LEGAL AND ADMINISTRATIVE PERSPECTIVES OF LAND REFORM IN SOUTH AFRICA

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Abstract

In 1994 South Africa emerged from a colonial rule with a skewed land distribution which included agricultural and residential land. The skewedness of the land contributed immensely in high poverty levels, and it was appropriate for the new government (African National Congress) to start addressing and opening dialogue on land issues. In answering the land question, there were important requirements that needed to be addressed properly to make sure that the land question was to be addressed successfully, and to the benefit of the previously disadvantaged groups under apartheid, such requirements were administration and legislative requirements which were critically needed to resolve the past history. It is against this brief background that the paper attempts to look at these issues. It does not pretend to capture all of the salient issues that permeate this vexing and complex issue. The land issue is not peculiar to South Africa alone, but is an emotional issue in other parts of the world also. The primary objectives of land reform initiatives in South Africa were to address injustices which were brought about by land dispossession, reduce poverty and inequality. These are some of the issues that will be discussed from a legal and administrative perspective in this paper.

Introduction

The target of this paper in terms of its discussion is to highlight the failures, success and needed improvements of land reform initiatives which are influenced by the impact of administrative and legislative requirements. In trying to accomplish the latter, case studies, random interviews of ordinary citizens, emerging farmers, commercial farmers, communities, cooperatives, business sector, non-governmental organizations, investors, civic organizations, political organizations, youth projects, academics, peoples experiences around land issues and so on were consulted, engaged in discussion and interviewed.

Through the engagement of the above stakeholders, the survey explored the extent to which legal variables and administrative issues of land have been used correctly in respect of land redistribution, reduction of poverty, meeting livelihoods, access to land and food security. It
should be noted that comments from all stakeholders suggest that formal and informal debates or dialogue is needed to give way to a positive answer to the land question in South Africa. Hence some of the insights alluded to in this paper cannot be found in a written format in South African literature on land issues.

The specific objective of the research that is encapsulated in this paper was therefore, to unpack some of the salient and important issues that have a resounding impact upon the land issue in South Africa, given the historical nuances involved because of the apartheid policy of the former government. These are outlined hereunder as follows:

- Appropriate land administration and transfer mechanisms.
- Designing replicable methodologies in assessing the impacts of land administration.
- Viable land reform administration and legislative mechanisms.

In respect to the above objectives, it must be placed on record and clearly understood that, they are not the only objectives that affect the processes of land reform in South Africa and that there are other issues that can be nuanced in respect of objectives that need attention by other researchers, in order to understand the land question more comprehensively. The paper therefore does not intrude on other hypotheses that may be offered by other researchers or for that matter upon work that has already been undertaken in this regard. It is however premised that, at least an attempt is being made to delineate, project and understand the importance and necessity of both legal and administrative issues in respect of land reform within the country. This is further premised on the basis that, if these fundamental issues and objectives are not adequately considered within the debates of policy reform in South Africa, it will have the distinct possibility of negating land reform initiatives by the democratic government, twenty years down the difficult path of transformation, post 1994. This could lead to devastating consequences, great dissatisfaction on the part of the historically disadvantaged black population groupings, and in many ways will lead to the reality of possible distrust of the democratic government, and will be accused of maintaining the status quo by disillusioned South Africans. IT can also be asserted that the democratic government will be on a cause of self – destruction because in many ways it has played into the hands of capitalist forces, in order to consolidate the neoliberal agenda.

