

The big land debate 13 March 2018

Where we come from

Starting in the mid-eighteenth century, Scotland's peasant farming families were systematically and forcibly evicted from their land. Their cottages were burnt and the families resettled in 'coastal crofts' (small tenant farms). The "Highland clearances" occurred in phases and lasted almost a century. The result is one of the most unequal land ownership countries in the world. Some estimates are that today 432 families own half the private land in Scotland, and just over 1200 owners hold over two thirds.

Two hundred years after the Clearances, in 1999, the Scottish parliament was established under a new policy of devolution from Westminster rule. One of the new parliament's first orders of business was land. The descendants of those who lost their land used newly acquired political power to address the pain and loss their forefathers suffered.

Land legislation was passed in 2000, 2003, 2004, 2015 and 2016. In 2013, the Scottish government announced a target of seeing 1 million acres of land in "community ownership" by 2020. The process is contentious, with court challenges and strong resistance from land owners, but it grinds on.

Dealing with the past

The lesson for South Africa is obvious: history cannot be swept under the carpet. We have our own history of "Highland clearances", with people being forcibly evicted and "black spots" cleared. The pain inflicted on black people must be faced. This was again brought home to me recently when I attended the launch of "The land is ours" by Tembeka Ngcukaitobi in Hyde Park, Johannesburg. The largely black audience was young and clearly upwardly mobile. I doubt any of them would ever want to live on a farm, yet they enthusiastically embraced the view of a history easily as brutal as that of the Scottish.

The celebrated South African constitution contains an unambiguous vision of how this history will be dealt with in democratic SA. Section 25, the property clause, protects property rights, but it also enjoins government to put right the injustices of the past. It rests on four pillars: protection of property rights, restitution for past injustices, promoting access to land, and tenure reform. The last three are often grouped together under the general term "land reform".

Restitution is a legal process involving verified claims, resulting in physical or monetary compensation, with court decisions where parties cannot agree. This is on-going.

To promote access to land (apart from restitution), government has initiated five different land reform programmes since 1994, each trying to ameliorate the shortcomings of the previous one. In addition we have the commonages project, which aims to enhance people's access to municipal land; and farm equity schemes to involve workers in ownership. Like the Scots, we are finding it is an ongoing process requiring constant adjustments and recalibration.

Close to 10% of South Africa's agricultural land has been transferred under these programmes. Another estimated 10% has been bought by black South Africans on the open market, according to research by prof Johann Kirsten. That would place about 20% of SAs agricultural land in Black ownership. (Both AgriSA and the government have conducted land audits; but they come to widely different conclusions; with critics expressing strong critique on both audits. This contestation on basic information is not helping consensus.)

Motlanthe Report

Former deputy-president Motlanthe led a panel, appointed by parliament, to assess the impact of legislation on socio-economic transformation.

On land reform the panel noted that “the need to pay compensation has not been the most serious constraint on land reform in South Africa – other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform.”

The Panel concluded that “government has not used the powers it already has to expropriate land for land reform purposes effectively, nor used the provisions in the Constitution that allow compensation to be below market value in particular circumstances. Rather than recommend that the Constitution be changed, the Panel recommends that government should use its expropriation powers more boldly, in ways that test the meaning of the compensation provisions in Section 25(3), particularly in relation to land that is unutilised or underutilised.”

Title reform

Very little progress has been made on the fourth pillar of land reform, namely extending title, particularly for people in the rural areas under traditional leaders. The Motlanthe panel is very critical of current policy that land beneficiaries do not get secure title to the land they are given, “making it impossible for them to develop the land or protect their right to it”.

The panel also recommended that the Ingonyama Trust, which owns huge tracts of land in KwaZulu Natal, either be disbanded with the land reverting to the state for redistribution, or that its trust deed be radically altered because it is unconstitutional. The Zulu king is not impressed and has expressed his opposition.

So where are we going?

Peering through the dust, three scenarios are broadly possible.

Starting with the most extreme, section 25 may be fundamentally altered with the protection of property rights being suspended. The negative implications of this scenario are obvious – the empirical evidence is Zimbabwe.

The second scenario is a narrowly targeted, circumscribed amendment to section 25, preserving property rights while allowing some expropriation without compensation. The legal draftsmen will have a huge job on their hands to draft this amendment in terms which still meet the values of the constitution. Easy it won't be.

Thirdly, a compromise could be forged in which the constitution remains as is, but important actors like land owners, the banks, agribusiness, mining houses and government agree on steps to dramatically increase access to land for black South Africans. Various options exist, but synchronising all the players will be a real challenge. It is worth noting, however, that bank CEOs who have been asked about this issue during recent interactions with analysts have all been very relaxed about the land issue. Do they know something we don't ...?

I doubt whether the first scenario will materialise. The ANC itself is too divided, hence their heavily qualified position on “expropriation without compensation”. Achieving agreement within the ANC is more important than linking up with the EFF.

Parliament has referred the issue to the standing committee on the constitution, who must report back in six months' time, at the end of August, on proposed changes (if any). The committee has said that they will hold consultations in all nine provinces. Expect a lot of noise.

Equity vs Efficiency

Land is about both equity and efficiency. Using one (the productive use of land) to deny the other (restoring historical inequity) is not helpful. Neither is it useful to ignore productive use and focus on equity only. In the end a way must be found to pursue both goals.

So What?

- History cannot be swept under the carpet – it reasserts itself even if it is two hundred years later. In SA too land is as much about history as it is about productive use.
- The Constitution instructs us to deal with past history, and stipulates four pillars of that process: property rights, restitution, equitable access and title reform. Achieving the last three has turned out to be much harder than envisaged, leading to widespread dissatisfaction and political pressure.
- Little progress has been made with title reform and we can expect changes to that regime.
- With parliament looking at possible changes to the property clause, three scenarios are possible: property rights being suspended; expropriation without compensation legalised under narrowly defined circumstances; and no constitutional change but practical co-operation to increase access to land for black South Africans. In our opinion, the first one is highly unlikely; the last one most likely.
- The uncertainty around this issue has a negative impact on the economy and undermines some of the euphoria of Ramaphosa's election. A quick resolution seems unlikely with parliament engaging on the matter.