

Land reform report big on historical context, sketchy on the future

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When the advisory panel on land reform and agriculture released its final report in late July, six key opportunities were highlighted to address a more equitable distribution of South Africa's land. The report cautions that the land reform process in the context of South Africa is complicated, and in reference to the most controversial aspect of land reform, namely expropriation without compensation (EWC), states that it cannot alone be fixed through one constitutional amendment (section (25)).



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While the spirit of the report and its detail in outlining the historical and legislative contexts of the current land debate are commendable, certain recommendations will potentially be problematic in implementation, while others will require an establishment of new policies as 'work arounds' in order to address the current challenges to finding a just and equitable distribution of land.

One of the main concerns with the proposals contained in the report is that some of them seem to gloss over the deep structural and systematic challenges in the current processes, for example, the painstakingly slow evaluation and finalisation process of land claims, of which there is a backlog of approximately 20,000 cases. While the report states that the land court must be strengthened, a paragraph outlining the proposed remedy to the systemic problems inherent in the process are not practically unpacked.

Moreover, the report does not discuss the challenges of fiscal spending around the land reform project in relation to other growing and competing needs. The government has in the past been criticised for very low levels of budget allocations to the land reform process relative to other social expenditures. For example, government has been criticised for spending a total of R50bn over 25 years for only approximately 4% of total agricultural land.

Comparatively, in the 2018 fiscal year alone, the social security budget was at R390bn and the emergency budget for education was at R57bn.



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The report acknowledges that it is ultimately the "political will, capacity and ability of stakeholders, especially the State, that will determine the success of the whole land reform process." Yet capacity and ability are in practical terms hamstrung by a deteriorating GDP growth rate (South Africa's Reserve Bank puts this at 0.6% this year), growing unemployment rate which is at a 16-year high of 29% as well as the failing finances of many State-Owned Enterprises (SOEs), including Eskom's current debt of R441bn.

While not exhaustive, below are some of the aspects of the report that deserve careful attention.

The purpose of the advisory panel

The Presidential Advisory Panel on Land Reform and Agriculture was set up in September 2018 to support the Inter-Ministerial Committee (IMC) on Land Reform. The advisory panel was mandated to support sound policymaking, to review, research and suggest models for government to implement a fair and equitable land reform process that redresses the injustices of the past, increases agricultural output, promotes economic growth and protects food security.

Expropriation without compensation

The report cautions that in terms of the considerations of EWC, the panel's role is distinct from and does not "duplicate the role of Parliament's constitutional review committee which is considering an amendment to the constitution in order to make provision for expropriation without compensation."

The panel has recognised and stated accordingly that amending the Constitution for a blanket EWC would collapse the constitution itself, because a blanket EWC would be in conflict with other sections of the Constitution.

However, in recognising the opposing views on EWC, the panel has posited that should the purpose of a constitutional amendment be to move away from a compensation-centred expropriation model, an additional and new section - (25(2)(c)) - could be added to the constitution to make more explicit the criteria for identification of instances in which EWC or expropriation at lower than market price would be reasonable and justifiable.

The report goes so far as to suggest wording as follows: Parliament must enact legislation determining instances that warrant expropriation without compensation for purposes of land reform envisaged in section 25(8).

While motivating for a minimal, if any, constitutional amendment to make explicit instances requiring EWC, the report quite clearly states that EWC must be permitted under specific circumstances which must be explicitly stated in the Draft Expropriation Bill.

The Draft Expropriation Bill, 2019

The panel argues that government has until now not made use of Section 25 of the Constitution to expropriate land for reform purposes, continuing rather buy properties in the open market or in negotiated purposes. This is in alignment with the Expropriation Act 63 of 1975 which itself does not align with the transformative mandate of South Africa's New Constitution. The panel advises that the draft Expropriation Bill outlined this year be swiftly finalised to replace the previous Expropriation Act.

The Expropriation Bill of 2019, Section 12, states that it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to certain circumstances. The land reform report recommends extending the current list of five instances as contained in the draft Expropriation Bill to a more explicit list of ten, including instances such as hopelessly indebted land; land obtained through criminal activity; informal settlement areas; inner-city buildings with absentee landlords; and farm equity schemes.

The panel also states that the Bill must clearly specify the instances where 'nil' compensation would be activated, including on land held for market 'speculative purposes' and on 'abandoned land'.

A compensation policy

Additionally, the report recommends that a compensation policy be developed with its key elements formalised as regulations within the Expropriation Bill. This should outline a compensation spectrum, ranging from zero compensation to minimal compensation, to market-related compensation, to substantial compensation. It should provide a typology of situations and indicate how compensation should be approached in each case.

The panel proposes that the Expropriation Bill plus its regulations should be referred to the Constitutional Court for confirmation that they are consistent with the constitution.

Recognition of a mixed tenure model

Self-proclaimed by the report as a "bold new approach" is a model that will seek to recognise and record the diverse range of tenure rights that exist within South Africa. The report outlines land tenure reform to include legally enforceable rights; a unitary system of land registration and administration that is flexible, allowing people to choose their preferred tenure system; members of group-based tenure systems must be equal and enjoy due process; and tenure reform must recognise the de facto vested rights that exist on the ground.

The Land Records Bill

In order to drive tenure reform, the report suggests that a Lands Records Bill be established to, in its words, "enable the majority of citizens, who hold property 'off-register', to record and register their property – including residents of informal settlements, farm dwellers, labour tenants, residents of communal areas, and others."