**Background**

Land reform goes back in history as far as 133BC. It was inevitable that, though delayed by colonialisation it was bound to be a major issue at one point or another in the history of Africa as it happened in other Asian countries decades ago. The realization of political liberation in 1957, when Ghana received its independence as a free nation of Africa has indeed culminated in the birth of land reform projects on the continent of Africa. The fact that many of South Africa’s and Africa’s population affected by colonial imperatives of the past, might view it as unjustified for them to buy back the land that was forcibly from them on any principle defined by the democratic government. This is exemplified by the policy of the willing buyer, willing seller policy that was introduced by the African National Congress (ANC) government, post 1994. This policy was too expensive an exercise in monetary terms, because the majority of blacks who were dispossessed of land could not participate because they did not have the means to do so. On the other hand white farmers and land owners inflated land prices and thus excluded the majority from participating, amidst a host
of other tangible reasons. Much opposition by other black liberation movements such as the Pan Africanist Congress (PAC) and the Azanian Peoples Liberation Movement (AZAPO) have been vociferously registered against the government’s policies on land it raises the critical question of whether post-colonial Africa should adopt a negotiated or a more radical land reform process, particularly with the settler classes. In South Africa, it has also fuelled much debate by the recently formed Economic Freedom Fighters Party led by expelled ANC firebrand and former ANC Youth League President, Julius Malema. This is a major headache for the ruling party as the 2014 elections loom in May 2014.

The reasoning for the call for a more radical land reform process is, among others, is based on the view that a negotiated process favours a capitalistic approach – a system seen as having failed to address the plight of the poor in the post-colonial era in the first place – and, which by nature is based on the promotion of individual property rights which automatically excludes the poor and marginal groups within Africa societies and in South Africa. This is the route South Africa chose to follow, post 1994. This policy therefore negated the aspirations of the majority after liberation from colonialism and apartheid ideology. Thus the issue of the land question remains a sensitive issue in a volatile country and within the continent as a whole. It therefore, has to be dealt with urgently.

Land reform is based on the fundamentals of redressing the skewed land ownership of the colonial past, poverty alleviation, and food security because a large percentage of the population in Southern Africa lives in rural areas and depends primarily on agriculture. In sub-Saharan Africa, land still remains a critical resource and, an important factor of production. Although in many parts of the continent a nomadic farming and pastoralist way of life continues to exist side by side with commercial agriculture, it is not enough to redress the injustices of the past. Africa continues to be plagued by serious challenges in respect to land reforms and this includes:

- The issue of land management systems (centralisation vs. localisation).
- Choice of land reform management systems (formal or informal).
- Processes, systems and structures to manage land disputes.
- Rural land tenure systems and, a host of other important variables in respect to the agrarian question and actual reform.

All these challenges require a politically intense process, since they deal with doing away with the, existing land status quo and requires new reforming land policies that, create changes in power relations between and within communities and as well as between the state and the communities. The obligation of African governments is to ensure that, land is equitably distributed, which create tensions and impact of vested interests with adverse effects and results among a number other serious and emotional issues which stymie development. Impatience among the land hungry and destruction by those whose interests are threatened also poses a serious challenge to land reform initiatives and processes within South Africa. In order to address these manifest problems, some African countries have tended to adopt the quick and radical approaches when dealing with land reforms. Land reform, particularly in South Africa, will be an unfulfilled aspiration, if all the stakeholders do not play their part in fast-tracking successful land reform in South Africa.
In South Africa the government together with some of its institutions have begun a process in respect of land reform because, it recognizes the volatility of the situation which post 1994 has proceeded very slowly as the government panders to business and the capitalist classes, including foreign interests. However, some of the government initiatives post 1994 is as follows:

- The Land and Agricultural Development Bank of South Africa have been indirectly used as a holding department for land repossessions.
- This agreement allows the Bank to be a land warehouse.
- This arrangement continues to assist in delivering land reform initiatives.
- The challenges of escalating costs in relations to maintaining these farms and in some instances keep them in a productive mode remain very high, but this can be alleviated through government funding specifically designed for this purpose.

The above initiatives are a piece meal approach and in reality have not met with great success. This must also be viewed against the background that the Land Bank was formed under apartheid and was only partially transformed and had its own administrative problems in its reconstruction phases. Although supported by government, it lacks monetary inputs and skills. In reality the bank must be reconstructed with more than adequate support and its mandates must be changed to meet the requirements of the Constitution of the Republic of South Africa. It should therefore tailor its programmes to fit into the call for redress as defined and enunciated in the Freedom Charter of the African National Congresses’ founding fathers when the organization was a liberation movement. This basic principle has been negated by the ruling party. As long as the status quo is maintained nothing tangible will be achieved and the Land Bank will only play a minor repository role.

