote equality, 2) monitor the implementation of these plans, and c) make regular reports on progress in achieving these plans. The enactment of chapter 5 of the Equality Act will go a long way to assisting in the achievement of equitable access to land.

In order to advance citizens gaining access to land on an equitable basis the state would need to deal both with people suffering the consequences of past historical injustices as well as with present socio-economic injustices. This means that legislation needs to make sure that ‘black’ people (who were discriminated against during and before apartheid, and were unable to acquire and own land in ‘white’

¹² See for example the recommendations calling for a new Land reform Framework law in the Report of the High Level Panel on the Assessment of key Legislation and the Acceleration of Fundamental Change of November 2017 makes similar recommendations, found at: <http://afesis.org.za/new-framework-law-land-reform/>

¹³ <http://dictionary.cambridge.org/dictionary/english/equitable>

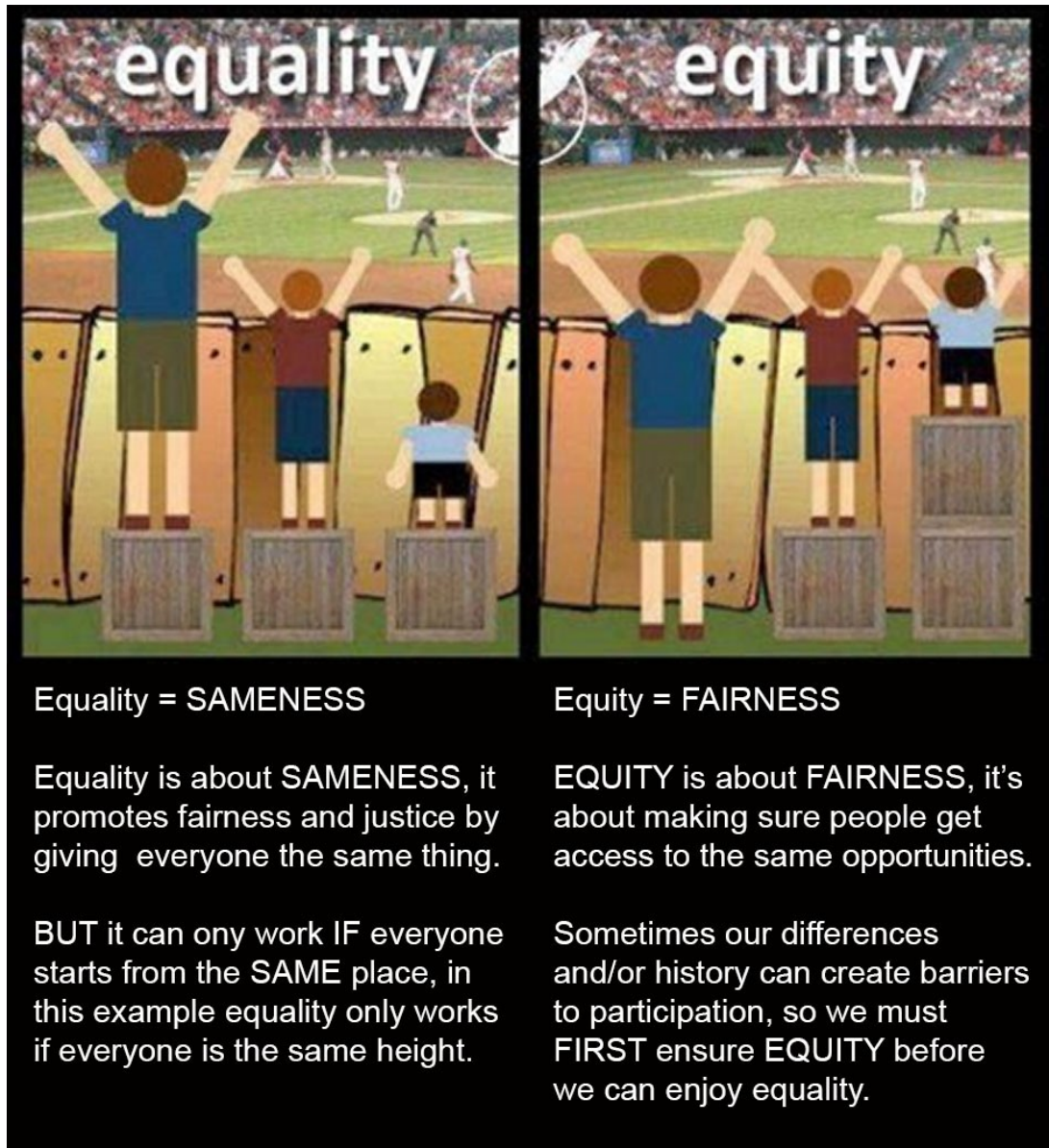
¹⁴ <https://www.collinsdictionary.com/dictionary/english/equitable>

¹⁵ Section 1.a of the constitutions states that “[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms’.

areas) are prioritised when it comes to using state resources to help people get land. It also means that the state needs to ensure that the poor are prioritised when it comes to using state resources to help people get land.

Any analysis of the concept of equitable access to land needs to understand the difference between equality of conditions (or outcome) and equality of opportunity.

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<https://www.pinterest.co.uk/pin/293578469444132167/>

One interpretation of equality of conditions implies that one strives for an outcome where everyone is living in similar conditions; where people who are undertaking similar land use activities have similar sized portions of land. Another interpretation of equality of conditions (or outcome) is that the number of people who have access to land (either in terms of numbers of people or hectares of land) matches the racial (and class, gender and other) population patterns of the area, be it at the national, provincial or municipal scale. In other words if a certain percentage of the people in an area are from a certain category of people (e.g. categorised according to race, class, gender, etc.) then a similar percentage of the land should be owned by that category.

Equality of opportunity on the other hand implies that all people are provided with the same opportunity to be able to acquire similar types of land. What people then do with this land is up to them.

A further interpretation of equitable access to land argues that equitable access implies that priority needs to be given to those most in need. This includes those living without access to land, including for example the poor, the aged, people living with disabilities and women.

This short enquiry shows that there are multiple questions that need to be unpacked if one is to make sense of section 25.5 of the constitution. What is the meaning of the phrase “*foster conditions which enable citizens to gain access to land on an equitable basis*”? What are the legislative and other measures that need to be put in place? What is reasonableness? What does it mean to foster conditions? Who are the citizens? What does gain access to land mean? What does equitable access to land mean? What is land?

The more one tries to understand the concept of ‘equitable access to land’, the more one can tie oneself in conceptual knots. The only way to untangle ones thinking and reach broad agreement with others on these concepts is to engage with others around this topic. If nothing else, I hope that this learning brief contributes towards this engagement.