

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON THE GREEN PAPER ON LAND REFORM, 2011

1. INTRODUCTION

The Green Paper has a clear socio economic goal, consistent with the Constitution of South Africa, intended to redress past wrongs, more specifically those resulting from colonialism and apartheid. As the Law Society of South Africa (LSSA), representative of the vast majority of lawyers, and committed to the Rule of Law, it is imperative that, for the future of our country and the achievement of a just social order, we engage with this process to restore the land to its people in a just and orderly manner, within the framework of our constitutional democracy. We therefore deem it prudent to make some observations on an interim basis and reserve our position to amplify same under more appropriate circumstances, given the present time constraints.

1.1 Global demographic developments have resulted in challenges that have to be addressed worldwide, and more especially in the developing world within which South Africa belongs. These developments are:

1.1.1 Rapidly expanding populations: The world's population now exceeds 7 billion people. This places an enormous strain on the environment, which is deteriorating at an alarming rate, especially in sub-Saharan Africa where famine is increasingly becoming a common and recurring phenomenon. South Africa's population has grown from a mere 5 174 827 inhabitants in 1904 to nearly 10 times that number today.

1.1.2 Rapid urbanization resulted from the migration of large sections of the population from rural to urban areas, seeking better lifestyles, employment, education and other socio economic advantages. More especially, in countries such as China, Brazil, Nigeria and Mexico, to give but a few examples, millions of peasants from rural areas are flooding the big cities in desperation to escape poverty, drought, hunger and unemployment. In a country like Mexico, a wide range of people, including the poor and

uneducated, cross the border, more often than not illegally, to the so called bright lights and attractions, tragedies and risks that the United States of America presents. In Africa, many Somali's are now flocking to Kenya and other states in Africa, nearby and as far south as our country. The crisis in Zimbabwe over the past decade has caused hundreds of thousands of Zimbabweans to seek refuge and a home in South Africa, thereby exacerbating our own socio-economic problems.

- 1.2 Not only South Africa, but the world, has changed dramatically since the end of the so called "cold war", symbolised by the demolition of the Berlin Wall in 1990. These changes, which commenced in a pronounced manner after World War II, brought about the population explosion, rapid urbanization, the incredible advance of technology, global inter-connectivity and economical inter-dependence. They are not only irreversible, but also threaten many cultures around the globe. The competition for survival is fierce and would appear to escalate as more and more countries focus on the acquisition of knowledge and skill through education in order to become and to remain competitive. The Green Paper challenges these issues and needs critical examination.
- 1.3 Post-war and modern history has shown that nations and people are still engaged in struggles over land. The use of science and education in all struggles has to be the prime tools for empowerment, and not guns and war. Economies and growth had flourished in countries like Japan, Korea and Singapore. More recently, China and India have grown powerful economies. Countries that have failed to adopt policies based on justice and the rule of law after gaining independence from their colonial masters are many, and they are struggling with poverty. It may be debated that the Soviet Union also failed in its programme of land distribution. Whatever the answer, there are lessons to be learnt from them.
- 1.4 The Green Paper states that "The key parameters for measuring development, therefore, are social, political, administrative, cultural, institutional and economic". We would argue that education and science should be considered as additional criteria.

1.5 In view of the above, we submit that colonialism and apartheid have left us with a legacy that we have to reverse.

2. PROBLEM STATEMENT

Whilst it is common cause that people in our country were dispossessed of their land, the last century bears witness to the tendency that people in most countries of the world elected to abandon the harsh realities of rural life for the opportunities afforded by the cities. In the U.S.A. 50% of the population was engaged in agriculture in 1900. The percentage has dropped to only 2% today and is still dropping. The U.S.A. nevertheless enjoys not only food security, but is also one of the World's major exporters of agricultural products, due to its powerful manipulation of foreign and economic policies of many countries. In France, also a very successful country when it comes to food security and abundant agricultural production, the percentage of the population engaged in agriculture dropped from 50% in 1939 to barely 5% today. The importance of this is the obvious emphasis these countries place on agriculture and food production, which is paramount. It is untenable that a country such as ours has to import basic agricultural products to feed its people, where in the recent past this was not necessary, nor should it be in future. This should be a major, if not the major factor, in considering land reform. Agriculture has to be viable, and land has to be productively used.