The municipalities can be adequately capacitated and funded to be effectively used to enhance land reform through commonages and urban settlements. The Development Finance Institutions like Industrial Development Corporation and Development Bank of Southern Africa, to name just a few, can also if given proper mandates and transformed in terms of engineering new land reform policies could play a major role. Pressure needs to be exerted on government by persuading those interested in land usage to actively participate in farming equity schemes.

The current land administration process

Lodgement

It is obvious that the conventional land registration systems often do not end up with the desired results. In uncertain land tenure cases like post-conflict situations, peri-urban areas, land restitution and so on it would help a great deal for South Africa to consider using records of oral history or oral tradition in aboriginal land claims. This will, in many instances, at least quell the land thirst among the historically dispossessed, to some extent. Efficient land administration systems and flexible database approaches are the main contributors of nearly perfect land management systems, although there is always been an argument on the accuracy and correctness of such systems and information and what constitute efficient and accurate land database, more research, application with refinement is required.
Proper land records need to be put in place, as these will in the end protect the interest of vulnerable groups. There is consensus that proper land record systems help in uncertain situations (in South Africa), where currently the number of dispossessed groups is still not known to date. It must also be acknowledged and appreciated that the government has moved swiftly in trying to address the latter. Although there is still a need to further advance this regimen, in order to make land reform a meaningful word, the government has tried various initiatives and approaches, with some successes. The notion that the country has an efficient system of registration of titles to land through the land survey system is debatable when it comes to land reform; it is still viewed as a contributing factor to the unfulfilled obligation by government towards the dispossessed groups.

**Screening**

The land reform screening processes should guard against anomalies, like in situations where the transfer of land ownership from the relatively more powerful and generally small number of wealthy owners with extensive land, to large groups of resource poor new owners, occurs without proper consultation, poor support mechanisms, poor extension, a lack of monetary resources, who possess poor skills, some have not farmed scientifically before and due to allocation based on political patronage does not augur well for the future and success of poor black farmers. This situation is further exacerbated by the political recognition of the elites. Amidst these issues that have been identified there are numerous other challenges and problems. If these issues are not dealt with in a decisive manner, not much will be achieved and therefore land reform although necessary and important will come to naught.

Yet, in some cases some people use such ownership transfer as land reform, which is only the beginning of the process. These typical transactions defeat the purpose of the land reform project figures, as land transfer without concomitant resource support, creates further distortions in land transfer figures because, it creates disinvestment in land and agriculture and often denies the economy a productive resource; as farm land without investment tends to lie fallow. In some instances the beneficiaries are made to believe that they are the owners of land only to find that they were used by former land owners to access land grants from the government. All these events have led to the government tightening up the gaps and these gaps still require further tightening. The important question therefore is what will happen to those transactions where these anomalies have been picked up? Will the rightful owners of these land properties be compensated in one way or another? Will those that have been found to have orchestrated such acts be brought to book? Are those lands going down in history books as land reform initiatives? Who will again look at the rescue plan for the poor victims who have fallen prey of the land reform vultures? These questions are important and have to be answered by government and its land reform departments and institutions. If remedial action is not taken and people not prosecuted in many ways the land reform processes embarked upon currently and within the last twenty years will be meaningless.
Settlement and adjudication

This primarily talks to the question, “who should adjudicate land ownership disputes?” Lessons have shown that, in many land reform projects, this is where most vulnerable groups are dealt the most extreme blow. Again there are measures in place to respond to the question, but in many cases people who have the opportunity to adjudicate these cases put their personal interest before the entire process. Some among the affected population feel that they should be more represented in these processes and they should drive them as having been the victims. But questions always remain as to what will be role of the government if these requests are to be acceded to? Again, if the government lets loose the process, will the process be fair, just, equitable, or will it be emotionally driven; and if the latter is to prevail then unintended consequences may result, although the role of emotions that come into play with past colonial land issues, which marginalised people and the atrocities that they were subjected to, should not be underestimated., Hence there is a good reason for these debates to be held and heard to avoid unhealthy situations and, moreover, all concerned stakeholders (government, communities, private sector, NGO’s, investors, and others) must try and address the land reform issue as quickly and swiftly as possible. It should not only be left to the government to drive it and policy issues must be developed by all stakeholders, in order to get a complete buy in. This will drive successful land reform initiatives in the country. It is therefore the government’s role to make sure that in these processes, and primary objectives are met and vulnerable groups are protected against anomalies. There continues to be the view that in many African countries, land reform processes are not pro-poor, they only build secure property rights for the wealthy and elites at the expense of the poor.

