

Summary of the HSF's Submission to the Constitutional Review Committee:

On 27 February 2018, the National Assembly adopted a motion on a review and potential amendment of Section 25 of the Constitution relating to expropriation without compensation ("the Motion"). The Motion had been introduced by the Economic Freedom Fighters ("EFF"), but the final text included certain amendments put forward by the ANC. The National Assembly established an ad hoc committee ("the Committee") to conduct a review of Section 25 of the Constitution. This Committee has to report to the National Assembly by 30 August 2018.

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The HSF has submitted a written submission to the Committee, which is summarised in this brief.

Section 25 of The Constitution Already Allows for Expropriation Without Compensation

Section 25 permits expropriation of property in the public interest, which is defined as including "the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources". It also sets out the criteria for compensation to be paid. On a literal interpretation, there is nothing in Section 25 that precludes the compensation from being small (or nothing at all), if that is the result of taking all relevant circumstances into account, as required by its provisions. This would be possible where land has been unutilized for a considerable time, from which the owner is deriving no income, which provides no employment, where there are no plans to use the land in a productive manner but where there is real potential (either for agricultural or urban purposes) in making it available within the Government's land reform programme. The history of the property and the way in which it was acquired may also be relevant.

In addition, Section 25(8) of the Constitution provides that:

"No provision of this Section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this Section is in accordance with the provisions of Section 36(1)."

Section 36(1), which is referred to at the end of Section 25(8), provides that limitations may only be contained in legislation of general application. In other words, such measures may not target specific individuals or groups, but must apply to all.

Given the clear and unambiguous meaning of Section 25(8), what need is there even to discuss changing the Constitution to provide for expropriation without compensation?

Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3), particularly in relation to land that is unutilised or under-utilised.

Changing The Constitution is No Substitute for a Lack of Action on Land Reform

The Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change¹, published in November 2017, ("the High Level Panel") provides a comprehensive overview of the land reform process. The High Level Panel's report makes it clear that the reason for the slow pace of land reform is not the Constitution:

"Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date - other constraints, including increasing evidence of corruption by officials, the diversion of land reform budget to elites, lack of political will, and lack of training and capacity have proved the more serious stumbling blocks to land reform Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3), particularly in relation to land that is unutilised or under-utilised. "²

Making the Constitution the villain of the piece serves as a convenient excuse for the lack of political will in land reform. Clear evidence of the lack of political will is indicated by the following:

- The pace of restitution has been extremely slow. According to the Report of the High Level Panel, there has been a downward trend in the pace of redistribution since 2008³. There are still 7000 unsettled claims in the current restitution process and more than 19 000 unfinalised claims that had been lodged before 1998. It will take 35 years to settle these claims at the present rate of 560 claims a year.
- The budget allocated to land reform and restitution is negligible. In the 2018 National Budget, only 0,3% of the consolidated expenditure is allocated to land reform and restitution combined.⁴
- The Government has made no real attempt at using Section 25 of the Constitution to effect expropriation of land in a meaningful manner.
- The failure to amend legislation such as the Expropriation Act of 1975, which contains the "willing seller – willing buyer" concept, which does not appear in the Constitution.

Is Expropriation Without Compensation necessary?

Whilst emphasis is given in Government statements to rectifying the historical dispossession of land, the underlying message is that it is a way of broadening economic participation, given the degree of continued inequality in wealth between racial groups in South Africa.

Attempts to rectify this considerable imbalance incrementally through the normal workings of the economy will, even if economic growth increases substantially

over current levels, take generations. It is therefore not unexpected that more radical policies are advocated, such as a more aggressive approach to land reform.

However, a rushed and poorly thought out programme will incur unnecessary delays and costs and lead to disappointing outcomes. It should have a beneficial economic influence and the poorest in our society must be the beneficiaries. Land reform would not be justified if, as a consequence, the wealthier sectors of society accumulate further assets.

In order to avoid arbitrary, corrupt or incompetent conduct in the implementation of a land reform policy, a clear legislative and administrative framework, together with a properly resourced Government institution to manage the process, has to be put in place.

Expropriation Without Compensation Should Only be Carried Out Within a Clearly Defined Decision-Making Process and Administrative Structure

The HSF believes that it is possible in terms of Section 25 of the Constitution (as it stands now) to expropriate land in the public interest, often with little or no compensation.

In order to avoid arbitrary, corrupt or incompetent conduct in the implementation of a land reform policy, a clear legislative and administrative framework, together with a properly resourced Government institution to manage the process, has to be put in place. If this is not done, any expropriation policy is going to confront insurmountable problems.