It will be a challenge to reverse this worldwide phenomenon in South Africa to such an extent that the acquisition of land by the dispossessed will lead to the "creation of conditions which are conducive to fostering social cohesion and development amongst those historically dispossessed of their land". We must guard against the country's rapid urbanization, as such an initiative could serve an ever diminishing sector of the community. Although the Green Paper does not purport to address the urban situation, the social cohesion of the ever-expanding urban population is important and also deserving of attention.

An inevitable consequence of urbanisation is that it will be necessary for those farmers who remain in agriculture (and for those who will acquire land through the land reform measures) to produce food for commercial purposes, in order to supply the urban population. Subsistence farming will not suffice for those who acquire property through the proposed land reform measures - it will be necessary for them to produce sufficient food supplies for the whole

population. This would imply that they will have to have access to finance, equipment, knowledge and skills required for commercial farming.

3. VISION FOR LAND REFORM

The proposal to change the land tenure system should be dealt with in a critical manner. Furthermore, the wording used in the Green Paper has to be clear in order to be effective. The LSSA however accepts that, notwithstanding some of its concerns regarding the feasibility of the Department's vision for land reform, steps must be taken to redress the wrongs of the past through land reform, taking into account all the challenges that we face in South Africa.

Before discussing the proposed "re-configured single, coherent four-tier system of land tenure", the LSSA wishes to raise the matter of the identification of NEW land parcels, with reference to un-surveyed State and tribal land. The Green Paper needs to address this crucially important aspect, as these are the areas where new land parcels can be identified. Productive farm land that provides food security for our fast expanding population must receive careful attention. A concerted effort, without delay, should be made to complete the cadastre for the whole of South Africa, with special reference to State and tribal land. This would also offer more options for the process of land distribution.

The implementation of a "coherent four-tier system of land" may well lead to discrimination based on title in so far as financial institutions are concerned. As Hernando de Soto illustrates in his book, "The Mystery of Capital", the ability to obtain mortgage finance is the key to small farmers to move out of the cycle of poverty. A prerequisite for the obtaining of mortgage finance from the private sector is a sound land registration system. As so many developing countries do not possess sound land registration systems, small farmers in those countries (he quotes Egypt and Peru as examples), are deprived of the option to obtain mortgage finance and therefore doomed to perpetual deprivation as is evidenced by the plight of so many small farmers in Africa, South and Central America and vast swathes in Asia. As a consequence, they are unable to improve their land in order to improve production, thus enabling them to escape poverty.

A four-tier system will have the same adverse consequences for lesser forms of tenure, as financial institutions will always tend to go for the best form of security when considering applications for mortgage finance. If a time period is attached to any of these forms of tenure, farmers may find it simply impossible to obtain mortgage finance from the private sector, as the expiry date approaches. Financial institutions worldwide are wary of titles with a limited lifespan, as is evidenced by the fact that it is impossible to obtain mortgage finance in respect of registered long leases approaching their expiry dates. The massive extent to which financial institutions, such as commercial banks, finance farming operations, is not always appreciated and must not be underestimated. Their support in the context of land use and development is absolutely vital. Should their support be withdrawn, this will simply add to the already large percentage of people facing poverty and possible future starvation.

We are of the view that the State should make certain interventions and provide relief in instances where the private sector is not prepared to or unable to furnish finance. We therefore suggest that the possibility of creating a State run financial institution should be explored. A State run Land Bank should be formed for this purpose.

