

Expropriation of Land without Compensation

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Introduction

- Ramaphosa letter to the London Financial Times
- History
 - Freedom Charter, 1955
 - Constitutional negotiations
- Section 25
 - Public interest
 - Land reform and equitable access
 - Just and equitable compensation
- Section 36 limitations

Content

- The Parliamentary Resolution
- State Land Audit
- High Level Panel Report
- Land Bills
- The Water and Minerals Examples

Content (contd)

- The State as the Owner of Natural Resources
- Government Statements
- Economic Impact
- International Law
- Foreign Constitutions

The Parliamentary Resolution

- June / July 2017 ANC Conference : two proposals
- December 2017 ANC Conference : amendment to Constitution
- February 2018 – Parliament’s resolution :
 - Proposal by Julius Malema
 - ANC’s alternative - increase agricultural production and food security
- Consultation process and draft report
- Economic / agricultural aspects
- Further consultation, court challenges and the 2019 elections

State Land Audit

- No meaningful data
- Department of Rural Development and Land Reform Audit Report
- Excludes State / trust land – 6 %
- Excludes companies / community organizations / trusts – 60%

State Land Audit (contd)

- Agricultural :
 - Whites – 72%
 - Africans – 4%
 - Coloureds – 15%
 - Indians – 5%
- Urban :
 - Whites – 26%
 - Africans – 56%
 - Coloureds – 9%
 - Indians – 7%
- Sectional title :
 - Whites – 50%
 - Africans – 17%
 - Coloureds – 21%
 - Indians – 6%
 - Co-owners – 6%
- Conclusion : new land tenure system vesting all land in the nation

High Level Panel Report

- Assess the State's performance
- Land reform chapter – Dr Aninka Claassens
- Urgent need to provide security of tenure
- Leases vs individual ownership
- New land record system
- Section 25 is sufficient

High Level Panel Report (contd)

- Restraints :
 - Corruption
 - Diversion of budget to elites
 - Lack of political will
 - Lack of training and capacity

High Level Panel Report (contd)

- Summary :
 - Constitution should not be amended
 - State should use existing expropriation powers
 - Constitution allows for discounted acquisition
 - New form of land title should be adopted

Land Bills – Regulation of Agricultural Holdings Bill

- Aim : redistribute agricultural land more equally by race and class
- Features:
 - Establishment of Land Commission
 - Register of agricultural land holdings
 - Restrictions on foreign ownership
 - Ceilings for land holdings and effective forced redistribution
- Unconstitutional

Land Bills – Property Valuation Act and Draft Regulations

- Distinguishes between property acquired for land reform and for other reasons
- Different valuations apply
- Proposed amendment to stipulate discount to market value on a spectrum
- Unconstitutional

Land Bills – Expropriation Bill

- Current version constitutional, in contrast to earlier versions
- Oust jurisdiction of courts
- Impose particular interpretation of section 25
- Withdrawn

The Water and Minerals Examples

- State allocates water and mineral rights
- Privately held rights converted into new order rights
- National Water Act and Mineral & Petroleum Resources Development Act
- Systems effectively provide State powers of reallocation
- Constitutional challenge failed
 - The State did not acquire rights; the “nation” / the “people” did
 - Core right not acquired
 - Froneman J : approach could lead to abolition of private ownership of all property without compensation

The Water and Minerals Examples

- Following law could be held to be constitutional :
 - All land vests in the nation
 - The Minister is the custodian of the nation's land
 - The Minister is empowered to grant new land rights
 - The owners of old order rights will be divided into users and non-users
 - Used rights will entitle the holder to apply for a new right subject to conditions
 - Unused rights to fall away

Government Statements

- Deputy Minister Cronin
- Process will target :
 - Unused vacant land in cities
 - Abandoned buildings
 - Commercial properties held unproductively and for speculative purposes
 - Agricultural land occupied by labour tenants
- Definitional and other issues

Economic Factors

- Implementation to:
 - Not harm economy
 - Increase agricultural production
 - Provide for food security
- R8 trillion impact to property sector not properly considered
- Cost outweighs benefit
- Zimbabwe example - US\$20 billion vs US\$11 billion

International Law

- Customary international law – no expropriation without compensation
- Public purpose, without discrimination and prompt compensation
- Application to private individuals / companies
- International controversy and potential diplomatic measures
- Adequate, effective or appropriate compensation
- Social and economic reforms to be given consideration
- Flexibility of Section 25(3)

International Law (contd)

- Confiscation not just and equitable
- Principle of equivalence
- Article 16 of the United Nations 1974 Charter
- Potentially acceptable formulation of Expropriation Act
- Amendment would need to:
 - Closely and clearly circumscribe when no compensation payable
 - Continue to apply the equivalence principle
- Section 36 – reasonable and justifiable limitation

Foreign Jurisdictions

- Expropriation without compensation: Zimbabwe
- Just compensation: CAR, Congo, Egypt, Japan, Mozambique, Namibia, Poland, Senegal, USA
- Fair compensation: Egypt, France, Madagascar, Rwanda, Tanzania
- Full compensation: Denmark, Kenya, Lesotho, Russia, Seychelles
- Adequate compensation: Botswana, Malta, Uganda, Zambia
- Equitable balance of interest: Germany, South Africa

Conclusion

- Conservative view
- Amendment for clarification
- Radical view
- Freehold replaced with new form of title
- Economic implications
- Submissions

Thank You