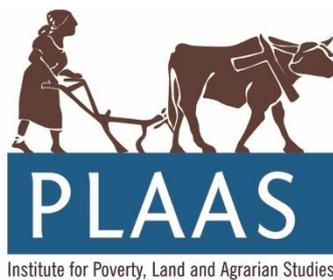


EIGHTEENTH CONSTITUTIONAL AMENDMENT BILL

Submission to the
Ad Hoc Committee on Section 25, National Assembly

from the
Institute for Poverty, Land and Agrarian Studies (PLAAS)
University of the Western Cape



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1. Introduction

1.1. The Institute for Poverty, Land and Agrarian Studies (PLAAS) is a research institute in the Faculty of Economic and Management Sciences (EMS), at the University of the Western Cape (UWC).

1.2. PLAAS engages in research, training, policy development and advocacy in relation to structural poverty, land and agrarian reform, rural governance and natural resource management.

1.3. PLAAS is also committed to social change that empowers the poor, builds democracy and enhances sustainable livelihoods. Gender is integral to these goals.

1.4. PLAAS also aims for rigour in its scholarship, excellence in its training, and effectiveness in its policy support and advocacy. It strives to play a critical yet constructive role in the processes of social, economic and political transformation.

1.5. We welcome the opportunity to make a submission on the Draft 18th Constitutional Amendment Bill, 2019 to the Adhoc Committee on Section 25, National Assembly. We propose some textual changes to the property clause and submit that this will help to clarify key issues in relation to the expropriation of property without compensation.

2. Back ground and context

2.1 The 18th Amendment Bill of South Africa's constitution seeks to make changes to Section 25 of the Bill of Rights (the property clause) in order to make explicit the circumstances that would warrant the payment of nil compensation following the expropriation of land. Land reform remains a key aspect of transformation in South Africa.

2.2 South Africa's land reform is provided for in the Constitution and the property clause strikes a balance between the protection of existing private property rights and the imperative to effect historical redress through equitable redistribution of land and other natural resources. Land reform has stalled, partly as a result of the failure by the state to boldly utilise the powers to expropriate land provided for in Section 25(3) of the Constitution.

2.3 The 'willing buyer, willing seller' approach is largely a policy choice and not a constitutional requirement while the payment of market value as compensation is not the only methodology prescribed by the constitution for determining the level of compensation.

2.4 Previous failure by the state to use expropriation powers as prescribed by the Constitution means that the mechanisms for expropriating property outlined in section 25 (3) have not been sufficiently tested. Nevertheless, the 18th Amendment Bill may bring more clarity on expropriation and appropriate compensation mechanisms. This will enable the state to effectively use its expropriation powers alongside other land acquisition mechanisms to effectively implement land and related reforms.

2.5. We argue that the state must enact appropriate legislation to guide the implementation of land reform and give legal effect to rights contained in Section 25 (5) of the Bill of Rights. The High Level Panel (HLP) of Parliament on the Assessment of Key Legislation and Acceleration of Fundamental Change, for instance, developed an illustrative National Land Reform

Framework Bill, 2017¹. The need to develop a new land reform law is also supported by the Presidential Advisory Panel Report on Land Reform and Agriculture (2019).

3. The Eighteenth Constitutional Amendment Bill

3.1 We include suggestions on the textual amendment of the property clause. The suggested rewording will foreground a broad conception of compensation instead of fixating on nil compensation. Subsection 3 of Section 25 of the constitution must provide the basis for a comprehensive compensation framework that encompasses a wide range of circumstances including nil compensation at the lower end of the spectrum.

3.2. Equally important is the streamlining of administrative and legal processes in land expropriation. The rewording of the property clause must clearly separate the roles and functions of the executive and the judiciary in land expropriation.

3.3. The draft Expropriation Bill already provides that the expropriating authority is responsible for making the initial determination of the value of compensation. Disgruntled parties may still find recourse from a competent court. A court will make the ultimate determination in relation to what constitutes 'just and equitable' compensation in any given circumstance.

3.4. A broad and expanded conception of property is in line with the overall thrust of the constitution as outlined in Section 25 (4) (b) of the Bill of Rights which emphasises the broad conception of property and clearly states that 'property is not limited to land'.

3.5. As such legislative and policy processes in relation to the property clause are not confined to land reform alone. It is important to align section 25 (2) (b) on compensation with section 25 (8) which directs 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)".

3.6. We argue that the state must enact appropriate legislation to guide the implementation of land reform and give legal effect to rights contained in Section 25 (5) of the Bill of Rights. An illustrative National Land Reform Framework Bill was developed by the High Level Panel (HLP) of Parliament on the Assessment of Key Legislation and Acceleration of Fundamental Change (2017). The illustrative National Land Reform Framework Bill, 2017 contains important principles and guidelines on ensuring equitable access to land.

