

The Politics of Land Reform

UFS Thought-Leader Series

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26 July 2018

“Expropriation without Compensation”

A problematic diversion?

Or an opportunity to have a different and constructive discussion?

Two Contexts Need to be Understood:

- Broader Social Context – SA in 2018
- Internal-ANC Context

Broader SA'n context

EWC - a proxy for a deeper challenge

- 24 years after 1994 democratic breakthrough – crisis levels of **unemployment, poverty** and **inequality** – strongly marked by **racial, gendered** and **spatial** factors
- Pace and quality of land reform – both rural and urban – weak.
- Land an emotive issue against background of brutal colonial and apartheid expropriation of land - and **other economic assets** (cattle, homes, trading licences) AND **cultural/spiritual** assets.
- Popular anger and frustration has often now condensed around emotive call for “Stolen land to be **returned without compensation**”
- **Narrow Africanism** – return to the “indigenous, rightful owners”- (what are you saying to SA'ns who are coloured, or of Indian origin – who also suffered horrific property dispossession?)
- **Notion of a “return”** to when? And note, in 2018 – land & spatial inequities and challenges are considerably **urban** – well-located, affordable housing/shelter/community amenities

WE MUST NEVER FORGET THE PAST – BUT WE CANNOT RETURN TO A “BETTER PAST”

The internal-ANC Context

ANC December 2017 National Conference Resolution:

*“Expropriation of land without compensation should be among the key mechanisms available to government to give effect to land reform and redistribution...we must ensure that we do not undermine **future investment in the economy**, or **damage agricultural production or food security**. Furthermore, our interventions must **not cause harm to other sectors of the economy**.”*

- **At face value an oxymoron (self-contradictory) – a reflection of a highly factionalised Conference**
- **Food security – 11 million SA'ns are food insecure**

However, debate CAN be turned into an opportunity, rather than mutual destruction

Further elements of ANC resolution:

- “The ANC’s approach to land reform must be based on 3 separate elements: **increased security of tenure**, **land restitution**, and **land redistribution**”
- “The accelerated programme of land reform must be done in an **orderly manner**.”
- “**Democratise control and administration** of areas under **communal land tenure**.”

NOTE: ANC position VERY different from EFF’s: Security of Tenure and diverse forms of Tenure (public, private, communal, cooperative); Orderly Process AND...

Constitution may/may not be amended in terms of resolution

Why has land reform been so weak?

High Level Panel:

- “increasing evidence of corruption by officials”
- “diversion of the land reform budget to elites”
- “lack of political will”
- “lack of training and capacity”
- problems with narrow focus on RESTITUTION

3 Pillars of Land Reform

- **LAND RESTITUTION** – at current rate it will take at least **35 years** to finalise old order claims, new order claims lodged in terms of (repealed) Restitution of Land Rights Amendment Act (2014) – **143 years**. And if re-opened the expected 397,000 claims will take **709 years** to complete.
 - Complexity of system
 - Many claimants accept financial compensation = just...but doesn't change distorted land use and ownership patterns
 - Claims are creating community divisions, re-tribalisation, etc.
- **Hence importance of REDISTRIBUTION** – needed clear framework legislation, who are beneficiaries, what are the strategic objectives?
 - Food security for all – sustainable livelihoods for 17 million in former homelands
 - National food sovereignty
 - Transformation of apartheid settlement patterns
- **And SECURITY OF TENURE**

Misreadings of HLP

Security of Tenure

- **Ingonyama Trust** – HLP DOESN'T call for Expropriation without Compensation, but for repeal/amendment of IT Act 1994 – to ensure **democratisation** of communal land tenure rights. “The Trust is meant...to function subject to existing land rights under customary law...not undermine ...such customary and other underlying land rights.”
- Conversion of PTOs to leases – R96m 2015/16
- Leased land to 3rd Parties (eg, shopping centres) without consulting or obtaining consent of those whose customary land rights were subsumed

Other Misreadings of HLP (and Constitution)

Douglas Gibson (*“Election ploy or real priority?” The Star, July 10 2018*)

“What we need in all the hype is a dose of reality. That was given by the HLP...”

“The constitutional imperative to broaden **land ownership**, clearly recognised and provided for in Clause 25 of the constitution.”

“Although 7,5 million black people own homes, the vast majority don’t have **proper title deeds**” “anything up to 65% of black SA’ns could be dramatically and effectively enriched...by land reform that transfers...**real property rights**.”

Neither Constitution nor HLP Speak of universalising Title Deeds

- S25 calls for “equitable access to land” and “security of tenure”
- **HLP:** “Recognise, record and administer effectively a **continuum of rights to land**...too many SA’ns, in rural and urban areas, ...have insecure tenure to the property that they **occupy**...**Layered and interconnected property rights**, as understood by communities, are not recognised...The Panel **proposes [a] simpler, more accessible [and recognition of] a wider range of rights than the deeds registry system.**”

Hernando de Soto's Title Deed Mystique

De Soto: “Houses of the poor = dead capital. Provide title deeds and enable homes to be used as collateral, unleashing billions of dollars”

But:

- Applying a formal system to an informal area can increase risk to poor – de-emphasises assets as a **safety net** and seeks to turn them into a **tradable commodity**
- Banks, in any case, reluctant to lend to poor
- Rural land systems based on common property resources **never exclusive to one person** – **fluid boundaries** and flexible rules vs. more rigid formal systems of land tenure.

S25 Bill of Rights

The Property Clause

- 25 (1) “no law may permit **arbitrary deprivation** of property”
- 25 (2) “property may be **expropriated** ...(a) for a **public purpose** or in the **public interest**; (b) and subject to **compensation**...”
- 25 (3) “compensation must be **just and equitable**, reflecting an equitable balance between the public interest and those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition & use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy...in the property; (e) the purpose of the expropriation.”

The Property Clause – a Mandate for Transformation

- 25 (4) (a) “public interest includes the **nation’s commitment to land reform**, and reforms to bring about **equitable access to all SA’s natural resources**; and (b) property is not limited to land.”
- 25(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.**”

Without compensation??

25 (8) “No provision **[for instance the requirement of compensation]** 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).”

36 (1) Limitation of Rights

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society...taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation...”

The un-promulgated Expropriation Bill (2015)

- It is possible (and preferable) NOT to amend Bill of Rights – but to introduce a brief LIMITATION clause into the Expropriation Bill
- Indicative DRAFT:
“In cases of expropriation in the public interest, the state MAY withhold compensation where the property is (a) an abandoned building; (b) un-utilised land; (c) property held unproductively and purely for speculative purposes; (d) under-utilised property owned by public entities; (e) land actively farmed by labour tenants with an absentee title holder...”

In Summary

- Bill of Rights and specifically the Property Clause are NOT obstacles to effective land reform (agrarian and urban);
- Expropriation with/without compensation is only ONE (and not remotely the major) means to achieving just, equitable, sustainable and absolutely necessary land reform
 - Acquisition of land is not major impediment – DRDLR has some 4000 farms not allocated
 - Land reform requires – financial, infrastructural, institutional support, etc.
 - AND a clear, legislative indication of who should be the major beneficiaries

We need to have a rational, constitutionally aligned and patriotic discussion on how to address the Land Question