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Expropriation without compensation and the Namibian Constitution

As we are nearing the 2nd National Land Conference in October, the subject of land expropriation will possibly be one of the most fiercely debated topics on the agenda. Over the past few weeks, calls from a few individuals have gone out in support of land expropriation without compensation. While such an approach might seem attractive to bring about a quick fix solution to the Namibian land question, it would be prudent to likewise consider the consequences that might flow from such actions.

Our nation's respect for the rule of law in Namibia is perhaps the main reason why Namibia has enjoyed continued socio-political and economic stability since its independence in 1990. The Namibian Constitution as the Supreme Law of Namibia, sets out the foundation on which Namibia's legal order is built. The Constitution provides the guiding principles under which the State may exercise its legislative, judicial and executive powers, but more importantly, it protects the fundamental rights and freedoms enjoyed by all natural and legal persons in Namibia against the State's misuse of its powers.

Article 16 of the Constitution deals with "property" rights and forms part of Chapter 3 of the Namibian Constitution on "Fundamental Human Rights and Freedoms". Article 16(1) commits the Government to guarantee the right of all persons to own property, while Article 16(2) prescribes that "[t]he State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation in accordance with requirements and procedures to be determined by Act of Parliament".

The Agricultural (Commercial) Land Reform Act 6 of 1995 (ACLRA) sets requirements and procedures for the expropriation of agricultural land. The "public interest" component of ACLRA that justifies land expropriation is clearly stated in the Act's preamble

– namely, that agricultural land is to be acquired by the State for allocation to “...those Namibians...disadvantaged by past discriminatory laws or practices...”.

Government has followed two approaches under the ACLRA to acquire land for its land reform programme: the “willing buyer, willing seller” approach and the “compulsory acquisition of agricultural land” (expropriation with compensation).

Under the willing buyer, willing seller approach, government has been able to resettle 1486 families on about 385 farms totalling almost 2.8 million hectares of land from 1990 to 2015 through its National Resettlement Programme (NRP). In comparison, between 1992 and 2015, previously-disadvantaged Namibians have obtained 642 loans from the Agribank’s Affirmative Action Loan Scheme (AALS) involving almost 3.4 million hectares of land. Participants under the AALS have 25 years to repay their loans to Agribank. Thus, more land has been distributed to previously-disadvantaged Namibians through affirmative action loans than under the government’s resettlement programme.

In 2004, government announced that it will start using expropriation with compensation to acquire land for resettlement purposes, arguing that the process of land reform has become too slow because of arbitrarily-inflated land prices and the unavailability of productive land being offered for sale.

However, implementation of the expropriation option has not been successful so far. In 2007, Government attempted to expropriate four farms. These expropriations were challenged by the farm owners in the High Court. The Court ruled in favour of the owners, on the grounds that government had failed to satisfy “administrative justice” as required by Article 18 of the Constitution. In its judgment, the Court presented meticulous guidelines to the Lands Ministry on how to implement the expropriation option correctly.

However, 10 years after this judgment (which is known as the “Kessl” case), Government has yet to follow the recommendations of the High Court. Thus, although the Constitution provides an avenue for legally expropriating land in the public interest, Government’s failure to comply with the Court’s guidelines appears to be the problem.

The alternative of changing the Namibian Constitution is clearly not the answer. Changing Article 16 would in effect require abolishing the Namibian Constitution in its totality, as the provision which prevents expropriation without compensation is entrenched against amendments which would weaken it. All of the fundamental rights and freedoms, including the provisions on property rights, are covered by Article 131 which says that no repeal of any of the fundamental rights and freedoms will be permissible “in so far as such repeal or

amendment diminishes or detracts” from any of those rights. Article 131 also says that no repeal or amendment which attempts to do this will “be valid or have any force or effect”.

So why not just amend Article 131? Because Article 132(5), which covers the process for amending any Article of the Constitution, essentially says that no Constitutional amendment can be used to undermine the entrenchment of the fundamental rights and freedoms.

Trying to subvert this strong protection for the provisions on fundamental rights and freedoms would amount to abandoning Namibia’s constitutional arrangement, which would likely have far-reaching political and economic consequences in the form of disinvestment and job losses, which would ultimately result in higher inflation and higher living costs.

The current tools for acquiring land for redistribution entail costs to the State, but the costs to the country’s reputation and economy from overturning the entire constitutional order would be massively higher.

What is needed is rather a serious rethink of how the government implements its land reform programme. For example, post-resettlement support to new land reform beneficiaries is virtually non-existent – giving rise to the criticism that when government does make land available to beneficiaries, it sets them up to fail.

Inter-ministerial cooperation between ministries is key to the successful implementation of the land reform programme. For example, land reform provides a golden opportunity to revise Namibia’s agricultural policy by empowering resettlement beneficiaries to assist the nation in becoming food secure.

Land reform is undeniably an expensive and cumbersome process, but its costs can be recouped in time if land reform is implemented in a manner which results in effective and productive utilisation of the land.

Proposals for fundamental changes to the Constitution are kneejerk reactions to the frustrations of the current land reform programme, but that route would lead to political and economic consequences that would not be easy for the nation to recover from.

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