Financial management

South Africa is typical of the example of market-assisted land reform initiatives, which are very expensive, to maintain and apply, especially with regards to land prices. The government is expected to buy the land for reforms in an open market. This compromises the entire land reform process. Further, those who own the land become more determined to get highest prices, especially when the government or a historical disadvantaged individual is a buyer. This makes government budgets and the system insufficient and often the available funds are quickly depleted, and the programme comes to a standstill. It is argued that in South Africa those who have land do not want to play a fair game in respect to land reform, and most land activists refer to the South African approach to land reform as a capitalistic and, thus unable to address, the plight of the dispossessed and the poor. The land reform initiatives in the South African context seems to be a one sided affair, with the government attempting to identify and buy the land for claimants, and the land owners chasing the highest prices for their land, this has created major challenges. Another problem is the all embracing reality and fact that there are a number of absentee landlords who cannot be identified within the country and some of them have settled abroad. In dealing with this issue, some of the challenges are listed below which requires government, institutions dealing with land reform and all stakeholders to work together, in order to address these manifest and important problems and challenges that confront land and agrarian reform in democratic South Africa.
Efficient administrative systems

There is no doubt that South Africa as a country has to improve and establish a more rigorous and efficient land administration system which is currently in place, because, it still excludes a huge quantity and volume of land that was dispossessed from the marginalised. In other words, the records and the systems currently in place need to be revisited and reviewed with the hope that the government’s idea of a new structure, such as the Surveyor General’s Office will prove to be meaningful, applicable and acceptable by all involved in land reform initiatives, particularly claimants and the historically deprived.

Transparency

Is the land information system transparent to everyone? Can the system be manipulated, and can it be guaranteed that past land registration was accurate and without defects? These are important questions that the land reform process in South Africa needs to grapple with and address cogently and meaningfully. It is obvious that the historical land database information is distorted; hence the land issue will be an on-going assignment of future successive governments. In some cases land transaction information is so confusing for a layman to understand, and therefore, is viewed with suspicion. Even today, some transactions in the deeds system, still shows owners of land but, with no reflection of amounts paid for those transactions. The question is - why is the system failing to reveal such crucial information because it is for public consumption? There is a possibility that the system can allow a person to transfer huge hectares of land with no value attached to it, and how can land prices be compared to the market values at the time of the transaction, in order to determine, at least a future base selling price for that land. These are the pitfalls that had led the government to pay exorbitant amounts when buying land and these pitfalls always favour the open market price approach. It is unfortunate that anti-land reform activists do not advocate for a middle ground transactional approach when selling land to the government. It then becomes inevitable that the land reform process becomes unfair to the government and the marginalised. Some may argue that for land reform to be just and fair to all, land documents and decisions must be made available to the public and opened to all for inspection and, in addition must be easily accessible and understandable by all those involved because of language barriers that impede the processes involved.

Ownership

There is a dire need for the government to address this skewed information in order to be able to address land reform challenges. There seems to be a few forces at play here. These include: land owned by investors, foreigners, private companies. What are the implications here? Is this ownership to be excluded from land reform? If so, will the government have enough land for land reform and who will answer the plight of the poor victims of land dispossessions, if not everyone is prepared to take part in land reform processes and initiatives.

Urban settlements

There are so many of these transactions where government bought many hectares of land for community settlements. Looking at the trends and the beneficiaries of these
settlements, it is fair and correct to state that urban settlements should be treated as land reform initiatives, solely because history informs that the real owners of those lands were the victims of land dispossession.