The process should draw on pilots that are already underway in South Africa and Africa, although the report does not add detail about these projects. However, by using low-cost technology and "block-chain options" the process would ultimately enable all forms of tenure to be included in the Deeds Registry. Additionally, the report states that the Lands Records Bill should provide for local and accessible recording of existing land rights, from individuals through to communities.

The report cites the Land Boards of Botswana as having had some success in administering land rights and providing for local dispute resolution. The report anticipates that such local land boards could be established in South Africa.

While the proposal for formally registering land use access and ownership rights should be supported, it may still be hard to justify how the effort would require establishing an additional fourth pillar (i.e. land administration) to South Africa's land reform project which is already overburdened with costly bureaucratic processes. Establishing only a unit for this particular exercise and purpose may be sufficient.

The proposed recognition of a mixed tenure model seems reasonable in spirit, also given the current structure of tenure regimes that are operational on the ground. However, questions that arise from this proposal are numerous and multifaceted.

For instance, what would be the primary purpose of formally recognising non-individual ownership rights? If, for example, the aim for formally recognising and registering common property rights is to protect individual citizens, especially women, against gender-based abuse in traditional areas, then the recognition would have a positive impact in that direction.

If the formal recognition of common land rights is also to enable rural residents to use land as collateral in accessing finance, for example, then it is likely that a number of questions and challenges would arise. For example, how or under which legal entity would such common rights be recorded and for whom or which group to bear the responsibilities for taking risky decisions in using such land as collateral for accessing financial resources if such were accepted by formal banking institutions?

In instances of debt defaulting, who would in a rural community, for example, be held accountable for any potential financial losses, and how? Hence it should be made clearer what the practical benefits would be for establishing a land registry with records on land occupations in all areas and what the costs might be for individuals and communities. An impression cannot be created that the registry, however useful, would readily facilitate access to finance to rural communities, especially from formal banks.

Additionally, a number of cultural questions would also remain. For instance, how would the registering of common land occupations for the protection of all citizens affect the power of traditional leaders versus their subjects? Would the potential changes in power dynamics be readily acceptable in traditional areas? Would the same model be applied to all traditional areas in different provinces? In which areas would the registries more or less likely get support from the current traditional institutions? These would be some of the tough questions to face the on-the-ground implementation of this proposal.

Land donations policy

In response to the interest of donating land by private owners, the panel advised the IMC on Land Reform to commence with the process of developing a land donations policy. A draft is currently being put together with input from National Treasury, the Department of Trade & Industry (the dti) and the Department of Agriculture, Fisheries and Forestry (DAFF), and currently awaits information on tax exemptions and how this policy would work in conjunction with existing empowerment legislation.

While the proposal for establishing a land donations policy makes sense, such a policy would have to also account for potential perverse abuses, in the form of evasion or avoidance, where tax incentives in the form of exemptions are used to encourage donations.

Land reform fund

As a key enabler of land reform, the report recommends setting up a land reform fund that would serve as a multi-dimensional funding instrument to obtain public and private sector funding contributions using grants, low interest-rate loans and equity portfolios. The objective would be to bridge the gap by de-risking the extension of credit to small-scale farmers who need access to capital to build their enterprises. Anticipated capital would come from capital donations, development finance at preferential rates, and joint-venture funding.

These financial arrangements should happen on preferential terms (such as deferred interest payments and subsidised interest). In addition, a state guarantee for these on-lended funds could act as collateral to ease the access to finance for new entrants in the land reform space.

How this would work in practical terms is another matter. Despite banks seeking innovative solutions to funding small farmers, the fact remains that those farmers who don't hold the title deeds to the land remain a major risk for banks.

However, as the Standard Bank's head of agribusiness, Nico Groenewald noted earlier this year, should agriculture and land policy certainty be coupled with an effective disbursement of government grants to deserving farmers, this would further support banks safely leveraging the balance sheets of emerging farmers.

Nevertheless, given that the lack of access to finance is only one of the many factors that have led to very high land reform project failures, a multifaced and developmental approach is required in this area. In addition to finance, emerging farmers require skills in goods production phases and in business management, they also require access to networks for, especially, marketing purposes. Approaching these challenges holistically would more likely reduce the risks of potential financial losses to emerging farmers than dealing with issues of financial access in isolation through the proposed fund.

Conclusion

To what degree the inputs from the panel would inform the work of the legislature remains open for speculation. The report is exhaustive in historical detail and posits some useful suggestions to this country's land reform, yet it is challenged in terms of sketching out long term planning scenarios or vision. The report does not spend enough acknowledging the present context that has challenged the land reform implementation strategies.

Not enough time is spent on discussing the challenges to the reform process stemming from the poor oversight of the land reform process, systemic process inefficiencies, a lack of adequate planning and/or implementation with a long-term view, the potentially negative effects of playing party politics, the lack of political will in some quarters to chart a pro-economic growth path for the reform process, and so on. In this regard, the progress of the land reform project seems stuck due to conflicting ideologies relating to how land resources should be given meaning, treated and administered politically and economically.

The conflicting philosophical meanings to land resources in the market versus cultural spheres have also contributed to opening the sector to highly contested ideologies, which seem to have contributed to confusions in political planning strategies.

Should these practical challenges inherent in the land reform process not be adequately addressed now, there is the concern that the Presidential Advisory Panel's report may amount to nothing more than a pipe dream with the future of the land reform process remaining unclear.

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