South African Institute of Race Relations NPC (IRR)

SUBMISSION

to the Portfolio Committee on Agriculture, Land Reform, and Rural Development, National Assembly, regarding the Preservation and Development of Agricultural Land Bill [B8-2021]

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1 Introduction

The Portfolio Committee on Agriculture, Land Reform, and Rural Development in the National Assembly (**the committee**) has invited public input on the Preservation and Development of Agricultural Land Bill [B8-2021] (**the Bill**) by 21 May 2023.

This submission is made by the South African Institute of Race Relations NPC (**the IRR**), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 Improvements over previous version of the Bill

The previous version the Bill contained various provisions that do not appear explicitly in the current version. These provisions included:

- Deeming agricultural land 'the common heritage of all the people of South Africa' and government 'the custodian thereof'.
- Prohibiting the sale of agricultural land for 'non-agricultural purposes' without government consent.
- Prohibiting the sale of portions of agricultural land without government consent.
- Prohibiting the sale of agricultural land to foreign persons who lack permanent residency status without government consent.
- Prohibiting the rezoning of agricultural land for non-agricultural purposes without government consent.
- Prohibiting the subdivision of agricultural land without government consent.

- Prohibiting the leasing of agricultural land for ten years or longer without government consent.
- Requiring an agriculturalist to 'actively use and develop his agricultural land to its optimal agricultural potential'. Where the land was 'used in a manner significantly below its optimal production potential', the government was empowered to expropriate the land 'at a lower price' than would be paid for land that is being optimally farmed.
- Requiring agriculturalists to protect the land from widely defined 'non-sustainable agricultural activities'.
- Establishing a host of new bureaucratic bodies in all spheres of government.

Despite these provisions not appearing in the Bill explicitly, as will be noted below, there is a concern that government intends to effectively introduce many of these provisions through the exercise of the regulatory power.

3 Problems with the Bill

3.1 Inapplicable principles

The 'Principles' listed in section 4 'apply to all agricultural land' but in large part have nothing to do with private landowners. For example, section 4(1)(b) notes that South Africa has limited 'high agricultural productivity' land as part of the 'principle of productivity'. Private landowners are productive as a function of the profit motive that operates within the agricultural market. That South Africa has limited land deemed of high agricultural quality cannot be a 'principle' that 'applies' to land owned privately.

Furthermore, section 4(1)(c) notes as part of the 'principle of stability' that 'actual or potential conflicts between organs of state should be resolved through conflict resolution procedures.' This section's principles 'apply to all agricultural land'. Most agricultural land in South Africa is privately owned, not by organs of state. It follows that disputes would tend to be between a private landowner and an organ of state. Why is the principle, then, not that conflicts between *these* parties should be resolved through a conflict resolution procedure?

Finally, section 4(1)(f) explains the 'principle of equitability', which includes the requirement that 'all activities on agricultural land [be] subjected to a fair, equal, and just assessment and treatment'; 'decisions take into account the interests, needs, and values of all interested and affected parties; and 'the participation by vulnerable and disadvantaged farmers or potential farmers are [sic] ensured.' It is unclear how or why any of this is applicable 'to all agricultural land', in particular that of private landowners.

None of these ‘principles’, all seemingly benign and worthy of praise, have anything to do with a private owner utilising their property according to their best judgment. Regrettably, when these principles are read alongside the remainder of the Bill, in particular the rolling five year ‘agricultural plans’, it would appear as if the Bill seeks to set the stage for a far more intensive (and invasive) planning of the agricultural market by bureaucrats within the Department of Agriculture, Rural Development, and Land Reform.

That these principles, which seem to ignore the reality that agricultural land is private property protected by section 25 of the Constitution, are to be applied when any ‘actions and decisions [are] made in respect of agricultural land’ (as provides section 4(2)(e)) is concerning.

