

Land expropriation and the religious community



The land reform issues has many questioning what to do. (PHOTO: John Fedele)

Land expropriation is a highly political and emotionally charged issue. Freedom of Religion South Africa (FOR SA) is closely monitoring this area since it clearly has the potential to impact on the religious community. We therefore want to bring a balanced perspective to our constituency so that we have a framework of reference within which to formulate appropriate responses at the appropriate time.

The issue of land expropriation has taken centre stage since the ANC adopted a policy at its Congress in December last year, subsequently endorsed by a resolution tabled in Parliament in February 2018 calling for “Expropriation Without Compensation” (EWC). Yet almost immediately, President Ramaphosa stated that there was no cause for alarm, that there would be no land grabs, that it was imperative to ensure that the economy remained stable and food security protected. At the same time, the EFF attacked the government of back-peddalling, saying that this was no more than an electioneering

ruse to undermine their more radical and populist approach. The initial EFF resolution called for “the necessity of the State being a custodian of all South African land”. However, placing all land into the custody of the State is not in the interest of any South African, given the well-documented lack of State capacity to optimally administer land for land reform purposes. The undermining of property rights will impact all equally.

At the centre of the debate is whether (or not) there is a need for an amendment of section 25 of the Constitution (the “property clause”) to allow the State to expropriate land without compensation. Section 25 has two distinct parts: Subsections (1) to (4) provide protection against arbitrary deprivation of property rights and define the principles and framework for expropriation. Subsections (5) to (9) describe the State’s obligation to ensure equitable access to land, land reform and redress.

It is argued by some that there is no need for an amendment to the Constitution, since the current provisions do not specify a Rand amount for compensation, but rather use the expression “just and equitable”. If implemented strictly, this could mean that a zero (or nominal) amount of financial compensation could be paid and – if opposed – the courts could decide on whether this is a possible interpretation.

A complex issue with no easy solutions

At the outset, although many believe that land expropriation is a question of justice, there is evidently no easy solution to this problem. It is also arguably more of a political issue than a recognition of a priority demand at grass roots level, as evidenced by a recent survey which showed that a mere 9 respondents out of 2 245 demographically represented people (0.4% of the total) identified land reform as a key unresolved problem. For most South Africans, the issue has little or no significance, with jobs, crime and housing being far more important issues for the majority.

However, the issue of land ownership is highly symbolic, with some estimates showing that the vast majority of land in South Africa is “white owned”, with the obvious related question of “how was this acquired?” At the same time, others have challenged the veracity of these figures because they omit vast land holdings owned by the State and other tribal trust structures. Against this background, it is important to note that this is not a black and white issue but rather many shades of grey. For example:

- How far back in history do you go when considering what land to appropriate? In this regard, the Khoi San lay claim to the ownership of nearly two thirds of all land in present day South Africa.
- How do you decide who should become the new owners of the land, especially where you cannot prove previous tenure as in the Western Cape?
- What framework will the State develop/use to decide which land to expropriate?

The religious sector is clearly worried about this development, which has the potential danger of being very divisive since there is a perception that the traditional churches are significant land owners whereas the more independent (particularly African) churches are often unable to acquire land for economic reasons. However, a Pietermaritzberg based organisation called Church Land has done extensive research on this area and initial enquiries seem to indicate that large scale land ownership by churches is not true and that the religious community is a negligible land owner. Typically if/when churches no longer use land, they sell it.

Whatever policy may be adopted, it will need to consider the reality that there are existing and different property ownership systems in South Africa. In particular, huge tracts of land are owned by traditional rulers in the form of customary land, where in many cases an individual owns the

land on behalf of the community. An example of this is the Ingonyama Land Trust, where some 3 million hectares in KwaZulu-Natal are owned by the Zulu King, who has already stated that his people will defend their land in needs be. This traditional system contrasts with the “Roman Dutch” law model of private ownership evidence by title deeds. The State – via multiple government departments and State-owned enterprises (SOEs) – also has vast land holdings.

However, at present there is no definitive audit available of land ownership in South Africa – hence President Ramaphosa ordering this to take place, with an ad hoc Committee due to present a report on this by August 30 2018. This is imperative, because it will provide essential information that will inform the process of policy development which will then be used for any subsequent EWC actions.

No “free for all” land grab

While there is a tendency to panic, it is important to note that any amendment to section 25 which might take place will not affect other pertinent provisions of the Constitution, which will remain in effect and be applicable. It will not be a “free for all” land grab because the rule of law and legal rights framework would not disappear. This includes:

- It is the State that must implement the expropriation process, not an individual. You therefore cannot lay claim to a property simply because you want one – you must be able to prove legitimate cause.
- Expropriation must be justified, eg if there are six farms for sale in an area, it would be difficult to justify the expropriation of a seventh.
- Procedural principles in the Constitution will still apply, such as any expropriation must be non-discriminatory eg you cannot just expropriate Afrikaner-owned farms.
- There must be just administration – the principle of proportionality will apply to any legislative provision

in the Bill/Act.

However, there is no doubt that there have been historic injustices in the current status quo of land ownership in South Africa. It is therefore important to look at how we arrived at this point and to consider what sacrifices we are prepared to make to remedy situations. This is particularly so where unjust land ownership transfer took place under Apartheid and both those who benefitted and those who were the victims are still living with the consequences. This would apply to eg forced land removals, the consolidation of homelands etc, where land was often acquired for nothing or a nominal payment. In such cases – which are also symbolic and evidently issues of justice – expropriation without compensation would seem appropriate.

Need for constructive engagement

The bottom line is that even if strong political will is exerted – which has been noticeably lacking in this area since 1994 – there is a long process ahead before any significant shifts are likely to take place. While it is very important to stay abreast of developments and to be well informed about (and involved in) the process, there is no need for undue alarm but rather for constructive engagement in this important national issue.

FOR SA will keep monitoring this issue – in particular with regard to the potential impact on religious communities in South Africa – and inform our constituency of developments and any opportunity for input in this regard.

*With thanks for the input of Adv Mike Pothier of the Southern African Catholic Bishops' Conference (SACBC) Parliamentary Liaison Office.