In establishing such a framework, clarity first has to be obtained on a number of different issues which would have a direct effect on any expropriation process. Examples of these issues are illustrated by the following questions (which are by no means exhaustive)⁵:

- How will decisions be taken on land that is to be expropriated? What criteria are relevant in any decisions? Who will take the decisions? What procedure is foreseen for objections?
- Who is to be given the expropriated land? Who will decide on who is to be a beneficiary? On what criteria? Will the policy be targeted to benefit the poor?
- Are the financial circumstances of the persons whose land are to be expropriated relevant (to avoid former owners being left destitute)?
- What dispute resolution mechanism is to be established?
- How will sufficient transparency be given to the process to avoid public discontent?
- What is to be the basis for deciding that specific land is suitable for redistribution for agricultural or urban purposes? What are the needs for each category? Will any land redistribution be subject to feasibility studies which set out what can realistically be achieved in any specific case? Have the environmental implications been taken into account in an adequate manner? If urban development is foreseen, will it fit into larger urban development programmes (including transport and basic infrastructure)?
- Is post-settlement support by Government to be provided, or will beneficiaries (mainly the poor) be left to their own devices?

- On what legal basis is the land to be held by beneficiaries? With full legal title or through a lease from a local or traditional authority? If it is a lease, what security of tenure will beneficiaries have? Is any form of tenure reform envisaged by Government for this purpose?
- Will the process be managed by an adequately resourced and staffed land reform agency? Will appropriately qualified staff be available for this?
- Will Government be able to fund this whole undertaking, in stark contrast to the purely nominal funding dedicated to land reform up to now?

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It is striking that none of these issues have been raised in the public debate so far.

If the questions which are set out above are not dealt with in an adequate manner, together with the establishment of a suitable legislative and administrative framework, the consequences will be the following:

- Legal challenges based on the irrational/arbitrary exercise of executive power will bring the process to a grinding halt very quickly.
- The problems which already exist in the land reform process, will continue, leading not only to a stalled process, but also to perceptions of a failed policy, further fueling public dissatisfaction.
- Business and investment confidence will experience a serious shock. It is easy to underestimate the degree to which such confidence relies on legal certainty and on the predictability of Government policy.
- A lack of a clear policy framework also increases the perceived risk to private property rights and will have direct financial consequences in the form of urban and rural ventures being unable to source funding from banks (since the banks would not wish to lend if the activities they are financing are on land where ownership is not considered to be secure).

The Important Practical Issues Need to be Dealt With Outside of The Constitution

No amendment to the Constitution will provide answers to the practical questions which are set out above. Extensive legislation and clear administrative regulations and guidelines will be required, together with a properly funded and staffed supervisory/management agency, to enable a process which is characterized by rational decision-making and efficient implementation.

The Need For a New Framework Law on Land Reform and for Clarification of The Content of Land Tenure Rights

As far as the legal tenure of residents in traditional areas is concerned, the HSF shares the High Level Panel's concern, where the latter comments as follows:

"It is of great concern to the Panel that recent policy shifts appear to default to some of the key repertoires that were used to justify the denial of political and property rights for black people during colonialism and apartheid. These repertoires include the assumption that customary and de factoland tenure systems do not constitute property rights for the poor. The State Land Lease and Disposal policy, and the CPA Amendment Bill default to the model of state trusteeship put in place by the Development Trust and Land Act of 1936 as

the most appropriate form of land rights for beneficiaries of land reform. This model previously applied only in the former homelands, but now appears to have been extended to all land made available through restitution and redistribution."⁶

In paragraph 10(b) of the Motion, the Committee is asked to propose "the necessary constitutional amendments, where applicable, with regards to the kind of future land tenure regime needed". The HSF is of the opinion that this matter does not need to be determined in the Constitution. Rather, legislation should be prepared to enable real ownership rights to be given not only to persons who benefit from land reform, but also those who live in areas where they are subject to the authority of traditional authorities. Historical state/traditional authority trusteeship models need to benefit from administrative standards and practices that allow for secure tenure.

The various studies and audits that have been carried out, have therefore not succeeded in describing the racial imbalance in land ownership in precise terms. "There is almost zero information on how many people have actually benefited from land reform, patterns of land use after transfer, and levels of production and income."

Land Ownership Statistics

In the public debate on land reform, statistics are often selected in accordance with the individual speaker's agenda. There is no generally accepted set of statistics available for an accurate analysis. Much is clouded by the fact that private ownership statistics include land owned by companies, trusts and other entities which make it impossible to obtain an accurate impression of racial composition. Further, large areas inhabited by black residents are held by traditional authorities and the legal basis of individual tenure is often less than clear. It is also evident that this latter segment cannot be compared to freehold areas.

The various studies and audits that have been carried out, have therefore not succeeded in describing the racial imbalance in land ownership in precise terms. "There is almost zero information on how many people have actually benefited from land reform, patterns of land use after transfer, and levels of production and income."⁷

In an attempt to obtain an indicative overall picture, we can refer to the summary provided by the Institute for Poverty, Land and Agrarian Studies at the University of the Western Cape.⁸ It sets out the following rough distribution:

- 67% commercial agricultural land (where most farmers are white but small numbers of black farmers with access to capital are acquiring land through the market independently of land reform);
- 15% communal areas (mostly state-owned, and settled by black households under various form of customary tenure, including the land held by the Ingonyama Trust, which on its own holds 2% of South Africa's land);
- 10% other state land; and
- 8% remainder, which includes urban areas.

