Submission

to the

Joint Constitutional Review Committee

on

Section 25 of the Constitution

and the

Need to Expropriate Land Without Compensation

15 June 2018
1. Introduction

The Catholic Parliamentary Liaison Office (CPLO) is an office of the Southern African Catholic Bishops’ Conference, tasked with liaising between the Church and Parliament/Government, commenting on issues of public policy, and making submissions on legislation. The CPLO welcomes the opportunity to comment on the question of whether or not Section 25 of the Constitution should be, or needs to be, amended to allow for expropriation of land without compensation.

2. Background

The Catholic Church is acutely aware of the ‘land question’ in our country. In 2012, in a document entitled *Vision for Land Reform in South Africa*, the then President of the Bishops’ Conference, Archbishop Buti Tlhagale of Johannesburg, wrote as follows:

“[W]e are saddened at the lack of meaningful progress in enabling those who are impoverished to assert their right to own land. We are saddened that even the minority that have benefitted from various land reform programmes and have become land owners, have not received sufficient support to enable them to use and care for the land in such a way that it benefits them.”

The Church recognises that land reform is not just a matter of *distributive justice* – ensuring that land, as a fundamental social good, is fairly and equitably shared among the country’s people so as to address poverty and inequality; it is also a matter of *restitutive justice* – undoing, as far as possible, the wrongful seizure of land by formerly dominant sections of SA society.

If we look back at the land reform programme since 1994, the inescapable conclusion is that, despite some significant achievements, it has failed to meet its targets. This must prompt us to ask what the obstacles have been; and how best those obstacles can be overcome.

We also recognise that the land issue is a highly sensitive and emotive one which touches people very deeply. Land has profound cultural, spiritual and religious associations for many sectors of our population, and is closely bound to peoples’ senses of identity and rootedness. Unfortunately, this has

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led to the land question becoming to some extent a political football, with unhelpful populist rhetoric sounding from all sides of the ideological spectrum as various role-players try to exploit it for electoral and other short-term benefits.

In this regard, we believe that it is crucial to approach the land question on the basis of firm evidence, rather than assumed facts; and not to make the mistake of thinking that there is any simple ‘silver bullet’ that will solve the problem quickly and without potentially serious side-effects.

3. Amending the Constitution

As a religious organisation, we hesitate to express a firm view on whether or not the Constitution needs to be amended, either to allow for the specific matter of expropriation of land without compensation, or for the broader goal of accelerated land reform. We are aware that there is a range of expert legal opinion on the question.

We have noted the view that an amendment is not necessary, and that section 25 of the Constitution, as it stands, allows for such expropriation. We are also aware of arguments to the effect that factors such as lack of capacity in the relevant government departments, poor planning and leadership, and corruption are primarily responsible for the slow pace of land reform.²

On the other hand, we are also deeply conscious of the extent of land hunger in our country, and of the need for a just resolution of the problem. If a constitutional amendment can contribute to real progress in meeting our people’s needs where land is concerned, and can avoid further lengthy delays, then it may well be the preferable option.

The gravity of this situation requires concerted action from the country’s political leadership; but at the same time a careful and well thought-out approach is needed. Accordingly, we wish to commend this Committee on its decision to hold public hearings both in Parliament and around the country, so that as many people as possible have the opportunity to express their views. This is participatory democracy at its best.

² See, for example, Prof Ruth Hall’s interview at https://www.dailymaverick.co.za/article/2018-03-29-the-interview-plaass-professor-ruth-hall-on-land-and-what-you-should-and-shouldnt-worry-about/#.WxZtWYq-nlU
4. The Need for Expropriation without Compensation

The assertion that expropriation of land without compensation is necessary seems to imply that the requirement to pay compensation has been a serious obstacle to land reform. Whether this is in fact the case is, once again, a matter on which the advice of experts is required. We are aware of reports that some land-owners have selfishly inflated the asking prices of their properties, thereby frustrating government’s attempts to acquire land for purposes of redistribution.

On the other hand, it is also argued that nothing in the Constitution or in other legislation obliges the state to pay market-related prices for land that it acquires for redistribution; neither is the ‘willing-buyer, willing-seller’ principle required by law – it is merely a policy stance adopted by government, which could very simply be dropped.

A further important point, in our view, arises from the November 2017 report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, which stated that,

“The Panel is of the view that government has not used the powers it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in particular circumstances.”

The Panel also concluded that there were certain underlying problems affecting land reform; there was

[Increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity.]

If these findings of the Panel are accurate, then it is questionable, at least, whether the introduction of expropriation without compensation will truly address the problem it is intended to solve. Issues of capacity, training, political will and corruption will not disappear merely because the state is no longer required to pay compensation.

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4 ibid.
5. Potential Negative Consequences

Even if it is agreed that expropriation without compensation is a correct and justifiable thing to do, its potentially serious negative effects must be taken into consideration. We note that President Ramaphosa has on many occasions stated that expropriation without compensation will be carried out in a way that does not endanger food security, harm investor confidence, or destabilize the economy.

5.1. Food security

There is no reason why an accelerated land reform programme should endanger food security; indeed, it could be argued that by empowering and resourcing a new cohort of farmers, who were previously denied access to productive land, food security would be improved. However, this would be dependent on proper support and resources being made available by government to the new farmers – and the record up to now has been extremely poor in this respect. If therefore, large amounts of productive agricultural land are expropriated, and the new owners receive the same low level of, or non-existent, assistance from government, food security may well be detrimentally affected.

5.2. Investor confidence

If government envisages a method whereby land can be expropriated without compensation in a way that will not undermine the confidence of potential investors (bearing in mind that any kind of fixed investment requires land), be they local or foreign, then it needs to provide details of that method. Otherwise, a loss of investor confidence seems unavoidable.

This is not simply a matter of potentially upsetting a few wealthy companies. Given our critical levels of unemployment, SA needs as much fixed investment as possible in sectors such as mining, manufacturing, agriculture, forestry, and tourism. All of these involve the use of land, and it is obvious that investors will be concerned, if not entirely discouraged, if they fear that the land they buy or lease may be confiscated.

5.3. Economic destabilization

As with investor confidence, widespread expropriation without compensation will unavoidably impact the financial sector, since a very large proportion of privately-owned land in SA is mortgaged; effectively, it is owned or part-owned by the Landbank or by one of the commercial banks. Major pension
funds and finance houses also have massive investments in land and in land-based commercial activities. Once again, if government has a strategy for expropriating land without compensation which will somehow protect the financial sector, and millions of citizens’ savings and pensions, from significant harm, then it should share the details of that strategy. Until it does, the only reasonable assumption is that it has not thought through the consequences of adopting such a policy coherently.

6. Conclusion

It may well be that expropriation of land without compensation should be part of the overall package of land reform measures in SA. The Catholic Church is not in principle opposed to this, especially in cases where the land in question was illegitimately and dishonestly taken from its previous holders under colonialism and apartheid.

However, the fact that expropriation without compensation may be justifiable does not mean that it is necessarily a wise or appropriate policy. It may end up having seriously adverse consequences for the very people whom it is intended to benefit. It is a step that could do far more harm than good.

We wish the Committee well in its deliberations, and we urge the Committee not to be distracted by the loudest voices; it is vitally important that the widest possible range of views be heard, and that those of the poorest and most vulnerable people be particularly attended to.

We would appreciate the opportunity to make an oral submission.

For further information please contact:

Adv Mike Pothier
mike@cplo.org.za

Catholic Parliamentary Liaison Office
Cape Town
021 461 1417 / 083 309 3512