**Accuracy of land ownership in deeds offices**

There has been much undertaken, done and achieved in this space, but challenges supersede all the efforts. The government’s re-opening of the land claims, has in some ways dealt marginally with the injustice of the past and is being addressed slowly, as a result. It is the view of many that due to the fact that the country’s land reform was characterized by many factors which have thus far been excluded, land reform should be an open-ended process to be fair and just to the victims and the economy. There is no doubt that South Africa has done some commendable work in land reform, however challenges remain. These challenges twenty years into democracy must now be addressed decisively by government. There has to be overt commitment but above all the political will and willingness to do so. There cannot be any painful lingering of the land reform processes because, it has the potential to derail the achievements made thus far and has the real potential to stymie the emergence of a truly democratic state.

**Willing buyer, willing seller concept**

The above concept has been criticised by many land reform activists as the main contributor to the failure of radical land reform initiatives in South Africa. The argument is that this approach makes it difficult for vulnerable and land victims to afford land in open markets, thus compelling them to turn to the government for help, which government more often finds itself between a rock and hard place in the sense that, although it is willing to take radical steps, such steps should be implemented within the confines of the Constitution. The approach though, has had a moderating influence on the government’s part, thus its soft approach towards land reform resulting in the retreat from projects like SLAG which were pro-poor farming communities under the LRAD concept which are more concerned with wealth than land reform.

**Legislative Requirements and other related legislation: impact on restitution for investigation of Claims**

**Functions of the Commission**

- To receive and to investigate claims for restitution giving due to Section 2 provisions.
- Attempt to resolve claims through mediation and negotiation.
- If a claim cannot be resolved through mediation and negotiation, the Commission has to refer it to the Land Claim Court in terms of Section 14.
- If a claim cannot be resolved, refer the claim to the Minister in the Section 42D.
Requirements of Section 11

- The claim must be an arguable case on both facts and law.
- The Commission has to be satisfied that the claim is lodged in the prescribed manner.
- The claim is not precluded by the requirements of Section 2.
- The claim is not frivolous and vexatious.
- The claim meets requirements of Section 2.
- Dispossession must be real and verified.
- Right's in land claims is essential.
- Labour tenants, beneficial occupation (undisturbed possession).
- Customary law interest/indigenous ownership must be considered.
- After 19 June 1913 land claims are applicable.
- Racially discriminatory laws/practices (laws that would not comply with Section 9 of the Constitution) and purpose of dispossession to further apartheid can be considered.
- Community: (there must be a sufficient cohesive group or part of a community at the time of the claim with elements of communality with the community at the time of dispossession.

MINIMUM REQUIREMENTS OF Rule 3

- The Commission has to be satisfied that:
- Claim is lodged in the prescribed manner.
- Reasonable grounds for arguing that the claim meets requirements of Section 2.
- Claim is not fraudulent.
- Where a claim is for informal land right, a sworn statement from the claimant stating the description of the land and the nature of the right being claimed.

MINIMUM REQUIREMENTS OF RULE 5

- This is a report conducted after the acceptance of the claim and it must contain:
- Establish history of the acquisition of the land by the owner.
- Establish land use and conditions at dispossession.
- Establish whether compensation was paid, if so whether it was properly determined.
- Establish which racially discriminatory law applied.
- Investigate the nature of the right in land claimed.
- Establish whether or not claimant is a person/state/ direct descendant/community.
- Establish racial practice that was used for dispossession.
- Get topographical map and other maps.
- Establish if current owner is opposed to the claim.
DETERMINING JUST AND EQUITABLE COMPENSATION

Judgement by Justice Y Mokgoro in the Constitutional Court in Du Toit held that, “it is the Constitution and not the Expropriation Act which provides the principles and values and sets the standards to be applied whenever property is expropriated, every Act or legislation must comply with the Constitution, including the spirit, purport and objects generally and Section 25 in particular. The amount of compensation must be adhered to the standards of justice and equity.”

Compensation must reflect an equitable balance between interest of the public and those affected by the expropriation or dispossession. The Section 25(3) standards are peremptory and every amount of compensation agreed to or decided upon by the Court must comply with them. Not all factors must be applied; they will apply only so far as they are relevant or applicable.

