

Reflections on the Section 25 Public Consultation Process



DYLLON NICHOLLS holds a BA and is currently completing his LLB at the University of Pretoria. Dyllon served an internship at the Helen Suzman Foundation in July 2018.



MIRA MENELL BRIEL holds a BSocSci and a LLB from the University of Cape Town. She is a Legal Researcher at the Helen Suzman Foundation.

Introduction

Since the Motion to consider an amendment to section 25 of the Constitution was adopted by the National Assembly in February 2018, the 'Land Debate' has been the centre of many lectures, conferences, explosive twitter arguments, heated dinner table exchanges and research undertaken by civil society organisations.

The work of the Joint Constitutional Review Committee ("the Committee") established in terms of this Motion is close to wrapping up. At a glance, this appears to be one of the most extensive, constitutionally compliant public consultations executed by Parliament. A closer analysis yields a less optimistic conclusion. This piece will consider the different aspects of the public consultation process which is meant to lay the foundation for making an informed judgment on the process and its outcome.

The Process

The Committee made a call for written submissions on 13 April 2018. The deadline was 15 June 2018, to which there were more than 500 000 responses. The Committee then embarked on countrywide public hearings at 34 venues, inviting everyone and anyone to have their say. These were well attended. Finally, certain persons and groups who made written submissions were invited to make oral presentations before the Committee at Parliament. The list included religious groups, academic institutions, the private sector, advocacy groups, civil society, the agricultural sector, professional bodies and cultural movements. No political parties or government departments were invited to make oral submissions. The Committee is mandated to consider the contributions made in this public consultation process, regarding the necessity of changing the Constitution to enable expropriation without compensation.

Written Submissions

The volume of submissions is unprecedented. To put this into perspective, there are in some instances less than ten submissions made to Parliament on proposed, material legislative amendments. This response is encouraging as it demonstrates civil society's engagement with our participatory democracy but is also indicative of how passionate people feel about the protection of their property rights on the one hand and redistribution and restitution of land on the other.

A contract was awarded to an outside service provider to compile and summarise the written submissions. By late August, 1 49 886 submissions had been processed

and from a Report¹ presented by Co-Chairperson Smith of the Committee, clear trends emerged. According to this Report, the submissions were analysed in two groups – those that wanted the Constitution to be changed and those that did not want the Constitution to be changed. Although numbers on their own are an oversimplification, 89 327 (59,6%) of the analysed submissions were against a constitutional amendment, 60 157 (40,14%) indicated the Constitution must be amended and 402 (0,27%) were undecided.

The highline trend for those that do not want the Constitution amended is the argument that section 25 in its current form allows for expropriation without compensation. This position is generally substantiated by a fear of loss of investor confidence caused by legal uncertainty, job losses and threats to food security. Many submissions identify the adoption of this land policy as an electioneering tactic. A view frequently expressed is that land reform efforts must prioritise the use and redistribution of government-owned land rather than expropriation of private property.

The Khoi-San people stated that section 25(7) of the Constitution constitutes an inhibition to restitution because their claims were negated by the 1913 cut-off date. Descendants of Khoi and San people saw themselves as the rightful owners whilst black African communities contended that they were the rightful owners.

A recurring position taken by those who support a change to the Constitution is that an amendment will satisfy the need to recognise historical injustices and that the Constitution in its current form is an impediment to land reform. Another trend identified from this group of submissions is the legal entitlement farm labourers should have to land they have lived on for many years and the injustice of forced removals which such labourers often have to endure at the hands of new farm owners. It is suggested that an amendment to the Constitution will remedy this situation.

Public Hearings

The public hearings which took place over several weeks triggered much controversy and debate. In contrast to the view of most written submissions, the overwhelming sentiment expressed at the public hearings was that the Constitution should be amended. While many people came in their personal capacity as an interested party there was also a clear Economic Freedom Fighters ("EFF") representation in most towns.

As expected, contributions made at these hearings were of a more personal and emotive nature – people speaking of their experience of dispossession, disappointment with the lack of land reform progress and a need for not just land but housing and post-settlement support in the case of redistributed agricultural land.