In addition, even if some statistics on land ownership are accurate, they only tell a part of the story, as nothing is normally said about the quality of the land or whether it is suitable for any particular purpose. The following example shows how deceptive statistics can be in this context, without some contextual

explanation. According to the Abstract of Agricultural Statistics published by the Department of Agriculture, Forestry & Fisheries, only 1,3% of the total area of the Northern Cape Province constitutes arable land.⁹ You could therefore theoretically own 98.7% of the Northern Cape Province, but none of its arable land.

Statistics South Africa divides South Africa into three geographical types: urban, traditional areas, and non-traditional areas. The difficulty with this classification is that it obscures the level of urbanisation within traditional areas, which is higher than generally assumed.

In spite of a lack of accurate statistics, it is clear that a very substantial racial imbalance in land ownership exists. However, we do not believe that redistribution of land on its own, will solve the problem, without a developmental economic approach which accompanies it (and with the supporting framework that such an approach requires).

Land Reform Policies need to Accept the Increasing Importance of Urbanisation¹⁰

Land reform is often thought about in relation to rural areas, but it is most needed in urban areas. This is the result of an urban transition which is much more complete than is generally recognised.

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In rural areas the population is dropping, making land reform easier. Land there is not the main problem. It is the policy, institutional and support surround that really matters and hard work on these fronts is needed to make rural land reform work. Equally, the availability of land in metros is not the key constraint on land reform. Making human settlements policy fitter for purpose, mobilizing the energies of households, private developers and finance institutions, and providing leadership to encouraging change in outlook in urban areas are all much more important.

Protection of Investment

The Protection of Investment Act 22 of 2015, has been criticised for the watering down of foreign investors' rights to seek redress in the case of expropriation of their investments. In terms of this Act (which is still to come into force), the dispute settlement mechanism is domestic mediation and the South African Government may (but is not obliged to) consent to international arbitration, once domestic remedies have been exhausted. In the event of international arbitration, the question of customary international law on this topic will certainly be raised. Depending on the circumstances, customary international law may treat expropriation without compensation as unlawful.

Legal protection of investment would now be provided for by Section 10 of the Act which states that:

"Investors have the right to property in terms of Section 25 of the Constitution."

Any amendment to Section 25 of the Constitution would therefore have an immediate impact on the legislative protection of foreign investment. In addition, if it is accompanied by the absence of a clear legislative and administrative framework to implement a land reform policy, it will have a negative knock-on effect on foreign investor confidence. It is the perception that is important in this context. If confronted with what is seen as an arbitrary expropriation régime,

potential foreign investors are likely to come to the conclusion that the risks of investing in South Africa are too great for comfort. Such investors would prefer to invest elsewhere in the world.

Conclusion

The HSF agrees that land reform is necessary, given South Africa's history, and to assist in creating employment and addressing the inequalities in the country. However, the focus of the Motion, in considering a change to the Constitution, is misplaced and diverts attention from the policy and institutional changes needed for effective land reform. Instead of considering a change to the Constitution, the Committee should recommend the establishment of a clearly defined overall legislative and regulatory framework, together with an adequately resourced and financed administrative structure.

As an integral part of this overall framework, consideration will also need to be given to the nature of rights that are to be granted to beneficiaries. Clearly defined rights to land are appropriate, as opposed to a form of undefined lease tenure which runs the danger of being insecure and dependent on the whim of local authorities. The danger of abuse and corruption in the latter situation is clear.

It is evident that the implementation of any new land reform policy is a massive undertaking from a legislative, administrative and financial perspective. Land reform should not be jeopardized by underestimating the extent of the undertaking or by putting inadequate measures in place.

NOTES

- 1 The High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change was created by the Speaker's Forum (a voluntary association comprising speakers and other office bearers of the National Assembly, the National Council of Provinces and Provincial Legislatures). The Panel was chaired by former President Kgalema Motlanthe and its work was divided into three thematic areas: (i) poverty, unemployment and the equitable distribution of wealth (ii) land reform: restitution, redistribution and the security of tenure and (iii) social cohesion and nation-building. The Working Group on land reform was led by Dr Aninka Claassens, a land reform specialist from the University of Cape Town. The Working Group was given the task of producing a report focusing on the most important policies and laws passed since 1994.
- 2 *Ibid.*, p. 300.
- 3 *Ibid.*, p. 210.
- 4 Tables 5.5 & 5.12, <http://www.treasury.gov.za/documents/national%20budget/2018/review/FullBR.pdf>
- 5 The Report of the High Level Panel raises many of these questions. See p 220.
- 6 *Ibid.*, p. 303.
- 7 Ben Cousins, Land debate in South Africa is clouded by misrepresentation and lack of data, The Conversation, 2018 available at: <https://theconversation.com/land-debate-in-south-africa-is-clouded-by-misrepresentation-and-lack-of-data-93078>.
- 8 Institute for Poverty, Land and Agrarian Studies, FACT CHECK NO.1 LAND REFORM:<http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf>
- 9 Abstract of Agricultural Statistics 2013, Table 5, Department of Agriculture, Forestry and Fisheries.
- 10 The material in this section is based on Charles Simkins, Human settlements and urban land reform, HSF.