

EXECUTIVE SUMMARY

IS EXPROPRIATION THE ANSWER TO THE ILLS OF LAND REFORM?

An Examination Of Expropriation As A Redistributive Mechanism To Acquire Land For The Landless

Indigenous South Africans have been subjected to centuries of land dispossession and the expropriation of their land, seldom accompanied by any form of compensation. So it is that in the 21st century, the majority of South Africans are landless and socio-economically powerless. The coming to be of the “new South Africa” was to ostensibly change all that and realise a more equitable distribution of land and the country’s resources. However, ten years into the nascent democracy, landlessness is still endemic and the pace of land reform remains slow and unresponsive to land starvation.

The market-based approach to land reform, within the context of an unyielding macro-economic policy, is proving to be inappropriate and is not advancing the interests of the landless. It is therefore necessary to consider alternative remedies or instruments that may address the pressing challenges of land hunger. This paper explores whether the mechanism of expropriation could make a contribution towards addressing the inadequacies of the current land reform programme in South Africa. In section two, the constitutional and legal parameters of expropriation are explored and questions about its nature and form are posed. Lessons are drawn from comparable international experience in countries such as Brazil, where the use of expropriation is exercised largely through pressure being brought to bear by social movements; the Philippines, where the use of expropriation is on a decline due to pressure from the World Bank and the proponents of market-based land reform; and Zimbabwe, where expropriations have come to the fore and virtually approximate the wholesale nationalisation of agricultural land.

In countries that have a more redistributive approach to land reform, expropriation is used more readily and proactively while countries which adhere to a market-based approach tend to shy away from expropriation or use it only as a last resort. Depending on the nature of the state and the broader political economy in which it operates, expropriation may be utilised as a transformative tool and may be exercised with or without the payment of compensation to the landowner, or it may be selectively utilised within the parameters of maintaining the status quo of existing property relations. Expropriation can take different forms and in South Africa, given the Constitutional protection of private property and the limitations clause in the Bill of Rights, it is constitutionally determined that compensation be paid for the land that is expropriated; with the market value of the land being the starting point for determining the amount of compensation. Section three of the paper highlights the tension between balancing the security of land rights and land reform needs, and outlines the evolution and content of the law of private property and the mechanism of expropriation. To this end, the property clause in the Constitution and Bill of Rights is examined, as are the various laws, policies and procedures regarding laws of general application that outline the contexts in which expropriation and compensation may be instituted.

Many progressive land sector practitioners have proposed that the use of expropriation would serve to speed up land reform; make it more cost effective, efficient and systematic; and contribute to a more targeted and planned approach to land reform. In doing so, they argue that it would challenge existing property relations and serve to alter entrenched landownership patterns through a more just distribution of land. Section four of this paper examines such reasoning and explores whether expropriation, in its current incarnation, would in fact make land reform any cheaper; whether it would serve to speed up the pace of land reform and considers the factors that militate against an improved pace – such as resistance on the part of landowners; the formulaic adherence to project cycles and bureaucratic procedures on the part of implementing agencies; and the legalistic blockages and contradictions that undermine progress and participation. It further proposes that the benefits of expropriation can only be effectively realised and maximised within the context of a more comprehensive and planned approach to land reform – thereby advocating the phasing out of the current ad hoc project-by-project and demand-based approach.

Section five considers the current market-based approach as practiced in South Africa and debates the extent to which it is in fact market-based and free of state intervention and whether expropriation would be alien to such a modus operandi. In doing so, it explores whether expropriation in its current form is in fact the radical tool that many suggest it to be. Commonly mooted motivations and rationales for the introduction of expropriation into market-based contexts are then considered – these cite pressure from below, and the failure of the willing seller/willing buyer approach and the lack of co-operation from landowners. These rationales are critiqued and it is suggested that differing class interests and a lack of political will may well underscore and prompt the explanations proffered for the failures of land reform.

While being mindful of the danger of tinkering with a land reform policy approach that has been found to be wanting, Section six focuses on strategic proposals which could potentially allow the mechanism of expropriation to offer a degree of remedy and contribute towards a more equitable redistribution of land in South Africa. These strategic proposals include pointers regarding the following:

- **Expropriation as an integral part of a planned approach to land reform:** It is suggested that expropriation be considered as part of a planned and more coherent land reform programme that is based on district or area-based plans that are responsive to land need. Given that the state has the option of pursuing a more interventionist approach, it should establish comprehensive and inclusive land reform programmes in identified areas of land need. In doing so, the DLA should carry out selective expropriations in areas where demand has been expressed, where no land is available or where negotiations have failed. In the event of a more planned and area-based approach being adopted, the use of expropriation could make a significant difference to the efficiency and pace of land reform.
- **The utilisation of what already exists in terms of legislation, policy and procedures, which govern the use of expropriation, and the extension of its scope and impact.** The DLA already has access to powerful tools in order to further the interests of pro-poor land reform, but these remain under-used or are avoided. It is proposed that the DLA utilises the legislation, policy and procedures that are already at its disposal – albeit that they are imperfect. This proposal is underpinned by the sentiment of the oft-used coinage of Nike advertising - “just do it”. It is through the application of the legislation and policy that exists that the problems within them will be ironed out and amended so as to become harmonised, more user-friendly and appropriate. In addition, it is proposed that

the gains made through the amendments of the Restitution Act should benefit all arms of land reform. The use of and commitment to expropriation as envisaged in relation to Restitution should be extended to the Redistribution and Tenure components of land reform as the land market and landowners in rural areas – both private and corporate - continue to override, subvert and determine the pace and purpose of land reform.