The existing principles should be scrapped. Instead, a new set of principles should be introduced that include the recognition of and deference to the private ownership of agricultural land by trained and/or experienced agriculturalists and the making available of government assistance to them should they (the agriculturalists) deem it desirable. Government, if it is to have any role at all, must support the agricultural sector, not lead it or plan it.

3.2 Unrestrained power to classify agricultural land

Section 5(1)(a) empowers the Minister of Agriculture to ‘establish evaluation and classification systems to appraise’, among other things, the ‘potential and use of agricultural land’. There are no restraining criteria imposed on this power of the Minister, other than a duty to consult with their provincial counterparts. This provision should be amended to include a duty on the part of the Minister to also consult with the affected landowners. The omission of a duty to so consult is repeated in other provisions of the Bill.

Elsewhere, in section 11(2)(a), the Bill appears to get ahead of the Minister by referring to ‘land capability ratings’ that include ‘above moderate’. As elsewhere, it appears that the inappropriate provisions that were present in the previous versions of the Bill are now assumed to be eventually adopted by the Minister through regulation, and section 11(2)(a) is a leftover provision from those previous versions.

3.3 Rolling five-year agricultural plans

Section 6(2), read with other provisions in Part 3 of the Bill, requires provincial governments to formulate and review ‘agricultural sector plans’ every five years. These plans *inter alia* are aimed at the coordination and harmonisation of agricultural policies, the promotion of ‘a sustainable agricultural environment’ and the ‘preservation and development of agricultural land across the country as a whole’.

There is no good reason for government, provincial or otherwise, to formulate and adopt 'plans' for an economic sector that comprises independent producers. Agriculturalists and private landowners also make their own 'plans' about production, and it is likely that the provincial plans will interfere with and distort these initiatives. This provision should be scrapped. Instead, the government should defer to experienced agriculturalists who have 'skin in the game' of agriculture to manage the agricultural sector.

If, however, there is to be a state-mandated 'plan' for provincial agriculture, it must be as close as possible to being set in stone, and not left in a state of constant flux. If these plans are certain and fixed for longer periods of time, it would allow agriculturalists to adapt their own operations to those plans, rather than being forced to change them twice a decade.

3.4 Protected agricultural areas

Section 11(2)(a) of the Bill provides that the Minister may only declare a protected agricultural area to protect 'land capable of producing significantly higher levels of agricultural goods'. The provision does not specify: 'higher' than what? Ultimately, if left unclarified, this provision would in practice provide the Minister the power to exercise a discretion arbitrarily.

Subclause (b) further provides that such an area may be declared to 'preserve the area primarily for food production'. This provision is another manifestation of the notion that government knows better than private landowners what the best use of a particular piece of property is. Government must instead, if it has good reason to suppose an area must be used 'primarily for food production', incentivise such utilisation through methods such as tax breaks.

Section 11(4) goes on to empower provincial governments to declare provincial protected agricultural areas *inter alia* if they are of 'significant agricultural importance' and to 'preserve the area primarily for agricultural purposes'. Without constraining criteria, these provisions give provincial governments a wide discretion to deem any agricultural land 'significant' and reserve it for 'agricultural purposes'. This would unequivocally be an infringement of private landowners' protected property rights and a violation of the rule of law, in that it would introduce an impermissible degree of vagueness in legal compliance.

These provisions ought to be scrapped, and government ought to defer to landowners.

3.5 Lack of consultation with landowners

Section 12(1)(a)(iv) provides that before a protected area is declared nationally or provincially, the Minister or provincial government must 'consult with the municipality or municipalities in which' the area falls, among other

requirements. The Bill does however not specify that government must also consult with the agriculturalists and other landowners whose land falls within the contemplated area.

Section 17(d)(ii) also provides that before the Minister may list an activity requiring an 'agro-ecosystem authorisation', the Minister must consult with provincial and local governments in the respective agricultural area. It is not required for consultation to take place with agriculturalists or private landowners.

