

**ABSTRACT: THE SOUTH AFRICAN LAND REFORM PROGRAMME AND EXPROPRIATION WITHOUT COMPENSATION: A SILVER BULLET OR A (CALCULATED) SHOT IN THE DARK?**

***Thursday 7 March 2019 at 11am at the University of Aberdeen***

The need to broaden access to land in South Africa resulted from the former Colonial and Apartheid land control systems. Essentially the combined impact of (a) regulating tenure on a racial basis; (b) rigidly applying squatting measures; (c) endorsing racial spatial planning; and (d) distinguishing between a 'national' and 'customary law' (or communal) property and land system in an hierarchical fashion drastically stifled and restricted property law systems and land ownership patterns. Inevitably, the transition to democracy coincided with the urgent need to address land matters. This overarching goal was also linked to other objectives, including poverty alleviation and national reconciliation. In this context a concerted, focused land reform effort was critical.

South Africa endorsed a market-based or market-assisted approach. This approach, directly connected to the willing-seller-willing-buyer principle was a result of a peaceful transition from Apartheid to democracy, embodying a negotiated settlement. On the basis that specific rights were protected during the negotiation phase, being able to sell and purchase land in an open, unrestricted market, was likewise endorsed. The level of complexity of especially the redistribution programme, provided for in section 25(5) of the Constitution, coupled with the difficulties experienced with willing-seller-willing-buyer, raised various red flags where broadening access to land and redistribution were concerned. It was within this context that a clear move away from the principle was voiced at the National Land Summit in 2005 that was continuously repeated thereafter.

To the extent that the willing-seller-willing-buyer principle may have caused price hikes, making a market-based approach unsustainable, it became increasingly clear that some interference in the land and property market was called for. In this regard a two-pronged approach regarding the acquisition of land or property emerged: (a) adjusting or manipulating the market, to some extent, where land or property had to be acquired for land reform purposes; and (b) adjusting the expropriation paradigm to bring it in line with the Constitution and the objectives linked to land reform specifically.

In the course of 2018 a constitutional review committee was established with the specific brief to explore the amendment of section 25, the property clause, so as to enable expropriation without compensation. It was argued that such a step would ultimately speed up the land reform process and adjust land ownership patterns more effectively. While thousands of written submissions were submitted, and numerous oral presentations were dealt with by the Committee in the course of August and September 2018, the amended version of the property clause is still in the pipe line. However, on 21 December 2018 the Draft Expropriation Bill [2019] was published for comment. The whole of the Bill deals with expropriation-related matters, aligned with the Constitution. Clause 12(3) specifically provides that it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including, but not limited to five specific categories of land.

The presentation aims to interrogate the value of expropriation as a tool in land reform generally and specifically in light of the proposed categories of nil compensation, given the inherent and prevailing shortcomings and disconnects in the South African land reform programme. In this regard a short historical background is briefly provided, followed by an exposition of the three sub-land reform programmes. The interventions with regard to the acquisition of land – adjusting the market and drafting legislation dealing with expropriation – are specifically dealt with. Finally, the question is posed whether the intended amendments providing for nil compensation specifically, will address the difficulties and disconnects. In short: is expropriation generally and expropriation without compensation indeed the “Silver Bullet” so desperately needed?

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