

SEPARATING THE WHEAT FROM THE CHAFF IN THE LAND REFORM DEBATE

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The debate on land reform is currently taking place across many fronts. This should be expected, given the complexity of the matter. However, there is a danger that related but distinct factors may be mashed into one, thus confounding rather than clarifying the fundamental issues.

Parliament's Constitutional Review Committee has been holding hearings in various parts of the country. Views have been freely expressed on the need or otherwise to amend the 'property clause' in the constitution. The weight of the arguments in the written submissions and the hearings – rather than a referendum-style numbers' game – will determine the content of their report, says co-chairperson of the Review Committee, Vincent Smith.

At the same time, questions have been raised about a combination of issues on communal land. This has arisen sharply in relation to the Ingonyama Trust which is responsible for communal land in the KwaZulu-Natal province.

Throw into the pot the 'silly season' of electoral contestation, the tyranny of the soundbite and the temptation to define everything as polar opposites, and the noisy republic can easily work itself into a frenzy.

What is the essence of the debate, and what are the possible paths to follow in dealing with these matters in a manner that meets the objectives of meaningful transformation and redress?

At its Conference last December, the ANC resolved that, in order to ensure effective land reform, expropriation without compensation should be used as one of the mechanisms available to government. The qualifications on not undermining economic investment, agricultural production and food security aside, the question remains whether this actually requires amendment of the Constitution. The argument coming out of the ANC's May consultative land summit is that, parallel to the constitutional review process which may be protracted – and which may conclude that an amendment is not necessary – there should be practical action to test the limits of current constitutional provisions. What are some of the possibilities in this regard?

The processing of the Expropriation Bill, setting out criteria for expropriation without compensation, can be expedited. Current legal test cases can also be used. For instance, the Msiza case where the Land Claims Court asserted that market value should not be the frame of reference in determining compensation was overturned by the Supreme Court of Appeal, and it needs to be appealed at the Constitutional Court. The government should drop its appeal against the class action (Mvelase and Others) where the court found in the tenants' favour. This can then be used to test partial expropriation without compensation.

In addition, the Gauteng provincial government's rapid land release programme will include expropriation without compensation, and the DA-controlled Johannesburg City Council is threatening similar action on some city buildings.

In other words, expropriation without compensation does not have to wait for the completion of the constitutional review process.

Overlaying all these debates is the question whether there are differences of principle among the various political players, beyond form (amendment of the Constitution) and substance (the purpose of expropriation and the systems of ownership envisaged).

The ANC argues that the system of land ownership should include private, communal, state, co-operative and other forms. In line with the Freedom Charter, emphasis should be on ownership of land 'by those who work it' which should include share-ownership and sharecropping by workers. The Freedom Charter also asserts that all should 'have the right to occupy land wherever they choose' as opposed to the erstwhile racially-based Group Areas Act dispensation. The Economic Freedom Fighters, on the other hand, argues that all land – until recently, including communal land in all the provinces – should be expropriated without compensation, to fall under state ownership. Everyone in the country would then become a tenant.

This is a fundamental difference.

However, these distinctions should not subtract from the fact there is impatience in society for a radically different approach to land reform. It is instructive that, of the thirteen parties in parliament, only four (Democratic Alliance, the African Christian Democratic Party, the Congress of the People and the Freedom Front Plus) are in principle opposed to expropriation without compensation and they were against the constitutional review process.

What about communal land and the drama around the Ingonyama Trust?

Few would argue against communal ownership among communities and families. Whether the land covered should be extended, or whether a nuanced form of such ownership can be used in urban and peri-urban areas, is a matter that requires further reflection. Three critical questions, though, need to be clarified: security of tenure for residents in communal areas, the status and role of traditional leaders and the conduct of traditional structures in relation to the residents.

Communal tenure not only has the potential to ensure security of tenure across generations; but it also protects the poor against ceding such property willy-nilly and thus falling into sheer pauperism. This, of course, needs to be balanced against what Peruvian economist Hernando de Soto refers to as fungibility of assets – the possibility to use them as collateral or for purposes of some form of exchange.

Then there is the question of management of communal land. The first principle in this regard should be that the land belongs to the people. Secondly, and attached to this, is the understanding that, apart from their own estates, traditional leaders are not owners of communal land. Thirdly, to the extent that traditional leaders act as custodians of such land, this should be governed by institutions that are truly representative and democratic in their composition and operations. The Traditional Leadership and Governance Framework Act defines how such structures should be constituted, including gender representativity, and how they should operate.

While these legal principles do find expression in some areas, there are many instances where they are observed in the breach. Two case studies recently published by the Mapungubwe Institute for Strategic Reflection (MISTRA), which will be included in a book on the role of traditional leaders in a constitutional democracy, illustrate how things can go horribly wrong. Sithandiwe Yeni on the Makhhaseni village in KwaZulu-Natal and Sonwabile Mnwana on Bakgatla-ba-Kgafela in the

Northwest Province, illustrate how traditional leaders can ride roughshod over the interests and wishes of communities. In Limpopo's Vhembe district at Phiphidi waterfall, conflict has been brewing between the community and traditional authorities.

On the Ingonyama Trust, in particular, parliament recently had to intervene to stop the board's practice of converting permission-to-occupy agreements into leases. This, the portfolio committee on rural development argues, reduces residents into tenants, forced to pay rates or face eviction, which amounts to expropriation of land owned by communities.

In other words, it may not so much be the existence of the Trust as such, but the board's practices which violate people's rights, and the legislative gaps that make this possible, that need to be addressed. Parliament's actions against these violations cannot, therefore, be interpreted as a threat against any kingdom. It is the responsibility of government, traditional leaders and the South African nation as a whole to ensure that constitutional rights are protected and promoted.

The Constitutional Review Committee may or may not propose an amendment to the Constitution. In the case of the former, a broad formulation on circumstances under which expropriation without compensation can take place will need to be found, and the concepts of 'land' and 'property' will need to be clarified. But the Constitution can only state general principles: in both instances, a law of general application in the form of an expropriation act will still be required.

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