4. PRINCIPLES UNDERLYING LAND REFORM

Whilst we have concern as to whether the action proposed in the Green paper will realize the stated principles, we must support these initiatives. The acquisition of skills required by a developing and growing economy through State-subsidised training and education must accompany a cost-effective and lasting option for the attainment of growth and prosperity.

5. CURRENT CHALLENGES AND WEAKNESSES : RATIONALE FOR CHANGE

The willing-buyer willing-seller model presents a challenge in the land reform context that has to be resolved.

It is debatable whether the declining agricultural contribution to the GDP is a weakness or a challenge, if such decline can be ascribed to the escalation of other economic activities, such as manufacturing, the services industries or mining. China is a point in case. Agriculture constituted a massive percentage of the country's economy 40 years ago. Since the industrial revolution in that country, agriculture's contribution to the GDP has declined. Such a decline is not indicative of the fact that the agricultural sector is ailing, but rather that the economy has diversified – as any vibrant and healthy economy should. The reasons for declining agricultural production comparative to other sections of the economy, must also be sought elsewhere and is an ill which will not be solved by land reform alone, as proposed.

The term "a fragmented beneficiary support system" is unclear and must be spelt out properly.

The unrelenting increase in rural unemployment is a universal phenomenon certainly not peculiar to South Africa and one of the root causes of the rapid urbanization that is besetting the entire world. Land reform would not necessarily resolve this problem. Ever improving farming techniques, as well as more advanced/sophisticated farming implements, increasingly negates the need for intensive labour, whether on small holdings or on huge commercial farming operations.

6. AN IMPROVED TRAJECTORY FOR LAND REFORM

6.1 We note that an attempt will be made to "improve on past and current land reform perspectives, without significantly disrupting agricultural production and food security".

It is uncertain what is meant by "significantly disrupting". A 10%, 20% or 40% decrease in food production? Who will possibly be able to prove that a drop in food production is due to an over-zealous implementation of the proposed land reform measures, if, at the same time, bureaucrats were to incorrectly allege that the drop in food production can be ascribed to natural causes, such as drought? As we indicated earlier, food production must be the absolute priority. Legislation which might have a negative effect on food production may not escape Constitutional scrutiny. Clearly, the Green Paper does indeed contemplate a disruption – it refers to it as a possibility.

We are witnessing food riots as a result of poor socio economic policies in many countries. Such riots have the potential of seriously disrupting the social fabric of perceived stable states. We should be mindful of running this risk in South Africa, by embarking on a social experiment that could, if imprudently imposed, seriously disrupt food production. Too large a segment of our population is poor, not only in rural areas but also in settlements in the proximity of urban areas. These poor people are absolutely reliant on affordable staple foods.

The proposed single four-tier tenure system envisages, with regard to privately owned land, "freehold, with limited extent". It is uncertain what is meant with "limited extent". Does this imply that ownership will lapse after a period of time? If so, the use of the word "freehold" in this context would constitute a contradiction in terms. We would then at best have a glorified lease instead of ownership. If this is in fact the case, the remarks under paragraph 3 above would certainly apply. Farmers must be able to raise mortgage capital in order to develop and farm their land. Irrigation systems, hothouses, farming equipment and fertilizers are very expensive and absolutely necessary for food production on a massive productive scale in order to feed 50 million people relatively cheaply. Should "freehold" be qualified in this manner, financial institutions would rather channel mortgage funds to other, more secure borrowers. This would detrimentally affect the ability of farmers to remain sufficiently productive. The ultimate victim will be the consumer. People through the centuries and all over the world were only prepared to invest heavily in improving their land if their title was secure and unassailable. For this reason, many of our most productive farms have remained in families for many generations, each generation making a further contribution to enhance the productivity of the "family farm". This is another transformation challenge that needs to be addressed.