LEGAL AND ADMINISTRATION CHALLENGES FACING LAND REFORM IN SOUTH AFRICA

There is a slow pace for redistribution of land to the then marginalised majorities of this country. This comes as a result of holistic legislations that were passed by the Department of Justice and Constitutional Development in the year 2000 such as Promotion of Administrative Justice Act (PAJA). Hence, the policy of the Department of Rural Development and Land Reform is for a willing buyer willing seller principle. Researching of properties under land claims requires the Commission of Restitution of Land Rights to follow a fair administrative process - either land owner or claimant is affected. In gazetting a land claim, indication is that the claim meets the requirements of Section 2 of the Restitution of Land Rights Act 22 of 1994(as amended). In considering that the claim does not meet legal requirements, the Commission should adhere to the same process of fair administrative process and this contribute to much to the matter being referred to court. Conflicts amongst members of communities also result in affecting administrative process in resolving land claims. Labour tenants and those who were dispossessed of their land rights during apartheid era further contribute to a delay to settle land claims. Land owners are refusing to release land for purposes of land reform and Section 42E of the Restitution Act also requires the government to follow PAJA in expropriating the property. Expropriation applies in a case where land owner is disputing price, where a land owner is disputing merits of land claim, the government is informed by the Court that the institution to resolve such, is the Land Claim Court. The Commissioner is empowered to adjudicate on the merits of a land claim. Most research reports compiled by the officials of the Commission are weak on merits and the latter end up losing most of the cases in court.

Traditional Councils in respect to Communal Property Association also affect administrative processes of the Commission and for beneficiaries to benefit in terms of restored land. There is no policy on Section 6 (2) (b) of the Restitution Act for redistribution of land where claimants don’t qualify in terms of Section 2, but the former provision allows the Commission to make recommendation to the Minister for appropriate relief in case they do not qualify. Extension of Security Tenure Act is also weak in terms of strengthening the rights of farm dwellers and occupiers. As a result, land owners continue to abuse
farm dwellers and occupier. There is a need to amend the Constitution so that the process of land reform moves fast in terms of the redistribution program, pro-active land acquisition strategy, tenure reform, restitution program and development for the benefit of the majorities of the country in accessing land. Restitution is a political program and therefore, political will of all those involved in it, is of paramount importance.

**Recommendations/Conclusions**

**The state should look at:**

**Improving land titling, registration, valuation and information systems**

Developing the cadastral and information systems, cadastral mapping, establish model land titling and registration offices, improve deed and title registration, land use planning and management, establish land valuation database, pilot demarcation and registration of allodial land boundaries, pilot systematic land titling and registration.

**Harmonising land policy and regulatory framework for land administration**

Strengthen civil courts to expedite case resolution and develop alternative mechanisms to resolve land related disputes, take stock of all acquired state lands and define outstanding land compensation, review policies, laws and regulations.

**Institutionalizing reform and development**

Support customary land administration, reinforce private land sector institutions, restructuring public sector land agencies, strengthening and decentralizing land administration services, strengthening land administration, management training and research institutions.

**Project management, monitoring and evaluation**

Project coordination and management, human resources development, communication strategy and evaluation and impact assessment.

**Proactive involvement of municipalities at levels in land management**

Municipalities should play a proactive role in their respective areas in terms of accurate land database, updated land audit, and deal decisively with human settlement issues affecting their respective communities.

**Conclusion**

This paper attempted to discuss the important issue of legal imperatives and the administrative processes involved in land reform in South Africa. Amidst the numerous challenges, it identified the slow processes used in dealing with this vexing issue. It outlined the importance to the process of both the legal and administrative processes. The paper exemplified as to how and why the government has to intervene in respect of both the land question and the agrarian processes that go hand in hand with land reform. The
entire system has to be overhauled if land reform has to be successful for the economic empowerment of the majority that were disadvantaged by both colonial imperatives and apartheid ideology. The democratic government has delayed land reform processes in South Africa and must stay clear of the neoliberal agenda of capitalist countries. If it does this then the people will obtain genuine redress and it will be a victory for democracy. Sustained, coordinated, acceptable and legal land reform is the only way that peace and stability will reign supreme in South Africa. It is a government problematic that requires sincere intervention by the African National Congress government.

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