4. Recommended changes to the property clause

The underlined, bold text below shows our proposed textual changes to the property clause in order to make explicit what is implicit. These textual changes seek to clarify the roles of the Executive and the courts in the expropriation of property. Our proposed rewording of the property clause also foregrounds the development of a comprehensive compensation policy that encompasses the full spectrum of options for compensating the expropriated parties. We also suggest an amendment to Section 25 (9) of constitution to provide for the passing of

¹https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf

legislation which gives effect to section 25 (5) of the constitution on broadening access to land on an equitable basis.

25. Property

1. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

2. Property may be expropriated only in terms of law of general application

a. for a public purpose or in the public interest; and

b. Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided **by the state and approved by a court, provided that compensation for property expropriated for the purposes of land, water and related reforms may be nil.**

3. The amount of the compensation and the time and manner of **any** payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including

a. the current use of the property;

b. the history of the acquisition and use of the property;

c. the market value of the property;

d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

e. the purpose of the expropriation.

(3A) National legislation must provide for a spectrum of compensation, and specify those circumstances in which compensation may be nil.

4. For the purposes of this section

a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

b. property is not limited to land.

5. 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.

8. 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).

9. **Parliament must pass legislation to give effect to section 25 (5) of the Constitution.**

5.1 Clarifying the range of positions on compensation

- 5.1.1. There should be no compensation for any expropriation - we disagree
- 5.1.2. Compensation should be addressed on a case-by-case basis - we agree
- 5.1.3. Expropriation without compensation should be explicitly allowed - we agree
- 5.1.4. Expropriation without compensation should be limited to instances where the expropriation is for the purposes of land, water and related reforms - we agree
- 5.1.5. Expropriation without compensation should be limited to land, and not other forms of property - we disagree

5.2. Clarifying the range of positions on allocation of powers

- 5.2.1. The courts should determine compensation in each case - we disagree
- 5.2.2. The Executive (Minister) should determine compensation - we agree
- 5.2.3. The courts should approve ministerial determinations - we agree
- 5.2.4 The courts should only address compensation on appeal - we disagree

5.3. Who decides and who approves?

We agree that the determination of compensation should not be the exclusive preserve of the courts. Rather, the state (in the form of the Minister) should be empowered to determine compensation, on the basis of national legislation and a compensation policy. This is what we believe the drafters of the Constitution intended when they chose the words 'decided or approved by a court'. The Minister can decide, and the courts can approve.

5.4. Who approves?

Should each determination of compensation be sent to the court for approval? We believe this should be the case. Why?

5.4.1 Rules for everyone: If there is no court approval, then a Ministerial determination shifts the onus onto the expropriated party to dispute the compensation in court. While this might seem appropriate to many – because wealthy landowners should be able to pursue their own interests by launching court applications – we must bear in mind that many people whose property rights are expropriated are poor and marginalised, and may not have the capacity, resources and connections to enable them to appeal in court. The Constitution has to set out rules that apply to all citizens, and the reality is that poor people, as holders of rights, are vulnerable to expropriation without compensation. This is the case for farm dwellers and occupiers, on farms targeted for expropriation. It is also the case for residents of communal areas who hold customary tenure rights, rather than private ownership, and also to residents of urban townships and informal settlements and backyard shacks. Any taking of property from such people can constitute an expropriation, and their rights must be subject to defence by the courts against state abuse.

5.4.2. Court reform: there is an initiative currently to reform the Land Claims Court to expand its powers; to rename it the Land Court; to give it additional capacity including permanent judges; and to enable it to refer matters for mediation and arbitration at the Commission for Conciliation, Mediation and Arbitration (CCMA), whose commissioners

will be capacitated on land reform and land laws. This means that many court appeals can be resolved through alternative dispute resolution – and the outcomes merely sent to the Land Court for approval and to become an order of the court. In the same way that labour disputes can be resolved at the CCMA and sent to the Labour Court for approval. This is a way (a) to provide protection especially for vulnerable holders of property rights, including land, water, mineral and other rights; (b) to ensure adequate oversight of the executive arm of government, (c) without encumbering the courts or leading to backlogs, blockages and delays.

6. Some key points of discussion

6.1 Developing a compensation policy

6.2. Some key operative terms should inform the amendment of section 25 (2) (b) of the Bill of rights. Overall, the amount, time and manner of payment must be just and equitable. As such, the clarification in the amendment should not be fixated on the circumstances under which expropriation may proceed with the public interest without compensation.