- **The harmonisation of legislation, policies and procedures:** The complexity of the legalistic framework for expropriation is compounded by the fact that the law itself is not consistent across the various pieces of legislation and policies that refer to expropriation. There is a need for the various elements to be harmonised. This process would reduce the scope for legal loopholes to be exploited and minimise the challengeability of expropriation and thereby cut down on time delays and endless judicial contestations.
- **Reconsideration of the nature and application of compensation:** A number of the delays and areas of legal confusion pertain to the manner in which compensation is determined and the procedures that govern it. A number of different proposals are made in relation to different aspects of compensation as it is currently formulated. These include:
 - a stricter reading and application of the Constitution's formula and a consideration of *all* elements of the formula with a weighting being given to elements that allow for social and historical redress;
 - a consideration of agricultural productive value as the basis for determining compensation;
 - the harmonisation of compensation law and policy and clarity regarding the use of compensation formulae appropriate to different kinds of expropriation contexts and the development of a more rigorous practice in order to respond to predictable challenges. Critically, claimants should not be prejudiced by the process of the settlement of compensation and should not find themselves unable to commence with the development of their land due to their grants being tied up in litigation about the amount of compensation. In addition, it is proposed that the modalities of compensation payment be reviewed – for consideration is the implementation of alternative long-term compensation payments in the form of, for example, government bonds, as instituted in countries such as Brazil and Thailand where compensation for expropriated land is paid for by means of cash payments for improvements, livestock and equipment while the land is paid for by long-term government bonds at a set interest rate per annum.
- **A more claimant-centred approach:** It is proposed that a more beneficiary or claimant-centred approach to expropriation be developed by land sector agencies and the DLA and that increased levels of community participation are facilitated. The DLA and community support agencies are encouraged to ensure that participative processes and report-back sessions are built into the process of instituting an expropriation. In order for communities to participate it is essential that they understand the process and its requirements. It is therefore proposed that programmes of sustained education and information dissemination are undertaken regarding expropriation and available land reform options, so as to better equip communities to engage in processes such as expropriation more actively.

- **Develop clear procedures, manuals and implement training and information dissemination programmes:** Flowing from the development of clear procedures, it is proposed that the DLA develops training manuals which clearly outline the application of expropriation and its related procedures, and that all DLA officials attend training courses in this regard. Such education sessions could also be made available to other land sector practitioners and development para-legals.
- **Improved budget allocation for land reform implementation across all programmes:** One of the persistent challenges faced by the land reform programme is the lack of budget allocation to effectively implement the programmes for acquiring land (be this by means of expropriation or purchase on the land market) and supporting beneficiaries in the post-transfer period. It is therefore proposed that a re-orientation of the National Budget is essential and that the DLA and land sector agencies lobby the National Treasury to allocate an adequate budget for land reform so that land reform in general and expropriation in particular can be implemented in accordance with the expressed need for land.
- **The monitoring of expropriations:** Expropriations are currently not systematically recorded and little if any monitoring or evaluation of expropriation processes has been undertaken. It is therefore suggested that the DLA establishes a database for recording all expropriations. Such a system would hopefully assist in drawing the lessons from expropriations to date and contribute towards the identification of problem areas and allow for improvements to be made in the legislation, policy and procedures.

In conclusion, if expropriation is to become an instrument that is able to contribute towards delivering a more equitable and coherent form of land redistribution, the structural conditions and manner in which the mechanism of expropriation is currently framed, the prevailing interpretations of the Constitution, the modus operandi of the Department of Land Affairs and Agriculture, the socio-political role of the State, and the market-based foundations of land reform all require detailed attention and review.

The document suggests that in many instances the assumptions inherent in the calls for the use of expropriation are tantamount to wishful thinking and on occasion naively ignore the reality of the nature of the State and its regimen as well as the inherent constraints within the way in which the expropriation mechanism has been constructed in South Africa – noting that a state's intentions and manner of implementation can either employ the mechanism of expropriation as a genuinely transformative instrument or one that maintains the status quo, even if in the guise of it being a more radical instrument. The paper underscores the pivotal role of the political perspective and will of the State and its agents in introducing or utilising the tool of expropriation, as well as the critical ingredient of social mobilisation in a bid to alter the manner in which expropriation and land reform are currently understood and practiced.

While expropriation should be encouraged and used as a tool to acquire land for the landless, it is in and of itself not necessarily the answer to the inadequacies of land reform currently being experienced. It will only begin to have the desired effect if its form and substance are such that it becomes a tool that can be effectively utilised in response to the needs of the landless and if those who are duty-bound to implement the land reform programme are enthused with a revitalised sense of purpose and commitment. As part of this process, it would be necessary for expropriation to be incorporated within a context of a more planned and comprehensive approach to

land reform, which has the necessary political, financial and resource support from the state, and which involves the participation of organised land-seeking people. For this to be effected, the involvement of the State becomes central, as does the mobilisation of rural communities and the building of their organisations. In the absence of social mobilisation to effect changes to the prevailing approach to land reform, and in the absence of political will, a strong sense of purpose, and an avoidance of unnecessary legalistic and bureaucratic procedures, expropriation will not necessarily prove to be the radical tool that a more just and effective form of land redistribution requires.