Furthermore, with regard to land which is not freehold but leasehold, one has to go through a bureaucratic structure before one can deal with the land. If one wishes to mortgage leasehold land or cede the long term notarial lease, one is obliged to obtain the consent of the landlord and this can be a time consuming and frustrating process. This sort of land ownership stultifies opportunities to further develop, mortgage or transfer land. This challenge should be addressed.

- 6.2 The necessity of introducing bodies such as the proposed Land Management Commission (LMC), the Land Valuer-General and the Land Rights Management Board, needs consideration.

Should the LMC have the power to “verify and/or validate/invalidate individual or corporate title deeds”? Only the High Court can nullify a title deed at present. The Judiciary is the ultimate guardian of our rights and more specifically, our property rights. The need to by-pass the High Court as the ultimate guardian of every citizen's rights (and especially his or her property rights) by delegating this power to the Executive in this manner needs serious consideration. On what grounds would these officials be entitled to “invalidate” a title deed? Should this become reality, financial institutions will have to carefully consider mortgage finance in respect of properties that can be invalidated/nullified by an official in the employ of the Executive and introduce changes. If the LMC is introduced, we are of the view that provision should be made that all its decisions be confirmed by the High Court.

The same arguments apply to the proposed power of the LMC to “seize or confiscate land gotten through fraudulent or corrupt means”. This was the sole prerogative of the High Court.

The LSSA is of the view that in these circumstances The Prevention of Organized Crime Act No 121 of 1998, which has received widespread acclaim, should be utilised as the appropriate legislation. Instead of introducing new legislation to deal with the LMC's power to “seize or confiscate land gotten through fraudulent or corrupt means”, serious consideration should be given to the possibility of rather acting in terms of the provisions of this Act, and more in particular in terms of the provisions of Chapter 6 thereof (refer to Section 37 and the next succeeding sections). Should this Act require amendment to provide for seizure and confiscation as envisaged in the Green Paper, we propose that this legislation rather be amplified accordingly, failing which we are of the view that the constitutionality of the LMC's power to seize or to confiscate land, may well be successfully challenged in the Constitutional Court.

The importance of secure title cannot be underestimated. Insecurity of title attacks the very core of property ownership, development and improvement, and harms the value of the property, as investors and prospective purchasers of property will be deterred if the title may be invalidated / nullified by the proposed LMC.

A further area of concern is the lack of independence of the LMC, which, in paragraph 6.5 of the Paper is described as “autonomous” and in the same breath as “not independent”, but “accountable to the Ministry”. This is a contradiction in terms.

Subject to our reservations above, we are not opposed to the introduction of the proposed structures, if they are to be introduced to replace the existing structures that have failed to deliver for historical or other reasons of poor administration. If that is the intention, the Green Paper should clearly state so. However, in these circumstances the proposed structures should be properly empowered with the necessary administrative support structures, training and oversight over their work. They need to be accountable and properly managed.

- 6.3 We are of the view that it is unnecessary to “develop accessible and efficient systems for recording and registering rights on land”. Our existing land registration system is regarded as one of the best in the world. It is well proven and must be left intact. The Deeds Offices function with efficiency. Rights to land, whether these are freehold or leasehold rights, mortgages, servitudes (whether personal or praedial) or long term leases, are all registered expeditiously with the minimum of trouble. What complicates property matters are the laws of the land that would in any event apply to any alternative or new form of land registration. Complicating the issue by abandoning (albeit presumably only in respect of rural land) tried and trusted property rights that have evolved over the course of centuries need careful consideration. We believe that the important services rendered by the conveyancing fraternity in conjunction with our efficient Deeds Offices are not fully understood and that there is not enough appreciation of the fact that the laws of the land will always apply (necessitating full compliance therewith), irrespective of the land tenure system that may be introduced in respect of rural land. In this regard, the LSSA can be of assistance.

