

# **REPORT OF THE CONSTITUTIONAL REVIEW COMMITTEE ON THE AMENDMENT OF SECTION 25 OF THE CONSTITUTION TO ALLOW FOR EXPROPRIATION OF LAND WITHOUT COMPENSATION: OBSERVATIONS AND RECOMMENDATIONS BY STEVEN SWART MP**

## **AFRICAN CHRISTIAN DEMOCRATIC PARTY (ACDP)**

**12 NOVEMBER 2018**

The ACDP makes these Observations and Recommendations following its written submission made to the Constitutional Review Committee (the Committee) on 14 June 2018.

At the outset, we wish to express our deep concern about the manner in which the Committee has dealt with written submissions. As indicated during deliberations on this issue, the Committee is obliged to consider written submissions as part of the public participation process required by section 59 of the Constitution. This duty has been confirmed by the Constitutional Court in various judgements, including **Doctors for Life International v Speaker of the National Assembly and Others 2006(6) SA 416 (CC)**.

The ACDP makes the following Observations and Recommendations on the basis that the Committee **has not** complied with its constitutional obligations regarding consideration of written submissions. It is not sufficient in our view to merely afford members of the Committee an opportunity to peruse the written submissions at Parliament. In any event, the majority of members did not make use of this opportunity. This aspect will be further amplified during the deliberations.

## **OBSERVATIONS**

The ACDP appreciates that the issue of Land Reform, consisting of restitution, redistribution and tenure, is a complex and deeply emotive issue. We have observed first-hand during the public hearings how divisive the issue of Expropriation of Land Without Compensation has been.

As various churches submitted, Land Reform should be informed by principles of love, peace, justice, reconciliation, stewardship, restitution, restoration and protections against long-term dispossession, particularly of an arbitrary nature. As leaders, we should be united across political party lines in finding solutions based on principles that promote harmony and social cohesion. We are encouraged by the widespread commitment observed during the public participation process to address historic injustices through Land Reform, although there are differing views on the method to be adopted.

The ACDP is in agreement that any decision regarding the question on a possible review of section 25 of the Constitution must consider the impact on food security, stability in the agricultural sector and economy, investor confidence, financial exposure to banks and other financial institutions by commercial farmers, as well as result in adequate support for emerging farmers.

We appreciate that there were differing views on whether the current section 25 of the Constitution is an impediment to Land Reform. We would submit however that the overwhelming evidence by legal experts is that section 25 **does not present** such an impediment. This view was convincingly argued by former Constitutional Court Judge, Judge Albie Sachs, and is also the view expressed by the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (Motlanthe Panel Report).

It is also significant that the South African Human Rights Commission (SAHRC), the custodian of the Bill of Rights, stated unequivocally in their submission that, while they regard expropriation of land without compensation as being just and equitable in appropriate circumstances, *“the Constitution **does not** lend itself to amendments in the detail needed to limit expropriation without compensation in the context of addressing the results of past racial discrimination.”* It adds that until a law of general application exists that can be used to expropriate land without compensation for the purposes of land reform, an amendment to the Bill of Rights **would be premature and would additionally conflict with the doctrine of subsidiarity.**

There were various views on title deeds and state custodianship of property. We fully support the granting of full title deeds in rural and urban areas, as this will not only advance equality and enhance the dignity of beneficiaries, but also unlock value and enable emerging farmers and small-scale businesses to obtain financing.

Evidence was heard about widespread fraud, corruption and nepotism in the Land Reform process. This evidence is corroborated by the findings of the Motlanthe Panel Report. We question how further powers of expropriation of land without compensation could be granted, given this deplorable state of affairs? This, together with insufficient resources in the department of Rural Development and Land Reform, has largely contributed to the failure of the Land Reform process.

The Motlanthe Panel Report was referred to by various persons and institutions during the hearings, and is being considered by various parliamentary committees. Its recommendations relating to Land Reform (which followed an extensive public participation process) **have not** been considered by the Committee.

There were various views expressed about the inaccuracies in existing land audits, with widely differing statistics being presented. While land ownership is skewed, it is significant that 14 per cent of registered land is state land, and a further 7 per cent is unregistered state land.

## **RECOMMENDATIONS**

In view of the fact that the Constitutional Court has not yet pronounced on the full parameters of section 25, and more particularly what is meant by “just and equitable” compensation in the light of the factors mentioned in section 25(3); how 25(5) should be interpreted; and what the implications of section 25(8) are; **the ACDP recommends that the Constitutional Court be approached to provide clarity on the full parameters of section 25.**

We share the widely-held view that section 25 **does not** present an impediment to Land Reform, but are of the opinion that the Court will provide much-needed clarity, and thereby obviate the need for a constitutional amendment.

In this regard, section 80 of the Constitution provides that members of the National Assembly may apply to court for an order declaring that all or part of an Act of Parliament is unconstitutional. While this provision is not strictly applicable to an application seeking a declaratory order on the ambit of section 25, it does give guidance as to the possibility of political parties approaching the Constitutional Court.

The wide-ranging findings and recommendations on Land Reform contained in the Motlanthe Panel Report, including but not limited to steps to improve and speed up the land restitution process, should be considered and where necessary, implemented, prior to consideration of any amendment of section 25.

In view of the views expressed by various academics and institutions, and more particularly the SAHRC, a law of general application, an amended Expropriation Bill, should be tabled in Parliament, **before** any amendment of section 25 is considered. This would avoid any conflict and concerns expressed by the SAHRC about the principle of subsidiarity.

All existing land audits need to be investigated for their veracity to determine actual and reliable statistics relating to land ownership in the country.

Beneficiaries of land restitution and redistribution projects must be given title deeds, and provided with monetary, resource and skills support, where necessary. The security of tenure for farm workers, farm tenants and those residing on communal land held in Trust must be protected within the framework of existing legislation.

The interests of existing commercial farmers (who produce about 80 per cent of the food in the country), and the interests of the nation as a whole, including the economy, agricultural development, and food security, must be protected, including the impact that any legislative reform, and in particular any constitutional amendment may have on them.

We are concerned at the large numbers of illegal land invasions that have taken place, believing this to be a threat to stability and the rule of law. We would urge the Committee to express its condemnation of such illegal action, and call upon law enforcement agencies to take strict action in this regard.

If one considers that any decision regarding the question on the possible review of section 25 of the Constitution must consider the impact on food security, stability in the agricultural sector and economy, investor confidence, financial exposure to banks, and other financial institutions by commercial farmers, and result in adequate support for emerging farmers, then it is apparent that the question must be decided in the negative.

**In conclusion, the ACDP reiterates its position that we oppose the Expropriation of Land Without Compensation, and any move to amend section 25 in this regard.**