Tensions were particularly high around the question of who the 'rightful owner of the land' is. The Khoi-San people stated that section 25(7) of the Constitution constitutes an inhibition to restitution because their claims were negated by the 1913 cut-off date. Descendants of Khoi and San people saw themselves as the rightful owners whilst black African communities contended that they were the rightful owners.

Those against an amendment to the Constitution frequently cited the findings published in the Report of the High-Level Panel to support the argument that the



Constitution has not been an obstacle to land reform but that the obstacles have been corruption, elite-capture and weak institutions. White farmers spoke about the necessity of certainty to maintain a productive agricultural sector.

Co-chairperson Smith remarked on behalf of the Committee, "I want to say to South Africans that this is not a referendum so it doesn't matter how many say yes or how many say no. It's not about numbers – it's about the strength of the argument".² As reassuring as this sentiment is, it remains difficult to imagine how the Committee members will impartially distinguish between strong and weak arguments and not ultimately reduce their analysis to a for/against numbers question.

The conflation of a constitutional amendment to explicitly allow for expropriation without compensation and redress of lasting apartheid inequalities and social injustice dominated the public hearings and may have distorted any impressions at this stage.

Oral Submissions

Around 40 organisations and individuals made oral presentations to the Committee. This stage of the consultation process was meant to give persons the chance to reinforce the position put forward in a written submission and to allow the Committee an opportunity to clarify points in the submission. In general, the engagements, which were live-streamed, lacked the intellectual rigour one would have expected. Digressing from a constructive dissection of the substance of submissions, members of the Committee focussed on aspects of presentations that were often irrelevant to the issue at hand. This stage of public consultation does not carry more weight than any other but it is an opportunity to quiz experts in the field and absorb research willingly put before Parliament to assist in making informed, rational decisions.

Conclusion

South Africa is far from the enactment of a Constitutional amendment. The task of the Committee is a preliminary inquiry to determine whether South Africans believe the Constitution needs to be amended to allow more rapid land reform. In the Report still to be adopted by Parliament, the Committee recommends that

the Constitution be amended. The actual drafting of the amendment Bill, another public consultation period and the processing of the Bill through Parliament (where it must obtain a two-thirds majority in the National Assembly - the ANC on its own does not constitute two-thirds) is still to take place. First, the outcome of this preliminary process must be accepted as a constitutional, meaningful and proper process – as demonstrated above, it is easy to allege that the public participation was in many instances superficial, meaningless and inadequate.

It remains unclear whether the true substance of the written submissions was appropriately distilled by the service provider and accurately relayed to the Committee. The fact that Committee members have expressly raised doubt about the appointment of the service provider, the mandate given to them and their methodology does not bode well.³ The conflation of a constitutional amendment to explicitly allow for expropriation without compensation and redress of lasting apartheid inequalities and social injustice dominated the public hearings and may have distorted any impressions at this stage.⁴ The oral hearings lacked substantive engagement and caught the attention of the public for the wrong reasons. The whole public consultation process seems to be more of a box-ticking exercise than a meaningful engagement with stakeholders.

The public participation model itself raises questions to consider: What duty does a Committee member have to South Africans and the Legislature? How can they be held accountable? How is access to engage given to the poorest South Africans (the cost of transport is just one barrier to participation for example)? This was never going to be an easy undertaking but perhaps the magnitude and importance of a constitutionally meticulous process was wildly underestimated. All we can wish for at this stage is that reason will prevail.

NOTES

- 1 Parliamentary Monitoring Group, Section 25 review: progress update & selection of oral submission participants, 22 August 2018.
- 2 Parliamentary Monitoring Group, Public Hearings on Review of Section 25 of Constitution, 17 July 2018.
- 3 The appointment of the service provider, Isilumko, is contested. Suspicions were raised about Isilumko's suitability for the job as a recruitment company with no established track record of doing work of this kind. Questions were raised in a Committee meeting about the company's capabilities and whether their analysis of the written submissions is adequate (<https://www.news24.com/SouthAfrica/constitutional-review-committee-to-ask-for-extension-for-its-work-on-section-25-20180920>)
- 4 Marianne Merten, Explainer: Everything you wanted to know (or would rather not have known) about expropriation without compensation, Daily Maverick, 10 September 2018.