Since this law would be applicable to 'all agricultural land' it is inappropriate, when most agricultural land is privately owned, that everyone except agriculturalists is to be consulted when important policy decisions regarding agriculture is made. These and all other provisions requiring consultation must make clear provision for consultation with private landowners.

3.6 'Agro-ecosystem' authorisations

Section 15(1) of the Bill introduces a system where agriculturalists and private landowners would need 'authorisation' before they may do certain things on their land 'in a protected agricultural area'.

Section 16(1) then empowers the Minister to list these things – which would likely include the subdivision of agricultural land[1] – as 'activities' that necessitate such an 'agro-ecosystem authorisation'. The Minister must be convinced, according to section 16(2), that these activities should be capable of having 'a permanent negative impact on the agricultural potential, capability, suitability or use of agricultural land' before they may be listed.

Sections 15(5) and (6) provide that compliance with the strict requirements for an authorisation does not absolve applicants from complying with other regulations and legislation, and that acquiring other forms of government approval in terms of other regulations and legislation does not absolve agriculturalists from having to obtain an authorisation. These provisions implicitly acknowledge the regulatory burden that this additional form of permission represents.

The compliance burden represented by this provision stands in stark contrast to President Cyril Ramaphosa's repeated commitment that government is

[1] This is notable, as it was deemed necessary under the Subdivision of Agricultural Land Act, 1970, and the previous edition of this Bill, for the prohibition on subdivision to be a legislative institution – that is, a rule adopted by Parliament. It appears likely to us that this is now to become a regulatory institution. If this is the case, it is indicative of a worrying trend where the executive (regulatory) branch of government is acquiring evermore legislative powers to create rules of substance for legal subjects, whereas the people's elected representatives are adopting a more 'hands-off' approach. This is an example of democratic backsliding.

dedicated to removing red tape, not worsening it.[2] The institution of agro-ecosystem authorisations ought to be scrapped.

3.7 Compliance inspections

Section 31(1)(a) empowers the 'competent authority' to designate anyone 'as an inspector to investigate any non-compliance with this Act'. Non-compliance with this law, when adopted, would by necessity be a contravention of law, which in turn is widely recognised to be a matter to be dealt with by *law enforcement* authorities. It is inappropriate for 'any' person to be designated to investigate non-compliance. This power should either rest with an existing and capacitated law enforcement authority, or with a new law enforcement authority established for this purpose.

This problem is exacerbated by the fact that section 31(3) empowers these inspectors to *inter alia* enter private agricultural land without notice or permission, demand and/or seize books and records and other items, and direct persons to 'appear before him or her'. No warrant is required for the exercise of any of these powers, except under section 31(6) where the entering of a private dwelling requires a warrant. This is an instance where the present version of the Bill represents a step backward from the previous edition. In the previous edition of the Bill, a warrant was required for inspections aimed at investigating whether the law was being contravened. It would be more appropriate for the necessity of a warrant, in the present version of the Bill, to be extended to any power inspectors would have that involves the infringement of the constitutional rights to privacy and property.

In a similar provision, section 33(a) of the Bill allows the 'competent authority' to authorise any person 'with the necessary skills or experience' to enter onto private land with the consent of the owner 'or occupier' of the land. It would be appropriate to only allow lawful 'occupiers' of the land to provide such consent if the owner is habitually unreachable.

3.8 Contravention directives

Section 32(5) of the Bill empowers the 'competent authority' to direct landowners who, in its view, are not complying with the law 'to take any action specified' to cure their supposed noncompliance. This is too broad a power that could include unreasonable instructions. This power must be strictly circumscribed.

Section 32(3)(a) provides that the notice for these directives may be delivered in various ways, only one of which is to deliver it in person. Given the severe incursion into the property rights of owners that these directives may

[2] https://www.stateofthenation.gov.za/priorities/growing-the-economy-and-jobs/cutting-red-tape.

represent, it would be more appropriate for in-person, documented delivery to be the only acceptable method.