6.3. Instead, the property clause should be the basis for developing appropriate compensation policy that encompasses the full spectrum of options for compensating the expropriated parties. In Section 25 (3), the insertion of any indicates that it is not just about paying nil compensation but a wide spectrum of compensation options. A key operative term in the property clause in relation to compensation is 'just and equitable'. The development of a systematic and comprehensive compensation policy is necessary to operationalise and define what 'just and equitable' means.

6.4. It is imperative that 'just and equitable' takes into account the full range of circumstances that attract different levels of compensation as part of a broader compensation policy.

6.5. This may be in the form of a typology that ranges from nil compensation, below market compensation, minimal compensation, substantial compensation, premium compensation. More detailed compensation procedures should be included in the draft Expropriation Bill which is being finalised.

7. Clarify the administrative and legislative roles in expropriation

7.1. While the Constitutional provisions are broad and not meant to be prescriptive they nevertheless foreground key aspects in relation to the role of the executive and the courts in relation to expropriation. In the draft Expropriation Bill, the expropriating authority makes the initial determination. In cases where the expropriated party is disgruntled there is an option to approach the courts for recourse.

7.2. This is in line with section 25 (b) which identifies key processes in the expropriation of property, namely agreement which denotes consensus between the parties, deciding where the expropriator makes a determination and in cases of disagreement an approval of the by the court.

7.3. In short, compensation is determined by the Minister through the Office of the Valuer General and approved by the Court. This is already enabled by section 25(2)(b) of the Bill of Rights.

7.4. Expropriation is essentially an administrative process based on systematic evaluation by the Office of the Valuer General. This requires the development of a compensation policy

which explores the broad spectrum of options ranging from nil compensation, below the market compensation, market value compensation and premium compensation.

7.5. The compensation policy should be informed by or derive from the different set of scenarios or circumstances outlined in Schedule 12 (3) of the yet to be finalised draft Expropriation Bill. However, the subsidiary section of the Expropriation Bill, for instance, the regulations section, may include a broad spectrum of cases that may attract zero compensation. Besides the cases that attract nil compensation, we propose the adoption of a typology in the form of a compensation framework that outlines a spectrum of different values for compensation.

7.6. The courts may provide recourse in cases where negotiation has not happened or there is disagreement with the administrative process of determining compensation. Notification of key parties and an offer by the state to expropriate (expropriation by agreement), and if the offer is rejected the courts may provide recourse and make a final determination. Compensation can be decided by the Minister and approved by the court. The expropriated party may approach the courts if expropriation by agreement fails.

8. A new land reform law

We propose that section 25 (9) of the constitution should be amended to ensure that the state enacts a law on equitable access to land. A new National Land Reform Framework Bill should clearly define the powers of the state and the rights of the citizens. This will ensure that citizens can invoke their rights in relation to equitable access to land and that the state may take appropriate measures to fulfil those rights. Both the High Level Panel (HLP) of Parliament Report on the Assessment of Key Legislation and Acceleration of Fundamental Change (2017) and the Presidential Advisory Panel Report on Land Reform and Agriculture (2019) note that the failure to enact appropriate legislation to guide land reform and operationalise the right to equitable access to land, partly explains the poor land reform outcomes in South Africa.

9. Conclusion

9.1. The 18th Constitutional Amendment Bill represents a positive development since it emboldens the state to use its already existing expropriation powers. The effectiveness of expropriation as a mechanism for land acquisition is predicated on three key issues. First, a comprehensive compensation policy where nil compensation is part of the typology of options needs to be foregrounded in the property clause and elaborated in the Expropriation Bill. Second, the roles of the Executive and the courts need to be streamlined. Where possible, the state should still seek to resolve cases through negotiation, consensus and agreement. The Executive, with support from the OVG, may decide the level of compensation based on systemic criteria derived from the compensation policy. Ultimately, the courts have a significant role to play if the expropriated parties are not satisfied with the administrative processes.

9.2. Third, expropriation is simply a method of land acquisition. Key issues in relation to who should benefit from land reform require the enactment of an overarching National Land Reform Framework Bill to guide the implementation of land reform in South Africa. Both the High Level Panel (HLP) of Parliament Report on the Assessment of Key Legislation and Acceleration of Fundamental Change (2017) and the Presidential Advisory Panel Report on Land Reform and Agriculture (2019) note that existing legislation, for instance, the Land Reform: Provision of Land and Assistance Act, 126 of 1993 fails to operationalise 'equitable access' to land in any meaningful way.

9.3. Finally, the Draft National Policy on Beneficiary Selection and Land Allocation² released for public comment on the 3rd of January 2020 provides an opportunity to develop a clear set of guidelines on beneficiary selection and targeting, land identification and allocation as well as the rationing of public resources in land reform. In sum, all key pieces of legislation which are supposed to argument land reform need to be finalized.

² https://www.gov.za/sites/default/files/gcis_document/202001/42939gon2.pdf