7. THE STRATEGIC THRUST OF LAND REFORM

Although it is acknowledged that a simple method of land ownership in rural areas is necessary, it is not clear from the Green Paper what is meant by the concept “rural land”. Mention is made of “agrarian transformation”, not only in this paragraph, but also elsewhere in the Paper, such as in the Introduction. Is the intention to limit the concept “rural” to agrarian land only, i.e. land used solely for cultivation and grazing purposes? Would the balance of rural land, such as rural villages, be excluded? Although this would appear to be the thrust of the Paper, the last sentence of sub-clause 7 seems to hint that “land” may well include land for other productive but non-agricultural uses. This point certainly needs clarification, as this could mean anything, e.g. would an office park on an urban edge fall within the meaning of other productive land not used for agricultural purposes?

Various issues in the Green Paper are vague and in need of clarification. These include:

- What is meant by “significantly disrupting” food production;
- What exactly is meant by the concept “freehold, with limited extent”;
- The purpose of introducing the LMC, the Land Valuer-General and the Land Rights Management Board;
- The structure and accountability of the LMC, the Land Valuer-General and the Land Rights Management Board;
- Whether “rural land” would only include land used for cultivation and grazing purposes, or also land used for non-agricultural purposes.

These issues should be spelt out clearly.

8. LAND REFORM EXPERIENCE ELSEWHERE

We must consider historical precedents that disrupted the economies of some countries. The “Great Leap Forward” in China under Chairman Mao Tse-Tung in the late Sixties of the 20th century that disrupted the lives of an estimated 100 million people, must be borne in mind.

China today is a country where there is a vast disparity between the rural poor and its prosperous cities, hence the fact that we are now witnessing the greatest urban migration in human history. It is clear that China is on the same route travelled by the U.S.A. and France (and many other developed countries such as Japan) in the 20th century.

According to Hernando de Soto, in his work referred to in paragraph 3 above, Egypt's malfunctioning land registration system is one of the most important reasons for the country's small farmers finding themselves in an unbreakable grip of poverty.

9. CHALLENGES AND CONSTRAINTS

We agree with the sentiments expressed in this paragraph. Problems cannot be legislated away – they can only be resolved with proper management and correct, well researched solutions.

10. SUMMARY AND CONCLUSION

The LSSA agrees that the problems in our rural areas need urgent and comprehensive attention. Wisdom, goodwill and hard work in abundance are required. The LSSA would support any initiative to ensure that the land is restored to the people, *provided* that it is done in a just and orderly manner, the rule of law is adhered to and the constitutional principles that protects and advances the rights and obligations of every citizen is respected.

Cognisance must be taken of demographic realities that have manifested themselves not only in this country, but world-wide. Care must be taken not to introduce legislation that could create more socio-economic problems, rather than resolving existing ones. Perhaps one lesson that can be taken from our country's sad past is not to introduce legislation (irrespective of how well-intended it may be) that in the end may transpire to have been either incapable of execution or simply unable to resolve the problems it intended to address.

In conclusion, we submit that the following should be considered:

- Access to urban land is a more pressing problem (now and in future) than rural land. Urban development and housing needs urgent addressing.
- Creating more bureaucratic institutions, such as the Land Management Commission, should be reconsidered, as this could be costly and would complicate and over-regulate matters even more – see paragraph 6.2 above.
- An institution like the Land Management Commission that can be empowered to “invalidate” title deeds needs reviewing – see paragraph 6.2 above.
- Protect and preserve the basics of our existing land registration system (with adjustments) to ensure good title and provision of security for financial institutions through mortgage bonds – see paragraph 6.3 above.
- As a starting point, a concerted effort is required by Government to redistribute thousands of hectares of state-owned land that are unutilised and wasted by lying vacant.
- Education and empowerment in respect of methods and infra-structure is of paramount importance to ensure advancement for those who will acquire land through the proposed land reform measures and to ensure that the interest of the country as a whole is served best. The same applies to those who have acquired land through the existing system.

The LSSA believes that sound management and hard work by both the public and private sectors would go a long way towards resolving the problems identified in the Green Paper.