3.9 Regulatory circumvention

Section 26(g) provides that the information regarding the landowner or 'land user' that must be recorded in the 'national agro-eco information system' may include the nationality and gender of the owner or user. Subclause (h) further provides that 'any other information' may be prescribed for inclusion. As previously noted, one of the problematic provisions of the previous edition of the Bill was that it would have strictly regulated the sale of agricultural land to foreigners. This provision does not appear in the present Bill. However, given section 26(g), it appears likely that the drafters' intention is for regulatory and executive authorities to re-introduce such provision via regulation.

In fact, in the context of the aforementioned, open-ended 'agro-ecosystem authorisations', it appears to us likely that many, if not all, of the problematic provisions of the previous edition of the Bill will be surreptitiously reintroduced through the backdoor of executive regulations. This would be an instance of democratic backsliding, where executive authorities are acquiring more and more of the jurisdiction of legislative authorities. It is our hope that this Bill will not end up being an example of regulatory circumvention of legislative authority, and would respect the separation of powers.

4 Ramifications of the Bill

Should the Bill be adopted in its current form, the normal competencies of ownership for agriculturalists and other landowners will be significantly curtailed. They will require government consent for any activities the Minister decides to list as requiring 'agro-ecosystem authorisations', which is likely to include rezoning or subdivision. Consent might also be needed for such changes as opening up 'bed and breakfast' accommodation on one portion of a maize farm, or setting up a restaurant on a wine farm. In addition, any sale of a portion of a farm, or any sale where the buyer plans a non-agricultural use, will also likely need to be approved, as will any long lease, or any sale to a foreigner.

All the things that might in future require authorisation could rob agriculturalists of the necessary flexibility and nimbleness to respond to shifting market needs.

The government arguably lacks both the capacity and competence to subject the entirety of the agricultural sector to an intensive and invasive form of central economic planning as the Bill appears to contemplate. Long delays in the granting of authorisations are likely to become endemic, along with

‘backhanders’ to officials who turn a blind eye to contraventions or promise to help speed up approval processes. Five-yearly reviews of sector plans will likely also prove disruptive to the sector.

The Bill appears to implicitly ignore the fact that many current obstacles to food security are largely the product of the government’s own interventions since 1994. These include the dismantling of agricultural extension services, the disbanding of the commando system which helped maintain farm security, and the laying down of often unrealistic minimum wages for farm workers. Most damaging of all, however, have been the government’s inept attempts at land reform over the past 21 years, and in recent years, serious threats of expropriating agricultural land for no or inadequate compensation.

Long delays in settling claims for the restitution or return of land have eroded investment in farms by owners no longer certain of their title. Government compounded the difficulty in finalising these outstanding claims by re-opening the land claims process for an additional five years from 2014 to 2019.

In addition, the farming potential of agricultural land is being further undermined by misguided proposals to transfer 50% of all commercial farms to long-serving farm workers; introduce ceilings on the maximum size of farms (pegged in general at 5,000 hectares, at most); and appointing a Valuer-General to value all land and movables targeted for land reform.

Landowners are likely to become increasingly unwilling to put further working capital into farms given this Bill’s constraints on their competencies of ownership and the host of other damaging policies (as outlined above), which have already been written into the law or are soon to be enacted into statute. In addition, even where agriculturalists are still willing to invest, their capacity to raise working capital from banks will diminish as the collateral they have to offer becomes increasingly uncertain and insecure.

The best way to enhance the country’s food security is to create a policy environment conducive to agricultural investment – and then leave it to the market and individual landowners to make their own decisions on how best to use their land. This requires freehold title, policy certainty, and a concomitant confidence that ownership rights will be respected in the future, rather than incrementally eroded. Damaging dirigiste interventions regarding labour, in particular, must also be removed, while the current damaging land reform process must be fundamentally transformed.

If the government is serious about ensuring and improving food security, it must withdraw this Bill and not pursue it further. To support the agricultural sector, the government must desist from tying up agriculturists in yet more reams of expensive, impractical, and damaging red tape.