

LAND REFORM

We can do without rehashed analysis — Expropriation Bill is up to the task

Patricia de Lille

The definition of insanity is doing the same thing over and over again, but expecting different results, said Albert Einstein, the German-born theoretical physicist who developed the theory of relativity.

The Nobel prize winner for physics in 1921 may have been thinking about people who like to rehash ideas, in so doing denying themselves the opportunity to see important lessons from the past and move on.

The Expropriation Bill aims to provide equitable redress to victims of racially motivated land dispossession. The Institute of Race Relations (IRR) has developed an alternative bill (“Alternative effort by the IRR fills the many gaps in the expropriation bill”, October 25), forgetting that rehashing ideas doesn’t mean they will be relevant to our present-day situation or that those ideas will be accurate

Let us recap. Our constitution gives people and communities who were dispossessed of land after June 19 1913 as a result of racially discriminatory laws or practices the right to restitution of that property or to fair compensation. The total surface area of SA is 122,081,300ha. Cities, towns and municipal commonage make up 8% of that – the eight metropolitan areas account for just 2% of the land but are home to 37% of the total population. Another 10% is owned by national or provincial governments, while communal land represents 15%.

That leaves 67% as privately owned, which until 1994 was owned almost exclusively by whites, according to the 2017 land audit report by the department of rural development and land reform. While this has since changed substantially, it is time that South Africans clearly understood the need to reverse the apartheid-era land dispossession.

While urgent and accelerated land reform is required to tackle the injustices of the past, there is a perception that little is being done to speedily redress the skewed land ownership.

Alas, using the same argument the organisation made five years ago, the IRR’s Anthea Jeffery argues that the Expropriation Bill contradicts the constitution and needs to be changed. She therefore proposes an alternative bill, suggesting that “if the constitution is to be meaningful in protecting the property rights of all South Africans, the onus must lie on the municipality to prove that all relevant constitutional requirements for a valid expropriation are met”.

The IRR continues to say: “Just and equitable compensation must include damages for all direct losses arising from the expropriation. If justice is to be done to those affected, the full extent of their consequential losses must be taken into account, not

disregarded. Compensation due to the owner, as decided by the high court before the service of the notice of expropriation, must be paid in full before ownership passes to the municipality. If the compensation is not paid in time, the notice of expropriation automatically falls away and has no further legal force.”

When these suggestions were first made five years ago the department of public works & infrastructure approached advocates Geoff Budlender SC and Uday Naidoo to respond to the IRR’s alternative bill.

The two legal minds found that the IRR’s concerns have been addressed. The Expropriation Bill 2020 clearly outlines how and when expropriation can take place as it makes explicit what is implicit in section 25 of the constitution.

The question is therefore no longer whether compensation will be payable or not, it is now a question of how and on what basis no compensation will be determined.

Budlender and Naidoo reiterated that section 25 of the constitution states that the amount, time and manner of payment of compensation must be just and equitable. To determine the terms of just and equitable compensation a balance must be struck between the public interest on the one hand, and the interests of those affected on the other. To do so, the decisionmaker must have regard to all relevant circumstances.

Budlender and Naidoo stated in 2015: “In our view, the IRR draft is inconsistent with the approach to property which is reflected in the constitution”.

They were and are correct. For 26 years the country has been working to implement land reform to usher in equitable access to all of SA’s natural resources, though with limited success.

I am reminded of a speech former deputy chief justice Dikgang Moseneke gave on this subject. He said: “In short, restitution of land is smothered

under the burden of legal formalism and low access to courts and bureaucratic bungles. There are ample constitutional and legal instruments to tackle land equity. Seemingly very little has been done to facilitate land redress.”

The Expropriation Bill provides that the expropriation amount should either be agreed to by those affected or decided or approved by a court. Also, the compensation amount and time and manner of payment must be just and equitable, balancing both the interests of the public and those affected.

The emotive land issue needs clear perspective to avoid disinformation campaigns, bad analysis and political populism, as seen in the IRR alternative bill. There is no more time for alternative bills or legislation.

Let us get on with the important task of land reform and spatial justice.

● De Lille is minister of public works & infrastructure.